BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Rezoning Hearing Stream 12 – Upper Clutha

CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

Rezoning Hearing Stream 12 – Upper Clutha

15 May 2017

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INDEX TO CASES REFERRED TO BY QUEENSTOWN LAKES DISTRICT COUNCIL

Cases referred to by Queenstown Lakes District Council	Tab
Bald Developments Ltd v Queenstown Lakes District Council EnvC Christchurch ENV-2007-CHC-242	1
Colonial Vineyard Limited v Marlborough District-Council [2014] NZEnvC 55	2
Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38	3
Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council [2017] NZEnvC 53	4
Freda Pene Reweti Whanau Trust v Auckland Regional Council HC Auckland CIV-2005-404-356, 9 December 2005	5
Hanton v Auckland City Council [1994] NZRMA 289	6
McGuire v Hastings District Council [2002] 2 NZLR 577 (PC)	7
Minister of Conservation v Federated Farmers of New Zealand (Southland Province) Inc EnvC Auckland A039/01, 19 April 2001	8
Ngati Rangi Trust v Manawatu-Wanganui Regional Council EnvC Auckland, A067/04, 18 May 2004	9
Queenstown Lakes District Council v Allenby Farms Limited [2017] NZDC 3251	10
Sutherland v Queenstown Lakes District Council EnvC Christchurch RMA898/03, 11 February 2005	11
Upper Clutha Environmental Society v Queenstown Lakes District Council EnvC Christchurch C114/2007, 22 August 2007	12
Upper Clutha Tracks Trust v Queenstown Lakes District Council [2010] NZEnvC 432	13
Upper Clutha Tracks Trust v Queenstown Lakes District Council [2012] NZEnvC 79	14
Waikanae Christian Holiday Park v Kapiti Coast District Council HC Wellington CIV-2003-485-1764, 27 October 2004	15
Wakatipu Environmental Society Inc vs Queenstown Lakes District Council [2003] NZRMA 289 (EnvC)	16
Water Care Services Ltd v Minhinnick [1998] 1 NZLR 294 (CA) app	17
Whangamata Marina Society Inc v Attorney-General [2007] 1 NZLR 252 (HC)	18

TAB 1

BEFORE THE ENVIRONMENT COURT

Decision No C055/2009

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	BALD DEVELOPMENTS LIMITED (ENV-2007-CHC-000242) Appellant
AND	QUEENSTOWN-LAKES DISTRICT COUNCIL Respondent
AND	UPPER CLUTHA ENVIRONMENT SOCIETY INCORPORATED Section 274 party

Hearing:	at Wanaka on 27 and 28 April and 9, 10 and 11 June 2009
Court:	Alternate Environment Judge DFG Sheppard Environment Commissioner W R Howie Environment Commissioner S Watson
Appearances:	M R Christensen and A C Ritchie for the appellant M A Ray for the respondent A Borick for the section 274 party
Decision issued:	12 August 2009

DECISION OF THE ENVIRONMENT COURT

A. The appeal is disallowed, and the decision declining the resource consent application is confirmed.

B. The question of costs is reserved. Directions are given in case that question has to be decided by the Court.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

TABLE OF CONTENTS

Introduction

[1] Bald Developments Limited (BDL) applied to the Queenstown-Lakes District Council for consent to a subdivision of about 680 hectares of rural land in the upper Clutha Valley near Luggate to create 38 residential lots and building platforms and one lot (to be held in common by the owners of the residential lots) for farming and recreational activities. Land-use consent was sought for construction of dwellings, and common recreational buildings and facilities. The application was opposed by the Upper Clutha Environment Society Incorporated (UCESI).

[2] After a hearing by two independent commissioners, consent was refused, and by this appeal BDL sought that consent be granted. However by the time the appeal was heard, BDL and the Council had reached agreement that consent should be granted to a modified proposal by which 25 rural-residential lots and one common lot for farming and recreation (630.38 hectares) would be created, subject to conditions on which they had reached agreement.

[3] Owners of properties adjoining the site on the east and the west gave their written approvals to the modified proposal. However UCESI (which took part in the appeal under section 274 of the RMA) maintained its opposition to the modified proposal, contending that having regard to relevant provisions of the Act and the district plan, consent should be refused.

[4] UCESI submitted that the Council should not be permitted to call evidence in support of the modified proposal. After hearing submissions, on 27 April 2009 the Court gave an oral ruling rejecting that submission.[1]

The primary legislation

[5] The appeal has to be decided in accordance with the Resource Management Act 1991, by which the decision has to be made for the purpose of the Act: to promote the sustainable management of natural and physical resources.[2] The meaning of the term sustainable management is described in section 5(2) of the Act, and elaborated by provisions of sections 6, 7 and 8 of Part 2. Relevantly, by section 6(b) the Court has to recognise and provide for a

[1] Transcript, 27.04.09, pp10f.
[2] RMA s 5(1).

matter of national importance, being the protection of outstanding natural landscapes from inappropriate subdivision, use and development.

[6] Subject to Part 2, when considering a resource-consent application a consent authority is to have regard to any actual and potential effects on the environment of allowing the activity[3] (except any effect on a person who has given written approval to the application);[4] to any relevant provisions of planning instruments;[5] and to any other matter the consent authority considers relevant and reasonably necessary.[6] When forming an opinion about effects on the environment, a consent authority may disregard an adverse effect if the plan permits an activity with that effect.[7] In deciding an appeal, the Court has the same power, duty and discretion as the consent authority;[8] and has to have regard to the decision the subject of the appeal.[9]

[7] In considering a resource-consent application for a discretionary activity, a consent authority has power to grant or refuse the application, and (if it grants the application) can impose conditions under section 108.[10]

[8] By section 108(1), except as expressly provided in that section, a resource consent may be granted on any condition that the consent authority considers appropriate.

The district plan

[9] The provisions of planning instruments that are relevant in this case are contained in the Queenstown-Lakes District Council's partly operative district plan (the PODP). No party contended that any respect in which the plan is not yet operative is material; nor that any other planning instrument is relevant. We will identify the relevant provisions of the PODP, and apply them to the circumstances of the proposal, before making our findings on the environmental effects of the activity.

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[3] RMA, s104(1)(a).
[4] Ibid, s104(3)(b).
[5] RMA, s104(1)(b).
[6] RMA, s104(1)(c).
[7] RMA, s104(2).
[8] RMA, s290(1).
[9] RMA, s290A.
[10] RMA, s104B.

Objectives and policies

[10] Part 4 of the district plan addresses district-wide issues.

[11] Part 4.1 concerns the natural environment. It states several objectives, including protection and enhancement of functioning of indigenous ecosystems, and of sufficient viable habitats to maintain the communities and the diversity of indigenous flora and fauna; improved linkages between habitat communities; and protection of outstanding natural landscapes. Policies for achieving those objectives include avoiding adverse effects of activities on the natural character of the environment and on indigenous ecosystems by ensuring that opportunities are taken to promote protection of them, including at the time of resource consents.[11]

[12] Part 4.2 concerns landscape and visual amenity. It identifies classes of activity that have the potential to impact adversely on the landscape and visual amenity, including structures. Of settlement, it states–

> The location and impact of new development must be managed to ensure that the changes that occur do so in a manner which respects the character of the landscape and avoids any adverse effects on the visual qualities of the landscape.[12]

[13] Part 4.2 also recognises that the visual impact of structures is increased when located in visually sensitive areas; that roads, particularly on prominent slopes, may adversely affect landscape values; and that amenity planting may alter the landscape.

[14] The key resource management issues within outstanding natural landscapes are identified as their protection from inappropriate subdivision, use and development, particularly where activity may threaten the openness and naturalness of the landscape.[13]

[15] Part 4.2 states an objective by which subdivision, use and development are undertaken in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values. It specifies numerous policies for achieving that objective, of which those about future development, outstanding natural landscapes (district-wide), avoiding cumulative degradation, structures, and retention of existing vegetation are relevant.

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[11] POPD para 4.1.4 Policy 1.7.
[12] Ibid, para 4.2.3i.
[13] Ibid, para 4.2.4(a).

[16] The policies about future development are avoiding, remedying or mitigating adverse effects of development and subdivision where landscape and visual amenity values are vulnerable to degradation, and encouraging development and subdivision in areas with greater potential to absorb change without detraction from landscape and visual amenity values, ensuring that as far as possible it harmonises with local topography and ecological systems, and other nature conservation values.[14]

[17] The district-wide policies for outstanding natural landscapes include maintaining the openness of those outstanding natural landscapes which have an open character at present; avoiding subdivision and development in those parts of the outstanding natural landscapes with little or no capacity to absorb change, but allowing limited subdivision and development in those areas with higher potential to absorb change; and recognising and providing for protecting the naturalness and enhancing amenity values of views from public roads.[15]

[18] On avoiding cumulative degradation, the policies are for ensuring that the density of subdivision and development does not increase to a point where the benefits of further planting and building are outweighed by adverse effects on landscape values of over-domestication of the landscape; and encouraging comprehensive and sympathetic development of rural areas.[16] (The Environment Court has defined over-domestication in this context as the threshold at which the character of the landscape is diminished by the introduction of a density of development which the land cannot absorb.[17])

[19] The policies in respect of structures include preserving the visual coherence of outstanding natural landscapes and visual amenity landscapes by avoiding, remedying or mitigating any adverse effects of structures on the skyline, ridges and prominent slopes and hilltops; encouraging structures which are in harmony with the line and form of the landscape; and placement of structures in locations where they are in harmony with the landscape. There is also a policy in respect of all rural landscapes of providing for greater development setbacks from public roads to maintain and enhance amenity values associated with views from public roads.[18]

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[14] Ibid, cl 4.2.5.1.
[15] Ibid, cl 4.2.5.2.
[16] Ibid, cl 4.2.5.8.
[17] *Hawthorn Estates v Queenstown-Lakes District Council* Environment Court Decision C83/04, para [78].
[18] PODP, cl 4.2.5.9.

[20] In respect of transport infrastructure, there are policies for preserving the open nature of the rural landscape, including discouraging roads and tracks on highly visible slopes.[19]

[21] There is also a policy of maintaining the visual coherence of the landscape and to protect the existing levels of natural character, of encouraging the retention of existing indigenous vegetation in gullies and along watercourses, and maintaining of tussock grasslands and other native ecosystems in outstanding natural landscapes.[20]

[22] Another policy is by encouraging land use in a manner which minimises adverse effects on the open character and visual coherence of the landscape.[21]

[23] On earthworks, the PODP states an objective of avoiding remedying or mitigating the adverse effects from earthworks on the nature and form of existing landscapes and landforms particularly (among others) in areas of outstanding natural landscapes and on the amenity values of neighbourhoods.[22] Policies for achieving that objective are avoiding or mitigating adverse visual effects of earthworks on outstanding natural landscapes, and avoiding earthworks including tracking on steeply sloped sites.[23]

[24] An objective of the Rural General Zone (in which the site is situated) is:

> To protect the character and landscape value of the rural area by promoting sustainable management of natural and physical resources and the control of adverse effects caused through inappropriate activities.[24]

[25] Policies for achieving that objective include ensuring that activities not based on the rural resources of the area occur only where the character of the rural area will not be adversely impacted;[25] avoiding, remedying or mitigating adverse effects of development on the landscape values of the district;[26] and preserving the visual coherence of the landscape by ensuring all structures are to be located in areas with the potential to absorb change.[27]

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[19] Ibid, 4.2.5.12.
[20] Ibid, cl 4.2.5.15.
[21] Ibid, cl 4.2.5.17 .
[22] Ibid, cl 4.10.3.
[23] Ibid, cl 4.10.3.4 & 5.
[24] Ibid, para 5.2, Objective 1.
[25] Ibid, para 5.2, Policy 1.4.
[26] Ibid, para 5.2, Policy 1.6.
[27] Ibid, para 5.2, Policy 1.7.

[26] The PODP includes a site standard setting limits on the quantities and dimensions of earthworks, with exceptions that include earthworks for subdivision with resource consent and for a residential building platform.[28]

[27] On subdivision and development, the PODP states an objective of recognition and protection of outstanding natural landscapes and nature conservation values.[29] Policies for achieving that objective include ensuring works associated with subdivision and development avoid or mitigate the adverse effects on the natural character and qualities of the environment, and avoiding any potential adverse effects on the landscape and visual amenity values as a result of land subdivision and development.[30]

Classification of landscape

[28] The purpose of the Rural General Zone (in which the site is situated) is to manage activities so they can be carried out in a way that achieves stated aims, including protecting and enhancing nature conservation and landscape value; and maintains acceptable amenity for visitors to the zone.[31] In that zone, subdivision of land, and identification of residential building platforms, are classified as discretionary activities.[32] Construction of the proposed common recreational facilities is also classified as a discretionary activity.[33] A new building on an approved residential building platform is classified as a controlled activity.[34] Control is reserved in respect of external appearance, associated earthworks, access, landscaping, and provision of services.[35]

[29] The PODP is constructed so that, by combination of district-wide provisions relating to landscape and visual amenity,[36] and assessment matters for the Rural General Zone,[37] a finding has to be made whether a site is in one of three identified classes of landscape: Outstanding Natural Landscape, Visual Amenity Landscape, and Other Rural Landscape. Specific policies and assessment criteria apply to rural landscapes in those categories.

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[28] Ibid, Rule 5.3.5.1viii.
[29] Ibid, para 15.1.3, Objective 4.
[30] Ibid, Policies 4.2f.
[31] Ibid, para 5.3.1.1.
[32] Ibid, cl 15.2.3.3.
[33] Ibid, cl 5.3.3.3(i).
[34] Ibid, cl 5.3.3.2.
[35] Idem, subcl (b).
[36] Ibid, Part 4.
[37] Ibid, Part 5.4.

[30] The PODP prescribes a three-step process for assessment of applications for resource consent in respect of rural zones. It requires an analysis of the site and the surrounding landscape, determination of the landscape category, and consideration of stated assessment criteria.[38]

[31] On this appeal, the correct classification of the landscape in which the site is contained was in issue. The Council and UCESI contended that the site is in an outstanding natural landscape. BDL contended that the part of the site that would contain the built form is in a visual amenity landscape.

[32] BDL maintained that it would make no difference to the outcome if it is found to be in an outstanding natural landscape. Despite that, we understand that the Court has to make a finding on classification of the landscape of the site, to identify the provisions of the district plan that govern the decision on the proposal; and to know whether section 6(b) is applicable.

[33] Analysis of the site is an important step in the determination of the landscape category, and has to include listed existing qualities and characteristics. Analysis of surrounding landscape has to include a number of other listed matters. Determination of landscape category has to include consideration of the matters identified in the analysis of the site and the surrounding landscape, and any other relevant matter in the context of the broad description of the landscape categories. It involves consideration of the site and the wider landscape within which it is situated; and certain landscape maps.[39]

[34] The material landscape categories are described in paragraph 4.2.4 of the PODP as follow:

> The outstanding natural landscapes are the romantic landscapes – the mountains and the lakes – landscapes to which section 6 of the Act applies. The key resource management issues within outstanding natural landscapes are their protection from inappropriate subdivision, use and development, particularly where activity may threaten the landscapes openness and naturalness.
>
> The visual amenity landscapes are the landscapes to which particular regard is to be had under section 7 of the Act. They are landscapes which wear a cloak of human activity much more obviously pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the District's downlands, flats and terraces. The extra quality that these landscapes possess which bring

[38] Ibid, cl 5.4.2.1.
[39] Ibid, cl 5.4.2.1.

> them into the category of 'visual amenity landscape' is their prominence because they are
> - adjacent to outstanding natural features or landscapes; or
> - landscapes which include ridges, hills, downlands or terraces; or
> - a combination of the above.
>
> The key resource management issues for the visual amenity landscapes are managing adverse effects of subdivision and development (particularly from public places including public roads) to enhance natural character and enable alternative forms of development where there are direct environmental benefits.[40]

[35] Each party called a landscape architect who, among other things, addressed the analysis of the site and the surrounding landscape, and the classification of the landscape. Ms D J Lucas and Mr A D Rewcastle gave their reasons for classifying the landscape as an outstanding natural landscape; and Mr P J Baxter gave his reasons for classifying as a visual amenity landscape the part of the site where the residential sites (and common recreational centre) are proposed, though he accepted that the steeply sloping part of the site to the west is part of an outstanding natural landscape.

[36] In the event, as might be expected, there was no material difference among them on the analysis of the site and the surrounding landscape. Even the difference between Mr Baxter and the others over classification of the landscape was more one of interpretation and opinion than of direct confrontation.

[37] Ms Lucas distinguished the eroding mountain lands from the outwash plains of the valley floor. She remarked that the development site is not a raised deposition terrace, but an ice-shorn shoulder of the Pisa Range, overlain by a scattering of smeared glacial till.

[38] This witness observed that the mountain landscape continues below the site to the base of the escarpment near the Cromwell to Wanaka Highway, which separates the mountain land from the outwash plains of the valley floor. She gave her opinion that the outstanding natural landscape extends to the base of the escarpment; and that most of the site, including the development area, is included in the outstanding natural landscape.

[39] Mr Rewcastle quoted this passage from an Environment Court decision about the classification process:

> When considering the issue of outstanding natural landscapes we must bear in mind that some hillsides, faces or foregrounds are not in themselves outstanding

[40] Ibid, para 4.2.4.

> natural landscapes, but looked at as a whole together with other features that are, they become part of a whole that is greater than the sum of its parts.
> ... where the outstanding natural landscapes and features end...is... based on the importance of foregrounds in (views of) landscape.[41]

[40] The witness remarked that although parts of the terraced area have been smoothed by ploughing and removal of rocks (citing land in the adjoining Lake Mackay Station) those areas are contained within and dominated by the wider outstanding natural landscape context.

[41] Mr Baxter gave evidence that when viewed from a distance, the terrace area on which the residential building platforms and common facilities are to be located is clearly distinguishable from the rest of the landform, both to the north and the south.

[42] This witness stated that the mid and upper slopes demonstrate landscape characteristics inherent in being an outstanding natural landscape, but that the lower slopes and terrace area are not outstanding natural landscape because of the geographical features and the modification of grazing land on terraces, recent development of land in the Central Otago District, presence of roads, tracks, power lines, pylons, and farm buildings, which identify a cultural and managed visual amenity landscape.

[43] Mr Baxter acknowledged that the terrace area proposed to contain development is flanked by outstanding natural landscape, and stated that the terrace area itself has visual amenity landscape characteristics from the cloak of human activity which is visible to the west of the site, and that changes in the landscape that will occur in time with the approved development to the east on land in the Central Otago District.

[44] We follow the reasoning in the passage from the Environment Court decision quoted by Mr Rewcastle.

[45] We accept that the site and its surrounds contain features indicative of human activity listed by Mr Baxter; and that further rural-residential development in the vicinity has been granted consent by the Central Otago District Council.

[46] Having, with the assent of the parties, viewed the site and its environs, we find persuasive the common opinion of them all that the higher ground is part of an outstanding

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[41] *Wakatipu Environmental Society Incorporated v Queenstown-Lakes District Council* Environment Court Decision C180/99, para 105.

natural landscape. The part of the site where the residential and common recreation developments are proposed is broken ground in a basin-like feature which, considered on its own, may not itself qualify as an outstanding natural landscape. The features indicative of human activity listed by Mr Baxter are present but scattered and, seen in context, do not make the landscape fit the plan's description of a visual amenity landscape, although consented development in the Central Otago District would contribute to that classification.

[47] In the scale of the landscape of the upper Clutha Valley, the part of the site to be developed is relatively small; in the perspective of the landscape as a whole, that part does not diminish the quality of the whole landscape as outstanding and natural. Bearing in mind the stipulation in the PODP to consider the land subject to the consent application and the wider landscape within which that land is situated, and the reasoning of the Environment Court in the passage quoted by Mr Rewcastle, we accept the opinions of Ms Lucas and Mr Rewcastle, and find that the site (including the part where development is proposed) is contained in an outstanding natural landscape.

Consideration of assessment criteria

[48] The third step prescribed by the PODP is consideration of the proposed development (including subdivision, identification of building platforms, building, roading, earthworks, landscaping, planting and boundaries) by reference to stated assessment criteria, and recognising the reasons stated in paragraph 1.5.3(iii) for making the activity discretionary, and the 'frequency' with which appropriate sites for development will be found in the locality.[42] There are numerous criteria particular to considering resource-consent applications for activities in outstanding natural landscapes (district-wide) set out in clause 5.4.2.2(2); and also many more criteria of general application set out in clause 5.4.2.3. We will consider the proposal by reference to each assessment criterion that is relevant to the proposal (starting with those particular to development in outstanding natural landscapes (district-wide), then with those of general application); and then by those prescribed by paragraph 1.5.3(iii) and by the frequency of development sites in the locality.

[42] Ibid, cl 5.4.2.1.

Criteria particular to outstanding natural landscapes (district-wide)

[49] The assessment criteria applicable to subdivision and development in outstanding natural landscapes (district wide) are to be read "in the light of the further guiding principle" about existing vegetation. That relates to vegetation that was planted after, or (being self-seeded) was less than 1 metre high on, 28 September 2002; and it applies to vegetation that obstructs or substantially interferes with views from roads of the landscape in which proposed development is to be set. It is not relevant to the decision of this appeal.

Absorptive potential of the landscape

[50] The first applicable assessment matter relates to consideration of the potential of the landscape to absorb development, visually and ecologically. Seven matters are to be taken into account, consistent with retaining openness and natural character. The first of them is whether, and to what extent, the proposed development would be visible from public places.

Visibility from public places

[51] BDL submitted that visibility *per se* is not an adverse effect, and that there is no requirement in the PODP that development be invisible, or even reasonably difficult to see (those being tests set by the PODP for development in outstanding natural landscapes in the Wakatipu Basin, but not elsewhere in the District).

[52] BDL contended that due to folding topography, only 13 of the building platforms would be partly visible from public roads at a distance of at least 2.8 kilometres, altering as a viewer moves vantage point; but that not all of them would be would be visible in a single view. It maintained that the proposed building platforms, roading and curtilage areas would be indiscernible to the naked eye when viewed from off the site.

[53] In response to UCESI's case that the development would be visible from passing aircraft, BDL submitted that such visibility would be transitory, and dependent on the flight path taken according to weather conditions. It submitted that, as a matter of practicability, views from aircraft should be ignored.

[54] UCESI submitted that views from aircraft are not more transitory than those of a person travelling in a car or bus, but may be closer. It contended that all the proposed

residential complexes and associated roading or driveways would be visible from a walking track on the Grandview Range, a public place; and from several public roads.

[55] We accept that there is no requirement in the PODP that development on the site be invisible, or even reasonably difficult to see. The relevant criterion is the potential of the landscape to absorb development, visually and ecologically. That is not a condition of eligibility for consent, but one of several criteria of judgement whether consent should be granted or not. The question whether, and to what extent, the proposed development would be visible from public places is one factor to be considered in applying that criterion.

[56] Considerable evidence was devoted to this question. Our understanding of the evidence was assisted by our having visited various vantage points.

[57] We accept the evidence and find that the development would be visible from aircraft (including airliners approaching or departing from Wanaka Airport), although those views would be transitory; and that the development would also be visible from roads and public places (including from parts of walking tracks on the Grandview Range) but only at considerable distances, and only parts of the development at a time.

[58] The context of the visibility question is the potential of the landscape to absorb the development. In that context, we judge that the extent of visibility is so restricted by topography, distance, and transitory factors that from a visual viewpoint it does not on its own afford a substantial basis for finding that the landscape cannot absorb the proposed development.

Domination or detraction from natural landscape values

[59] The second factor in deciding the absorptive potential criterion is whether the proposed development is likely to be visually prominent to the extent that it dominates or detracts from views otherwise characterised by natural landscapes.[43]

[60] BDL contended that the proposed development would be difficult to see, would not dominate, nor detract from views. Mr Baxter gave his opinion that the development would not be visually prominent, nor would it detract from views characterised by natural

[43] PODP, cl 5.4.2.2(2)(a)(ii).

landscapes, being the greater views of the Pisa Range. He considered that the proposed environmental management plan and proposed mitigation measures required by proposed conditions would ensure that the development would integrate with the existing natural character, which would be protected and enhanced.

[61] Mr Rewcastle remarked that the proposed building platforms would be limited to elevations below 475 metres above sea level to avoid development being on high, prominent positions.

[62] UCESI, by its President Mr J R Haworth, asserted that the development would significantly detract from views of outstanding natural landscape. He listed dwellings, accessory buildings, and numerous other articles associated with residential occupation (which he described as "surrounding clutter") extending a presence of people, wood-smoke, children's toys, glinting windows, lighting at twilight and at night; and also adverse amenity effects of noise from vehicles, lawnmowers, hand tools, stereos and so on. He described the development as a complete change in landscape character for the site with significant adverse effects on natural values; and spoke of the proposed subdivision sitting incongruously in, and significantly detracting from, views of the outstanding natural landscape.

[63] Having reviewed the evidence in the light of our observations from vantage points agreed on by the parties, we find acceptable the evidence on this topic given by Mr Baxter. The restrictions on the visibility of the development would be such that it would not be visually prominent to the extent that it would dominate views of natural landscapes. What Mr Howarth described as 'surrounding clutter' would not be significant at the distances at which it would be visible, and we judge that it would be disproportionate to categorise reflections and lighting as significant detractions from views otherwise characterised by a natural landscape. He gave evidence as President of UCESI, and his evidence was not balanced in the way expected of an independent expert witness.

Detraction from natural patterns or processes

[64] The third factor on the absorptive potential of the landscape is whether any mitigation or earthworks and/or planting associated with the development would detract from existing

natural patterns and processes within the site and surrounding landscape, or otherwise adversely affect the natural landscape character.[44]

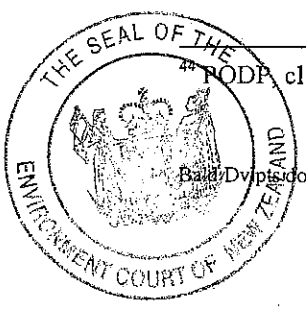
[65] In respect of that, BDL identified mitigation measures being proposed design controls over external appearance of buildings, over glare from windows, curtilages, vehicle movements, and lighting controls. On earthworks, BDL remarked that the roading network would use existing farm tracks, which would be located in less visible parts of the site and would be restricted to 3.8 metres width with vegetation to the edges, and would not be visible from wider views. Major earthworks and screen planting are not proposed, though natural regeneration is promoted.

[66] Mr Baxter gave detailed evidence generally supporting those contentions. He explained that the existing vegetation pattern would be protected and enhanced; that exotic planting would be restricted to curtilage areas; and that earthworks would be minor in extent. He confirmed that no mitigation screen planting or earth mounding is proposed. He accepted that the earthworks should be managed by collaboration of an engineer and a landscape architect.

[67] By Mr Howarth's evidence, UCESI supported the proposed avoidance of screen planting and earthworks as mitigation measures, but argued that this would leave parts of the development visible from some public places, as householders are unlikely to allow vegetation to obstruct views from their residences.

[68] We have already addressed the UCESI's assertions about the visibility of the development from public places. It would be insubstantial. Even if householders are allowed to trim vegetation to preserve views, that would not be relevant to this factor of absorptive potential of the landscape; nor would it detract from natural patterns or processes.

[69] On earthworks, we find that Mr Howarth's evidence overstated the likely effects because, as described by Mr Baxter, their extent would be restricted, and their implementation is to be professionally controlled.



[44] PODP, cl 5.4.2.2(2)(a)(iii).

[70] In short, we find that mitigation, earthworks, and planting would not detract significantly from natural patterns and processes, in the context of the absorptive potential of the landscape.

Effects of new subdivision boundaries

[71] The next factor to be addressed is whether, with respect to the subdivision, any new boundaries are likely to give rise to planting, fencing or other land use patterns which appear unrelated to the natural line and form of the landscape.[45] This factor is informed by a statement that wherever possible, with allowance for practical considerations, boundaries should reflect underlying natural patterns such as topographical boundaries.

[72] In this respect, BDL contended that the design of the subdivision is consistent with natural patterns.

[73] Mr Baxter gave evidence that in respect of the residential lots, fencing would only be permitted around the curtilage areas, and owners would be free to choose to fence closer to dwellings than on the curtilage boundaries. He concluded that neither roading nor fencing would give rise to arbitrary lines; and that fencing around Sheepskin Creek and the refugia would not draw attention to the residential development.

[74] Mr Baxter also gave his opinion that planting in curtilage areas (which would be restricted to 3 metres in height) would not cause arbitrary patterns. He acknowledged that the proposed lot boundaries do not follow natural lines of the landscape, but remarked that fencing lot boundaries would be prohibited. The parts of the lots beyond the curtilages are to be farmed in common with the residue lot. The witness also gave his opinion that fencing of the refugia and Sheepskin Creek would not be visible off site, and that any effect on the natural line or form of the landscape would be negligible.

[75] For UCESI, Mr Haworth contended that fencing the residential lots would be inevitable, could create a sharp contrast in colour and texture, and would be likely to be obvious as straight lines in the landscape in an area that is currently open. However, Mr Howarth did concede that fencing the lot boundaries is to be prohibited.

[45] PODP, cl 5.4.2.2(2)(a)(iv).

[76] Ms Lucas referred to the proposed fencing-off of part of Sheepskin Creek and a tributary. She stated that this would ignore the topography, and would result in non-natural management boundaries becoming apparent. She also gave her opinion that roads would be clearly evident as they would be kept open 20 or 10 metres wide as firebreaks.

[77] In addressing this factor we bear in mind that it relates to the subdivisional boundaries, in a context of the absorptive potential of the landscape; and an aim that boundaries should reflect natural patterns such as topographical boundaries.

[78] We accept that fencing of lot boundaries is to be prohibited; and that fencing of part of Sheepskin Creek to be subject to a conservation covenant would generally relate to the course of the creek and its tributary, and to the topography of that incision. We also accept that the lines of those boundaries, and of those around the refugia, would not be significantly visible from off the site, and find that their effects on the line and form of the landscape would be insignificant.

Effects on indigenous vegetation

[79] The fifth factor is whether the site includes any indigenous vegetation, wildlife habitats, wetlands, significant geological or geomorphologic features, or is otherwise an integral part of the same.[46] This leads to the sixth factor: whether, and to what extent, the proposed activity would have an adverse effect on any of the ecosystems and features identified.[47]

[80] BDL contended that the proposal, carried out in accordance with the environmental management plan, would enhance ecosystems.

[81] Mr A S W Penniket, a professional restoration ecologist, gave evidence of ecosystem conservation measures in the environmental management plan (including the exclusion of introduced browsers from Sheepskin Creek and refugia, predator control and habitat enhancement) all providing protected habitats and contributing to the protection of the Upper Clutha environment.

[46] PODP, cl 5.4.2.2(2)(a)(v).
[47] PODP, cl 5.4.2.2(2)(a)(vi).

[82] Mr G A Davis, an ecological consultant, gave detailed evidence of his ecological assessment of the site, and of the likely ecological effects of the proposed development. He gave his opinion that the environmental management measures in the environmental management plan would result in a net positive ecological benefit; and he reported his recommendations for mitigation measures. Those recommendations have been incorporated in the proposed consent conditions.

[83] In her evidence Ms Lucas (a landscape architect) was critical of Mr Penniket's evidence. However her critique was more rhetorical argument about the extent of the measures proposed, than identifying any ecosystem overlooked by Messrs Davis and Penniket. Nor was it directed to the questions in hand of adverse effects on ecosystems and features in the context of the landscape's absorptive potential. This witness did not present an ecological assessment of the site corresponding to that made by Mr Penniket.

[84] Having reviewed the evidence on this topic, we find generally acceptable the opinions presented by the qualified ecologists Messrs Davis and Penniket. In reliance on that evidence, we find that the site contains indigenous ecosystems and wildlife habitats, and is an integral part of significant geological and geomorphologic features. We find, too, that the proposed environmental management plan and mitigation conditions would result in a net positive ecological effect, particularly in respect of the galaxiid habitat in Sheepskin Creek, and the ecologies of the proposed refugia.

Introduction of exotic species that could spread

[85] The final factor to be taken into account in considering the potential of the landscape to absorb development, both visually and ecologically, is whether the proposed activity would introduce exotic species with the potential to spread and naturalise.[48]

[86] In considering that, we have regard to the altered stocking of the site, by which cattle are no longer to be run, and the numbers of sheep reduced. We also have regard to the proposed fencing of the Sheepskin Creek covenant area and of the refugia, to reduce exotic pests, particularly stoats, rats, opposums and rabbits. Ongoing grazing by sheep would control exotic briar. Exotic (wilding) pine and broom are to be controlled.

[48] PODP, cl 5.4.2.2(2)(a)(vii).

[87] In summary, the evidence does not support a finding that the proposed activity would introduce exotic species with potential to spread or naturalise; but supports a finding that existing exotic species would be considerably reduced.

Judgement on absorptive potential of landscape

[88] Taking into account the seven factors prescribed, we have now to come to a judgement on the first criterion, the potential of the landscape to absorb development, consistent with retaining openness and natural character. On none of the seven factors does our finding indicate that the landscape lacks potential to absorb the proposed development consistent with retaining openness and natural character if carried out in compliance with the proposed consent conditions, including the environmental management plan. In respect of visibility from public roads and places, we accept BDL's contention in closing that the landscape has potential to absorb some change.

Effects on openness of landscape

[89] The second assessment criterion is the adverse effects of the proposed development on the openness of the landscape. In applying this criterion, the PODP prescribes three factors that are to be taken into account.[49]

Location in visible open landscape

[90] The first factor is whether and the extent to which the proposed development would be within a broadly visible expanse of open landscape when viewed from any public road or public place.[50] (There is a further point about unformed legal roads but, there being none in the vicinity of the site, that is not applicable in this case.)

[91] BDL contended that all the proposed building platforms are within topographic folds, and not within a broadly visible expanse of open landscape when viewed from public places or roads. It added that the openness of the site would be maintained by retaining 92.74 percent (630 hectares) of the site as open space.

[49] PODP, cl 5.4.2.2(2)(b).
[50] PODP, cl 5.4.2.2(2)(b)(i).

[92] It was Mr Baxter's evidence that minimal visibility of the proposed development means the landscape would still be viewed as open space; and that the scale of development in relation to the size of the site would result in the majority of the site and surrounding landscape being retained as open space, with development concentrated in areas with higher potential to absorb development by being less visible or not visible as open space from outside the site. This witness disagreed with Mr Howarth's statement that some of the residential complexes would be broadly visible from important public roads and places.

[93] Mr Rewcastle gave his opinion that the plateau on which the proposed building platforms are to be located forms part of a broad, visible expanse of open mountainous landscape, and that the proposed development would compromise that openness to some extent. However he considered that the openness of the most sensitive parts of the site (the broad plateau shoulders) would be maintained, and that the complex, undulating topography provides an opportunity to mitigate visibility and reduce prominence of such development.

[94] Mr Martin gave his opinion that the development would be sufficiently recessive when visible from available public vantage points, and that the openness and character of the outstanding natural landscape would be reduced but would be sufficiently protected.

[95] It was Ms Lucas's evidence that the site is on display to the wider upper Clutha, particularly to Hawea Flat, the Grandview Range, and the Clutha corridor including the State highway to Tarras. This witness stated that there are public viewpoints across these lands, including a public track along the Grandview Range, from which the development would be within a broadly visible expanse of open landscape. She added that, viewed from public roads down within the valley, the site is an important part of the open landscape of the Pisa flanks.

[96] Ms Lucas gave her opinion that any evidence of the development would adversely affect the open space values of the northern flank of the Pisa Range, with cues to domestication, and sprawl across the ice-scoured shoulder of the mountain. She assessed that the openness of the landscape would be significantly compromised and adversely affected by the development dispersed across the site.

[97] In making an assessment of this factor, we have to consider two questions: whether the development would be within a broadly visible expanse of open landscape when viewed from any public road or public place; and (if so) the extent to which it would be so.

[98] Having reviewed the evidence in the light of our own observations, on the first question we find that the proposed development would be within an expanse of open landscape and, when viewed from certain public roads and public places (including the Grandview Range) that expanse of landscape is broadly visible, even though at some distance.

[99] On the second question (of extent), we find that (with exceptions) the development would be only partly, not fully, within a broadly visible expanse of open landscape when viewed from any public road or public place. Exceptions are from the air, and possibly from vantage points on the top, or high on the flank, of the Grandview Range.

[100] On that basis, we adopt Mr Rewcastle's opinion that the development would compromise the openness of the landscape to some extent, although the more sensitive parts of the landscape would be maintained in open space.

Effects on open space values

[101] The second factor prescribed for assessing the effects on the openness of the landscape is whether, and the extent to which, the proposed development is likely to adversely affect open space values with respect to the site and surrounding landscape.[51]

[102] In that respect, Mr Baxter gave his opinion that the development would not adversely affect open space values because minimal visibility of proposed dwellings means that the landscape would still be viewed as open space; the majority of the site and surrounding landscape would be retained as open space; development would be clustered in areas with higher potential to absorb it by being less or not visible as open space from outside the site; and the remaining lands (including visible bluffs and slopes of the Pisa Range) are to be retained as farm land.

[103] Mr Rewcastle also remarked that the openness of the most sensitive parts of the site would be maintained, referring to the broad plateau shoulders.

[51] PODP, cl 5.4.2.2(2)(b)(ii).

[104] UCESI (by Mr Howarth) asserted that the existing entirely open space values of the site (in terms of absence of built form) would disappear by construction of the 26-lot residential subdivision.

[105] Ms Lucas observed that this factor is not confined to visibility from public places, and gave her opinion that the development would adversely affect the open space values of the northern flank of the Pisa Range, remarking that it would sprawl across about 250 hectares on the shoulder of the mountain. She assessed that the openness of the majority of the shoulder of the range would be significantly compromised and adversely affected.

[106] We accept Ms Lucas's point that this factor is distinct from others in that is not predicated on visibility from public places. It is focused on open space values of the site and the surrounding landscape. So we are not persuaded by Mr Baxter's point that the open space values of the site and surrounding landscape would not be adversely affected because of restricted visibility from public places. Nor are we persuaded by his points that the majority of the site and landscape (including visible bluffs and slopes) would be retained in open space, and that the development would be clustered in less visible parts of the site.

[107] On the question whether the development would adversely affect open space values, we accept Ms Lucas's evidence and find that it would do so, even though visibility of the development would be limited. On the extent of the adverse effects, we accept that the effects could be more severe, if more open space of the site was to be developed. Correspondingly, the effects might be less severe if the development was to be less extensive. However we judge that the dispersal of 26 dwellings (and ancillary development) across what is currently open space would adversely affect open space values of the site and surrounding landscape to a considerable extent.

Definition of development by natural elements

[108] The third factor by which effects on openness of landscape is to be addressed is whether the proposed development is defined by natural elements such as topography and/or vegetation which may contain any adverse effects associated with the development.[52]

[52] PODP, cl 5.4.2.2(2)(b)(iii).

[109] For UCESI, Mr Howarth contended that the development would not be defined by topographical elements, but would sprawl over a very larger area of landscape. That contention does not appear to be contradicted.

[110] We find that although largely on a terrace, the proposed development would not be defined by natural elements such as topography or vegetation that would contain its adverse effects.

Judgement on effects on openness of landscape

[111] So on the second criterion (effects on openness of landscape) we have found that the development would be within an expanse of open landscape, broadly visible when viewed from public roads or places; that it would adversely affect open space values to a considerable extent; and that it would not be defined by natural elements which would contain its adverse effects.

Cumulative effects on landscape values

[112] The third criterion is cumulative effects on landscape values.[53] Four factors are to be considered in applying it.

Elements inconsistent with natural character

[113] The first factor is whether, and to what extent, the proposed development would result in the introduction of elements which are inconsistent with the natural character of the site and surrounding landscape.[54]

[114] In his evidence, Mr Rewcastle gave his opinion that the proposed development would introduce elements (most significantly, buildings) which are inconsistent with the natural character of the site and surrounding landscape. He referred to mitigation and enhancement measures by which, on balance, he considered the development would represent potential for the natural character to be enhanced; but gave his opinion that in the wider landscape context, the proposed development would further degrade natural values.

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[53] PODP, cl 5.4.2.2(2)(c).
[54] Ibid, cl 5.4.2.2(2)(i).

[115] UCESI contended that the development would be entirely at odds with the current open, undeveloped, and largely natural character of the site; and would introduce elements inconsistent with that natural character.

[116] Ms Lucas agreed with Mr Rewcastle's opinion that the development would further degrade natural values, and stated that it is likely that the proposed development would reduce rather than enhance naturalness. This witness assessed the site as having a high naturalness; and gave her opinion that the introduction of substantial residential structures, roading and activity across much of the more accessible lands of the site would be very inconsistent with the surrounding natural landscape character of the Pisa flanks.

[117] We accept the evidence of Ms Lucas and Mr Rewcastle, and find that the development would result in the introduction of elements that would be inconsistent with the natural character of the site and surrounding landscape, namely dwellings and associated structures, roading, and residential activity. The extent of the inconsistency is assessable by the number of proposed dwellings (26), the potential for accessory structures, the extent of roading to provide access to 26 dispersed dwellings, and the residential activity that would be generated in and about that many dwellings. In our judgement that extent should be categorised as substantial.

Exacerbating effects on natural character

[118] The second factor prescribed for consideration of adverse effects is whether the elements identified would further compromise the existing natural character of the landscape either visually or ecologically by exacerbating existing and potential adverse effects.[55]

[119] BDL submitted that the environment that may be affected is not just the environment as it currently exists, but also the environment that would exist if activities permitted by the district plan, or authorised by unimplemented resource consents, are carried on.

[120] A question arose whether, for this purpose, unimplemented resource consents for residential development on adjacent land in the Central Otago District are to be considered, if they would not be permitted activities by a proposed change to the Central Otago district plan. That question was not argued by counsel in this appeal.

[55] PODP, cl 5.4.2.2(2)(c)(ii).

[121] Absent more information about the reasons for the plan change, and assistance from counsel, we regard the outcome of the plan change as difficult to predict. For the present purpose only, we treat the Central Otago District Council's resource consents for the development as current, and lawfully able to be exercised.

[122] We therefore treat the rural-residential developments of adjacent land that had been authorised by the Central Otago District Council's grant of resource consents as part of the environment of the subject site. We find that this existing and potential development of adjacent land (some 170 dwellings in total) has existing and potential adverse effects on the openness of the landscape, and on its natural character. We have now to consider whether those elements the proposed development would introduce that would be inconsistent with the natural character of the site and surrounding landscape would further compromise the existing natural character of the landscape by exacerbating those effects.

[123] In respect of that, BDL acknowledged that the proposed development would add to the existing and anticipated development that is in the Central Otago District, but contended that the cumulative effects would not be significant due to the recessiveness of the proposed development, ensured by location and design restrictions, when viewed from locations off the site; and the whole of the proposed development not being visible at the same time, in the same visual catchment as development in the Central Otago District.

[124] Mr Baxter gave his opinion that the proposed development would not visually compromise the existing natural and pastoral character of the site, because of the undulating nature of the site, its lack of immediate visibility and the existing vegetation patterning that allows for carefully thought-out development to occur. He concluded that overall the site would largely remain as an open rugged typical central Otago landscape, with the residential lots set among the same mottled landscape.

[125] Mr Baxter gave his opinion that the cumulative effects of adding the proposed development to those already permitted would not give way to adverse effects on the wider landscape because the proposed development would have substantially lower density, and because certainty is to be given to platforms and controls, and because the proposal secures and seeks to enhance the existing landscape character.

[126] Mr Ferguson acknowledged that the capacity of the landscape to absorb development has been affected by the developments having consent in the Central Otago District.

[127] Mr Rewcastle also acknowledged that the developments authorised in that district would have some cumulative effect along the walls of the larger mountain containment of the upper Clutha basin; and that there are existing adverse effects (which he considered not significant in the wider landscape) of agricultural modification on the Lake Mackay Station to the west of the site, and in the form of the electricity distribution line and fence lines on the subject site. He concluded that the proposed development would further degrade natural values.

[128] UCESI contended that the proposed development would further compromise the natural character of the landscape in addition to the adverse effects of the subdivision consents granted for development in the adjacent landscape; and would exacerbate existing and potential adverse effects resulting from them.

[129] Ms Lucas described the site as having high naturalness, and gave her opinion that the proposed development would exacerbate the effects of the development already consented to in the adjoining district; and that the proposed development would very significantly further degrade the natural values, resulting in very significant cumulative adverse effects on the Pisa Range landscape.

[130] We have found that the proposed development would introduce elements (dwellings, associated structures, roading and residential activity) that would be inconsistent with the natural character of the site and surrounding landscape. We find that the existing natural character of the landscape is impacted by existing and potential adverse effects of the extensive residential developments that have been authorised on adjacent land in the Central Otago District.

[131] We acknowledge BDL's point about restrictions on the visibility of the proposed development, and Mr Baxter's point about the proposed mitigation of adverse effects by careful design taking advantage of the topography. Those are matters of degree of visibility of the proposed development. However the focus of this factor of the cumulative effects criterion is compromise of the natural character of the landscape, rather than visibility of the proposed development.

[132] We judge that the natural character of this landscape is adversely affected by the developments authorised in the adjoining district; and that the elements of the proposed

development that are inconsistent with the natural character of the landscape would further compromise the existing natural character of the landscape and exacerbate those effects.

Threshold of absorptive capability for change

[133] The third factor prescribed for assessing the cumulative effects on landscape values is whether existing development and/or land use represents a threshold with respect to the site's ability to absorb further change.[56]

[134] UCESI contended that the site has a low threshold for development, further reduced by the consents for development on adjacent land within the same outstanding natural landscape and able to be viewed at the same time from public places.

[135] Ms Lucas gave her opinion that the development allowed in the Central Otago District represents a threshold that would be exceeded if development continued westward across the territorial authority boundary.

[136] Mr Baxter gave his opinion that the cumulative effects of adding the application sites to those already permitted would not exceed the threshold for development because the proposed 26 rural-residential lots have a substantially lower density than those in the Central Otago District, and certainty would be given to platforms and controls to secure and enhance the existing landscape character.

[137] Mr Ferguson accepted that the capacity of the landscape to absorb development has been affected by the existing and consented development across the territorial authority border, but he observed that the subject proposal would locate building development within confined platforms and limited curtilage areas, to check further spread of domestication and restrict visibility from public places.

[138] Mr Rewcastle gave his opinion that the proposed development is close to reaching a threshold of the site's ability to absorb change, but on balance he considered that cumulative effects would not be significant.

[56] PODP, cl 5.4.2.2(2)(c)(iii).

[139] We have already stated our finding that the landscape has potential to absorb some change. That was in the context of visibility factors. The factor now addressed is in a context of cumulative effects on landscape values, with particular reference to the natural character of the landscape.

[140] The reasons given by Messrs Baxter and Ferguson for their opinions were influenced by the design of the proposed development by which views of it would be restricted. To that extent we discount their opinions on a natural character threshold, as natural character can be diminished by development and structures that are secluded from view.

[141] Rather we find Ms Lucas's opinion on this topic persuasive. We judge that the existing and potential development (largely in the adjoining district) represents a threshold with respect to the ability of the subject site to absorb further change without substantial loss of the landscape's natural character.

Degradation of natural values or inappropriate domestication

[142] The fourth factor prescribed for assessment in consideration of the cumulative effects criterion applies where development has occurred or there is a potential for it to occur under existing resource consent or zoning. The factor is whether further development is likely to lead to further degradation of natural values or inappropriate domestication of the landscape.[57]

[143] In this respect, UCESI acknowledged that it requires imagining 170 residential complexes with associated curtilages and roading in the landscape to the east of the subject site. Only some of the residential complexes and some of the roading exists there now.

[144] UCESI contended that, with the existing and potential development, the further development sought on this appeal would lead to further degradation of natural values and inappropriate domestication.

[145] Ms Lucas gave her opinion that the proposed development would very significantly further degrade the natural values, and would inappropriately spread domestication westward across the Pisa flanks. This witness stated her disagreement with Mr Rewcastle's opinion

[57] PODP, cl 5.4.4.2(2)(c)(iv).

that the proximity of Luggate enhances the suitability of the site for residential use, because the PODP seeks a clear distinction between the township and its rural context. However, she did agree with Mr Rewcastle's opinion that the proposed development would further degrade natural values.

[146] Mr Baxter gave a contrary opinion that the cumulative effects of adding the application sites to those already permitted would not give adverse effects on the wider landscape, citing the lower density of the proposal, the certainty given to building platforms, and controls that he considered would enhance the existing landscape character. He also referred to the possibility of the proposed development providing a logical end to development from the east, and providing a buffer against development further west.

[147] We find that development has occurred, and there is potential for more development (already consented) to occur, on adjacent land in the Central Otago District; and we hold that this factor has to be taken into account.

[148] The focus is on natural values and inappropriate domestication of the landscape. We find that the existing and potential development on the adjacent land does and would degrade natural values in an outstanding natural landscape; and does and would result in inappropriate domestication of that landscape.

[149] We accept that the proposed development would, as Mr Baxter stated, have lower density, be subject to controls over building sites, and be intended to enhance the existing landscape character. Even so, the proposed development would by its nature be inconsistent with the natural character of the site and surrounding landscape, and would be inappropriate domestication in an outstanding natural landscape. It would represent degradation of natural values, and inappropriate domestication that, considered with the degradation and domestication resulting from the existing and potential development of adjacent land further east, would be further degradation and inappropriate domestication. In short, those adverse effects would be cumulative.

[150] We do not find persuasive Mr Baxter's point about the proposed development providing a logical end to development from the east, and providing a buffer against development further west. In our opinion, any justification for the existing and potential development in the part of this outstanding natural landscape that is in the Central Otago District ends at the territorial authority border; and if a buffer is needed against development

further west, the faithful application of the classification, assessment and other provisions of the PODP, in the light of its objectives and policies, indicate the appropriate extent of it.

Finding on cumulative effects on landscape values

[151] We have addressed the four factors to be taken into account in considering whether there are likely to be any adverse cumulative effects on the landscape as a result of the proposed development.

[152] We have found that the development would to a substantial extent introduce elements inconsistent with the natural character of the site and surrounding landscape. We have found that the natural character of the relevant landscape is adversely affected by the effects of developments authorised in the adjoining district; and that the elements of the proposed development that are inconsistent with the natural character of the landscape would further compromise the existing natural character of the landscape, and exacerbate those effects. We have found that the existing and potential development represents a threshold with respect to the ability of the subject site to absorb change without substantial loss of the landscape's natural character. And we have found that the proposed development would be inconsistent with the natural character of the site and surrounding landscape; would be inappropriate domestication in an outstanding natural landscape; and would lead to further degradation of natural values and inappropriate domestication of the landscape.

[153] Taking those findings together, we judge that the proposed development would have adverse cumulative effects on landscape values.

Positive effects

[154] The fourth relevant assessment criterion prescribed by the PODP is positive effects associated with the proposed developments.[58] The plan prescribes six factors that are to be taken into account in that regard. We address them in turn.

[58] PODP, cl 5.4.4.2(2)(d).

Protecting indigenous vegetation

[155] The first of the factors for considering whether there are any positive effects associated with the proposed development is whether it would protect, maintain, or enhance any of the ecosystems or features identified in subclause 5.4.2.2(2)(a)(v).[59] That is, whether the site includes any indigenous ecosystems, wildlife habitats, wetland, significant geological or geomorphological features or otherwise an integral part of the same.

[156] On this topic, BDL contended that the positive effects associated with the proposal include ecological protection and enhancement of the site through the environmental management plan, particularly fencing a larger area around the area subject to a conservation covenant, and excluding sheep grazing from it, to protect endangered flora and flathead galaxiid fish; monitoring vegetation to assess grazing impacts; 'enabling' increased regeneration of kanuka; and introduction of pre-settlement species. BDL urged that the life-supporting capacity, including ecological integrity, of the land would be enhanced and assured.

[157] The evidence of Mr D C Reeves, director of BDL, described the company's intention to provide rabbit-proof fencing of the Sheepskin Creek conservation area and of rock outcrop refuge areas for flora and fauna; and the environmental management plan intentions for protection from feral animal predators and for control of weeds.

[158] The value of those measures was endorsed by Messrs Penniket and Davis in their evidence. Mr Davis also drew attention to the effect of expanding the area subject to conservation covenant in protecting the quality of the water in the creek from fertilisers and herbicides, as well as from grazing sheep and rabbits.

[159] Mr Davis also explained the positive effects for native bird species from increasing the diversity of plant species as food sources and as cover, and from reducing pressure from predators; and positive effects for skinks, and geckos, as well as protection of the galaxiid population in Sheepskin Creek.

[59] PODP, c; 5.4.4.2(2)(d)(i).

[160] In his evidence Mr Baxter identified another potential enhancement of indigenous ecosystems arising from a proposed condition that 90 percent of any new planting within curtilage areas is to be in native species.

[161] UCESI questioned how it will be certain that the environmental management plan would be implemented, for instance, if the body corporate of the 26 owners of residential lots is wound up.

[162] Mr Howarth acknowledged that there may be a positive effect on ecosystems from the measures for protection of the galaxiid population in Sheepskin Creek. He offered some comments belittling the value of the potential positive effects, questioning the length of time it would take for the positive effects to eventuate, and whether they compare with the adverse effects.

[163] Ms Lucas categorised the proposed ecological protection and enhancement as minimal and questionable. She concluded that the protection would be piecemeal and fragmented, and that ecological systems would not be adequately addressed.

[164] The factor in question is whether the proposed activity would protect, maintain or enhance any of the ecosystems or features identified in subclause (a)(v). In addressing this factor, other potential positive effects are not relevant. Unlike other factors in this section of the PODP, this one does not extend from 'whether' to 'the extent to which'; so in addressing this factor, questions of degree or extent do not directly arise.

[165] Addressing the factor on its terms, we do not consider Mr Howarth's question whether the galaxiid population in Sheepskin Creek is threatened, as that is not raised by considering the proposal would protect, maintain or enhance any of the ecosystems or wildlife habitats identified. Likewise, we do not consider the length of time for the positive effects to eventuate; nor whether the protection would be piecemeal or fragmented or adequate; nor do we (at this point) compare the value of the potential positive effects with any adverse effects of the proposal.

[166] In considering whether the proposed activity would protect, maintain or enhance any of the ecosystems or features identified in subclause (a)(v), we find, first, that by the proposed extending and fencing of the Sheepskin Creek conservation area, and by the proposed excluding sheep and rabbit grazing in it, the proposal would protect the indigenous

ecosystems and wildlife habitats of that area, or integral parts of the same. The result would be protection, maintenance, and enhancement of the ecosystem and habitat associated with the indigenous galaxiid fish.

[167] Secondly, we also find that the fencing of the rock outcrop areas to be refuges for flora and fauna would protect, maintain, and potentially enhance indigenous ecosystems and wildlife habitats of those areas, particularly associated with native birds, skinks and geckos, and indigenous flora.

[168] Thirdly, we find that by 'enabling' increased regeneration of kanuka, by introduction of pre-settlement species, and by requiring that 90 percent of planting in curtilage areas be native species, the proposal would potentially enhance indigenous ecosystems and wildlife habitats associated with those woodland species.

[169] To the extent of those measures, we find that this factor of the criterion of positive effects would be met.

Native vegetation

[170] The second factor to be taken into account is whether the proposed activity would provide for the retention and/or re-establishment of native vegetation and "their" appropriate management.[60] It seems that addressing this factor may overlap to some extent with addressing the previous factor.

[171] In this respect BDL referred to a programme of assessing impacts of grazing on vegetation and monitoring stock numbers accordingly. It stated that the environmental management plan would protect existing vegetation to enable increased regeneration of kanuka woodland, and the introduction of pre-settlement species across the whole site.

[172] Mr Reeves gave evidence that BDL is offering implementation of the environmental management plan as a condition of consent to ensure that the current regeneration of the land is continued and enhanced; and accepted that removal of all wilding pines from the site, and rabbit-proof fencing around the Sheepskin Creek conservation area, and threatened plant and

[60] PODP, cl 5.4.4.2(2)(d)(ii).

refuge areas, would have to be carried out before the Council could issue a certificate under section 224 of the RMA.

[173] In his evidence, Mr Penniket identified conservation benefits of BDL having excluded cattle from the stocking regime of the site; having prohibited all fires there; and having reduced the numbers of sheep grazing the land; as well as potential benefits of implementation of the environmental management plan (referring particularly to its pest control measures). He explained that these would enable steady progress towards reversing soil erosion, decline of natural habitats, and deterioration of conservation areas, citing resultant kanuka regeneration. The witness also explained that the proposed fencing around the Sheepskin Creek conservation area would include a degraded forest remnant of *Olearia lineata* and *Coprosma intertexta*.

[174] Mr Davis, in his evidence, described the effect of exclusion fencing in promoting recruitment of *Oleara lineata,* and assisting with the maintenance and enhancement of that population. He also stated that *Comprosma intertexta* populations are associated with rock outcrops which are proposed for protection by exclusion fencing. Further, Mr Davis explained that the proposed removal of wilding pines would avoid risk of further trees establishing, and disturbing native vegetation.

[175] However from Mr Davis's evidence of his vegetation condition assessment, he considered that the development would disturb in total 0.10 hectares of kanuka woodland, 0.53 hectares of mixed shrubland, and 5.57 hectares of short tussock/pasture grassland. The witness referred to proposed revegetation of equivalent areas, and gave his opinion that over time the proposal would enhance the vegetation values of the site.

[176] In response to Mr Howarth's evidence, Mr Davis added his opinion that the grazing regime would promote the expansion of the kanuka woodland, and therefore would not have an adverse effect on native vegetation.

[177] UCESI did not contradict the evidence we have summarised tending to show that the proposed development would provide for retention and re-establishment of native vegetation and its appropriate management. Rather, the evidence of its witnesses focused on belittling the value of the retention, re-establishment and management of native vegetation in this case.

[178] In the present context, the PODP prescribes consideration of whether the proposed activity would provide further retention and/or re-establishment of native vegetation and their appropriate management. The value of doing so is not a question for a consent authority considering a specific application (although the value might be expressed indirectly in coming to an ultimate judgement).

[179] We accept the evidence of Messrs Reeves, Penniket, and Davis on the topic, and find that the proposal would provide for retention and re-establishment of native vegetation and its appropriate management.

Protection of open space

[180] The next factor prescribed to be taken into account in considering positive effects associated with the proposed development is whether it provides an opportunity to protect open space from further development which is inconsistent with preserving a natural landscape.[61]

[181] In this respect, BDL identified the proposed covenant (to be given effect by a consent notice) that would restrict further subdivision of the 630.28-hectare common lot (except farm buildings and boundary adjustments that do not create any additional lots), and contended that this would ensure that the open space of the site would be maintained in perpetuity.

[182] UCESI contended that this factor is failed, because the proposal would cause an area of open and largely natural landscape to be inappropriately developed. On the covenant requiring the 630-hectare part of the site to remain open space, Mr Howarth remarked that this is how it appears now; and that it is highly unlikely that consent for its development would ever be granted, given the provisions of the district plan. The witness added that this greatly reduces the value of the covenant.

[183] In addressing this factor, we do not consider that we are called on to predict whether the district plan provisions will remain unchanged indefinitely; nor to predict how a hypothetical application for resource consent for further subdivision or development of the residual lot might be decided; nor to assess the value of the covenant.

[61] PODP, cl 5.4.4.2(2)(d)(iii).

[184] Our task is to find whether the development would provide an opportunity to protect open space from further development that would be inconsistent with preserving a natural open landscape. On the evidence, we find that it would.

Remedying or mitigating adverse effects

[185] The fourth factor in considering positive effects is whether the proposed development provides an opportunity to remedy or mitigate existing and potential adverse effect by modifying, including mitigating or removing, existing structures or developments, and/or surrendering any existing resource consents.[62]

[186] No party or witness brought to the Court's attention any respect in which the proposed development might provide such an opportunity, or realise it. We therefore treat this factor as inapplicable in the circumstances of this application.

Esplanade reserves

[187] The fifth factor relates to the ability to take esplanade reserves around margins of any lake, river, wetland or stream within the subject site.[63]

[188] UCESI remarked that no esplanade reserve is offered by BDL; and that indeed appears to be the case.

[189] The natural character and natural conservation values of the part of Sheepskin Creek within the area proposed to be fenced off around it may be considered to be protected by that measure and the existing conservation covenant. Whether the remainder of the creek in the site (upstream of the galaxiid habitat) possesses natural character and natural conservation values that could be protected appropriately by an esplanade reserve was not addressed in the evidence. No party contended, and no witness gave an expert opinion, that it would.

[190] In the absence of any contention or evidence to the contrary, we conclude that this factor is not applicable in the circumstances.

[62] PQDP, cl 5.4.4.2(2)(d)(iv).
[63] PQDP, cl 5.4.4.2(2)(d)(v).

Legal instruments to realise and ensure positive effects

[191] The sixth and final factor prescribed for considering positive effects is the use of restrictive covenants, easements, consent notices, or other legal instruments otherwise necessary to realise those positive effects referred to in subclauses (i) to (v) and/or to ensure that the potential for future effects, particularly cumulative effects, 'are' avoided.[64]

[192] In that context, BDL proposed the retention of the common lot (630.28 hectares) as open space by a volunteered covenant (to be assured by consent notice) restricting any further development (except farm buildings or subdivision other than boundary adjustments that do not create any additional lots) to ensure that the open space of the site is maintained in perpetuity. That was confirmed by the evidence of Mr Reeves.

[193] In his evidence, Mr Davis referred to a proposed condition (also to be assured by consent notice) that would impose a ban on keeping domestic cats on the property, to limit the risk of cats predating on native bird, skink and gecko populations.

[194] On the proposed covenant against further subdivision and development of the common lot, Mr Howarth remarked that this area is already well protected by the district plan from inappropriate subdivision and development. He added that the value of the covenant is further diminished by the existing covenant over part of Sheepskin Creek.

[195] Mr Howarth went on to make other remarks about the scale of potential financial gains for BDL if the proposal gains consent. The relevance of his conjecture about that is not apparent to us.

[196] Our duty, in considering whether there are any positive effects of the proposal, is to take into account the use of legal instruments to realise the positive effects identified in the previous five factors, and ensure that the potential for future effects, particularly cumulative effects, is avoided. In carrying out that duty, we take into account the consent conditions proposed by BDL, including the environmental management plan; the covenant restricting further subdivision and development of the common lot (to be assured by consent notice);

[64] PODP, cl 5.4.4.2(2)(d)(vi).

and the covenant restraining the keeping of domestic cats (also to be assured by consent notices).

[197] No party identified any other subject-matter within the scope of this factor for such a legal instrument that might be contended to be desirable; and we are not aware of any.

Finding on positive effects

[198] We have addressed the six factors prescribed to be taken into account in considering whether there are any positive effects associated with the proposed development. We have found that the proposal would protect, maintain, and enhance certain indigenous ecosystems and wildlife habitats; that it would provide for the retention of native vegetation and its appropriate management; that it would provide an opportunity to protect open space from further development that would be inconsistent with preserving a natural open landscape; and that legal instruments would be used to realise those positive effects and to ensure that potential adverse effects (including potentially cumulative effects) would be avoided.

[199] Taking together those findings on the prescribed factors, we find that there would be positive effects associated with the proposed development.

[200] We add that the proposal would potentially have one or more other positive effects on the environment that do not fall within any of the factors prescribed by the PODP for considering the potential effects. Therefore we consider that possibility later in this decision in the course of performing the duties prescribed by section 104(1)(a) of the RMA.

General criteria for assessment

[201] We have addressed the assessment matters prescribed by the PODP that are particular to considering applications for resource consent for activities in outstanding natural landscapes (district-wide).

[202] The PODP also stipulates reference to another set of general assessment matters, prescribed in clause 5.4.2.3. The subject-matter of some of those criteria overlap with matters already considered in addressing the particular criteria; and others are not applicable to the proposal or the site.

Natural conservation values

[203] Under this subheading, seven criteria are prescribed.[65] Several of them relate to indigenous ecosystems and biodiversity.

[204] The first is the extent to which the proposed activity would result in opportunities for their protection and enhancement. The second is any adverse effects on them from animal pests and domestic animals. The fifth is the extent to which the activities would protect and enhance the survival and well-being of indigenous plants and/or animals that are rare, vulnerable, endangered or significant. The sixth relates to the extent to which the activity would adversely affect, or provide opportunities to enhance, lizard populations and their habitats at rock outcrops.

[205] In considering the criteria particular to outstanding natural landscapes (district-wide), we addressed factors relating (among other things) to indigenous ecosystems. We stated findings (among others) that the proposed environmental management plan and consent conditions would result in a net positive ecological effect; and to the effect that the proposed exclusion of animal pests from around the Sheepskin Creek area and from around the rock outcrop refuges would reduce adverse effects on indigenous ecosystems. The prohibition on keeping cats is also intended to mitigate such effects. Those measures would provide some protection and enhancement for indigenous plants and animals, including lizard populations and their habitats.

[206] The third criterion for assessing effects on natural conservation values is any need to avoid, contain, manage and/or monitor the adverse effects of introduced plant species/forms which have potential to spread and naturalise.[66]

[207] The particular criteria required us to consider whether the proposed activity would introduce exotic species with the potential to spread and naturalise. We stated our findings that the proposed activities would not introduce such species, and that existing exotic species would be considerable reduced (including by removal of wilding pines).

[65] PODR, cl 5.4.2.3i.
[66] PODP, cl 5.4.2.3i(c).

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[208] The fourth criterion is the extent to which the activity provides opportunities for making available information regarding indigenous vegetation.[67]

[209] We have reviewed the submissions of the parties and the evidence given, but have not found any reference to this topic. We infer that it is considered inapplicable in the circumstances of this proposal.

[210] The seventh criterion is the extent to which the inherent values of the site, and its ecological context, have been recognised and provided for.[68]

[211] The inherent values of the site and the relationship of its ecological context to them, were described in the evidence of Ms Lucas, Mr Davis and Mr Baxter. The inherent values include its open, natural character, and its geomorphology and topography, expressive of glacial impacts.

[212] In addressing the particular criteria, we stated our findings that the proposed activities would compromise the openness of the site to some extent, although the more sensitive parts would be maintained in open space; and that the proposed development would to a considerable extent adversely affect open space values of the area to be developed. So on the seventh of the natural conservation value criteria, we find that the inherent values of the site would not be fully recognised or provided for.

Finding on natural conservation values

[213] Having addressed the listed criteria for consideration of natural conservation values, we conclude that the development would provide some protection and enhancement for indigenous plants and animals (including populations of galaxiids and lizards and their habitats); would not introduce exotic species with potential to spread and naturalise; but would not fully recognise and provide for the inherent natural values of the site (particularly its open, natural character).

[67] PODP, cl 5.4.2.3i(f).
[68] PODP, cl 5.4.2.3i(g).

Other general criteria

Buildings

[214] The next of the general criteria that is applicable relates to buildings.[69] It requires consideration of the extent to which the location of buildings and associated earthworks, access and landscaping would break the line and form of ridges, hill and prominent slopes. It also requires consideration of whether the external appearance of buildings would be appropriate within the rural context, but as far as we know, none of the residential buildings to be constructed on the site has been designed yet, so we cannot sensibly address that point at this stage.

[215] Consideration of the locations of buildings and associated earthworks, access and landscaping overlaps with consideration already given to some factors of the particular criteria about the absorptive potential of the landscape. The extent of visibility of the development would be so restricted by topography, distance and transitory factors that the landscape would be able to absorb it, and it would not be visually prominent to the extent that it would dominate views of natural landscapes; nor would mitigation, earthworks and plating detract significantly from natural patterns and processes in the context of the absorptive potential of the landscape.

[216] So we find that the design of the proposed development would result in buildings, earthworks, access and planting making no significant breaks in the line and form of the landscape.

Access

[217] The next of the general criteria that is applicable in this case relates to access.[70] It involves consideration of three factors.

[218] The first is the extent to which alternative formed access can be assured to the residential unit in the long term.

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[69] PODP, cl 5.4.2.3.iv.
[70] PODP, cl 5.4.2.3.xxiii.

[219] Having reviewed the evidence, we are not satisfied that alternative formed access to the proposed residential units can be assured for the long term, or at all.

[220] The second factor is the extent to which the level and nature of the use of the proposed residential unit will make it unlikely that formed road access will ever be necessary.

[221] We have considered the level and likely nature of the proposed residential units, and are satisfied that formed road access would be needed to them all.

[222] The third factor about access relates to financial contributions to the Council. We are not aware that there is any dispute between BDL and the Council in this respect; nor does this proceeding provide an appropriate opportunity for resolving any such dispute.

Nature and scale of activities

[223] The next criterion identifies six respects for considering the nature and scale of the proposed activities.[71]

[224] The first is the extent to which the activity and the proposed use of buildings would be compatible with the scale of other buildings and activities in the surrounding area.

[225] In that respect, we find that they are likely to be compatible with the scale of buildings and activities on adjacent land in the Central Otago District where consents for subdivisions have been granted and some are already being exercised.

[226] The second respect is the extent to which the character of the site will remain dominant.

[227] The character of the site is open and natural, and development of 26 residential complexes with associated access would compromise its open, natural character, to the extent that it could no longer be described as open and natural.

[71] PODP, cl 5.4.2.3.xxiv.

[228] The third and fourth respects do not apply directly to the BDL proposal. The fifth is the extent of noise and visual impact.

[229] The proposed buildings would be sufficiently spread that any noise from their use would be attenuated before being perceived off site. The visibility of buildings and other structures would be restricted by topography and distance so the visual impact would be largely absorbed by the landscape.

[230] The sixth respect for considering the nature and scale of proposed activities is the extent of adverse effects of likely traffic generation, and the ability to mitigate such effects.

[231] We consider that the scale of residential traffic likely to be generated by 26 rural-residential complexes would be unlikely to have an adverse effect on State Highway 6 between Cromwell and Wanaka.

[232] In summary, the scale of the proposed activities would not be problematic, but their nature would be inconsistent with the open, natural character of the site.

Significant indigenous vegetation

[233] Another general criterion stipulates four respects for considering effects on significant indigenous vegetation.[72] In considering the proposed development by reference to them, we address them out of the order in which they are prescribed.

[234] The fourth respect is the extent to which previous activities have modified the site. On that topic, Mr Davis gave evidence that the pre-settlement vegetation on the part of the site to be developed was likely to have been dominated by shrubland, including kanuka, kowhai, and halls totara, with wetland communities in depressions. He stated his understanding that much of the woody vegetation would have been lost in early Maori fires; and that this loss would have been exacerbated by effects of burning and grazing associated with historic pastoral activities. Ms Lucas added her understanding that barely 1 percent of the original forest remains.

[72] PODP, cl 5.4.2.3.xxvi.

[235] So on that evidence we find that previous activities have modified the indigenous vegetation of the site to a very considerable extent.

[236] Next we turn to the significance of the existing species and their communities. There was no question that they are important.

[237] Then we consider the extent to which the proposed development may adversely affect the life-supporting capacity of the indigenous species. There was no evidence that it would.

[238] Next, the extent to which the proposed activity may adversely affect landscape and natural values of the site and in the vicinity of the site. In the context of significant indigenous vegetation, we have stated our findings that the proposal would provide for retention and re-establishment of native vegetation, and that there would be a positive net ecological effect.

[239] Then we are to have regard to the extent to which the proposed activities may adversely affect the life-supporting capacity of soil and water. We have considered the evidence, and see no basis for finding that the activities would have any significant impact on that capacity.

[240] Finally we are required to consider the degree to which alternative sites and methods have been considered. Because there is no evidence of adverse effects of substance on significant indigenous vegetation, consideration of alternative sites is unrealistic from that viewpoint.

Residential units

[241] The list of general criteria continues by itemising seven factors for considering residential units that are discretionary activities.[73]

[242] The first of those factors is the extent to which the proposed residential activity would maintain and enhance several qualities, not all of which are applicable to the proposal and its site. First we are to consider the extent to which the proposed development would maintain and enhance rural character. In that a collective of the owners of the rural-residential lots is

[73] PODP, cl 5.4.2.3.xxvii.

expected to contract for grazing by sheep of the common lot, the proposal would maintain a rural character; and the presence of residential activities on the 26 residential lots would not diminish that significantly.

[243] Then we are to consider the extent to which the residential activity would maintain and enhance landscape values. This calls for consideration of matters already addressed by reference to the particular criteria for assessing activities in outstanding natural landscapes (district-wide). In that context, we stated findings to the effect that the development, carried out in accordance with the environmental management plan and in compliance with the proposed consent conditions, would not be visually prominent so as to dominate views of the natural landscape, but would compromise its openness and natural character, and have adverse cumulative effects on landscape values.

[244] The third consideration is the extent to which the residential activity would maintain and enhance heritage values, but no such values were identified as being associated with the site.

[245] The fourth consideration is the extent the residential activity would maintain and enhance visual amenity. Because the residential activities would be largely obscured from view, except in small parts and at a considerable distance or transitory views from the air, we find that the extent to which they would fail to maintain those amenity values would be minor.

[246] The fifth consideration is the life-supporting capacity of soils, vegetation and water. We have not identified any basis in the evidence for finding that the residential activities would have any significant impact on the life-supporting capacity of those media.

[247] The remaining respects are the extent to which the residential activity maintains and enhances infrastructure, traffic safety, and public access to and along lakes and rivers. Given the location of the site, a decision to grant or refuse consent to this proposal cannot, in practice, be informed by consideration of any of those matters.

[248] The second factor for considering residential units that are discretionary activities is the extent to which the residential activity may adversely affect adjoining land uses.

[249] Resource consent has been granted for rural-residential subdivision and development of the adjoining land to the east (in the Central Otago District). The proposed development would not adversely affect that use of that land.

[250] Adjoining land to the south, west and north is being farmed, and the proposed development would not be likely to adversely affect that use of that land.

[251] The current owners of both those adjoining lands have given (and as far as we know, have not withdrawn) their written approvals to the proposal, so we are required by section 104(3)(b) of the RMA not to have regard to any effect on them.

[252] The third factor is the extent to which the residential activity may be adversely affected by natural hazards or exacerbate a natural hazard situation. There was no basis in the evidence for making a finding on those points.

[253] The fourth factor is the extent to which the location of the residential unit and associated earthworks, access and landscaping affects the line and form of the landscape. We have considered this topic in the context of the general criterion in respect of buildings, and stated our finding that it would not.

[254] The fifth factor is whether the bulk, design, external appearance and overall form of the residential unit is appropriate in the rural context. As we said in considering the general criterion in respect of buildings, as none of the residential buildings has been designed yet, we cannot sensibly address the appearance of the proposed buildings at this stage. That also applies in this context too.

[255] The sixth factor relates to supply of potable water, disposal of domestic sewage, and telephone and electricity services. None of those topics was in issue on this appeal, and we presume that satisfactory provision could be made in accordance with local requirements and practice.

[256] The seventh factor raises potential to interfere with irrigation infrastructure. The evidence on this appeal gives no basis for an adverse finding in that respect.

Earthworks

[257] The next topic in the set of general assessment matters is earthworks.[74] There are six main criteria, each involving two or more items for consideration.

[258] The first main criterion is environmental protection measures, itemising seven respects, mostly relating to the way in which the proposed earthworks are to be carried out to minimise adverse environmental effects.

[259] The proposed consent conditions require the taking of appropriate measures, and the focus of the appeal hearing was whether consent should be granted or refused, rather than details of how earthworks are to be carried out. Accordingly, we do not address those points item by item.

[260] The second main criterion is effects on landscape and visual amenity values, with six respects itemised.

[261] Although the specific wording may differ, the substance of the items is generally similar to that of particular criteria for considering proposed activities in outstanding natural landscapes (district-wide). To avoid unnecessary repetition, we confine ourselves to items that raise new topics, or that could be significant in deciding the application.

[262] One item is the potential for cumulative effects on the natural forms of existing landscapes (which we take to mean, on the existing natural form of a landscape). Another is whether and the extent to which the earthworks would create an area that is inconsistent with the existing character of the landscape.

[263] In our opinion the effects of alterations to existing natural forms of the landscape by earthworks for building platforms and access tracks would be cumulative on effects of similar alterations for similar purposes on land to the east, and for farming purposes on other adjacent land. The visual effects of the proposed earthworks are to be mitigated by planting, but the natural landforms are to be altered permanently, and that would be inconsistent with

[74] PODP, cl 5.4.2.3.xxviii.

the existing natural character of the landscape generally, including the higher, southern part of the site itself.

Finding on earthworks

[264] In our opinion although visual effects of the earthworks proposed for the subdivision and development (building platforms and access tracks) would be mitigated, the effects of actual alterations to the natural landform would, cumulative on effects of existing and consented alterations to the natural landform in the vicinity, be inconsistent with the natural character of the landscape, and have an adverse effect on the environment.

Reasons for making activity discretionary

[265] The PODP stipulates that consideration of an application for a discretionary activity in the rural zones is to include recognition of the reasons stated in paragraph 1.5.3(iii) for making the activity discretionary.[75] That paragraph explains several reasons for classifying classes of activity discretionary. Of them, two are of general application: a potential that the activities may not be suitable in all locations, and where environmental effects are so variable that general standards cannot be prescribed for them.

[266] Another reason is particular to outstanding natural landscapes and features in certain parts of the district, including the inner upper Clutha area. It is simply that the activities that are classified discretionary are inappropriate in almost all locations in those parts of the district.

[267] In his evidence, Mr Haworth relied on this for general propositions that the PODP discourages development in outstanding natural landscapes; and that the objectives, policies and assessment criteria are onerous in respect of subdivision and development in the Rural General Zone where the site is in an outstanding natural landscape.

[268] We find those propositions too general to be helpful. The appropriateness of each proposal that is a discretionary activity has to be judged on its own circumstances.

[75] PODP, cl 5.4.2.1, Step 3.

Frequency of appropriate sites in locality

[269] Finally, the PODP also stipulates that consideration of an application for a discretionary activity in the rural zones is to include the 'frequency' with which appropriate sites for development will be found in the locality.[76] In this respect, Mr Ferguson gave evidence about management of land in the same landscape as the site, but in the Central Otago District. Mr Howarth also gave evidence of an ample supply of locations for residential and rural living in more appropriate places.

[270] On the evidence we find that there are numerous sites for residential and rural residential development in consented subdivisions on the outskirts of Luggate and on land close to the site in the Central Otago District. We judge that granting consent to the BDL proposal cannot be justified on the ground of there being insufficient sites for residential or rural residential development in the locality. Sites on the outskirts of Luggate would be more appropriate in terms of the PODP, because they are not in an outstanding natural landscape.

Assessment of proposal by criteria prescribed by PODP

[271] We have considered the proposal by reference to separate assessment criteria prescribed by the PODP: some particular to activities in outstanding natural landscapes, as well as some criteria of more general application. We have now to develop from our findings on the separate criteria an assessment of whether consent to the proposal should be granted or refused.

[272] Many of our findings, based on prescribed assessment criteria, are indicative of the proposal, carried out in compliance with the proposed consent conditions (including the environmental management plan) being judged worthy of consent:

(a) In visual terms, the landscape has potential to absorb that change.

(b) The proposal would have net positive effects in protecting, maintaining and enhancing certain indigenous ecosystems and wildlife habitats (including populations of galaxiids, skinks and lizards and their habitats); and would provide for retention of important indigenous vegetation.

[76] Idem.

(c) The proposal would (by legal instrument) protect substantial open space from further development that would be inconsistent with preserving a natural open landscape.

(d) The proposed earthworks (access tracks and building platforms) would be needed for the residential complexes.

(e) The scale of the proposed residential activities would not be problematic.

(f) The proposal would maintain a rural character that would not be diminished significantly by the residential activities.

[273] However, findings on other topics identified in the prescribed assessment criteria indicate that consent for the proposal should be refused:

(a) The development would compromise intrinsic values of the site and landscape of openness and natural character by introducing elements inconsistent with them, in particular buildings and earthworks.

(b) The existing and consented potential development of other land in the vicinity represents a threshold on the ability of the landscape to absorb change without substantial loss of open and natural character.

(c) The loss of those character elements would be cumulative on similar effects of development already consented in respect of land in the immediate vicinity, and would exacerbate them.

[274] We have considered whether the plan permits an activity that would have those effects, but find that it does not. Those adverse effects cannot be disregarded on that ground.

Consideration by objectives and policies and section 6(b)

[275] We have now to consider whether the objectives and policies of the PODP, and the provisions of Part 2 of the RMA, guide the making of a decision.

[276] Neither section 6(b) of the RMA, nor the objectives and policies of the PODP, prohibit all subdivision development in an outstanding natural landscape. Section 6(b)

directs protection of those landscapes from inappropriate subdivision, use and development; and the objectives and policies apply that direction to outstanding natural landscapes of the district by indicating effects of subdivision development in them that may be appropriate.

[277] There are respects in which BDL's proposed development would not be inappropriate. It would avoid structures being placed on skylines, ridges, prominent slopes and hilltops; and the residential buildings would largely be secluded from public view. It would also appropriately protect by fencing and removal of weeds and wilding pines, indigenous populations and habitats of Sheepskin Creek and around rock outcrops. In these respects the proposal would support objectives of the PODP.

[278] However the proposed development would be inappropriate in terms of the PODP in other respects, related to the intrinsic qualities of the outstanding natural landscape: its openness and its naturalness. It would not be consistent with the policy of maintaining the openness of outstanding natural landscapes; nor with the policy of maintaining existing levels of natural character; nor (as a cumulative effect) with the policy against over-domestication; nor would it be consistent with the policy about subdivision works avoiding adverse effects on the natural character and qualities of the environment.

[279] The several objectives and policies of the PODP should be read together to indicate a consistent theme. In our opinion the consistent theme of the PODP relating to subdivision development in outstanding natural landscapes (district-wide) is that development may be permitted and treated as appropriate if it does not adversely affect the natural environment, nor the landscape and visual amenities, nor the intrinsic qualities and character of the landscape.

[280] In determining the appeal, the Court is obliged to have regard to the decision that is the subject of the appeal. In doing so, we bear in mind that the proposal before the independent commissioners who made that decision differed from the modified proposal before the Court, particularly in that it provided for 35 rural-residential lots, not 26.

[281] The commissioners found that the part of the site proposed for development has a strong natural and pastoral character, and that the impact of the proposed building would be significant and detrimental. They considered that the amount of development proposed would far exceed the ability of the site to absorb development while maintaining a dominant

natural and pastoral character; and concluded that what was proposed was well outside the intentions of the district plan, even assuming a visual amenity landscape classification.

Ultimate judgement

[282] On our own findings, the proposed development (creating only 26 rural-residential lots) in protecting indigenous fauna and flora and removing weeds and wilding pines) would not adversely affect the natural environment, and has been designed to minimise adverse effects on visual amenity landscape values. However the proposed development would degrade the intrinsic qualities and character of the outstanding natural landscape of openness and naturalness; and those effects would be cumulative on similar adverse effects of development already consented to by the adjoining territorial authority. Except in the latter respect, our findings are largely similar to those of the commissioners who made the decision subject to appeal.

[283] We acknowledge that the proposal would have another positive, beneficial effect, in that BDL is offering to provide a public access track to the Pisa Conservation Area, the public value of which was endorsed by Mr T S Dennis, Chairman of the Upper Clutha Tracks Trust.

[284] Nor do we overlook Mr Reeves's warning about the risks to environmental values if the site is not developed, and is farmed as a permitted activity to maximum economic advantage with burning of tussock, clearing of other vegetation, cultivation, and grazing by cattle.

[285] Even so, the Court's duty is to make a judgement whether granting consent would more fully achieve the purpose of the Act than would refusing consent; and the direction to recognise and provide for the protection of outstanding natural landscapes from inappropriate subdivision, use and development is identified as a matter of national importance contributing to that purpose. The PODP incorporates an application to the district of that direction.

[286] In that the proposed subdivision and development would deprive the relevant outstanding natural landscape of its openness and naturalness, we hold that it would be inappropriate in terms of section 6(b), and inconsistent with the relevant PODP policies for applying the direction in that section to the outstanding natural landscapes of the district. In

our judgement, those considerations indicate that, although there would be beneficial positive effects, and positive design elements, the purpose of the Act would be more fully achieved by refusing consent than by granting it.

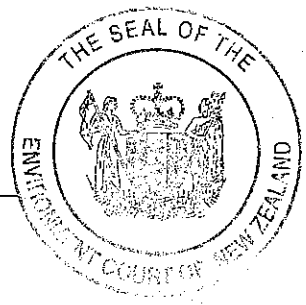
[287] So the Court disallows the appeal, and confirms the primary decision declining resource consent to the modified proposal.

Costs

[288] The question of costs is reserved. If agreement cannot be reached, any party may lodge and serve a written application for costs within 20 working days of the date of this decision accompanied by affidavit evidence of any matters of fact (beyond the findings of this decision) on which the application is made. Any party against whom an order for costs is sought may lodge and serve written submissions in response within 20 working days of receipt of the application, and those submissions may similarly be accompanied by affidavit evidence. If necessary, a written reply may be lodged and served by the applying party within 10 working days of receipt of the response.

DATED at Auckland this 14th day of August 2009.

For the Court:



D F G Sheppard
Alternate Environment Judge

TAB 2

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 55

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	COLONIAL VINEYARD LIMITED
	(ENV-2012-CHC-108)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A J Sutherland
Venue:	Blenheim
Hearing dates:	9 to 13 and 16 and 17 September 2013. (Final submissions received 24 October 2013).
Appearances:	N Davidson QC and M J Hunt for Colonial Vineyard Limited S F Quinn and M Booth for Marlborough District Council Q A M Davies and D P Neild for New Zealand Aviation Limited and The Marlborough Aero Club (under s274) M Radich for Trustees of the Carlton Corlett Trust (under s274)
Date of Decision:	14 March 2014
Date of Issue:	14 March 2014

DECISION

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A: Under section 290 of the Resource Management Act 1991:

(1) the appeal is allowed;

(2) the decision of the Marlborough District Council dated 31 July 2012 is cancelled; and

(3) Plan Change 59 as notified is approved subject to the changes stated in the Reasons below.

B: Subject to C, the parties are directed to discuss the proposed policies, maps and rules and if possible to lodge an agreed set by Wednesday 30 April 2014.

C: Under section 293 the council is directed to consult with the parties over the urban design principles included in Mr T G Quickfall's Appendix 4 and to lodge its approved version for approval by the Environment Court by 30 April 2014.

D: Leave is reserved for any party to apply for further directions (under section 293 of the RMA or otherwise) if agreement cannot be reached.

E: Costs are reserved.

REASONS

Table of Contents Para

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1. Introduction

1.1 The issue: should the land be rezoned residential?

[1] The principal question in this proceeding is whether a 21.4 hectare vineyard in New Renwick Road on the southern side of the Wairau Plains near Blenheim should be rezoned for residential development, as sought in private Plan Change 59 ("PC59").

1.2 The vineyard and its landscape setting

[2] The vineyard is owned by Colonial Vineyard Ltd ("CVL"). The land is legally described as Lot 2 DP350626 and Lot 1 DP11019 ("the site"). The site is flat and is located south of New Renwick Road between Richardson Avenue and Aerodrome Road, on the periphery of Blenheim. It is west of the Taylor River which is about 100 metres away at its closest, and about 400 metres from the extensive reserves and walking tracks of the Wither Hills. The site is currently planted with Sauvignon Blanc grapes, and the north, south and east boundaries are lined by olive trees[1].

[1] M Davis, evidence-in-chief at para [9] [Environment Court document 3].

[3] The land opposite the site on the eastern and northern boundaries has Residential zoning[2]. The land to the south of the site is rural land owned by the Carlton Corlett Trust. It is currently in pasture and light industrial/commercial development and likely future light industrial development[3].

[4] Further to the south, on more land owned by the Carlton Corlett Trust, are the Omaka Aviation Heritage Centre and related aviation and engineering activities, and a Car Museum. An airport used for general aviation called "the Omaka airfield" adjoins the Omaka Museum site and is to the southwest of the CVL site.

[5] The Omaka aerodrome was established in 1928 and contains what are reputed to be the oldest set of grass runways in the country. The Marlborough Aero Club Inc., which is based there, is one of the oldest flying clubs in the country. Omaka is now the main airfield in Marlborough for general (as opposed to commercial) aviation. Operations include helicopter businesses for crop spraying and frost protection, pilot training and aircraft repair work. Omaka is also the home of the Aviation Heritage Centre which houses a superb collection of World War I aircraft and replicates and other memorabilia. The grass runways and the adjacent workshops in the hangars are of heritage value, whereas the helicopter operations and some of the aircraft maintenance are parts of the "air transport" infrastructure.

[6] The site and the airfield are about 600 metres apart at their closest. The 55 dBA Ldn noise contour from the Omaka airfield currently crosses the Carlton Corlett land in (approximately) an east-west line several hundred metres south of the site as shown in the acoustic engineer, Dr J W Trevathan's Plan B[4]. This contour is based on three months of data recorded by Mr D S Park and includes helicopter noise abatement paths as discussed later in this decision.

[7] Blenheim's urban area is to the north and east of the site. The Wither Hills lie south, and to the west and northwest is the Wairau Plain, principally covered in large-scale vineyards. Approximately 5 kilometres northwest of the site is Marlborough's main commercial airport at Woodbourne.

1.3 Plan Change 59

[8] CVL was the initiator of the request for a private plan change (PC59) to the Wairau Awatere Resource Management Plan ("WARMP"). The proposal for Plan Change 59 was lodged with the Marlborough District Council in April 2011. PC59 sought to rezone the site from Rural 3 (the Wairau Plain zone) to Urban Residential 1 and 2 to provide for residential development. The plan change also sought to amend or

2 T G Quickfall, evidence-in-chief [9](b) [Environment Court document 18].
3 T G Quickfall, evidence-in-chief [9](c) [Environment Court document 18].
4 J W Trevathan, supplementary brief of evidence, Attachment B [Environment Court document 14B].

add some policies[5] in the district plan, together with consequential changes to methods of implementation.

[9] CVL initiated its plan change following the initial completion of the Southern Marlborough Urban Growth Strategy 2010 ("the 2010 Strategy") that assessed the residential growth potential in different areas using a "multi-criteria" approach[6]. The analysis under the 2010 Strategy is quite comprehensive and CVL placed some reliance on that process and its findings as part of its section 32 analysis of PC59.

[10] CVL's original version of PC59 (as notified) sought the following:

(a) to produce a residential development consistent with good design principles;
(b) to rezone the bulk (15 hectares) of the site as Urban Residential 1;
(c) to rezone 6.4 hectares on the southern and western boundaries of the site as Urban Residential 2;
(d) to amend the WARMP by introducing proposed policies set out in Appendix 1 to the application;
(e) to amend Appendix G of the WARMP so that the CVL site be identified and the rules will require buildings to be constructed in accordance with the 'Indoor Design Sound Levels set out in Appendix M'[7].

[11] The only important policy change is that PC59 (as notified) proposes that policy (11.2.2)1.3 be amended as follows:

> Maintain high density residential use <u>close to open spaces and</u> within the inner residential sector of Blenheim located within easy walking distance to the west and[8] [south of] the Central Business Zone.

The underlined words are the addition. The effect of the proposed change would be to allow some relatively high density residential development close to open spaces, thus expanding the scope for residential development of the site, and elsewhere to the south of the CBD.

[12] The application for a plan change was approved for notification and publicly notified. There were submissions and a hearing. So far that was routine. However, at the council hearing CVL purported to amend its application to incorporate the following changes:

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5 Policies (11.2.2)1.3; (19.3)1.7 and (19.7)1.8; (23.5.1)1.17 and 1.18; (29.2)8.1.
6 T G Quickfall, evidence-in-chief [15] [Environment Court document 18].
7 Commissioners' Decision para 12 – citing the CVL application at p 56.
8 PC59 actually uses the words "sought for" rather than "south of" but that misquotes (and makes nonsense of) the actual policy.

(a) the provision of an internal roading hierarchy including a primary local road and low speed residential streets;
(b) a requirement for acoustic insulation within the entire site for dwellings;
(c) a new zoning map;
(d) a concept plan showing likely roading connections and open space layout; and
(e) other changes to objectives and policies to better reflect those requirements in this location.

Changes (a) to (d) cause us no jurisdictional difficulties, but (e) may.

[13] The potential difficulties were compounded because the proposed objectives and policies were further amended in Mr Quickfall's evidence. CVL now proposes to add two new objectives to Section 23.6 of the WARMP[9]. The first is a new objective specific not to the site but to Omaka Aerodrome and the aviation cluster. This would be[10]:

> To recognise, provide for and protect on-going operation and strategic importance of the Omaka Aerodrome and aviation cluster (activities related to the Aerodrome).

While well-intentioned, the additions to objectives proposed by CVL at the council hearing and then, in an expanded version, to the court are beyond jurisdiction. They refer to land which is not the subject of the notified plan change (and not even contiguous to the site) and there are persons not before the court (e.g. some neighbours of the airfield) who might be affected by further amendments to the plan change. On the principles stated in *Hamilton City Council v NZ Historic Places Trust*[11] and *Auckland Council v Byerley Park Limited*[12], there must be considerable doubt about the court's jurisdiction to add the first objective. In any event, since no party suggested we give directions under section 293 in respect of them, we will not consider them further.

[14] Although the 2010 Strategy made some initial recommendations, the final recommendations are dated March 2013 and were adopted by MDC on 21 March 2013. These final recommendations note the importance of Omaka airfield as a regional resource and suggest that the appellant's land (the subject of PC59) be earmarked for employment activities, rather than residential. That is a significant shift from the 2010 Strategy's recommendations[13] as we shall discuss in more detail later.

[15] The council issued its decision declining CVL's application for private plan change on 31 July 2012. CVL appealed the decision to the Environment Court. The

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9 We question the number: existing 23.6 of the WARMP relates to Methods of Implementation, not objectives or policies.
10 T G Quickfall, evidence-in-chief Annexure 4 [Environment Court document 18].
11 *NZ Historic Places Trust v Hamilton City Council* [2005] NZRMA 145 at [25] (HC).
12 *Auckland Council v Byerley Park Limited* [2013] NZHC 3402 at [41]-[42].
13 M J Foster, evidence-in-chief [1.11] [Environment Court document 27].

council supported its decision and was supported by the section 274 parties — NZ Aviation Ltd and the Marlborough Aero Club (together called "the Omaka Group") and the Carlton Corlett Trust.

[16] Throughout the hearing various terms were used to describe non-residential urban land. We will, with some reservations about the term's generality, follow the council's new practice and use the term "employment land" to encompass land suitable for business, retail and industrial uses.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements
   1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
   2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
   3. When preparing its district plan (change) the territorial authority **must give effect to**[23] any national policy statement or New Zealand Coastal Policy Statement[24].
   4. When preparing its district plan (change) the territorial authority shall:
      (a) **have regard to** any proposed regional policy statement[25];

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14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act[35].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies[36];
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness,** as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

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26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must **have regard to** one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

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41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].

[20] In relation to C, a key part of the case is to consider the proposed new policy and the rezoning. Since the new policy effectively seeks to justify the zoning of the site for residential purposes, we will consider the policy and the zoning together under the section 32 tests. They require us to examine, having regard to the efficiency and effectiveness of the proposed policy change and zoning, whether they are the most appropriate method for achieving the objectives of the district plan.

[21] We will consider D in relation to the proposed rules at the appropriate time. E (Other statutes) is irrelevant. Finally, in relation to F: we will have regard to the Commissioners' decision at the end of this decision.

1.5 The questions to be answered

[22] In summary the questions which need to be answered under the list in the previous section are:

- what are the relevant provisions in the operative regional policy (which must be given effect to) and what are the relevant objectives in the WARMP — the operative district plan (which must be implemented by PC59)? [See 2 below];
- what are the benefits and costs of PC59 and the alternatives? [See 3 below];
- what are the risks of approving (or not) PC59? [See 4 below];
- does PC59 give effect to the RPS and is it the most appropriate method for achieving the objectives of the WARMP? [See 5 below];
- does PC59 achieve the purpose of the RMA? [See 6 below];
- should the result be different from the council's decision? [See 7 below].

[23] The first alternative in this case is, whether the site should be rezoned for residential development now or whether any urban rezoning should wait until a district plan review is carried out. It is largely uncontested (at least by the council, the Omaka Group position is less clear) that the site should be used for urban purposes. However, the case for the council before us was that the site should probably be used for industrial ("employment") purposes, and that should be resolved in a proposed plan review.

[24] The other choice is to do nothing. That is, to retain the existing zoning at present because of the alleged effects that residential development may have on future use of the Omaka airfield and the Omaka Aviation Heritage Centre.

2. Identifying the relevant objectives and policies

2.1 The Marlborough Regional Policy Statement

[25] We must give effect to any operative regional policy statement. In these proceedings the relevant document is the Marlborough Regional Policy Statement ("the RPS") which became operative on 28 August 1995. The policies and methods most relevant to this proceeding are found in the chapter on Community Wellbeing (Part 7 of the RPS). Objective 7.1.2 focuses on the quality of life, seeking to maintain and enhance the quality of life for people while ensuring activities do not adversely affect the environment. Implementing policy 7.1.5 seeks to avoid, remedy or mitigate adverse effects of activities on the health of people and communities. Another implementing policy is to enhance amenity values provided by the unique character of Marlborough settlements[51]. The explanation recognises that Blenheim is the main urban, business and service settlement in Marlborough.

[26] A further policy[52] enables the appropriate type, scale and location of activities by:

- clustering activities with similar effects;
- ensuring activities reflect the character and facilities available in the communities in which they are located;
- promoting the creation and maintenance of buffer zones (such as stream banks or 'greenbelts');
- locating activities with noxious elements in areas where adverse environmental effects can be avoided, remedied or mitigated.

[27] Objective 7.1.14 is to provide safe and efficient community infrastructure in a sustainable way. An important implementing policy relates to 'Air Transport'. The relevant policy, methods and explanation state[53]:

> 7.1.17 Policy – Air Transport
> [To] enable the safe and efficient operation of the air transport system consistent with the duty to avoid, remedy or mitigate adverse environmental effects.
>
> 7.1.18 Methods
> (a) Recognise and provide for Marlborough (Woodbourne) Airport as Marlborough's main air transport facility for both military and civilian purposes.
>
> *Marlborough Airport is an important link for air transport (for passengers and freight) between Marlborough and the rest of New Zealand and potentially overseas. Operation of the airport for civilian and military purposes is an important activity in Marlborough and it is appropriate that Council has a policy which reflects this.*

51 Policy 7.1.7 [RPS p 57].
52 Policy 7.1.10 [RPS p 59].
53 Policy 7.1.17 and 18 RPS.

(b) Commercial and industrial activities which support or service the air transport industry and defence will be provided for.

Facilities at Marlborough Airport and the associated RNZAF Base Woodbourne are well developed to serve air transport and military aviation needs. This policy recognises this and seeks to promote commercial and industrial development and military activities associated with air transport.

(c) Regulate within the resource management plans, land use activities which have a possible impact on the safe and efficient operation of air transport systems.

Urban development in the vicinity of Woodbourne Airport should be discouraged where the use of land for such purposes would adversely affect the safe and efficient operation of aircraft and airport facilities. Some controls may be necessary to ensure that activities do not conflict with the safe and efficient operation of aircraft operating into and out of Marlborough. The resource management plans will also provide for navigation aids within Marlborough which service aircraft using the airport and for any aircraft generally in the area.

It is noteworthy that the Woodbourne airport is identified as the main air transport facility for Marlborough. The Omaka airfield is not expressly mentioned. In his closing submissions for the council, Mr Quinn stated that the Omaka airfield is regionally significant[54] in respect of its provision of general aviation functions since Woodbourne is primarily a commercial airport for scheduled air services and some military activity. The RPS does not support that submission. At best the significance of the Omaka airfield is recognised at the policy level in the District Plan, (as we will see shortly). On the other hand, the Omaka airfield does have heritage values — especially in connection with the Aviation Heritage Centre — which we consider later.

[28] In relation to heritage values, objective 7.3.2 of the RPS requires that buildings and locations identified as having significant heritage value are retained. Potentially, that could apply to the Omaka airfield. However, the implementing policy[55] is to protect "identified" heritage features. The methods contemplate that resource management plans will identify significant features, and the Omaka airfield has not been so identified in the RPS.

2.2 The Wairau Awatere Resource Management Plan

[29] The combined district and regional plan for the Wairau Awatere area of the district is called "The Wairau Awatere Resource Management Plan" (abbreviated to "WARMP") and envisages its life as being ten years[56]. It became operative in full on 25 August 2011.

[30] The WARMP is in three volumes. Volume 1 contains 24 chapters of objectives and policies, the rules are in Volume 2, and zoning and other maps are in Volume 3. Of the many chapters of objectives and policies, three are of particular relevance in this proceeding. They are:

54 Closing submissions for Marlborough District Council, dated 4 October 2013, at [87].
55 Policy 7.3.3 RPS.
56 Chapter 1, para 1.5 [WARMP Vol 1 p 1-2].

Chapter 11	Urban Environments
Chapter 12	Rural Environments
...	
Chapter 22	Noise

[31] The principal policies guiding potential residential development are found in Chapter 11, to which we now turn.

Urban environments (Chapter 11)

[32] The first objective in this chapter of the WARMP is to maintain and create[57] residential environments which provide for the existing and future needs of the "community". The primary policy to implement that objective is to accommodate[58] residential growth and development of Blenheim within the current boundaries of the town. Policy 1.3 states:

> Maintain high density residential use within the inner residential sector of Blenheim located within easy walking distance to the west and[59] south of the Central Business Zone.

We have already recorded that PC59 proposes a minor change to this policy with the addition of words justifying high density residential use "close to open spaces".

[33] Some urban expansion is contemplated by policy 1.5 which is[60]:

> ... [to] ensure where proposals for the expansion of urban areas are proposed, that the relationship between urban limits and surrounding rural areas is managed to achieve the following:
>
> - compact urban form;
> - integrity of the road network;
> - maintenance of rural character and amenity values;
> - appropriate planning for service infrastructure; and
> - maintenance and enhancement of the productive soils of rural land.

[34] Chapter 11 of the WARMP also describes the sort of environment contemplated for an urban environment. Objective 11.4 provides for "the maintenance and enhancement of the amenities and visual character of residential environments".

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57 Objective (11.2.2)1 [WARMP p 11-3].
58 Policy (11.2.2)1.1 [WARMP p 11-3].
59 PC59 actually uses the words "sought for" rather than "south of" but it misquotes (and makes nonsense of) the actual policy.
60 Policy (11.2.2)1.5 [WARMP p 11-3].

[35] Chapter 11 of the WARMP also provides for business and industrial activities. In relation to the latter the objective[61] is to contain the effects of industry within the two identified Industrial Zones: the heavy industrial activity in Industrial 1 Zone at Riverlands and Burleigh; and the lighter Industrial 2 Zone strung along State Highways 1 and 6. There is no objective or policy governing the creation of new industrial zones within the urban environments of the district.

The rural environment (Chapter 12)

[36] Chapter 12 contains two relevant sections, relating to General Rural Activities and to Airport Zones. Subchapter 12.4 which covers the area outside Wairau Plain's Rural 3 zoning[62] contains an objective[63] of providing a range of activities in the large rural section of the district. The implementing policy[64] seeks to ensure that the location, scale and nature, design and management of (amongst other activities) industry will protect the amenity values of the rural areas. In summary, any industrial growth in the Rural Zones is to be in the general rural areas, not in the lower Wairau Plain.

[37] In fact the land of most interest to this case is in special zones:

- the current zoning of the site[65] is Rural 3;
- the Omaka airfield is zoned[66] 'Airport Zone' (as are the Woodbourne and Picton airfields) in the WARMP;
- the Aviation Museum site to the northeast of the Omaka airfield is also zoned Rural 3.

[38] Chapter 12 (Rural Environments) of the WARMP sets out a range of issues, objectives and policies for the district's "Airport zone[s]". PC59 as notified did not include any amendments to chapter 12 and so it should be consistent with the objectives and policies in that chapter so far as that may be required by the plan. Paragraph 12.7.1 identifies[67] as an issue:

> Recognition of the need for and importance of national, regional and local air facilities, and providing for them, whilst avoiding, remedying or mitigating any adverse effects of airport activities on surrounding areas.

The explanation continues:

> Each of the air facilities has the potential to cause significant environmental effects including traffic generation, chemical / fuel hazard, landscape impact, and most significantly, noise pollution. The operational efficiency and functioning of Marlborough Airport, Base

61 Objective (11.4.2)1 [WARMP p 11-24].
62 Subchapter 12.2 pp 12-1 *et ff.*
63 Objective (12.4.2)2 [WARMP p 12-15].
64 Policy (12.4.2)2.5 [WARMP p 12-15].
65 See e.g. Map 155 in WARMP Vol 3.
66 See Maps 153 and 164 [WARMP Vol 3] which shows the airport zone in an ochre colour and specifically identifies "Omaka Airport".
67 WARMP Vol 1 p 12-22.

> Woodbourne, and Omaka Airfield requires continual on-site maintenance and servicing of aircraft, often associated with significant noise generation (engine testing in particular). It is essential for the continued development of industry, commerce and tourism activity in the District that a high level of air transport access is maintained. Performance standards will be applied to all activities within airport areas to avoid, remedy or mitigate adverse effects. **Likewise, the sustainability of the airport is also dependent on not being penalised by the encroachment of activities which are by their very nature sensitive to noise for normal airport operations.** (emphasis added).

[39] In that light, the objective and three policies for the airport zone(s) are[68]:

Objective 1	The effective, efficient and safe operation of the District's airport facilities.
Policy 1.1	To provide protection of air corridors for aircraft using Marlborough, Omaka and Picton Airports through height and use restrictions.
Policy 1.2	To establish maximum acceptable levels of aircraft noise exposure around Marlborough Airport and Omaka Aerodrome for the protection of community health and amenity values whilst recognising the need to operate the airport efficiently and provide for its reasonable growth.
Policy 1.3	To protect airport operations from the effects of noise sensitive activities.

[40] The methods of implementation identified are to represent the airfields as Airport Zones in the planning maps and then to establish rules to[69]:

> Plan rules provide for the continued development, improvement and operation of the airports subject to measures to avoid remedy or mitigate any adverse effects. Rules define the extent of the airport protection corridors through height and surrounding land use restrictions.
>
> Plan rules will, within an area determined with reference to the 55 Ldn noise contour (surveyed in accordance with NZS 6805 'Airport Noise Management and Land Use Planning'), require activities to be screened through the resource consent process and where permitted to establish noise attenuation will be required.
>
> | | |
> |---|---|
> | Performance Conditions | Conditions are included to protect surrounding residential land uses from excessive noise. |

[41] In fact no air noise contours or outer control boundaries have yet been introduced for the Omaka airfield. In contrast they <u>are</u> shown for the Woodbourne Airport on Map 147[70] as an "Airport Noise Exposure Overlay". CVL placed significant weight on this difference since the WARMP anticipated that an outer control boundary will be created for all the District's airports[71]. The council's evidence is that the process began for the Omaka airfield in 2007[72] and as demonstrated by the uncertainty in the noise evidence it will apparently take some time yet to resolve.

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68 Objective 12.7.2 [WARMP p 12-23].

69 Para 12.7.7.3 [WARMP p 12-23 to 12-24].

70 WARMP Vol 3 Maps 146 and 147.

71 e.g. noise buffers surrounding the airport are considered the most effective means of protecting "their" operations (WARMP p 12-23).

72 R L Hegley, evidence-in-chief, para 5 [Environment Court document 25].

Noise (Chapter 22)

[42] Chapter 22 of the district plan essentially provides for the protection of communities from noise which may raise health concerns. The objective and most relevant policies are those in subchapter 22.3 which state:

Objective 1	Protection of individual and community health, environmental and amenity values from disturbance, disruption or interference by noise.
Policy 1.1	Avoid, remedy or mitigate community disturbance, disruption or interference by noise within coastal, rural and urban areas.
Policy 1.2	Include techniques to avoid the emission of excessive or unreasonable noises within the design of any proposal for the development or use of resources.
Policy 1.3	Accommodate inherently noisy activities and processes which are ancillary to normal activities within industrial and rural areas.

...

Subdivision (Chapter 23)

[43] We were referred to a number of policies in this chapter. Policy 1.6 requires decision-makers to "recognise the potential for amenity conflict between the rural environment and the activities on the urban periphery". Similarly policy 1.8 is to: "consider the effects of subdivision on the rural environment in so far as this contributes to the character of the Plan Area, and avoid or mitigate any adverse effects". Policy 23.4.1.1.11 is "to ensure that any adverse effects of subdivision on the functioning of services and other infrastructure and on roading are avoided, remedied or mitigated". We consider these policies are to be applied when a subdivision application or consent for land use is being applied for. They are not relevant when the rezoning of land is being considered. There is a plethora of policies — as identified above — to be considered already.

Rules

[44] For completeness we record that in the volume of rules[73], section 44 sets out the rules in the Airport Zone. These apply to Omaka airfield. The usual aviation activities are permitted activities[74]. Woodbourne Airport has its take-off and landing paths protected on the Planning Maps in accordance with Map 213 'Airport Protection and Designation 2'. Omaka airfield's flight paths are set out in a rule[75] rather than in a map.

2.3 NZS 6805: the Air Noise Standard

[45] It will be recalled that the methods of implementation in the district plan expressly contemplate application of the New Zealand Standard ("NZS 6805:1992") called "Airport Noise Management and Land Use Planning". That includes as the main recommended methods of airport noise management[76]:

73 WARMP Vol 2.
74 Rule 44.1.1 [WARMP Vol 2 p 44-1].
75 Rule 44.1.4.2.2 [WARMP Vol 2 p 44-3].
76 NZS 6805 para 1.1.5.

(a) ... establish[ing] maximum levels of aircraft noise exposure at an Airnoise Boundary, given as a 24 hour daily sound exposure averaged over a three month period (or such other period as is agreed).

(b) ... establish[ing] a second, and outer, control boundary for the protection of amenity values, and prescribes the maximum sound exposure from aircraft noise at this boundary.

[46] In relation to the latter, NZS 6805 explains:

1.4.2 *The outer control boundary*

1.4.2.1
The outer control boundary defines an area outside the airnoise boundary within which there shall be no new incompatible land uses (see table 2).

1.4.2.2
The predicted 3 month average night-weighted sound exposure at or outside the outer control boundary shall not exceed 10 Pa^2s (55 Ldn).

[47] NZS 6805 then describes how to locate the two boundaries. The two important points for present purposes are that once the technical measurements and extrapolations have been made, the decision as to where to locate the two boundaries is made under the procedures[77] for preparation of district plans under the RMA; and, secondly, that evaluative (normative) decisions have to be made by the local authority under clause 1.4.3.7 as to whether the predicted contours at the chosen date in the future are a "reasonable basis for future land use planning", taking into account a wide range of factors.

[48] For completeness we record that the standard then refers to two tables which are explained in this way[78]:

1.8 Explanation of tables

C1.8.1
All considerations of annoyance, health and welfare with respect to noise are based on the long term integrated adverse responses of people. There is considerable weight of evidence that a person's annoyance reaction depends on the average daily sound exposure received. The short term annoyance reaction to individual noise events is not explicitly considered since only the accumulated effects of repeated annoyance can lead to adverse environmental effects on public health and welfare. Thus in all aircraft noise considerations the noise exposure is based on an average day over an extended period of time — usually a yearly or seasonal average. (Further details may be obtained from US EPA publication 500/9-74-004 "Information on levels of environmental noise requisite to protect public health and welfare with an adequate margin of safety").

77 Schedule 1 to the RMA.
78 Para 1.8 NZS 6805.

Table 2

[49] A Table 2 is then introduced as follows[79]:

> Table 2 enumerates the recommended criteria for land use planning within the outer control boundary i.e. 24 hour average night-weighted sound exposure in excess of 10 Pa^2s.

Table 2 states:

> RECOMMENDED NOISE CONTROL CRITERIA FOR LAND USE PLANNING INSIDE THE OUTER CONTROL BOUNDARY BUT OUTSIDE THE AIR NOISE BOUNDARY

Sound exposure Pa^2s (1)	Recommended control measures	Day/night level Ldn (2)
>10	New residential, schools, hospitals or other noise sensitive uses should be prohibited unless a district plan permits such uses, subject to a requirement to incorporate appropriate acoustic insulation to ensure a satisfactory internal noise environment. Alterations or additions to existing residences or other noise sensitive uses should be fitted with appropriate acoustic insulation and encouragement should be given to ensure a satisfactory internal environment throughout the rest of the building.	>55

> NOTE –
>
> (1) Night-weighted sound exposure in pascal-squared-seconds or "pasques".
>
> (2) Day/night level (Ldn) values given are approximate for comparison purposes only and do not form the base for the table.

[50] There is a problem as to what Table 2 means. The MDC's Commissioners wrote[80]:

> There appear ... to be two alternatives we should consider viable:
>
> (a) that the qualification after the word *unless* only applies if the District Plan presently permits residential activity within the OCB. In such a case the Standard does not consider that the existing 'development rights' attaching to the land should be withdrawn on acoustic grounds alone. In such a case mitigation will be a sufficient response; or
>
> (b) that the qualification after *unless* applies to both existing and new district plan provisions where new residential activity is proposed subject to appropriate acoustic insulation.

They preferred the first interpretation[81].

[51] We are reluctant to step into this debate. It is not our task to establish an outer control boundary in this proceeding and so we do not need to establish the correct meaning of the Standard. We consider the proper approach to the standard is to use it as

79 Para 1.8.3 NZS 6805.
80 Commissioners' Decision para 118 [Environment Court document 1.2].
81 Commissioners' Decision para 119 [Environment Court document 1.2].

a guide — always bearing in mind, as we have said, that the standard itself involves value judgements as to a range of matters.

2.4 Plan Changes 64 to71

[52] Following the Southern Marlborough Urban Growth ("SMUGS") process the council notified Plan Changes 64-71 ("PC64-71") to rezone areas to meet the demand for residential land. CVL is a submitter in opposition.

[53] As noted by the Omaka Group, these plan changes do not form part of the matters the court is to consider in terms of the legal framework although the need for residential land was one argument put forward in support of PC59[82]. It is submitted by the Omaka Group that, given any future residential shortage will be addressed by PC64 to 71, the court should be cautious in giving weight to the effect of PC59 on this need[83]. For its part the council says that while that may be the case the court must still make its decision in the context of the relevant planning framework[84]. Notification of PC64 to 71 is a fact and that process is to be separately pursued by the council[85]. While there is no guarantee the plan changes will become operative in their notified form, they are — at most — a relevant consideration under section 32 of the RMA. PC64 to 71 are of very limited assistance to the court since these plan changes are at a very early stage in their development. They had not been heard, let alone, confirmed by the council at the date of the court hearing.

3. What are the benefits and costs of the proposed rezoning?

3.1 Section 32 RMA

[54] Under section 290 of the Act, the court stands in the shoes of the local authority and is required to undertake a section 32 evaluation.

[55] Section 32(1) to (5) of the Act, in its form prior to the 2013 amendments[86], states (relevantly):

> 32 Consideration of alternatives, benefits, and costs
>
> (1) In achieving the purpose of this Act, before a ... change, ... is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by —
> (a) ...
> (b) ...
> (ba) ...

82 Closing submissions for Omaka Group, dated 11 October 2013 at [26].
83 Closing submissions for Omaka Group, dated 11 October 2013 at [29].
84 Closing submissions for Marlborough District Council, dated 4 October 2013 at [72].
85 Closing submissions for Marlborough District Council, dated 4 October 2013 at [48].
86 Schedule 12 clause 2 Resource Management Amendment Act 2013: If Part 2 of the amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), then the further evaluation for that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of Schedule 1); or
(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) ... of the Schedule 1.

(2) A further evaluation must also be made by —
(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
(b) ...

(3) An evaluation must examine —
(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
(b) whether having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and ... an evaluation must take into account —
(a) the benefits and costs of policies, rules, or other methods; and
(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

[56] Mr T G Quickfall, a planner called by CVL, gave evidence that he prepared PC59 including its section 32 analysis[87]. He relied on that in his evidence-in-chief[88], writing "I am confident that section 32 has been met". To the opposite effect Ms J M McNae, a consultant planner called by the council, stated that the section 32 analysis was "inadequate"[89]. The other planners who gave evidence[90] did not write anything about the plan change in relation to section 32.

3.2 The section 32 analysis in the application for the plan change

[57] In fact, the analysis in the application for the plan change is confusing. Table 2[91] commences by referring to the appropriateness under section 32 of three objectives (in chapters 11, 19 and 23 respectively). However, PC59 does not seek to change any objectives or to add any new ones so that analysis is irrelevant.

[58] Slightly more usefully the next table in the application then contains[92] a qualitative comparison of the benefits and costs. In summary the Table stated that the proposed changes to explanation; policies, rules and other methods would lead to these benefits: better provision for urban growth, alignment with urban design principles, implements growth strategy and land availability report, implements NZS 4404:2010, provides for more flexible road design and more efficient layout, reduces hard surfaces,

87 Section 4 of the proposed plan change dated 28 April 2011.
88 T G Quickfall, evidence-in-chief para 30 [Environment Court document 18].
89 J M McNae, evidence-in-chief para 40 [Environment Court document 28].
90 M J G Garland, M A Lile, P J Hawes and M J Foster.
91 Proposed Plan Change 28 April 2011 p 25.
92 Proposed Plan Change 28 April 2011 p 26.

increases residential amenity through wider choice of roading types, and recognises Omaka airfield as regional facility and avoids reverse sensitivity effects.

[59] The only costs were the costs of the plan change in his view.

[60] Similarly, the application identified[93] the benefits of the proposed zoning as being:

- provides for immediate to short term further growth and residential demand;
- wider range of living and location choices;
- implements urban design principles;
- enables continued operation of Omaka and avoids reverse sensitivity effects; and
- improved connections to Taylor River Reserve.

The costs identified were "the replacement of rural land use with residential land use".

[61] The application for the plan change identifies it as being more efficient and effective although what PC59 is being compared with is a little obscure — presumably the status quo. That analysis merely makes relatively subjective assertions which are elaborated on more fully in the planners' evidence. It would have been much more useful if the section 32 report or the evidence had contained quantitative analysis. As the court stated — of section 7 rather than section 32 of the RMA, but the same principle applies — in *Lower Waitaki Management Society Incorporated v Canterbury Regional Council*[94]:

> ... it is very helpful if the benefits and costs can be quantified because otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in respect of sections 5 to 8 of the Act.

[62] Section 4 of the application for the plan change then assessed[95] the following "alternative means for implementing the applicant's intentions":

> ...
> (i) Do nothing.
> (ii) Apply for resource consent(s).
> (iii) Initiate a plan change.
> (iv) Wait for the final growth strategy.
> (v) Wait for a council initiated plan change ...

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93 Proposed Plan Change 28 April 2011 Table 3 p 26.

94 *Lower Waitaki Management Society Incorporated v Canterbury Regional Council* Decision 080/09 (21 September 2009).

95 Application for plan change 28 April 2011 pp 27-58.

We have several difficulties with that. First, we doubt if (i) or (v) would implement the applicant's intentions. Second, the application is drafted with reference to a repealed version of section 32.

3.3 Applying the correct form of section 32 to the benefits and costs

[63] The applicable test is somewhat different. As noted earlier, from 1 August 2003, with minor subsequent amendments, section 32 (in the form we have to consider[96]) requires an examination[97] of whether, having regard to their efficiency and effectiveness, the policies and methods are the most appropriate for achieving the objectives. Then subsection (4) reads:

> (4) For the purposes of the examinations referred to in subsection (3) and (3A) an evaluation must take into account —
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

The reference to "alternative means" has been deleted, so read by itself, the applicable version of section 32(4) looks as if a viability analysis — are the proposed activities likely to be profitable? — might suffice. Certainly section 32 analyses are often written as if applicants think that is what is meant. However, the purpose of the benefit/cost analysis in section 32(4) is that it is to be taken into account when deciding the most appropriate policy or method under (here) section 32(3). The phrase "most appropriate" introduces (implicitly) comparison with other reasonably possible policies or methods. Normally in the case of a plan change, those would include the status quo, i.e. the provisions in the district plan without the plan change. Here, as we have said, the recently notified PC64 to 71 are also relevant as options.

[64] Given that the relevant form of section 32 contains no reference to alternatives, the applicant questioned the legal basis for considering alternative uses of the land. Counsel referred to *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Co. Ltd*[98] where Dobson J stated:

> If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

Given that the High Court decision in that proceeding was appealed direct to the Supreme Court (with special leave) we prefer to express only brief tentative views on the law as to alternatives under section 32. First, that 'most appropriate' in section 32

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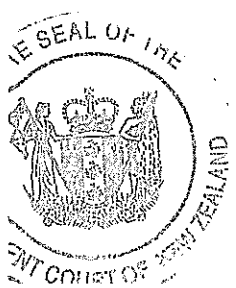
96 It was amended again on 3 December 2013 by section 70 Resource Management Amendment Act 2013.

97 Section 32(3) RMA.

98 *Environmental Defence Society Incorporated & Sustain Our Sounds v The New Zealand King Salmon Company Limited* [2013] NZRMA 371 at [171] (HC).



suggests a choice between at least two options (or, grammatically, three). In other words, comparison with something does appear to be mandatory. The rational choices appear to be the current activity on the land and/or whatever the district plan permits. So we respectfully agree with Dobson J when he stated that consideration of yet other means is not compulsory under the RMA. We would qualify this by suggesting that if the other means were raised by reasonably cogent evidence, fairness suggests the council or, on appeal, the court should look at the further possibilities.

[65] Secondly a review of alternative uses of the resources in question is required at a more fundamental level by section 7(b) of the RMA. That requires the local authority to have particular regard to the "efficient use of natural and physical resources". The primary question there, it seems to us, is which, of competing potential uses put forward in the evidence, is the more efficient use. We consider that later.

[66] For those reasons, Mr Quickfall was not completely wrong to rely on the analysis in section 4 of the application for the plan change when he relied on its qualitative comparison of alternatives. However, as we have stated the analysis is not, in the end, particularly useful because it adds little to the analysis elsewhere more directly stated in his and other CVL witnesses' evidence-in-chief.

[67] The only planner to respond in detail on section 32 was Ms McNae for the council. Her analysis[99] is as unhelpful as Mr Quickfall's for the same reason: it repeats subjective opinions stated elsewhere[100]. We will consider their differences in the context of the next section 32 question, to which we now turn.

4. What are the risks of approving PC59 (or not)?

4.1 Introducing the issues

[68] The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the "risk", recalling that a risk is the product of the probability of an event and its consequences (see *Long Bay Okura Great Park Society v North Shore City Council*[101]).

[69] The evidence on the risks of acting[102] (i.e. approving PC59) was that the experts were agreed that the following positive consequences are likely:

99 J McNae, evidence-in-chief para 53 [Environment Court document 28].
100 e.g. J McNae, evidence-in-chief para 54 [Environment Court document 28].
101 *Long Bay Okura Great Park Society v North Shore City Council* A078/2008 at [20] and [45].
102 See section 32(4) RMA.

(a) urgent demand for housing will be (partly) met[103];

(b) the site has positive attributes[104] for all the critical factors for residential development except for one. That is, the soils and geomorphological conditions and existing infrastructure and stormwater systems are all positive for such development. The exception is that the consequences for the roading network and other transport factors would be merely neutral;

(c) of the (merely) desirable factors[105], the site only shows positively on one factor — the proximity of recreational possibilities. It is neutral in respect of community, employment and ecological factors, and is said to be negative in respect of landscape although we received minimal evidence on that point;

(d) although the potential to develop land speedily is not a factor referred to in the district plan, we agree with CVL that it is a positive factor that the land is in single ownership and could be developed in a co-ordinated single way. The 2010 Strategy recognised[106] that with the anticipated growth rates the site might be fully developed within 3.5 years.

[70] The negative consequences of approving PC59 are likely to be:

(a) that versatile soils would be removed from productivity;
(b) that some rural amenities would be lost;
(c) that an opportunity for 'employment' zoning would be lost;
(d) there is the loss of a buffer for the Omaka airfield;
(e) there may be adverse effects on future use of Omaka airfield.

[71] The risks of not acting (i.e. refusing PC59) are the obverse of the previous two paragraphs.

[72] Few of the witnesses seemed much concerned with loss of rural productivity. As Mr Quickfall recorded[107] the site contains 21 hectares, and the Rural 3 Zone as a whole covers 17,100 hectares. Development of the whole site would displace 0.1228% from productive use. We prefer his evidence to that of Ms McNae.

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103 Transcript p 427 (Cross-examination of Mr Bredemeijer).
104 South Marlborough Urban Growth Strategy May 2010 — summarised in T G Quickfall, evidence-in-chief Table 1 at para 25 [Environment Court document 18].
105 T G Quickfall, Table 1, evidence-in-chief at para 25 [Environment Court document 18].
106 2010 Strategy para 120.
107 T G Quickfall, evidence-in-chief para 54 [Environment Court document 18].

[73] On the effects of PC59 on rural character and amenity, again we accept the evidence of Mr Quickfall[108] that the site and its surroundings are not typical of the Rural 3 Zone. Rather than being surrounded by yet more acres of grapevines, in fact the site has sealed roads on three sides[109], beyond which are residential zones and some houses on two sides, and the Carlton Corlett land to the south. We accept that rural character and amenity are already compromised[110].

[74] The remaining questions raised by the evidence are:

- what is the supply of, and demand for, employment land?
- what is the reasonably foreseeable residential supply and demand in and around Blenheim?
- what is the current intensity of use, and the likely growth of the Omaka and Woodbourne airports?
- what effects would airport noise have on the quantity of residential properties demanded and supplied in the vicinity of the airports?

4.2 Employment land

[75] Obviously the risk of not meeting demand for industrial or employment land is reduced if there is already a good supply of land already zoned. There was a conflict of evidence about this, but before we consider that, we should identify the documents relied on by all the witnesses.

The Marlborough Growth Strategies

[76] In relation to the CVL land, all the planning witnesses referred to the fact that the MDC has been attempting to develop a longer term growth "strategy" which considers residential and employment growth. There are three relevant documents:

- the "Southern Marlborough Urban Growth Strategy" ("the 2010 Strategy") (this is the 2010 Strategy already referred to);
- the "Revision of the Strategy for Blenheim's Urban Growth" ("2012 Strategy")[111];
- the "Growing Marlborough ... district-wide ..." ("2013 Strategy").

It should be noted that the three strategies cover different areas — Southern Marlborough, Blenheim, and the whole district respectively. Further, as Mr Davies reminded us these documents are not statutory instruments.

[77] As we have recorded, PC59 was strongly influenced by the 2010 Strategy, so CVL was disappointed when the 2010 Strategy, after being put out for public

108 T G Quickfall, evidence-in-chief paras 57 and 58 [Environment Court document 18].
109 T G Quickfall, evidence-in-chief para 57 [Environment Court document 18].
110 T G Quickfall, evidence-in-chief para 58 [Environment Court document 18].
111 C L F Bredemeijer, evidence-in-chief Appendix 3 [Environment Court document 21].

consultation, was revised by the subsequent strategies. The council pointed out that, while the 2010 Strategy was relevant in terms of PC59, it had not undergone the process set out in Schedule 1 of the RMA and so was always subject to change[112].

[78] For the reasons given in the 2013 Strategy, Colonial's site (and its proposed PC59) was set aside as an option for Residential zoning and the matter left for this court to determine.

The council's approach

[79] Mr C L F Bredemeijer, of Urbanismplus and on behalf of the council, was the project manager and report author during the processes leading to the three Marlborough Growth Strategies[113]. He, in turn, engaged Mr D C Kemp, an economist and employment and development specialist, to investigate employment and associated land issues for the Marlborough region[114].

[80] In Mr Kemp's view the traditional rural services at present around the Blenheim town centre should be relocated and provision made for future growth in employment related activities which should be located away from the town centre. The CVL site, according to Mr Kemp, offers "an exceptional opportunity" for accommodating these activities[115]. He saw a need to protect the site as strategic land for existing, new and future oriented business clusters[116].

[81] To quantify the need for employment land up to the year 2031 Mr Kemp considered two scenarios. The first he called the Existing Economy Scenario and the second, a realistic Future Economy Scenario. The latter includes, in addition to all factors considered in the Existing Economy Scenario, consideration of the perceived shortfall in industrial land uses where Marlborough currently has less than expected employment ratios and provides for relocation of existing inappropriately located activities[117]. For the period 2008 to 2031 the Existing Economy Scenario led to a requirement for 69 hectares of employment land with 120 hectares required for the Future Economy Scenario[118]. These represent growth rates of 3.0 and 5.2 hectare/year respectively.

[82] Mr Kemp's figures were incorporated into the 2010 Strategy, being referred to as the "minimum" and the "future proofed" requirements[119]. The latter required:

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112 Closing submissions for Marlborough District Council, dated 4 October 2013 at [24].
113 C L F Bredemeijer, evidence-in chief para 7 [Environment Court document 21].
114 D C Kemp, evidence-in-chief para 7 [Environment Court document 20].
115 D C Kemp, evidence-in-chief paras 11–19 [Environment Court document 20].
116 D C Kemp, evidence-in-chief para 26 [Environment Court document 20].
117 D C Kemp, evidence-in-chief paras 31 and 35 [Environment Court document 20].
118 D C Kemp, evidence-in-chief paras 33 and 36 [Environment Court document 20].
119 Southern Marlborough Growth Strategy 2010, p 108.

- 63 hectares for small scale Clean Production and Services;
- 7 hectares for Vehicle Sales and Services;
- 24 hectares for larger-scale Transport and Logistics; and
- 30 hectares for other "Difficult to Locate" activities with low visual amenity and potentially offensive impacts.

The 2010 Strategy then notes: "There is clearly sufficient employment land in Blenheim to meet all of these potential needs with the exception of "... 5 ha ..."". The 5 ha refers to land for "difficult to locate activities" which Mr Kemp acknowledged would be inappropriate to place on the site[120].

[83] Following the 2010 and 2011 Christchurch earthquakes the council sought reports on liquefaction prone land in the vicinity of Blenheim. The reports raised serious concerns about the suitability of some of the land identified for development in the 2010 Strategy. (No liquefaction issues were identified with respect to the site). The council recognised that there would be a severe shortfall of residential and employment land in Blenheim[121] assuming no change to the demand for employment land. Instead of there being "clearly sufficient" land for employment purposes there was now a shortfall of approximately 85 hectares[122]. Mr Hawes, planner for the council, appeared to accept this figure[123]. The court has no reason to dispute it and thus accepts it as the best estimate of employment land required to future proof Blenheim in this regard until 2031.

[84] To meet the perceived shortfall of 85 hectares, revised strategies for provision of employment land identified a preference for employment land development near Omaka and Woodbourne airports. That near Omaka included the site, which was identified in the 2010 Strategy for residential use[124] and the Carlton Corlett Trust land to its south[125]. This was seen as a logical progression of employment land north from the Omaka airport to New Renwick Road and as a solution to noise issues. These preferences were carried through to the 2013 Strategy which was released in March 2013 and ratified by the full council on 4 April 2013[126]. We note that neither CVL as the site's land owner nor adjacent residential owners and occupiers[127] were consulted about this change in preference from residential to industrial[128].

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120 D C Kemp, evidence-in-chief para 25 [Environment Court document 20].
121 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].
122 C L F Bredemeijer, evidence-in-chief para 37 [Environment Court document 21].
123 P J Hawes, evidence-in-chief para 36 [Environment Court document 22].
124 P J Hawes, evidence-in-chief Figure 1 [Environment Court document 22].
125 P J Hawes, evidence-in-chief para 37.3 [Environment Court document 22].
126 P J Hawes, evidence-in-chief paras 44 and 46 [Environment Court document 22].
127 There are 84 adjacent residential properties, 31 of which face the site along New Renwick Road and Richardson Avenue.
128 C L F Bredemeijer, evidence-in-chief paras 44-46 [Environment Court document 21].

[85] The 2013 Strategy summarised planning over the last 5 or 10 years for urban growth as follows[129]:

> Land use and growth
> The original Southern Marlborough Urban Growth Strategy Proposal catered for residential and employment growth in a variety of locations on the periphery of Blenheim, including the eastern periphery. As explained earlier, the areas to the east of Blenheim were removed from the Strategy as a result of the significant risk and likely severity of the liquefaction hazard. This decision was made by the Environment Committee on 3 May 2012.
>
> The Strategy now focuses residential growth to the north, north-west and west of Blenheim and employment growth to the south-west. In this way, the Strategy will provide certainty in terms of the appropriate direction for growth for the foreseeable future.
>
> The Strategy, including the revision of Blenheim's urban growth, is based on the sustainable urban growth principles presented in Section 2.1. In assessing the suitability of these sites, it was clear that residential activity would encroach onto versatile soils to the north and north-west of Blenheim. The decision to expand in this direction was not taken lightly. However, given the constraints that exist at other locations, the Council did not believe it had any other options to provide for residential growth. The decision was made also knowing that land fragmentation in some of the growth areas had already reduced the productive capacity of the soil.

[86] In summary, the council's strategic vision with respect to provision of employment land is set out in the 2013 Strategy as[130]:

- a further 64 hectares for future general and large scale industry in the Riverlands area;
- additional employment land near the Omaka Aerodrome (53 hectares) and the airport at Woodbourne (15 hectares);
- possible future business parks near Marlborough Hospital, near Omaka and near the airport at Woodbourne.

[87] However, the 2013 Strategy expressly left open the future appropriate development of the (Colonial) site[131]:

> W2 (or Colonial Vineyard site)
> During the process of considering submissions on W2, the owners of the land requested a plan change to rezone the property Urban Residential to facilitate the residential development of the site. The Council declined to make a decision on this growth area to ensure there was no potential to influence the outcome of the plan change process. Given the delay caused by the liquefaction study and the subsequent revision, the plan change request has now been heard by Commissioners and their decision was to decline the request. This decision has been appealed to the Environment Court by the applicant. This appeal will be heard during 2013.
>
> Due to the effect of the liquefaction study on the strategy and the areas it identified for employment opportunities to the east of Blenheim, other areas have now been assessed in terms of their suitability for employment uses. This includes the W2 site and adjoining land in the vicinity of Omaka Aerodrome. Refer to the employment land section below for further details.

129 Page 36 of the 2013 Strategy.
130 2013 Strategy, p 30.
131 C L F Bredemeijer, evidence-in-chief Appendix 4 [Environment Court document 21].

> It is noted that if the plan change request is approved by the Court, the subsequent development of the rezoned land will assist to achieve the objectives of this strategy. If the Court does not approve the plan change then the Council will be able to promote Area 8 as an alternative.

CVL's approach

[88] Mr Kemp's approach was challenged by the applicant's witnesses on the grounds that:

- much industrial expansion and new employment occurs in the rural zone as discretionary activities. This reduces the need for industrial zoning. This factor was not mentioned by Mr Kemp[132];
- Mr Kemp's projections require an additional 3,650 employees to support them while Statistics New Zealand's projection of population growth for the same period is 2,700 persons[133];
- use of only one year's data on which to base projections is inappropriate. That the year is a boom year, 2008, and prior to the global financial crisis caused further concern[134].

[89] In predicting the future need for employment land CVL's witnesses preferred to consider the past take up of industrial land and to account for the areas of land available at present for employment land. They also considered which industries would be likely to develop on or relocate to the site. Mr T P McGrail, a professional surveyor, compared land use as delineated in a 2005 report to council with the existing situation for what he described as business and industrial uses. Noting the area of land available for these uses in 2005 was essentially the same as that available in 2013 he concluded the net take up of vacant land since 2005 has been "very low"[135]. As an example he records that in May 2008 54 hectares was rezoned at Riverlands but no take up of this land has occurred in the 5 years it has been available[136]. His evidence was that there have been three greenfield industrial subdivisions in the Blenheim area in the last 34 years of which 19 hectares has been developed[137]. This is at a rate of 0.56 hectares/year. That contrasts with the growth rates of 3.0 and 5.2 hectares/year adopted by Mr Kemp and noted above.

[90] In considering which industries may chose to locate or relocate to the site, Mr McGrail dismissed wet industries (on advice from the council) together with processing of forestry products and noxious industries including wool scouring and sea food processing on the basis of their effects on neighbouring residents[138]. Other employment uses discussed by Mr McGrail were aviation, large format retail and business. Due to

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132 T P McGrail, Rebuttal evidence paras 37 and 38 [Environment Court document 9A].
133 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
134 T J Heath, Rebuttal evidence para 58 [Environment Court document 16].
135 T P McGrail, Rebuttal evidence paras 3–6 [Environment Court document 9A].
136 T P McGrail, Rebuttal evidence para 33 [Environment Court document 9A].
137 T P McGrail, Rebuttal evidence paras 26 and 28 [Environment Court document 9A].
138 T P McGrail, Rebuttal evidence paras 8–10 [Environment Court document 9A].

the Carlton Corlett Trust land's proximity to the airfield it would be preferred to the site for aviation related industries. This 31 hectares together with 42 hectares designated as Area 10, located immediately to the northwest of Omaka airfield, gives 73 hectares of land better suited to employment (particularly aviation) uses than the site.

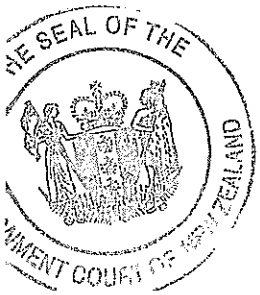
[91] Council has identified five areas, including the site, which are available for large format retail. Mr McGrail believed large format retail is well catered for even if the site becomes residential[139]. He also considered that some 50% of the types of business presently in Blenheim would not choose to locate or relocate to the site because they would lose the advantages that accrue by being close to main traffic routes and the town centre[140]. This underlay his skepticism of Mr Kemp's projections for business uptake of the site[141].

[92] Mr T J Heath, an urban demographer and founding Director of Property Economics Limited, was asked by CVL to determine if there was any justification for the council preferred employment zoning of the site[142]. To do so he assessed the demand for employment land using his company's land demand projection model. This uses Statistics New Zealand Medium Series population forecasts, historical business trends and accounts for a changing demographic profile in Marlborough. It first predicts increases in industrial employment which are then converted to a gross land requirement[143]. Use of this model to predict the need for future employment land was not challenged during the hearing.

[93] Industrial employment projections from the model suggested a 28% increase over the period 2013 to 2031 which translated to a gross land requirement of 49 hectares[144]. This result is considered by Mr Heath to be "towards the upper end of the required industrial land over the next 18 years". Two other scenarios are presented in his Table 3 each of which results in a smaller requirement[145]. Mr Heath then relied upon Mr McGrail's estimates of presently available employment land which totalled 103 hectares[146]. This comprised the 19 hectares identified by Mr McGrail and referred to above plus the 84 hectares of land available at Riverlands[147].

[94] During cross examination Mr Heath stated[148] "My analysis shows me you have zoned all the land required to meet the future requirements out to 2031". This was a reiteration of his rebuttal evidence where he wrote[149] "even at the upper bounds of

139 T P McGrail, Rebuttal evidence para 19 [Environment Court document 9A].
140 T P McGrail, Rebuttal evidence para 21 [Environment Court document 9A].
141 T P McGrail, Rebuttal evidence paras 21 and 22 [Environment Court document 9A].
142 T J Heath, Rebuttal evidence para 6 [Environment Court document 16].
143 T J Heath, Rebuttal evidence para 31 [Environment Court document 16].
144 T J Heath, Rebuttal evidence Table 3 [Environment Court document 16].
145 T J Heath, Rebuttal evidence paras 35and 36 [Environment Court document 16].
146 T J Heath, Rebuttal evidence Table 4 [Environment Court document 16].
147 T P McGrail, Rebuttal evidence Figure 2.
148 Transcript p 315.
149 T J Heath, Rebuttal evidence para 39 [Environment Court document 16].



49 hectares, there is clearly more than sufficient industrial land to meet Blenheim's and in fact Marlborough's future industrial needs ...".

Findings

[95] We ignore the 15 hectares near Woodbourne as this is Crown land that could form part of a Treaty settlement for Te Tau Ihu Iwi[150]. Its future is thus uncertain. The 53 hectares near Omaka includes the site (21.7 hectares) and the Carlton Corlett Trust land (31.3 hectares). The land owner of the latter has expressed a desire to develop the property to provide for employment opportunities[151]. Indeed, together the Carlton Corlett Trust land (31 hectares) and the further 64 hectares at Riverlands total 91.3 hectares. This is in excess of the 85 hectares sought by council for its future proofing to 2031.

[96] In addition to the lands listed above, council has identified 42 hectares of land (referred to as Area 10) to the west of Aerodrome road and north of the airfield for additional employment growth in the long term[152].

[97] The council strategy requires 89 hectares of employment land to future proof the need for such land in the vicinity of Blenheim. There is at present sufficient land available to provide for this without any rezoning. We conclude the need for employment land within a planning horizon of 18 years (to 2031) is not a factor weighing against the requested plan change.

4.3 Residential supply and demand

[98] Prior to 2011, there was a demand for between 100 and 150 houses a year and an availability of approximately 1,000 greenfield sites[153]. Based on that, counsel for the Omaka Group submitted there is no evidence that the alleged future shortfall will materialise before further greenfield sites are made available[154]. We are unsure what to make of that submission because counsel did not explain what he meant by "shortfall". There is not usually a general shortfall. Excess demand is an excess of a quantity demanded at a price. In relation to the housing market(s), excess demand of houses (a shortfall in supply) is an excess of houses demanded at entry level and average prices over the quantity supplied at those prices.

[99] Mr Hayward gave evidence for CVL that there has been "a subnormal amount of residential land coming forward from residential development in Marlborough"[155]. He also stated that there was an imbalance between supply and demand, with a greater quantity demanded than supply[156]. Further, none of the witnesses disputed Mr Hawes'

150 2013 Strategy, p 41.
151 2013 Strategy, p 40.
152 2013 Strategy, p 40.
153 Environmental Management Services Limited report, dated 11 January 2011.
154 Closing submissions for Omaka at [101].
155 A C Hayward, Transcript at p 98, lines 10-15.
156 A C Hayward, Transcript at p 103, lines 20-25.

evidence[157] that the Strategies are clear that there is likely to be a severe shortfall of residential land in Blenheim if more land is not zoned for that purpose.

[100] Plan Changes 64 to 71 would potentially enable more residential sections to be supplied to the housing market. However, in view of the existence of submissions on these plan changes, we consider the alternatives represented by those plan changes are too uncertain to make reasonable predictions about.

[101] We find that one of the risks of not approving PC59 is that the quantity of houses supplied in Blenheim at average (or below) prices is likely to decrease relative to the quantity likely to be demanded. That will have the consequence that house prices increase.

4.4 Airports

[102] In view of the importance placed on the Woodbourne Airport in the RPS, it was interesting to read the 2005 assessment by Mr M Barber in his report[158] entitled "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options". He wrote[159] of Omaka:

> The principal threats to the sustainable use of Omaka Aerodrome arise from its proximity to Woodbourne/Blenheim Airport, the potential for encroachment on the obstacle limitation surfaces, and urban or rural-residential encroachment.

[103] Currently Omaka aerodrome may expand its operations as a permitted activity. However, it is uncertain what restrictions or protection may be put in place for Omaka by way of a future plan change process and it is in this uncertain context that the court is asked to determine what the likely noise effects of the airfield will be in the future.

[104] The Omaka Group argued that, given the uncertainty around the air noise boundary and outer control boundary which are likely to be imposed in the future, it is helpful to have regard to the capacity of the airfield. Although, as Mr Day conceded in cross-examination[160], the capacity approach is unusual, the Omaka Group argued it is sensible in the context of uncertainty about the level of use to consider the capacity of the airfield. This would allow for full growth in the future, regardless of the current recession[161]. CVL responded that the capacity approach is an argument not advanced by any witness and so there is no evidence as to the capacity of the airfield[162].

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157 P J Hawes, evidence-in-chief paras 33 and 36 [Environment Court document 22].

158 P J Hawes, evidence-in-chief Appendix 2 [Environment Court document 22].

159 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 40. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

160 Transcript 501 line 3.

161 Closing submissions for Omaka at 81-82.

162 Closing submissions for Colonial Vineyards Ltd at 161.

[105] Mr Barber in his 2005 report wrote in relation to the potential for urban encroachment[163]:

> Clearly, there is considerable existing and future potential for urban residential development to the south-west of Blenheim which could result in encroachment on Omaka Aerodrome. To avoid possible adverse effects on the future safe and efficient operation of the aerodrome, it is important that the area likely to be subject to aircraft noise in the future be identified and appropriate protection measures be incorporated in the District Plan.

4.5 Noise

[106] In relation to the risks of acting when there is insufficient certainty and/or information about the subject matter of the policies or methods, we observe that the uncertainties are not about the current environment but about the environment in 15 or 25 years' time.

[107] Similarly the Marlborough Aviation Group was aware of the issue in 2008. As a former President, Mr J McIntyre, admitted in cross-examination[164], he wrote[165] of The Marlborough Aero Club Inc. in the President's Annual Report for 2008:

> The opening of the Airpark adjacent to the Aviation Heritage Centre is a positive aspect of this, but has thrown up some curly questions as to how operations should take place from this area. Concurrent with increased numbers of aircraft (of all types) is the concern that we will draw undue attention to ourselves with noise complaints, as we are squeezed by ever-increasing urban encroachment. On this front, it does not help that the District Council did not see fit to have the fact that airfield exists included in developer's information and LIM reports for the new sub division up Taylor Pass Road.

Current airport activity

[108] The site lies under the 01/19 vector runways[166] of the Omaka airfield. Thus it is subject to some noise from aircraft taxiing, taking off and landing. How much noise was a subject of considerable dispute.

[109] Two methods of assessing aircraft noise were put forward. CVL produced the evidence of Mr D S Park based on 2013 measurements and extrapolations. In December 2012 Mr Park had installed a system at the site for recording the radio transmissions made by pilots operating at Omaka. In this way he sought an understanding of aircraft noise data obtained at the site as described by Dr Trevathan[167] and to aid in the analysis of that data. In contrast the MDC and the aviation cluster initially relied on data collected at Woodbourne between 1997 and 2008 ("the Tower data"), extrapolated to the present. They later based their predictions out to 2039 on Mr Park's measurements, as discussed below.

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163 M Barber, "Air Transport - Provision for the future use, development and protection of air transport facilities in Marlborough District – Part 1 Issues and options" 8 December 2005 at p 42. (Appendix 2 to the evidence-in-chief of P J Hawes) [Environment Court document 22].

164 Transcript p 732 lines 15-20 (Tuesday 17 September 2013).

165 Exhibit 35.1.

166 i.e. runways on which aircraft taking off are on bearings of 10° and its reciprocal 190° (magnetic) respectively.

167 J W Trevathan, evidence-in-chief para 5.1 [Environment Court document 14].

[110] Mr Park's figures relied on the fact that at unattended aerodromes, such as Omaka, it is normal for pilots to transmit, by radio, a VHF transmission, their intentions to take off or to land and their intended flight path. While this is a safety procedure it also provides a record of movements to and from the aerodrome. Once recorded on Mr Park's equipment the VHF transmissions were analysed to provide[168]:

- the number of takeoffs and landings by radio equipped aircraft at Omaka during the recording period;
- the approximate time of each movement;
- the runway used during each movement; and
- the aircraft registration.

An aircraft's registration allows it to be identified and thus categorised as either a helicopter or a fixed wing aircraft and, if the latter, as having either a fixed or a variable pitch propeller. This is necessary as the two types have different noise signatures with the variable pitch propellers being the louder. Helicopters are noiser again.

[111] The runway information suggests which movements are likely to have resulted in a noise event being recorded by the equipment on the site.

[112] At the time of filing his evidence-in-chief (22 February 2013) Mr Park had data from the period 10 January – 9 February 2013 only, which he acknowledged[169] was "a relatively short time". His rebuttal evidence filed on 3 July 2013 reported on data from the period 10 January – 8 April 2013. Data from the Easter Air Show was not captured as that used a different transmission frequency[170]. Data from 81 days was analysed, there being over 30,000 transmissions of which 7,553 related to movements at Omaka: 7,082 were fixed wing aircraft and 471 were helicopters.

[113] The results of Mr Park's monitoring were given as[171]:

• average fixed wing movements/day	87.4
• average fixed wing movements/night	0.8
• average helicopter movements/day	5.8
• average helicopter movements/night	0.6
• average use of runway 01 for takeoffs	26%
• ratio fixed pitch/variable pitch	84%/16%

168 D S Park, evidence-in-chief para 4.6 [Environment Court document 13].
169 D S Park, evidence-in-chief para 5.8 [Environment Court document 13].
170 D S Park, Rebuttal evidence para 11.2 [Environment Court document 13A].
171 D S Park, Rebuttal evidence para 11.4 [Environment Court document 13].

These numbers are subject to error from a number of causes including aircraft not equipped with radio, pilots choosing not to transmit their intentions, or by confusion of call signs. Mr Park chose to account for this by adding 10% to the recorded numbers: some 750 extra movements[172]. He also added 1.1 helicopter movements/night to reflect a suggestion from Mr Dodson that some night helicopter movements had been missed[173]. Whether this was before or after the 10% increase was not stated. The results of these adjustments[174] are given in terms of averages per day as:

- fixed wing 96.1
- helicopter 8.0

Mr Park noted[175] that the entry for helicopters should have been 7.5 flights per day. The quoted figure of 8.0 was retained by Mr Park and used in his subsequent projections of future helicopter movements.

[114] These figures are difficult but not impossible to understand. In summary:

- the figure of 96.1 fixed wing flights is an increase of 10% on the recorded figure for fixed wing movements/day of 87.4. The night movements of fixed wing aircraft are thus not included in the adjusted figures. We infer that the term "averages per day" used in connection with these figures means day time flights only;

- the figure of 7.5 helicopter flights can be obtained by increasing the recorded 5.8 day time helicopter flights by 10% and then adding 1.1. However this is mixing day and night flights and may well be a coincidence. For day flights only a 10% increase gives 6.4 flights, a figure that would fit into the averages per day table above. If the total of recorded day time plus night time helicopter flights (6.4) is increased by 10% and 1.1 flights added the result is 8.1 flights, a figure close to that used by Mr Park in his projections;

- of the fixed wing movements only those takeoffs from Runway 01 are assumed by Mr Park to result in noise effects on the site[176]. He reports 26.2% of day time fixed wing movements and 2.8% of fixed wing night time movements occur on Runway 01. Of the helicopter movements 25% of those departures to the north from Runways 01 and 07 together with 16.1% of those arrivals from the north on Runways 19, 25 and 30 were considered by Mr Park to have a noise effect on the site.

172 D S Park, Supplementary evidence para 3.4 [Environment Court document 13B].
173 D S Park, Rebuttal evidence para 11.6(b) [Environment Court document 13A].
174 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].
175 Transcript p 143 lines 21-24.
176 D S Park, Rebuttal evidence para 11.12 [Environment Court document 13A].

[115] Dr Trevathan was asked[177] to provide a current 55 dB Ldn contour based on Mr Park's data from the period 10 January to 8 April 2013 for aircraft movements that affect the site. This contour is shown as crossing the Carlton Corlett land in a generally east/west direction and at least 180 metres from the site[178]. We find that helicopters departing and arriving fly directly[179] over the site at present. Dr Trevathan's modeling confirms that these flights make a significant contribution to the average noise levels experienced on the site. Similarly, flight paths for departures and arrivals from the east — on the 07/29 vector runways — lie directly over the residential area to the east of Taylor River[180].

[116] Mr A Johns, a member of the Marlborough Aero Club, challenged the reliability of Mr Park's VHF recordings and the data derived from them. He was concerned about the presence of unrecorded aircraft movements which included those by aircraft not equipped with radios, movements which the pilot chose not to report and those associated with the Air Show held at Easter 2013. Possible misidentification of aircraft type which would lead to an incorrect noise signature being assigned and the percentage of movements allocated to Runway 01 were other concerns. Mr Johns' information was based on his knowledge of actual use of Omaka airfield from, presumably, records held by the Marlborough Aero Club. Mr Park through his company, Astral Limited, sought access to these records[181] which would have allowed him to assess the accuracy of his VHF results. This request was declined[182] as the Omaka Group and the Aero Club did not consider the request "had merit". We note that Mr Johns did not produce any of these records in his evidence preferring simply to give aircraft types and movement percentages that cannot be verified. Since the Marlborough Aero Club did not cooperate with Mr Park's reasonable request, we prefer the latter's evidence.

[117] With respect to the flights associated with the Air Show Mr Park, based on his experience as chair of the Ardmore Airport Noise Committee, expressed the view that these would be excluded from any noise evaluation and expressly provided for in any Noise Management Plan that the Aero Club might produce and in any special recognition the council may wish to give the Air Show in the District Plan[183].

[118] Mr Johns gave a list[184] of historic aircraft which were misidentified as modern aircraft. Having been identified by Mr Park the movements made by these aircraft would have been recorded and thus included in the total number of movements. It is

177 J W Trevathan, Rebuttal evidence para 3.1 [Environment Court document 14A].
178 J W Trevathan, Supplementary evidence Attachment 2 [Environment Court document 14B].
179 D S Park, evidence-in-chief para 65 [Environment Court document 13].
180 D S Park, evidence-in-chief Annexure 3, Figures 5 and 6 [Environment Court document 13].
181 D S Park, Supplementary evidence para 3.1 and Exhibit A [Environment Court document 13B].
182 D S Park, Supplementary evidence para 3.1 and Exhibit B [Environment Court document 13B].
183 D S Park, Rebuttal evidence para 8.2 and Supplementary evidence para 3.23 [Environment Court documents 13A and 13B respectively].
184 A Johns, Supplementary evidence para 18 [Environment Court document 24A].

likely the assigned noise category would have been in error. Reference to 48 flights of an Avro Anson, a World War II bomber, that appeared to have been missed by Mr Park was made by Mr Johns[185]. In his oral evidence[186] he stated that subsequent to filing his written evidence he had identified that the bomber had used a call sign unknown to Mr Park and that at least half the bomber's flights had been recorded, but not recognised as such, by Mr Park.

[119] Another consideration which adds uncertainty is that the split between variable pitch and fixed pitch propeller aircraft will influence the location of any derived contour[187]. Mr Johns, from a "back of the envelope" calculation, suggested aircraft with variable pitch propellers make up close to 20% of the total fixed wing aircraft movements[188]. Mr Park's measurements over the three month period indicated a figure of 16%.

[120] Mr Park's recordings indicated runway 01 was used for 26.2% of the fixed wing takeoff movements[189]. Mr Johns, having made allowance for the interruption to movements on runway 01 from the Air Show, suggested 28% which he noted was closer to the estimate provided by Mr Sinclair for the modelling done by Mr Hegley for the council[190]. In taking all these perceived deficiencies in Mr Park's recording and analysis into account[191] Mr Johns believed "a greater level of error should be allowed for than the 10% suggested by Mr Park". No alternative figure was produced by Mr Johns. We found that the 10% increase in movements (over 700) allowed by Mr Park is more than sufficient to cover at most 24 flights (48 movements) by the bomber that may have been missed.

Findings

[121] We prefer Mr Park's data set to that of the Aero Club because the latter derives from flights at a period of unusually intense activity immediately prior to the global financial crisis. For example, on the numbers of flights in 2008, Mr J McIntyre wrote[192] in the President's Annual Report for 2008:

> After dipping slightly last year, flying hours were up again with 2288 hours chalked up for the Clubs 80th year. This is the highest since 1990/91 and is heartening in the face of rocketing fuel prices and escalating charges from all quarters.

The 2013 base data from Mr Park can be used to predict the location of noise contours near and over the site in 2038. The court is not charged with fixing these contours and indeed does not have sufficient information to do so. Rather, we are interested in the

185 A Johns, Supplementary evidence para 20 [Environment Court document 24A].
186 Transcript pp 525-526.
187 As recorded above: Variable pitch propellers are louder than fixed pitch propellers.
188 A Johns, Supplementary evidence para 30 [Environment Court document 24A].
189 D S Park, Rebuttal evidence para 11. 12 [Environment Court document 13].
190 A Johns, Supplementary evidence para 33 [Environment Court document 24A].
191 A Johns, Supplementary evidence para 43 [Environment Court document 24A].
192 Exhibit 35.1.

contours as an indication of what could happen in the next 25 years. For this purpose we are satisfied that Mr Park's data is an appropriate base from which to project forward.

Future noise

[122] In fact some attempts had been made to establish likely noise contours. The experts endeavoured to formulate a growth rate and applied it to the current use to calculate the contours which would restrict the airfield's growth. Mr Park and Dr Trevathan, the experts for CVL, adopted a compounding annual growth rate of 2.7% for fixed wing aircraft[193]. Mr Foster, for the council, gave unchallenged evidence that were a proposed World War II fighter squadron project to eventuate then a 4% per annum growth rate would be more realistic[194]. Looking at the Tower data one could calculate a compounding growth rate of 4.4%[195] which provides support for Mr Foster's proposed growth rate. Omaka submits that any certainty in the contours proposed by Dr Trevathan is diminished by the uncertainty around the flight numbers supplied by Mr Park[196].

[123] Parallel to the SMUGS process, the council commissioned reports from Hegley Acoustic Consultants as an initial step to introducing airnoise boundaries and outer control boundaries.

[124] Mr R Hegley, of Hegley Acoustic Consultants, was commissioned in 2007 to undertake acoustic modelling of Omaka airfield[197]. He based his model on data provided by Mr Sinclair[198] which included growth rates to determine aircraft numbers up to the selected design year of 2028. These growth rates were not recorded in Mr Hegley's evidence. Mr Park deduced, from Mr Sinclair's evidence to the initial hearing[199], that they were[200]:

- fixed wing 2.7% per annum
- helicopter 10% per annum

The projected values used by Mr Hegley to derive his 55 dB Ldn contour were not recorded in his evidence.

[125] Mr Park[201] used Mr Hegley's growth rates to project his one month of recorded movements out to 2028 and provided the data to Dr Trevathan for his derivation of the

193 Transcript at 178 line 32ff.
194 M J Foster, evidence-in-chief at [6.17] [Environment Court document 23].
195 A Johns, supplementary evidence at [12].
196 Closing submissions for Omaka at 53.
197 R L Hegley, evidence-in-chief para 5 [Environment Court document 25].
198 R L Hegley, evidence-in-chief para 17 [Environment Court document 25].
199 D S Park, evidence-in-chief Annexure 1A [Environment Court document 13].
200 D S Park, evidence-in-chief paras 5.12–5.16 [Environment Court document 13].
201 D S Park, evidence-in-chief, para 5.19 [Environment Court document 13].

resultant 55 dB Ldn contour. Doubt was expressed by Mr Park over the 10% growth rate for helicopters which he considered excessive[202].

[126] Initial projections used by Mr Hegley on behalf of the council were 20 year projections from 2008, i.e. out to 2028. In preparing for the hearing all witnesses agreed this was too short for airport planning and agreed 2038 to be an appropriate planning horizon. The rates of growth in fixed wing and helicopter movements were not agreed.

[127] With concern having been expressed by a number of witnesses in their evidence-in-chief over the inadequacy of a 2028 design year, attention turned to providing projections out to the agreed year of 2038. Mr Hegley was instructed by the council to project out to 2038 retaining the 2.7% and 10% per annum growth rates for fixed wing and helicopters respectively[203]. He was asked to use the aircraft flight numbers as presented in Dr Trevathan's evidence-in-chief[204]. These figures came from Mr Park and were thus based on his one month of VHF recorded data. At this point all use of the alternate data set favoured by the Airport Cluster and the Aero Club ceased.

[128] Mr Park also considered the 2038 design year. He retained the 2.7% growth rate to 2038 for fixed wing aircraft and used a 6.6% growth rate for helicopters both applied to his three month 2013 base data[205]. The latter he considered appropriate in view of the CAA helicopter registration records[206] which show a 4.4% per annum growth rate from 1993 until 2013 with a period (8 years) having a maximum growth rate of 7.8% per annum. The 6.6% rate is 50% above the long term growth rate and will result in almost five times as many helicopter movements in 2038 suggesting up to 35 helicopters will be operating from Omaka at that time. In Mr Park's view the 6.6% growth rate is adequate to account for the special nature of helicopter operations from Omaka[207]. The planning consultant[208] for the council, Mr Foster, who has extensive experience in airport planning, stated that the 2.7% growth rate for fixed wing aircraft is not unreasonable[209] and that 6.6% as a growth rate for helicopters is realistic[210].

[129] Using these growth rates and Mr Park's adjusted 2013 data for flight movements the projected movements for 2038 expressed as averages per day are[211]:

- fixed wing 187.1
- helicopter 39.7

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202 D S Park, evidence-in-chief, para 5.17 [Environment Court document 13].
203 R L Hegley, evidence-in-chief para 29 [Environment Court document 25].
204 R L Hegley, evidence-in-chief para 27 [Environment Court document 25].
205 D S Park, Rebuttal evidence, para 11.7 [Environment Court document 13].
206 D S Park, Rebuttal evidence Annexure 1 [Environment Court document 13A].
207 D S Park, Rebuttal evidence paras 11.9 and 11.10 [Environment Court document 13A].
208 M J Foster, evidence-in-chief paras 1.2 – 1.4 [Environment Court document 27].
209 M J Foster, evidence-in-chief para 6.27 [Environment Court document 27].
210 Transcript at 646 line 24.
211 D S Park, Rebuttal evidence para 11.11 [Environment Court document 13A].

The percentages of these flights to affect the site were assumed to be the same as those derived from Mr Park's 2013 data.

The 55 dB Ldn contours

[130] Noise contours are produced using software referred to as an Integrated Noise Model ("INM"). The acoustic experts agreed[212] this software was appropriate to predict future noise levels at Omaka airfield and that the model aircraft types and settings that have been developed by Mr Hegley and Marshall Day Acoustics and confirmed by Dr Trevathan's measurements to be appropriate. The software requires at a minimum the input of runway locations, aircraft types and numbers of flights and flight tracks. There is disagreement over the helicopter flight tracks that should be modelled.

[131] Helicopters taking off towards and landing from the north currently track over the site[213]. Mr Hegley has used these tracks in his INM modelling. Mr Park believes these tracks create unnecessary disturbance over the site and to adjacent residential areas[214]. He thus proposed "helicopter noise abatement flight paths". On takeoff to the north a helicopter would veer slightly right and as it crossed New Renwick Road it would turn left and follow the Taylor River. Approaches from the north would come along the river and turn right to reach the eastern edge of the airfield[215]. Such noise abatement paths, according to Mr Park, are in common use at other aerodromes in New Zealand and are in accord with both the Aviation Industry Association of New Zealand's code of practice for noise abatement and Helicopter Association International guidelines[216].

[132] Mr M Hunt, an acoustics expert for the council, found the use of selected flight paths to reduce noise on the ground to be highly unusual but not unheard of. He was also concerned over the practicality of the paths suggested by Mr Park and how they could be imposed and enforced[217]. Mr Day, acoustic consultant to the Omaka Group, also found the approach unusual in that it moved flight paths so as to push the noise over existing residences to avoid noise on a future residential development[218]. This criticism was echoed by Mr Dodson, Managing Director of Marlborough Helicopters and holder of a Commercial Helicopter Pilot Licence. He described the noise abatement tracks as "clearly an inferior option from a noise abatement perspective and arguably is a less safe option"[219].

[133] Opinion as to the efficacy of the abatement paths was clearly divided. One reason is that no evaluation of the noise effects generated by flights along the abatement

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212 Joint Statement of Acoustic Experts dated 21 August 2013 Exhibit 14.1 para 5.
213 D S Park, evidence-in-chief Annexure 3 figures 5 and 6 [Environment Court document 13].
214 D S Park, evidence-in-chief para 6.9 [Environment Court document 13].
215 D S Park, evidence-in-chief Annexure 3 figure 8 [Environment Court document 13].
216 D S Park, evidence-in-chief paras 6.10–6.15 [Environment Court document 13].
217 M J Hunt, evidence-in-chief paras 55 and 58 [Environment Court document 26].
218 C W Day, evidence-in-chief para 3.6 [Environment Court document 23].
219 O J Dodson, evidence-in-chief para 21 [Environment Court document 30].

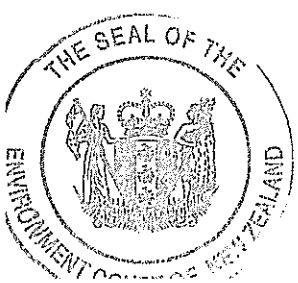
paths, and in particular on the residences along the river, has been carried out. The court has no power to introduce or enforce any flight paths and offers no view as to the appropriateness of the proposed paths at Omaka.

[134] The court received a number of 55 dB Ldn contours from the parties each derived under different assumptions. We list each contour received:

- Mr Hegley's 2028 contours: errors in the derivation of his first contour were corrected with a second contour being produced. Because both contours were for only 15 years in the future, they are disregarded.
- Mr Hegley's 2038 contour: this incorporates Mr Park's flight information for Runway 01 from one month of VHF recordings, annual growth rates of 2.7% and 10% for fixed wing aircraft and helicopter movements respectively, and uses the current flight paths from all runways. This contour crosses the site in an east/west direction with some 45% (9.6 ha)[220] of the site inside the contour.
- Dr Trevathan's 2028 contour: being only a 15 year projected contour this too is disregarded.
- Dr Trevathan's 2038 contours: all four contours are based on the three months (10 January – 8 April 2013) of recorded VHF data and a 2.7% growth rate for fixed wing aircraft movements. Two annual growth rates for helicopter movements, 6.6% and 7.7% (being 10% to 2028 and 4.4% for 2028 -2038), are used and for each there are contours with and without helicopter noise abatement paths.

[135] Dr Trevathan's contours all cross the site from east to west at varying distances from the southern boundary. The most intrusive contour is the 7.7% annual growth rate for helicopters with no abatement paths. It is at most 112.1 metres from the boundary[221] and encompasses 3.84 hectares. The least intrusive contour is the 6.6% annual growth rate for helicopters with abatement paths. This contour is not more than 42.9 metres from the boundary[222]. It encompasses 1.11 hectares.

[136] Dr Trevathan's contour assumed that helicopters would use "noise abatement flight paths" where helicopters alter course shortly after takeoff in order to reduce noise. At Omaka such a route would require a heading change of 10 degrees after takeoff from runway 01 to follow the Taylor River north and pass over an industrial area[223]. This flight path was used by Dr Trevathan in his modeling. It is a significant difference to Mr Hegley's modeling which used the current flight paths.



220 M J Hunt, evidence-in-chief para 62 [Environment Court document 26].
221 T P McGrail, Rebuttal evidence figure 7 [Environment Court document 9A].
222 T P McGrail, Rebuttal evidence figure 6 [Environment Court document 9A].
223 D S Park, evidence-in-chief para 6.20 [Environment Court document 13].

[137] The Omaka Aero Club has not implemented noise abatement paths for helicopters as an attempt to protect the amenity of its neighbours. Mr Dodson, of Marlborough Helicopters, states his company has a written policy to avoid overflying built areas whenever possible[224] but we received no indication that this policy is adopted by Omaka as an airport. Should the helicopter numbers increase at the suggested rate of 10% per annum there very likely will be reverse sensitivity effects arising from the helicopter tracks to the east which may force Omaka to adopt noise abatement paths (as suggested by Mr Park). Such paths operate at other New Zealand airports including Ardmore. Mr Park believes such paths should be developed for Omaka[225] in accordance with the Helicopter Association International guidelines and the Aviation Industry Association of New Zealand Code of Practice. The former includes a guideline[226] for daily helicopter operations which reads "Avoid noise sensitive areas altogether, when possible ... Follow unpopulated routes such as waterways".

[138] We see this as a possible way to protect residents' amenity and still let Omaka grow some of its operations as predicted out to 2038. There are differences of opinion[227] regarding the practicality and efficacy of the proposed tracks which we acknowledge. Further, as suggested by witnesses for the Omaka Group, those flight tracks might impose more noise on residents east of the Taylor River. We cannot ascertain from the noise contours (see the next paragraph) whether or not that is likely to be the case. Despite that we accept this approach in principle and thus regard Dr Trevathan's 2038 contour[228] as the best indication of the likely (but still inaccurate) location of the 55 dB Ldn contour in the vicinity of the site in 2038.

[139] The 55 dB Ldn contour was also plotted by Mr McGrail as a complete contour surrounding the aerodrome[229]. It encloses 349 existing residential properties east of the Taylor River. To obtain this contour Dr Trevathan assumed movements on runways other than 01 to be those recorded in a Hegley Acoustic Consultants' report which he attached to his evidence as Attachment 6. In the light of Mr Park's 2013 recording, Dr Trevathan was not confident about the correctness of these movements and thus believed the contour at places away from the site was incorrect[230]. He gave no indication of the magnitude or location of discrepancies from a "correct" contour.

Findings

[140] The 2013 55 dB Ldn noise contour produced by Dr Trevathan and not challenged by any witness will expand as airport activity increases. The court accepts Mr Day's view that the contour will reach the residential area east of the Taylor River

224 O J Dodson, evidence-in-chief para 17 [Environment Court document 30].
225 D S Park, evidence-in-chief para 6.16 [Environment Court document 13].
226 D S Park, evidence-in-chief para 6.15 [Environment Court document 13].
227 D S Park, evidence-in-chief para 6.2 [Environment Court document 13] and O S Dodson, evidence-in-chief para 21 {Environment Court document 30].
228 J W Trevathan, evidence-in-chief Attachment 9 [Environment Court document 14].
229 T P McGrail, Rebuttal evidence figure 4 [Environment Court document 9A].
230 J W Trevathan, evidence-in-chief para 6.2 [Environment Court document 14].

before it reaches the site[231]. It is the general view of the acoustic witnesses, and the court concurs, that there has not been sufficient work done to enable the location of a 55 dB Ldn noise contour for 2038 either near the site or for the airport as a whole. Not only is there insufficient information, but in any event there is considerable uncertainty as to the likely character of future use of the Omaka airfield.

[141] As a set the contours are sufficient to indicate to the court, the Omaka Group Aero Club and the council what may occur in the future. They will be a useful guide when formulating noise abatement procedures by way of a Noise Management Plan and possible protection within the District Plan.

Noise mitigation measures

[142] In addition to the use of abatement paths, Dr Trevathan provided a number of other suggestions for mitigating noise effects on the Colonial land[232]:

(i) aviation themed subdivision;
(ii) covenants;
(iii) situating houses so that outdoor areas are to the north;
(iv) reducing dwelling density on the southern boundary;
(v) mechanical ventilation;
(vi) acoustic insulation.

[143] Dr Trevathan suggested that the development could have an aviation theme[233], so that only people who liked airfield noise would choose to live there. As counsel for Omaka pointed out, this relies on people correctly identifying themselves as not being noise sensitive. Further, as the noise level is predicted to increase over time it is difficult to assess whether people will be able to cope with the noise in the future.

[144] The effectiveness of "no-complaints" covenants was discussed by Mr P Radich, an experienced lawyer in Marlborough, who gave evidence for Carlton Corlett Trust. While he accepted covenants are legally enforceable[234], Mr Radich was cautious about their effectiveness since they really just signal a problem rather than providing an effective solution[235]. He said that enforcement was dependent on how reasonable the covenanter thought it and whether they were the original covenanter[236]. Further, it is not council practice to enforce private covenants as such disputes are viewed as a private matter for the parties to determine themselves[237].

231 Transcript pp 514-515.
232 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
233 J W Trevathan, evidence-in-chief para 10.11 [Environment Court document 14].
234 *South Pacific Tyres Ltd v Powerland (NZ) Ltd* [2009] NZRMA 58 (HC).
235 Transcript at 748 line 17.
236 Transcript at 749 line 7.
237 Transcript at 750 line 14.

[145] It was suggested each house on the CVL site could be situated to the south of its allotment so that the outdoor areas were further away, although Dr Trevathan acknowledged this would not protect residents from the noise of planes flying overhead[238].

[146] With regard to acoustic ventilation, Dr Trevathan accepted that if all houses on the Colonial land were outside the OCB any additional insulation would be unnecessary[239]. As for mechanical ventilation, this allows people to keep windows closed reducing internal noise levels. However, since the internal noise level is already satisfactory with open windows at the level of external noise likely to be experienced on the Colonial land (depending on where the future airnoise boundary is) mechanical ventilation is not needed[240].

[147] In our view the only mitigation which is desirable is the registration of "no-complaints" covenants. The other measures would simply add costs without gaining commensurate benefits. We have considered whether even the proposed covenants will give sufficient benefits to outweigh the transaction costs of imposing them. Counter-considerations are that, as we find elsewhere, residents east of the Taylor River are likely to be affected by noise from aircraft taking off and landing at Omaka airfield before residents on the site — yet, so far as we know, there are no covenants imposed on the Taylor River residents. Further, there are likely to be other limitations on helicopter numbers operating from Omaka (e.g. conflict with Woodbourne operations).

[148] Over-riding those concerns is that airports — even those with very small numbers of aircraft using them — are potentially subject to "noise" complaints. Such complaints may have a critical mass beyond which the legality (or existing use rights) can potentially become irrelevant in the face of political pressure. Further, there is a suggestion by the High Court that councils are responsible for ensuring that nuisance issues do not arise through activities it allows: *Ports of Auckland Limited v Auckland City Council*[241].

[149] Since CVL is volunteering the covenants, we consider they should be accepted.

5. Does PC59 give effect to the RPS and implement WARMP's objectives?

5.1 Giving effect to the RPS

[150] We judge that PC59 would give effect to the Regional Policy Statement. It would enhance the quality of life[242] by supplying houses while not causing adverse effects on the environment, and it would appropriately locate a type of activity

238 Transcript at 245 line 7.
239 J W Trevathan, evidence-in-chief para 10.1 [Environment Court document 14].
240 Transcript at 246 line 21.
241 *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 600 at 612 (HC).
242 Regional objective 7.1.2.

(residential development) which would cluster[243] with housing to the north and east, reflect the local character and provide the use of the river banks and beyond that, the Wither Hills.

[151] The air transport policy in the RPS — which focuses on Woodbourne — would not be affected.

5.2 Implementing the objectives of the WARMP

[152] The question for the court in this proceeding is whether the rezoning of a 21.4 hectare vineyard on the southern side of the Wairau Plains near Blenheim for 'residential' development, given its proximity to Omaka airfield, would promote the objectives and policies of the WARMP and the sustainable management of the district's natural and physical resources.

[153] The most relevant policy — (11.2.2)1.5 — requires that any expansion of the urban area of Blenheim achieves specified outcomes. We consider these in turn. In relation to achieving a compact urban form we note that development of the CVL would add to an existing part of Blenheim. In some ways it would tidy the existing rather anomalous residential enclaves along New Renwick Road and Richardson Avenue, both adjacent to the site.

[154] No issues were raised in relation to integrity of the road network. The site is adjacent to three roads, and can be suitably developed.

[155] As for maintenance of rural character and amenity values, the rural character of the site will be reduced, but the site is already rather anomalous in that respect since it has residential development to the north and east, and the business activities of the Omaka airfield and the Heritage Museum to the south.

[156] Appropriate planning for service infrastructure is an important issue. A significant feature of the site is that all services are readily available at a reasonable cost. The section 42 report presented to the council hearing stated "The development of the site is not constrained by the development of services"[244].

[157] Infrastructure must also be provided within the site to each dwelling. The site is essentially flat with a fall of 4 to 5 metres from southwest to northeast. This will allow the sewer and stormwater services to be easily staged throughout the development of the site[245]. Planning for this will necessarily be part of the overall development plan for the site and will produce no difficulties.

243 Regional policy 7.1.10.
244 T P McGrail, evidence-in-chief para 13 [Environment Court document 9].
245 T P McGrail, evidence-in-chief para 11 [Environment Court document 9].

[158] The 2010 Strategy assessed the site, along with nine other locations, for the provision of water, sewer and stormwater services. It found that "Development in this area can be connected to existing networks without upgrades of infrastructure"[246]. We conclude appropriate planning has been done for service infrastructure to the site and thus no further planning is necessary in this regard.

[159] Perhaps the key service infrastructure issue in the case — and a central issue in the proceeding — is the extent to which residential development of the site might restrain future development of the Omaka airfield. We discuss that in our conclusions below.

[160] No issue was raised in relation to productive soils.

[161] The Rural Environments section (Chapter 12) of the WARMP recognises the importance of the airport zone(s) and the explanatory note states that noise buffers surrounding the airport are the most effective means of protecting the airport's operation[247]. The RPS also requires that buildings and locations identified as having significant historical heritage value are retained[248] and as we have found Omaka airport to be a heritage feature this is relevant in terms of its protection, especially with reference to section 6(f) of the Act. We consider the covenant suggested as a mitigating measure by CVL can assist in that regard so that the heritage operation — flights of old aircraft — can continue and grow (within reason).

[162] While the objectives and policies of the WARMP give some protection to Omaka there is a "balance"[249] to be achieved with activities that might be affected by them. In summary we consider PC59 meets more objectives and policies (especially the important ones) than not, and thus represents integrated management of the district's resources.

5.3 Considering Plan Changes 64 to 71

[163] We consider the Plan Changes 64-71 are only relevant to the extent they show that the council has other solutions to the problem of supplying land for further residential development and we considered them earlier. We reiterate that these plan changes are at such an early stage in their development we should give them minimal weight.

246 SMUGS 2010 Summary for Public Consultation, p 14.
247 Wairau/Awatere Resource Management Plan 12.7.2, explanatory note at pp 12-23.
248 RPS objective 7.3.2.
249 M J Foster, evidence-in-chief para 4.14 [Environment Court document 27].

6. Does PC59 achieve the purpose of the RMA?

[164] In *Hawthorn*[250], the future state of the environment was considered in a land use context. The Court of Appeal concluded that[251]:

> ... all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

The future state of the environment includes the environment as it might be modified by permitted activities and by resource consents that have been granted where it appears likely those consents will be implemented. It does not include the effects of resource consents that may be made in the future. CVL submitted that, in a plan appeal context, this must extend to the prospect of plan changes or even plan reviews with entirely uncertain outcomes at some indeterminate time in the future[252]. CVL accepts there is a requirement to consider the future environment and has endeavoured to do so in its evidence using a predicted level of activity and effects associated with it. However, while the projections to 2038 will influence the resolution of the plan, CVL says the plan must also reflect other influences over those 25 years[253].

[165] Counsel for the Omaka Group submitted we should distinguish *Hawthorn* as concerning a resource consent application rather than a plan change. If the proposed airnoise boundary is to be taken into account as part of the environment the Omaka Group suggested that great care needs to be taken in assuming that airnoise and (outer control) boundaries will protect the community from noise and reverse sensitivity effects when there is currently no plan change proposed[254]. CVL argued that Omaka misses the point — section 5 applies to all functions under the RMA[255].

[166] The council submitted that, given the timing of PC59, before restrictions or protection are put in place for Omaka through a future plan change process, the planning environment as it is today is the appropriate reference. Mr Quinn submitted that the policy and planning framework of the WARMP:

- affords the district's airports, including Omaka, a high level of protection relative to land use aspirations around the airport;
- provides that an outer control boundary should be created for Omaka and specifically cites NZS 6805 and states that any 55 dBA Ldn noise contour must be surveyed in accordance with it; and

250 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299
251 *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [57]
252 Closing submissions for CVL, dated 21 October 2013 at [48].
253 Closing submissions for CVL, dated 21 October 2013 at [55].
254 Closing submissions for Omaka, dated 11 October 2013 at [11].
255 Closing submissions for CVL, dated 21 October 2013 at [54].

- allows expansion of the Omaka aerodrome as a permitted activity.

6.1 Sections 6 and 7 RMA

[167] Section 6 of the Act concerns matters of national importance. Only one paragraph in section 6 is relevant. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use, and development and is relevant for two reasons. First, the three grass runways are claimed to be the longest surviving set in New Zealand. They were prepared in 1928 and have been used ever since. Secondly, there is the world-class collection of World War I aircraft and replicas, superbly displayed with other thematic memorabilia, at the Aviation Heritage Centre.

[168] We accept it is a matter of national importance to protect those heritage values, and to allow their responsible expansion. There was no evidence that residential activities on the site will cause reverse sensitivity effects on the Omaka airfield in the near future. The evidence did establish that a business as usual approach for the Omaka airfield as a whole might cause issues for residents of the CVL site and thus potential reverse sensitive effects (complaints) by 2039. But not all activities at the Omaka airfield have heritage value. In particular there are helicopter and other general aviation activities whose expansion will need to be carefully examined by the council as it makes its decision about an outer control boundary for the airfield. Given those circumstances, we hold that the heritage values of the airfield need not be affected by the plan change and so give this factor minimal weight in the overall weighing exercise.

[169] Section 7 of the Act sets out other matters the court is to have particular regard to when making its decision. Section 7(b) of the Act concerns the efficient use and development of natural and physical resources and we will consider it in the context of the section 32 analysis. Section 7(c) provides for the maintenance and enhancement of amenity values and section 7(f) is also relevant since it talks about maintenance and enhancement of the quality of the environment. Both these matters are covered by and subsumed in the objectives and policies in the district plan.

[170] Counsel for the Omaka Group suggested[256] that section 7(g) of the RMA could be relevant but there was no specific evidence about that. There are extensive grass flats on the Wairau Plains so we consider that that argument cannot get off the ground.

6.2 Section 5(2) RMA

[171] The ultimate purpose of any proposed plan or plan change under the RMA is to achieve the purpose of the RMA as defined in section 5 of the Act. In the case of a plan change (depending on its breadth) that purpose is usually subsumed in the greater detail and breadth of the operative objectives and policies which are not sought to be changed. That is broadly the situation in this proceeding as we have discussed already.

256 Closing submissions for Omaka para 172.

[172] In terms of section 5 of the RMA the proceeding comes down to this: we must weigh enabling of a potential small community of residents on the site in the near future (in a situation where there is a relative undersupply of houses) against the potential longer-term (post 2038) disenabling expansion of activities on the Omaka airfield as the aviation cluster would like. We have found that the evidence, that growth in activities which would need to be restricted is unlikely, is more plausible than the evidence of greater growth (e.g. to 35 helicopters operating from the airfield by 2038). While we have recognised above the superb heritage value represented by the grass airstrips and the Aviation Heritage Centre, those can be protected into the future without causing reverse sensitivity effects if the site is rezoned under PC59.

[173] We also take into account that it is possible that some limitation on, in particular, helicopter movements at Omaka airfield may be necessary in the future. However, it will not necessarily be as the result of complaints from residents of the site. On the evidence it is more likely to be caused by complaints from occupiers of the council's subdivision east of Taylor River, or as a result of restrictions imposed by CAA, in order to safeguard operations at Woodbourne.

[174] In any event we have found that the objectives and policies of WARMP favour acceptance of the PC59 rather than its refusal. Our provisional view is that PC59 should be approved. However, there are some further considerations.

7. Result

7.1 Having regard to the MDC decision

[175] In accordance with section 290A of the Act the court must have regard to the decision which is the subject of the appeal.

[176] The Commissioners' Decision deals with the site in two parts. "Area A" is outside a notional outer control boundary ("OCB") and Area B is within the OCB. In respect of the area inside the contour — Area B — the Commissioners concluded[257]:

> 122. We consider that Area B should not be rezoned to accommodate new residential development. Sufficient reasons for that conclusion are:
>
> (a) The Standard directs that new residential activity should not be located in the OCB;
>
> (b) The reverse sensitivity effects on the Omaka Aerodrome from new residential development will be serious and potentially imperil the present and future operations of the Omaka Aerodrome not least by demand by residents to limit aviation related activities;
>
> (c) New residential development will not achieve the settled WARMP goals as expressed in the following provisions:
> (i) Section 11.2.1, Objective 1;
> Section 12.7.2, Objective 1. Section 11.2.2, Objective 2.

257 Commissioners' Decision para 122 [Environment Court document 1.2].

(ii) Section 22.3, Policy 1.1
Section 23.4.1, Policy 23.4.1 and Section 12.7.2, Policies 1.2 and 1.3.

(d) By reason of (a) – (c) above MDC is not assisted by PPC 59 in carrying out its functions under RMA s 31(1)(a) and PPC 59 does not achieve the overarching purpose of the RMA of sustainable management.

[177] In respect of mitigation they decided[258]:

(a) That full noise insulation (not just of bedrooms) was required;

(b) That insulation would have been inadequate mitigation because it did not allow for natural airflow from open windows which is an adverse amenity effect;

(c) Noise insulation within the building fabric does not address wider amenity concerns;

(d) We do not support the use of no complaint methods in this context as an adequate mitigation method to achieve the social wellbeing of the community which is a key component of sustainability.

[178] While Area A is outside of the OCB and therefore potentially suitable for residential development the Commissioners identified the following issues[259]:

124. The difficulties are:

(a) the total urban design concept presented by CVL is based on the whole site being developed for new residential use;

(b) there was no urban design assessment of the appropriateness of development on Area A alone;

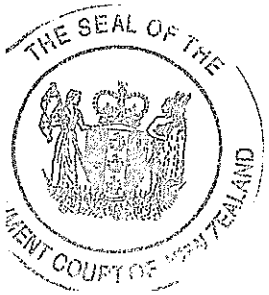
(c) there is no concept plan for Area A alone that can be used in order to ensure an appropriate planning outcome is achieved;

(d) it is unclear how the balance of the site (Area B) will be utilised in the long term. Conceivably it can be used for other purposes such as industrial development. An integrated solution will need to be carefully thought through and more detailed analysis undertaken.

[179] On balance the Commissioners considered that:

> ... the risk of approving new residential development on Area A by rezoning presents an unacceptable risk of poor strategic planning and lack of integrated development. A comprehensive strategic planning exercise is part of MDC's work stream and review of the WARMP and there is no pressing need for new residential land[260].

[180] The Commissioners' overall conclusion was that the application in its entirety should be declined[261].



258 Commissioners' Decision para 120 [Environment Commissioner document 1.2].
259 Commissioners' Decision para 124 [Environment Commissioner document 1.2].
260 Commissioners' Decision para 125 [Environment Commissioner document 1.2].
261 Commissioners' Decision para 126 [Environment Commissioner document 1.2].

7.2 Should the result be different from the council's decision?

[181] First, we have found the plan change meets more objectives and policies of the WARMP than not. This finding is in contrast to the Commissioners who found the goals of the WARMP would not be achieved.

[182] There was repeated reference in the evidence of the council's witnesses to PC59 not representing integrated management. That evidence reiterated the findings of the Commissioners' decision quoted above. We have taken special care to identify and consider the relevant objectives and policies of the district plan (the WARMP) and we find that PC59 is more likely than not to achieve most of the relevant objectives, and to do so in a generally integrated way.

[183] We also accept counsel for CVL's argument that the council is being inconsistent. Mr Davidson QC and Mr Hunt wrote[262]:

> If the Council is reliant on the notion that PC59 is a pre-emptive strike to a fully integrated process under the RMA then it [the Council] stands against the very process it utilised in Plan Changes 64 – 71. The importance of integrating Employment land use was not matched with any similar urgency or affirmative action.
>
> If Plan Changes 64 – 71 are thought to be fully integrated because they are incorporated as part of the final iteration of SMUGS then the same can be said of Colonial, which is expressly acknowledged to give effect to the Growth Strategy (with the only qualification that it be approved by the Environment Court).

[184] Second, the Commissioners' decision is predicated on the assumption that a (future) outer control boundary would cross the site dividing it into the two areas identified by the Commissioners as 'A' and 'B'. We do not consider that assumption is justified, because, as we have stated, the location of any future outer control boundary depends on a number of value judgements which we cannot (should not) make now.

[185] In fact, it was agreed by all parties that the noise contours provided to the Commissioners were for too short a time period and were erroneous. The 2038 timeline was agreed and the council accepted Mr Park's data as appropriate for projecting future noise levels. Dr Trevathan's 2038 contour with abatement paths is our preferred prediction although we accept it with due caution especially since we share Mr Park's scepticism that 30 helicopters will be using the Omaka airfield even by 2038.

[186] That analysis assumes that the Omaka airfield will continue to grow as it has in the recent past. However, as NZS 6805 recognises, there is a normative element to establishing where outer control boundaries should go. That exercise of judgement under the objectives and policies of the district plan and, ultimately, under section 5 of the RMA requires us to consider whether the Omaka airfield can, or should, develop at whatever pace supply (under the Aero Club's policies) and demand drive.

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262 Final submissions for CVL paras 30 and 31 [Environment Court document 39].

[187] It seems probable (and appropriate) that some constraints in growth of the Omaka airfield — especially in helicopter numbers — will be appropriate due to two constraints independent of development of the site. These are the recent residential development east of the Taylor River, and the requirements of the Woodbourne airfield as it grows. Mr Day stated[263] that any 55 dB Ldn contour would expand on to the land east of the Taylor River well before it reaches the site.

[188] Third, the Commissioners were influenced by the need for "employment" land. While the obvious alternatives for the land are between the proposed Residential zoning and the existing Rural zone, we accept that the realistic alternatives for the site are residential versus some kind of "employment" use in the sense discussed earlier.

[189] We have found that industrial zoning of the site is likely to be an inefficient use of the resource. Nor would that inefficiency be sufficiently remedied by consideration of the Omaka airfield.

[190] It would (also) be inefficient to block residential development of the site because of perceived future reverse sensitivities of the Omaka airfield sometime after 2030. That is for two reasons: first, the best estimate of the 55 dB Ldn contour in 2038 depends on helicopter growth (30 helicopters operating out of the airfield) which we consider is unlikely; and secondly, there are more than likely to be other constraints[264] on such growth of Omaka airfield use in any event — for example complaints from residents of the new subdivision east of Taylor River, and operational demands of the Woodbourne airport as its operations increase in size and frequency.

7.3 Outcome

[191] Weighing all matters in the light of all the relevant objectives and policies, we conclude comfortably that the scales come down on the side of PC59 in general terms. We conclude that the purpose of the RMA and of the WARMP are better met by rezoning the site part as Urban Residential 1 and part as Urban Residential 2 as shown in the notified application subject to any adjustments for services as described by Mr Quickfall in his evidence.

[192] Two new objectives were proposed by CVL for the new section 23.6.1 of the WARMP. Those objectives are beyond jurisdiction as we discussed earlier. However, they are well-intentioned, and the second in particular seeking to introduce urban design principles — is potentially very useful. We consider they can be introduced as policies.

[193] We generally endorse the amendments to the policies and rules as stated in Mr Quickfall's Appendix 4 (subject to the *vires* deletions discussed at the beginning of this

263 Transcript pp 514-515.
264 Transcript p 160 lines 20-30.

decision) but we expect the parties to agree on the amended policies and rules in the light of these Reasons. For the avoidance of doubt we record that we regard the best practice urban design principles identified in Mr Quickfall's Appendix 4 as important and expect them to be written into PC59 (since no party opposed them) although we doubt whether they should be in "section 23.6" since that already exists in the WARMP. Since we have some doubts as to our jurisdiction under section 290, we will make an order under section 293 in respect of the urban design principles in order they may be introduced as policies, rather than as objectives. In case it assists we see these as implementing the urban growth objectives in the WARMP and thus tentatively suggest they should be located there.

For the court:

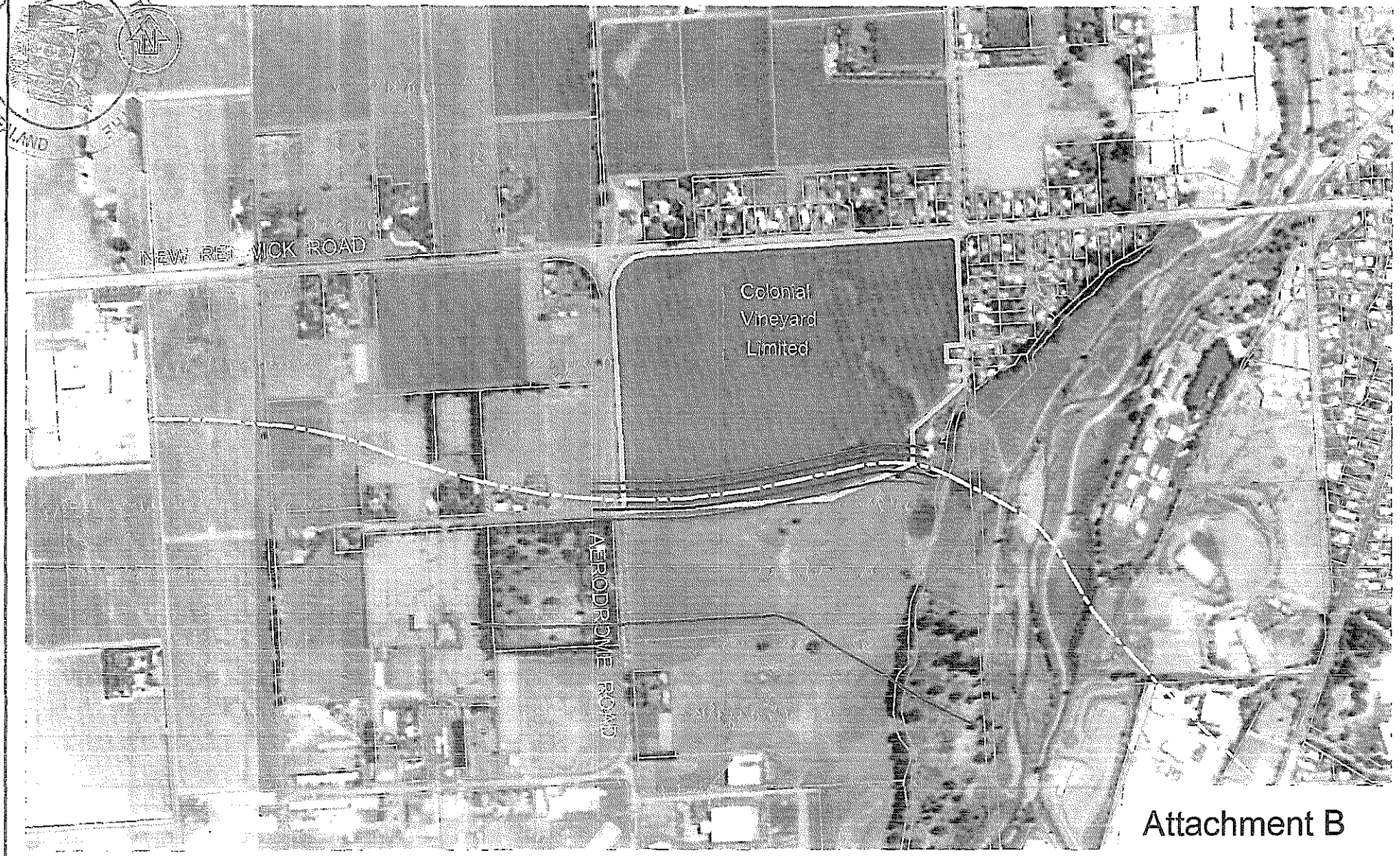
J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

A J Sutherland
Environment Commissioner

Attachment 1: Site Map.

JacksojJud_Rule\d\Colonial Vineyards v Marlborough DC.doc



Attachment B

Ayson and Partners Ltd
REGISTERED PROFESSIONAL SURVEYORS
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Blenheim, New Zealand
Ph 03 579 2099, Fax 03 578 7028
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Consultants in Surveying, Resource Management, Subdivision and Land Development

SUPPLEMENTARY EVIDENCE OF JEREMY TREVATHAN

2038 55dB Ldn Noise Exposure Contour. Based on updated flight movement data provided by Dave Park including helicopter abatement tracks

- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 5 %
- Change to contour if 2013 fixed wing *and* helicopter flight numbers increased or decreased by 10 %
- Approximate 2013 55 dB Ldn contour

SCALE (A3)	JOB NUMBER	
1:6000	13217	
DATE 09.09.2013	SHEET 25	ISSUE A
LB GW / CHECK TM		

0 10 20 30 40 50 60 70 80 90 100mm

J:\13200\13217-Colonial Env Court\AutoCAD\13217 NP 3E & 4E.dwg

ATTACHMENT 1

TAB 3

Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd

Supreme Court of New Zealand SC82/2013; [2014] NZSC 38
19, 20, 21, 22 November 2013; 17 April 2014
Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Resource management – New Zealand Coastal Policy Statement – Interpretation – Apparently conflicting policies – Whether balancing approach appropriate – Duty of planning authorities to give effect to NZCPS – Interpretation of NZCPS – "Inappropriate" – NZCPS, policies 8, 13, 15 – Resource Management Act 1991, ss 55, 58.

Resource management – Resource consents – Whether and when requirement to consider alternative sites – Observations. – Resource Management Act 1991, s 32.

King Salmon applied for changes to the Marlborough Sounds Resource Management Plan to change salmon farming from a prohibited activity to a discretionary activity in eight locations and at the same time applied for resource consents to undertake salmon farming at those locations and one other for a term of 35 years. The Minister of Conservation decided that the application involved matters of national importance and should be decided by a Board of Inquiry. The Board considered the New Zealand Coastal Policy Statement and also Part 2 of the Resource Management Act 1991. Policy 8 of the NZCPS was intended to enable aquaculture subject to conditions while policies 13 and 15 required decision makers to avoid adverse effects of activities on the natural character of areas of outstanding natural character, outstanding natural features and outstanding natural landscapes in the coastal environment. The Board considered that these policies conflicted and that it was required to balance their requirements and make an overall judgment. It found that there would be adverse effects on areas of outstanding natural attributes but nonetheless decided to grant the applications for plan changes in respect of four sites and to grant the resource consents for those four sites, subject to conditions. The Environmental Defence Society and others appealed unsuccessfully to the High Court, arguing that the Board had wrongly taken an "overall judgment" approach to balancing the requirements of different policies. EDS and SOS then appealed to the Supreme Court under s 149V of the Resource Management Act.

Held: 1 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) Section 5(2) of the Resource Management Act 1991 was to be read as an integrated whole. The word "while" did not indicate that the section addressed two different sets of interests but had its ordinary meaning of "at the same time as". The word

"avoiding" in s 5(2)(c) had its ordinary meaning of "not allowing" or "preventing the occurrence of" (see [24], [62], [96]).

2 (unanimously) Although a policy in the New Zealand Coastal Policy Statement did not come within the definition of a "rule" in the RMA, it could have the effect of what in ordinary speech would be a rule and prohibit particular activities in certain localities (see [10], [116], [182]).

3 (per Elias CJ, McGrath, Glazebrook and Arnold JJ) The NZCPS gave substance to the principles in Part 2 of the RMA in relation to New Zealand's coastal environment by translating the general principles to more specific or focused objectives and policies. Therefore in principle, when considering a plan change in relation to the coastal environmental, a regional council was necessarily acting in accordance with Part 2 by giving effect to the NZCPS. No party had challenged the validity of the NZCPS or any part of it and there was no uncertainty in the meaning of the relevant policies of the NZCPS which required reference to Part 2 (see [85], [88], [90]).

4 (William Young J dissenting) The word "inappropriate" in the NZCPS emerged from the way particular objectives and policies were expressed and related to the natural character and other attributes that were to be preserved or protected and also emphasised that the NZCPS required a strategic, region-wide approach (see [102], [105]; compare [193], [194]).

5 (William Young J dissenting) Planning authorities were required to "give effect to" the New Zealand Coastal Policy Statement. "Giving effect to" meant "implement" and was a strong directive creating a firm obligation on the part of planning authorities. The NZCPS did not simply identify a range of potentially relevant policies to be given effect as policy makers considered appropriate on an overall judgment in the particular circumstances. Although Part 2 of the RMA did not give primacy to preservation or protection over other interests, this did not mean that the NZCPS could not do so in particular circumstances. There was no conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policy 8 provided for salmon farming in appropriate areas but salmon farming could not occur in breach of policies 13(1)(a) and 15(a) which directed authorities to avoid significant adverse effects on particular limited areas of the coastal region – areas of outstanding natural character, outstanding natural features or outstanding natural landscapes. The use of the word "avoid" in these policies was a strong direction, meaning they are not merely relevant considerations to factor into a broad overall judgment. It followed that given the Board's findings that the Papatua site engaged policies 13(1)(a) and 15(a), the plan change should not have been granted in respect of that site. The overall judgment approach was inconsistent with the process by which an NZCPS was issued, would create uncertainty and had the potential to undermine the strategic, region-wide approach that the NZCPS required planning authorities to take (see [77], [124], [125], [127], [129], [130], [132], [135], [137], [139], [146], [147], [152], [153]).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC) discussed.

Result: Appeal allowed/dismissed.

Observations: (per totam curiam) If consideration of alternatives is permissible, there must be something about the circumstances of particular cases that make it so. Those circumstances may make consideration of alternatives not simply permissible but necessary. In the case of an application relating to the applicant's own land, the RMA does not require consideration of alternative sites as a matter of course but there may be instances where such consideration is required and there may be instances where the decision maker must consider the possibility of alternative sites. The question of alternative possible sites may have greater relevance in cases where application is made to use part of the public domain for a commercial purpose. Whether consideration of alternative sites may be necessary will be determined by the nature and circumstances of the particular application (see [166], [167], [168], [169], [170], [176]).

Brown v Dunedin City Council [2003] NZRMA 420 (HC) discussed.

Other cases mentioned in judgment

Auckland Regional Council v North Shore City Council [1995] 3 NZLR 18 (CA).

Brown v Dunedin City Council [2003] NZRMA 420 (HC).

Campbell v Southland District Council W114/94, 14 December 1994.

Clevedon Cares Inc v Manukau City Council [2010] NZEnvC 211.

Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council [2010] NZEnvC 403.

Foxley Engineering Ltd v Wellington City Council W12/94, 16 March 1994.

Green & McCahill Properties Ltd v Auckland Regional Council [1997] NZRMA 519 (HC).

Hodge v Christchurch City Council [1996] NZRMA 127 (PT).

Man O'War Station Ltd v Auckland Council [2013] NZEnvC 233.

Meridian Energy Ltd v Central Otago District Council [2011] 1 NZLR 482 (HC).

New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).

North Shore City Council v Auckland Regional Council (1996) 2 ELRNZ 305 (EnvC).

Plastic and Leathergoods Co Ltd v Horowhenua District Council W26/94, 19 April 1994.

Shell Oil New Zealand Ltd v Auckland City Council W8/94, 2 February 1994.

Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402.

Wairoa River Canal Partnership v Auckland Regional Council [2010] 16 ELRNZ 152 (EnvC).

Appeal

These were appeals (SC82/2013) by the Environmental Defence Society Inc under s 149V of the Resource Management Act 1991 from the judgment of Dobson J, [2013] NZHC 1992, dismissing an appeal from a Board of Inquiry set up under s 142(2)(a) of the RMA, supported by Sustain Our Sounds Inc, second respondent, and opposed by New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries,

fourth respondents and (SC84/2013) by Sustain Our Sounds Inc from the same judgment, supported by the Environmental Defence Society Inc, second respondent, and opposed by The New Zealand King Salmon Co Ltd, first respondent, Marlborough District Council, third respondent and the Minister of Conservation and Director-General of the Ministry for Primary Industries, fourth respondents, leave to appeal having been granted by the Supreme Court [2013] NZSC 101, the approved questions on appeal being (SC82/2013):

(a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:

(i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.

(ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal Policy Statement under s 67(3)(b) of the Act in coming to a balanced judgment or assessment in the round in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary; and

(SC84/2013): was the conclusion of the Board of Inquiry that the key environmental effects of the plan change in issue would be adequately managed by the maximum feed discharge levels set in the plan and the consent conditions it proposed to impose in granting the resource consent to King Salmon one made in accordance with the Act and open to it?

DA Kirkpatrick, *RB Enright* and *NM de Wit* for EDS.

DA Nolan, *JDK Gardner-Hopkins*, *AS Butler* and *DJ Minhinnick* for the King Salmon Co.

MSR Palmer and *KRM Littlejohn* for Sustain Our Sounds Inc.

CR Gwyn and *EM Jamieson* for Minister of Conservation and Director-General of Ministry for Primary Industries.

SF Quinn for Marlborough District Council.

PT Beverley and *DG Allen* for the Board of Inquiry.

Palmer for SOS: This case demonstrates the importance of the Resource Management Act 1991. Resources and the uses to which they are put are mediated by the RMA through the principle of sustainable management. Consent authorities often pay lip service to this principle by listing all relevant considerations and then coming to an overall conclusion – a "broad judgment" approach which means that the weight assigned to different considerations cannot be appealed. This approach has not previously been taken to plan changes. Mr Upton said in the third reading debate on the Bill that the concept of sustainable management provided a "physical bottom line" which should not be compromised ((4 July 1991) 516 NZPD 3019) either by plan changes or consents. This is one of the rare cases when we come up against the bottom line. SOS is not challenging Parliament's attempts to streamline and simplify the RMA. The challenge is to the particular decision of the Board which did not have before it the information about the key environmental effects it required. This Court can provide guidance to the courts below and to the increasing numbers of boards of inquiry as to decision making.

SOS is not opposed to salmon farming in general. King Salmon applied for a plan change carving out eight areas from the zone where salmon fishing is a prohibited activity and making it a discretionary activity in those areas. Concurrently it applied for consents (as well as consent for another farm where it was already zoned as discretionary) and the Board of Inquiry agreed to the request for four of them. The Board was set up because the Minister was concerned about water quality, among other factors. Open-cage salmon farming introduces nitrogen and other pollutants from salmon feed and faeces. The ability of the water to deal with this depends on the complex interaction of factors such as water flow, temperature, and pre-existing nutrient levels natural and unnatural, including run off from fertilisers on land. Excessive nitrogen causes eutrophication where dissolved nutrients reduce oxygen levels and increases algal blooms which reduce sunlight. The process is potentially reversible over time but once a certain point is reached, return to a pristine state becomes impractical. It is not just the levels that matter but the degree of change from the pre-existing natural state. The feed discharge from the nine farms applied for would be equivalent to the raw effluent discharge from 400,000 people (BoI report, at [379]). So we need to know the current state of the environment and need good information (not perfect information) as to the effect of an increase in nutrients given the maximum feed quantities allowed by the consent. SOS considers the conditions on both the plan change and the consent inadequate. The applicants had modelled only on the initial stages and not on the maxima.

The Board (Appendix 3) does not amend the objectives of the plan. The Board says that there can be an increase in salmon farming where the effects can be mitigated. The additional rules required would be effected by plan change. Marine farms are discretionary activities within Zone 3 provided that they comply with the standards set out. These relate to water quality: maximum discharges and maximum increases per year. King Salmon proposed that farming for different species would be a prohibited activity but the Board amended this to non-complying.

Water appears in the long Title of the RMA. Section 5 sets out the purpose of the RMA as to promote sustainable development of natural and physical resources, which are all defined terms. Purpose is important in interpreting provisions in an Act (*Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767). Sustainable development is defined in s 5(2) as including the needs of future generations and safeguarding the life-supporting capacity of water and ecosystems, avoiding, remedying or mitigating any adverse environmental effects. If the use of water is not sustainable and life-supporting capacity not supported, the plan change cannot go ahead. Section 6 expands on sustainable management and refers to the preservation of the natural character of the coastal environment, its protection from inappropriate use and the protection of any significant habitat of indigenous fauna. The Rt Hon Simon Upton MP, said that s 5(2) was not a mere manifesto ("Purpose and Principle in the Resource Management Act" (1995) 3 Wai L Rev 17). The trade off on sustainability was made by Parliament. The Act marked a shift in focus from planning activities to regulating effects, so it is necessary to know what the effects will be. Part 3 in general allows activities unless they are controlled, prohibited etc. In respect of the coast, s 12 lists things that one cannot do unless they are expressly allowed by a rule in a coastal plan; s 14 does the same re water and s 15 for discharges. So water is treated differently from land. The coastal and marine areas are the responsibility of the Minister of Conservation under the RMA, not the Minister for the Environment but the use of space in coastal and marine areas is the responsibility of regional authorities as is the use of water. Functions are expressed in light of the purpose. "Integrated management" is a reference to the Bruntland Report from where "sustainable management" also derives. Section 32 requires cost-benefit analysis and s 32(4)(b) in respect of plan changes must include the risks of acting and of not acting if there is insufficient information. The precautionary principle is implicit in the section and implicit in the definition of sustainable management. The Board was not cautious in the face of uncertainty. Part 5 of the RMA sets out the hierarchy of standards and policies and the hierarchy of documents which provide the framework for consents (see ss 63, 65(6), 66 and 84). There has to be a coastal policy statement under s 57 and the CPS refers to sustainability. Each document in the hierarchy must give effect to the document in the hierarchy above. Policies relate to how objectives are to be achieved. The precautionary approach, in Policy 3, underpins all the policies but the Board does not consider uncertainty as to effects. Policy 23 on discharge of contaminants required particular sensitivity to the receiving environments (see also s 108(8) of the RMA), but the Board said it did not have evidence as to the nature of the receiving environment. Regional policy statements are also directed to the integrated management of resources. The Marlborough Regional Policy Statement refers to Agenda 21 and affirms commitment to controlling degradation of the marine environment (chapters 5 and 7). Part 5.3.6 of the RPS refers to problems of limited information. The approach of the statement is to move along the path to sustainable development. Where insufficient information is available, plans will take a precautionary approach (7.2.11). Coastal water quality is to be

maintained at a level which will support the eco-system. Methods of achieving policies include controls in plans to avoid, remedy or mitigate the effects of discharges. The Board did not do this.

King Salmon argues that a discretionary activity has to go through all resource consent steps so it does not matter whether it is potentially harmful. This is not correct. Status as a discretionary activity indicates how an activity is to be thought about when considering applications for resource consent. Discretionary status indicates that the activity may well be desirable provided that conditions are complied with, or may not be. So the result of the application could go either way. A coastal permit is a type of resource consent (s 105). The Board of Inquiry acts as a consent authority (s 149) and a consent authority has a quasi-judicial role (*Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562). On the application for a plan change, the Board must act as if it were a regional council (s 149). Concurrent applications for plan changes and resource consents are dealt with by s 149P(8), (9) and (10). The Board had to determine matters relating to the plan change and only then consider the resource consent application in the light of the amended plan. A plan cannot depend upon a resource consent but at [12.76] the Board purports to apply Part 2 of the Act to plan changes and says that where there are identified adverse effects that overcame the benefits, consent would be refused and where adverse effects could be mitigated, conditions would be imposed on consents. In other words, the amendment to the plan depended upon the conditions in the consents. This is contrary to the scheme and purpose of the Act.

The bulk of the Board's report relates to contested effects. As to water quality and the effect of waste feed and faeces, the Board considered that it had enough information when one added the year of monitoring which would be one of the conditions of the resource consent. The then Minister of Conservation considered that this was insufficient information and submitted that a precautionary approach was warranted, especially as to effects on water quality. There was expert evidence as to the tropic state of the Sounds overall and of individual Sounds. The Board concurred with the experts on the paucity of information on the current state of the Sounds (at [372]). The Board was unable to assess the effect of farm run-off. It refers to sustainable feed levels, but it is not clear whether it is referring to the sustainability of the farming or of the water. The Board was surprised that there had been no modelling of the effect of maximum feed levels, whether locally or overall (at [430]–[435]). So the Board identified numerous problems but then went straight on to consider what conditions should be imposed on the resource consent and failed to consider whether the consents should be granted at all. The conditions imposed are complex. There are 84 conditions ranging from feed conditions up to the maximum to increases in discharges to be allowed if the monitoring shows that they are not harmful. So the conditions on the consents were being used to set standards which should have been in the amended plan.

Granting the plan change on the basis of the maximum feed discharge limits about which the Board itself said it had insufficient information and of the proposed consent conditions to gather that essential information would not adequately manage the environmental effects on water quality. Accordingly, the Board did not fulfil the function for which the Minister established it and its

decision was inconsistent with the principle of sustainable management, with the emphasis on water quality in the RMA and planning regime and the precautionary approach. If these consents were dropped or cancelled, we would still have salmon farming as a discretionary activity in the plan but without the controls on it which the Board considered essential. The plan change creates a zone specifically for salmon farming so we need to know what the effects will be. The words "have regard to" must be interpreted against the purpose of the Act. If after having regard to a matter, it is decided that the proposal is not compatible with sustainable management, consent cannot be granted. If the Board can identify conditions necessary for salmon farming these should be in the plan which the public can make submissions on. Granting the plan change on this basis was inconsistent with *Edwards v Bairstow* [1956] AC 14, [1955] 3 All ER 48 (HL). The Board should have re-appraised matters when it realised it did not have enough information (as in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153). The decision of the Board should be set aside. [Reference also made in printed case to: *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA); *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *Minister of Conservation v Kapiti Coast District Council* [1994] NZRMA 385 (PT); *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC); *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA); *Re Canterbury Regional Council* [1995] NZRMA 110 (PT); *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 (PT); *Unison Networks Ltd v Hawke's Bay Wind Farm* [2007] NZRMA 340 (HC); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149; *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475 (HC).]

Kirkpatrick for EDS: Question 1 turns on the interpretation of certain key words and phrases: "give effect to" in s 67(3)(d) of the RMA; "avoid" in Policies 13(a) and 15(a) of the NZCPS; "preserve" and "protect" in Policy 13(1) and "protect" in Policy 15; and "appropriate" in Policy 8. The central point for EDS is that Policies 8, 13, and 15 do not contradict or pull against each other; all three policies may be reconciled on the basis that "appropriateness" in Policy 8 is to be determined in accordance with, among other things, the guidance on areas of natural character and natural landscapes in Policies 13 and 15. That approach is not affected by the other policies of the NZCPS in the circumstances of this case; it is consistent with the objectives of the NZCPS (especially objectives 2 and 6); and is in accordance with Part 2 of the RMA. Part 2 has to be read with other matters such as the NZCPS. Hence the Board erred in saying that the NZCPS contained objectives and policies that pulled in different directions and that therefore a judgment had to be made as to whether the instrument as a whole is generally given effect to. Part 2 does not create extra grounds for refusing restricted discretionary activity (see *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC), Randerson J at [40]–[47]). One applies the relevant detail, rather than resolving tensions on the basis of Part 2. Giving effect to the NZCPS will achieve the objectives of the Act. King Salmon submits that this is to read up the NZCPS; we say that King

Salmon is reading down s 67(3)(b). The purpose of the RMA given in s 5 is a complex statement encompassing the enabling of community well-being while avoiding, remedying or mitigating adverse effects of activities on the environment (see *Judges' Bay Residents Association v Auckland Regional Council* A72/98, 24 June 1998, especially Part 11 of the judgment). Promoting sustainable development is a single objective, no one aim overrides the others.

The RMA relies on the hierarchy of documents to achieve its objectives; the rungs between the Act and the Rules (which are deemed Regulations) are important. In this case, it is a requirement to give effect to the NZCPS. It is not necessary to return to the Act to resolve every tension, only to the relevant rung in the hierarchy. It is routinely argued in the Environment Court that some of the policies in the NZCPS are in conflict but we still have to examine the policies in detail. If the policies are not relevant to the current decision, it does not matter that they conflict. No issues arise as to waste water and so how Policies 8, 13, and 15 apply to waste water is irrelevant. There is no doctrine of precedent in consideration of resource consents (*Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA)) and any arguments about what might happen in other cases is answered by s 6 of the Interpretation Act 1999, that statutes are applied to circumstances as they arise.

The RMA also has a hierarchy of words and phrases relating to how decision makers must deal with various consideration of which "give effect to" is the most directory. "Avoid" and "prohibit" are words of ordinary meaning. "Avoid" is not a step short of "prohibit" as suggested by *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. "Avoid" is something one does oneself, "prohibit" is what authorities do to other people. Hence "avoid" is appropriate to policies and "prohibit" to rules. "Avoid" means to stop something from happening. Policies 13(a) and 15(a) say "avoid" which does not allow taking other matters into account; that would be mitigation, not avoidance. They thus provide non-negotiable baselines. Prohibition is not provided in Part 2 of the RMA but is provided for elsewhere in the Act. Prohibited activity status should only be used when the activity will not be contemplated in that place under any circumstances (*Coromandel Watchdog*). "Veto" means a power to reject a proposal. It hardly ever appears in legislation but does appear in RMA case-law starting with *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA). It is not appropriate here; this is a provision preventing something from happening. The NZCPS does not have direct regulatory effect (*Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 22–23) but it must be given effect to and the Environment Court can order amendment of a plan to give effect to the NZCPS. It determines what goes into plans and the plans contain rules. But the NZCPS cannot be used to prosecute a party for breach.

An applicant for a resource consent is not required to go right round New Zealand looking for alternative sites. We are not seeking a veto but merely that the change for Port Gore be declined. Policy 8 refers to "avoid, remedy or mitigate" unlike Policy 11 which only refers to "avoid" but it applies only where a species is threatened or at risk. Policies 13 and 15 call for mapping but an area can be found to be an outstanding natural landscape without being mapped as such. If the area is found to be an ONL or significant habitat it will be covered by Policies 13 and 15. Policy 16 on natural surf breaks

refers to "avoiding" other activities in the water. A developer has to enable access and use which is not onerous. Under Policy 25 it is increases in risk which are to be avoided, not existing risk from existing activity. Development in ONLs is not forbidden as long as adverse effects from development are avoided (*North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EC)).

Enright, following: The Board at [124] found that it had no jurisdiction to consider alternative sites for the purposes of plan changes, referring to *Brown v Dunedin City Council* [2003] NZRMA 420 (HC) but at [127] it quotes *Brown* [16] but misses out an important qualifier in the penultimate sentence. The Board also said at [125] that there was no burden on the applicant for resource consent to consider alternatives but this does not apply to plan changes. In *Brown* it was not appropriate to require the applicant to consider sites over which he had no control but *Brown* did acknowledge that there may be cases where looking at alternatives would be required. In *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC) it was said that alternatives should be examined but not too far afield but the ratio of *Meridian* is confined to s 7(b) which does not apply here. Whether there is a requirement to examine alternatives depends on the context including what is being protected. The question is how important is the site and why. The High Court in *Meridian* considered that the Environment Court had overstepped the mark: see *Meridian* (HC) at [92]. Dobson J at [171] said that it was not mandatory to consider alternatives but in this case there are no proprietary rights until consent is granted and so it is appropriate to look for other sites. We seek a decision that it is mandatory in the case of plan changes. Other sites were considered but not in the context of the plan changes. In *TV3 Network Services Ltd v Waikato District Council* [1998] NZLR 360, [1997] NZRMA 539 (HC), Hammond J said that if s 6 applies then alternative sites are a relevant consideration. On s 32 and plan changes, see *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 45 at [68], [84] and [103], *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21] and *Coromandel Watchdog* at [16]). [Reference also made in printed case to: *Green and McCahill Properties Ltd v Auckland Regional Council* HC Auckland HC 4/97, 18 August 1997; *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC)); *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331.]

Gardner-Hopkins for King Salmon: King Salmon has been farming salmon in the Marlborough Sounds since the 1980s. It was a pioneer but has learned a great deal since then. King Salmon was part of the process by which zones were allocated by consent in 1999. At that time King Salmon did not need to reserve any areas for future use and accepted the zone boundaries. It began looking for new sites from 2007 and has reviewed some 500 mussel farm sites but found them unsuitable for salmon farming. It is well known that until 2011, the aquaculture regime hindered the development of aquaculture. The 2011 amendments removed legislative obstacles. In particular, the concurrent application for plan change and resource consent encourages applications for plan changes without creating the risk that someone else will apply for resource consent.

The Board was primarily concerned with sustainable development (see the Board at [75]–[81], [1227] and [1276]–[1278]). The SOS argument fundamentally misconceives the statutory scheme as to the role of regional plans and discretionary resource consents. The plan change itself has no environmental effects. All it does is enable applications for discretionary activity resource consent for salmon farming at four specific locations. For a discretionary activity there is no presumption that consent will be granted. The Act does not require that plans include conditions for resource consents and certainly not the detailed conditions demanded by SOS. For discretionary activities, all relevant matters have to be considered when consent applications are considered. The Board had more than sufficient information to approve the plan change and there was full public participation in the process, including discussions between the parties which led to the conditions. In fact, the amended plan contained more specific standards and assessment criteria than the existing plan. The Board applied the precautionary approach in the plan changes: in declining five of the nine proposed sites; in setting standards for initial feed levels and subsequent increases; and then in the resource consents by imposing robust adaptive management conditions. The approval of the plan change was not predicated on the specific consents; the Board was "aware" of them and SOS does not contest that they were a relevant consideration.

The NZCPS Objective 6 recognises that some uses and developments can only be in the coastal area, this includes salmon farming and Policy 6(2) recognises that appropriate locations have to be found. Policy 8 requires regional policy statements and regional coastal plans to provide for aquaculture in appropriate places, recognising the need for high water quality including ensuring that the water is fit for aquaculture. The Regional Policy Statement states at [3.6] the limitations that we may never fully understand some ecosystems and effects of decisions and the absence of complete information is not necessarily an excuse for avoiding resource management decisions. Discretionary status is precautionary in that consent requires compliance with the purposes of the Act. Under Policy 7.2.10(d) of the Regional Policy Statement, applications for aquaculture consents are considered in the light of adjoining activities, navigation and other factors. Hence it is necessary to prohibit in some areas. The Board clearly had regard to all these matters in its decisions (see [283] and [284] of the Board decision). The Sounds Plan sets out policies, objectives and methods which enable applicants to understand how any application will be assessed. The plan emphasises the importance of assessment criteria and standards which will protect water quality and so on, so discretionary status is sufficient to ensure that the objectives of the Act are met. Chapter 9 "Coastal marine" recognises the importance of marine farming to the regional economy and community. Some Sounds communities have been revitalised by aquaculture. Research is continuing into farming new species which might then require further plan changes. Where there may be adverse effects, rigid controls can be imposed by conditions on the consent. Conditions could be called standards. The scheme of the Plan is that for some discretionary activities there are assessment criteria; for others there are standards. This Plan meets the requirements. Discretionary activities have previously been declined on sustainability grounds. The proposed plan changes go further. Once adaptive management requirements have been imposed on early consents they might not

be required for later consents and so should not be imposed. If the standards were not met under the amended Plan, a discretionary activity would become a non-complying activity. The 14 assessment criteria include assessment of any adverse effects on water and water quality and cumulative effects on habitat. The potential threats to Hector's Dolphin and the King Shag are dealt with. These criteria are more specific than those already in the plan; they are mandatory considerations and a guide to applicants as to the material that must be provided in an application. The consents include specific conditions about the amount of nitrogen in feed, limits on feed discharges, restrictions on when feed limits could be increased, and conditions on benthic effects. Maximum feed levels were not modelled as it was expected that benthic effects would be the limiting factor. Standards were set for the water column: no increase in phytoplankton bloom; no increase in algal bloom; no reduction in oxygen levels; no increase in nutrient levels; and a power to review the consents. The cumulative effects on the water column would be substantially reduced by the fact that five of the nine consents were refused. It is permissible to leave standard setting until later provided that the objectives are clear and achievable. What should be in the plan and what should be in the consents was extensively discussed before the Board. SOS wanted more conditions in the plan change rather than in the consents; the Council wanted the plan not to be cluttered with too much detail. "Assessment criteria" are not mentioned in the RMA but could be considered as parts of rules under s 67(1)(b) or as an "other method for implementing policy" under s 67(2)(b). There is no bright line test to determine the status of activities, the RMA leaves the choice as to activity status to the planning authorities. There was therefore no error of law. The Board was a planning authority and had discretion which it exercised after careful consideration of the relevant matters (see contested effects at pp 94–336: s 32 analysis is at [1224] and water column effects at [1212]). Its discretionary decision cannot be said to be so unreasonable that no reasonable planning authority could have taken it. The Board then considered site-specific issues relating to the plan change, including nitrogen and cumulative effects, ecological integrity and the ability of Port Gore to be serviced separately. This is why only four of the sites were approved for plan changes.

The Board then considered the resource consent applications and grants resource consent for the four plan change sites. Water quality issues were extensively considered, see [405], [411], [412], [421], [456], [458] and [460]. In the contested effects section of its report, the Board was still dealing with the nine applications. Its decision was precautionary: approval only for four sites. There is no need for philosophical debate about how to reconcile the limbs of s 5(2). The Board was aware of the need to "avoid, remedy or mitigate". It did refer to the "balance between" the two limbs but this was a mischaracterisation of its own decision making. At [439], the Board said that consent for increases was conditional on more information and adaptive management. This does not mean that the plan changes depended on the consent conditions, they were referring to the future. The Board was aware of the specific consent conditions, which was appropriate. The Board considered the precautionary approach at [173]–[182] and recognised "adaptive management" as part of the precautionary approach, a way of giving effect to the precautionary approach.

The Board recognised the reduction in adverse effects and benefits from only granting four consents rather than nine. The SOS complaint boils down to saying that this was not precautionary enough. This was a matter of weight, not law.

Nolan, following: The NZCPS and s 67(3)(b) must be interpreted in the light of the purpose of the NZCPS which is to state policies aimed at achieving the purpose of the RMA. The individual policies in the NZCPS are not ends in themselves. There can be tensions between them. Some policies, for example 13 and 15, give more direction than others, but they are not standards or vetos. Section 67(3) requires that effect be given to the NZCPS as a whole, not that every policy has to be achieved individually (*Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [257]–[258]; *Man O' War Station* at [41]–[43]). Documents are interpreted as a whole and policy documents have to be approached with care as they are not drafted with the same precision as legislation (*Beach Road Preservation Society Inc v Whangarei District Council* HC Whangarei CP27/00, 1 November 2000). Nor can any single matter in ss 6 (such as ONLs), 7 and 8 trump s 5 (*New Zealand Rail Ltd*). It would undermine the purpose of the RMA to allow some considerations to trump all other factors. The Board considered all the relevant considerations and applied the correct law and was entitled to reach the conclusions that it did. Policy 15, if read in the manner sought by EDS, would prevent any development that had any adverse effect. "Effect" is widely defined in the RMA, s 3. But the introductions to policies 13 and 15 refer to "appropriate". On EDS's argument, navigation beacons currently in ONLs on the Cook Strait would not have been permitted. Likewise, Policy 11a refers to "any adverse effects"; if this were interpreted in the manner sought by EDS one would never get to social and economic benefits. Several policies in the NZCPS use the word "avoid", so on EDS' argument no development would be possible, even if the adverse effects could be remedied or mitigated.

The NZCPS can direct regional councils to put matters into regional plans (s 55(2)), but these could only be objectives and policies. Provisions of the NZCPS can be put into rule form but are not rules themselves (s 43(a)). A wide range of interests such as recreational boating and fishing (Policy 6) and windfarms (*National Policy Statement on Renewable Energy Generation*) have to be taken into account. Places suitable for salmon farming are places with few inhabitants or holiday homes and with good water flow. It is part of the role of the decision maker to determine what will give effect to the NZCPS and Part 2 of the RMA. Status as an ONL is to be considered in making a decision, but does not require any particular process. The Board discusses all these matters, especially at pp 183–184. The weight to be given to them was a matter for the Board and is not apt for reconsideration on appeal. Matters emerging from Policies 6 and 8 are not determinative but are factors to be considered (Dobson J at [110]). The Board of Inquiry on the current NZCPS referred to giving more weight to the protection of landscape and to providing further guidance: indicates that the policies were not intended to be standards and rules. The Board in the present case had regard to the NZCPS as a whole, focused on effects, assessed those effects and considered the adverse effects along with the enablement of economic and social wellbeing (see [1184], [1185], [1240], [1241] and [1243]). The Board also placed weight on

biosecurity. Currently, New Zealand salmon farms are free from infectious diseases. The Papatua site was seen as safe as it is not connected to the other areas (see [1242]). The Board also considered that the adverse effects on landscape and natural character were less at Papatua than at Kaitira. The answer to the first part of Q 1(a)(i) is "no"; even if the Court answers it "yes", the answers to the remaining parts of Q 1(a) are "yes" and "yes".

As to alternatives, a decision maker may consider alternative sites but there is no mandatory requirement in s 32 to consider alternative sites for a specific plan change (*Brown*). There are express requirements elsewhere in the RMA (for example, ss 168A(3) and 171(1)(b). The title to s 32 refers to alternatives but the text of the section does not and certainly not to alternative sites. Parliament has amended s 32 regularly but has not included a mandatory requirement to consider alternative sites. For a site-specific plan change, s 32 requires consideration of whether the policies and rules proposed for that site are the most appropriate to achieve the purposes of the RMA. Earlier references to alternatives in s 32 were removed. A planning authority would not have evidence before it of all the effects of the activity at an alternative site. Section 105(1)(c) refers to alternative methods of discharge. *McGuire* referred to a notice of requirement not to a plan change. King Salmon produced evidence as to why the existing plan provisions did not adequately provide for salmon farming (see Board at [1204]). No other party gave evidence of any alternative biosecure site. In any case, the Board did consider alternatives. King Salmon's application contained detailed descriptions of alternatives and the analysis by the Board included consideration of alternatives (see Board at [136]–[158]). [Reference also made in printed case to: *Auckland City Council v John Woolley Trust*; *Brown v Dunedin City Council*; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363; *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211; *Director-General of Conservation v Marlborough District Council* EnvC Christchurch C113/2004, 17 August 2004; *Dye v Auckland Regional Council*; *Gisborne District Council v Eldamos Investments Ltd* HC Gisborne CIV-2005-485-1241, 26 October 2005; *Graeme v Bay of Plenty Regional Council* [2013] NZEnvC 173; *Man O'War Station Ltd v Auckland Council*; *McGuire v Hastings District Council*; *Meridian Energy Ltd v Central Otago DC*; *Moturoa Island Ltd v Northland Regional Council* [2013] NZEnvC 227; *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZRMA 293 (HC); *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 (PT); *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA).]

Gwyn for the Ministry: The Ministry appears only in respect of Q 1(a). The purpose of the 2010 amendments was to encourage aquaculture and reduce costs, delays and uncertainty. The NZCPS does not state policies which have the effects of rules and there is no need to read up the NZCPS as other tools are available, for example ss 25A, 25B and 360A. There are no national priorities stated in the NZCPS and it is well established that the preservation of the natural character of the coastline is subordinate to the primary purpose of promoting sustainable development (NZ Rail). Policies in this context may be inflexible (*Auckland Regional Council v North Shore City Council* [1995] 3

NZLR 18 (CA) at 20–21) but the current NZCPS is not intended to state inflexible policies. The wording of Policies 13 and 15 indicates that they are not intended as rules or absolute directions to planning authorities. There are not only tensions between policies within the NZCPS but also between the NZCPS and other documents, for example, the policy statements on electricity, on renewable energy and on freshwater. Windfarms for example may have significant adverse effects on the landscape but must be put where a source of energy is available. Many of the policies are written in the imperative voice, there is no indication that some sentences are more important than others. "Avoid" is a step short of prohibition, see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] NZEnvC 309 at [15]–[16] and *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZRMA 143 at [178]–[179]. "Appropriate" must be defined with regard to Policies 8, 13 and 15. [Reference also made in written submissions to: *Auckland City Council v John Woolley Trust*; *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC); *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA); *Crest Energy Kaipara Ltd v Northland Regional Council* (2011) NZRMA 420; *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597; *McGuire v Hastings District Council*; *Man o' War Station Ltd v Auckland Regional Council*; *Meridian Energy Ltd v Central Otago District Council* HC Dunedin CIV-2009-412-980, 16 August 2009; *New Zealand Rail Ltd*; *Ngai Tumapuhiaarangi Hapu Me Ona Hapu Karanga v Carterton District Council* HC Wellington, 25 June 2001 AP6/01; *Ngati Ruahine v Bay of Plenty Regional Council* (2012) 17 ELRNZ 68 (HC); *Rational Transport Society Inc v New Zealand Transport Agency* HC Wellington CIV-2011-485-2259, 15 December 2011; *S & M Property Holdings Ltd v Wellington City Council* HC Wellington CP257/01, 7 August 2002; *Tait v Hurunui District Council* EnvC Christchurch C106/2008, 29 September 2008; *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Watercare Services Ltd v Minhinnick; Whistler v Rodney District Council* EnvC Auckland A228/02, 19 November 2002.]

Palmer, replying: SOS accepts that the Board thought that the initial limits were sustainable in terms of its own assessment of what that meant. But it has become clear that there are issues over the interpretation of s 5. The Board's overall assessment approach did not accord with the correct approach under s 5. The plan change limits were not sustainable in the sense required by a proper interpretation of s 5. Even the initial discharge limits decision did not accord with proper process under s 5. The Board makes frequent references to competing principles, balancing factors, and the balance between the limbs of s 5(2). It adopted an overall balancing approach which is also regularly applied in the Environment Court.

The Board thought that the maximum limits were not sustainable and was not using a proper definition of sustainable. The Board changed the plan to classify salmon farming as a discretionary activity at four sites despite "a paucity of data" (at [373], [406], [407] and [461]) and when the only constraints were an unconstrained annual increase to the proposed maximum discharge levels that it had expressed concern about. The Board should have taken a proper precautionary approach and retained the prohibited status until

the information deficiencies were remedied (*Coromandel Watchdog* at [45]). Adaptive management is not "prudent avoidance" and is not precautionary in these circumstances and not consistent with what the Board was set up to do: s 149P(1)(a). The Board's evaluation of contested effects for both the plan change and the resource consent applications led it to conflate two different decision-making processes. A fair reading of the report shows that the plan change was predicated on the conditions in the consents ([1185], [1209], [1277(b) and (c)] and [1278]). The assessments of the resource consent applications do not mention the mandatory relevant consideration of "assessment conditions" it put into the amended plan. Given the Board's findings, it should not have classified salmon farming as a discretionary activity at the maximum feed discharge levels. That is what it did do and so its decision in relation to the four approved sites should be set aside.

Kirkpatrick, replying: Aids to navigation are provided for under the Maritime Transport Act 1994, not in the Regional Plan. A lighthouse may not be adverse to the landscape, for example, at Cape Reinga. "Appropriate" in policy 8 does not mean appropriate for salmon farming; policies 13 and 15 help identify what was appropriate in policy 8. As to alternatives, see *Coromandel Watchdog* at [16]. If *Brown* is not treated as a rule, s 32 analysis should give submitters the opportunity to discuss alternatives. Plan changes do have environmental effects. The change from prohibited status to discretionary status is enabling and so the planning authority must consider the effects of enabling change. As to mootness, the issue of alternatives under Q 1(b) is important and it would be beneficial to have guidance.

Cur adv vult

Reasons

The reasons of Elias CJ, McGrath, Glazebrook and Arnold JJ were given by **ARNOLD J.**

Table of contents

Table of contents

Introduction

[1] In October 2011, the first respondent, New Zealand King Salmon Co Ltd (King Salmon), applied for changes to the Marlborough Sounds Resource Management Plan[1] (the Sounds Plan) so that salmon farming would be changed from a prohibited to a discretionary activity in eight locations. At the same time, King Salmon applied for resource consents to enable it to undertake salmon farming at these locations, and at one other, for a term of 35 years.[2]

[2] King Salmon's application was made shortly after the Resource Management Act 1991 (the RMA) was amended in 2011 to streamline planning and consenting processes in relation to, among other things, aquaculture applications.[3] The Minister of Conservation,[4] acting on the recommendation of the Environmental Protection Agency, determined that King Salmon's proposals involved matters of national significance and should be determined by a board of inquiry, rather than by the relevant local authority, the Marlborough District Council.[5] On 3 November 2011, the Minister referred the applications to a five member board chaired by retired Environment Court Judge Gordon Whiting (the Board). After hearing extensive evidence and submissions, the Board determined that it would grant plan changes in relation

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1 Marlborough District Council *Marlborough Sounds Resource Management Plan* (2003) [Sounds Plan].

2 The proposed farms were grouped in three distinct geographic locations – five at Waitata Reach in the outer Pelorus Sound, three in the area of Tory Channel/Queen Charlotte Sound and one at Papatua in Port Gore. The farm to be located at White Horse Rock did not require a plan change, simply a resource consent. For further detail, see *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371 [*King Salmon* (HC)] at [21].

3 Resource Management Amendment Act (No 2) 2011. For a full description of the background to this legislation, see Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [5.71] and following.

4 The Minister of Conservation deals with applications relating to the coastal marine area, the Minister of the Environment with other applications: see Resource Management Act 1991 (RMA), s 148.

5 The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and a district council. The Board of Inquiry acted in place of the Council: see *King Salmon* (HC), above n 2, at [10]–[18].

to four of the proposed sites, so that salmon farming became a discretionary rather than prohibited activity at those sites.[6] The Board granted King Salmon resource consents in relation to these four sites, subject to detailed conditions of consent.[7]

[3] An appeal from a board of inquiry to the High Court is available as of right, but only on a question of law.[8] The appellant, the Environmental Defence Society (EDS), took an appeal to the High Court as did Sustain Our Sounds Inc (SOS), the appellant in SC84/2013. Their appeals were dismissed by Dobson J.[9] EDS and SOS then sought leave to appeal to this Court under s 149V of the RMA. Leave was granted.[10] We are delivering contemporaneously a separate judgment in which we will outline our approach to s 149V and give our reasons for granting leave.[11]

[4] The EDS and SOS appeals were heard together. They raise issues going to the heart of the approach mandated by the RMA. The particular focus of the appeals was rather different, however. In this Court EDS's appeal related to one of the plan changes only, at Papatua in Port Gore. By contrast, SOS challenged all four plan changes. While the SOS appeal was based principally on issues going to water quality, the EDS appeal went to the protection of areas of outstanding natural character and outstanding natural landscape in the coastal environment. In this judgment, we address the EDS appeal. The SOS appeal is dealt with in a separate judgment, which is being delivered contemporaneously.[12]

[5] King Salmon's plan change application in relation to Papatua covered an area that was significantly greater than the areas involved in its other successful plan change applications because it proposed to rotate the farm around the area on a three-year cycle. In considering whether to grant the application, the Board was required to "give effect to" the New Zealand Coastal Policy Statement (NZCPS).[13] The Board accepted that Papatua was an area of outstanding natural character and an outstanding natural landscape and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. As a consequence, policies 13(1)(a) and 15(a) of the NZCPS would not be complied with if the plan change was granted.[14] Despite this, the Board granted the plan change. Although it accepted that policies 13(1)(a) and 15(a) in the NZCPS had to be given considerable weight, it said that they were not determinative and that it was required to give effect to the NZCPS "as a whole". The Board said that it was required to reach an "overall judgment" on King Salmon's application in light of the principles contained in Part 2 of the RMA, and s 5 in particular. EDS argued that this analysis was incorrect and that

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6 Board of Inquiry, *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents,* 22 February 2013 [*King Salmon* (Board)]. At [1341].
7 At [1341].
8 RMA, s 149V.
9 *King Salmon* (HC), above n 2.
10 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZSC 101 [*King Salmon* (Leave)].
11 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 41.
12 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40.
13 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the *New Zealand Gazette* on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].
14 *King Salmon* (Board), above n 6, at [1235]–[1236].

the Board's finding that policies 13(1)(a) and 15(a) would not be given effect if the plan change was granted meant that King Salmon's application in relation to Papatua had to be refused. EDS said that the Board had erred in law.

[6] Although the Board was not named as a party to the appeals, it sought leave to make submissions, both in writing and orally, to assist the Court and deal with the questions of law raised in the appeals (including any practical implications) on a non-adversarial basis. The Court issued a minute dated 11 November 2013 noting some difficulties with this, and leaving the application to be resolved at the hearing. In the event, we declined to hear oral submissions from the Board. Further, we have taken no account of the written submissions filed on its behalf. We will give our reasons for this in the separate judgment that we are delivering contemporaneously in relation to the application for leave to appeal.[15]

[7] Before we address the matters at issue in the EDS appeal, we will provide a brief overview of the RMA. This is not intended to be a comprehensive overview but rather to identify aspects that will provide context for the more detailed discussion which follows.

The RMA: a (very) brief overview

[8] The enactment of the RMA in 1991 was the culmination of a lengthy law reform process, which began in 1988 when the Fourth Labour Government was in power. Until the election of the National Government in October 1990, the Hon Geoffrey Palmer MP was the responsible Minister. He introduced the Resource Management Bill into the House in December 1989. Following the change of Government, the Hon Simon Upton MP became the responsible Minister and it washe who moved that the Bill be read for a third time. In his speech, he said that in formulating the key guiding principle, sustainable management of natural and physical resources,[16] "the Government has moved to underscore the shift in focus from planning for activities to regulating their effects ... ".[17]

[9] The RMA replaced a number of different Acts, most notably the Water and Soil Conservation Act 1967 and the Town and Country Planning Act 1977. In place of rules that had become fragmented, overlapping, inconsistent and complicated, the RMA attempted to introduce a coherent, integrated and structured scheme. It identified a specific overall objective (sustainable management of natural and physical resources) and established structures and processes designed to promote that objective. Sustainable management is addressed in Part 2 of the RMA, headed "Purpose and principles". We will return to it shortly.

[10] Under the RMA, there is a three tiered management system – national, regional and district. A "hierarchy" of planning documents is established. Those planning documents deal, variously, with objectives, policies, methods and

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15 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 11.
16 As contained in s 5 of the RMA.
17 (4 July 1991) 516 NZPD 3019.

rules. Broadly speaking, policies implement objectives and methods and rules implement policies. It is important to note that the word "rule" has a specialised meaning in the RMA, being defined to mean "a district rule or a regional rule".[18]

[11] The hierarchy of planning documents is as follows:

(a) First, there are documents which are the responsibility of central government, specifically national environmental standards,[19] national policy statements[20] and New Zealand coastal policy statements.[21] Although there is no obligation to prepare national environmental standards or national policy statements, there must be at least one New Zealand coastal policy statement.[22] Policy statements of whatever type state objectives and policies,[23] which must be given effect to in lower order planning documents.[24] In light of the special definition of the term, policy statements do not contain "rules".

(b) Second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans. There must be at least one regional policy statement for each region,[25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules.[27] Although a regional council is not always required to prepare a regional plan, it must prepare at least one regional coastal plan, approved by the Minister of Conservation, for the marine coastal area in its region.[28] Regional plans must state the objectives for the region, the policies to implement the objectives and the rules (if any) to implement the policies.[29] They may also contain methods other than rules.[30]

(c) Third, there are documents which are the responsibility of territorial authorities, specifically district plans.[31] There must be one district plan for each district.[32] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any)

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18 RMA, s 43AA.
19 Sections 43–44A.
20 Sections 45–55.
21 Sections 56–58A.
22 Section 57(1).
23 Sections 45(1) and 58.
24 See further [31] and [75]–[91] below.
25 RMA, s 60(1).
26 Section 59.
27 Section 62(1).
28 Section 64(1).
29 Section 67(1).
30 Section 67(2)(b).
31 Sections 73–77D.
32 Section 73(1).

to implement the policies.[33] It may also contain methods (not being rules) for implementing the policies.[34]

[12] New Zealand coastal policy statements and regional policy statements cover the coastal environment above and below the line of mean high water springs.[35] Regional coastal plans operate below that line out to the limit of the territorial sea (that is, in the coastal marine area, as defined in s 2),[36] whereas regional and district plans operate above the line.[37]

[13] For present purposes we emphasise three features of this scheme. First, the Minister of Conservation plays a key role in the management of the coastal environment. In particular, he or she is responsible for the preparation and recommendation of New Zealand coastal policy statements, for monitoring their effect and implementation and must also approve regional coastal plans.[38] Further, the Minster shares with regional councils responsibility for the coastal marine area in the various regions.[39]

[14] Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the general is made increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and "rules".

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

[16] In relation to resource consents, the RMA creates six categories of activity, from least to most restricted.[40] The least restricted category is permitted activities, which do not require a resource consent provided they are compliant with any relevant terms of the RMA, any regulations and any plan or proposed plan. Controlled activities, restricted discretionary activities,

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33 Section 75(1).
34 Section 75(2)(b).
35 Sections 56 (which uses the term "coastal environment") and 60(1) (which refers to a regional council's "region": under the Local Government Act 2002, where the boundary of a regional council's region is the sea, the region extends to the outer limit of the territorial sea: see s 21(3) and Part 3 of sch 2). The full extent of the landward side of the coastal environment is unclear as that term is not defined in the RMA: see Nolan, above n 3, at [5.7].
36 RMA, ss 63(2) and 64(1).
37 Section 73(1) and the definition of "district" in s 2.
38 Section 28.
39 Section 30(1)(d).
40 See s 87A.

discretionary and non-complying activities require resource consents, the difference between them being the extent of the consenting authority's power to withhold consent. The final category is prohibited activities. These are forbidden and no consent may be granted for them.

Questions for decision

[17] In granting EDS leave to appeal, this Court identified two questions of law, as follows:[41]

(a) Was the Board of Inquiry's approval of the Papatua plan change one made contrary to ss 66 and 67 of the Act through misinterpretation and misapplication of Policies 8, 13, and 15 of the New Zealand Coastal Policy Statement? This turns on:

(i) Whether, on its proper interpretation, the New Zealand Coastal Policy Statement has standards which must be complied with in relation to outstanding coastal landscape and natural character areas and, if so, whether the Papatua Plan Change complied with s 67(3)(b) of the Act because it did not give effect to Policies 13 and 15 of the New Zealand Coastal Policy Statement.

(ii) Whether the Board properly applied the provisions of the Act and the need to give effect to the New Zealand Coastal Policy Statement under s 67(3)(b) of the Act in coming to a "balanced judgment" or assessment "in the round" in considering conflicting policies.

(b) Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment? This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

We will focus initially on question (a).

First question: proper approach

[18] Before we describe those aspects of the statutory framework relevant to the first question in more detail, we will briefly set out the Board's critical findings in relation to the Papatua plan change. This will provide context for the discussion of the statutory framework that follows.

[19] The Board did not consider that there would be any ecological or biological impacts from the proposed farm at Papatua. The Board's focus was on the adverse effects to outstanding natural character and landscape. The Board said:

> [1235] Port Gore, and in particular Pig Bay, is the site of the proposed Papatua farm. Port Gore, in the overall context of the Sounds, is a

41 *King Salmon* (Leave), above n 10, at [1].

> relatively remote bay. The land adjoining the proposed farm has three areas of different ecological naturalness ranked low, medium and high, within the Cape Lambert Scenic Reserve. All the landscape experts identified part of Pig Bay adjoining the proposed farm as an area of Outstanding Natural Landscape.
>
> [1236] We have found that the effects on natural character at a site level would be high, particularly on the Cape Lambert Reserve, which is recognised as an Area of Outstanding Natural Character. We have also found that there would be high to very high adverse visual effects on an Outstanding Natural Landscape. Thus the directions in Policy 13(1)(a) and Policy 15(1)(a) of the [New Zealand] Coastal Policy Statement would not be given effect to.
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> ...
>
> [1241] We have, also, to balance the adverse effects against the benefits for economic and social well-being, and, importantly, the integrated management of the region's natural and physical resources.
>
> [1242] In this regard, we have already described the bio-secure approach, using three separate groupings. The Papatua site is particularly important, as King Salmon could operate a separate supply and processing chain from the North Island. Management of the biosecurity risks is critical to the success of aquaculture and the provision of three "biosecure" areas through the Plan Change is a significant benefit.
>
> [1243] While the outstanding natural character and landscape values of outer Port Gore count against the granting of this site the advantages for risk management and the ability to isolate this area from the rest of the Sounds is a compelling factor. In this sense the appropriateness for aquaculture, specifically for salmon farming, [weighs] heavily in favour. We find that the proposed Papatua Zone would be appropriate.

[20] As will be apparent from this extract, some of the features which made the site outstanding from a natural character and landscape perspective also made it attractive as a salmon farming site. In particular the remoteness of the site and its location close to the Cook Strait made it attractive from a biosecurity perspective. King Salmon had grouped its nine proposed salmon farms into three distinct geographic areas, the objective being to ensure that if disease occurred in the farms in one area, it could be contained to those farms. This approach had particular relevance to the Papatua site because, in the event of an outbreak of disease elsewhere, King Salmon could operate a separate salmon supply and processing chain from the southern end of the North Island.

Statutory background – Part 2 of the RMA

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to *promote* sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical

resources rather than requiring its achievement in every instance,[42] the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.

[22] Section 5(2) defines "sustainable management" as follows:

> (2) In this Act, *sustainable management* means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while —
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[23] There are two important definitions of words used in s 5(2). First, the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.[43] Second, the word "environment" is defined, also broadly, to include:[44]

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters ...

The term "amenity values" in (c) of this definition is itself widely defined to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[45] Accordingly, aesthetic considerations constitute an element of the environment.

[24] We make four points about the definition of "sustainable management":

(a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.

(b) Second, as we explain in more detail at [92]–[97] below, in the sequence "avoiding, remedying, or mitigating" in subpara (c),

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42 BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago L Rev 51 at 59.

43 RMA, s 3.

44 Section 2.

45 Section 2.

"avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of".[46] The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).

(c) Third, there has been some controversy concerning the effect of the word "while" in the definition. The definition is sometimes viewed as having two distinct parts linked by the word "while".[47] That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in subparas (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development *and protection* of natural and physical resources so as to meet the stated interests – social, economic and cultural well-being as well as health and safety. The use of the word "protection" links particularly to subpara (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in subparas (a) and (b). As we see it, the use of the word "while" before subparas (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".

(d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in subpara (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable

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46 The Environment Court has held on several occasions, albeit in the context of planning documents made under the RMA, that avoiding something is a step short of prohibiting it: see *Wairoa River Canal Partnership v Auckland Regional Council* [2010] 16 ELRNZ 152 (EnvC) at [15]; *Man O'War Station Ltd v Auckland Council* [2013] NZEnvC 233 at [48]. We return to this below.

47 See Nolan, above n 3, at [3.24]; see also Harris, above n 42, at 60–61. Harris concludes that the importance of competing views has been overstated, because the flexibility of the language of s 5(2)(a), (b) and (c) provides ample scope for decision makers to trade off environmental interests against development benefits and vice versa.

management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:[48]

> The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[25] Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in Part 2, ss 6, 7 and 8:

(a) Section 6, headed "Matters of national importance", provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall recognise and provide for" seven matters of national importance. Most relevantly, these include:
   (i) in s 6(a), the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use and development; and
   (ii) in s 6(b), the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

   Also included in s 6(c)–(g) are:
   (iii) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
   (iv) the maintenance and enhancement of public access to and along the coastal marine area;
   (v) the relationship of Maori and their culture and traditions with, among other things, water;
   (vi) the protection of historical heritage from inappropriate subdivision use and development; and
   (vii) the protection of protected customary rights.

(b) Section 7 provides that in achieving the purpose of the RMA, all persons excising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall have particular regard to" certain specified matters, including (relevantly):
   (i) kaitiakitanga and the ethic of stewardship;[49]
   (ii) the efficient use and development of physical and natural resources;[50] and
   (iii) the maintenance and enhancement of the quality of the environment.[51]

(c) Section 8 provides that in achieving the purpose of the RMA, all persons exercising powers and functions under it in relation to managing the use, development and protection of natural and physical resources "shall take into account" the principles of the Treaty of Waitangi.

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48 Resource Management Bill 1989 (224-1), explanatory note at i.
49 RMA, s 7(a) and (aa).
50 Section 7(b).
51 Section 7(f).

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, s 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of s 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[29] The use of the phrase "inappropriate subdivision, use or development" in s 6 raises three points:

(a) First, s 6(a) replaced s 3(c) of the Town and Country Planning Act, which made "the preservation of the natural character of the coastal environment, and the margins of lakes and rivers, and the protection of them from *unnecessary* subdivision and development" a matter of national importance.[52] In s 6(a), the word "inappropriate" replaced the word "unnecessary". There is a question of the significance of this change in wording, to which we will return.[53]

(b) Second, a protection against "inappropriate" development is not

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52 Emphasis added.
53 See [40] below.

necessarily a protection against *any* development. Rather, it allows for the possibility that there may be some forms of "appropriate" development.

(c) Third, there is an issue as to the precise meaning of "inappropriate" in this context, in particular whether it is to be assessed against the particular features of the environment that require protection or preservation or against some other standard. This is also an issue to which we will return.[54]

[30] As we have said, the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to Part 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality. Three of these documents are of particular importance in this case – the NZCPS, the Marlborough Regional Policy Statement[55] and the Sounds Plan.

New Zealand Coastal Policy Statement

(i) General observations

[31] As we have said, the planning documents contemplated by the RMA are part of the legislative framework. This point can be illustrated by reference to the NZCPS, the current version of which was promulgated in 2010.[56] Section 56 identifies the NZCPS's purpose as being "to achieve the purpose of [the RMA] in relation to the coastal environment of New Zealand". Other subordinate planning documents – regional policy statements,[57] regional plans[58] and district plans[59] – must "give effect to" the NZCPS. Moreover, under s 32, the Minister was obliged to carry out an evaluation of the proposed coastal policy statement before it was notified under s 48 for public consultation. That evaluation was required to examine:[60]

(a) the extent to which each objective is *the most appropriate way to achieve the purpose of this Act*; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are *the most appropriate way for achieving the objectives*.

...

[32] In developing and promulgating a New Zealand coastal policy statement, the Minister is required to use either the board of inquiry process set out in ss 47–52 or something similar, albeit less formal.[61] Whatever process is used, there must be a sufficient opportunity for public submissions. The NZCPS was promulgated after a board of

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54 See [98]–[105] below.
55 Marlborough District Council *Marlborough Regional Policy Statement* (1995).
56 The 2010 version of the NZCPS replaced an earlier 1994 version: see [45] below.
57 RMA, s 62(3).
58 Section 67(3)(b).
59 Section 75(3)(b).
60 Section 32(3) (emphasis added), as it was until 2 December 2013. Section 32 as quoted was replaced with a new section by s 70 of the Resource Management Act Amendment Act 2013.
61 Section 46A.

inquiry had considered the draft, received public submissions and reported to the Minister.

[33] Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"[62] and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with Part 2 in particular. Consistently with s 32(3), we will treat its objectives as being the most appropriate way to achieve the purpose of the RMA and its policies as the most appropriate way to achieve its objectives.

[34] We pause at this point to note one feature of the Board's decision, namely that having considered various aspects of the NZCPS in relation to the proposed plan changes, the Board went back to Part 2 when reaching its final determination. The Board set the scene for this approach in the early part of its decision in the following way:[63]

> [76] Part II is a framework against which all the functions, powers, and duties under the RMA are to be exercised for the purposes of giving effect to the RMA. There are no qualifications or exceptions. Any exercise of discretionary judgment is impliedly to be done for the statutory purpose. The provisions for the various planning instruments required under the RMA also confirm the priority of Part II, by making all considerations *subject to Part II* – see for example Sections 51, 61, 66 and 74. The consideration of applications for resource consents is guided by Sections 104 and 105.
>
> ...
>
> [79] We discuss, where necessary, the Part II provisions when we discuss the contested issues that particular provisions apply to. When considering both Plan Change provisions and resource consent applications, the purpose of the RMA as defined in Section 5 is not the starting point, but the finishing point to be considered in the overall exercise of discretion.
>
> [80] It is well accepted that applying Section 5 involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. The RMA has a single purpose. It also allows for the balancing of conflicting considerations in terms of their relative significance or proportion in the final outcome.

[35] The Board returned to the point when expressing its final view:

> [1227] We are to apply the relevant Part II matters when balancing the findings we have made on the many contested issues. Many of those findings relate to different and sometimes competing principles enunciated in Part II of the RMA. We are required to make an overall broad judgment as to whether the Plan Change would promote the single purpose of the RMA – the sustainable management of natural and physical resources. As

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62 NZCPS, above n 13, at 5.
63 *King Salmon* (Board), above n 6. Emphasis in original, citations omitted.

> we have said earlier, Part II is not just the starting point but also the finishing point to be considered in the overall exercise of our discretion.

[36] We will discuss the Board's reliance on Part 2 rather than the NZCPS in reaching its final determination later in this judgment. It sufficient at this stage to note that there is a question as to whether its reliance on Part 2 was justified in the circumstances.

[37] There is one other noteworthy feature of the Board's approach as set out in these extracts. It is that the principles enunciated in Part 2 are described as "sometimes competing".[64] The Board expressed the same view about the NZCPS, namely that the various objectives and policies it articulates compete or "pull in different directions".[65] One consequence is that an "overall broad judgment" is required to reach a decision about sustainable management under s 5(2) and, in relation to the NZCPS, as to "whether the instrument as a whole is generally given effect to".[66]

[38] Two different approaches to s 5 have been identified in the early jurisprudence under the RMA, the first described as the "environmental bottom line" approach and the second as the "overall judgment" approach.[67] A series of early cases in the Planning Tribunal set out the "environmental bottom line" approach.[68] In *Shell Oil New Zealand Ltd v Auckland City Council*, the Tribunal said that s 5(2)(a), (b) and (c):[69]

> ... may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource ... is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the [RMA] must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.
>
> In this case there is no great issue with s 5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the [RMA] is not achieved.

In *Campbell v Southland District Council*, the Tribunal said:[70]

> Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. ... [T]he definition in s 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue ... .

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64 *King Salmon* (Board), above n 6, at [1227].

65 At [1180], adopting the language of Ms Sarah Dawson, a planning consultant for King Salmon. This paragraph of the Board's determination, along with others, is quoted at [81] below.

66 At [1180].

67 See Jim Milne "Sustainable Management" in *DSL Environmental Handbook* (Brookers, Wellington, 2004) vol 1.

68 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

69 *Shell Oil New Zealand Ltd v Auckland City Council*, above n 68, at 10.

70 *Campbell v Southland District Council*, above n 68, at 66.

[39] The "overall judgment" approach seems to have its origin in the judgment of Grieg J in *New Zealand Rail Ltd v Marlborough District Council*, in the context of an appeal relating to a number of resource consents for the development of a port at Shakespeare Bay.[71] The Judge rejected the contention that the requirement in s 6(a) to preserve the natural character of a particular environment was absolute.[72] Rather, Grieg J considered that the preservation of natural character was subordinate to s 5's primary purpose, to promote sustainable management. The Judge described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management.[73]

[40] Greig J pointed to the fact that under previous legislation there was protection of natural character against "unnecessary" subdivision and development. This, the Judge said, was stronger than the protection in s 6(a) against "inappropriate" subdivision, use and development:[74] the word "inappropriate" had a wider connotation than "unnecessary".[75] The question of inappropriateness had to be determined on a case-by-case basis in the particular circumstances. The Judge said:[76]

> It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the [RMA] expresses in ordinary words of wide meaning the overall purpose and principles of the [RMA]. It is not, I think, a part of the [RMA] which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the [RMA].
>
> In the end I believe the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the [RMA] or its intention. I do not think that the Tribunal erred as a matter of

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71 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
72 At 86.
73 At 85.
74 Town and Country Planning Act 1977, s 3(1).
75 *New Zealand Rail Ltd*, above n 71, at 85.
76 At 85–86.

> law. In the end it correctly applied the principles of the [RMA] and had regard to the various matters to which it was directed. It is the Tribunal which is entrusted to construe and apply those principles, giving the weight that it thinks appropriate. It did so in this case and its decision is not subject to appeal as a point of law.

[41] In *North Shore City Council v Auckland Regional Council*, the Environment Court discussed New Zealand Rail and said that none of the s 5(2)(a), (b) or (c) considerations necessarily trumped the others – decision makers were required to balance all relevant considerations in the particular case.[77] The Court said:[78]

> We have considered in light of those remarks [in New Zealand Rail] the method to be used in applying s 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or fully attain, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject s 5(2) to the strict rules and proposal of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court – formerly the Planning Tribunal) alluded to in the [*New Zealand Rail*] case.
>
> ...
>
> *The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the [RMA] has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*

[42] The Environment Court has said that the NZCPS is to be approached in the same way.[79] The NZCPS "is an attempt to more explicitly state the tensions which are inherent within Part 2 of the [RMA]".[80] Particular policies in the NZCPS may be irreconcilable in the context of a particular case.[81] No

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77 *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347; aff'd *Green & McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519 (HC).

78 *North Shore City Council v Auckland Regional Council*, above n 77, at 347 (emphasis added). One commentator expresses the view that the effect of the overall judgment approach in relation to s 5(2) is "to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case": see IH Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago L R 673 at 682.

79 See, for example, *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 and *Man O'War Station*, above n 46.

80 *Ngai Te Rangi Iwi Trust*, above n 79, at [257].

81 At [258].

individual objective or policy from the NZCPS should be interpreted as imposing a veto.[82] Rather, where relevant provisions from the NZCPS are in conflict, the court's role is to reach an "overall judgment" having considered all relevant factors.[83]

[43] The fundamental issue raised by the EDS appeal is whether the "overall judgment" approach as the Board applied it is consistent with the legislative framework generally and the NZCPS in particular. In essence, the position of EDS is that, once the Board had determined that the proposed salmon farm at Papatua would have high adverse effects on the outstanding natural character of the area and its outstanding natural landscape, so that policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to, it should have refused the application. EDS argued, then, that there is an "environmental bottom line" in this case, as a result of the language of policies 13(1)(a) and 15(a).

[44] The EDS appeal raises a number of particular issues – the nature of the obligation to "give effect to" the NZCPS, the meaning of "avoid" and the meaning of "inappropriate". As will become apparent, all are affected by the resolution of the fundamental issue just identified.

(ii) Objectives and policies in the NZCPS

[45] Section 57(1) of the RMA requires that there must "at all times" be at least one New Zealand coastal policy statement prepared and recommended by the Minister of Conservation following a statutorily-mandated consultative process. The first New Zealand coastal policy statement was issued in May 1994.[84] In 2003 a lengthy review process was initiated. The process involved: an independent review of the policy statement, which was provided to the Minster in 2004; the release of an issues and options paper in 2006; the preparation of the proposed new policy statement in 2007; public submissions and board of inquiry hearings on the proposed statement in 2008; and a report from the board of inquiry to the Minister in 2009. All this culminated in the NZCPS, which came into effect in December 2010.

[46] Under s 58, a New Zealand coastal policy statement may state objectives and policies about any one or more of certain specified matters. Because they are not mentioned in s 58, it appears that such a statement was not intended to include "methods", nor can it contain "rules" (given the special statutory definition of "rules").[85]

[47] As we discuss in more detail later in this judgment, Mr Kirkpatrick for EDS argued that s 58(a) is significant in the present context because it contemplates that a New Zealand coastal policy statement may contain "national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate

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82 *Man O'War Station*, above n 46, at [41]–[43].

83 *Ngai Te Rangi Iwi Trust*, above n 79, at [258].

84 "Notice of the Issue of the New Zealand Coastal Policy Statement" (5 May 1994) 42 *New Zealand Gazette* 1563.

85 In contrast, s 62(e) of the RMA provides that a regional policy statement must state "the methods (excluding rules) used, or to be used, to implement the policies". Sections 67(1)(a)–(c) and 75(1)(a)–(c) provide that regional and district plans must state the objectives for the region/district, the policies to implement the objectives and the rules (if any) to implement the policies. Section 43AA provides that rule means "a district or regional rule" Section 43AAB defines regional rule as meaning "a rule made as part of a regional plan or proposed regional plan in accordance with section 68".

subdivision, use and development". While counsel were agreed that the current NZCPS does not contain national priorities in terms of s 58(a),[86] this provision may be important because the use of the words "priorities", "preservation" and "protection" (together with "inappropriate") suggests that the RMA contemplates what might be described as "environmental bottom lines". As in s 6, the word "inappropriate" appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are "inappropriate".

[48] The NZCPS contains seven objectives and 29 policies. The policies support the objectives. Two objectives are of particular importance in the present context, namely objectives 2 and 6.[87]

[49] Objective 2 provides:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
> - encouraging restoration of the coastal environment.

Three aspects of objective 2 are significant. First, it is concerned with preservation and protection of natural character, features and landscapes. Second, it contemplates that this will be achieved by articulating the elements of natural character and features and identifying areas which possess such character or features. Third, it contemplates that some of the areas identified may require protection from "inappropriate" subdivision, use and development.

[50] Objective 6 provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

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86 The 1994 version of the New Zealand coastal policy statement did contain a number of national priorities.

87 It should be noted that the NZCPS provides that the numbering of objectives and policies is for convenience and is not to be interpreted as an indication of relative importance: see NZCPS, above n 13, at 8.

- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the coastal environment contains renewable energy resources of significant value;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;
- the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

[51] Objective 6 is noteworthy for three reasons:

(a) First, it recognises that some developments which are important to people's social, economic and cultural well-being can only occur in coastal environments.

(b) Second, it refers to use and development not being precluded "in appropriate places and forms" and "within appropriate limits". Accordingly, it is envisaged that there will be places that are "appropriate" for development and others that are not.

(c) Third, it emphasises management under the RMA as an important means by which the natural resources of the coastal marine area can be protected. This reinforces the point previously made, that one of the components of sustainable management is the protection and/or preservation of deserving areas.

[52] As we have said, in the NZCPS there are 29 policies that support the seven objectives. Four policies are particularly relevant to the issues in the EDS appeal: policy 7, which deals with strategic planning; policy 8, which deals with aquaculture; policy 13, which deals with preservation of natural character; and policy 15, which deals with natural features and natural landscapes.

[53] Policy 7 provides:

Strategic planning

(1) In preparing regional policy statements, and plans:

(a) consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level; and

(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

(i) are inappropriate; and

(ii) may be inappropriate without the consideration of effects

> through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.
>
> (2) Identify in regional policy statements, and plans, coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects. Include provisions in plans to manage these effects. Where practicable, in plans, set thresholds (including zones, standards or targets), or specify acceptable limits to change, to assist in determining when activities causing adverse cumulative effects are to be avoided.

[54] Policy 7 is important because of its focus on strategic planning. It requires the relevant regional authority to look at its region as a whole in formulating a regional policy statement or plan. As part of that overall assessment, the regional authority must identify areas where particular forms of subdivision, use or development "are" inappropriate, or "may be" inappropriate without consideration of effects through resource consents or other processes, and must protect them from inappropriate activities through objectives, policies and rules. Policy 7 also requires the regional authority to consider adverse cumulative effects.

[55] There are two points to be made about the use of "inappropriate" in policy 7. First, if "inappropriate", development is not permitted, although this does not necessarily rule out any development. Second, what is "inappropriate" is to be assessed against the nature of the particular area under consideration in the context of the region as a whole.

[56] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
>
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[57] The importance of policy 8 will be obvious. Local authorities are to recognise aquaculture's potential by including in regional policy statements and regional plans provision for aquaculture "in appropriate places" in the coastal environment. Obviously, there is an issue as to the meaning of "appropriate" in this context.

[58] Finally, there are policies 13 and 15. Their most relevant feature is that, in order to advance the specified overall policies, they state policies of avoiding adverse effects of activities on natural character in areas of outstanding natural character and on outstanding natural features and outstanding natural landscapes in the coastal environment.

[59] Policy 13 provides:

> **Preservation of natural character**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> including by:
>
> (c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
>
> (d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.
>
> (2) Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
>
> (a) natural elements, processes and patterns;
>
> (b) biophysical, ecological, geological and geomorphological aspects;
>
> (c) natural landforms such as headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs and surf breaks;
>
> (d) the natural movement of water and sediment;
>
> (e) the natural darkness of the night sky;
>
> (f) places or areas that are wild or scenic;
>
> (g) a range of natural character from pristine to modified; and
>
> (h) experiential attributes, including the sounds and smell of the sea; and their context or setting.

[60] Policy 15 provides:

> **Natural features and natural landscapes**

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:
  (i) natural science factors, including geological, topographical, ecological and dynamic components;
  (ii) the presence of water including in seas, lakes, rivers and streams;
  (iii) legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes;
  (iv) aesthetic values including memorability and naturalness;
  (v) vegetation (native and exotic);
  (vi) transient values, including presence of wildlife or other values at certain times of the day or year;
  (vii) whether the values are shared and recognised;
  (viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;
  (ix) historical and heritage associations; and
  (x) wild or scenic values;
(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and
(e) including the objectives, policies and rules required by (d) in plans.

[61] As can be seen, policies 13(1)(a) and (b) and 15(a) and (b) are to similar effect. Local authorities are directed to avoid adverse effects of activities on natural character in areas of outstanding natural character (policy 13(1)(a)), or on outstanding natural features and outstanding natural landscapes (policy 15(a)). In other contexts, they are to avoid "significant" adverse effects and to "avoid, remedy or mitigate" other adverse effects of activities (policies 13(1)(b) and 15(b)).

[62] The overall purpose of these directions is to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development (policy 13) or to protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision,

use and development (policy 15). Accordingly, then, the local authority's obligations vary depending on the nature of the area at issue. Areas which are "outstanding" receive the greatest protection: the requirement is to "avoid adverse effects". Areas that are not "outstanding" receive less protection: the requirement is to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects.[88] In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of", but that is an issue to which we return at [92] below.

[63] Further, policies 13 and 15 reinforce the strategic and comprehensive approach required by policy 7. Policy 13(1)(c) and (d) require local authorities to assess the natural character of the relevant region by identifying "at least areas of high natural character" and to ensure that regional policy statements and plans include objectives, policies and rules where they are required to preserve the natural character of particular areas. Policy 15(d) and (e) have similar requirements in respect of natural features and natural landscapes requiring protection.

Regional policy statement

[64] As we have said, regional policy statements are intended to achieve the purpose of the RMA "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[89] They must address a range of issues[90] and must "give effect to" the NZCPS.[91]

[65] The Marlborough Regional Policy Statement became operative on 28 August 1995, when the 1994 version of the New Zealand coastal policy statement was in effect. We understand that it is undergoing revision in light of the NZCPS. Accordingly, it is of limited value in the present context. That said, the Marlborough Regional Policy Statement does form part of the relevant context in relation to the development and protection of areas of natural character in the Marlborough Sounds.

[66] The Marlborough Regional Policy Statement contains a section on subdivision, use and development of the coastal environment and another on visual character, which includes a policy on outstanding landscapes. The policy dealing with subdivision, use and development of the coastal environment is framed around the concepts of "appropriate" and "inappropriate" subdivision, use and development. It reads:[92]

> 7.2.8 **POLICY – COASTAL ENVIRONMENT**
>
> Ensure the appropriate subdivision, use and development of the coastal environment.

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88 The Department of Conservation explains that the reason for the distinction between "outstanding" character/features/landscapes and character/features/landscapes more generally is to "provide the greatest protection for areas of the coastal environment with the highest natural character": Department of Conservation *NZCPS 2010 Guidance Note – Policy 13: Preservation of Natural Character* (September 2013) at 14; and Department of Conservation *NZCPS 2010 Guidance Note – Policy 15: Natural Features and Natural Landscapes* (September 2013) at 15.

89 RMA, s 59.

90 Section 62(1).

91 Section 62(3).

92 Italics in original.

Subdivision, use and development will be encouraged in areas where the natural character of the coastal environment has already been compromised. Inappropriate subdivision, use and development will be avoided. The cumulative adverse effects of subdivision, use or development will also be avoided, remedied or mitigated.

Appropriate subdivision, use and development of the coastal environment enables the community to provide for its social, economic and cultural wellbeing.

[67] The methods to implement this policy are then addressed, as follows:

7.2.9 **METHODS**

(a) Resource management plans will identify criteria to indicate where subdivision, use and development will be appropriate.

The [RMA] requires as a matter of national importance that the coastal environment be protected from inappropriate subdivision, use and development. Criteria to indicate where subdivision, use or development is inappropriate may include water quality; landscape features; special habitat; natural character; and risk of natural hazards, including areas threatened by erosion, inundation or sea level rise.

(b) Resource management plans will contain controls to manage subdivision, use and development of the coastal environment to avoid, remedy or mitigate any adverse environmental effects.

Controls which allow the subdivision, use and development of the coastal environment enable the community to provide for their social, economic and cultural wellbeing. These controls may include financial contributions to assist remediation or mitigation of adverse environmental effects.

Such development may be allowed where there will be no adverse effects on the natural character of the coastal environment, and in areas where the natural character has already been compromised. Cumulative effects of subdivision, use and development will also be avoided, remedied or mitigated.

[68] As to the outstanding landscapes policy, and the method to achieve it, the commentary indicates that the effect of any proposed development will be assessed against the criteria that make the relevant landscape outstanding; that is, the standard of "appropriateness". Policy 8.1.3 reads in full:[93]

8.1.3 **POLICY – OUTSTANDING LANDSCAPES**

Avoid, remedy or mitigate the damage of identified outstanding landscape features arising from the effects of excavation, disturbance of vegetation, or erection of structures.

The Resource Management Act requires the protection of outstanding landscape features as a matter of national importance. Further, the

93 Italics in original.

> *New Zealand Coastal Policy Statement [1994] requires this protection for the coastal environment. Features which satisfy the criteria for recognition as having national and international status will be identified in the resource management plans for protection. Any activities or proposals within these areas will be considered on the basis of their effects on the criteria which were used to identify the landscape features.*
>
> *The wellbeing of the Marlborough community is linked to the quality of our landscape. Outstanding landscape features need to be retained without degradation from the effects of land and water based activities, for the enjoyment of the community and visitors.*

Regional and district plans

[69] Section 64 of the RMA requires that there be a regional coastal plan for the Marlborough Sounds. One of the things that a regional council must do in developing a regional coastal plan is act in accordance with its duty under s 32 (which, among other things, required an evaluation of the risks of acting or not acting in circumstances of uncertainty or insufficient information).[94] A regional coastal plan must state the objectives for the region, policies to implement the objectives and rules (if any) to implement the policies[95] and must "give effect to" the NZCPS and to any regional policy statement.[96] It is important to emphasise that the plan is a *regional* one, which raises the question of how spot zoning applications such as that relating to Papatua are to be considered. It is obviously important that the regional integrity of a regional coastal plan not be undermined.

[70] We have observed that policies 7, 13 and 15 in the NZCPS require a strategic and comprehensive approach to regional planning documents. To reiterate, policy 7(1)(b) requires that, in developing regional plans, entities such as the Marlborough District Council:

> identify areas of the coastal environment where particular activities and forms of subdivision, use, and development:
>
> (i) are inappropriate; and
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

Policies 13(1)(d) and 15(d) require that regional plans identify areas where preserving natural character or protecting natural features and natural landscapes require objectives, policies and rules. Besides highlighting the need for a region – wide approach, these provisions again raise the issue of the meaning of "inappropriate".

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94 RMA, s 32(4)(b) as it was at the relevant time (see above n 60 for the legislative history).
95 Section 67(1).
96 Section 67(3)(b).

[71] The Marlborough District Council is a unitary authority with the powers, functions and responsibilities of both a regional and district council.[97] It is responsible for the Sounds Plan, which is a combined regional, regional coastal and district plan for the Marlborough Sounds. The current version of the Sounds Plan became operative on 25 August 2011. It comprises three volumes, the first containing objectives, policies and methods, the second containing rules and the third maps. The Sounds Plan identifies certain areas within the coastal marine area of the Marlborough Sounds as Coastal Marine Zone One (CMZ1), where aquaculture is a prohibited activity, and others as Coastal Marine Zone Two (CMZ2), where aquaculture is either a controlled or a discretionary activity. It describes areas designated CMZ1 as areas "where marine farming will have a significant adverse effect on navigational safety, recreational opportunities, natural character, ecological systems, or cultural, residential or amenity values".[98] The Board created a new zoning classification, Coastal Marine Zone Three (CMZ3), to apply to the four areas previously zoned CMZ1) in respect of which it granted plan changes to permit salmon farming.

[72] In developing the Sounds Plan the Council classified and mapped the Marlborough Sounds into management areas known as Natural Character Areas. These classifications were based on a range of factors which went to the distinctiveness of the natural character within each area.[99] The Council described the purpose of this as follows:[100]

> *This natural character information is a relevant tool for management in helping to identify and protect those values that contribute to people's experience of the Sounds area. Preserving natural character in the Marlborough Sounds as a whole depends both on the overall pattern of use, development and protection, as well as maintaining the natural character of particular areas. The Plan therefore recognises that preservation of the natural character of the constituent natural character areas is important in achieving preservation of the natural character of the Marlborough Sounds as a whole.*
>
> The Plan requires that plan change and resource consent applications be assessed with regard to the natural character of the Sounds as a whole as well as each natural character area, or areas where appropriate. ...

[73] In addition, the Council assessed the landscapes in the Marlborough Sounds for the purpose of identifying those that could be described as outstanding. It noted that, as a whole, the Marlborough Sounds has outstanding visual values and identified the factors that contribute to that. Within the overall Marlborough Sounds landscape, however, the Council identified particular landscapes as "outstanding". The Sounds Plan describes the criteria against

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97 Sounds Plan, above n 1, at [1.0].
98 At [9.2.2].
99 At Appendix 2.
100 At [2.1.6]. Italics in original.

which the Council made the assessment[101] and contains maps that identify the areas of outstanding landscape value, which are relatively modest given the size of the region.[102] It seems clear from the Sounds Plan that the exercise was a thoroughgoing one.

[74] In 2009, the Council completed a landscape and natural character review of the Marlborough Sounds, which confirmed the outstanding natural character and outstanding natural landscape of the Port Gore area.[103]

Requirement to "give effect to" the NZCPS

[75] For the purpose of this discussion, it is important to bear two statutory provisions in mind. The first is s 66(1), which provides that a regional council shall prepare and change any regional plan[104] in accordance with its functions under s 30, the provisions of Part 2, a direction given under s 25A(1), its duty under s 32, and any regulations. The second is s 67(3), which provides that a regional plan must "give effect to" any national policy statement, any New Zealand coastal policy statement and any regional policy statement. There is a question as to the interrelationship of these provisions.

[76] As we have seen, the RMA requires an extensive process prior to the issuance of a New Zealand coastal policy statement – an evaluation under s 32, then a board of inquiry or similar process with the opportunity for public input. This is one indication of such a policy statement's importance in the statutory scheme. A further indication is found in the requirement that the NZCPS must be given effect to in subordinate planning documents, including regional policy statements and regional and district plans.[105] We are concerned with a regional coastal plan, the Sounds Plan. Up until August 2003, s 67 provided that such a regional plan should "not be inconsistent with" any New Zealand coastal policy statement. Since then, s 67 has stated the regional council's obligation as being to "give effect to" any New Zealand coastal policy statement. We consider that this change in language has, as the Board acknowledged,[106] resulted in a strengthening of the regional council's obligation.

[77] The Board was required to "give effect to" the NZCPS in considering King Salmon's plan change applications. "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:[107]

> [51] The phrase "*give effect to*" is a strong direction. This is understandably so for two reasons:
>
> [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
>
> [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

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101 At ch 5 and Appendix 1.
102 At vol 3.
103 *King Salmon* (Board), above n 6, at [555] and following.
104 The term "regional plan" includes a regional coastal plan: see RMA, s 43AA.
105 See [31] above.
106 *King Salmon* (Board), above n 6, at [1179].
107 *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

[78] Further, the RMA provides mechanisms whereby the implementation of the NZCPS by regional authorities can be monitored. One of the functions of the Minister of Conservation under s 28 of the RMA is to monitor the effect and implementation of the NZCPS. In addition, s 293 empowers the Environment Court to monitor whether a proposed policy statement or plan gives effect to the NZCPS; it may allow departures from the NZCPS only if they are of minor significance and do not affect the general intent and purpose of the proposed policy statement or plan.[108] The existence of such mechanisms underscores the strength of the "give effect to" direction.

[79] The requirement to "give effect to" the NZCPS gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.

[80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

[81] The Board developed this point in its discussion of the requirement that it give effect to the NZCPS and the Marlborough Regional Policy Statement (in the course of which it also affirmed the primacy of s 5 over the NZCPS and the perceived need for the "overall judgment" approach). It said:[109]

> [1180] It [that is, the requirement to give effect to the NZCPS] is a strong direction and requires positive implementation of the instrument. However, both the instruments contain higher order overarching objectives and policies, that create tension between them or, as [counsel] says, "pull in different directions", and thus a judgment has to be made as to whether the instrument as a whole is generally given effect to.
>
> [1181] Planning instruments, particularly of a higher order, nearly always contain a wide range of provisions. Provisions which are sometimes in conflict. The direction "to give effect to" does not enjoin that every policy be met. It is not a simple check-box exercise. Requiring that every single policy must be given full effect to would otherwise set an impossibly high threshold for any type of activity to occur within the coastal marine area.
>
> [1182] Moreover, there is no "hierarchy" or ranking of provisions in the [NZCPS]. The objective seeking ecological integrity has the same standing as that enabling subdivision, use and development within the coastal environment. Where there are competing values in a proposal, one does not automatically prevail over the other. It is a matter of judgement on the facts

108 RMA, s 293(3)–(5).
109 *King Salmon* (Board), above n 6 (citations omitted).

of a particular proposal and no one factor is afforded the right to veto all other considerations. It comes down to a matter of weight in the particular circumstances.

[1183] In any case, the directions in both policy statements are subservient to the Section 5 purpose of sustainable management, as Section 66 of the RMA requires a council to change its plan in accordance, among other things, the provisions of Part II. Section 68(1) of the RMA requires that rules in a regional plan may be included for the purpose of carrying out the functions of the regional council and achieving the objectives and policies of the Plan.

[1184] Thus, we are required [to] "give effect to" the provisions of the [NZCPS] and the Regional Policy Statement having regard to the provisions of those documents as a whole. We are also required to ensure that the rules assist the Regional Council in carrying out its functions under the RMA and achieve the objective and policies of the Regional Plan.

[82] Mr Kirkpatrick argued that there were two errors in this extract:

(a) it asserted that there was a state of tension or conflict in the policies of the NZCPS without analysing the relevant provisions to see whether such a state actually existed; and

(b) it assumed that "generally" giving effect to the NZCPS "as a whole" was compliant with s 67(3)(b).

[83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations. We discuss at [106]–[148] below whether this approach is correct.

[84] Moreover, as we indicated at [34]–[36] above, and as [1183] in the extract just quoted demonstrates, the Board ultimately determined King Salmon's applications not by reference to the NZCPS but by reference to Part 2 of the RMA. It did so because it considered that the language of s 66(1) required that approach. Ms Gwyn for the Minister supported the Board's approach. We do not accept that it is correct.

[85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional

council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[86] Second, there are contextual considerations supporting this interpretation:

(a) As will be apparent from what we have said above, there is a reasonably elaborate process to be gone through before the Minister is able to issue a New Zealand coastal policy statement, involving an evaluation under s 32 and a board of inquiry or similar process with opportunity for public input. Given that process, we think it implausible that Parliament intended that the ultimate determinant of an application such as the present would be Part 2 and not the NZCPS. The more plausible view is that Parliament considered that Part 2 would be implemented if effect was given to the NZCPS.

(b) National policy statements such as the NZCPS allow Ministers a measure of control over decisions by regional and district councils. Accordingly, it is difficult to see why the RMA would require regional councils, as a matter of course, to go beyond the NZCPS, and back to Part 2, when formulating or changing a regional coastal plan which must give effect to the NZCPS. The danger of such an approach is that Part 2 may be seen as "trumping" the NZCPS rather than the NZCPS being the mechanism by which Part 2 is given effect in relation to the coastal environment.[110]

[87] Mr Nolan for King Salmon advanced a related argument as to the relevance of Part 2. He submitted that the purpose of the RMA as expressed in Part 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so, the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.

[88] Before addressing this submission, we should identify three caveats to the "in principle" answer we have just given. First, no party challenged the validity of the NZCPS or any part of it. Obviously, if there was an allegation going to the lawfulness of the NZCPS, that would have to be resolved before it could be determined whether a decision-maker who gave effect to the NZCPS as it stood was necessarily acting in accordance with Part 2. Second, there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether Part 2 provides assistance in dealing with the matter(s) not covered. Moreover, the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind, including when giving effect to the NZCPS. Third, if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to Part 2 may well be justified to assist in a purposive interpretation. However, this is against the

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110 Indeed, counsel in at least one case has submitted that Part 2 "trumps" the NZCPS: see *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [197].

background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.

[89] We do not see Mr Nolan's argument as falling within the third of these caveats. Rather, his argument is broader in its effect, as it seeks to justify reference back to Part 2 as a matter of course when a decision-maker is required to give effect to the NZCPS.

[90] The difficulty with the argument is that, as we have said, the NZCPS was intended to give substance to the principles in Part 2 in respect of the coastal environment by stating objectives and policies which apply those principles to that environment: the NZCPS translates the general principles to more specific or focussed objectives and policies. The NZCPS is a carefully expressed document whose contents are the result of a rigorous process of formulation and evaluation. It is a document which reflects particular choices. To illustrate, s 5(2)(c) of the RMA talks about "avoiding, remedying or mitigating any adverse effects of activities on the environment" and s 6(a) identifies "the preservation of the natural character of the coastal environment (including the coastal marine area) ... and the protection of [it] from inappropriate subdivision, use and development" as a matter of national importance to be recognised and provided for. The NZCPS builds on those principles, particularly in policies 13 and 15. Those two policies provide a graduated scheme of protection and preservation based on the features of particular coastal localities, requiring avoidance of adverse effects in outstanding areas but allowing for avoidance, mitigation or remedying in others. For these reasons, it is difficult to see that resort to Part 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.

[91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

Meaning of "avoid"

[92] The word "avoid" occurs in a number of relevant contexts. In particular:

(a) Section 5(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

(b) Policy 13(1)(a) provides that decision-makers should "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character"; policy 15 contains

the same language in relation to outstanding natural features and outstanding natural landscapes in the coastal environment.

(c) Policies 13(1)(b) and 15(b) refer to avoiding significant adverse effects, and to avoiding, remedying or mitigating other adverse effects, in particular areas.

[93] What does "avoid" mean in these contexts? As we have said, given the juxtaposition of "mitigate" and "remedy", the most obvious meaning is "not allow" or "prevent the occurrence of". But the meaning of "avoid" must be considered against the background that:

(a) the word "effect" is defined broadly in s 3;

(b) objective 6 recognises that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms and within appropriate limits"; and

(c) both policies 13(1)(a) and (b) and 15(a) and (b) are means for achieving particular goals – in the case of policy 13(1)(a) and (b), preserving the natural character of the coastal environment and protecting it from "inappropriate" subdivision, use and development and, in the case of policy 15(a) and (b), protecting the natural features and natural landscapes of the coastal environment from "inappropriate" subdivision, use and development.

[94] In *Man O'War Station*, the Environment Court said that the word "avoid" in policy 15(a) did not mean "prohibit",[111] expressing its agreement with the view of the Court in *Wairoa River Canal Partnership v Auckland Regional Council*.[112] The Court accepted that policy 15 should not be interpreted as imposing a blanket prohibition on development in any area of the coastal environment that comprises an outstanding natural landscape as that would undermine the purpose of the RMA, including consideration of factors such as social and economic wellbeing.[113]

[95] In the *Wairoa River Canal Partnership* case, an issue arose concerning a policy (referred to as policy 3) proposed to be included in the Auckland Regional Policy Statement. It provided that countryside living (that is, low density residential development on rural land) "avoids development in those areas ... identified ... as having significant, ecological, heritage or landscape value or high natural character" and possessing certain characteristics. The question was whether the word "inappropriate" should be inserted between "avoids" and "development", as sought by Wairoa River Canal Partnership. In the course of addressing that, the Environment Court said that policy 3 did "not attempt to impose a prohibition on development – to avoid is a step short of to prohibit".[114] The Court went on to say that the use of "avoid" "sets a presumption (or a direction to an outcome) that development in those areas will be inappropriate ...".[115]

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111 *Man O'War Station,* above n 46, at [48].
112 *Wairoa River Canal Partnership*, above n 46.
113 *Man O'War Station*, above n 46, at [43].
114 *Wairoa River Canal Partnership*, above n 46, at [15].
115 At [16].

[96] We express no view on the merits of the Court's analysis in the *Wairoa River Canal Partnership* case, which was focussed on the meaning of "avoid", standing alone, in a particular policy proposed for the Auckland Regional Policy Statement. Our concern is with the interpretation of "avoid" as it is used in s 5(2)(c) and in relevant provisions of the NZCPS. In that context, we consider that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". In the sequence "avoiding, remedying, or mitigating any adverse effects of activities on the environment" in s 5(2)(c), for example, it is difficult to see that "avoid" could sensibly bear any other meaning. Similarly in relation to policies 13(1)(a) and (b) and 15(a) and (b), which also juxtapose the words "avoid", "remedy" and "mitigate". This interpretation is consistent with objective 2 of the NZCPS, which is, in part, "[t]o preserve the natural character of the coastal environment and protect natural features and landscape values through ... identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". It is also consistent with objective 6's recognition that protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits". The "does not preclude" formulation emphasises protection by allowing use or development only where appropriate, as opposed to allowing use or development unless protection is required.

[97] However, taking that meaning may not advance matters greatly: whether "avoid" (in the sense of "not allow" or "prevent the occurrence of") bites depends upon whether the "overall judgment" approach or the "environmental bottom line" approach is adopted. Under the "overall judgment" approach, a policy direction to "avoid" adverse effects is simply one of a number of relevant factors to be considered by the decision maker, albeit that it may be entitled to great weight; under the "environmental bottom line" approach, it has greater force.

Meaning of "inappropriate"

[98] Both Part 2 of the RMA and provisions in the NZCPS refer to protecting areas such as outstanding natural landscapes from "inappropriate" development – they do not refer to protecting them from *any* development.[116] This suggests that the framers contemplated that there might be "appropriate" developments in such areas, and raises the question of the standard against which "inappropriateness" is to be assessed.

[99] Moreover, objective 6 and policies 6 and 8 of the NZCPS invoke the standard of "appropriateness". To reiterate, objective 6 provides in part:

> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;

116 RMA, s 6(a) and (b); NZCPS, above n 13, objective 6 and policies 13(1)(a) and 15(a).

This is echoed in policy 6 which deals with activities in the coastal environment. Policy 6(2)(c) reads: "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 8 indicates that regional policy statements and plans should make provision for aquaculture activities:

> ... in appropriate places in the coastal environment, recognising that relevant considerations may include:
>
> (i) the need for high water quality for aquaculture activities; and
> (ii) the need for land-based facilities associated with marine farming;

[100] The scope of the words "appropriate" and "inappropriate" is, of course, heavily affected by context. For example, where policy 8 refers to making provision for aquaculture activities "in appropriate places in the coastal environment", the context suggests that "appropriate" is referring to suitability for the needs of aquaculture (for example, water quality) rather than to some broader notion. That is, it is referring to suitability in a technical sense. By contrast, where objective 6 says that the protection of the values of the coastal environment does not preclude use and development "in appropriate places and forms, and within appropriate limits", the context suggests that "appropriate" is not concerned simply with technical suitability for the particular activity but with a broader concept that encompasses other considerations, including environmental ones.

[101] We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected. It will be recalled that s 6(b) of the RMA provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> ...

A planning instrument which provides that any subdivision, use or development that adversely affects an area of outstanding natural attributes is inappropriate is consistent with this provision.

[102] The meaning of "inappropriate" in the NZCPS emerges from the way in which particular objectives and policies are expressed. Objective 2 deals with preserving the natural character of the coastal environment and protecting natural features and landscape values through, among other things, "identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities". This requirement to identify particular areas, in the context of an overall objective of preservation and protection, makes it clear that the standard for inappropriateness relates back to the natural character and other attributes that are to be preserved or protected, and also emphasises that the NZCPS requires a strategic,

region-wide approach. The word "inappropriate" in policies 13(1)(a) and (b) and 15(a) and (b) of the NZCPS bears the same meaning. To illustrate, the effect of policy 13(1)(a) is that there is a policy to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development *by avoiding the adverse effects on natural character in areas of the coastal environment with outstanding natural character.* The italicised words indicate the meaning to be given to "inappropriate" in the context of policy 13.

[103] If "inappropriate" is interpreted in the way just described, it might be thought to provide something in the nature of an "environmental bottom line". However, that will not necessarily be so if policies 13 and 15 and similarly worded provisions are regarded simply as relevant considerations which may be outweighed in particular situations by other considerations favouring development, as the "overall judgment" approach contemplates.

[104] An alternative approach is to treat "inappropriate" (and "appropriate" in objective 6 and policies 6(2)(c) and 8) as the mechanism by which an overall judgment is to be made about a particular development proposal. On that approach, a decision-maker must reach an evaluation of whether a particular development proposal is, in all the circumstances, "appropriate" or "inappropriate". So, an aquaculture development that will have serious adverse effects on an area of outstanding natural character may nevertheless be deemed not to be "inappropriate" if other considerations (such as suitability for aquaculture and economic benefits) are considered to outweigh those adverse effects: the particular site will be seen as an "appropriate" place for aquaculture in terms of policy 8 despite the adverse effects.

[105] We consider that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning. The same applies to objective 2 and policies 13 and 15 in the NZCPS. Again, however, that does not resolve the fundamental issue in the case, namely whether the "overall judgment" approach adopted by the Board is the correct approach. We now turn to that.

Was the Board correct to utilise the "overall judgment" approach?

[106] In the extracts from its decision which we have quoted at [34]–[35] and [81] above, the Board emphasised that in determining whether or not it should grant the plan changes, it had to make an "overall judgment" on the facts of the particular proposal and in light of Part 2 of the RMA.

[107] We noted at [38] above that several early decisions of the Planning Tribunal adopted what has been described as the "environmental bottom line" approach to s 5. That approach finds some support in the speeches of responsible Ministers in the House. In the debate on the second reading of the Resource Management Bill, the Rt Hon Geoffrey Palmer said:[117]

> The Bill as reported back does not reflect a wish list of any one set of views. Instead, it continues to reflect the balancing of the range of views that society holds about the use of land, air, water and minerals, while recognising that there is an ecological bottom line to all of those questions.

117 (28 August 1990) 510 NZPD 3950.

In introducing the Bill for its third reading, the Hon Simon Upton said:[118]

> The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. Clause 4 [now s 5] sets out the biophysical bottom line. Clauses 5 and 6 [now ss 6 and 7] set out further specific matters that expand on the issue. The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

[108] In the plan change context under consideration, the "overall judgment" approach does not recognise any such bottom lines, as Dobson J accepted. The Judge rejected the view that some coastal environments could be excluded from marine farming activities absolutely as a result of their natural attributes. That approach, he said, "would be inconsistent with the evaluative tenor of the NZCPS, when assessed in the round".[119] Later, the Judge said:[120]

> The essence of EDS's concern is to question the rationale, in resource management terms, for designating coastal areas as having outstanding natural character or features, if that designation does not protect the area from an economic use that will have adverse effects. An answer to that valid concern is that such designations do not afford absolute protection. Rather, they require a materially higher level of justification for relegating that outstanding natural character or feature, when authorising an economic use of that coastal area, than would be needed in other coastal areas.

Accordingly, Dobson J upheld the "overall judgment" approach as the approach to be adopted.

[109] One noteworthy feature of the extract just quoted is the requirement for "a materially higher level of justification" where an area of outstanding natural character will be adversely affected by a proposed development. The Board made an observation to similar effect when it said:[121]

> [1240] The placement of any salmon farm into this dramatic landscape with its distinctive landforms, vegetation and seascape, would be an abrupt incursion. This together with the Policy directions of the Sounds Plan as indicated by its CMZ1 classification of Port Gore, weighs heavily against the Proposed Plan Change.

We consider these to be significant acknowledgements and will return to them shortly.

[110] Mr Kirkpatrick argued that the Board and the Judge were wrong to adopt the "overall judgment" approach, submitting in particular that it:

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118 (4 July 1991) 516 NZPD 3019.
119 *King Salmon* (HC), above n 2, at [149].
120 At [151].
121 *King Salmon* (Board), above n 6.

(a) is inconsistent with the Minister's statutory power to set national priorities "for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use, and development";[122] and

(b) does not reflect the language of the relevant policies of the NZCPS, in particular policies 8, 13 and 15.

[111] In response, Ms Gwyn emphasised that the policies in the NZCPS were policies, not standards or rules. She argued that the NZCPS provides direction for decision-makers (including boards of inquiry) but leaves them with discretion as to how to give effect to the NZCPS. Although she acknowledged that policies 13 and 15 give a strong direction, Ms Gwyn submitted that they cannot and do not prohibit activities that adversely affect coastal areas with outstanding features. Where particular policies are in conflict, the decision-maker is required to exercise its own judgment, as required by Part 2. Mr Nolan's submissions were to similar effect. While he accepted that some objectives or policies provided more guidance than others, they were not "standards or vetos". Mr Nolan submitted that this was "the only tenable, workable approach that would achieve the RMA's purpose". The approach urged by EDS would, he submitted, undermine the RMA's purpose by allowing particular considerations to trump others whatever the consequences.

(i) The NZCPS: policies and rules

[112] We begin with Ms Gwyn's point that the NZCPS contains objectives and policies rather than methods or rules. As Ms Gwyn noted, the Full Court of the Court of Appeal dealt with a similar issue in *Auckland Regional Council v North Shore City Council*.[123] The Auckland Regional Council was in the process of hearing and determining submissions in respect of its proposed regional policy statement. That proposed policy statement included provisions which were designed to limit urban development to particular areas (including demarking areas by lines on maps). These provisions were to have a restrictive effect on the power of the relevant territorial authorities to permit further urbanisation in particular areas; the urban limits were to be absolutely restrictive.[124]

[113] The Council's power to impose such restrictions was challenged. The contentions of those challenging these limits were summarised by Cooke P, delivering the judgment of the Court, as follows:[125]

> The defendants contend that the challenged provisions would give the proposed regional policy statement a master plan role, interfering with the proper exercise of the responsibilities of territorial authorities; that it would be "coercive" and that "The drawing of a line on a map is the ultimate rule. There is no scope for further debate or discretion. No further provision can be made in a regional plan or a district plan".

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122 RMA, s 58(a).
123 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
124 At 19.
125 At 22.

The defendants' essential point was that the Council was proposing to go beyond a policy-making role to a rule-making role, which it was not empowered to do under the RMA.

[114] The Court considered, however, that the defendants' contention placed too limited a meaning on the scope of the words "policy" and "policies" in ss 59 and 62 of the RMA (which deal with, respectively, the purpose and content of regional policy statements). The Court held that "policy" should be given its ordinary and natural meaning and that a definition such as "course of action" was apposite. The Court said:[126]

> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. ...

[115] As to the argument that a regional policy statement could not contain what were in effect rules, Cooke P said:[127]

> A well-meant sophistry was advanced to bolster the argument. It was said that the [RMA] in s 2(1) defines "rule" as a district rule or a regional rule, and that the scheme of the [RMA] is that "rules" may be included in regional plans (s 68) or district plans (s 76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the [RMA] does not include direct enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of the rules in district plans or proposed district plans (s 9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the special definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.

(ii) Section 58 and other statutory indicators

[117] We turn next to s 58. It contains provisions which are, in our view, inconsistent with the notion that the NZCPS is, properly interpreted, no more than a statement of relevant considerations, to which a decision-maker is entitled to give greater or lesser weight in the context of determining particular matters. Rather, these provisions indicate that it was intended that a New Zealand coastal policy statement might contain policies that were not

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126 At 23.
127 At 23.

discretionary but would have to be implemented if relevant. The relevant provisions provide for a New Zealand coastal policy statement to contain objectives and policies concerning:

(a) national priorities for specified matters (s 58(a) and (ga));
(b) the Crown's interests in the coastal marine area (s 58(d));
(c) matters to be included in regional coastal plans in regard to the preservation of the natural character of the coastal environment (s 58(e));
(d) the implementation of New Zealand's international obligations affecting the coastal environment (s 58(f));
(e) the procedures and methods to be used to review the policies and monitor their effectiveness (s 58(g)); and
(f) the protection of protected customary rights (s 58 (gb)).

[118] We begin with s 58(a), the language of which is set out at [110(a)] above. It deals with the Minister's ability (by means of the NZCPS) to set national priorities in relation to the preservation of the natural character of the coastal environment. This provision contemplates the possibility of objectives and policies the effect of which is to provide absolute protection from the adverse effects of development in relation to particular areas of the coastal environment. The power of the Minister to set objectives and policies containing national priorities for the preservation of natural character is not consistent with the "overall judgment" approach. This is because, on the "overall judgment" approach, the Minister's assessment of national priorities as reflected in a New Zealand coastal policy statement would not be binding on decision-makers but would simply be a relevant consideration, albeit (presumably) a weighty one. If the Minister did include objectives or policies which had the effect of protecting areas of the coastal environment against the adverse effects of development as national priorities, it is inconceivable that regional councils would be free to act inconsistently with those priorities on the basis that, although entitled to great weight, they were ultimately no more than relevant considerations. The same is true of s 58(ga), which relates to national priorities for maintaining and enhancing public access to and along the coastal marine area (that is, below the line of mean high water springs).

[119] A similar analysis applies in respect of s 58(d), (f) and (gb). These enable the Minister to include in a New Zealand coastal policy statement objectives and policies concerning first, the Crown's interests in the coastal marine area, second, the implementation of New Zealand's international obligations affecting the coastal environment and third, the protection of protected rights. We consider that the Minister is entitled to include in such a statement relevant objectives and policies that are intended, where relevant, to be binding on decision-makers. If policies concerning the Crown's interests, New Zealand's international obligations or the protection of protected rights were to be stated in binding terms, it is difficult to see what justification there could be for interpreting them simply as relevant considerations which a decision-maker would be free to apply or not as it saw appropriate in particular circumstances. The Crown's interests in the coastal marine area, New Zealand's

relevant international obligations and the protection of protected rights are all matters about which it is to be expected that the Minister would have authority to make policies that are binding if he or she considered such policies were necessary.

[120] Next we come to s 58(g), which permits objectives and policies concerning "the procedures and methods to be used to review the policies and to monitor their effectiveness". It will be recalled that one of the responsibilities of the Minister under s 28(d) of the RMA is to monitor the effect and implementation of New Zealand coastal policy statements. The Minister would be entitled, in our view, to set out policies in a New Zealand coastal policy statement that were designed to impose obligations on local authorities so as to facilitate that review and monitoring function. It is improbable that any such policies were intended to be discretionary as far as local authorities were concerned.

[121] Finally, there is s 58(e). It provides that a New Zealand coastal policy statement may state objectives or policies about:

> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value: ...

The term "restricted coastal activity" is defined in s 2 to mean "any discretionary activity or non-complying activity that, in accordance with s 68, is stated by a regional coastal plan to be a restricted coastal activity". Section 68 allows a regional council to include rules in regional plans. Section 68(4) provides that a rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on one of the two grounds contained in s 58(e). The obvious mechanism by which the Minister may require the activity to be specified as a restricted coastal activity is a New Zealand coastal policy statement. Accordingly, although the matters covered by s 58(e) are to be stated as objectives or policies in a New Zealand coastal policy statement, the intention must be that any such requirement will be binding on the relevant regional councils. Given the language and the statutory context, a policy under s 58(e) cannot simply be a factor that a regional council must consider or about which it has discretion.

[122] This view is confirmed by policy 29 in the NZCPS, which states that the Minister does not require any activity to be specified as a restricted coastal activity in a regional coastal plan and directs local authorities that they must amend documents in the ways specified to give effect to this policy as soon as practicable. Policy 29 is highly prescriptive and illustrates that a policy in a New Zealand coastal policy statement may have the effect of what, in ordinary speech, might be described as a rule (because it must be observed), even though it would not be a "rule" under the RMA definition.

[123] In addition to these provisions in s 58, we consider that s 58A offers assistance. It provides that a New Zealand coastal policy statement may incorporate material by reference under sch 1AA of the RMA. Clause 1 of sch 1AA relevantly provides:

> **1 Incorporation of documents by reference**
>
> (1) The following written material may be incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement:
>
> (a) standards, requirements, or recommended practices of international or national organisations:
>
> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> ...
>
> (3) Material incorporated by reference in a national environmental standard, national policy statement, or New Zealand coastal policy statement has legal effect as part of the standard or statement.

[124] As can be seen, cl 1 envisages that a New Zealand coastal statement may contain objectives or policies that refer to standards, requirements or recommended practices of international and national organisations. This also suggests that Parliament contemplated that the Minister might include in a New Zealand coastal policy statement policies that, in effect, require adherence to standards or impose requirements, that is, policies that are prescriptive and are expected to be followed. If this is so, a New Zealand coastal policy statement cannot properly be viewed as simply a document which identifies a range of potentially relevant policies, to be given effect in subordinate planning documents as decision-makers consider appropriate in particular circumstances.

[125] Finally in this context, we mention ss 55 and 57. Section 55(2) relevantly provides that, if a national policy statement so directs, a regional council[128] must amend a regional policy statement or regional plan to include specific objectives or policies or so that objectives or policies in the regional policy statement or regional plan "give effect to objectives and policies specified in the [national policy] statement". Section 55(3) provides that a regional council "must also take any other action that is specified in the national policy statement". Under s 57(2), s 55 applies to a New Zealand coastal policy statement as if it were a national policy statement "with all necessary modifications". Under s 43AA the term "regional plan" includes a regional coastal plan. These provisions underscore the significance of the regional council's (and therefore the Board's) obligation to "give effect to" the NZCPS and the role of the NZCPS as an mechanism for Ministerial control. They contemplate that a New Zealand coastal policy statement may be directive in nature.

(iii) Interpreting the NZCPS

[126] We agree with Mr Kirkpatrick that the language of the relevant policies in the NZCPS is significant and that the various policies are not inevitably in

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128 Section 55 of the RMA uses the term "local authority", which is defined in s 2 to include a regional council.

conflict or pulling in different directions. Beginning with language, we have said that "avoid" in policies 13(1)(a) and 15(a) is a strong word, meaning "not allow" or "prevent the occurrence of", and that what is "inappropriate" is to be assessed against the characteristics of the environment that policies 13 and 15 seek to preserve. While we acknowledge that the most likely meaning of "appropriate" in policy 8(a) is that it relates to suitability for salmon farming, the policy does not suggest that provision must be made for salmon farming in *all* places that might be appropriate for it in a particular coastal region.

[127] Moreover, when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account",[129] "have (particular) regard to",[130] "consider",[131] "recognise",[132] "promote"[133] or "encourage";[134] use expressions such as "as far as practicable",[135] "where practicable",[136] and "where practicable and reasonable";[137] refer to taking "all practicable steps"[138] or to there being "no practicable alternative methods".[139] Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.

[128] Both the Board and Dobson J acknowledged that the language in which particular policies were expressed did matter: the Board said that the concern underpinning policies 13 and 15 "weighs heavily against" granting the plan change and the Judge said that departing from those policies required "a materially higher level of justification".[140] This view that policies 13 and 15 should not be applied in the terms in which they are drafted but simply as very important considerations was based on the perception that to apply them in accordance with their terms would be contrary to the purpose of the RMA and unworkable. Both Ms Gwyn and Mr Nolan supported this position in argument; they accepted that policies such as policies 13 and 1 5 provided "more guidance" than other policies or constituted "starting points", but argued

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129 NZCPS, above n 13, policies 2(e) and 6(g).
130 Policy 10; see also policy 5(2).
131 Policies 6(1) and 7(1)(a).
132 Policies 1, 6, 9, 12(2) and 26(2).
133 Policies 6(2)(e) and 14.
134 Policies 6(c) and 25(c) and (d).
135 Policies 2(c) and (g) and 12(1).
136 Policies 14 (c), 17(h), 19(4), 21(c) and 23(4)(a).
137 Policy 6(1)(i).
138 Policy 23(5)(a).
139 Policy 10(1)(c).
140 *King Salmon* (Board), above n 6, at [1240]; and *King Salmon* (HC), above n 2, at [151].

that they were not standards, nor did they operate as vetoes. Although this view of the NZCPS as a document containing guidance or relevant considerations of differing weight has significant support in the authorities, it is not one with which we agree.

[129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.

[130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.

[131] A danger of the "overall judgment" approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them. In the present case, we do not see any insurmountable conflict between policy 8 on the one hand and policies 13(1)(a) and 15(a) on the other. Policies 13(1)(a) and 15(a) provide protections against adverse effects of development in particular limited areas of the coastal region – areas of *outstanding* natural character, of *outstanding* natural features and of *outstanding* natural landscapes (which, as the use of the word "outstanding" indicates, will not be the norm). Policy 8 recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area. So interpreted, the policies do not conflict.

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development. It is also consistent with classification of activities set out in s 87A of the RMA, the last of which is activities that are prohibited.[141] The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

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141 See [16] above.

[133] The contrast between the 1994 New Zealand Coastal Policy Statement (the 1994 Statement) and the NZCPS supports the interpretation set out above. Chapter 1 of the 1994 Statement sets out national priorities for the preservation of the natural character of the coastal environment. Policy 1.1.3 provides that it is a national priority to protect (among other things) "landscapes, seascapes and landforms" which either alone or in combination are essential or important elements of the natural character of the coastal environment. Chapter 3 deals with activities involving subdivision, use or development of areas of the coastal environment. Policy 3.2.1 provides that policy statements and plans "should define what form of subdivision, use or development would be appropriate in the coastal environment, and where it would be appropriate". Policy 3.2.2 provides:

> Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent practicable.

[134] Overall, the language of the 1994 Statement is, in relevant respects, less directive and allows greater flexibility for decision-makers than the language of the NZCPS. The greater direction given by the NZCPS was a feature emphasised by Minister of Conservation, Hon Kate Wilkinson, when she released the NZCPS. The Minister described the NZCPS as giving councils "clearer direction on protecting and managing New Zealand's coastal environment" and as reflecting the Government's commitment "to deliver more national guidance on the implementation of the [RMA]".[142] The Minister said that the NZCPS was more specific than the 1994 Statement "about how some matters of national importance under the RMA should be protected from inappropriate use and development". Among the key differences the Minister identified was the direction on protection of natural character and outstanding landscapes. The emphasis was "on local councils to produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast". The Minister also noted that the NZCPS made provision for aquaculture "in appropriate places".

[135] The RMA does, of course, provide for applications for private plan changes. However, we do not see this as requiring or even supporting the adoption of the "overall judgment" approach (or undermining the approach which we consider is required). We make two points:

(a) First, where there is an application for a private plan change to a regional coastal plan, we accept that the focus will be on the relevant locality and that the decision-maker may grant the application on a basis which means the decision has little or no significance beyond that locality. But the decision-maker must nevertheless always have regard to the region-wide perspective that the NZCPS requires to be taken. It will be necessary to put the application in its overall context.

(b) Second, Papatua at Port Gore was identified as an area of outstanding natural attributes by the Marlborough District Council. An applicant

142 Office of the Minister of Conservation "New Coastal Policy Statement Released" (28 October 2010).

> for a private plan change in relation to such an area is, of course, entitled to challenge that designation. If the decision-maker is persuaded that the area is not properly characterised as outstanding, policies 13 and 15 allow for adverse effects to be remedied or mitigated rather than simply avoided, provided those adverse effects are not "significant". But if the coastal area deserves the description "outstanding", giving effect to the NZCPS requires that it be protected from development that will adversely affect its outstanding natural attributes.

[136] There are additional factors that support rejection of the "overall judgment" approach in relation to the implementation of the NZCPS. First, it seems inconsistent with the elaborate process required before a national coastal policy statement can be issued. It is difficult to understand why the RMA requires such an elaborate process if the NZCPS is essentially simply a list of relevant factors. The requirement for an evaluation to be prepared, the requirement for public consultation and the requirement for a board of inquiry process or an equivalent all suggest that a New Zealand coastal policy statement has a greater purpose than merely identifying relevant considerations.

[137] Second, the "overall judgment" approach creates uncertainty. The notion of giving effect to the NZCPS "in the round" or "as a whole" is not one that is easy either to understand or to apply. If there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome, one result being complex and protracted decision-making processes in relation to plan change applications that affect coastal areas with outstanding natural attributes. In this context, we note that historically there have been three mussel farms at Port Gore, despite its CMZ1 classification. The relevant permits came up for renewal.[143] On various appeals from the decisions of the Marlborough District Council on the renewal applications, the Environment Court determined, in a decision issued on 26 April 2012, that renewals for all three should be declined. The Court said:[144]

> [238] In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, we consider that achieving the purpose of the [RMA] requires that each application for a mussel farm should be declined.

[138] While the Court conducted an overall analysis, it was heavily influenced by the directives in policies 13 and 15 of the NZCPS, as given effect in this locality by the Marlborough District Council's CMZ1 zoning. This was despite the fact that the applicants had suggested mechanisms whereby the visual impact of the mussel farms could be reduced. There is no necessary inconsistency between the Board's decision in the present case and that of the Environment Court,[145] given that different considerations may arise on a salmon farm application than on a mussel farm application. But a comparison

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143 Although the farms were in a CMZ1 zone, mussel farming at the three locations was treated as a discretionary activity.

144 *Port Gore Marine Farms v Marlborough District Council*, above n 110.

145 The Board was aware of the Court's decision because it cited it for a particular proposition: see *King Salmon* (Board), above n 6, at [595].

of the outcomes of the two cases does illustrate the uncertainty that arises from the "overall judgment" approach: although the mussel farms would have had an effect on the natural character and landscape attributes of the area that was less adverse than that arising from a salmon farm, the mussel farm applications were declined whereas the salmon farm application was granted.

[139] Further, the "overall judgment" approach has the potential, at least in the case of spot zoning plan change applications relating to coastal areas with outstanding natural attributes, to undermine the strategic, region-wide approach that the NZCPS requires regional councils to take to planning. We refer here to policies 7, 13(1)(c) and (d) and 15(d) and (e).[146] Also significant in this context is objective 6, which provides in part that "the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected". This also requires a "whole of region" perspective.

[140] We think it significant that the Board did not discuss policy 7 (although it did refer to it in its overview of the NZCPS), nor did it discuss the implications of policies 13(1)(c) and (d) and 15(d) and (e). As applied, the "overall judgment" approach allows the possibility that developments having adverse effects on outstanding coastal landscapes will be permitted on a piecemeal basis, without a full assessment of the overall effect of the various developments on the outstanding areas within the region as a whole. At its most extreme, such an approach could result in there being few outstanding areas of the coastal environment left, at least in some regions.

[141] A number of objections have been raised to the interpretation of the NZCPS that we have accepted, which we now address. First, we acknowledge that the opening section of the NZCPS contains the following:

> [N]umbering of objectives and policies is solely for convenience and is not to be interpreted as an indication of relative importance.

But the statement is limited to the impact of numbering; it does not suggest that the differences in wording as between various objectives and policies are immaterial to the question of relative importance in particular contexts. Indeed, both the Board and the Judge effectively accepted that policies 13 and 15 did carry additional weight. Ms Gwyn and Mr Nolan each accepted that this was appropriate. The contested issue is, then, not whether policies 13 and 15 have greater weight than other policies in relevant contexts, but rather how much additional weight.

[142] Second, in the *New Zealand Rail* case, Grieg J expressed the view that Part 2 of the RMA should not be subjected to "strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[147] He went on to say that there is "a deliberate openness about the language, its meanings and its connotations which ... is intended to allow the application of policy in a general and broad way."[148] The same might be said of the NZCPS. The NZCPS is, of course, a statement of objectives and policies and, to that extent at least, does differ from an enactment. But the

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146 See [63] above.
147 *New Zealand Rail Ltd*, above n 71, at 86.
148 At 86.

NZCPS is an important part of a carefully structured legislative scheme: Parliament required that there be such a policy statement, required that regional councils "give effect to" it in the regional coastal plans they were required to promulgate, and established processes for review of its implementation. The NZCPS underwent a thoroughgoing process of development; the language it uses does not have the same "openness" as the language of Part 2 and must be treated as having been carefully chosen. The interpretation of the NZCPS must be approached against this background. For example, if the intention was that the NZCPS would be essentially a statement of potentially relevant considerations, to be given varying weight in particular contexts based on the decision-maker's assessment, it is difficult to see how the statutory review mechanisms could sensibly work.

[143] The Minister might, of course, have said in the NZCPS that the objectives and policies contained in it are simply factors that regional councils and others must consider in appropriate contexts and give such weight as they think necessary. That is not, however, how the NZCPS is framed.

[144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word "effect" is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

[145] The definition of "effect" in s 3 is broad. It applies "unless the context otherwise requires". So the question becomes, what is meant by the words "avoid adverse effects" in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

[146] Finally, Ms Gwyn and Mr Nolan both submitted, in support of the views of the Board and the High Court, that to give effect to policies 13(1)(a) and 15(a) in accordance with their terms would be inconsistent with the purpose of the RMA. We do not accept that submission. As we have emphasised, s 5(2) of the RMA contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b). It is further reinforced by the provision of a "prohibited activity" classification in s 87A, albeit that it applies to documents lower in the hierarchy of planning documents than the NZCPS. It seems to us plain that the NZCPS contains policies that are intended to, and do, have binding effect, policy 29 being the most obvious example. Policies 13(1)(a) and 15(a) are clear in their terms: they seek to protect areas of the coastal environment with outstanding natural features from

the adverse effects of development. As we see it, that falls squarely within the concept of sustainable management and there is no justification for reading down or otherwise undermining the clear terms in which those two policies have been expressed.

[147] We should make explicit a point that is implicit in what we have just said. In *New Zealand Rail*, Grieg J said:[149]

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the [RMA], that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principle purpose.

This passage may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular s 6(a) and (b), and s 5.

[148] At the risk of repetition, s 5(2) defines sustainable management in a way that makes it clear that protecting the environment from the adverse effects of use or development is an aspect of sustainable management – not the only aspect, of course, but an aspect. Through s 6(a) and (b), those implementing the RMA are directed, "in relation to managing the use, development, and protection of natural and physical resources", to provide for the preservation of the natural character of the coastal environment and its protection, as well as the protection of outstanding natural features and landscapes, from inappropriate development, these being two of seven matters of national importance. They are directed to make such provision in the context of "achieving the purpose of [the RMA]". We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Section 6(a) and (b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management.

[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that s 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Conclusion on first question

[150] To summarise, both the Board and Dobson J expressed the view that the "overall judgment" approach was necessary to make the RMA workable and to give effect to its purpose of sustainable management. Underlying this is the perception, emphasised by Grieg J in *New Zealand Rail*, that the Environment Court, a specialist body, has been entrusted by Parliament to construe and apply

149 At 85.

the principles contained in Part 2 of the RMA, giving whatever weight to relevant principles that it considers appropriate in the particular case.[150] We agree that the definition of sustainable management in s 5(2) is general in nature, and that, standing alone, its application in particular contexts will often, perhaps generally, be uncertain and difficult. What is clear about the definition, however, is that environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of Part 2.

[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of Part 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant. It does not follow from the statutory scheme that because Part 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in Part 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.

[153] The Board accepted that the proposed plan change in relation to Papatua at Port Gore would have significant adverse effects on an area of outstanding natural character and landscape, so that the directions in policies 13(1)(a) and 15(a) of the NZCPS would not be given effect to if the plan change were to be granted. Despite this, the Board granted the plan change. It considered that it was entitled, by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. We consider, however, that the Board was obliged to deal with the application in terms of the NZCPS. We accept the submission on behalf of EDS that, given the Board's findings in relation to policies 13(1)(a) and 15(a), the plan change should not have been granted. These are strongly worded directives in policies that have been carefully crafted and which have undergone an intensive process of evaluation and public consultation. The NZCPS requires a "whole of region" approach and recognises that, because the proportion of the coastal marine area under formal

150 At 86.

protection is small, management under the RMA is an important means by which the natural resources of the coastal marine area can be protected. The policies give effect to the protective element of sustainable management.

[154] Accordingly, we find that the plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the RMA in that it did not give effect to the NZCPS.

Second question: consideration of alternatives

[155] The second question on which leave was granted raises the question of alternatives. This Court's leave judgment identified the question as:[151]

> Was the Board obliged to consider alternative sites or methods when determining a private plan change that is located in, or results in significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

The Court went on to say:[152]

> This question raises the correctness of the approach taken by the High Court in *Brown v Dunedin City Council* [2003] NZRMA 420 and whether, if sound, the present case should properly have been treated as an exception to the general approach. Whether any error in approach was material to the decision made will need to be addressed if necessary.

[156] At the hearing of the appeal, Mr Kirkpatrick suggested modifications to the question, so that it read:

> Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?

We will address the question in that form.

[157] We should make a preliminary point. We have concluded that the Board, having found that the proposed salmon farm at Papatua would have had significant adverse effects on the area's outstanding natural attributes, should have declined King Salmon's application in accordance with policies 13(1)(a) and 15(a) of the NZCPS. Accordingly, no consideration of alternatives would have been necessary. Moreover, although it did not consider that it was legally obliged to do so, the Board did in fact consider alternatives in some detail.[153] For these reasons, the second question is of reduced significance in the present case. Nevertheless, because it was fully argued, we will address it, albeit briefly.

[158] Section 32 is important in this context. Although we have referred to it previously, we set out the relevant portions of it for ease of reference:

> **32. Consideration of alternatives, benefits, and costs –** (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—

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151 *King Salmon* (Leave), above n 10, at [1].
152 At [1].
153 *King Salmon* (Board), above n 6, at [121]–[172].

> ...
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
> (2) A further evaluation must also be made by—
> (a) a local authority before making a decision under clause 10 or clause 29(4) of Schedule 1; and
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
> (3) An evaluation must examine—
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
> ...
> (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—
> (a) the benefits and costs of policies, rules, or other methods; and
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[159] A number of those who made submissions to the Board on King Salmon's plan change application raised the issue of alternatives to the plan changes sought, for example, conversion of mussel farms to salmon farms and expansion of King Salmon's existing farms. As we have said, despite its view that it was not legally obliged to do so, the Board did consider the various alternatives raised and concluded that none was suitable.

[160] The Board noted that it has been held consistently that there is no requirement for consideration of alternatives when dealing with a site specific plan change application.[154] The Board cited, as the principal authority for this proposition, the decision of the High Court in *Brown v Dunedin City Council*.[155] Mr Brown owned some land on the outskirts of Mosgiel that was zoned as "rural". He sought to have the zoning changed to residential. The matter came before the Environment Court on a reference. Mr Brown was unsuccessful in his application and appealed to the High Court, on the basis that the Environment Court had committed a number of errors of law, one of which was that it had allowed itself to be influenced by the potential of alternative sites to accommodate residential expansion. Chisholm J upheld this ground of appeal. Having discussed several decisions of the Environment Court, the Judge said:

> [16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*,[156] when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal

154 At [124].
155 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).
156 *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) (citation added).

> alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and clause 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of the [RMA]. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the [RMA] so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.
>
> [17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the [RMA]. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

(Chisholm J's observations were directed at s 32 as it was prior to its repeal and replacement by the version at issue in this appeal, which has, in turn, been repealed and replaced.)

[161] The Board also noted the observation of the Environment Court in *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*:[157]

> It seems to us that whether alternatives should be considered depends firstly on a finding of fact as to whether or not there are significant adverse effects on the environment. If there are significant adverse effects on the environment, particularly if they involve matters of national importance, it is a question of fact in each case as to whether or not an applicant should be required to look at alternatives, and the extent to which such an enquiry, including the undertaking of a cost/benefit analysis, should be carried out.

[162] In the High Court Dobson J held that the Board did not commit an error of law in rejecting a requirement to consider alternative locations.[158] The Judge adopted the approach taken by the Full Court of the High Court in *Meridian Energy Ltd v Central Otago District Council*.[159] There, in a resource consent context, the Court contrasted the absence of a specific requirement to consider

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157 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690] (quoted in *King Salmon* (Board), above n 6, at [126]).
158 *King Salmon* (HC), above n 2, at [174].
159 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).

alternatives with express requirements for such consideration elsewhere in the RMA.[160] The Court accepted that alternatives could be looked at, but rejected the proposition that they must be looked at.[161] Referring to *Brown*, Dobson J said:[162]

> Although the context is relevantly different from that in *Brown*, the same practical concerns arise in imposing an obligation on an applicant for a plan change to canvass all alternative locations. If, in the course of contested consideration of a request for a plan change, a more appropriate means of achieving the objectives is raised, then there is nothing in s 32 or elsewhere in the RMA that would preclude the consenting authority having regard to that as part of its evaluation. That is distinctly different, however, from treating such an assessment as mandatory under s 32.

[163] For EDS, Mr Kirkpatrick's essential point was that, in a case such as the present, it is mandatory to consider alternatives. He submitted that the terms of policies 13(1)(a) and 15(a) required consideration of alternatives in circumstances where the proposed development will have an adverse effect on an area of the coastal environment with outstanding natural attributes. Given that these policies appear alongside policy 8, the Board's obligation was to consider alternative sites in order to determine whether, if it granted the plan change sought, it would "give effect to" the NZCPS. Further, Mr Kirkpatrick argued that *Brown* had been interpreted too widely. He noted in particular the different context – *Brown* concerned a landowner seeking a zoning change in respect of his own land; the present case involves an application for a plan change that will result in the exclusive use of a resource that is in the public domain. Mr Kirkpatrick emphasised that, in considering the plan change, the Board had to comply with s 32. That, he argued, required that the Board consider the "efficiency and effectiveness" of the proposed plan change, its benefits and costs and the risk of acting or not acting in conditions of uncertainty. He emphasised that, although this was an application in relation to a particular locality, it engaged the Sounds Plan as a whole.

[164] In response, Mr Nolan argued that s 32 should not be read as requiring consideration of alternative sites. He supported the findings of the Board and the High Court that there was no mandatory requirement to consider alternative *sites*, as opposed to alternative *methods*, which were the focus of s 32: that is, whether the proposed provisions were the most appropriate way to achieve the RMA's purpose. He relied on the *Meridian Energy* case. Mr Nolan accepted that there is nothing to preclude consideration of an alternative raised in the context of an application for a private plan change but said it was not a mandatory requirement. He noted that the decision in *Brown* has been widely adopted and applied and submitted that the distinction drawn by Mr Kirkpatrick between the use of private land and the use of public space for private purposes was unsustainable: s 32 applied equally in both situations. Mr Nolan submitted that to require applicants for a plan change such as that at issue to canvass all possible alternatives would impose too high a burden on them. In an application for a site-specific plan change, the focus should be on

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160 At [77]–[81].
161 At [86]–[87].
162 *King Salmon* (HC), above n 2, at [171].

the merits of the proposed planning provisions for that site and whether they satisfy s 32 and achieve the RMA's purpose. Mr Nolan noted that there was nothing in policies 13 or 15 which required the consideration of alternative sites.

[165] We do not propose to address these arguments in detail, given the issue of alternatives has reduced significance in this case. Rather, we will make three points.

[166] First, as we have said, Mr Nolan submitted that consideration of alternative sites on a plan change application was not required but neither was it precluded. As he neatly put it, consideration of alternative sites was permissible but not mandatory. But that raises the question, when is consideration of alternative sites permissible? The answer cannot depend simply on the inclination of the decision-maker: such an approach would be unprincipled and would undermine rational decision-making. If consideration of alternatives is permissible, there must surely be something about the circumstances of particular cases that make it so. Indeed, those circumstances may make consideration of alternatives not simply permissible but necessary. Mr Kirkpatrick submitted that what made consideration of alternatives necessary in this case was the Board's conclusion that the proposed salmon farm would have significant adverse effects on an area of outstanding natural character and landscape.

[167] Second, *Brown* concerned an application for a zoning change in relation to the applicant's own land. We agree with Chisholm J that the RMA does not *require* consideration of alternative sites as a matter of course in that context, and accept also that the practical difficulties which the Judge identified are real. However, we note that the Judge accepted that there may be instances where a consideration of alternative sites was required and suggested a way in which that might be dealt with.[163]

[168] We agree with Chisholm J that there may be instances where a decision-maker must consider the possibility of alternative sites when determining a plan change application in relation to the applicant's own land. We note that where a person requests a change to a district or regional plan, the relevant local authority may (if the request warrants it) require the applicant to provide "further information necessary to enable the local authority to better understand ... the benefits and costs, the efficiency and effectiveness, and *any possible alternatives to the request*".[164] The words "alternatives to the request" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. The ability to seek further information on alternatives to the requested change is understandable, given the requirement for a "whole of region" perspective in plans. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application.

[169] Third, we agree with Mr Kirkpatrick that the question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public

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163 *Brown v Dunedin City Council*, above n 155, at [16].
164 RMA, sch 1 cl 23(1)(c) (emphasis added).

domain for a private commercial purpose, as here. It is true, as Mr Nolan argued, that the focus of s 32 is on the appropriateness of policies, methods or rules – the section does not mention individual sites. That said, an evaluation under s 32(3)(b) must address whether the policies, methods or rules proposed are the "most appropriate" way of achieving the relevant objectives, which requires consideration of alternative policies, methods or rules in relation to the particular site. Further, the fact that a local authority receiving an application for a plan change may require the applicant to provide further information concerning "any possible alternatives to the request" indicates that Parliament considered that alternative sites may be relevant to the local authority's determination of the application. We do not accept that the phrase "any possible alternatives to the request" refers simply to alternative outcomes of the application, that is, granting it, granting it on terms or refusing it.

[170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that a particular activity needs to occur in part of the coastal environment. If that activity would adversely affect the preservation of natural character in the coastal environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

[171] Also relevant in the context of a site specific plan change application such as the present is the requirement of the NZCPS that regional councils take a regional approach to planning. While, as Mr Nolan submitted, a site-specific application focuses on the suitability of the planning provisions for the proposed site, the site will sit within a region, in respect of which there must be a regional coastal plan. Because that regional coastal plan must reflect a regional perspective, the decision-maker must have regard to that regional perspective when determining a site-specific plan change application. That may, at least in some instances, require some consideration of alternative sites.

[172] We see the obligation to consider alternative sites in these situations as arising at least as much from the requirements of the NZCPS and of sound decision-making as from s 32.

[173] Dobson J considered that imposing an obligation on all site-specific plan change applicants to canvass all alternative locations raised the same practical concerns as were canvassed by Chisholm J in *Brown*.[165] We accept that. But given that the need to consider alternative sites is not an invariable

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165 *King Salmon* (HC), above n 2, at [171].

requirement but rather a contextual one, we do not consider that this will create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application and the reasons advanced in support of it. Particularly where the applicant for the plan change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement.

Decision

[174] The appeal is allowed. The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement. If the parties are unable to agree as to costs, they may file memoranda on or before 2 June 2014.

WILLIAM YOUNG J.

A preliminary comment

[175] The plan change to permit the Papatua salmon farm in Port Gore would permit activities with adverse effects on (a) "areas of the coastal environment with outstanding natural character" and (b) "outstanding natural features and outstanding natural landscapes in the coastal environment" (to which, for ease of discussion, I will refer collectively as "areas of outstanding natural character"). The majority conclude that the protection of areas of outstanding natural character from adverse effects is an "environmental bottom line" by reason of the New Zealand Coastal Policy Statement (NZCPS)[166] to which the Board of Inquiry was required to give effect under s 67(3)(b) of the Resource Management Act 1991. For this reason, the majority is of the view that the plan change should have been refused.

[176] I do not agree with this approach and for this reason disagree with the conclusion of the majority on the first of the two issues identified in their reasons.[167] As to the second issue, I agree with the approach of the majority[168] to *Brown v Dunedin City Council*[169] but, as I am in dissent, see no point in further analysis of the Board's decision as to what consideration was given to alternative sites. I will, however, explain, as briefly as possible, why I differ from the majority on the first issue.

The majority's approach on the first issue – in summary

[177] Section 6(a) and (b) of the Resource Management Act 1991 provide:

> **6. Matters of national importance –** In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

166 Department of Conversation *New Zealand Coastal Policy Statement 2010* (issued by notice in the *New Zealand Gazette* on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].
167 At [17] of the majority's reasons.
168 At [165]–[173] of the majority's reasons.
169 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate ... use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate ... use, and development:

The majority consider that these subsections, and particularly s 6(b), contemplate planning on the basis that a "use" or "development" which has adverse effects on areas of outstanding natural character is, for that reason alone, "inappropriate". They are also of the view that this is the effect of the NZCPS given policies 13 and 15 which provide:

> **13. Preservation of natural character –** (1) To preserve the natural character of the coastal environment and to protect it from inappropriate . use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;
>
> ...
>
> **15. Natural features and natural landscapes –** To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate ... use, and development:
>
> (a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> (b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

[178] The majority interpret policies 13 and 15 as requiring regional and territorial authorities to prevent, by specifying as prohibited, any activities which will have adverse effects on areas of outstanding natural character. Section 67(3)(b) of the RMA thus requires salmon farming to be a prohibited activity in Port Gore with the result that the requested plan change ought to have been refused.

Section 6(a) and (b)

[179] As a matter of logic, areas of outstanding natural character do not require protection from activities which will have no adverse effects. To put this in a different way, the drafting of s 6(a) and (b) seems to me to leave open the possibility that a use or development might be appropriate despite having adverse effects on areas of outstanding natural character.

[180] Whether a particular use is "inappropriate" or, alternatively, "appropriate" for the purposes of s 6(a) and (b) may be considered in light of the purpose of the RMA. and thus in terms of s 5. It thus follows that the NZCPS must have been prepared so as to be consistent with, and give effect to, s 5. For this reason, I consider that those charged with the interpretation or application of the NZCPS are entitled to have regard to s 5.

The meaning of the NZCPS

Section 58 of the Resource Management Act

[181] Section 58 of the RMA provides for the contents of New Zealand coastal policy statements:

> **58. Contents of New Zealand coastal policy statements**
> A New Zealand coastal policy statement may state objectives and policies about any 1 or more of the following matters:
>
> (a) national priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate ... use, and development:
>
> ...
>
> (c) activities involving the ... use, or development of areas of the coastal environment:
>
> ...
>
> (e) the matters to be included in 1 or more regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the activities that are required to be specified as restricted coastal activities because the activities—
>
> (i) have or are likely to have significant or irreversible adverse effects on the coastal marine area; or
>
> (ii) relate to areas in the coastal marine area that have significant conservation value:

[182] I acknowledge that a "policy" may be narrow and inflexible (as the Court of Appeal held in *Auckland Regional Council v North Shore City Council*)[170] and I thus agree with the conclusion of the majority that a policy may have such a controlling effect on the content of regional plans as to make it a rule "in ordinary speech".[171] Most particularly, I accept that policies stipulated under s 58(e) may have the character of rules.

[183] Under s 58(e), the NZCPS might have stipulated what was required to be included in a regional coastal plan to preserve the natural character of the coastal environment. The example given in the subsection is confined to the specification of activities as restricted coastal activities. This leaves me with at least a doubt as to whether s 58, read as a whole, contemplates policies which require particular activities to be specified as prohibited. I am, however, prepared to assume for present purposes that s 58, and in particular s 58(e), might authorise a policy which required that activities with adverse effects on areas of outstanding natural character be specified as prohibited.

[184] As it happens, the Minister of Conservation made use of s 58(e) but only in a negative sense, as policy 29(1) of the NZCPS provides that the Minister:

> ... does not require any activity to be specified as a restricted coastal activity in a regional coastal plan.

[185] Given this explicit statement, it seems plausible to assume that if the Minister's purpose was that some activities (namely those with adverse effects on areas of outstanding natural character) were to be specified as prohibited,

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170 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
171 At [116] of the majority's reasons.

this would have been "specified" in a similarly explicit way. At the very least, policy 29 makes it clear that the Minister was not relying on s 58(e) to impose such a requirement. I see this as important. Putting myself in the shoes of a Minister who wished to ensure that some activities were to be specified in regional plans as prohibited, I would have attempted to do so under the s 58(e) requiring power rather than in the form of generally stated policies.

The scheme of the NZCPS

[186] Objective 2 of the NZCPS is material to the preservation of the coastal environment. It is relevantly in these terms:

> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> ...
>
> • identifying those areas where various forms of ... use, and development would be inappropriate and protecting them from such activities; and
>
> ...

[187] It is implicit in this language that the identification of the areas in question is for regional councils. I think it is also implicit, but still very clear, that the identification of the "forms of ... use, and development" which are inappropriate is also for regional councils.

[188] To the same effect is policy 7:

> **7. Strategic planning –** (1) In preparing regional policy statements, and plans:
>
> ...
>
> (b) identify areas of the coastal environment where particular activities and forms of . use, and development:
>
> (i) are inappropriate; and
>
> (ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the [RMA] process;
>
> and provide protection from inappropriate ... use, and development in these areas through objectives, policies and rules.

It is again clear – but this time as a result of explicit language – that it is for regional councils to decide as to both (a) the relevant areas of the coastal environment and (b) what "forms of ... use, and development" are inappropriate in such areas. There is no suggestion in this language that such determinations have in any way been pre-determined by the NZCPS.

[189] The majority consider that all activities with adverse effects on areas of outstanding natural character must be prevented. Since there is no reason for concern about activities with no adverse effects, the NZCPS, on the majority approach, has pre-empted the exercise of the function which it, by policy 7, has required regional councils to perform. Decisions as to areas of the coastal environment which require protection should be made by the same body as determines the particular "forms of ... use, and development" which are inappropriate in such areas. On the majority approach, decisions in the first

category are made by regional councils whereas decisions as to the latter have already been made in the NZCPS. This result is too incoherent to be plausibly within the purpose of the NZCPS.

[190] The point I have just made is reinforced by a consideration of the NZCPS's development-focused objectives and policies.

[191] Objective 6 of the NZCPS provides:

> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through ... use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
> - functionally some uses and developments can only be located on the coast or in the coastal marine area;
>
> ...
>
> - the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
>
> ...
>
> - the proportion of the coastal marine area under any formal protection is small and therefore management under the [RMA] is an important means by which the natural resources of the coastal marine area can be protected; and

[192] Policy 8 provides:

> **Aquaculture**
>
> Recognise the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities by:
>
> (a) including in regional policy statements and regional coastal plans provision for aquaculture activities in appropriate places in the coastal environment, recognising that relevant considerations may include:
> (i) the need for high water quality for aquaculture activities; and
> (ii) the need for land-based facilities associated with marine farming;
>
> (b) taking account of the social and economic benefits of aquaculture, including any available assessments of national and regional economic benefits; and
>
> (c) ensuring that development in the coastal environment does not make water quality unfit for aquaculture activities in areas approved for that purpose.

[193] Policy 8 gives effect to objective 6, just as policies 13 and 15 give effect to objective 2. There is no suggestion in the NZCPS that objective 2 is to take precedence over objective 6, and there is likewise no indication that policies 13 and 15 take precedence over policy 8. Viewed solely through the lens of policy 8 and on the findings of the Board, Port Gore is an appropriate location for a salmon farm. On the other hand, viewed solely through the lens of policies 13 and 15, it is inappropriate. On the approach of the majority, the standards for determining what is "appropriate" under policy 8 are not the same as those applicable to determining what is "inappropriate" in policies 13 and 15.[172]

[194] I disagree with this approach. The concept of "inappropriate ... use [unhandled character] development" in the NZCPS is taken directly from s 6(a) and (b) of the RMA. The concept of a "use" or "development" which is or may be "appropriate" is necessarily implicit in those subsections. There was no point in the NZCPS providing that certain uses or developments would be "appropriate" other than to signify that such developments might therefore not be "inappropriate" for the purposes of other policies. So I simply do not accept that there is one standard for determining whether aquaculture is "appropriate" for the purposes of policy 8 and another standard for determining whether it is "inappropriate" for the purposes of policies 13 and 15. Rather, I prefer to resolve the apparent tension between policy 8 and policies 13 and 15 on the basis of a single concept – informed by the NZCPS as a whole and construed generally in light of s 6(a) and (b) and also s 5 – of what is appropriate and inappropriate. On the basis of this approach, the approval of the salmon farm turned on whether it was appropriate (or not inappropriate) having regard to policies 8, 13 and 15 of the NZCPS, with ss 5 and 6(a) and (b) of the RMA being material to the interpretation and application of those policies.

[195] I accept that this approach requires policies 13 and 15 to be construed by reading into the first two bullets points of each policy the word "such" to make it clear that the polices are directed to the adverse effects of "inappropriate ... use, and development". By way of illustration, I consider that policy 13 should be construed as if it provided:

> **13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate ... use, and development:
>
> (a) avoid adverse effects of *such* activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of *such* activities on natural character in all other areas of the coastal environment; ...

[196] The necessity to add words in this way shows that my interpretation of the policies is not literal. That said, I do not think it is difficult to construe these policies on the basis that given the stated purpose – protection from

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172 At [98]–[105] of the majority's reasons.

"inappropriate ... use, and development" – what follows should read as confined to activities which are associated with "inappropriate ... use, and development". Otherwise, the policies would go beyond their purpose.

[197] The majority avoid the problem of the policies going beyond their purpose by concluding that any use or development which would produce adverse effects on areas of outstanding natural character is, for this reason, "inappropriate". That, however, is not spelt out explicitly in the policies. As I have noted, if it was the purpose of the Minister to require that activities with such effects be specified as prohibited, that would have been provided for directly and pursuant to s 58(e). So I do not see their approach as entirely literal either (because it assumes a determination that adverse effects equates to "inappropriate", which is not explicit). It is also inconsistent with the scheme of the NZCPS under which decisions as to what is "appropriate" or "inappropriate" in particular cases (that is, by reference to specific locations and activities) is left to regional councils. The approach taken throughout the relevant objectives and policies of the NZCPS is one of shaping regional coastal plans but not dictating their content.

[198] We are dealing with a policy statement and not an ordinary legislative instrument. There seems to me to be flexibility given that (a) the requirement is to "give effect" to the NZCPS rather than individual policies, (b) the language of the policies, which require certain effects to be avoided and not prohibited,[173] and (c) the context provided by policy 8. Against this background, I think it is wrong to construe the NZCPS and, more particularly, certain of its policies, with the rigour customary in respect of statutory interpretation.

Overbroad consequences

[199] I think it is useful to consider the consequences of the majority's approach, which I see as overbroad.

[200] "Adverse effects" and "effects" are not defined in the NZCPS save by general reference to the RMA definitions.[174] This plainly incorporates into the NZCPS the definition in s 3 of the RMA:

> **3. Meaning of effect –** In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

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173 Compare the discussion and cases cited in [92]–[97] of the majority's reasons.

174 The NZCPS, above n 166, at 8 records that "[d]efinitions contained in the Act are not repeated in the Glossary".

[201] On the basis that the s 3 definition applies, I consider that a corollary of the approach of the majority is that regional councils must promulgate rules which specify as prohibited any activities having any perceptible adverse effect, even temporary, on areas of outstanding natural character. I think that this would preclude some navigation aids and it would impose severe restrictions on privately-owned land in areas of outstanding natural character. It would also have the potential generally to be entirely disproportionate in its operation as any perceptible adverse effect would be controlling irrespective of whatever benefits, public or private, there might be if an activity were permitted. I see these consequences as being so broad as to render implausible the construction of policies 13 and 15 proposed by the majority.

[202] The majority suggest that such consequences can be avoided.[175] They point out that the s 3 definition of "effect" does not apply if the context otherwise requires. They also, rather as I have done, suggest that the literal words in which the policies are expressed can be read down in light of the purposes stated in each policy (in essence to the protection of areas of outstanding natural character). There is the suggestion of a de minimis approach. They also point out that a development might enhance an area of outstanding character (presumably contemplating that beneficial effects might outweigh any adverse effects).

[203] I would like to think that a sensible approach will be taken to the future application of the NZCPS in light of the conclusions of the majority as to the meaning of policies 13 and 15 and I accept that for reasons of pragmatism, such an approach might be founded on reasoning of the kind provided by the majority. But I confess to finding it not very convincing. In particular:

(a) I think it clear that the NZCPS uses "effects" in its s 3 sense.

(b) While I agree that the policies should be read down so as not to go beyond their purposes,[176] I think it important to recognise that those purposes are confined to protection only from "inappropriate" uses or developments.

(c) Finally, given the breadth of the s 3 definition and the distinction it draws between "positive" and "adverse" effects, I do not see much scope for either a de minimis approach or a balancing of positive and adverse effects.

My conclusion as to the first issue

[204] On my approach, policies 13 and 15 on the one hand and policy 8 on the other are not inconsistent. Rather, they required an assessment as to whether a salmon farm at Papatua was appropriate. Such assessment required the Board to take into account and balance the conflicting considerations – in other words, to form a broad judgment. A decision that the salmon farm at Papatua was appropriate was not inconsistent with policies 13 and 15 as I construe them and, on this basis, the s 67(3)(b) requirement to give effect to the NZCPS was not infringed.

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175 At [144] of the majority's reasons.
176 See above at [195].

[205] This approach is not precisely the same as that adopted by the Board. It is, however, sufficiently close for me to be content with the overall judgment of the Board on this issue.

Orders

(A) The appeal is allowed.
(B) The plan change in relation to Papatua at Port Gore did not comply with s 67(3)(b) of the Resource Management Act 1991 as it did not give effect to policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement.
(C) Costs are reserved.

Appeal allowed/dismissed.

Solicitors for Environmental Defence: *DLA Phillips Fox* (Auckland).
Solicitors for King Salmon: *Russell McVeagh* (Wellington).
Solicitors for Sustain Our Sounds: *Dyhrberg Drayton* (Wellington).
Solicitors for Marlborough District Council: *DLA Phillips Fox* (Wellington).
Solicitors for Minister of Conservation and Director-General for Primary Industries: *Crown Law Office* (Wellington).
Solicitors for Board of Inquiry: *Buddle Findlay* (Wellington).

Reported by: Bernard Robertson, *Barrister*

TAB 4

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 53

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14(1) of the First Schedule to the Act
BETWEEN	FEDERATED FARMERS OF NEW ZEALAND (INC) MACKENZIE BRANCH (ENV-2009-CHC-193) Appellant (and others – continued over page)
AND	MACKENZIE DISTRICT COUNCIL Respondent

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills
Hearing:	at Christchurch on 30 and 31 January, 1, 2, 3 and 7 to 10 February 2017 (Final submissions received 10 March 2017)
Appearances:	D Caldwell and J King for Mackenzie District Council K Forward for Mt Gerald Station Limited, The Wolds Station Limited and Irishman Creek Station (section 274 party) R Gardner for Federated Farmers of New Zealand (Inc) Mackenzie Branch A J Schulte for Fountainblue Limited, Pukaki Downs Tourism Holdings Partnership, Southern Serenity Limited, and Blue Lake Ltd and Ben Ohau Farming Trust as section 274 parties J Maassen for Meridian Energy Limited K J Wyss for Canterbury Regional Council S Newell for Director-General of Conservation J G A Winchester for Te Rūnanga o Ngāi Tahu and Te Rūnanga o Arowhenua Trust R G Haazen for Mackenzie Guardians Incorporated M Neilson for The Mackenzie Country Charitable Trust R B Enright and M Wright for Environmental Defence Society Incorporated
Date of Decision:	12 April 2017
Date of Issue:	13 April 2017

(continued)
MOUNT GERALD STATION LIMITED
(ENV-2009-CHC-181)

MACKENZIE PROPERTIES LIMITED
(ENV-2009-CHC-183)

MERIDIAN ENERGY LIMITED AND
GENESIS ENERGY LIMITED
(ENV-2009-CHC-184)

THE WOLDS STATION LIMITED
(ENV-2009-CHC-187)

FOUNTAINBLUE LIMITED & OTHERS
(ENV-2009-CHC-190)

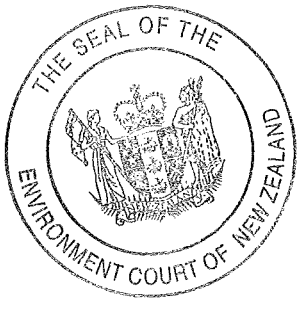
R, R AND S PRESTON AND
RHOBOROUGH DOWNS LIMITED
(ENV-2009-CHC-191)

HALDON STATION
(ENV-2009-CHC-192)

Further Appellants

ELEVENTH DECISION

A: Subject to Orders B and C, under section 293 of the Resource Management Act 1991 the Environment Court confirms Plan Change 13 ("PC13") to the Mackenzie District Plan as renotified on 14 November 2015 subject to the following amendments:



(1) In Chapter 7 (Rural) of the Mackenzie District Plan Objective 3B(3) is to be added following Objectives 3B(1) and (2). It reads:

> (3) Subject to objective (1) above and to rural objectives 1, 2 and 4:
>
> (a) to enable pastoral farming;
>
> (b) to manage pastoral intensification and agricultural conversion throughout the Basin and to identify areas where they may be enabled (such as Farm Base Areas);
>
> (c) to enable rural residential subdivision, cluster housing and farm buildings within Farm Base Areas around existing homesteads (where they are outside hazard areas).

(2) In Chapter 3 (Definitions) of the Mackenzie District Plan:

(1) the definition of "Pastoral Intensification" for the Mackenzie Basin which goes beyond the existing definition in the Plan should be redescribed as a definition of "Agricultural conversion" as follows:

> "Agricultural conversion" means direct drilling or cultivation (by ploughing, discing or otherwise) or irrigation.

(2) a definition of "Tussock grasslands" should be inserted as follows:

> "Tussock grasslands" means areas generally supporting native tussock grasses but typically comprising a mosaic of vegetation types that could include considerable areas of bare/stoney ground, mixed exotic/native herbfield, cushion and mat vegetation, native shrubs and exotic species such as browntop and hawkweed.

(3) The policies in PC13 should be amended as described in the Reasons (<u>underlined</u> versions of modified policies are usually given).

(4) Policy 3B14 is struck out.

(5) The methods and rules in PC13 should be amended as described in the Reasons.

(6) All consequential changes to the rules necessitated by the changes referred to in Order (5) shall be made.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

(7) The explanations and reasons are to be reviewed in PC13 and modified to reflect the Reasons for the Orders above.

(8) All questions about the location and extent of Scenic Grassland Area 7 on Mount Gerald Station are adjourned.

B: If any party considers that:

(a) there are any inconsistencies or mistakes in, or omissions from, the modifications to the policies, rules or maps proposed by the court; or

(b) that consequential changes are needed to rules or methods not mentioned by the court

— then they must advise the Mackenzie District Council of those in writing by **22 May 2017**.

C: The Mackenzie District Council shall prepare and circulate a copy of PC13 as confirmed by this decision (and including all amendments taking particular care with the numbering of the rules) and must lodge it with the Registrar by **17 June 2017** (or such extended date as the court may grant on application) for final confirmation.

D: If any party considers the version of PC13 lodged under the previous Order is inconsistent with the Reasons for this decision or is internally inconsistent then they must lodge and serve a memorandum identifying the disputed issues by **1 July 2017**, and the court will then set a timetable for resolving these issues.

E: (1) Any remaining questions as to the location and extent of Farm Base Areas is adjourned;

(2) The Mackenzie District Council is to report on progress on Farm Base Areas by **30 June 2017**.

F: Costs are reserved.

Table of Contents

REASONS

1. Introduction

1.1 The issue: should Plan Change 13 be confirmed?

[1] These proceedings relate to Plan Change 13 ("PC13") of the Mackenzie District Council. PC13 relates to the Mackenzie Basin[1]. The purpose of PC13 is "... to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use"[2].

[2] The issue is whether the court should, under section 293(1) of the Resource Management Act 1991 ("the RMA" or "the Act")[3] confirm Objective 3B(3) and the policies and methods included in the version of PC13 lodged with the Registrar at the Environment Court on 27 May 2016 by the Mackenzie District Council ("the MDC" or "the Council"). Oversimplifying for the sake of brevity, this version of PC13 differs from earlier ones in including:

- one (subordinate) objective – Objective 3B3;
- a different suite of policies implementing the settled Objectives 3B1, 3B2 and the proposed 3B3;
- an amended definition of "pastoral intensification" so that (in the Mackenzie Basin) it includes cultivation, irrigation and direct drilling in addition to the previous "topdressing and oversowing";
- rules which make "pastoral intensification" generally a discretionary activity in the Mackenzie Basin (subject to some important exceptions considered later).

[3] The primary submission[4] for Federated Farmers of New Zealand Inc Mackenzie Branch ("FFM"), The Wolds Station Limited ("The Wolds") and Mt Gerald Station Ltd ("Mt Gerald"), are that PC13 in its post-consultation form should not be confirmed, and the Commissioners' decision reinstated. In the alternative it sought changes to PC13 to

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1 As defined in paragraph 2 and map 1 of *High Country Rosehip Ltd and Mackenzie Lifestyle Ltd v Mackenzie District Council* [2011] NZEnvC 387.

2 [2011] NZEnvC 387 at [4].

3 All references to the RMA are to the Act in its pre-2009 Amendment form because PC13 was originally notified in 2007.

4 R Gardner closing submissions para 2 [Environment Court document 41].

make changes in farming operations easier than the outcomes in PC13(s293V) or the later post-consultation version.

[4] Meridian Energy Limited ("Meridian") appeared largely in support of the thrust of the notified version of PC13[5] and indeed the post-consultation version. Its major qualification was that Meridian disagrees with the wording of Policy 3B14 on "Wilding Trees".

[5] Fountainblue Limited and its associated appellants' concerns relate to the final form of Objective 3B(3) and to the proposed implementing Policies 3B3 (development in Farm Base Areas) and 3B14 (Wildings).

1.2 The history of the proceedings

[6] The history of these proceedings is considerably longer than that of most plan changes. A brief chronology of the relevant earlier dates is:

- 19 December 2007 PC13 notified;
- 3 September 2009 MDC Commissioners decision issued;
- 14 December 2011 First (Interim) Decision[6] issued by the court as *High Country Rosehip Ltd and Mackenzie Lifestyle Limited v Mackenzie District Council* ("*High Country Rosehip*")

...

[7] Because PC13 was notified before 1 September 2009, the applicable version of the Act is[7] the RMA prior to the 2009 and 2013 and subsequent amendments.

[8] In the First Decision[8] the Environment Court judged that the Mackenzie Basin is an outstanding natural landscape. We then proposed changes to objectives and suggested changes to policies. The court then issued directions under 293 RMA that

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5 The version notified on 14 November 2015.
6 *High Country Rosehip Ltd and Mackenzie Lifestyle Ltd v Mackenzie District Council* [2011] NZEnvC 387.
7 Section 161 Resource Management (Simplifying and Streamlining) Amendment Act 2009.
8 *High Country Rosehip,* above n 6.

the MDC should consult about changes to PC13 and then, after consultation[9] publicly notify the changes and lodge them with the court for confirmation.

[9] The years between the end of 2011 and the lodgment of a new version of PC13 with the Registrar for approval in 2016 were occupied by a series of appeals to the High Court – most relevantly in *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District* Council[10] ("*Mackenzie (HC 2014)*") – and beyond (by the appellant FFM) and a series[11] of procedural and substantive[12] decisions.

[10] *Mackenzie (HC 2014)* was an appeal against the Sixth to Eighth Decision of this court. In relation to the Environment Court's exercise of its powers under section 293 Gendall J "found"[13]:

(a) the court "may have stepped beyond its role ... by drafting the proposed changes";
(b) "the [c]ourt was ill-equipped to carry out the section 32 analysis of the proposed changes given their extent"; and
[(c)] "Further ... the Council should be directed to publicly notify the changes so comment is sought and received on each issue".

Apparently each of those statements identifies an error of law by this court in the Sixth to Eighth Decisions. The High Court then gave directions as to the future course of the proceedings.

[11] In particular Gendall J directed[14] that after preparation of amendments to PC13 the MDC should publicly notify those changes and <u>then</u> consult under section 293 of the Act. As this court observed[15] in the Ninth Decision that order varied this court's original direction[16] in the First Decision which was that notification should occur after consultation. It may also be worth observing that the High Court appears to have

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9 Order E(3) in *High Country Rosehip,* above n 6.
10 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Marlborough District Council* [2014] NZHC 2616; (2014) 18 ELRNZ 712; [2015] NZRMA 52.
11 There have been ten decisions involving all the parties, and five others restricted to single appellants.
12 The Eighth Decision – [2013] NZEnvC 304 – settled Objectives 3B(1) and (2).
13 *Mackenzie (HC 2014)*, above n 10 at [153].
14 *Mackenzie (HC 2014),* above n 10 at [154] and [170](b)(iv).
15 Ninth (Procedural) Decision *Federated Farmers of New Zealand (Inc) Mackenzie Branch and Others* [2014] NZEnvC 246 at 9(iv).
16 *High Country Rosehip,* above n 6 at Order E(3).

directed[17] the very action – notification of the plan change with the proposed changes – which the 2009 amendments[18] deleted from section 293.

[12] The timing directed by the High Court has caused quite serious problems. First issues have been raised over the fairness of the post-consultation version of PC13 (we consider these in part 2.2). More seriously, the Council did not have the benefit of the ideas brought in through consultation before it notified PC13(s293V). This has resulted in many of the potential improvements not being raised until circulated in the evidence for appellants[19] or section 274 parties.

[13] In its Ninth Decision[20], the Environment Court directed[21] the MDC to prepare changes under section 293 RMA to PC13 to the Mackenzie District Plan ("MDP") based on the matters referred to in the First Decision as modified by the various other decisions of the court and by the High Court in *Mackenzie (HC 2014)*. In order 9E the court then directed the MDC:

> (1) to publicly notify PC13 again on the following terms:
>
> (a) the provisions amended under section 290 should be included to give the context;
>
> (b) the provisions still in issue should be identified;
>
> (c) the notice should invite written advice from any person who seeks:
>
> (i) to be consulted; and/or
>
> (ii) to lodge a (late) section 274 notice to be heard by the Environment Court.
>
> — in respect of the provisions still in issue being:
>
> • (possibly) objective 3B(3);
>
> • the substantially amended policies on the matters identified in Order 9D(1)(c) and (d); and
>
> • all the methods of implementation (including rules);
>
> (2) to consult with all the persons who might be affected by the proposed change or who have made a submission in the light of the public notification;
>
> (3) to make changes it considers appropriate (within jurisdiction) to PC13 arising out of the consultation; and
>
> (4) to submit the changes to the court for approval together with a list of the persons who wish to be heard by the court.

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17 *Mackenzie (HC 2014),* above n 10 at [170](b)(iv).

18 By section 133 Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 no. 31).

19 E.g. Ms L M W Murchison's proposed Policy 3B15.

20 [2014] NZEnvC 246.

21 Orders 9A to 9D of [2014] NZEnvC 246 following the decision of the High Court in *Federated Farmers (HC)* [2013] NZHC 518.

[14] On 14 November 2015 a section 293 "package" was publicly notified and sent to a list of organisations and all rural landowners in the Basin. Expressions of interest in being consulted were invited and the Council then consulted extensively[22] with those people who had lodged submissions. Further, the public notice advised readers of their ability to join these proceedings (by lodging a late section 274 notice).

[15] On 28 April 2016 the MDC passed a resolution[23] approving an amended section 293 "package" "for lodgement with the ... court". A report on the package under section 32 RMA was also approved.

[16] The MDC then prepared the final post-consultation version of PC13 and lodged it in the court's Registry on 27 May 2016. We were advised by Mr Caldwell for the MDC that it was served on all parties (including section 274 parties) and the post-consultation version was sent to submitters from the MDC[24] together with advice as to how to join these proceedings if they wished.

[17] We will use the following abbreviations throughout this decision:

- "PC13(N)" for the plan change as notified on 19 December 2007;
- "PC13(C)" for the Commissioners' version issued on 5 September 2009;
- "PC13(8)" for version of the objectives finalised in the Eighth Decision[25] dated 23 December 2013;
- "PC13(s293V)" for the version notified on 15 November 2015;
- "PC13(pc)" for the version lodged on 27 May 2016 for approval by the court after public consultation.

1.3 The new section 274 parties

[18] Before, during and after the consultation process a number of persons applied to the court to become section 274 parties. Several applications for waiver were not opposed; others were granted by the court in the Tenth Decision[26]. At the risk of oversimplifying matters, we will briefly outline the positions of the section 274 parties.

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22 P Harte evidence-in-chief dated 15 July 2016 paras 13 to15 [Environment Court document 25].
23 Exhibit 25.2.
24 P Harte evidence-in-chief dated 15 July 2016 para 16 [Environment Court document 25].
25 Eighth Decision: [2013] NZEnvC 304.
26 [2016] NZEnvC 80.

Director-General of Conservation

[19] The Director-General of Conservation ("the DGC") lodged a submission with the Council on PC13(s293V) and a late section 274 notice with the court. Its submission and some suggested changes were "... to ensure that the ecological aspects of the [ONL] are recognised and provided for in a more comprehensive manner"[27]. That was a response to the court's invitation in Order E3(b) of the First (Interim) Decision.

Canterbury Regional Council

[20] The Canterbury Regional Council ("CRC") supported PC13(pc).

Te Rūnanga o Ngāi Tahu

[21] Te Rūnanga o Ngāi Tahu ("TRoNT") and Arowhenua Runaka lodged a notice expressing concern that their roles and values in relation to Te Manahuna (the Mackenzie Basin[28]) under the RMA are not adequately protected by PC13(pc). It is important (for jurisdictional reasons) that TRoNT lodged a submission on the original PC13 as notified.

Environmental Defence Society Inc and Mackenzie Guardians

[22] These two societies lodged submissions on similar lines to those of the DGC.

[23] Mr Enright, counsel for the Environmental Defence Society Inc ("EDS") submitted[29]:

> "A tipping point, exceedance of which will mean the Basin no longer qualifies as ONL, is at the risk of being reached". EDS submits that in neighbouring Omarama (Waitaki District Council jurisdiction) similar ecosystems to those of the Mackenzie Basin have been eradicated.[30]

[24] It is EDS' submission that part of the Mackenzie Basin within the MDC's jurisdiction is "the last bastion for much of [Te Manahuna's] ecology, geology,

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27 V M Smith evidence-in-chief at para 4.1 [Environment Court document 28].
28 We use the expression "Mackenzie Basin" in this decision to refer to that part of Te Manahuna within the Mackenzie District.
29 R B Enright closing submissions para 2 [Environment Court document 46].
30 Transcript p 186 line 26 – p 187 line 13.

geomorphology and associated iconic views"[31]. In the opinion of the botanist called by the Society, Mr N Head, development is "moving across the Basin"[32] yet landscape scale connectivity and coherence persist[33] and the Basin remains an ONL.

[25] In EDS' view:

> Loopholes in the operative planning framework have resulted in degradation and loss of ecological and corresponding landscape values[34]. Pursuant to s6(b) RMA and Objective 12.1.1 RPS, PC13 must install a regulatory regime that ensures protection of ONL characteristics and values.

Blue Lake Limited

[26] This company, which has an interest in Guide Hill Station on the eastern side of Lake Pukaki, is concerned about PC13 generally (in much the same way as other landowners and has a particular interest in a number of rules (including those relating to accommodation) and in the accuracy and need for the [Lakeside Protection Area] overlay[35].

Ben Ohau Farming Trust

[27] The sole issue for the Trust is the date for the exemption to Policy 3B13 and the related rule so that resource consent is not needed for "pastoral intensification" if a water permit to use water on land has been obtained from the CRC before 15 November 2015 (the date of notification of PC13(s293V)).

1.4 Recalling the issues

[28] In addition to recognition of the outstanding natural landscape of the Mackenzie Basin, PC13(N) described the issues to be dealt with in PC13 as[36]:

- rural lifestyle ... and rural residential development ... [which is] too extensive or in the wrong location ...;
- subdivision ... result[ing] in the loss of the former high country ethos and landscape pattern;

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31 Transcript p 187 lines 1-9.
32 Transcript p 187 line 10.
33 Exhibit 29.1 and Transcript p 456 lines 19-29.
34 The Mackenzie declaration decision: *Environmental Defence Society Inc v Mackenzie District Council* [2016] NZEnvC 253.
35 Blue Lake Limited section 274 notice, 15 December 2015.
36 PC13(N) p 4.

- ... more intensive use of the remaining farmed areas [especially with the] ... freeholding of former pastoral lease land;
- ... loss or degradation of views from the ... tourist highways;
- ... the extent to which additional irrigation will 'green' the Basin and change land use patterns.

[29] Many of the issues about domestication of the landscape have been dealt with by Objective 3A and its policies. What remains is the question of pastoral intensification and agricultural conversion.

[30] In PC13(C) the last sentence – referring to greening of the basin by irrigation – was omitted. The Environment Court held that was incorrect. The High Court ruled[37] that was an error of law: it is not mandatory[38] for a district plan to include any issue. However, the High Court's decision on this point is quite narrow: Gendall J specifically notes[39] that his ruling is "... not the death knell of the greening issue". We understand him to mean that merely because an issue is not stated in the final version of a plan or plan change does not entail it is not a live issue in the proceedings leading to that plan (change).

[31] The reason that the greening issue remains live is clear: the issues for a local authority (or on appeal the Environment Court) to consider are those raised in the plan (change) as notified. An "issue" in section 75(2)(a) RMA is simply a question which is to be answered by objectives and policies. It is not itself a policy or objective (although many read as if they are). An important point about the statement of an issue is that once a question is asked in a notified plan, it cannot be unasked. It may not be dealt with by objectives and policies if there is a reason for that, but so long as the proceedings are live (assuming there are general appeals) then an issue is live too: that is an important part of the participatory process incorporated in the RMA.

[32] None of the Environment Court "decisions" relied on by the High Court in *Mackenzie (HC 2014)* consider the question of deletion of an issue at all: *The Minister for the Environment v The Hurunui District Council*[40] was simply a Record of Determination – in which there was no actual decision – the court simply accepted the position of the parties. In any event the dispute between the parties (in that case) was

37 *Mackenzie (HC 2014)*, above n 10 at [116].
38 Section 75(2)(a) RMA.
39 *Mackenzie (HC 2014)*, above n 10 at [116].
40 *The Minister for the Environment v The Hurunui District Council* [1999] (EnvC) C110/99.

over the application of the word "efficient" rather than over the deletion of an issue. The reworded issue remained in the district plan.

[33] Similarly the "Final Decision" in *Cammack and Evans v Kapiti District Council*[41] was effectively the endorsement of amendments to issues earlier approved by the Environment Court. A reading of the "issues" amended will show they are largely descriptive. There is only one place where the "issues" – in the proper sense of a question to be answered – are referred to in the "Final Version" of Plan Change 73 to the Kapiti Coast District Plan put to the court and attached to the Final Decision. The (substantive) Interim Decision[42] in that proceeding does not state that the issues are to be changed. Indeed it only refers to one sentence of the statement[43].

[34] *Carter Holt Harvey Forests Ltd v Tasman District Council*[44] is a full and careful decision of the Environment Court concerned with the "right to rainfall". The issue of reductions in surface and groundwater resources was held to be inappropriately located under the heading *Land Resources*[45] arising from tall vegetation and crop irrigation[46]. But the issue was not deleted. Rather the question was merely moved to *Freshwater Resources*[47], a different part of the plan.

[35] Thus the question about whether and, if so, how the greening of the ONL of the Basin by irrigation should be managed under PC13 is still live. We also note that these questions about the "greening issue" are ultimately moot (or irrelevant) because the issue is simply a different aspect of an unchallenged issue in PC13, which is "[should there be] more intensive use of the remaining farms"?

[36] In summary, two general sets of issues are raised by PC13 about what is appropriate use and development of recognised outstanding natural landscape ("ONL") of the Mackenzie Basin:

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41 *Cammack and Evans v Kapiti Coast District Council* (EnvC) W 82/2009.
42 *Cammack and Evans v Kapiti Coast District Council* (EnvC) W 69/2009.
43 *Cammack and Evans,* above n 42 at [277] second bullet point.
44 *Carter Holt Harvey Forests Ltd v Tasman District Council* (1998) 4 ELRNZ 93 (EnvC).
45 *Carter Holt*, above n 44 at 116.
46 *Carter Holt*, above n 44 at 116.
47 *Carter Holt*, above n 44 at 116.

(1) where, how and to what extent can residential and other non-farming buildings[48] be allowed in the Basin;

(2) should pastoral intensification and irrigated farming be managed?

1.5 The layout of this decision

[37] We update our description of the environment in Chapter 2 and in Chapter 3 of this decision we set out our understanding of our role under section 293 and then address various legal issues that arise. We identify the relevant instruments in Chapter 4. We will then answer the following questions consecutively:

- does Objective 3B(3) integrate with the rest of the district plan and not depart from the higher statutory documents? (Chapter 5)
- do the policies effectively implement the objectives of the district plan (and PC13)? (Chapter 6)
- are the rules effective? (Chapter 7)
- are the proposed policies and rules a more efficient use of the resources of the Mackenzie Basin than the status quo? (Chapter 8)
- overall evaluation (Chapter 9).

2. The environment

2.1 The First Decision's description of the environment

[38] The environment and landscape of the Mackenzie Basin is fairly comprehensively described in the First (Interim) Decision[49]. We will not lengthen this decision by repeating the facts as stated in the First (Interim) Decision: we simply adopt paragraphs [1] to [124] of that decision subject to the reservations we express below. These reservations arise principally out of the concern expressed by the court at several points[50] in the First Decision about the lack of ecological evidence at the earlier hearing. We now reconsider our findings about the environment in the light of the evidence given to us in 2017. All findings of fact are made on the balance of probabilities; all findings of the probabilities of future events and effects are made on the standard probabilistic scale.

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48 Buildings and other infrastructure associated with the Waitaki Hydroelectricity Power Scheme ("HEPS") are sui generis and managed by a set of (now settled) policies in PC13.

49 *High Country Rosehip,* above n 6.

50 *High Country Rosehip*, above n 6 at Order E(3)(b) at [15], and at [486] and [488] to [490].

[39] At the 2017 hearing we received considerable further evidence on two of the natural science values of the ONL – the geomorphological characteristics of the flat and lower land within the Basin and its ecological values; and on the cultural values and other values of the Basin to tangata whenua, to farmers and to other residents or visitors.

[40] Before we attempt to marshall that evidence, there are two aspects of the environment we should re-emphasise[51]: the altitudinal and rainfall gradients. The "flat and easy grassland" within the Mackenzie Basin runs from at an altitude of approximately 800 metres above sea level ("masl") on terraces at the head of Lake Tekapo (900 masl on Braemar above Pukaki) down to a low of 375 masl at Lake Benmore. In step with that is a rainfall gradient which moves from 780 millimetres per year in the north (above Braemar) to about 300 millimetres per year in the south at Haldon Station[52].

[41] The impact of these gradients on the ecology of the area is significant as we shall see. The gradients complicate the task of managing the adverse effects of activities because methods are unlikely to work uniformly across them.

[42] Dr Scott an agronomist called by FFM described [53]climate and water holding capacity as the major factors influencing plant growth and survival in the farmed areas of the Mackenzie Basin. He wrote that water holding capacity is determined by soil texture (it increases as textures become finer) and the level of soil organic matter. Dr Scott then observed[54]:

> Unfortunately most soils in the Mackenzie Country have very low levels of organic matter which exacerbates their low water holding capacity and poorly developed soil structure which together make them very prone to wind erosion … . One of the unseen benefits of pasture improvement is the rapid increase in levels of soil organic matter and general soil health.

51 See the First Decision at para 31.
52 P J Boyd evidence-in-chief at para 1.3 [Environment Court document 8].
53 W R Scott evidence-in-chief at para 5.3 [Environment Court document 16].
54 W R Scott evidence-in-chief at para 5.4 [Environment Court document 16].

2.2 Tangata Whenua evidence

[43] Ms M Waaka-Home gave evidence on behalf of Kati Huirapa with "... the unconditional support of Te Rūnanga o Arowhenua, and Te Rūnanga o Ngāi Tahu"[55]. Ms Waaka-Home is a kaitaiaki of the Waitaki catchment[56] including Te Manahuna[57] (the wider Mackenzie Basin).

[44] She wrote[58]:

> 7.1 For Kāi Tahu, mahika kai is the basis of our culture, and the unrelenting cultural imperative is to ensure that we as kaitaki keep the mahika kai intact. In addition it is the basis of Kāi Tahu's economy both historically and also today. Mahika kai is often described as the gathering of foods and other resources, the places where they are gathered and the practices used in doing so. Over many generations Kāi Tahu Whānui developed food gathering patterns based on the seasons and lifecycles of various birds, animals and plants. These patterns are similar to the seasonal calendar contained in Appendix 2 which reflects a general calendar for Te Waipounamu based on one known by Hone Taare Tikao recorded in the 1920s.
>
> 7.2 The Waitaki and Te Manahuna were a fundamental component of these systematic seasonal food gathering patterns. A particular example is that during the months from May to August special Kāi Tahu families travelled to the Upper Waitaki catchment to harvest tuna, weka and other resources. The reason families harvested tuna and weka during this time was because the fat content in these species was at its highest level, which placed far more value on these species as kai because the higher fat content made the preservation process much easier. As well, the tuna whaka heke (migration) on the coast would have also been completed for the season by this time.

[45] She listed many other plants and some birds harvested in Te Manahuna and described[59] efforts to restore mahinga kai with fish passes in the Waitaki and research programmes and[60] the traditional routes into Te Manahuna from the lowlands. These included the Waitaki River, and its upstream branches the Ōhau, Pūkaki and Takapo (Tekapo) Rivers; the Hakataramea Pass, and Te Kopi o Opihi (Burkes Pass). As signs of that occupation there are archaeological sites within Te Manahuna comprising old cooking areas and "ancient settlements ... locations ... where artefacts have been

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55 M Waaka-Home evidence-in-chief at para 2.1 [Environment Court document 4].
56 M Waaka-Home evidence-in-chief at para 2.3 [Environment Court document 4].
57 M Waaka-Home evidence-in-chief at para 2.8 [Environment Court document 4].
58 M Waaka-Home evidence-in-chief at paras 7.1 and 7.2 [Environment Court document 4].
59 M Waaka-Home evidence-in-chief at para 13.6 [Environment Court document 4].
60 M Waaka-Home evidence-in-chief at para 8.1 et ff [Environment Court document 4].

found, ancient rock art drawings, caves and rock shelters"[61] as shown on the map produced[62] by Ms Waaka-Home. Within the Mackenzie Basin, most of these sites are clustered around the southern ends of Lakes Pūkaki and Tekapo, at Whakarukumoana (Lake MacGregor) and along the rivers

[46] The Kāi Tahu Claims Settlement Act 1998 (KTCSA)[63] stipulates three mechanisms to acknowledge and recognise the relationship of Kāi Tahu with the cultural landscape of Te Waipounamu:

(a) Statutory Acknowledgements;
(b) Dual Place names; and
(c) Nohoanga.

[47] Ms Waaka-Home described[64] "Statutory Acknowledgements" as "an acknowledgment by the Crown of the particular cultural association that Kāi Tahu Whānui holds for specific areas and is intended to ensure that Te Rūnanga o Ngāi Tahu is informed when a proposal may affect one of these areas". The "Statutory Acknowledgements" in the Te Manahuna are:

- Aoraki (Mount Cook);
- Hakataramea River;
- Lake Ōhau;
- Lake Pūkaki;
- Lake Takapo (Tekapo);
- Lake Ao Mārama (Lake Benmore); and
- Whakarukumoana (Lake MacGregor).

[48] Under the KTCSA dual place names are to be included on official maps, road signs and explanatory materials. The dual place names in Te Manahuna are Aoraki / Mt Cook, and Mackenzie Pass / Manahuna.

[49] Under the KTCSA nohoanga have been given contemporary meaning through the establishment of temporary campsites near areas of cultural significance. Any Kāi

61 M Waaka-Home evidence-in-chief at para 9.4 [Environment Court document 4].
62 M Waaka-Home evidence-in-chief at Appendix 4 [Environment Court document 4].
63 See also the map of Te Manahuna with Statutory Acknowledgements Areas marked in red attached as Appendix 1 to the evidence of Tanya J Stevens.
64 M Waaka-Home evidence-in-chief at para 12.3 [Environment Court document 4].

Tahu person or family can camp at nohoanga[65] (subject to certain conditions). The nohoanga in Te Manahuna are located at the Lake Ōhau and the Ōhau River, Takamoana (Lake Alexandrina) and Whakarukumoana (Lake MacGregor).

[50] Ms Waaka-Home described[66] other methods in which Te Rūnanga o Arowhenua, and Te Rūnanga o Ngāi Tahu have been working to restore their cultural relationship with Te Manahuna. Relevantly these included:

- a programme called "Aoraki Bound" which involves paddling waka the length of Pūkaki, and a hikoi (walk) up Te Awa Whakamau (the Tasman River) the feet of Aoraki (Mt Cook) in addition to other hikoi[67] and field trips;
- "... visiting Pastoral Leases ... as part of the Tenure and Review process to protect our mahika kai and wāhi tapu ..."[68];
- restoration of traditional Kāi Tahu names in the naming of Conservation Parks – Ahuriri, Te Rua Taniwha, and Te Kahui Kuapeka;
- a wider working relationship with the Department of Conservation;
- establishment of a community facility – Te Whare Mahana – in Twizel township.

[51] The witness concluded[69]:

> Currently I consider that Plan Change 13 does not adequately recognise Ngāi Tahu ancestral, historic and contemporary values, rights or interests. In this way I firmly believe that Plan Change 13 is denying me my ability to exercise my role as Kaitiki (as described earlier in my evidence) which was delegated to me by birth and right.
>
> These ancestral, historic and contemporary values, rights and interests espoused in my evidence could invariably, and easily, be incorporated into the Plan Change. This would go a long way towards achieving the type of recognition that Ngāi Tahu is concerned with.
>
> The evidence of Ms Stevens details the appropriate planning concerns and mechanisms that could remedy the situation. I support Ms Stevens' recommendations as being appropriate to address many of the matters covered in my evidence.

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65 "Nohoanga" means "seat, abode, or encampment".
66 M Waaka-Home evidence-in-chief at para 14 [Environment Court document 4].
67 M Waaka-Home evidence-chief at para 14.8 [Environment Court document 4].
68 M Waaka-Home evidence-chief at para 14.3 [Environment Court document 4].
69 M Waaka-Home evidence-in-chief at paras 15.2 to 15.4 [Environment Court document 4].

[52] In considering Ms Waaka-Home's evidence we have borne in mind that the values of Te Manahuna to TRoNT and its hapu are an important part of the total values of the ONL. Despite that, we are troubled by her conclusion for two reasons. First, Ms Waaka-Home does not recognise that PC13 needs to be read in the context of the MDP as a whole, and of course Chapter 4 of the plan expressly relates to tangata whenua. The ancestral and historic values she writes of are incorporated into the MDP already, and do not need to be added into PC13. Second in relation to the "contemporary" component of those "values, rights, and interests" Ms Waaka-Home did not identify any way in which those values were specifically not being maintained or improved. With one exception her evidence gives no idea of any problem that needs fixing (provided the MDP is read as a whole). The exception is that Ms Waaka-Home's role as one of the Kaitiaki of Te Manahuna is not being recognised. However, that is beyond the scope of PC13, and may even require amendment to the RMA to resolve.

[53] We consider later whether our concerns are met by the evidence of Ms T J Stevens, the planner called by TRoNT.

2.3 Farming in the Mackenzie Basin

[54] Outside the townships (Tekapo and Twizel) in the Mackenzie Basin, farming is the second most "important" activity (behind tourism) in employment terms. However, as we observed in the First Decision[70] "... if 'importance' is rated by the direct contribution to the national economy ... the Waitaki Power Scheme ... wins hands-down over farming". Due to a combination of natural (low rainfall, poor soils, high altitude) and legal (leasehold rather than freehold land) factors, much of the land in the Mackenzie Basin has until recently been farmed relatively lightly as large stations grazing sheep and some cattle at low densities. For example we received evidence from Mr J B Murray one of the owners of The Wolds Station that it currently runs 10,300 sheep and 390 Angus cattle on 8,000 hectares[71]. That is a doubling[72] of stock numbers since 1984.

[55] We accept, as FFM's witness Ms L M W Murchison wrote[73], that the people – including the high country "pastoral farming" community and their activities and culture are part of the landscape and identity of the Mackenzie Basin. That raises issues as to

70 [2011] NZEnvC 387 at para 41.
71 J B Murray evidence-in-chief para 7 [Environment Court document 5].
72 J B Murray evidence-in-chief para 9 [Environment Court document 5].
73 L M W Murchison evidence-in-chief at para 43 [Environment Court document 33].

how landowners are actually farming and how that has changed, and is changing the image and ethos[74] of the "Mackenzie Country" as pastoral farming.

[56] "Pastoral farming" has a specific Australasian set of meanings. *The New Zealand Oxford English Dictionary*[75] defines "pastoral" as (relevantly):

> ... **1** of relating to, or associated with shepherds or flocks and herds. **2a** of. pertaining to, or engaged in stock-raising as distinct from crop-raising. **b** (of land) used for, or suitable to be used for, stock-raising. **3** (of a poem, picture, etc.) portraying country life, usu. in a romantic or idealised form,
>
> ...
>
> **Pastoral lease** *NZ & Aust.* **1** an agreement under which an area of crown land is held on condition that it is used for stock-raising. **2** the land so held. **Pastoral property** (or **run**) *NZ & Aust.* A stock-raising establishment.

[57] Ms L M W Murchison is an experienced farmer from the Hurunui District in addition to having planning and resource management qualifications. She described[76] how in her opinion "oversowing topdressing, fencing, shelterbelts and dryland cultivation" need to be included as pastoral farming. That evidence is too broad and general to persuade us on the balance of probability that it is an accurate description of what has occurred in the Mackenzie Basin. Ms Murchison does not describe the role of the conditions of pastoral leases, or on what sort of scale and intensity those various practices have taken place.

[58] Mr G H Densem the landscape architect consulted by the MDC wrote[77]:

> 52. Pastoral intensification has occurred over the 150 years of pastoral runholding in the Mackenzie Basin. Under traditional regimes, which dominated until the 1990's, improved 'green' paddocks existed within the sheltered homestead block, while over the wider run, tussock variably intermingled with oversown exotic browntop grasses, forming a visually 'brown' dry grassland landscape. This was the basis of the high country landscape character identified in my 2007 study.[78]
>
> 53. Since the 1990's, but particularly since 2009, intensification has proceeded in the various stages described in paragraph 4.8 of my September 2015 paper, namely:

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74 PC13(N): Issues.
75 *The New Zealand Oxford English Dictionary* (2005) OUP p 825.
76 L M W Murchison evidence-in-chief at para 6 et ff [Environment Court document 33].
77 G H Densem evidence-in-chief 15 July 2016 at paras 52-53 [Environment court document 19].
78 G H Densem *The Mackenzie Basin Landscape* November 2007, 2.8-2.20 (p 11), 3.2-3.2 (p 17).

Cultivated or irrigated regimes:

1. Cultivated, irrigated pastures of largely green character within traditional homestead areas, now identified under Plan Change 13 as Farm Base Areas;
2. Cultivated, irrigated pastures of largely green character within consented irrigation areas outside Farm Base Areas, following Environment Canterbury water allocation hearings;
3. Seasonally green cultivated but unirrigated crop areas outside Farm Base Areas.

Dryland Regimes:

4. Extensive dryland grazing at low stocking rates, that maintains the tussock/browntop cover of the Basin. This may include oversown but uncultivated grasslands, that may be predominantly exotic Browntop, that remain generally brown through the year.
5. Retired conservation lands managed for ecological values, particularly maintenance of its fragile tussock covering, which may involve occasional maintenance grazing. Many such areas are above the 700m contour;
6. Retired, protected areas with specific ecological values such as wetlands, within the Basin floor and rivers.

[59] Traditionally the principal farming techniques in the Basin were burning of tussock, grasslands and scrub, grazing by sheep (at different stocking rates), "subdivisional fencing"[79], topdressing (often aerial) with fertiliser and oversowing with exotic grass-seed. We accept that limited ploughing and cultivation took place around homesteads or on the rarer pockets of fertile soils. Similarly there has been small scale border dyke irrigation where location of streams and topography has allowed it – notably at the downstream end of the Basin (on Haldon Station). Direct drilling has become widespread since the late 1950s. Mr Murray described[80] his father direct drilling after he purchased The Wolds Station in 1957.

[60] Topdressing with fertiliser and oversowing (often aerially since the 1950s) have also become regular practices in the Basin. Dr Scott pointed out why the application of fertilizer has become important in the high country, quoting[81] from a paper he wrote in 1995:

79 This does not mean fencing of a formal subdivision under Part 10 of the RMA but fencing of areas to enable more intensive stock pressure.
80 J B Murray evidence-in-chief at para 13 [Environment Court document 5].
81 W R Scott evidence-in-chief at para 8.3 [Environment Court document 16].

> High country pastoral farming is now reaching the stage, as elsewhere in New Zealand, that for sustainability, the mineral removal in products must be more than balanced by added fertiliser.

[61] Topdressing and the other activities have changed in intensity and scale since 1995. Direct drilling has covered wider areas as the equipment has become better able to cover more difficult terrain and more efficient. Compared with the petrol MF35 tractor used by Mr Murray's father in the early 1960s, closed cab tractors of more than 100 horsepower are now standard, as are five metre plus wide direct drills.

[62] We will turn to the quantitative evidence of changes in practices in the Mackenzie Basin shortly, but we can summarise to this point with a qualitative conclusion that there are very large differences between the pastoral farming traditionally carried on in the Basin and the agricultural businesses carried on south of Lake Ruataniwha (within Waitaki District).

[63] Until the last few years many of the stations in the Mackenzie Basin were held under pastoral leases under the Crown Pastoral Land Act 1998 ("the CPLA"). A significant proportion of the Mackenzie Basin is still held under such leases[82]. A pastoral lease gives the holder the "exclusive right of pasturage over the land"[83] but no right to the soil[84]. Burning[85], cropping, cultivation, ploughing, topdressing and/or oversowing are forbidden[86] without the written consent[87] of the Commissioner of Crown Lands ("CCL")[88].

[64] Many changes are due to a process under the CPLA called "Tenure Review" which has freeholded[89] much of the flat and easy land in the Mackenzie Basin, while returning higher land (and some wetlands and other reserves) to the Crown. The objects of Part 2 CPLA are stated in section 24 of that statute to be:

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82 Dr Walker produced a map showing the tenure review situation: evidence-in-chief Appendix 10 [Environment Court document 17].
83 Section 4(a) CPLA.
84 Section 4(c) CPLA.
85 Section 15 CPLA.
86 Section 16(1) CPLA.
87 Section 16(2) CPLA.
88 This raises an interesting point for claims of existing uses over former pastoral leasehold land: the claimant will need to produce copies of the written consents of the CCL.
89 See S Walker evidence-in-chief Figure A10 [Environment Court document 17].

24 Objects of Part 2

The objects of this Part are —

(a) to—

(i) promote the management of reviewable land in a way that is ecologically sustainable:

(ii) subject to subparagraph (i), enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument; and

(b) to enable the protection of the significant inherent values of reviewable land—

(i) by the creation of protective mechanisms; or (preferably)

(ii) by the restoration of the land concerned to full Crown ownership and control; and

(c) subject to paragraphs (a) and (b), to make easier—

(i) the securing of public access to and enjoyment of reviewable land; and

(ii) the freehold disposal of reviewable land.

[65] Some families have been farming in the Basin for a long time: Mr S J Cameron advised that his family and later the Ben Ohau Trust have been farming the land at Ben Ohau since 1891. He wrote[90]: "Over those 125 years my family has developed and used the land for sheep farming (primarily wool production), beef cattle and cropping, as have our neighbours. Our connection with the land at Ben Ohau is very real, as is our desire to protect it for my children and future generations to come".

[66] Because of the effects of oversowing and topdressing on native plants, the MDC has a (district-wide) definition of "Pastoral Intensification" as meaning: "... subdivisional fencing, topdressing and oversowing."[91] Under the MDP control on pastoral intensification only occurs within ecological sites called Sites of Natural Significance ("SONS").

[67] In fact farming techniques in the Basin have more recently included more widespread cultivation but more commonly direct drilling, herbicide application (usually when drilling but sometimes when oversowing), and irrigation. The effects of all these activities vary of course, with the frequency and extent of their use. Mr J B Murray described[92] how he currently manages The Wolds under a constantly assessed programme for different parts of the property in cycles:

90 S J Cameron evidence-in-chief at para 18 [Environment Court document 6].
91 Mackenzie District Plan pp 3 to 8.
92 J B Murray evidence-in-chief para 25 [Environment Court document 5].

- oversowing once every five to ten years;
- topdressing every two to three years.

[68] For consistency we will use three descriptions:

(1) "traditional pastoral farming": grazing of stock with limited oversowing and topdressing (plus limited cultivation and a small dairy herd/sometimes one milking cow) around a homestead;
(2) "pastoral intensification": subdivisional fencing and/or topdressing and/or oversowing[93];
(3) "agricultural conversion": direct drilling, cultivation, topdressing and/or oversowing or herbicide application, and/or irrigation.

[69] Both pastoral farming and pastoral intensification require weed and pest (rabbit) control. The costs are large. Mr R J Boyd who has lived and worked on Haldon Station for 35 years and managed it since 1987 gave evidence[94] that on its 22,000 hectares Haldon Station spends:

- $50 - $60,000 per annum on rabbit control;
- $25 - $30,000 per annum on wilding tree eradication;
- $20,000 per annum "on other wood weeds – Broome/Gorse/Willow"[95];
- "countless programmes on … possum, ferret and other mammalian pest control".

[70] Mr Densem described the visual effects of the changes and intensification of farming techniques as follows[96]:

> The above regimes represent a progression between unmodified brown areas of the basin and the modified green areas. The ONL value derive particularly from the former. Beyond a certain level of improvement, the site becomes green and akin to a lowland rural area. It then no longer possesses a high country character and therefore detracts from the ONL. However light intensification and oversowing generally maintain the dry grassland character, and thus ONL values of the Basin.
>
> …

93 This is a defined term: MDP pp 3 to 8.
94 P J Boyd evidence-in-chief at para 2.2 [Environment Court document 8].
95 P J Boyd evidence-in-chief at para 2.2 [Environment Court document 8].
96 G H Densem evidence-in-chief 15 July 2016 at paras 54 to 56 [Environment Court document 19].

> Intensification also degrades the characteristic landscape continuity and simplicity of the Basin by introducing green pastures, shelterbelts, buildings, roads and lighting that break up the extensive traditional landscape. The new houses, sheds, irrigators, farm roads and improved paddocks arising from these generally occur in the wider landscape and not within the traditional cultural pattern of Farm Base Areas (homesteads, home paddocks).

2.4 The *Mackenzie Agreement*

[71] Towards the end of the First Decision the court noted the existence of what is called "*The Mackenzie Agreement*"[97] relating to the wider "Mackenzie Country" of which the Mackenzie Basin is part. The court hoped unresolved matters in PC13 might be resolved under that agreement. That has not occurred. However the *Mackenzie Agreement* has been referred to by a number of witnesses and counsel – notably by FFM which says it supports the Agreement – so we will set out its more relevant provisions.

[72] An informal group called the "Upper Waitaki Share Vision Forum" produced *The Mackenzie Agreement: A Shared Vision and Strategy* in 2011. Signatories included the Mackenzie Federated Farmers, Otago High Country Federated Farmers, EDS, The New Zealand Fish and Game Protection Society Inc, "Tourism Waitaki", "Existing Irrigators" (represented by Mr P J Boyd), the Mackenzie Irrigation Company, the Mackenzie Guardians Inc, and Mr J O'Neill as an independent person appointed by the MDC. The *Mackenzie Agreement* sets out a "vision", which includes a mixed land use pattern incorporating irrigated and dry land agriculture, tourism and the protection or management of land for biodiversity and landscape purposes. That is a vision the Council supports. The *Mackenzie Agreement* is still supported by some other parties including FFM[98].

[73] The *Mackenzie Agreement* contemplated that a trust could be set up (inter alia) to assist to protect land with high natural science values as compensation for pastoral intensification or agricultural conversion. Mr M Neilson gave evidence[99] about the implementation of that aspect of the *Mackenzie Agreement* and attached a copy of a Mackenzie Country Trust Deed to his evidence. Apparently funding from the Government was available to set up the Trust, so it has some additional backing at higher levels than the local authorities.

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97 C Vivian evidence-in-chief Attachment CV-C [Environment court document 26].

98 R Gardner opening submissions para 13 [Environment Court document 2.2]; closing submissions para 3 [Environment Court document 41].

99 M J M Neilson evidence-in-chief [Environment Court document 3.6].

[74] The *Mackenzie Agreement* identified an area of 269,000 hectare of "flat and easy country"[100] in the larger Mackenzie Country comprising the Mackenzie Basin (within the Mackenzie District) and an area between the Ohau River and the south side of Omarama (within the Waitaki District). It provides for 64,342 hectares[101] to be developed. It continues[102]:

> The ... development area includes about 26,000 ha of land which under our Vision and Strategy will be intensified whether by irrigation or by intensified dryland farming practices. Under mid-range assumptions, this development strategy is capable of generating $100 million/year of additional export productions, and an increase in land values of $400 million. The resulting increase in rates payable from this land must exceed $1 million a year, and the tax payable by landholders and employees must exceed $5 million a year – a total of at least $6 million of public revenues. The cost of protecting land under JMAs will vary widely but it seems reasonable to assume an average cost of $50/ha/year. If the target area for conservation is set at 100,000 ha (of which 26,000 is already conservation land, or is in the process of becoming conservation land), then additional land for biodiversity and tussock protection managed under JMAs would cost $3.7 million a year.

[75] The scale of more intensive development proposed as at 2011 within the larger area of flat and easy country was[103]:

- 7,500 ha already developed for irrigation:
- 7,500 ha proposed for relatively small scale irrigation on 29 large sheep and beef properties;
- 9,600 ha proposed for large scale, intensive livestock farming on 5 properties.

The total of those three development areas is 24,600 hectares and the sub total of proposed irrigated development areas is 17,100 hectares.

2.5 Changes to the environment since the First Decision

[76] After the hearing we realised that the evidence we had received at the hearing was not easy to reconcile with the areas referred to in the *Mackenzie Agreement*. We requested a memorandum from counsel for the MDC (with an opportunity for the other parties to respond) to understand whether development of the areas of "flat and easy

100 *Mackenzie Agreement* p 5.
101 Ibid, at p 22 (and in Table 3).
102 Ibid, at p 22.
103 *Mackenzie Agreement* p 5.

land" outlined in Page 5 of the *Mackenzie Agreement* of 2011:

- is still being worked towards;
- has been achieved; or
- have been exceeded.

[77] On 22 March 2017 the court received a very useful report and analysis from Mr Caldwell and Ms King, counsel for the MDC. As they observe[104]:

> The comparison is not straightforward. The evidence of the various witnesses addressing the change in land use did not specifically address the comparison sought by the Court. Rather, that evidence focused on the degree of loss for various time periods between 1990-2016. Nor did the evidence specify with any degree of precision what changes were as a result of intensification, as opposed to forestry, wilding spread or similar[105].

We are grateful to Mr Caldwell and Ms King for their work and rely on it in what follows. Other parties responded and we now work through the evidence and submissions.

[78] The *Mackenzie Agreement* includes[106] a Table 3 showing existing development in the Mackenzie Country. Mr Caldwell reproduced parts of that table as follows:

Mackenzie Country land types	H1 fluvial valley fill	H1 + H2 valley Moraine & outwash	H3 basin moraine	H4 basin outwash	Total (ha) of basin land	%
Development :						
A. Already developed	917	952	11,649	25,009	38,527	14%
B. Proposed irrigation	231	525	5,365	19,694	25,815	10%
Total development area (A + B)	1,148	1,477	17,014	44,703	**64,342**	**24%**

[79] The table shows that 38,527 hectares has already been developed and 25,815 hectares was "proposed irrigation" in the greater Mackenzie Basin in 2011. However, the *Mackenzie Agreement* then qualifies that by stating[107]:

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104 D Caldwell and J King: Memorandum 22 March 2017 at [4] [Environment Court document 52].
105 They acknowledged that Dr Susan Walker did address percentages of different causes of change for 2009-2016 in her evidence-in-chief at para 49, footnote 60 [Environment Court document 52].
106 *Mackenzie Agreement* p 21.
107 *Mackenzie Agreement* p 22.

> The 64,000 ha shown in Table 3 as the total development area includes about 26,000 ha of land which under our Vision and Strategy will be intensified either by irrigation or by intensified dryland farming practices.

[80] As Mr Caldwell and Ms King pointed out[108]:

> The Mackenzie Agreement therefore contains two development figures: 17,100 ha, being the total of "proposed" irrigation stated on page 5, and 26,000 ha, being the area that *will be intensified either by irrigation or intensified by dryland farming practices* stated on page 22. It is not readily apparent why the figures differ although an existing development map as at 2009 is noted as an input.[109] For the purposes of this memorandum, Council has compared the evidence of development and irrigation against both of those figures.

[81] Ms Forward, counsel for Mt Gerald and The Wolds, has taken instructions and her clients have advised her that topdressing and oversowing are not regarded as intensified dryland farming (even if they are regarded as "developed"[110]). We accept that was their view, and can see that may have been the general understanding of the *Mackenzie Agreement*. We have found that rates of topdressing and oversowing, combined with different stocking rates can mean that indigenous tussock grasslands can convert to exotic cover over time. This means there is a fundamental ambiguity over what is meant by "intensified ... dryland farming practices" in the *Mackenzie Agreement.*

[82] The *Mackenzie Agreement* approximately[111] covers land within the Tekapo, Pukaki and Omarama ecological districts – an area which we called "the Greater Mackenzie Basin" in the First Decision and the "Mackenzie Country" in this. The Mackenzie Basin subzone (being that part of the Greater Mackenzie Basin within the Mackenzie District) encompasses the Tekapo and Pukaki ecological districts only.

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108 MDC submissions 22 March 2017 at para 9 [Environment Court document 52].

109 *Mackenzie Agreement* p 21, bulletpoint at 7(c).

110 J B Murray evidence-in-chief at para 5: "When referring to "developed" areas I mean those areas that are either under irrigation, have been cultivated or that have been oversown and topdressed". [Environment Court document 5].

111 Compare: evidence-in-chief of Nicholas Head for DoC (Map 1), with the Mackenzie Agreement (map on p 3) and affidavit of Matthew McCallum-Clark sworn 17 February 2017 (map in Annexure B).

The quantitative evidence on the changes to ecosystems in the Mackenzie Basin

[83] We received three sets of evidence relevant to this issue.

Mr N Head for the Director-General of Conservation

[84] Table 3 in Mr Head's evidence in chief sets out the results of analysis[112] of the extent of ecosystem loss that has occurred between 2000 and 2016 on inland alluvial surfaces and moraines, and in each ecological district[113]. Mr Head's Table 3 is now set out[114] here:

Table 3: Indigenous vegetation remaining on naturally rare ecosystems in the Mackenzie Basin and extent of loss (Hectares)

Ecosystem per ED	Exotic Ha 2000	Exotic Ha 2016	Indig. Ha 2000	Indig. Ha 2016	Indig. Ha lost	% lost between 2000-2016
Moraines	**11,400**	**18,400**	**52,200**	**45,100**	**7,000**	**13%**
Omarama ED	2,000	4,700	7,200	4,500	2,700	**37%**
Pukaki ED	2,000	2,900	4,200	3,300	894	**22%**
Tekapo ED	7,300	10,800	40,800	37,400	3,400	**8%**
Alluvial outwash Gravels	**16,500**	**38,300**	**87,000**	**65,300**	**21,800**	**25%**
Omarama ED	5,700	14,200	18,000	9,500	8,500	**47%**
Pukaki ED	7,600	19,000	53,800	42,500	11,300	**21%**
Tekapo ED	3,100	5,100	15,200	13,200	2,000	**13%**

[85] The appropriate totals are in the sixth (penultimate) column (shown in blue). Adding the figures for the Pukaki and Tekapo Ecological Districts Table 3 shows that on Mr Head's analysis between 2000 and 2016 17,594 hectares of indigenous vegetation was lost on moraines and alluvial outwash gravel areas in the ecological districts.

112 N J Head's figures were drawn from a Landcare Research database, version dated 30 June 2015 (footnotes 58 and 59 of his evidence-in-chief) [Environment Court document 14].

113 N J Head, 9 September 2016, at para 16.1 [Environment Court document 14].

114 The underlined figure being a correction Mr Head made in evidence at the hearing - Transcript p 169, lines 5-6.

[86] When questioned[115] by the court Mr Head was unable to provide specific figures for the change that has occurred between 2011 and 2016. Regrettably no one thought to ask Mr Head what has replaced the indigenous vegetation. Consequently we do not know whether the replacement use is wilding pines, direct drilled pastures, or exotic grasses or other green crops.

Dr S Walker for the Mackenzie Guardians

[87] An ecologist called by the Mackenzie Guardians, Dr S Walker gave evidence of the area in the Basin that has converted to exotic cover[116] and that the majority of that conversion occurred through pastoral intensification[117].

[88] An apparent 14,000 hectare discrepancy[118] between Dr Walker's and Mr Head's figures for 2001-2016 was resolved. Dr Walker explained that the difference was found in areas of the Basin that were not on either alluvial outwash or moraine[119]. She confirmed that in terms of developed areas on outwash and moraines, her and Mr Head's figures were identical[120]. Mr Harding agreed[121] in his affidavit that *changes on land that is neither moraine or outwash could explain the apparent discrepancy* between the figures of Mr Head and Dr Walker[122].

[89] Matters were complicated slightly by the fact that Dr Walker later revised some of her figures[123]. Table 1 from her affidavit is reproduced here:

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115 Transcript of proceedings, p 173, lines 27-33:
Q. The question is, how much of the changes occurred in the smaller interval, 2011 to 2016?
A. Oh sorry. 2011, well, I haven't mapped that exactly but I can't answer that question in terms of specifically, but the loss has been, you know, accumulating annually. So it's – I can't exactly tell you how much there's been in that period but there's been a substantial loss since five, six years.

116 Dr S Walker evidence-in-chief, 9 September 2016, para 49 [Environment Court document 17]. Also Transcript, p 250, lines 21-27.

117 Dr S Walker evidence-in-chief, 9 September 2016, para 49 and footnote 60 [Environment Court document 17].

118 Some 14,000 ha – Transcript of proceedings, p 253, at lines 13-15.

119 Transcript of proceedings, p 254, lines 9-10 and lines 13-15, and Exhibits 17.8 and 17.9.

120 Transcript of proceedings, p 486, lines 1-3 and p 487, lines 3-7.

121 Affidavit of M A C Harding, sworn 24 February 2017, at para 10 [Environment Court document 37].

122 Mr M A C Harding gave examples of such areas, and noted some areas that had been developed without any apparent link to irrigation (Maryburn and Rhoborough Downs) – affidavit of Mike Harding, sworn 24 February 2017, at paras 11-12 [Environment Court document 37].

123 Affidavit of Dr Susan Walker, sworn 28 February 2017, at paras 6-8 [Environment Court document 17A].

Table 1. Land areas of change from indigenous to exotic cover across the Mackenzie Basin floor in four periods, in hectares. Number in parentheses show the percentage of total change to July 2016. Corrections to numbers provided in my evidence and cross examination answers are shown in bold.

	Before 1990	1990 to 2001	2001 to 2009	2009 to July 2016
All of Mackenzie Basin floor[a]	6,700 (9.0%)	14,800 (19.8%)	**19,300 (25.8%)**	**34,000 (45.4%)**
Mackenzie Basin floor in Mackenzie District only[b]	5,700 (11.7%)	11,400 (23.3%)	**7,700 (15.8%)**	**24,000 (49.2%)**

[a] Omarama, Pukaki and Tekapo Ecological Districts

[b] Pukaki and Tekapo Ecological Districts only

[90] Again there is, as Ms Forward pointed out, ambiguity over whether the "exotic cover" is irrigated grassland, wilding conifers, or something else.

[91] Mr Caldwell and Ms King write that[124]: "The above changes affected the allocation of development between the time periods of 2001-2009 and 2009-2016. There was no change to the overall total for 2001-2016[125] and therefore the resolved 'discrepancy' ... is unaffected".

[92] Dr Walker also said that in her opinion 65-85% of the conversion recorded between 2009-2016 had occurred in the last three years[126]. After reflection she obviously had no reason to resile from that because she repeated[127] her assessment in her affidavit explaining the discrepancy discussed above.

[93] Mr Caldwell and Ms King calculated from Dr Walker's evidence[128] that between 22,100 to 28,900 hectares[129] of change from indigenous to exotic cover has occurred in

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124 Memorandum of D C Caldwell and J R King 22 March 2017 [Environment Court document 52].

125 Affidavit of Dr Susan Walker, sworn 28 February 2017, para 8 [Environment Court document 17A].

126 Transcript, pp 243-244, beginning line 30.

127 Affidavit of Dr S Walker, sworn 28 February 2017 at para 10 [Environment Court document 17A].

128 Figures taken from Dr Walker's Table 1 in her affidavit and her percentage of change as stated in evidence and in her affidavit [Environment Court document 17A].

129 The arithmetic is as follows:
34,000 x 0.65 = 22,100 ha
34,000 x 0.85 = 28,900 ha

the Tekapo, Pukaki and Omarama ecological districts since 2011. Of that, between 15,600 to 20,400 hectares[130] of development occurred in the Tekapo and Pukaki ecological districts (i.e. within the Mackenzie Basin).

Matthew McCallum-Clark (for the Canterbury Regional Council)

[94] At the court's request[131] Mr M E A McCallum-Clark, a planner called by the CRC, provided further evidence by way of affidavit[132] relating to water permits granted for irrigation by the Canterbury Regional Council in the Mackenzie District. He deposed that[133] within the Mackenzie Basin area:

(a) 10,660 hectares of new consents were granted from 2012 onwards;
(b) 2,043 hectares of consents underwent a change of conditions from 2012 onwards (there were no transfers during that time for this area)[134]; and
(c) 784.5 hectares of consents were currently in process.

The total of (a) to (c) is 13,487.5 hectares.

[95] The relevant figures within the *Mackenzie Agreement* area but outside the Mackenzie Basin area are:

(a) 4,610.5 hectares of new consents were granted from 2012 onwards;
(b) 882.5 hectares of consents either underwent a change of conditions from 2012 onwards or were granted from 2012 and were later transferred in name only[135];
(c) 2,868 hectares of consents were currently in process.

There remains uncertainty[136] as to whether consents granted before 2012 that have undergone changes in conditions post-2012 have the effect of providing for new

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130 The arithmetic is as follows:
24,000 x 0.65 = 15,600 ha
24,000 x 0.85 = 20,400 ha
131 Transcript, pp 760-761, beginning line 28 and ending line 27.
132 Affidavit of Matthew McCallum-Clark, sworn 17 February 2017 [Environment Court document 35].
133 Ibid, at para 21 [Environment Court document 35].
134 Ibid, Annexure A, third table [Environment Court document 35].
135 Ibid, Annexure A, fourth table [Environment Court document 35].
136 Ibid, at para 17 [Environment Court document 35].

irrigable area. This uncertainty relates up to 2,618.5 hectares of the 18,196 hectares total identified by Mr McCallum-Clark (being the consents noted in paragraphs (a) and (b) above, however excluding those consents transferred in name only[137]). Mr McCallum-Clark also noted[138] the following exclusions and uncertainties regarding the consents transferred or which underwent a change of conditions from 2012 onwards[139]:

- resource consents that have been transferred since 2012 (name change only) but that were originally granted before 2012 have not been included in the tables;
- transfers of consents originally granted after 1 January 2012 have been included; and
- there are some consents where conditions changed since 1 January 2012 ...These resource consents have been included, but there is some uncertainty as to whether all the irrigable area represents new development since 2012.

[96] Mr McCallum-Clark's combined total is 18,196 hectares of irrigation within the *Mackenzie Agreement* area[140]. That figure may rise by up to 3,652.5 hectares if the consents in process are granted. That is of course speculative.

Comparison of the figures

[97] Table A below compiled by counsel compares the evidence of Dr Walker and Mr McCallum-Clark[141] to both the 17,100 hectares[142] and 26,000 hectares[143] in the *Mackenzie Agreement*.

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137 Ibid, Annexure A, fourth table (307 ha being the last two listed consents in that table) [Environment Court document 35].
138 Ibid, at para 17 [Environment Court document 35].
139 Mr McCallum-Clark's total also excludes one further consent for community supply (irrigation of green spaces and the Twizel golf course) which does not include an irrigated area – Affidavit of Matthew McCallum-Clark, sworn 17 February 2017, at para 20 [Environment Court document 35].
140 Ibid, at para 21 [Environment Court document 35].
141 Dr N J Head's evidence is not included in Table A, as he was unable to quantify the area he considered had been developed between 2012 to 2016.
142 Being the total of "proposed" irrigation stated on p 5 of the *Mackenzie Agreement*.
143 Being the area that will be *intensified either by irrigation or intensified dryland farming practices* on p 22 of the *Mackenzie Agreement*.

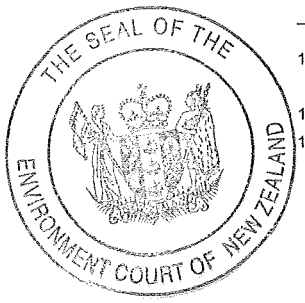
Table A. Summary of figures for 2012-2016

	Pukaki and Tekapo Ecological Districts (Mackenzie Basin)	Omarama Ecological District	Pukaki, Tekapo and Omarama Ecological Districts
Development			
Dr Walker (pastoral intensification)	15,600 – 20,400 ha	6,500 – 8,500 ha[144]	22,100 – 28,900 ha[145]
Mackenzie Agreement	–	–	17,100 - 26,000 ha
Irrigation consents			
Mr McCallum-Clark (irrigation only)	12,703 ha	5,493 ha	18,196 ha

[98] Table A shows that the figures identified in the *Mackenzie Agreement* may or may not be exceeded in terms of developed area. In relation to Dr Walker's figures, Mr Caldwell and Ms King observe that[146]:

> There may remain 3,900 ha of area able to be developed before the figures in the *Mackenzie Agreement* are achieved. Conversely, the amount of area developed may exceed that in the Mackenzie Agreement by 11,800 ha. The variance arises from using either the 17,100 or 26,000 figure from the Mackenzie Agreement, compared with either of the figures calculated from Dr Walker's evidence (22,100 – 28,900 ha).

[99] In relation to Mr McCallum-Clark's figures counsel observe that "As shown in the bottom half of Table A, consented irrigation may or may not exceed the figures in the *Mackenzie Agreement*". The consequence is there may still be 7,804 hectares of irrigation before the proposed development figures in the *Mackenzie Agreement* are achieved. Conversely, the area irrigated (or be en route to doing so) may exceed that in the *Mackenzie Agreement* by 1,096 hectares. The variance arises from using either the 17,100 or 26,000 figure from the *Mackenzie Agreement,* compared to Mr McCallum-Clark's figure (18,196 hectares).



144 This figure was not explicitly provided in evidence. Counsel calculated them from the evidence by subtracting the Tekapo and Pukaki districts figure from the Tekapo, Pukaki and Omarama figure.
145 As calculated above.
146 Memorandum of D C Caldwell and J R King 22 March 2016 at 29 and 30 [Environment Court document 52].

[100] There are two further uncertainties:

(1) Mr McCallum-Clark's irrigation figures could increase if consents currently being processed (up to 3,652.5 hectares) are granted. That is speculative at this stage;

(2) Mr McCallum-Clark's irrigation figures may also be overstated by up to 2,618.5 hectares, depending on whether some or all of the consents that underwent a change in conditions post-2012 had the effect of increasing the irrigable area authorised prior to 2012.

Conclusion

[101] How close to (or how far past) the outcomes in the *Mackenzie Agreement* development in the Mackenzie Basin has reached depends on whether the target was 17,100 hectares or 26,000 hectares.

[102] In their response to the Council's memorandum Mr Enright and Ms Wright advised that[147]:

> EDS does not agree there is lack of clarity as to how the 2 figures differ. The 17,000ha figure relates to development by irrigation. The 26,000ha figure relates to development by pastoral intensification more broadly. Page 22 Mackenzie Agreement confirms that the 26,000ha figure was the intended extent of future development consistent with achieving the Agreement's shared vision:
>
> > *The 64,000 ha shown in Table 3 as the total development area includes about 26,000 ha of land which under our Vision and Strategy will be intensified either by irrigation or by intensified dryland farming practices.*

In other words the 26,000 hectares was an irrigated area plus a dryland intensified area. That is quite plausible when it is recalled that towards the northern/higher end of the Basin there are "dryland" areas with much higher rainfall so they need less water from irrigation.

[103] We find on the balance of probabilities that the target in the *Mackenzie Agreement* for irrigated development was 17,100 hectares over the Mackenzie Country as a whole.

147 Memorandum of EDS 27 March 2017 at para 3 [Environment Court document 56].

[104] The EDS submits that the figures in Dr Walker's evidence should be preferred because:

a. Pastoral intensification across all land types and methods is captured[148].

b. Dr Walker is the only expert who has expressed a clear indication of the % change that has occurred from 2011-2017 (65-85%). This has allowed Council to calculate the approximate area of intensification in the Mackenzie Basin (capturing areas within its jurisdiction and the jurisdiction of Waitaki District Council) over that time: 22,100ha-28,000ha.[149]

c. Although Mr Head and Mr Harding did not provide specific figures of the extent of pastoral intensification in the Basin since 2011 both expressed a view that since that date pastoral intensification has accelerated and occurred on a larger scale[150]. Comments in cross-examination by Mr Murray support a similar conclusion[151].

Given the ambiguities over what Dr Walker was describing as exotic conversion, we cannot accept that completely.

[105] Mr Caldwell and Ms King conclude it is difficult to form any robust conclusions as to whether the figures in the *Mackenzie Agreement* have been achieved or potentially exceeded. We agree, in respect of what has happened in the recent past.

[106] So far we have only been concerned to try and establish what development has occurred between the signing of the *Mackenzie Agreement* in 2011 (and the First Decision of this court later in that year) and the section 293 confirmation hearing in early 2017. As for the future – which is the main thrust of PC13 – at the court's request the CRC lodged the affidavit for Mr M McCallum-Clark which also contained information about the number of irrigation consents granted in the year November 2015 to November 2016 (i.e. after notification of PC13(s293V). The answer was 12 water permits for a total proposed irrigation area of about 13,000 hectares[152].

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148 The figures in Mr Head's evidence are restricted to development on alluvial outwash and moraines. Mr Harding has agreed that development on areas outside these two land types is a reasonable explanation for the discrepancy between Dr Walker and Mr Harding's development figures and has provided specific examples of where development as occurred outside those land types: M A C Harding affidavit, sworn 24 February 2017 at [10]; Council memorandum 22 March 2017 at fns 15 and 16 [Environment Court document 52].

149 Council memorandum 22 March 2017 at para [19] [Environment Court document 52].

150 M A C Harding evidence-in-chief at para [74] [Environment Court document 12]; Transcript p 173 lines 27-33.

151 Transcript p 54, lines 26-33.

152 Affidavit of M McCallum-Clark 17 February 2017, Annexure A [Environment Court document 35].

[107] If that area were in fact to be irrigated, it appears to us that the *Mackenzie Agreement* would be meaningless.

2.6 Ecosystems and biodiversity

[108] The relevance of biodiversity is that landscapes are a cultural concept involving many factors and concepts as evidenced by the "assessment matters" in Policy 12.3.4 of the CRPS.

[109] We received quite extensive evidence of the ecosystems and biodiversity of the Mackenzie Basin which are summarised in the following part of this decision.

[110] Dr Walker described how[153]:

> 21. [The] landform sequence and parallel aridity gradient drive directional change in species composition and vegetation character, as species adapted to different environmental conditions replace one another in an overlapping sequence. However, complex topography and micro-topography also create strong, biologically important gradients in and patterning of physical habitats at smaller scales within the rare ecosystems. For example:
>
> 21.1. Moraine surfaces are undulating or lumpy, strewn with irregular piles of rocks, with kettleholes (depressions left by the melting of ice blocks deposited within the sediment) and other subsidences scattered across them. A disordered amalgam of soil particle sizes and depths has been worked on by wind following deposition, so that deep, fine deposits occur on south and east facing slopes and toes, and northern and western aspects are often stripped, shallow, and stony.
>
> 21.2. Outwash gravel surfaces are formed by the reworking and size-sorting of glacial deposits by meltwater. Their subtle surface micro-topographies of low channels and risers form intricate braided patterns. The patterns arise from alternation of sinuous channels and risers in the underlying gravels (formed when the outwash channels, fans and plains were active at the end of the relevant glaciations) and subsequent soil deposition and stripping (deflation) by prevailing winds and possibly occasional extreme wind events.

153 S Walker evidence-in-chief para 21 [Environment Court document 17].

21.3. Soil deposition and deflation interact with the orientations of the original outwash channels to form complex patters of stony phases (which may be ridges or channels) alternating with deeper accumulated soils (which may be ridges or leeward lenses).[154] Shallow soils intermediate between stony and deep-soil phases are often frost-heaved in winter and have a broken, 'fluffy' surface character.

21.4 Important sources of biological variation within and among outwash gravel surfaces in the Mackenzie Basin are the form of micro-topography ... and the prominence of its expression. These features determine spatial and temporal patterns of soil moisture, frost heave, and nutrient availability that are critical for plant survival.

[111] Dr Walker summarised[155] the broad-scale trends in the ecosystems of the Basin as including:

24.1. Transitions from tall and short tussock grasslands and shrublands and wetland on deeper soils of the north-western moraines to short tussock, cushion, mat and non-vascular (lichen and moss) vegetation on shallower, stonier soils on outwash and river gravels in the drier southeast.

24.2. A flora typical of moist tall tussock grasslands and shrublands in the higher west and northwest grades into a fescue tussock grassland flora with many drier floristic elements in lower moraines of the central basin floor. Outwash surfaces (especially those south and east of SH8) support a distinctive, endemic, often cryptic, slow-growing, diminutive, sparse, and exceptionally drought-tolerant flora.[156]

24.3. Higher moraines are feeding and breeding habitats for waterfowl, wetland and wading birds, and their shrublands support falcon (*Falco novaeseelandiae* "eastern") and forest species such as rifleman (*Acanthisitta chloris*), while drier short tussock grasslands of the central basin floor are favoured habitat for pipit (*Anthus novaeseelandiae*). Sparsely vegetated outwash plains (which occur mainly in the south and east) and alluvial surfaces have a simpler avifauna but are the principal breeding habitats of banded dotterel (*Charadrius bicinctus bicinctus*).

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154 On older outwash surfaces there are also areas of relatively deep, even loess deposits that completely obscure the underlying gravel channel and riser patterns (for example, on Balmoral outwash gravels on the former Maryburn pastoral Lease).

155 S Walker evidence-in-chief para 24 [Environment Court document 17].

156 Dr S Walker added in a footnote: "The invertebrate fauna is also distinctive and varies across the basin's major broad-scale gradients; ..."

[112] That summary oversimplifies drastically because it seems that there is remarkable complexity at a small scale. The local, within-ecosystem variation was described by Dr Walker as follows[157]:

> 25.1. Moraines support an array of different wetland types, including dense red tussock swamps, *Carex* swamps, seepages, string bogs, bogs, open water streams, riparian wetlands, tarns and ephemeral wetlands. Seasonally dry ephemeral wetlands in kettleholes are particularly biologically distinctive and unusual globally. Their finely intermixed, concentrically zoned short turfs include numerous obligate[158] turf plant species, including a number of threatened taxa.
>
> 25.2. Species habitats on moraines can vary within a few metres from lush and permanently moist (e.g. deep leeward soil lenses and seepages) to exceptionally harsh (e.g. dry wind-stripped rocky boulderfields and compacted platforms). This give rise to conspicuous local vegetation patterning and high local diversity of plant communities and indigenous plant and animal species.
>
> 25.3. On outwash plains, the tallest and grassiest vegetation ((including tussocks) occurs on deeper, finer textures soil lenses. Stony ridges ... or basins ... support low-growing cushions and mats of New Zealand's most drought tolerant endemic vascular plants, including subshrubs, dwarf grasses and cryptic dicotyledonous herb and ferns, as well as lichens and mosses. Shallow soils intermediate between the stoniest and deepest elements support the sparsest vegetation and fewest indigenous species.
>
> 25.4. Wind-deflated outwash terrace brows (a narrow zone of gentle slope at uppermost limit of the terrace scarp) are a key micro-habitat recognised by botanists for unusual densities of cryptic xerophytic (aridity-loving) endemic plant species.
>
> 25.5. Lichens and mosses can contribute high proportions of the ground cover in niches unsuitable for vascular plants on river terraces and stony outwash plain ridges and channels. These non-vascular assemblages are diverse and little-studied, and support distinctive endemic invertebrates such as the endemic robust grasshopper *Brachaspis robustus.*
>
> 26. Though relatively small in area, shrublands add considerably to the biodiversity of the basin floor as important habitats for grazing-and fire-sensitive biota (especially lizards and plants). They occur mainly in relatively fire-protected places such as moraine flanks and ridges, boulder fields, terrace risers, and moist fluvial channels of moraines and outwash plains.
>
> 27. Rock-strewn moraines, bouldery scarps, fans, and river terraces, as well as

157 S Walker evidence-in-chief para 25 [Environment Court document 17].

158 Dr Walker added in a footnote: "In the sense of 'by necessity', i.e. not known to occur outside this type of habitat".

grasslands, are important habitats of the endemic lizard fauna.

28. A further source of biological diversity is the placement of rare ecosystems within the overall climate gradient, which alters the particular species and communities associated with their type and their fine-scale habitat-patterning. For example, the Ohau Downs outwash plain in Waitaki District (with 'only' a 400-500 mm annual moisture deficit) lacks some of the threatened xerophytic endemic plants of outwash plains found, for example, on the Tekapo-Greys Hills outwash and alluvial sequence in Mackenzie District (with 500-700 mm annual moisture deficit). Conversely, the Ohau Downs outwash is distinctive in supporting plant communities and species that are absent on outwash surfaces in drier zones.

[113] Dr Walker confirmed[159]:

> In my opinion it is likely that drier landforms and features[160] supported relatively sparse vegetation throughout the Holocene. The level of local endemism in their cryptic flora suggests that these habitats originated early in the Pleistocene and remained unforested during interglacials because of their dryness. These are not landforms that could have supported the continuous tussock grasslands which dominated in wetter parts of the basin following post-settlement fires. Therefore, although human settlement and use has brought considerable change,[161] an impression that vegetation cover has become disproportionately depleted in drier parts of the basin may not be fully warranted.

Significance of remaining basin floor ecosystems

[114] We received evidence on the "significance" of remaining ecosystems on the floor of the Mackenzie Basin. We approach this evidence with caution bearing in mind that these proceedings are not primarily about the section 6(c) values of the area, and that the Council will be reviewing these in its forthcoming review of the District Plan. In Mr Harding's opinion[162]:

> ... most undeveloped (i.e. uncultivated and un-irrigated) areas on glacially-derived landforms (moraines and outwash terraces) in the Mackenzie Basin are likely to meet the [CRPS] criteria for SONS[163], except where vegetation is substantially modified by over-sowing, top-dressing, grazing, or wilding conifer spread. Severely degraded sites will, in many cases, meet the RPS criteria for SONS as these sites provide habitat for threatened plant and animal species.

Dr Walker agreed. She also shared Mr Harding's opinion on the ecological significance

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159 S Walker evidence-in-chief at para 30 [Environment Court document 17].
160 Especially the stony channels and risers of outwash plains, and alluvial river terraces.
161 M A C Harding evidence-in-chief at paras 13 and 14 [Environment Court document 12].
162 M A C Harding evidence-in-chief at para 31 [Environment Court document 12].
163 SONS = Sites of Natural Significance – an identification of valuable areas under section 6(c) RMA.

of areas south and east of SH8 between Twizel and Tekapo where he wrote[164]:

> ... parts of the area south and east of SH8 which lie on naturally uncommon ecosystems (moraines, outwash gravels and ephemeral wetlands) and are uncultivated are most likely to meet the RPS criteria for SONS. Other uncultivated parts of the area (on river gravels) are also likely to meet the RPS criteria as they provide habitat for threatened plant and bird species. ... Areas with severe degradation and/or high rabbit numbers should not be excluded from survey, as such areas may still provide habitat for threatened plant and bird species.

[115] In Dr Walker's opinion the ecological and biodiversity values are nationally significant. Her reasons were[165]:

> 56. ...
>
> 56.1. There is no other place in New Zealand where historically rare ecosystems occur to such an extent and in natural connected sequences in a relatively low lying landscape. In all other lowland and montane areas most historically rare ecosystems have already lost to development, and remaining examples are typically isolated.
>
> 56.2. As a consequence of recent development, sequences of these particular rare ecosystems are now unreplicated nationally.
>
> 56.3. Most species' habitats still represented in the Mackenzie District have undergone extreme loss nationally, with especially high loss-rates in the last two decades. As noted in my paragraph 52, a number of endemic plants, invertebrates, lizards, freshwater fishes, and birds now depend for their persistence largely on the remaining areas of connected and relatively undeveloped habitats still found here.
>
> 56.4. It is well-recognised that connected biological sequences and gradients such as these, and sizeable areas, are needed for many species to persist in the face of climatic variability. For example, when a plant species inhabits a connected sequence, wetter parts provide refuge in protracted dry periods, and drier parts provide refuges in extreme wet periods (e.g. when drought-adapted species are overtopped by faster growing species in the wetter portion of their range). The refuge facility is lost when sequences and gradients are geographically and functionality truncated and fragmented by habitat loss, and thus fragments in fluctuating environments lose species directionally over time.[166]

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164 M A C Harding evidence-in-chief at para 43 [Environment Court document 12].
165 S Walker evidence-in-chief at paras 56 to 57 [Environment Court document 17].
166 Dr Walker's footnote reads: "Interannual climate variability is relatively high in the Upper Waitaki Basin and expected to increase as climate change advances (Mullan et al. 2008; Renwick et al. 2016)".

57. The area south and east of SH8 is the only place where extensive, little-fragmented areas of the critically endangered outwash gravel ecosystem type now remain. It is of the most exceptionally high ecological significance in my opinion. I understand that these areas can appear featureless and desertified, of little value for anything but rabbits and hawkweed. However, I regard outwash gravels as the most ecologically and biologically distinctive of the Basin's ecosystems. They and their endemic biota are found nowhere else, and are unquestionably under the greatest threat of imminent clearance and loss. In particular:

    57.1. they have special character, especially as last remaining examples of the evolutionary response of the native biota to protracted arid conditions in New Zealand;

    57.2. outwash gravels support a greater number of the basin's known threatened or declining plant taxa (29 taxa) than any other type of habitat (even more the highly distinctive ephemeral wetlands, with 20 taxa) and also more naturally uncommon or data deficient plan taxa (12 taxa) than any other. This is shown in Table 1 (below), which sums the number of plant taxa considered to be Extinct, Threatened, or At Risk that I know to occur on seven habitat types on the basin floor;

    57.3. undeveloped outwash gravels are a principal breeding habitat for endemic threatened (Nationally Vulnerable) banded dotterel (*Charadrius bicinctus bicinctus*) which is destroyed by pastoral intensification;

[116] In a footnote[167] Ms Walker added:

Based on the data mapped in Figure 4 in Appendix 4, more than twice the area of outwash ecosystems (35,600 ha, 35% of the area remaining in 1990) was converted as of moraine ecosystems (15,800 ha, 25% of the area remaining in 1990) between 1990 and 2016 across the Mackenzie Basin floor (Omarama, Pukaki, and Tekapo EDs). Outwash gravel lost more than three times the area that moraines did (21,800 v 7,000 ha) between 2001 and 2016.

167 S Walker evidence-in-chief at para 57 [Environment Court document 17].

[117] Dr Walker produced a Table 1 showing the number of plant taxa considered to be **Extinct**, **Threatened**, or **At Risk**[168] in the New Zealand Threat Classification System and known to occur today in different types of rare ecosystems and other habitats on the Mackenzie Basin floor, in two combined categories.

Table 1: ...

Historically rare ecosystem or type of habitat	**Extinct** (1 taxon) **Threatened** (31 taxa) or **At Risk: Declining** (25 taxa)	**At Risk: Naturally Uncommon** (23 taxa) or **Data Deficient** (1 taxon)
Moraines	15	10
Ephemeral wetlands	20	7
Outwash gravels	29	12
Lake margins	4	2
Braided riverbeds and terraces	5	1
Other wetlands	5	2
Shrublands	9	2
Exclusively in ephemeral wetlands	8	3
Exclusively in outwash	8	2

[118] We attach as Appendix "B" at the end of this Decision a list of the taxa identified in the Table. While most of these plants are small and some are tiny, they and geomorphological niches they occupy, and the connections between those niches, all represent important components of the ONL.

2.7 The causes of ecological deterioration in the Mackenzie Basin

[119] Fire, pests, weeds, application of herbicides, oversowing, topdressing, cultivation, direct drilling and irrigation have all contributed to modify the natural ecosystems. We received conflicting evidence on the relationships between those stressors.

[120] A number of very experienced and competent farmers gave evidence of the utility (in their opinions) of various farming practices to the retention of tussock grasslands and the suppression of weeds. Mr J B Murray, owner of The Wolds Stations, considers that the high landscape values associated with the proposed Scenic

168 These categories are described in Appendix 9 to Dr Walker's evidence. She noted "that a taxon can occur in more than one type of habitat, and hence the sum of values in the table is greater than 79 (the total number of taxa counted). An extant population of *Dysphania pusilla* (categorised as Extinct) was discovered on the Mackenzie Basin floor in 2015".

Grassland on The Wolds are a direct result of continued oversowing and topdressing[169]. He is of the opinion that oversowing and topdressing on his land has raised the phosphate levels resulting in healthier tussocks with greater ground cover and consequently lower soil losses from bare ground[170]. Mr Boyd of the Haldon Station is of a similar opinion[171]. Mr Murray and Mr Boyd consider that the ability to oversow and topdress must be retained as a tool to combat soil loss which is one of the greatest threats to the Basin[172].

[121] Mr Murray also considered that oversowing and topdressing should not be put in the same category as irrigation and cultivation which have greater adverse effects on landscape and biodiversity[173]. We accept that and will consider its implications later, although we bear in mind that as a signatory to the *Mackenzie Agreement* Mr Murray accepts that even "... with oversowing the inter-tussock species diversity is reduced"[174].

[122] Mr A Simpson of Balmoral Station, current chairman of FFM and a member of the High Country Committee of Federated Farmers of New Zealand, commented on oversowing and topdressing in the context of maintaining pasture free of wilding trees. In his opinion grazing is the only way to reduce the risk of pest spread[175] (wilding conifers and other woody weed species). To be able to graze these areas he considers that regular oversowing and topdressing is necessary so that the vegetation is not taken over by unpalatable species (such as browntop)[176]. Even with this approach there is still a lot of expense involved in reducing wilding tree infestations.

[123] Dr Walker and Mr Harding[177] do not share the commonly held view that hawkweed is an irreversible cause of ecological degradation in the basin's vegetation. An important conclusion from research by her and others at Lake Tekapo Scientific Reserve (LTSR)[178] is that "hawkweed invasion is unlikely to be an impediment to the

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169 J B Murray evidence at para 14 [Environment Court document 5].
170 J B Murray evidence at para 17 [Environment Court document 5].
171 P J Boyd evidence-in-chief at para 2.6 [Environment Court document 8].
172 J B Murray evidence at para 18 [Environment Court document 5].
173 Ibid at para 19.
174 *Mackenzie Agreement,* p 5.
175 A Simpson evidence for Federated Farmers, 9 September 2016 at paras 3.5 to 3.6 [Environment Court document 7].
176 Ibid at paras 3.5 to 3.6.
177 M A C Harding. evidence-in-chief at paras 48 and 49 [Environment Court document 12].
178 Citing a paper written by herself and others (including Mr Head) and appended to her evidence at Appendix 6B Walker S, Comrie J, Head N, Ladley K J, Clarke D, Monks A (2016). Hawkweed invasion does not prevent indigenous non-forest vegetation recovery following grazing removal *NZ Journal of Ecology* 40:137 to 149. This paper was also referred to by M A C Harding, evidence-in-chief at para 49 [Environment Court document 12].

recovery from grazing of highly depleted short-tussock grasslands and herbfields on the floor of the Upper Waitaki Basin. Indeed, hawkweed cover may facilitate recovery, or its effects may be merely neutral".

[124] In Dr Walker's opinion a simpler and more plausible explanation for depletion of indigenous cover (and associated changes) is grazing, especially by rabbits. Hawkweed largely completed its invasion of the basin floor between 1990 and 2000[179], and has stabilised at between about 20 and 50% cover depending on landform and environment. Data from the Mackenzie Basin Grazing Trial[180] show that reductions (not increases) in bare soil occurred simultaneously with the invasion of hawkweed into basin-floor short tussock grasslands between 1990 and 2000.

[125] Dr Walker wrote[181]:

> ... perceptions of the ecological value of outwash gravels, and their degree of modification, can be influenced by mistaken assumptions that they 'should' support continuous tussock grassland (similar to moister moraines:[182] native flora and fauna have been compromised by hawkweed invasion;[183] and/or their endemic plants and animals have alternative 'better-condition' habitats.
>
> It is important for species adaption and evolution to protect biota at environmental limits and extremes, such as those of climatic and edaphic aridity of the basin's south-eastern outwash plains and river terraces. Adaptations in populations near limits represent extremes within a species, enabling them to survive, adapt to and exploit new environmental conditions (e.g. more frequent and protracted droughts expected under climate change).

[126] Mr K W Briden, a Technical Officer for the Department of Conservation and the holder of a Bachelor of Forestry Science, gave evidence on wilding conifer issues, including the sums being spent by the Department on wilding conifer control. He

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179 Dr Walker noted: "Aridity appears to have constrained rates of hawkweed invasion, and its potential cover, so that the basin's outwash landforms and river terraces were invaded relatively late and hawkweed cover remains lower there. This was observed by Duncan et al. (1997), at Lake Tekapo Scientific Reserve, and in the Mackenzie Basin Grazing Trial, and is discussed in Walker et al. (2016)" (Appendix 6b of Dr Walker's evidence) [Environment Court document 17].

180 The results of that study are described by Meurk et al changes in vegetation states in grazed and ungrazed Mackenzie Basin grasslands, New Zealand, 1990-2000 *New Zealand Journal of Ecology* 26: 95 to 106 (2002).

181 S Walker, evidence-in-chief para 57.4 and 57.5 [Environment Court document 17].

182 In her opinion the opposite is the case: S Walker evidence-in-chief at para 30 [Environment Court document 17].

183 In her opinion the opposite is the case: S Walker evidence-in-chief at paras 34, 36, and 39 [Environment Court document 17].

wrote[184]:

> Treating wilding conifers early [by helicopter wand], in lightly infested areas, can cost around $1 per hectare. Treating dense stands can typically cost $2,000/ha for herbicide treatment and $10,000/ha for chainsaw felling.

[127] Dr W R Scott, a senior agronomist called by FFM quoted anecdotal evidence[185] from Glentanner Station which "... suggests that grazing one year old pine seedlings in their first winter at a striking rate of at least 2.2 ewes or wethers per hectare achieves [the] objective"[186] of cutting of pine seedlings below the first growth node. He also observed that although the dominant shoot of a two year old seedling may be removed "... regrowth still occurs from the lateral shoots"[187], and that "Three year old seedlings ... are beyond control by grazing"[188].

[128] He qualified his evidence above by writing "... adequate subdivision[al] fencing is required to produce the desired stocking rate with the available livestock"[189]. That means the stocking rate he referred to in his earlier paragraph of 2.2 ewes per hectare is an averaged figure over a year. By inference the actual figure is a considerably higher number for a shorter period[190].

[129] As to the effect of the stocking rates on indigenous vegetation, Dr Scott quite properly said he was not an expert on that[191].

[130] The ecologists' evidence doubts the utility of stock for controlling wilding. Dr Walker, after discussing the effect of rabbit control ("it certainly correlates"[192]: fewer rabbits more pines[193]) stated[194] "I think we've got even less evidence of how much difference conservatively-managed pastoral grazing affects wilding pines establishment". She also answered a question from the court as follows[195]:

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184 K W Briden, evidence-in-chief para 19 [Environment Court document 15].
185 W R Scott, evidence-in-chief para 7.11(a) [Environment Court document 16].
186 W R Scott, evidence-in-chief para 7.11(b) [Environment Court document 16].
187 W R Scott, evidence-in-chief para 7.11(b) [Environment Court document 16].
188 W R Scott, evidence-in-chief para 7.11(c) [Environment Court document 16].
189 W R Scott, evidence-in-chief para 7.11(d) [Environment Court document 16].
190 "In the middle of winter": Transcript p 223 at line 12.
191 Transcript p 223, line 32.
192 Transcript p 284 line 14.
193 S Walker, evidence-in-chief Appendix 8 [Environment Court document 17].
194 Transcript p 284, lines 23-25.
195 Transcript p 290, line 28 to p 291.

Commissioner Mills:	Where does [the] sheep intensive grazing regime sit on the scale of detriment to ecological values in your mind?
Dr Walker:	At the level required to really achieve control [of pines] very high.

[131] Cross-examined Mr Briden stated research from the 1990s by Ledgard and Crozier refers to the need to graze "fairly intensively" and[196]:

> You need to get seedlings before they're ... aged 1 to 2, very small. Once they go over that, they can't be controlled by stock. The grazing needs to be relatively intensive because you need to get that last green needle ... If you ... leave ... green needles, they'll come up several metres and they'll actually be much more expensive to control later.

[132] Further points made by Mr Briden were that "... the best way to control wilding conifers is to remove the seed sources"[197], then for young (usually windblown) seedings three cycles at $1 per hectare for each cycle will cost $3 over nine years[198] "... and then the costs will diminish"[199].

[133] One aspect of the ecological evidence which has been largely ignored by the farming interests is the need for ecosystems not be divided into pieces or isolated. Mr Head and Dr Walker both, at the court's request drew lines on Dr Walker's Figure 5(b)[200] of the areas they considered were important for ecological connectivity. These lines largely cover open areas that contribute to the scenic values of the ONL. Protection of both may be important for integrated management of the natural science components of the ONL in addition to is visual characteristics.

Oversowing and topdressing

[134] FFM and the farming witnesses emphasized that in their opinion that farming generally and topdressing in particular will benefit tussock growth, thus maintaining or even improving views from roads. Again that is true but in a very qualified way. First, topdressing and direct drilling have adverse effects on the less dominant but still important small endemic plants are already described; second, we heard evidence that

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196 Transcript p 213, lines 2-3.
197 Transcript p 216, lines 31-32.
198 Transcript p 218, lines 25-28.
199 Transcript p 218, line 28.
200 Exhibits 14.1 (Mr Head) and 14.3 (Dr Walker). Consistently this latter should be 17.3 but due to a mistake by the Judge it was given the wrong number.

topdressing and oversowing will, depending on conditions, affect tussock grasslands adversely over time.

[135] Even in closing, counsel for FFM[201] and Mt Gerald Station contended[202] that oversowing and topdressing can occur "without adverse effects on ONL values"[203], and that they maintain the values of the ONL. The evidence of the expert ecologists is strongly to the opposite effect. Asked by Ms Forward to confirm that "there's actually no evidence these activities [oversowing and topdressing] cause degradation?" Dr Harding replied[204]:

> "I mean, the purpose of oversowing and topdressing is to replace indigenous species with palatable exotic species so that's, that degrades the ecological values".

[136] In response to a similar question Dr Head answered[205]:

> Also in topdressing ... potentially, for want of a better word may be more insidious, it induces unwanted changes to the ecosystem, in particular the richness or diversity, you know, exotic grass, you know, and the change in composition ... Exotic grasses are one of the worst threats to a whole range of our threatened plant species, the (inaudible 12:19:28) [sward] forming exotic grasses smother the microhabitats and these, you know, a lot of these are Mackenzie's rarities and are only often mostly found in the Mackenzie.

[137] In relation to the effect of pastoral intensification on visual effects, the landscape architect called by EDS, Mr S K Brown, stated[206]:

> We're dealing with degrees of intensification but I still think they [oversowing and topdressing] result in modification that's significant.
>
> ...
>
> The one thing they [different methods of intensification] have in common though is that they do result in the greening of part of the landscape and therefore a change to its character.

[138] The affidavit of Nathan Hole[207] confirms that lack of regulatory oversight and particularly the exclusion of oversowing and topdressing from the operative district plan definition of pastoral intensification has resulted in adverse effects on indigenous

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201 Federated Farmers closing submissions at para [45] [Environment Court document 41].
202 Mt Gerald Station closing submissions at para [45] [Environment Court document 40].
203 Mt Gerald Station closing submissions at para [14] [Environment Court document 40].
204 Transcript p 141 lines 20-22.
205 Transcript p 180 lines 9-20.
206 Transcript p 464 lines 27-29; p 465 lines 1-3.
207 Affidavit of N H Hole, 18 July 2013 [Environment Court document 36].

vegetation and landscape values. Confirming the problems the planners Ms Harte, Mr Vivian, Ms Smith, and Mr Reaburn all noted the difficulty in defining "maintenance" oversowing and topdressing consistent with traditional pastoral farming.

Herbicide and insecticide use

[139] FFM's witness, the agronomist Dr Scott, explained that the "application of herbicide, particularly high rates of Roundup, in many ways, is similar to cultivation"[208]. He continued: "And if you're into indigenous vegetation, I mean that sort of thing just destroys it when you do a blanket application of those powerful herbicides"[209]. Dr Allan shared that view[210].

[140] Mr Enright submitted for EDS that[211]:

> If undertaken as part of direct drilling then application of herbicide and insecticide is arguably not applied by "*spraying*", the element of the operative district plan definition of vegetation clearance[212] intended to capture and control herbicide and insecticide application. A loophole is created. It is more efficient and effective for all pastoral intensification methods to be captured by the definition applying to the Mackenzie Basin Subzone than elsewhere in the district plan.

Conclusions

[141] It was an important part of FFM's case that if farmers could not carry out pastoral intensification and/or agricultural conversion there would be two environmental consequences: first, they would not be able to afford to carry out weed (mainly wilding conifers) and pest (mainly rabbits) control; second, the land would convert to bare ground making it susceptible to soil erosion and/or invasion by hawkweed[213] and wilding trees.

[142] It is likely that any restrictions on pastoral intensification or agricultural conversion would reduce profit margins in the short and medium term (even with the reduced price of wilding pine control). Whether that would mean that farmers cannot afford to carry out weed control probably relates to their financial gearing, which is an individual matter. That the costs of weed and pest control are manageable seems to be

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208 Transcript p 228, lines 1-2.
209 Transcript p 228, lines 5-7.
210 B E Allan evidence-in-chief at paras [35] to [37] [Environment Court document 18].
211 Closing submissions for EDS para 17 [Environment Court document 46].
212 Definition found in Chapter 3 [MDP p 3-12].
213 *Hieracium* spp.

borne out by the prices which recent sales in the Basin have reached (see Chapter 8 of this decision).

[143] The second point distorts both the current position and the likely future environment. In the First Decision[214] the court stated that the issue of "Intensive Farming Activities" was[215]:

> ... a complex issue, made more so by the lack of ecological evidence. We continued: "Subject to that important qualification two broad themes emerge from our findings of fact and, tentatively, predictions. The first is that further conversion of brown grasslands to green introduced grasses (whether irrigated or not) is generally inappropriate in the Mackenzie Basin. The second is that because there are extensive – usually lower altitude – areas which are highly (and possibly irreversibly) modified, these may be very suitable for higher intensity irrigated farming.

In light of the ecological evidence now received we need to qualify our conclusions in the First Decision.

[144] On the basis of the nearly unopposed new evidence from four scientists[216] we conclude:

(1) it is likely that land in the Basin will not revert permanently to bare ground and hawkweed if oversowing and topdressing did not continue on it[217];

(2) further, as Dr B E Allan wrote[218] "The long term effects of traditional oversowing and topdressing on indigenous vegetation will depend on the ongoing management and fertiliser input." Effects will be felt on a continuum and depend on method, intensity and scale of application[219];

(3) cultivation results[220] "... in major, irreversible effects on indigenous vegetation, including the complete displacement of native species".

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214 Above n 6 at [205].
215 Above n 6 at [207] and [208].
216 Dr N J Head, Mr M A C Harding, Dr S Walker, Dr B E Allan.
217 Transcript (first week) p 142 at 30 (cross-examination of M A C Harding).
218 B E Allan evidence-in-chief para [35] [Environment Court document 18].
219 B E Allan evidence-in-chief at para [29] [Environment Court document 18].
220 Transcript (second week) p 464, line 27-29, p 465 line 1-3.

2.8 Scenic Grasslands

[145] In the First Decision the court requested that Scenic Grasslands ("GA") be identified and mapped, for the reasons stated in that Decision[221] in response the Council's landscape architect Mr Densem produced the maps of 13 Scenic Grassland areas[222]. They are proposed to be included in the Planning Maps of the MDP.

[146] Mr Densem described the process for preparing the maps, and the descriptions of the values identified in his document *Scenic Grasslands*[223]. He summarised the main points of that document as follows[224]:

- The northern part of Haldon Road, and Mackenzie Pass Road, have been taken as tourist roads;
- 'Grasslands' are taken to include exotic-dominated dryland areas of brown high country character. Mr Harding's evidence describes these;
- Where the grassland vista may extend continuously for (sometimes) several kilometres, such as GA 2 and 4, and the SG boundary has been drawn at an arbitrary 500m from the road, which is taken to be the foreground of the view;
- In finalising the SG maps for this hearing, several areas proposed as SG in 2011 were found to have undergone pastoral intensification, and were deleted from the maps;
- The May 2016 paper contains descriptions of the values and particulars of each SG.

[147] Mr Densem described[225] how in 2012 he travelled the tourist roads and assessed them at a whole of Basin scale[226]. The relevant map (his Map 4.2) showed 15 Scenic Grasslands[227]. That number has now reduced to 13 and with boundaries defined in the map series within the section 293 package. Mr Densem stated[228] that:

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221 First (Interim) Decision, above n 6 at para [189].
222 Included as Attachment C of the PC13(pc) package.
223 G H Densem evidence-in-chief at para 41 [Environment Court document 19] (lodged with the court as an attachment to the Section 32 Report).
224 G H Densem evidence-in-chief at para 41 [Environment Court document 19].
225 G H Densem evidence-in-chief 15 July 2016 at para 43 [Environment Court document 19].
226 G H Densem evidence-in-chief 15 July 2016: "initially in my '*Extra Map – 2nd Series, Map 4.2 – Scenic Grasslands and Pukaki Tourism Zone*', dated 24 May 2012" [Environment Court document 19].
227 G H Densem evidence-in-chief – Graphic Attachment p 3 [Environment Court document 19].
228 G H Densem evidence-in-chief at para 44 [Environment Court document 19].

The chief difference between the May 2012 map and those filed with the PC13(pc), "... is the reduction in size of several areas. This was either to lessen the imposition on private land or because some areas have in the meantime been developed for farming. These are described in my May 2016 *Scenic Grasslands* paper". (The 13 areas also have been renumbered.)

...

Description of Scenic Grasslands

46. Each SG is mapped and described in detail in my s.293 paper. The following is a brief description:

- **GA's 1, 2 & 5, SH8 Burkes Pass and westwards (Sawdon, Dead Man's Creek)**[229]**:** This group of SG maintain the 'wow' factor of high country grasslands for tourists entering the Mackenzie, southbound. In SG1 and SG2 (south of SH8) the grassland views are close up, whereas in SG2 (north of SH8) and SG5 the reserved parts represent the foreground of long views to hillslopes to the north.
- **GA6, Whiskey Cutting:** South of SH8, opposite SG5 above, this SG is more about maintaining open views to the vast Tekapo River flats beyond (to the south) than the grassland quality per se.
- **GA3 Haldon Road (north)**[230]**:** This also is more about the maintaining open views to the Tekapo River flats to the west, than grassland quality, which contains a measure of shrub growth.
- **GA4 Haldon and Mackenzie Pass Roads:** The outwash fans of the Rollesby Range (west side) are widely visible throughout the Tekapo River Flats and comprise continuous low rainfall grasslands. The extension into the Mackenzie Pass Valley seeks to maintain the environment of the Mackenzie Monument as a grassland. Although seemingly a large area, a small proportion only is more than 500m from the Haldon or Mackenzie Pass Road boundaries. The grasslands spread well beyond the SG boundaries to north and south and the boundaries are arbitrary, to minimise the incorporation of too much private land into the SG.
- **GA7 Lilybank Road**[231]**:** This SG seeks to maintain the widely visible flanks of Lake Tekapo, inland from the Lakeside Protection Area. The boundary is set arbitrarily at the 800m contour and large portions have been deleted due

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229 Mapping errors also exist in GA2 and GA6. Mr Densem explained "The Scenic Viewing Areas in both are shown set back from the road whereas they should about the road boundary. In GA2 this has been covered by showing Scenic Grassland between the road and Scenic Viewing Area on the south side". G H Densem evidence-in-chief at para 49 [Environment Court document 19].

230 G H Densem identified: "There is a mapping error in GA3. The map "shows GA3 extending to the east side of Haldon Road whereas it is intended to be only on the west side of the road, but to extend 500m west of the road. No SG is intended for the east side of this northern part of Haldon Road" (evidence-in-chief at para 47 [Environment Court document 19]).

231 G H Densem: A gap occurs in GA7. This is because pastoral development occurred between 2012 and 2016 in the now excluded area. Similar exclusions have occurred for the same reason in GA7 (Haldon Road), GA8 (Godley Peaks Road), GA 11 and 12 (SH8 Wolds – Maryburn), and GA13 (SH8 Pukaki Moraines) evidence-in-chief at para 48 [Environment Court document 19].

to land intensification between 2010 and 2016.

- **GA8 Godley Peaks Road**: This seeks to maintain as grassland the highly visible moraine surfaces between Lakes Tekapo and Alexandrina, seen from the Mount John observatory.
- **GA9, 10 SH8 Balmoral to Irishman Creek:** Widely-seen, largely good quality grasslands, west and some east of SH8. GA9 incorporates a close skyline as envisaged by the Court. GA10 incorporates a large area east of Irishman Creek but is particularly visible from SH8 northbound, after crossing the Tekapo Canal.
- **GA 11, 12 SH8 west and east sides at The Wolds & Maryburn:** Seek to maintain grassland views of the Tekapo River flats to the east and grasslands beyond roadside hillocks to the west. The latter are visible in numerous gaps in the hillocks. Several areas have been deleted due to pastoral improvements removing the dry grasslands.
- **GA13 SH8 Pukaki Moraines:** Seeks to maintain highly variable grassland views into valleys within the unique moraine landforms. Landowner activity has recently removed wildings from the area.

2.9 Summary

[148] In summary our findings on five important aspects of the environment of the Mackenzie Basin have changed since the First Decision was issued by the court in 2011. First there is now quite full evidence of the biodiversity values of the Mackenzie Basin especially of the lower, dryer areas. The natural science value component of that landscape unit within the ONL needs to be upgraded in the overall assessment of the landscape. In the First Decision we[232]:

> ... accept[ed] the tentative indirect evidence in some scientific papers, which we have quoted, that the desertification of parts of the lower plains is irreversible. We are uneasy about that because we received no evidence on whether mitigation is possible at least in some areas where continuous "top of mountains to lakeside" protected areas can be maintained or recreated.

[149] First, it turns out, on the current evidence, that we seriously understated the floristic and faunal (for lizards and invertebrates) values of the lower Mackenzie Basin for themselves and for the ONL as a whole.

232 First Decision, above n 6 at [153].

[150] Second, the Mackenzie Basin contains about 83 threatened or at risk species of native plant in addition to the more common endemic plants such as the tussock species.

[151] Third, we now find that the encroachment by hawkweed is not likely to be irreversible.

[152] A fourth conclusion is that on the evidence before us oversowing and topdressing can have adverse effects on ONL characteristics and values. Magnitude of effect is determined by method, intensity, and scale of application[233]. Farmers have relied on their farming regimes as supporting the ONL but it turns out they may be insidiously[234] (but unconsciously until now) undermining it. In other words – and this is a conclusion that farming interests may struggle to accept – the current (admittedly limited) scientific consensus is that pastoral intensification is not necessarily or even usually benign (at least in the longer term) in its effects on native flora. Indeed, even simple more intensive grazing to manage pines has harmful effects.

[153] The fifth major difference is on the ground. The time taken up by the FFM appeals and latterly by the Council's consultation under section 293 has seen extensive areas of the Mackenzie Basin developed for pastoral intensification and/or agricultural conversion.

3. The exercise of section 293 powers and the legal issues arising

3.1 The Environment Court's duties and powers under section 293

[154] Section 293 of the RMA in its applicable form[235] states:

> **293 Environment Court may order change to proposed policy statements and plans**
>
> (1) After hearing an appeal against, or an inquiry into, the provisions of any policy statement or plan that is before the Environment Court, the Court may direct the local authority to—

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233 Mr Murray cross-examined by Mr Caldwell explained his view on the *"two ways of putting seed on"* (oversowing) Transcript p 53 lines 27-29: *"Aerially or, spreading it, just dropping it or direct drilling and I've done a combination of both"*; also Transcript p 241 lines 22-28.

234 Transcript, p 180 line 11 (quoted above).

235 Prior to the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No. 31) enacted 1 October 2009.

(a) prepare changes to the policy statement or plan to address any matters identified by the Court:

(b) consult the parties and other persons that the Court directs about the changes:

(c) submit the changes to the Court for confirmation.

(2) The Court —

(a) must state its reasons for giving a direction under subsection (1); and

(b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

(3) Subsection (4) applies if the Environment Court finds that a policy statement or plan that is before the Court departs from—

(a) a national policy statement:

(b) the New Zealand coastal policy statement:

(c) a relevant regional policy statement:

(d) a relevant regional plan:

(e) a water conservation order.

(4) The Environment Court may allow a departure to remain if it considers that it is of minor significance and does not affect the general intent and purpose of the proposed policy statement or plan.

(5) In subsections (3) and (4), **departs** and **departure** mean that a proposed policy statement or plan —

(a) does not give effect to a national policy statement, the New Zealand coastal policy statement, or a relevant regional policy statement; or

(b) is inconsistent with a relevant regional plan or water conservation order.

The words "proposed" was added in front of "policy statement or plan" at every place that phrase occurs by section 133 Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No. 31). However since the Environment Court has no role in respect of operative plans, the section has always been read as applying to proposed plan changes.

[155] For FFM Mr Gardner submitted that the court's role under section 293 is "either/or": to confirm the post consultation changes or not. Counsel relied on a passage in the Ninth Decision where the presiding Judge wrote[236]:

> I start with the assumption that the approval required of the Environment Court is more than nominal, and that the Court may approve the changes, or not, or send them back to the Council with directions as to the further matters to be attended to.

236 [2014] NZEnvC 246 at para [43].

The court continued:[237]

> ... the approval process would appear to require something along these lines:
>
> (1) To consider any further evidence which the Court may allow;
> (2) To hear submissions from the parties;
> (3) To give its approval or not.

While that assumption and approach reflected an attempt to understand what *Mackenzie (HC 2014)* had said, they are not correct for reasons we now explain.

[156] Outlining the requirements of section 293 Gendall J, wrote in *Mackenzie (HC 2014)*[238]:

> [128] On its face s 293 seems to establish a bipartite regime. The first aspect consists of subss (1) and (2) and permits the Environment Court, after hearing the appeal (or inquiry) into the provisions of the plan, to direct the local authority to prepare changes to the plan to address "any matters" identified by the Court, "to consult the parties and other persons that the court directs about the changes", and to require the local authority to "submit those changes back to the Court for confirmation". Reasons must be given for such a direction. However, there is no indication that the s 293 jurisdiction can only be invoked at the behest of a party to an appeal (or hearing), as opposed to the Court which happened here.
>
> [129] The second aspect of s 293 is comprised of subs (3) – (5). In essence, this regime permits minor departures from various national planning documents to remain if the minor departure does not affect the general intent and purpose of the plan.
>
> [130] Without more, the first aspect of s 293 appears to confer upon the Environment Court a power to assume a quite significant planning role.[239] The power to direct changes is qualified only by the fact that the matters directed must be "identified by the Court".

[157] We note that an alternative reading of section 293 is that it is to be read as a whole[240], rather than as two parts. On that reading section 293 is rather more restrictive than the High Court set out. The confirmed reading of section 293 directs the Environment Court not to interfere with the local authority's post-consultation version of

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237 Ibid at [45].
238 *Mackenzie (HC 2014)*, above n 10 at [128] to [130].
239 The footnote reads: "However, as noted above it has been previously stated that "the [Environment] Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions". *Mawhinney v Auckland City Council* (2011) 16 ELRNZ 608 (HC) at [12].
240 The High Court seems to be adopting this approach at para [148](iii) *Mackenzie (HC 2014)*, above n 10.

its plan (change) unless its objectives and policies depart from relevant provisions in the higher order instruments in the statutory hierarchy. There is a pointed absence from section 293 of reference to Part 2 of the Act. In our view, Parliament was directing the Environment Court not to substitute its own general view under Part 2 for the more particularised objectives and policies in higher order instruments such as regional policy statements or plans. To that extent section 293 when amended in 2005 anticipated the decision of the Supreme Court in *Environmental Defence Society v The New Zealand King Salmon Co Ltd*[241] *("King Salmon").*

[158] In any event if we apply the approach to section 293 taken by the High Court in *Mackenzie (HC 2014)* the application of *King Salmon* means that we should only have resort to Part 2 of the RMA if the other (unamended) objectives of the district plan and/or the objectives and policies of any later, higher order instruments are incomplete, ambiguous or illegal[242].

[159] The principal matters to guide[243] a local authority when it prepares a plan change are set out in sections 74 and 75 of the RMA. Applying these in the light of the restrictions in section 293 RMA means that our tasks in this confirmation decision are[244] (relevantly):

- to ensure that the objectives, policies and methods of PC13 accord with the local authority's functions under section 31 RMA including the integrated management of the effects of development, use and protection of the resources of the district[245];
- to check that the plan (change) does not depart[246] from the relevant higher order statutory instruments; and to have regard to any management plans or strategies prepared under other Acts[247] and to take account of any relevant planning document recognised[248] by an iwi authority and lodged with the territorial authority;

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241 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195.
242 Ibid at [88].
243 See *Mackenzie (HC 2014),* above n 10 at [148](ii).
244 This is a modified version of the statement by the Environment Court in *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 at [35].
245 Section 74(1)(a) RMA.
246 Section 293(3) and (4) RMA.
247 Section 74(2)(b) RMA.
248 Section 74(2A) RMA.

- in our discretion[249], to assess PC13 under section 32 RMA[250].

We consider the details required by each of those tasks next.

Integrated management of the resources of the district

[160] Section 31 RMA sets out the functions of territorial authorities under the Act. It states:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
>
> (i) the avoidance or mitigation of natural hazards; and
>
> (ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
>
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:
>
> (iii) the maintenance of indigenous biological diversity:
>
> (c) *[Repealed]*
>
> (d) the control of the emission of noise and the mitigation of the effects of noise:
>
> (e) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:
>
> (f) any other functions specified in this Act.
>
> (2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

[161] There are two aspects of that which are particularly relevant. The first is that the functions expressly include the control of effects of the development and use of land for the maintenance of indigenous biological diversity. This is an issue – albeit indirectly – in these proceedings.

[162] Second, it is useful to recall that the phrase "... and associated natural and physical resources" while it expressly includes water[251] "... [this] does not include water

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249 Section 32A RMA.
250 Section 74(1)(d) and (e) RMA.
251 See the definition of "natural and physical resources" in section 2 RMA.

in any form while in any pipe, tank, or cistern"[252]. That is important because it entails that a territorial authority may consider the efficiency of use of water piped to irrigators especially if it has not been considered at all (or adequately) by a regional council. Further the control of the "use" of water in section 14(2) RMA is confined by Regional Councils to its use within the water body or at least its margins[253]. It is important to the scheme of the RMA in general, and section 7(b) of the Act, in particular that resources such as piped water are used efficiently.

[163] The integrated management[254] of the effects of the use, development and protection of the natural and physical resources of the Mackenzie Basin is also tied in with the effectiveness[255] of the proposed policies and methods of PC13(pc) and we now turn to that issue.

Section 32

[164] Section 32 was changed by the Resource Management Amendment Act 2013 (RMAA 2013). Section 70 of the RMAA 2013 replaced section 32 of the principal Act in its entirety and added section 32AA.

[165] The RMAA 2013 also distinguished between amendments which took effect immediately upon Royal assent[256], and those which took effect three months after Royal assent (i.e. on 3 December 2013). Section 70 of the RMAA 2013 was in Part 2 of that Act (comprising the amendments that commenced at the later date).

[166] The RMAA 2013 included transitional provisions specifically for amendments made on or after the commencement of the RMAA 2013. A new Schedule 12 was inserted into the RMA[257] providing as follows (relevantly):

> **2 Existing section 32 applies to some proposed policy statements and plans**
>
> If Part 2 of the Amendment Act comes into force on or after the date of the last day for making further submissions on a proposed policy statement or plan (as publicly notified in accordance with clause 7(1)(d) of Schedule 1), the further evaluation for

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252 See the definition of "water" in section 2 RMA.
253 *P and E Limited v Canterbury Regional Council* [2015] NZEnvC 106 (Procedural Decision) at [26]. We discuss this further in Chapter 8 of this Decision.
254 Section 74(1)(a) and section 31 RMA.
255 Section 32(3)(b) RMA.
256 Royal assent was given on 3 September 2013.
257 By section 68 of the RMAA 2013.

that proposed policy statement or plan must be undertaken as if Part 2 had not come into force.

The section 293 package was prepared and notified on 14 December 2015. That is after the RMAA 2013 came into force. At first sight it appears that the current version of section 32 should apply to the section 293 package.

[167] However, Mr Winchester submitted that PC13(s293V) as notified by the Council was not of itself a "proposed plan" or a "change" for the purpose of the RMA, and therefore the post 2003 version of section 32 is not triggered. The section 293 package is subject to a process directed by the court, rather than a process directed by Schedule 1 of the RMA. We agree: the important point is that there is no provision in the section 293 process set out by the High Court in this case (in *Mackenzie* (*HC 2014*)) for submissions seeking changes that go beyond what the Council is proposing in its version of the plan (change) prepared under a section 293 direction, unless they are consequential changes (usually to policies or rules) under clause 10(2) of Schedule 1 which we discuss shortly. Accordingly the RMAA 2013 amended version of section 32 does not apply to the PC13.

[168] Section 32 in its pre-2009 form states (relevantly):

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, ..., change, ... is publicly notified, ... an evaluation must be carried out by —
>
> ...
>
> (c) the local authority ...
>
> (2) A further evaluation must also be made by —
>
> (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
>
> ...
>
> (3) An evaluation must examine:
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.
>
> ...
>
> (4) For the purposes of the examination referred to in subsections (3) and (3A), an evaluation must take into account:
>
> (a) the benefits and costs of policies, rules and other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods.

...

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

On appeal we have a discretion[258] as to whether and how far to consider the matters in section 32 although that was not discussed in *Mackenzie (HC 2014).*

[169] While an evaluation under section 32 requires, on its face, an examination whether Objective 3B(3) is the most appropriate way of achieving the purpose of the Act that must, on a plan change, be read in the light of the principle in *King Salmon*[259] that the purpose of the Act is particularised in the objectives and policies of the relevant regional plan and regional policy statement and indeed in the settled higher order objectives of the Mackenzie District Plan. In these proceedings that is reinforced[260] by section 293 which suggests our task is to check that the objectives of PC13(pc) do not depart from the higher order statutory instruments.

[170] In our view there is little difference, if any, between the decision of a local authority (or the Environment Court on appeal) which must contain the reasons for its decision as to why any policy or method is the most appropriate in the circumstances and that part of section 32(3)(b) which directs that the local authority evaluate the effectiveness of policies and methods (including the risk of acting or not acting). Where the requirements of section 32 go beyond simply giving reasons is in the need to have regard to the efficiency of the policies and methods by taking into account their benefits and costs. The important point for present purposes is that a standard decision by the Environment Court is in effect half a section 32 evaluation even if it does not say so. (The other "half" is the efficiency analysis although that is usually only a few paragraphs due to the dearth of evidence commonly received on efficiency issues).

Scope and process

[171] In *Mackenzie (HC 2014)* the High Court listed the principles as to the correct approach to be taken to section 293. Gendall J did not distinguish between the factors that should be considered when the Environment Court is deciding whether it should

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258 Section 32A RMA.
259 *King Salmon,* above n 241.
260 *Mackenzie (HC 2014),* above n 10 at [248](iii).

exercise its discretion to start the section 293 process, and those which the court should have regard to when, later, it is asked to confirm a local authority's post consultation changes. While, strictly, the High Court was obiter in relation to the confirmation process we consider the following items in Gendall J's list seem as, or more, relevant to the later process[261]:

> ...
>
> (b) Where the use of s 293 would have substantial consequences on persons who would have a "vital interest",[262] resort ought not to be had to the section lightly. This issue is particularly acute where the invocation of s 293 would have impacts on geographical regions outside the original contemplation of the plan change[263] or on subject matters not within its original contemplation.[264] In the latter two situations, it is likely that granting such relief would be beyond its jurisdiction.[265]
>
> (c) Though the power conferred upon the Environment Court by s 293 is prima facie very broad, it does not confer a general discretion; it must be exercised judicially in accordance with the overall regime created by the RMA, and does not entitle the Environment Court to make planning decisions where it simply disagrees with decisions made by a planning authority.[266]
>
> (d) In the case of s 293 relief sought by a party to an appeal, that relief must relate to the subject matter of the appeal and the original relief sought "as a matter of discretion".[267] Though the jurisdiction "is not limited to the express words of the reference", the relief sought must be a foreseeable consequence of the changes proposed in the reference.[268] The overarching consideration is one of procedural fairness.[269]

In those items the High Court has identified some of the relevance and fairness factors that we must apply when exercising our discretion to confirm or not. We consider these in the next two parts.

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261 *Mackenzie (HC 2014),* above n 10 at [145].
262 *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-76].
263 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at para [468], citing *Hamilton City Council v New Zealand Historic Places Trust* [2005] NZRMA 145 (HC).
264 Ibid at [468]. See also *Friends of Nelson Haven and Tasman Bay (Inc) v Tasman District Council* (EnvC) W13/2008 at [25].
265 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZEnvC 224 at [15], citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [32] and [65].
266 *Auckland Council v Byerley Park Ltd* [2013] NZHC 3402, [2014] NZRMA 124 at [21] (HC).
267 *Gardez Investments Ltd v Queenstown Lakes District Council* (EnvC) C95/05, 4 July 2005 at [56].
268 *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [73].
269 *Westfield (NZ) Ltd* above at [74].

3.2 Can PC13 be amended further (e.g. in response to the section 274 parties)?

[172] Once it is established that the objectives proposed by the Council do not depart from the relevant higher order instruments than at first sight is still open to the appellants (and to a limited extent the section 274 parties) to argue in the normal way (under section 32) that the implementing policies and rules are not the most appropriate, or (under section 31 RMA) do not represent integrated management of the relevant resources.

[173] However, Ms Forward submitted that the court does not have the power to make further changes when considering whether or not to confirm PC13(s293V). She relied on the sentence in *Mackenzie (HC 2014)* where Gendall J wrote the Environment Court's jurisdiction is "... to direct that changes be made, not to make the changes and direct that they be implemented". We consider that sentence must be read in context. As we understand the High Court decision, it was referring to the Environment Court's powers under section 293(1)(a) RMA to direct the local authority to prepare changes. The High Court was not ruling on what the Environment Court should consider when deciding whether or not to confirm the section 293 changes prepared by the local authority.

[174] We hold that the proper approach to the confirmation decision under section 293(1)(c) RMA is basically the same as that of the court on any appeal under clause 14 Schedule 1 to the RMA including the discretion under clause 10(2)(b) Schedule 1 to include:

> ... (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and
>
> (ii) any other matter relevant to the proposed statement or plan arising from the submissions.

subject of course to the over-riding considerations:

- of fairness to both parties and to persons not before the court who might be affected by any consequential changes; and
- that any such changes must still be on the subject of the plan change.

[175] The question of consequential changes arose in the report of the Independent Hearings Panel ("IHP") on the Auckland Unitary Plan. The IHP wrote[270]:

> It is essential to the effectiveness of the Unitary Plan that it promotes the purpose of the Resource Management Act 1991 in an integrated way. As section 32 requires, the appropriateness of objectives must be evaluated in terms of achieving that purpose; then other provisions, being the policies, rules and other methods, must be evaluated in terms of achieving the objectives. This vertical relationship of the Unitary Plan with the Resource Management Act 1991 is repeated across all of the aspects of the environment in Auckland ... This context means that amendments to support integration and to align provisions where they are related could be in three dimensions[271]:
>
> (i) down through provisions to give effect to a policy change;
>
> (ii) **up from methods to fill the absence of a policy direction;** and
>
> (iii) across sections to achieve consistency of restrictions or assessments and the removal of duplicate controls.
>
> (Emphasis added)

[176] Various aspects of the IHP's report were appealed to the High Court. In *Albany North Landowners v Auckland Council*[272] Whata J found that the IHP considered numerous key elements including (relevantly):

> ...
>
> (e) Identifying four types of consequential change:[273]
>
> (i) Format/language changes;
>
> (ii) Structural changes;
>
> (iii) Changes to support vertical/horizontal integration and alignment, to give effect to policy change, to fill the absence of policy direction, and to achieve consistency of restrictions or assessments and the removal of duplicate controls; and
>
> (iv) Spatial changes, for example where a zone change for one property raises an issue of consistency of zoning for neighbouring properties and creates difficulty in identifying a rational boundary.
>
> (f) On changes supporting vertical integration, following a top down approach so that consequential amendments to the plan to achieve integration with overarching objectives and policies, which were drawn from higher level policy statements.

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270 Auckland Unitary Plan IHP Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan, 22 July 2016, section 4.4.3.

271 In passing, we note that the dimensional metaphor is not as useful as first appears, since the IHP only describes two lines in two dimensions ("up" and "down" are in one dimension).

272 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [96].

273 Ibid at [29] and [30].

> Given the logical requirement for a plan to function in this way, these changes would normally be considered to be reasonably anticipated.
>
> ...
>
> (h) Assessing consequential changes in several dimensions, being:
>
> (i) Direct effects: whether the amendment would be one that directly affects an individual or organisation such that one would expect that person or organisation to want to submit on it.
>
> (ii) Plan context: how the submission of a point of relief within it could be anticipated to be implemented in a realistic workable fashion; and
>
> (iii) Wider understanding: whether the submission or points of relief as a whole provide a basis for others to understand how such an amendment would be implemented.
>
> ...

It will be seen that the phrase "absence of policy direction" is used at [96](e)(i) but the full phrase in the IHP report "... up from methods to fill the absence of a policy direction" is not used by Whata J.

[177] Whata J held that "[t]he IHP's integrated approach to scope noted at [96](a)(iv)(f) and (g) accords ... more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA"[274]. We accept (and are bound by) that. However, we respectfully disagree with the IHP that methods can drive policies to fill a policy vacuum. In our view the policies and rules should be driven from the top down. Policies are to implement objectives and methods to give effect to policies. That is what the High Court described as the orthodox approach and we can see no justification for departing from it. Indeed it seems to be the only principled approach: anything else would leave the RMA – criticised for its open textured language as it already is – open to almost any application that people want to give for their convenience: think of a rule that suits a special interest or the Government and then write a policy to justify it.

[178] Later Whata J summarised the position as follows:

> In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale ... preceding statutory instruments ... the s 32 reportage, the [proposed plan], the full gamut of submissions, the participatory scheme of the RMA and Part 4, the

274 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [114].

> statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a reasonably foreseen logical consequence test which accords with the longstanding *Countdown* "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in *Clearwater*[275] and Kós J in *Motor Machinists*[276].

[179] We respectfully follow that approach with the further restrictions we have identified due to the section 293 process in general and the directions of the High Court in *Mackenzie (HC 2014)* in particular as discussed shortly.

[180] We note that the section 274 parties may be able to seek only limited (if any) relief because, of course, they are not appellants. Mr Schulte, counsel for several section 274 parties, carefully posed the questions as[277]:

> ... do the consultation submissions provide additional scope for further more restrictive changes to the package of objectives, policies and rules included in PC13 s293V? Or to adopt the change from assessing visible vulnerability to assessing landscape sensitivity[278]?

He continued[279]:

> The difficulty in treating the consultation submissions in the same way as submissions made under the First Schedule [of the RMA] is that they have not been subject to the formal testing process of being summarised and opened to further submissions.

[181] Some of the section 274 parties have suggested possible changes to policies and rules in their post-consultation submissions. It was in anticipation of that possibility that the court in its First Decision directed[280] notification after consultation. However, because – in compliance with the High Court's directions – PC13(s293V) was notified before consultation it is possible that some persons who might have wished to be heard on post-consultation changes have lost that opportunity. We will consider what to do about that if we assess any of the changes sought by section 274 parties as appropriate on the evidence before us.

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275 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003.
276 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290; [2014] NZRMA 519.
277 A J Schulte submissions 23 February 2017 para 16 [Environment Court document 39].
278 Which was proposed in Fountainblue's evidence as a consequence of the issues identified in its submission.
279 A J Schulte submissions 23 February 2017 para 17 [Environment Court document 39].
280 First Decision [2011] NZEnvC 387 at Order E(3).

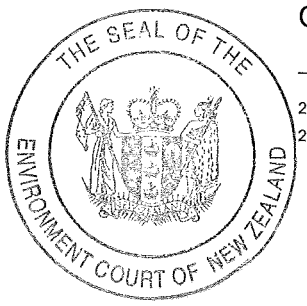
[182] In the particular circumstances of this case due to the procedure stipulated by the High Court in *Mackenzie (HC 2014)* there are further restrictions on our power to make change. We consider that we can readily make consequential changes if they are in the union of sets comprising PC13(N), the submissions on PC13(N), the decision on PC13(C), the court's First Decision and PC13(s293V) but that if they are in PC13(pc) or sought by a section 274 party we can only make minor procedural or minor consequential changes.

[183] If the proceeding had not taken so long to get to this point we might have adjourned the hearing for notification of PC13(pc) or of the submissions of section 274 parties. But at this point finality is the most important consideration. To that extent the process directed by the High Court in *Mackenzie (HC 2014)* has disadvantaged section 274 parties in that we are precluded – by jurisdictional considerations – from considering the full range of modifications suggested by them.

3.3 Has the process been fair to non-parties?

[184] Before the 2005 amendments to the RMA, section 293(3)(c) required the local authority concerned to give "public notice of any change ... proposed and of the opportunities being given to make submissions and be heard". That provision was replaced – with the rest of section 293 – by the current[281] version in 2005. Obviously there is no longer any statutory obligation for the local authority to give public notice of its proposed amendments and of the opportunities to make submissions and be heard on them because those requirements were expressly repealed in 2005. Parliament seems to have left the task of ensuring fairness to the Environment Court. In the First Decision the court dealt with the potential problem of changes being made by the MDC post-consultation by directing public notice after that.

[185] In the Seventh (Procedural) Decision[282] in these proceedings the court directed that the Council write and lodge policies to implement Objective 3B "... together with a memorandum from counsel, inter alia as to what directions as to notification ... are appropriate, so that the court can give further directions ...". The Seventh Decision (together with the Sixth and Eighth Decisions) was one of those appealed to the High Court.



281 Subsequent amendments have been very minor in effect.
282 [2013] NZEnvC 258; (2013) 17 ELRNZ 816 at Order 7A.

[186] As we have recorded, despite the history of section 293, Gendall J ordered that notification take place before consultation. A concern which arises out of the High Court's directions as to notification as carried out by the court and the MDC is whether persons who were satisfied with PC13(s293V) and thus did not make submissions on it were not given notice of the changes in PC13(pc). Ms Forward, counsel for The Wolds and Mt Gerald Station claimed that a number of landowners were not served with the PC13(pc). The Council conceded that, although as Mr Caldwell pointed out, Ms Forward did not claim that the landowners were unaware of the latest iterations.

[187] In the Ninth Decision the court complied with Gendall J's directions in *Mackenzie (HC 2014)* as already described. In its Minute of 17 May 2016 the court directed[283] that the timetable to be followed was (relevantly):

27 May 2016	the respondent's updated [post-consultation] section 293 version of PC13 must be lodged and served;
3 June 2016	the respondent must notify those parties who lodged submissions on the notified section 293 package but have not joined the PC13 proceedings as section 274 parties, that PC13 (section 293 version) is available for inspection at the Council's office or that electronic copies may be obtained from either the Council (georgina.hamilton@tp.co.nz) or the Registrar of the Environment Court (christine.mckee@justice.govt.nz);
1 July 2016	Any submitter to the Council on its PC13 (section 293 version) or draft or other person who considers they may qualify under section 274, may: (a) lodge a section 274 notice which must, in addition to the information required by the Resource Management (Fees and Forms) Regulations also set out precisely which provision the person seeks to be changed and why (referring to the relevant objectives in PC13 or the plan); and (b) must serve a copy of its notice [on] existing parties (a copy of an address list may be obtained from the Registrar of this court).

It will be noted that there was no provision for notification of a summary[284] of submissions or any opportunity for any persons "... that has an interest in the ... plan

283 Paragraph 4 Minute 17 May 2016.
284 Compare the process in clause 7 Schedule 1 RMA.

[change] greater than the interest that the general public has"[285] to make a further submission.

[188] Consequently persons not before the court and not consulted will have no notice of the changes sought by submitters under the court's directions. In response to that concern, Mr Caldwell submitted for the MDC that:

> While not determinative of the scope issue, the parties who have elected to participate in this process fully represent the interests of the community. Environmental Defence Society ..., Mackenzie Guardians, and the Department of Conversation represent those with a conservation focus, while Federated Farmers provided representation and evidence from the land owners' perspective.

[189] Further, there was also very extensive consultation within the Basin[286]. Finally FFM was a party at all times, and it was served. FFM is a (sub) branch[287] of the Federated Farmers of New Zealand South Canterbury Provincial District Inc which is itself a branch of Federated Famers of New Zealand Inc. Halfway through the long history of these proceedings the court enquired as to the identity of FFM. Its then Chairperson, Mr J B Murray of The Wolds Station (also an appellant in these proceedings) listed the members of the unincorporated branch as at 13 November 2013, in Exhibit "C" his affidavit of 13 November 2013. They included[288] many representatives of the station owners in the Mackenzie Basin. There are only a few stations which do not appear to have been directly represented.

[190] We provisionally conclude that any changes in PC13(pc) are generally within jurisdiction because most of the rural landowners concerned are represented either directly or indirectly by FFM and all were given the opportunity to be consulted with. There are two possible exceptions to that. The first relates to farm base areas which we consider next.

[191] A Farm Base Area ("FBA") was conceived as the area around an existing homestead cluster or other potential areas for more intensive farming and buildings. The recommended policy in PC13(pc) reads (the words in red represent the changes from PC13(s293V)):

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285 To use the words of clause 8(1)(b) Schedule 1 RMA.
286 P Harte evidence-in-chief paras 13 and 14 [Environment Court document 25].
287 J B Murray affidavit 13 November 2013.
288 G D W Loxton affidavit 5 April 2017.

Policy 3B3 – Development in Farm Base Areas

~~(1)~~Within Farm Base Areas ~~in areas of high visual vulnerability~~ subdivision and development (other than farm buildings) shall maintain or enhance the ~~significant and~~ outstanding natural landscape and other natural values of the Mackenzie Basin where possible by:

(a) Confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road.

(b) Integrating built form and earthworks so that it nestles within the landform and vegetation.

(c) Planting local native species and/or non-wilding exotic species and managing wilding tree spread.

~~(2) Subdivision and development (other than farm buildings) in Farm Base Areas which are in areas of low or medium vidual vulnerability to development shall:~~

~~(a) Restrict planting to local native species and/or non wilding exotic species~~

~~(b) Manage exotic wilding tree spread~~

~~(c) Maintain a sense of isolation from other development~~

~~(d) Mitigate the adverse effects of light spill on the night sky~~

~~(e) Avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance~~

~~(f) Install sustainable systems for water supply, sewage treatment and disposal stormwater services and access.~~

[192] At the request of the Council the location and extent of FBAs were never to be the subject of this decision. If necessary they were to be the subject of a further hearing.

[193] A potential difficulty with confirming (or not) the FBA policy in PC13(pc) and its implementing at this stage is that some station owners may be negotiating with the MDC about the extent of their own FBA(s) separately from FFM. In those discussions they may be working on the basis of Policy 3B3 in PC13(s293V) and its implementing rules. In fact we do not consider there is any problem with the policy since the PC13(pc) version is less containing than that in PC13(s293V). Accordingly we consider issues over the policy can be resolved in this decision. Confirmation of the rules should not be. To that limited extent it might be unfair to confirm the rules to implement Policy 3B3 as stated in PC13(pc) at this stage, and we will adjourn that issue for further

individual notification, and then resolution at the same time as the location and extent of individual FBAs are resolved.

[194] The second issue of potential unfairness which concerns us relates to the rather more complex issue of how the ONL should be assessed in relation to its capacity to absorb development and more intensive use. It is the proposed introduction in PC13(pc) of a new method of evaluating the ONL by its "landscape sensitivity" rather than by its "visual vulnerability" which was the concept used in PC13(s293V) as evidenced by the struck-through passage in Policy 3B3 quoted above. While, as we have stated above, we consider that farmers and landowners throughout the Basin generally are adequately on notice by the presence of their representative FFM, the whole concept of "visual vulnerability" was such a core part of the policy structure PC13(s293V) that we are uneasy about substituting a new process without notification. We will consider this issue further in relation to Policy 3B1 below.

[195] Any changes to objective 3B will be considered separately in Chapter 6. We will consider the scope to make any changes to PC13(s293V)'s policies at each point we make a determination as to effectiveness in Chapter 6 even if we do not make an express determination on the issue.

3.4 Jurisdictional issues in the Te Rūnanga o Ngāi Tahu case

[196] TRoNT seeks to add to Objective 3B(1) by adding the emphasised words in the (part) statement of the objective below:

> (1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the MacKenzie Basin Subzone in particular the following characteristics and/or values:
>
> ...
>
> **(g) the relationship of Ngāi Tahu with their ancestral lands, waters wāhi tapu and taonga.**

[197] Counsel for TRoNT, Mr Winchester submitted that the amendment sought to Objective 3B(1) is within the court's jurisdiction either as a consequential change or under the court's power in section 292 RMA to remedy defects in plans. The first argument relied on the "... reasonably foreseen logical consequence test" recently stated by the authoritative decision of Whata J in *Albany North Landowners v Auckland*

Council[289]. It is unclear to us that TRoNT's amendments to Objective 3B(1) can be said to be a reasonably foreseeable logical consequence of anything else in PC13.

[198] Second, Mr Winchester relied on section 292 RMA. That provision is used to correct a mistake, defect or uncertainty in an operative plan. The short point is that this proceeding is about a proposed plan change. In any event there does not appear to be any mistake in these proceedings. Nor is Objective 3B(1) obviously defective because while the planners agreed that the suggested change to Objective 3B(1) was appropriate they did not give reasons why it was necessary given the contents of Chapter 4 of the MDP (discussed shortly). No one pointed to any uncertainty in the provisions relating to tangata whenua in the district plan.

[199] The other matter that concerns us about TRoNT's proposal is that Objectives 3B(1) and (2) were settled by the Eighth Decision. If we had jurisdiction and could exercise our discretion[290], we should do so against TRoNT: they should <u>not</u> be amended now. If we were going to make changes to the objectives there are other matters that arise out of our better understanding of the (changed) environment (see 2 below) that would lead us to make other changes at the same time as that sought by TRoNT).

[200] TRoNT also seeks amendments to some of the policies, and we will consider these later since there do not seem to be any jurisdictional impediments to those changes.

4. The statutory instruments

4.1 <u>What are the relevant statutory documents</u>

[201] The relevant statutory documents are:

- the Mackenzie District Plan (including Objectives 3B(1) and (2)):
- 15 January 2013 – the Canterbury Regional Policy Statement ("the CRPS") which must be given effect to[291];
- 1 February 2016 – the Canterbury Land and Water Regional Plan ("the CLWRP") with which PC13 should not be inconsistent[292]; and

289 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at para [98].
290 Under section 292.
291 Section 75(3)(c) RMA.
292 Section 75(4)(b) RMA.

- the Iwi Management Plan of Kati Huirapa[293] for the area Rakaia to the Waitaki which must be taken into account[294].

The second and third documents – the CRPS and the CLWRP – have come into force since the district plan became operative and more relevantly since the First (Interim) Decision of the court on PC13 was issued. Because they post-date the First Decision, we need to give them particular attention.

4.2 The Operative District Plan and Objective 3B(1) and (2)

[202] PC13(pc) is designed to be part of the operative Mackenzie District Plan and needs to be integrated[295] with it. Since the provisions sought to be added by the Mackenzie District Council are to add one new subordinate Objective 3B(3) and policies and methods to implement settled Objectives 3B(1) and (2), as well as 3B(3), we set out the relevant objectives and policies of the whole plan to set the context for our consideration of the proposed provisions.

[203] The relevant chapters[296] of the Mackenzie District Plan are called:

1 – Introduction
2 – Policy and Legal Framework
3 – Definitions
4 – Takata Whenua
...
7 – Rural Objectives and Policies
...
11 – Heritage Protection
...
18 – Natural Hazards

The chapters often read as if they are self-contained but of course the MDP must be

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293 T J Stevens evidence-in-chief para 1.9(g) [Environment Court document 31].
294 Section 74(2A) RMA.
295 Section 74(1) and section 31 RMA.
296 Note:
(a) The chapters are called "sections" in the MDP, but we avoid this term so as not to cause confusion with sections of the RMA.
(b) three chapters dealing with special zones have been added since. They are irrelevant to these proceedings.

read as a whole: *Rattray and Sons v Christchurch City Council*[297] applied by the Court of Appeal in the RMA context in *Powell v Dunedin City Council*[298].

Chapter 3 – Definitions

[204] This chapter contains several definitions of relevance to this proceeding.

[205] "Farming activity" is defined[299] in the MDP as meaning:

> ... the use of land, buildings or water for the primary purpose of the production of vegetative matter and/or commercial livestock, and includes the on-site sale of produce grown or reared on the site. Farming activity does not include residential activity, home occupations, factory farming, forestry activity or the disposal of effluent beyond the level normally required to sustain the productive use of land.

[206] "Pastoral intensification" is already defined in the MDP as meaning "... subdivisional fencing, topdressing and oversowing".

[207] "Residential Activity" is defined[300] in the MDP as meaning:

> The use of land and buildings by people for the purpose of permanent living accommodation, including all associated accessory buildings, leisure activities and the keeping of domestic livestock. For the purpose of this definition, residential activity shall include residential community care homes for up to and including six people and management staff, and emergency and refuge accommodation.

[208] The term "farming activity" is broad and includes most types of farming. There is one exception: Chapter 3 contains a definition of "factory farming". We do not need to discuss that beyond recording that it is expressly excluded from "farming activity".

[209] One important subset of "farming activity" is the defined term "pastoral intensification" meaning to "subdivisional fencing, oversowing and topdressing". We infer from this that the MDP contemplates "pastoral farming" not as all forms of stock grazing (intensive or extensive) but as the more traditional and restricted sense of extensive dryland farming often under a pastoral lease as discussed earlier (in Chapter 2 of this decision).

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297 *J Rattray and Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 at 61.
298 *Powell v Dunedin City Council* (2005) 11 ELRNZ 144; [2004] 3 NZLR 721; [2005] NZRMA 174 at [35].
299 MDP p 3-4.
300 Mackenzie District Plan p 3-9.

Chapter 4 – Takata Whenua

[210] Chapter 4 (Takata Whenua Values) of the MDP identifies areas of concern[301] to tangata whenua, specifically by making[302] Statutory Acknowledgements of Areas which come under the Ngāi Tahu Claims Settlement Act 1998. Those within the Mackenzie Basin are Lakes Tekapo, Pukaki, Benmore and Ohau. It also recognises the need to protect koiwi takata and other wāhi tapu[303]. It contains the following objectives and policies[304]:

> **Objectives and Policies**
> **Objectives**
>
> 1 Recognition of the importance of the relationship of the takata whenua, their culture and traditions, with their ancestral lands, waters and sites, in the management of these resources within the District.
>
> 2 Recognition of the Treaty of Waitangi partnership between the takata whenua and the Crown which has devolved its policy and regulatory capacity in the management of natural resources to local government through the Resource Management Act 1991.

[211] To implement those objectives the following policies are identified as being "Specific to Takata Whenua Interests"[305]:

> 1 To include acknowledgement of Arowhenua Runaka in all future District Plans.
>
> 2 To develop a system of on-going consultation with the takata whenua by asking the takata whenua what form of consultation and participation in resource management they feel is appropriate for them.
>
> 3 To give recognition to traditional takata whenua place names within the District.
>
> 4 To promote, through education and information, public awareness of takata whenua obligations, interests and concerns within the District. Any promotion shall be done with the support of Runaka members.
>
> 5 To support the coming together of Runaka members and land managers (farmers, DoC, Council) to discuss the way that lands, waterways and mahika kai are

301 MDP p 4-3.
302 Pursuant to section 215 Ngāi Tahu Claims Settlement Act 1998.
303 MDP pp 4-4.
304 MDP p 4-4 to 4-5.
305 MDP p 4-4 to 4-5.

presently being managed in the District. The purpose of coming together is to work towards finding ways to manage these resources which suit all parties.

6 To support the takata whenua in encouraging landowners to approach the Runaka if they believe there are special sites on their land and in achieving a mutually satisfying outcome.

[212] We also note that Chapter 11 contains an Objective 1 on conservation of the heritage resources of the district including "... wāhi tapu sites and areas"[306]. There is a specific Policy 1C relating to such sites and an implementing rule[307].

Chapter 7 – Rural Objectives and Policies

[213] The objectives and policies for the Rural Zone include these headings:

- Objective 1 Indigenous Ecosystems, Vegetation and Habitat
- Objective 2 Natural Character of Waterbodies and Their Margins
- Objective 3A Landscape Values
- Objective 3B Activities in the Mackenzie Basin Outstanding Natural Landscape
- Objective 4 High Country Land
- Objective 5 Downlands and Plains Soils
- Objective 6 Rural Amenity and Environmental Quality
- Objective 7 Natural Hazards

Objective 7 relating to Natural Hazards needs to be considered with Chapter 18 of the district plan.

[214] The first objective[308] is "To safeguard indigenous biodiversity and ecosystem functioning through the protection and enhancement of significant indigenous vegetation and habitats, riparian margins ...". The second objective is[309] to preserve the natural character and function of the District's lakes, rivers, wetlands and their margins, and to promote public access along these areas. The third objective in the Rural section actually contains several. Objective 3A relates to the landscape values of

306 MDP p 11-2.
307 Rule (11)5 MDP p 11-7.
308 Rural Objective 1 – Indigenous Ecosystems, Vegetation and Habitat [MDP p 7-17].
309 Rural Objective 2 – Natural Character of Waterbodies And Their Margins [MDP p 7-20].

the district's rural areas generally and states[310]:

> **Rural Objective 3A – Landscape Values**
> Protection of outstanding landscape values, the natural character of the margins of lakes, rivers and wetlands and of those natural processes and elements which contribute to the District's overall character and amenity.

[215] Objectives 3B(1) and (2) were added to PC13 by this court's Eighth Decision[311] and were not affected by the High Court's decision on appeal since the alleged error of law was "effectively abandoned"[312]. They state:

> **Objective 3B – Activities in the Mackenzie Basin's outstanding natural landscape**
> (1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin subzone in particular the following characteristics and/or values:
> (a) the openness and vastness of the landscape;
> (b) the tussock grasslands;
> (c) the lack of houses and other structures;
> (d) residential development limited to small areas in clusters;
> (e) the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;
> (f) undeveloped lakesides and State Highway 8 roadside;
> (2) To maintain and develop structures and works for the Waitaki Power Scheme:
> (a) within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing Lake Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all of objective (1) and all implementing policies and methods in this section apply;
> (b) elsewhere within the Mackenzie Basin subzone so as to achieve objective (1) above.

[216] Objectives 3B(1) and (2) have been "incorporated"[313] into the MDP. However formal approval and notification under clauses 17 and 20 of the First Schedule to the Act have not been given or undertaken (respectively).

[217] As stated at the outset this decision is primarily about whether the court should confirm the subordinate Objective 3B(3) and policies in PC13(pc) put forward by the

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310 MDP p 7-22.
311 Eighth Decision: [2013] NZEnvC 304 Order 8C(2).
312 *Mackenzie (HC 2014),* above n 10 at [165].
313 Memorandum from MDC 30 March 2017.

Council under section 293 RMA and that really depends on whether those provisions achieve Objective B(1) and (2) when read in the context of the remainder of the MDP, and on achieving the objectives and policies of the (later) CRPS to be discussed shortly.

[218] In *High Country Rosehip*[314] the court described the other relevant objectives and policies in chapter 7 of the MDP as follows:

> [121] Also highly relevant is[315] a "high country" objective to encourage land uses which sustain soil and water and ecosystems and "which protect the outstanding landscape values of the high country, its indigenous plant cover and those natural processes which contribute to its overall character and amenity". Relevant implementing policies for this objective[316] include one requiring that land use should maintain "a robust and intact vegetation cover". We have already described how that is not happening in the lower and drier parts of the basin. Another policy[317] aims to ensure ecosystems, natural character and open space values are maintained by retaining (as far as possible) indigenous vegetation and habitat, maintaining natural landforms, and by managing adverse effects on landscape and visual amenity.

[219] The court then paused to[318] repeat "that there was a disappointing lack of ecological evidence in these proceedings, so that our findings may insufficiently take into account 'indigenous plant cover', especially in respect of the smaller native plant species which live in the spaces between tussocks, or which are dry hill/scree specialists". That presentiment has turned out to be correct as we found in Chapter 2. Further it now appears that the concept of an "intact vegetation cover" is not the nature of some of the microhabitats referred to by the ecological witnesses.

Indigenous ecosystems, etc

[220] Rural Objective 1 (Indigenous Ecosystems, Vegetation and Habitat)[319] is:

> To safeguard indigenous biodiversity and ecosystem functioning through the protection and enhancement of significant indigenous vegetation and habitats, riparian margins and the maintenance of natural biological and physical processes.

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314 *High Country Rosehip,* above n 6 at [121].
315 Rural Objective 4 – High Country Land [MDP p 7-25]; note that "High Country" is "defined so that in fact all of the Mackenzie Basin subzone comes within the term " [MDP p 7-3].
316 Rural Policy 54A – Vegetation Cover [MDP p 7-26].
317 Rural Policy 4B – Ecosystem Functioning, Natural Character and Open Space Values [MDP p 7-26].
318 *High Country Rosehip,* above n 6 at [121].
319 MDP at p 7-17.

[221] We note here that "Indigenous vegetation" is defined in Chapter 3 of the MDP as meaning[320]:

> ... a plant community in which species indigenous to that part of New Zealand are important in terms of coverage, structure and/or species diversity. For these purposes coverage by indigenous species or number of indigenous species shall exceed 30% of the total area or total number of species present, where structural dominance is not attained. Where structural dominance occurs (that is indigenous species are in the tallest stratum and are visually conspicuous) coverage by indigenous species shall exceed 20% of the total area.

Extensive parts of each of the three ecological districts in the Mackenzie Basin may qualify as "indigenous vegetation" because the 83 indigenous threatened species (even if sparsely distributed) plus the more common species – the tussocks, matagouri, speargrass – are likely to be well over 30% of the total species present.

[222] Rural Policy 1A (Department of Conservation and Landholders) is:

> To promote the long-term protection of sites with significant conservation values by encouraging:
> – landholders and relevant agencies to pursue protection mechanisms and agreements;
> – tenure review processes under the Land Act and Crown Pastoral Land Act 1998;
> – Implementation of the Conservation Management Strategy and the Management Plan for the Aoraki/Mount Cook National Park.

[223] That policy describes the Implementation Methods as being to "identify sites of significance". The MDP then states[321] secondary criteria used to assist in identifying sites of natural significance:

> (i) Scientific Value - The area is a type of locality or other recognised scientific reference area.
> (ii) Connectivity - The extent to which the area has ecological value due to its location and functioning in relation to its surroundings. An area may be ecologically significant because of its connections to a neighbouring area, or as part of a network of areas of fauna habitat, or as a buffer.
> (iii) Size and shape - The degree to which the size and shape of an area is conducive to it being, or becoming, ecologically self sustaining.

320 Mackenzie District Plan at p 3-6.
321 Mackenzie District Plan at p 7-19.

As we shall see that is not nearly as particularised as the later CRPS.

[224] In passing we note that Rules 12.1.1(g) and (h) relate to "Short Tussock Grasslands" and "Indigenous Cushion and Mat Vegetation ... Communities" respectively. They state[322]:

> 12.1.1.g **Short Tussock Grasslands**
>
> *An interim Rule that will be reviewed three years after the Plan becomes operative.*
>
> On each of the individual farm properties existing in the Mackenzie Basin Map as at 1 January 2002 in any continuous period of five years there shall be no clearance including cultivation above the following thresholds of short tussock grasslands, consisting of silver or blue (*Poa* species), or *Elymus solandri*, or fescue tussock where tussocks exceed 15% canopy cover:
>
> (i) 40 hectares or less – Permitted Activity
> (ii) Greater than 40 hectares – Discretionary Activity
>
> Performance Standards for Permitted Activity
>
> - The landholder shall notify the Mackenzie District Council of the proposed clearance 4 months prior to the clearance being undertaken and shall supply a map of the proposed site.
> - The clearance shall be more than 150m from the boundaries of any existing Sites of Natural Significance.
>
> **Exemptions**
>
> This rule shall not apply to:
>
> - Any removal of declared weed pests; or
> - Vegetation clearance for the purpose of track maintenance or fenceline maintenance within existing disturbed formations; or
> - Any vegetation clearance including burning which has been granted resource consent for a discretionary or non-complying activity from the Canterbury Regional Council/Environment Canterbury under the Resource Management Act 1991; or
> - Any short tussock grassland where the site has been oversown, and topdressed at least three times in the last 10 years prior to new

322 Mackenzie District Plan at pp 7-69 to 7-70. As a result of PC17 the exemptions do not apply from 24 December 2016 to 24 December 2017.

clearance so that the inter-tussock vegetation is dominated by clovers and/or exotic grasses.

12.1.1.h **Indigenous Cushion and Mat Vegetation and Associated Communities**
An interim Rule that will be revised three years after the Plan becomes operative.

On each of the individual farm properties existing in the Mackenzie Basin as at 1 January 2002 in any continuous period of five years there shall be no clearance including cultivation above the following thresholds of indigenous cushion, mat (*Raoulia* species) or herb and scabweed vegetation where at least 50% of the vegetation ground cover comprises vascular and non-vascular indigenous species, OR where the number of vascular indigenous species is greater than 20:

(i) 10 hectares or less – Permitted Activity
(ii) Greater than 10 hectares – Discretionary Activity
...

The performance standards and exemptions are similar to those for the Short Tussock rule.

[225] It will be noted that the exemption in the fourth bullet point has the effect that both rules can be avoided simply by oversowing once and topdressing at least three times in the ten years before clearance.

[226] The Implementation Methods includes a statement about a review[323] of Rules 12.1.1(g) and 12.1.1(h):

A review of Rules 12.1.1(g) and 12.1.1(h) will commence three years after the date at which the Plan became operative. These Rules will continue to apply until such time as the review is complete and a new Rule(s) is substituted. The agreed process for such a review is as follows:

(i) The Mackenzie District Council will review the extent and condition of short tussock grasslands and associated communities in the Mackenzie Basin, and the extent of cultivation and modification of these areas since the Plan became operative. Council will consult interested parties including landholders, Federated Farmers, Department of Conservation, Environment Canterbury, and environmental and community organisations. It will use relevant information such as the ortho-digital

323 Mackenzie District Plan at p 7-19.

technology of the RFT (Rural Futures Trust). It will consider matters such as the economic, ecological, landscape and other values of the short tussock grasslands and associated vegetation.

(ii) The review process may result in the Council amending the Plan and/or Rules 12.1.1 (g) Short Tussock Grasslands and 12.1.1 (h) Indigenous Cushion and Mat Vegetation and Associated Communities to identify areas where development and modification needs to be more strictly controlled and/or areas where the above Rules would no longer apply.

Environmental Results Anticipated

- Protection of the natural habitats of indigenous plants and animals from the adverse effects of human activities and a reduced overall rate of degradation of indigenous habitats and biodiversity.

The MDP became operative in 2004 so the review should have been completed by the end of 2007. Nothing happened. At the hearing the MDC advised the court that a review will be carried out this year (2017).

[227] Those facts make the first part of Mr Gardner's submission[324] that the provisions in the MDP "... should be assumed to provide all the protection of [biodiversity] values that is needed and that the value of landscape in protecting biodiversity is limited" rather inaccurate.

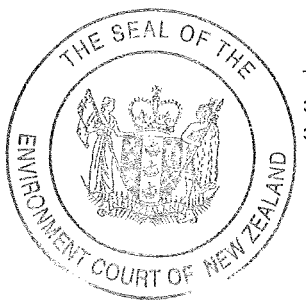
[228] Rural Objective 2 – Natural Character of Waterbodies and Their Margins[325]. This states:

> The preservation of the natural character and functioning of the District's lakes, rivers, and wetlands and their margins, and the promotion of public access along these areas.

4.3 The Canterbury Regional Policy Statement

[229] Since the First Decision a new regional policy statement ("the CRPS") has come into force (on 15 January 2015). There are three relevant chapters in the CRPS which must be given effect to. They are:

- Chapter 4 Provision for Ngāi Tahu and their relationship with resources



324 R Gardner closing submissions para 25 [Environment Court document 41].
325 Mackenzie District Plan at p 7-20.

- Chapter 9 Ecosystems and indigenous biodiversity
- Chapter 12 Landscape

Provision for Ngāi Tahu and their relationships and resources

[230] It is not clear that the CRPS does provide fully for Ngāi Tahu since Chapter 4 of the CRPS does not contain any objectives or policies on the issues of importance to tangata whenua.

[231] The only guidance it gives to territorial authorities such as the MDC, is to record, under the heading[326] 'Tools and Processes' that territorial authorities will:

> ... in order to give effect to their functions under the RMA[327]:
>
> **4.3.15**
> Include provisions for the relationship between Ngāi Tahu, their culture and traditions, and their ancestral lands, water, sites, wāhi tapu and other taonga within district plans.
>
> **4.3.16**
> Include methods for the protection of Ngāi Tahu ancestral lands, water, sites, wāhi tapu and other taonga within district plans.
>
> **4.3.17**
> Take into account iwi management plans during plan development.

The MDP uses the first two of those methods; the third can be taken into account in this decision. However, it cannot be said that PC13(pc) is departing from Chapter 4 of the CRPS when the plan change is read with the district plan as a whole.

Ecosystems and indigenous biodiversity (Chapter 9)

[232] Objective 9.2.1 in Chapter 9 (Ecosystems and indigenous biodiversity) is to halt the decline of Canterbury's ecosystems and indigenous biodiversity[328]. The second – Objective 9.2.2 – is to restore or enhance ecosystems and indigenous biodiversity; and the third objective[329] in Chapter 9 is to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna and to protect their values and ecosystem functions.

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326 Para 4.3 [CRPS p 24].
327 Para 4.3.15 to 4.3.17 [CRPS p 26].
328 Objective 9.2.1 [CRPS p 105].
329 Objective 9.2.3 [CRPS p 106].

[233] Policy 9.3.1. (protecting significant natural areas) states[330] that:

> 1. Significance, with respect to ecosystems and indigenous biodiversity, will be determined by assessing areas and habitats against the following matters:
>
> (a) Representativeness
>
> (b) Rarity or distinctive features
>
> (c) Diversity and pattern
>
> (d) Ecological context
>
> The assessment of each matter will be made using the criteria listed in Appendix 3.
>
> 2. Areas or habitats are considered to be significant if they meet one or more of the criteria in Appendix 3.
>
> 3. Areas identified as significant will be protected to ensure no net loss of indigenous biodiversity or indigenous biodiversity values as a result of land use activities.
>
> ***This policy implements the following objectives:***
>
> Objective 9.2.1 and Objective 9.2.3

[234] The next relevant implementing policy is:

> **Policy 9.3.2 – Priorities for protection**
>
> To recognise the following national priorities for protection:
>
> ...
>
> 4. Habitats of threatened and at risk indigenous species.

"Threatened" is explained[331] as meaning "A species facing a very high risk of extinction in the wild and includes national critical, nationally endangered, and naturally vulnerable species as identified in the [NZ] Threat Classification Lists". A schedule of the plants on that list which occur in the Mackenzie Basin was produced[332] by Mr N Head, a botanist called by DoC. It contains 83 species and is attached to this decision as Appendix "B".

[235] Appendix 3 to the CRPS sets out the criteria[333] for determining significant habitat. The methods suggest[334] that an analysis of some of the criteria for determining significance needs to be carried out in the LWRP (but it has not yet been). Determinations will need to be made by the MDC on its plan review of Appendix 3 to the CRPS under other criteria including 6 to 10. We should not decide those issues

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330 Policy 9.3.1 [CRPS p 107].
331 Glossary and Definitions [CRPS p 199].
332 N J Head evidence-in-chief Appendix 1 [Environment Court document 14].
333 Appendix 3 criteria for determining significant indigenous vegetation and significant habitat of indigenous biodiversity [CRPS p 234].
334 Methods for Policy 9.3.1 [CRPS Statement p 107].

here since there are value (or policy) judgements involved in those criteria ("distinctive" – in Policy 6, "high diversity" in Policy 7, "importance" in Policies 8, 9 and 10) which should be left to the MDC on its review.

[236] Appendix 3 also contains the criterion:

> **Criteria for determining significant indigenous vegetation and significant habitat of indigenous biodiversity**
>
> ***Rarity/Distinctiveness***
>
> ...
>
> 4. Indigenous vegetation or habitat of indigenous fauna that supports an indigenous species that is threatened, at risk, or uncommon, nationally or within the relevant ecological district.
>
> ...

Criterion 4 is important because the question whether there is an area of indigenous vegetation that is threatened, "at-risk", or is uncommon is simply a question of fact to be resolved on a species-by-species basis. In large parts of the Mackenzie Basin there is not simply one species but 83 species of indigenous plants which qualify. Accordingly we find on the balance of probabilities that much of the ONL[335] meets the area of significant vegetation criterion, notwithstanding the presence of introduced plants or weeds. This is not a policy decision, simply a determination of fact. Then Policy 9.3.1(2) of the CRPS says that those (extensive) parts of the Mackenzie Basin are significant areas.

[237] Consequently the ONL is a significant natural area under Policy 9.3.1 of the CRPS.

Chapter 12 (Landscapes)

[238] Chapter 12 of the CRPS contains three objectives. The first[336] largely repeats section 6(b) RMA but adds that the values which make an ONL[337] should be "specifically recognised"[338]. The explanation is that:

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335 Obviously excluding cultivated pasture, wilding conifer forests with closed canopy, woodlots, or some areas of greater pastoral intensification.
336 Objective 12.2.1 [CRPS p 141].
337 Or outstanding natural feature.
338 Objective 12.2.1 [CRPS p 141].

> Landscape is an integral element of the environment and potential land-use effects on landscape values require an integrated management response. Changes in landscape can also affect the relationship of Ngāi Tahu with ancestral land, sites and wāhi tapu.
>
> Landscape is multi-dimensional and includes natural science, legibility, aesthetic, shared and recognised, transient, heritage and tāngata whenua values. These values can also overlap with the statutory considerations in Section 6(a) of the RMA, concerned with natural character, Section 6(c), significant areas of indigenous vegetation and significant habitats of indigenous fauna, Section 6(f), historic heritage and Section 8 in relation to the principles of the Treaty of Waitangi. Accordingly, it is important that there is some clarity as to which values within a landscape contribute to its status as outstanding.
>
> It is important to acknowledge that landscape-related management methods are not intended to be prohibitive with respect to all land-use change. As part of sustainable management, land-use, and thereby landscape change may occur. The focus should be on what is appropriate development in relation to the values that make a landscape outstanding. As such, there will be instances where certain types or scales of development, are inappropriate.

[239] The second and third objectives are not relevant to these proceedings as they deal with, respectively, other landscapes than those which qualify under section 6(b) and with consistency of assessment across the region.

[240] The first relevant implementing policy is[339]:

> **Policy 12.3.1 – Identification of outstanding natural features and landscapes**
> To identify the outstanding natural features and landscapes for the Canterbury region, while:
> 1. recognising that the values set out in Appendix 4 indicate the outstanding natural features and landscapes for Canterbury, at a regional scale; and
> 2. enabling the specific boundaries of outstanding natural features and landscapes, for inclusion in plans, to be determined through detailed assessments which address the assessment matters set out in Policy 12.3.4(1).

This policy has of course largely been accomplished by the MDC by the identification of the Mackenzie Basin as an ONL.

[241] Next, out of order, we refer to Policy 12.3.4[340] which seeks regional consistency in the identification of outstanding natural features and landscape areas and values by

339 Policy 12.3.1 [CRPS p 142].
340 Policy 12.3.4 [CRPS p 145].

(relevantly):

1. considering the following assessment matters which address biophysical, sensory and associative values when assessing landscapes in the Canterbury region:
   (a) Natural science values
   (b) Legibility values
   (c) Aesthetic values
   (d) Transient values
   (e) Tāngata whenua values
   (f) Shared and recognised values
   (g) Historic values

[242] The Appendix 4 referred to then identifies the key ONL values of the wider Mackenzie Basin under those headings as being[341]:

> **Natural Science:** The upper river valleys (such as the Godley and Tasman) are largely weed free and have a high degree of naturalness. These river valleys support an array of unique and threatened native birds. Kettleholes in the basin floors are an important habitat. Numerous Department of Conservation managed reserves, including scientific reserves are in the basin and valleys (linking with Aoraki/Mt Cook National Park). Elevation and the orographic effect of the main divide enable particularly clear views of the night sky, which has resulted in the location of the Mt John Observatory in the Mackenzie Basin.
>
> **Legibility:** Highly legible features such as moraines, roches moutonnees, hanging valleys, terraces and fans. 'Kame terraces' near Lake Pukaki are alluvial terraces formed by streams that flowed along the margins of large glaciers. Numerous geopreservation sites are located within the basin. The Clay Cliffs are one of New Zealand's best examples of 'badlands' erosion, where steep-sided canyons are cut into easily erodible sediments. The sediments have been uplifted and tilted by movements on the Ostler Fault.
>
> **Aesthetic:** The vast basin, large river valleys and enclosing mountain ranges form a dramatic and spectacular landscape. While some parts of the basin have been substantially modified by residential, hydro and agricultural development, the basin as a whole retains its openness and largely coherent character. Despite the landcover modifications induced by historic farming practices, the area maintains a high level of visual coherence. The Golden Tussock-laden slopes which surround the basin have high aesthetic values. Impressive views up the wide U-shaped valleys to the snow and ice covered peaks of the Alps are experienced from the basin. Pukaki and Tekapo reflect a striking milky-blue colour in sunlight. They form an integral part of one of the most memorable landscapes in the country.

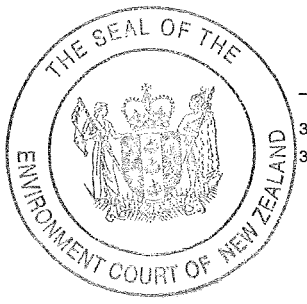
341 Appendix 4 pp 72-73 [CRPS 2013].

> **Transient:** Snow coats the ranges and basin floors during much of the winter months. The distinctive turquoise colour of the lakes in sunny conditions is spectacular. Nowhere else in the country can the effects of 'norwester' weather patterns and the rainfall gradient from west to east be as vividly experienced as in the Mackenzie Basin.
>
> **Tāngata Whenua:** The Mackenzie Basin lakes (Tekapo, Pukaki and Ohau) are all referred to in the legend of "Nga Puna Wai Karikari o Rakaihautu" which describes how the principal lakes of Te Wai Pounamu were dug by the rangatira (chief) Rakaihautu. Māori used the lakes in this area for mahinga kai. These lakes are part of a wider mahinga kai trail that ran from Lake Pukaki down the original path of Waitaki River to the coast.
>
> **Shared and Recognised:** Iconic South Island landscape. Inspiration for numerous artists and writers. The lakes and the basin are tourist icons. National importance for tourism and recreation. ... Lake Ruataniwha near Twizel, which has been developed as part of the Waitaki Hydro Electric Power Scheme, has been developed as a national rowing venue.
>
> **Historic:** Historic features include homesteads, farm buildings, sheep yards, pack bullock & dray tracks, mustering huts, shelterbelts and fences. The Mackenzie Basin is named after the first European to discover the area, James Mackenzie. Mackenzie, convicted of sheep stealing, has a monument commemorating his capture.

[243] Those matters are very important because PC13 needs to give effect to them by recognising them and providing appropriately for them. The implementing Policy 12.3.2 is[342] to ensure management methods which "seek to achieve protection" of outstanding natural features and landscapes from inappropriate subdivision, use and development. We add that Appendix 4 is on the evidence before us as described in Chapter 2 of this decision, clearly incomplete in relation to the importance of the native flora of the Mackenzie Basin. It is not only "kettleholes" which are important habitat.

[244] The explanation acknowledges[343]:

> ... that some activities, such as pastoral farming, have enabled landscape values, such as legibility of the underlying landform, to be maintained. Some landscape values also occur at a very large geographic scale, such as Banks Peninsula or the intermontane basins, and it is appropriate that working landscapes within these large-scale features are maintained to ensure that the community continues to provide for its economic and social well-being. ...



342 Policy 12.3.2 [CRPS p 143].
343 Explanation to Policy 12.3.2 [CRPS p 145].

[245] Policy 12.3.3 relates to other landscapes and is not relevant.

4.4 The Canterbury Land and Water Regional Plan

[246] There is no obligation for a regional plan to say anything about an ONL so the CLWRP does not. We will not refer to it further.

4.5 The Kati Huirapa Iwi Management Plan 1992

[247] This plan focuses on mahinga kai and the protection of natural processes and waterways. It specifically refers to hills and mountains, " ... seeking that sources of life giving waters remain protected by natural vegetation" accordingly to Ms T J Stevens[344], the planning witness for TRoNT. That is too general to be of real assistance in these proceedings.

5. Is Objective 3B(3) in PC13(pc) the most appropriate objective?

5.1 The proposed Objective 3B(3)

[248] The MDC proposes to add a new subclause (3) addressing pastoral farming, pastoral intensification, agricultural conversion and subdivision and buildings within "Farm Base Areas". Objective 3B(3) in its PC13(pc) forms reads:

> (3) Subject to objective (1) above and to rural objectives 1, 2 and 4:
>
> (a) to enable pastoral farming;
>
> (b) to enable pastoral intensification including cultivation and/or direct drilling and high intensity (irrigated) farming, in Farm Base Areas and areas for which irrigation consent was granted prior to 14 November 2015 and the effects on the outstanding natural landscape have been addressed through the regional consenting process; and elsewhere, to manage pastoral intensification;
>
> (c) to enable rural residential subdivision, cluster housing and farm buildings within Farm Base Areas around existing homesteads (where they are outside hazard areas).

This does not differ from that notified in PC13(s293V).

344 T J Stevens evidence-in-chief para 4.12 [Environment Court document 31].

[249] Ms Harte explained that the purpose of objective subclause (3) is to manage activities that have the potential to adversely affect the outstanding natural landscape of the Basin, and in particular impact the values listed in Objective 3B(1), so that the activities enabled are subject to Rural Objectives; 1 (Indigenous Ecosystems, Vegetation and Habitat), 2 (Natural Character of Waterbodies and their margins), 3B(1) (ONL), and 4 (High Country land).

[250] Enabling pastoral farming and intensification "subject to" those other objectives means that the identified activities will be managed where this is required to:

- protect or enhance the outstanding natural landscape;
- safeguard indigenous biodiversity and ecosystem functioning through protection and enhancement of significant indigenous vegetation and habitats;
- sustain ecosystem functions, open space and natural values of the high country;
- preserve the natural character and functioning of the district's lakes, rivers and wetland and their margins.

5.2 Renaming extra pastoral intensification as "agricultural conversion"

[251] As we have explained a new specific definition of "pastoral intensification" (to apply only in the Mackenzie Basin) is proposed to be added in PC13(pc) as follows:

> Pastoral intensification within the Mackenzie Basin Subzone means subdivisional fencing, cultivation, irrigation, topdressing and oversowing and/or direct drilling.

It will be noted the term is now proposed to include cultivation, irrigation and direct drilling. In effect PC13(pc) expands on the concept of pastoral intensification already in the MDP and provides for a significant extension to the areas where it is to be controlled through consenting

[252] We consider that the two definitions of "pastoral intensification" will lead to confusion. The simple answer is for that term to have one meaning throughout the Mackenzie District, and to define the more intensive activities as something else.

[253] The more intensive activities not already included can conveniently be renamed as "agricultural conversion" in Chapter 3 of the MDP as follows:

> **"Agricultural conversion"** means direct drilling, cultivation (by ploughing, discing or otherwise) or irrigation.

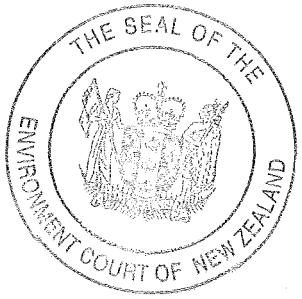
That is simple because it is simply a definitional change.

Inclusion of fencing in the definition

[254] The definition of pastoral intensification in PC13(pc) no longer contains a reference to "subdivisional fencing". After consultation the Council wishes to recognise that fencing can achieve good control of grazing and also enables fencing of waterways. It proposes, in PC13(pc) to remove fencing from the definition.

[255] However, the Council's ecological witness Mr Harding pointed out that while fencing of areas of ecological value is worthwhile, subdivisional fencing of larger blocks into small blocks accompanied by the intensive grazing that is designed to assist establishment of exotic grasses (and in the hope of suppressing pines) can significantly affect the indigenous vegetation. He acknowledged that this would usually occur in conjunction with other elements of pastoral intensification[345]. Dr Walker also referred to this issue[346]. In response Mr P D Reaburn, the planner called by EDS, proposed a compromise position of putting the reference to subdivisional fencing back into the definition of pastoral farming but with an exemption for fencing off streams and wetlands[347]. Ms Harte agreed with this approach[348].

[256] In fact those solutions will not work with the course we have decided is most apposite which is to retain the definitions of 'pastoral intensification' already in the plan. We consider the solution is to have the Council's planner draft a rule which specifically allows subdivisional fencing except in the special areas (SONS, SGAs, SVAs, etc.) and in areas of high visual vulnerability.



345 M A C Harding evidence-in-chief at para 87 [Environment Court document 12].
346 S Walker evidence-in-chief at para 43 [Environment Court document 17].
347 P D Reaburn evidence-in-chief at para 29 [Environment Court document 29].
348 P Harte rebuttal evidence, 7 October 2016 at para 44 [Environment Court document 25A].

5 3 Consideration of the objective

[257] The question we must answer is: "Is the proposed Objective 3B(3) the most appropriate way to achieve the purpose of the Act?" There is little if any dispute over the introduction to Objective 3B(3)(a). Mr C Vivian the planner called by Fountainblue and others suggested[349] that it is unnecessary to make Objective 3B(3) subject to "rural objectives 1, 2 and 4 "as they must all be read in conjunction with one another in any case"[350]. Ms V M Smith the planner called by the DGC disagreed pointing out that:

> "Subject to" means "conditionally upon"[351] indicating a different test to the objectives being read in conjunction with each other as equal in status.

The Council considers 3B(3) should be subservient to the other objectives and we consider that is appropriate.

[258] Policy 3B(3)(b) with the introduction of our proposed definition of agricultural conversion would read:

> (b) to enable pastoral intensification and/or agricultural conversion ... in Farm Base Areas, etc; and elsewhere to manage pastoral intensification and agricultural conversion.

[259] There were conflicting views for the planners on Objective 3B(3)(b). Ms Harte, for the Council, supported it as we have set out. She was largely supported by Mr Reaburn and Ms Smith.

[260] Ms L M W Murchison, FFM's planner, was critical of the level of detail about irrigation in Objective 3B(3)(b). In her opinion the detail is more appropriate in a policy or rule. She also observed that the detail can be provided in Policy 3B13(3) and Rule 15A.1.2.(b).

[261] FFM relied on that evidence and on the court's suggestion in the First (Interim) Decision[352] that it would be appropriate to have an objective recognising the role of pastoral farming and "(potentially) some areas of high intensity (irrigated) farming". PC13(s293V) amended the court's suggested wording for Objective 3B(3). FFM sought

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349 C Vivian evidence-in-chief at para 6.4 [Environment Court document 26].
350 V M Smith evidence-in-chief at 8.28 [Environment Court document 28].
351 Concise Oxford Dictionary.
352 *High Country Rosehip,* above n 6 at para [147].

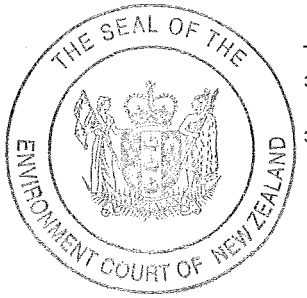
in its submission that the objective be reworded to reflect the words suggested by the court[353]. FFM considers that, as it now stands, Objective 3B(3)(b) is more restrictive than that suggested by the court in 2011 because the new version contains greater limitations on the areas in which pastoral intensification is appropriate.

[262] We consider that FFM has overlooked an important caveat in the court's First Decision where we expressly stated a reservation concerning the enabling of pastoral intensification and what we have since, to avoid confusion, called agricultural conversion. The court wrote that[354]:

> [left] the door open for extensive cultivation and (if water is available and water permits are granted) irrigation on the Tekapo and Pukaki plains, which would lead to greening of a large part of the lower basin. However, we stress that the ecological values of those areas have not been taken into account other than to accept the tentative indirect evidence in some scientific papers, which we have quoted, that the desertification of parts of the lower plains is irreversible. We are uneasy about that because we received no evidence on whether mitigation is possible at least in some areas where continuous "top of mountains to lakeside" protected areas can be maintained or recreated. If we decide to take the section 293 route we would request expert evidence on these issues.

[263] We have now received that evidence and in Chapter 2 of this decision the court found that pastoral intensification has adverse effects on the endemic flora at both the light and at the heavy end of the continuum of topdressing and oversowing; agricultural conversion effectively eliminates the endemic flora of the area converted. We hold that to enable the appropriate balance between pastoral intensification (and agricultural conversion) and protection of the ONL, and to give effect to Objective 3B(1) and (2) the objective should be along the lines in PC13(s293V).

[264] On the other hand we agree with Ms Murchison's criticism that some of Objective 3B(3) is over-elaborate in an objective and if appropriate should be in a policy or method.



353 Federated Farmers of New Zealand – Submission on the Mackenzie District Council Plan Change 13 (Mackenzie Basin) – section 293 Package, at p 7.

354 *High Country Rosehip,* above n 6 at para [153].

5.4 Result

[265] Accordingly we consider that the objective would be more appropriate for achieving the objectives and policies of CRPS and of the MDP and for integrating management of the resources of the Mackenzie Basin if it reads:

> (3) Subject to objective 3B(1) above and to rural objectives 1, 2 and 4:
>
> (a) to enable pastoral farming;
>
> (b) to manage pastoral intensification and agricultural conversion throughout the Mackenzie Basin and to identify areas where they may be enabled (such as Farm Base Areas);
>
> [(c) to enable rural residential subdivision, cluster housing and farm buildings within Farm Base Areas around existing homesteads (where they are outside hazard areas)].

[266] The four drafting improvements are:

- replacement of Objective 3(1) by 3B(1) in (a);
- paragraph (b) has simply been altered by using different definitions of the same activities, so that "pastoral intensification" can be used consistently throughout the MDP;
- to reverse the management and enabling objectives in (b) so that the objective which covers the greater[355] area goes first;
- the final change is that the existing use situation where pastoral intensification or agricultural conversion might be permitted are, as Ms Murchison suggested, moved to a policy/rule.

We have been careful to avoid making any substantive changes as beyond jurisdiction.

6. Effectiveness of the policies in PC13(s293V) and PC13(pc)

6.1 Introduction to the contentious policies

[267] We now turn to the policies notified in PC13(s293V) and proposed to be modified in PC13(pc). We need to be bear in mind that these policies are to implement more than objectives; Objective 3B(3). Our task at this point is to determine whether the policies:

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355 See Chapter 2 of this decision for the analysis of areas of "developable" versus "traditional pastoral and protection" land.

(1) Effectively implement Objectives 3B(1), 3B(2) and 3B(3) in an integrated way with the other objectives of the MDP;

(2) Depart from the objectives and policies of the CRPS and the CLWRP.

[268] It should be noted that there are a number of policies which are resolved by agreement. These largely relate to the Waitaki Electricity Power Scheme ("WEPS") and we will consider those no further. Their existence should be borne in mind because they explain the gaps in the sequence of policies discussed below.

6.2 Policy 3B1 – Recognition of the Mackenzie Basin's distinctive characteristics

[269] The post-consultation Policy 3B1 in its PC13(pc) form is:

> **3B1** Recognition of the Mackenzie Basin's distinctive characteristics to recognise that within the Mackenzie Basin's outstanding natural landscape there are:
>
> (a) Many areas where development beyond pastoral activities is either generally inappropriate or should be avoided;
>
> (b) Some areas with greater capacity to absorb different or more intensive use and development, including areas of lesser ~~visual vulnerability~~ landscape sensitivity and identified Farm Base Areas.
>
> (Underlining added)

That is not the same as the PC13(s293V) which referred to "visual vulnerability" (as shown by the struck-through words in red) rather than "landscape sensitivity" and was accompanied by maps showing different areas of low, medium and high visual vulnerability as a guide to landowners. We shortly consider the arguments raised by that change but first there were some changes proposed by the tangata whenua.

TRoNT's suggested change

[270] Ms Stevens, the planner called by TRoNT proposed the following emphasized amendments to Policy 3B1 (as we have held it should be confirmed):

> *To recognise that* ***Ngāi Tahu are manawhenua and kaitiaki of Te Manahuna/The Mackenzie Basin and have a relationship with Te Manahuna, and that within Te Manahuna****/the Mackenzie Basin's outstanding natural landscape there are:*
>
> *(a) Many areas where development beyond pastoral activities is either generally inappropriate or should be avoided;*
>
> *(b) Some areas with greater capacity to absorb different or more intensive use and development, including areas of lesser visual vulnerability and identified Farm Base*

Areas;

(c) ***Areas, places and features of particular significance to Ngāi Tahu.***

[271] We consider the first change is inappropriate as merely repeating the (admittedly very important) role of Ngāi Tahu as kaitiaki. It would be like adding to the policy a statement that the MDC is the local authority which is obviously not very helpful in this context. However, the policy is about recognising areas and so we consider proposed (c) would be effective in giving effect to the objectives of the MDP and PC13(pc). Accordingly that should be added as shown in the previous paragraph.

"Visual vulnerability" versus "landscape sensitivity"

[272] The MDC now proposes in PC13(pc) to use the term "landscape sensitivity" in Policies 3B1 and 3B2 to acknowledge the varying capacity of the ONL to absorb change. Ms Harte explained that this change primarily recognises that "visual vulnerability" represents only a part of the value of the landscape, which is the part that is appreciated for aesthetic and visual amenity when viewed. Another important element is what could be called landscape character which is based on inherent characteristics of the landscape which include natural science factors.

[273] Ms Harte also explained that a further reason for not using the visual vulnerability categories in policies and rules is the scale at which these categories were identified. At the large scale 1:3000 2 A3, it was difficult to determine from the visual vulnerability map where the boundaries of the different categories fell which created uncertainty for landowners.

[274] All the landscape architects and planning experts, save two, endorsed this approach, some in strong terms. Mr S K Brown wrote[356]:

> I strongly support this approach. ONLs are identified and exist with or without connection to public viewpoints. They have intrinsic value. Effects on unseen or little seen landscapes (or parts thereof) remain effects on the character and intrinsic values of that landscape.

356 S K Brown evidence-in-chief at para 36 [Environment Court document 23].

[275] On the other hand Ms Murchison for Federated Farms suggested that the visual vulnerability classifications in PC13 be retained[357]. She referred to some evidence[358] of Mr C Glasson as the reason for this preference. It is difficult to see those passages supporting "visual vulnerability" as the primary landscape classification tool. As Ms Harte observed Mr Glasson "is simply referring to the provisions and making comments on the ability to place development within discrete parts of the Basin"[359].

[276] Ms Murchison was of the opinion[360] that the changed approach to landscape description in PC13(pc) has:

> Moved from ... assessing the landscape's characteristics and ability to absorb land use change, to one of managing the landscape by trying to maintain current land use patterns, confining any land use change to existing Farm Base areas.

We consider that Ms Murchison's opinion is not an accurate description of the policy since Policy 3B1 is simply about describing the Mackenzie Basin's characteristics. Those characteristics are identified in general terms in Appendix 4 of the CRPS (quoted above) which shows that much more than the scenic qualities of the Mackenzie Basin are to be protected from inappropriate development.

[277] One of those characteristics is traditional pastoral farming, and we have accepted from the beginning that should be recognised in the district plan. However, we have found that traditional pastoral farming does not include either pastoral intensification or agricultural conversion.

[278] Those characteristics are recognised in the proposed explanations and reasons for Policy 3B1 which read (in PC13(s293V)):

- A distinctive 'Mackenzie Country' character has developed, based on the visual and physical qualities of the Basin, combined with the land use practice and the social pattern of run holders, workers and extensive stations. Despite its modified and managed land surface as a working landscape, the entire Basin remains 'outstanding' in terms of landscape values. This is because of the uniqueness, natural and visual qualities of the high mountain basin environment, lakes, land

357 L M W Murchison evidence–in-chief at para 5.16 [Environment Court document 33].
358 C R Glasson evidence-in-chief at paras 16 to 19 [Environment Court document 22].
359 P Harte rebuttal evidence at para 11 [Environment Court document 25A].
360 L M W Murchison evidence-in-chief at para 5.11 [Environment Court document 33].

forms, land use, community and Mackenzie identity.

- The Basin has a diversity of conditions with a north to south altitude gradient and west to east rainfall gradient. To this can be added the topographic and soil variability of outwash, moraine, valley, lake, hillside and mountain environments and the variability of closeness to or remoteness from the state highways and other roads.
- The 2007 report "The Mackenzie Basin Landscape; character and capacity" by Graham Densem assesses the Mackenzie Basin landscape, identifying its various character areas and describes their characteristics and values.

[279] Consequently we hold that a version of Policy 3B1 is needed to give effect to the CRPS and to the Rural Objectives in the MDP and PC13(pc). The question is which version – PC13(s293V) or PC13(pc)?

Should landscape sensitivity be assessed more fully or in another way?

[280] Ms Harte recommended a fourth bullet point to the explanation to read[361]:

- The sensitivity of the landscape to change is a key matter in determining the ability of an area to absorb that change without adversely impacting the outstanding natural landscape of the Basin. This sensitivity comprises visual sensitivity (incorporating general visual exposure of an area, number and types of viewers and potential to mitigate visual effects of proposed changes) and landscape character (incorporating natural patterns such as geomorphology, hydrology, vegetation patterns and processes, cultural patterns, landscape condition and aesthetic factors such as naturalness and remoteness).

[281] Fountainblue's planner, Mr C Vivian, also suggested[362] adding a note to the explanations and reasons elaborating on how landscape sensitivity would be assessed using a recognised methodology. The planning witness for the DGC, Ms V M Smith, agreed that the District Plan should clearly state how landscape sensitivity is to be assessed. To achieve this Policy 3B1 should include a new subsection about methodology specifying who should undertake an assessment and the components to be considered in a landscape sensitivity assessment[363]. Ms Smith endorsed Mr Vivian's opinion in proposing an amendment referring to a landscape sensitivity

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361 P Harte evidence-in-chief on behalf of Mackenzie District Council, para [139] [Environment Court document 25].

362 C Vivian evidence-in-chief [Environment Court document 26]. He referred to the methodology set out in the document *'Landscape Character Assessment: Guidance for England and Scotland. Topic Paper 6: Techniques and Criteria for Judging Capacity and Sensitivity'*, the Countryside Commission and Scottish Natural Heritage, 2004.

363 V M Smith evidence for Department of Conservation at para 9.7 [Environment Court document 28].

assessment needing to be undertaken using a "recognised methodology"[364]. She elaborated on the elements within landscape sensitivity and specifically mentioned the importance of ecology and vegetation patterns. Ms Harte considered the proposed amendment worthwhile because it acknowledges at a policy level the need for a detailed assessment of impacts on the sensitivity of the landscape. However, Ms Harte did not include reference to who should undertake this assessment as she did not consider that level of detail is appropriate in a policy.

[282] For EDS Mr Brown suggested another option[365]:

> Given the need for focus and flexibility, a better alternative may in fact be to focus on the key characteristics and values of the Basin's constituent landscapes.

It is difficult to understand whether an activity achieves, or at least is consistent with, the protection of the ONL if the evaluation does not require account to be taken of the identified characteristics and values of the landscape being protected[366]. In Mr Brown's opinion an "environmental bottom line" is appropriate so that development which does not protect listed characteristics and values should not be approved[367]. As an example of this approach Mr Brown identified the characteristics and values of two of the six catchments he has identified within the Basin.

[283] To implement Mr Brown's suggestion, Mr Reaburn proposed amendments to Objective 3B(3)(c) and (d), Policies 3B1, 3B3, 3B6, 3B13 and 3B14 which require identification and recognition of the characteristics and values that make up the Mackenzie Basin's outstanding natural landscape. Ms Harte considered[368] the proposed approach had merit. She conceded that at present the characteristics and values for the various parts of the Mackenzie Basin are contained in external documents and so are not readily accessible.

[284] Ms Smith was also of the view[369] that a specific mechanism for assessment of indigenous biodiversity is needed when land use change or development is proposed. She proposed an addition to Policy 3B1 referring to the need for an assessment of tussock grasslands and other indigenous vegetation using criteria in the CRPS. That

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364 Ibid at para 9.10.
365 S K Brown evidence-in-chief at para 39 [Environment Court document 23].
366 Ibid at para 48.
367 Ibid at para 49.
368 P Harte rebuttal evidence at para 16 [Environment Court document 25A].
369 V M Smith evidence-in-chief at para 9.12 [Environment Court document 28].

would enable adverse effects on additional sites of natural significance to be avoided[370]. Ms Harte agreed:[371]

> As pastoral intensification and buildings have potential to impact significant indigenous vegetation as well as ONL values of an area, I consider it is appropriate for the Council to require assessment of the biodiversity values when resource consent is required for breach of a landscape-based control. I therefore support this suggested change.

[285] Ms Smith, observed[372] that PC13(s293V) contains a number of overlays: Sites of National Significance ("SONS"), and Lakeside Protection Areas ("LPAs"), Scenic Viewing Areas ("SVAs"), Scenic Grassland Areas ("SGAs"), and land above 900 metres. She wrote[373] that:

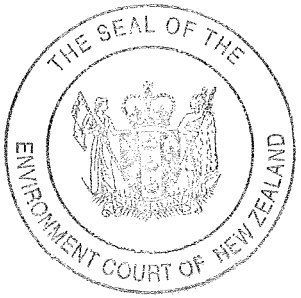
> The purpose of these overlays (and where descriptions and maps of them are to be found) is unclear or not specifically included in the policies. These are important overlays in relation to protection of the outstanding natural landscape of the Mackenzie Basin and will be key considerations when applications for resource consents are considered.

Conclusions

[286] We have found this a difficult issue.

[287] A large majority of experts favour the PC13(pc) version over the PC13(s293V) version of Policy 3B1, and on what seem to be good grounds. However, the PC13(pc) version is incomplete: all the experts agree that the "landscape sensitivity" version of the policy needs much more working out and the landscape experts put forward options for how that might be done. Further, there are jurisdictional difficulties in that this important change was introduced (as a result of the High Court's directions in *Mackenzie (HC 2014)*) after notification of PC13(s293V). Some individual station owners notably at the southern end of the Basin (Grays Hill, Streamlands, Black Forest) may be surprised to lose their "low visual vulnerability areas" to the (as yet) inchoate and undefined landscape sensitivity areas.

[288] In contrast, for all its faults Mr Densem's visual vulnerability analysis exists and has been mapped. There was acknowledgement by Ms Harte that the "boundaries" are



370 Ibid at para 9.13.
371 P Harte rebuttal evidence 7 October 2016 at para 20 [Environment Court document 25A].
372 V M Smith evidence-in-chief at para 9.15 [Environment Court document 28].
373 V M Smith evidence-in-chief at para 9.15 [Environment Court document 28].

unclear and criticism by FFM in closing that the mapping had not been ground-truthed. We are not too concerned by those difficulties since the areas are not zones but guides to areas where development may be more (or less) appropriate. So in the interests of finality, and to avoid being unfair to persons not before the court, we consider the second-best policy solution represented by the visual vulnerability analysis is the more effective policy at this stage.

[289] We have come to that decision reluctantly. The court does not usually like to endorse visual vulnerability analyses for ONLs because they omit so much that is valuable in these nationally important landscapes. However, in this case we face the jurisdictional difficulties identified above, and the fact that the alternative is incomplete. We can reconcile ourselves to the alternative more readily in this case because the Mackenzie Basin's landscape is so expansive (by New Zealand's non-continental standards). That means there is some merit in Mr Densem's concept because it will enable the court to provide for some building development in areas of low visual vulnerability with relative ease. There is of course a considerable difference between building development and pastoral intensification because the former will have relatively little impact on other ONL values such as geomorphology or flora whereas the latter may have larger impacts as we discuss in relation to Policy 13B1(3) later.

[290] We also emphasise that the reintroduction of the visual vulnerability analysis does not make other aspects of landscape sensitivity irrelevant. Instead they will have to be considered on a case by case.

[291] There are some procedural or informational changes to Policy 3B1 in PC13(s293V) which we can make in accordance with Ms Smith and Ms Harte's evidence. There is also a clumsy repetition of "recognise" in the introductory words to the policy which can be resolved early since the policy does not refer further to the Basin's "distinctive characteristics".

[292] Accordingly we consider the most effective version of Policy 3B(1) would read:

> **3B1** (1) To recognise that within the Mackenzie Basin's outstanding natural landscape there are:
>
> (a) Many areas where development beyond pastoral activities is either generally inappropriate or should be avoided;
>
> (b) Some areas with greater capacity to absorb different or more intensive use and development, including areas of low or

medium visual vulnerability and identified Farm Base Areas;

(c) Areas, places and features of particular significance to Ngāi Tahu.

(2) To identify, describe and map as overlays, specific areas within the Mackenzie Basin that assist in the protection and enhancement of the characteristics and/or values of the outstanding natural landscape contained in Objective 3B(1) being:

(a) Lakeside Protection Areas, in schedule XX and shown on planning map YY;

(b) Scenic Viewing Areas, in schedule XX and shown on planning map YY;

(c) Scenic Grassland Areas, in schedule XX and shown on planning map YY;

(d) Sites of Natural Significance, in schedule XX and shown on planning map YY, and

(e) Land above 900m in altitude, in schedule XX and shown on planning map YY.

(3) As part of an assessment of the suitability of an area for a change in use for development:

(a) To identify whether the proposed site has high, medium or low ability to absorb development according to Appendix V (Areas of Landscape Management);

(b) To require an assessment of landscape character sensitivity (incorporating natural factors including geomorphology, hydrology, ecology, vegetation cover, cultural patterns, landscape condition and aesthetic factors such as naturalness and remoteness).

We understand that the proposed Appendix V (Areas of Landscape Management) is the map attached to this Decision as Appendix "A".

[293] We consider the fuller explanation in PC13(pc) should be included provided that the third bullet point is deleted (but reintroduced below the fourth), the fourth bullet placed as the third, and a new fourth bullet point is added explaining that.

> The visual sensitivity is approximately shown in the Visual Vulnerability Areas on the planning maps and is explained further in the 2007 report "The Mackenzie Basin Landscape; character and capacity" by Graham Densem [which] assesses the Mackenzie Basin landscape, identifying its various character areas and describes their characteristics and values.

[294] Further the deleted summary of visual vulnerability categories in the *Explanation and Reasons* should be reintroduced as in PC13(s293V) with three consequential minor changes:

- as sought by the DGC, in the "High Visual Vulnerability" category the word "pristine" should be deleted[374] since there are few if any such areas and their identification can be problematic;
- also in that category, before "particularly" add: "extensive areas and intact sequences of native plant communities";
- in the "Low Visual Vulnerability" category the word "would" should be replaced by "may" to recognise that other important landscape qualities may after all – under other objectives and policies – preclude development.

[295] The summary would then read:

High Visual Vulnerability:

Areas of high visual vulnerability can be summarised as:

- the wide basins;
- lakes and lakesides, including shorelines and lakeside hill and mountain flanks;
- raised mountain ranges, hills and isolated mountains;
- river corridors;
- extensive areas and intact sequences of native plant communities particularly areas of continuous natural grassland, low development levels and visual vividness.

Medium Visual Vulnerability:

These are areas which remain vulnerable to change but are not highly vulnerable by being less prominent to view or having more existing development such as tree growth or land surface disturbance. These are areas where modest or light developments may be considered but should not be extensive and should be configured to fit into the landscape with a high degree of conformity:

Low Visual Vulnerabilty:

These areas have a low visual vulnerability to change, meaning that it may be possible to provide for development in these areas while still maintaining the main landscape values. Areas of low visual vulnerability include:

- recessed valleys at the meeting point between plains and surrounding hills;
- valleys and gullies incised below the generally seen surfaces;

374 DGC submission (2009) attached to section 274 notice of 1 July 2016.

- recessed gullies and indentations back from lake shorelines;
- areas of tree shelter and buildings in existing Farm Base Areas;
- areas of existing subdivision and rural residential development.

6.3 Policy 3B2 – Subdivision and building development

[296] As a consequence of our judgment as to what is a more effective Policy 3B1 – with its re-introduction of the visual vulnerability assessment – Policy 3B2 will need to revert in part to its notified form. The notified policy in PC13(s293V) with proposed changes in PC13(pc) in red reads:

> **Policy 3B2 – Subdivision and Building Development**
>
> To ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated by:
>
> (1) Managing residential and rural residential subdivision and housing development within defined Farm Base Areas (refer to Policy 3B3);
>
> (2) Enabling farming buildings in Farm Base Areas and areas of low visual vulnerability subject to bulk and location standards and protection of environmental values and elsewhere managing them in respect of location and external appearance size, separation and avoidance of sensitive environments;
>
> (3) Ensuring new residential or rural residential zones in areas of low or medium visual vulnerability achieve Objectives 1, 2, 4, 7, 8 and 11 of the Rural chapter and satisfy Policy 3B4 below;
>
> (4) Strongly discouraging non-farm buildings ~~residential units~~ elsewhere in the Mackenzie Basin outside of Farm Base Areas.

[297] The justification for Policy 3B2 was explained by the Council's landscape architect Mr Densem. He considered that the fragmentation or visual division of the empty, open landscape of the Mackenzie is a significant threat to its character and the visual amenity that it provides. Consequently, subdivision for rural living purposes and building activities should be carefully regulated.

[298] In Ms Harte's opinion[375] it would be appropriate to acknowledge the greater sensitivity of particular overlay areas (Lakeside Protection, Scenic Viewing Areas, Scenic Grasslands, Sites of Natural Significance and lands over 900 metres) to built development and subdivision as compared to other areas in the Mackenzie Basin Subzone outside Farm Based Areas. Mr Vivian[376] and Ms Smith[377] agreed Policy 3B2

375 P Harte rebuttal evidence 7 October 2016 para 58 [Environment Court document 25A].
376 C Vivian evidence-in-chief at para 6.20 [Environment Court document 26].
377 V M Smith evidence–in-chief at para 9.41 [Environment Court document 28].

might be amended to recognise and provide for these two different situations (within overlay areas and outside them). We consider that is unnecessary given that there are specific policies covering those overlays.

Policy 3B2(2)

[299] As for subpolicy (2) in view of our decision to revert (largely) to the Visual Vulnerability classification in Policy 3B1 we consider that should be reflected by enabling farm buildings in areas of low visual vulnerability. Further the reference to farm buildings in FBAs and low visual vulnerability areas "... subject to ... protection of environmental values" is too broad.

Policy 3B2(3)

[300] Mr Vivian considered that subpolicy Policy 3B(3) belongs with Policy 3B4. We agree and will move it to that policy when we consider it.

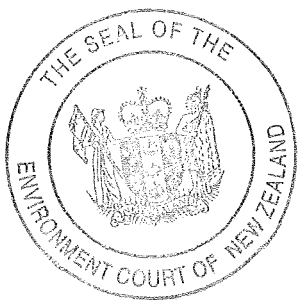
Policy 3B2(4)

[301] We should add that PC13(s293V) and PC13(pc) propose to add a new definition to the MDP as follows:

> **Farm building** means a building the use of which is incidental to the use of a site for a farming activity, dairy and factory farming (refer definitions) and does not include dwellings or other buildings used for residential activity.

This effectively returns the definition to PC13(N) as it was notified in 2009. We note that the proposed definition dovetails with the definition of "Farming Activity" (quoted above) since the latter expressly excludes "residential activity" (another defined term). A non-farm building is presumably any building which is not a farm building.

[302] The proposed definition of a farm building is opposed by FFM and some individual farmers as it no longer includes farm dwellings and farm workers accommodation. They prefer the definition of "farm buildings" in the PC13(C) which included "residential units and accommodation used for people predominantly involved in farming activities and their families".



[303] Mr Murray[378] of The Wolds and his landscape architect Mr A W Craig[379] consider that farm residences should fall within the definition of farm building as they are closely associated with the operation of a farm. Residences would then be a considered as a restricted discretionary activity outside of Farm Base Areas ensuring they would be assessed against policy covering a range of relevant considerations. Mr Craig said he had been involved in applications for dwellings within the Basin but outside Farm Base Areas, all of which have been granted. He infers that it is possible to locate dwellings in a manner to achieve desired landscape outcomes[380].

[304] Mr Craig was cross-examined[381] asked about difficulties in distinguishing between, or limiting residential buildings to those associated with farming[382]. Asked whether it could "create difficulties from a landscape perspective in terms of limiting it to that use and creating expectations or creating part of the existing environment or similar which could essentially lead to a disconnect between the two", he responded "affirmatively"[383]. Despite that acknowledgement he maintained that the effects of a residential building can be managed as part of the consent process[384].

[305] We consider the Council's distinction should remain, primarily because it is so difficult to impose tests that depend on intentions. Most districts in the South Island have seen cases where landowners apply to subdivide because a residential building is no longer needed for a farming purpose.

Addition sought by TRoNT

[306] Ms Stevens, the planning witness for TRoNT proposed[385] to add a qualifying clause (after 3B2(4)) to read:

> While recognising and providing for the historic and contemporary relationship and values of Ngāi Tahu with Te Manahuna/the Mackenzie Basin.

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378 J B Murray evidence-in-chief, 19 August 2016 at para 34 [Environment Court document 5].
379 A W Craig evidence for The Wolds Station, 19 August 2016 at para 77 [Environment Court document 21].
380 A W Craig evidence for The Wolds Station, 19 August 2016 at para 78 [Environment Court document 21].
381 Transcript, pp 388-391.
382 Transcript, p 390 lines 1-4.
383 Transcript, p 390 lines 5-10: "Aamm yeah".
384 Transcript, p 391 at lines 19-22.
385 T J Stevens evidence-in-chief at para 5.29 [Environment Court document 31].

[307] She explained that the change, while acknowledging that the Council has a duty to protect the ONL (through the use of word 'while'), should recognise and provide for the relationship of Ngāi Tahu with Te Manahuna[386] in particular by providing guidance to plan users that this includes considering the Ngāi Tahu values and relationship with Te Manahuna.

[308] The "contemporary relationships" are not explained nor how they differ from the historic values. The contemporary relationships identified by Ms Waaka-Home were quite limited[387] – although that should not be taken as undermining their importance. The elemental things are important for human wellbeing. Consequently we do not accept Ms Steven's proposed additions because they appear to be much broader and vaguer than what Ms Waaka-Home was contemplating. On the evidence we find no need to allow tangata whenua an easier path to subdivision and development than farmers or anyone else (there is a potential partial exception to this we discuss in relation to Policy 3B5 below).

Conclusion

[309] Accordingly Policy 3B2 should be amended to read:

> **Policy 3B2 – Subdivision and Building Development**
>
> To ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated by:
>
> (1) Managing residential and rural residential subdivision and housing development within defined Farm Base Areas *(refer to Policy 3B3)*;
>
> (2) Enabling farm buildings Farm Base Areas and in areas of low visual vulnerability subject to bulk and location standards and elsewhere managing them in respect of location and external appearance size, separation and avoidance of sensitive environments;
>
> (3) Strongly discouraging non-farm buildings elsewhere in the Mackenzie Basin outside of Farm Base areas.

We are reluctant to change anything else in Policy 3B2 because none of the other proposed changes are merely formal.

386 Consistently with section 6(e) RMA.
387 See Chapter 2.2 of this Decision.

6.4 Policy 3B3 – Development in Farm Base Areas

[310] A 'Farm Base Area' is to be defined in Chapter 3 of the district plan as an area identified in "Appendix R" of the MDP. The idea is that each existing homestead and principal farm building area will be identified on a map as an FBA. The questions of the location and extent of FBAs was never intended by the Council to be the subject of this hearing. As we recorded earlier individual farmers have been negotiating with the Council about those.

[311] The recommended policy in PC13(s293V) reads:

Policy 3B3 - Development in Farm Base Areas

(1) Within Farm Base Areas in areas of high visual vulnerability subdivision and development (other than farm buildings) shall maintain or enhance the [significant and] outstanding natural landscape and other natural values of the Mackenzie Basin by:

(a) Confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road.

(b) Integrating built form and earthworks so that it nestles within the landform and vegetation.

(c) Planting local native species and/or non-wilding exotic species and managing wilding tree spread.

(d) Maintaining a sense of isolation from other development.

(e) Built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing.

(f) Mitigating the adverse effects of light spill on the night sky.

(g) Avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance.

(h) Installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

(2) Subdivision and development (other than farm buildings) in Farm Base Areas which are in areas of low or medium visual vulnerability to development shall:

(a) Restrict planting to local native species and/or non wilding exotic species

(b) Manage exotic wilding tree spread

(c) Maintain a sense of isolation from other development

(d) Mitigate the adverse effects of light spill on the night sky

(e) Avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(f) Install sustainable systems for water supply, sewage treatment and disposal stormwater services and access.

[312] We consider the PC13(s293V) version of this policy is prima facie more effective since it links to the visual vulnerability categories which we have confirmed in Policy 3B1. There is one minor deletion – the words "significant and"[388] in front of "outstanding natural landscape".

[313] Fountainblue seeks to have sub-clause (1)(a) of Policy 3B3 deleted. In the opinion[389] of Mr Espie the test of 'visual inconspicuousness' is unnecessary in relation to a FBA. He saw no need for any embarrassment over the visibility of the development in a FBA subject to it being appropriate in appearance. The other landscape architects were of the same mind: Mr Densem for the Council agreed[390], as did Mr Brown. Ms Lucas initially expressed a concern that deleting Policy 3B3(a) might lead to "visual obtrusiveness" of development. In cross-examination she agreed[391] that her concern was answered with reference to Policy 3B3(1)(e).

[314] Two planners, Ms Harte and Ms Smith, for the Council and Minister of Conservation respectively, expressed concerns about deleting 3B3(a). Ms Harte[392] saw some residual benefit in keeping the sub-clause, though she did not oppose modifying it. Ms Smith was not convinced that the issue of visual impacts has been assessed in identifying the FBAs and Mr Raeburn agreed.

[315] Some of those difficulties have arisen out of the fact that this policy may have been intended both to guide development within existing FBAS (usually homestead or woolshed blocks) and within new FBAs. Ms Smith's point raises the question whether the policy is needed to assist with FBA identification. Mr Raeburn considered[393] that providing further policy basis for FBAs was not required, because on his understanding the process of identifying the Basin's FBAs was largely complete (subject to final approval and, in light of Mr Harding's comments for the Council, refinements to some of the mapping).

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388 Place in square brackets in Policy 3B3 as notified.
389 B Espie, evidence-in-chief at para 3.20 [Environment Court document 20].
390 G H Densem, rebuttal paras 64 to 65 [Environment Court document 19A)
391 Transcript p 521.
392 Transcript pp 586-587.
393 P D Reaburn, cross-examined at p 701 of Transcript.

[316] As Mr Schulte observed Policy 3B3 commences with the words "Within farm base areas ..." so it clearly aimed at areas already selected to fulfil the purpose of FBAs. He submitted[394]:

> ... that purpose is explained in Mr Vivian's proposed additional explanation to Objective 3B3, which is essentially Mr Vivian's proposed definition of FBAs written (in response to Mr Raeburn's suggestion) as an explanation.
>
> While neither Mr Vivian nor Mr Raeburn were of the opinion that converting the explanation to a policy is necessary, Fountainblue abides the Court's decision in that respect. Meanwhile, a possible addition to Policy 3B4 is suggested below (and in **Attachment A**) if it is considered that further policy support for FBA identification is necessary.

[317] Fountainblue seeks to remove "avoids" at 3B3(3), and replace it with "strongly discourages" on the grounds that[395]:

- The opening words of policy refer to ensuring the adverse effects of sporadic development are "... *avoided, remedied or mitigated by:*". This wording sits awkwardly with a subclause that commences "avoid";
- Conversely, "Strongly discouraging" sits well with non-complying activity status; and
- In addition, as noted in the opening submissions for [T]he Wolds and Mt Gerald, and by Mr Reaburn, the combination "avoids" and non-complying creates a *de facto* prohibition.

Conclusions

[318] Since FBAs are defined simply as areas on maps identified in an Appendix R (not yet finalised) to the MDP, any potential FBA that does not get onto that list will need a plan change. Accordingly we consider the better view of the policy is that it is to guide management of the FBAs to be identified in Appendix R. Accordingly we agree with Messrs Espie, Densem and Brown that sub policy 3B3(1)(a) is an unnecessary restriction on landowners and should be deleted.

394 A Schulte closing submissions paras [31] and [32] [Environment Court document 39].
395 A Schulte closing submissions at [42] [Environment Court document 39].

[319] As for "avoids" in 3B3(1)(g) we consider that is simpler and more effective than the alternatives. We see no difficulty with using the word "avoids" for a specific class of effects in a policy which generally seeks to "avoid, remedy, or mitigate". Nor do we accept that there is a de facto prohibition on an activity. What is attempted to be prevented is a set of adverse effects. It is any effects which are to be avoided, not the proposed subdivision and/or development.

[320] Accordingly Policy 3B3 is more effective at implementing the Rural Objective if it reads (largely as in PC13(s293V)) as:

Policy 3B3 - Development in Farm Base Areas

(1) Within Farm Base Areas in areas of high visual vulnerability subdivision and development (other than farm buildings) shall maintain or enhance the [significant and] outstanding natural landscape and other natural values of the Mackenzie Basin by:

(a) Integrating built form and earthworks so that it nestles within the landform and vegetation.
(b) Planting local native species and/or non-wilding exotic species and managing wilding tree spread.
(c) Maintaining a sense of isolation from other development.
(d) Built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing.
(e) Mitigating the adverse effects of light spill on the night sky.
(f) Avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance.
(g) Installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

(2) Subdivision and development (other than farm buildings) in Farm Base Areas which are in areas of low or medium visual vulnerability to development shall:
(a) Restrict planting to local native species and/or non wilding exotic species
(b) Manage exotic wilding tree spread
(c) Maintain a sense of isolation from other development
(d) Mitigate the adverse effects of light spill on the night sky
(e) Avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
(f) Install sustainable systems for water supply, sewage treatment and disposal stormwater services and access.

6.5 Policy 3B4 – Potential residential, rural residential and visitor accommodation activity zones and environmental enhancement

[321] With an amended heading as shown above and returning to the visual vulnerability assessment in PC13(s293V), Proposal Policy 3B4 reads:

> (1) To mitigate the effects of past subdivision on landscape and visual amenity values in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options such as Rural-residential where there are demonstrable advantages for the environment.
>
> (2) to consider and encourage appropriate residential and rural residential activities in areas of low or medium visual vulnerability of the Mackenzie Basin by identifying where appropriate, alternative specialist zoning options which incorporate enhancement of landscape and ecological values, including wilding pine control;
>
> (3) Any development within such zones shall maintain or enhance the ~~significant and~~ outstanding natural landscape and other natural values of the Mackenzie Basin by:
>
> (a) Confining developments to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki, provided that there may be exceptions for development of existing Farm Base Areas at Braemar, Tasman Downs and for farm bases at the stations along Haldon Arm Road.
>
> (b) Integrating built form and earthworks so that it nestles within the landform and vegetation.
>
> (c) Planting local native species and/or non-wilding exotic species and managing wilding tree spread.
>
> (d) Maintaining a sense of isolation from other development.
>
> (e) Built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing.
>
> (f) Mitigating the adverse effects of light spill on the night sky.
>
> (g) Avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance.
>
> (h) Installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

[322] Ms Stevens considered that the policy needs to provide[396] for consideration as to whether proposed development will allow Ngāi Tahu to express their relationship with Te Manahuna. In addition she sought inclusion of a specific note requiring notification of private plan changes under this policy to Te Rūnanga o Arowhenua is sought in

396 Suggested wording was given in T J Stevens evidence-in-chief Appendix 2 [Environment Court document 31].

order to enable manawhenua to exercise kaitiakitanga through consultation and to ensure that development is appropriate.

[323] In cross-examination Ms Stevens answered in effect "no" in response to a question whether Ngāi Tahu developments "should be confined" to where they're visually inconspicuous"[397]. The MDC opposed the change, and we accept that position. The ONL is as vulnerable to the adverse effects of special zones promoted by TRoNT as it is to those promoted by Tauiwi.

[324] Mr Vivian criticised subpolicy 3(a) for the same reasons as he did the equivalent paragraph(s) in Policy 3B3 and on reflection we agree, especially since the references to FBAs in ;this policy seems redundant. We also accept his evidence that subpolicy(1) is also now redundant as a result of the creation of several subzones as a result of the PC13 process.

[325] Accordingly Policy 3B4 should read as stated above with the following changes:

- deletion of 3B34(1) and (3)(a);
- no party opposed the addition of "rural residential" activities so we confirm that change and the deletion of the phrase "significant and ...".;
- the phrase "lesser landscape sensitivity" should be replaced by "low or medium visual vulnerability" to be consistent with Policy 3B1;
- the addition of the word "large-scale"[398] before "residential' in 3B4(2);
- add a new subpolicy (3) – being the subpolicy 3B2(3) moved as recommended by Mr Vivian[399].

[326] The amended policy is therefore:

(1) to consider and encourage appropriate large scale residential and rural residential activities in areas of low or medium visual vulnerability of the Mackenzie Basin by identifying where appropriate, alternative specialist zoning options which incorporate enhancement of landscape and ecological values, including wilding pine control;

(2) Any development within such zones shall maintain or enhance the outstanding natural landscape and other natural values of the Mackenzie Basin by:

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397 Transcript, p 744 at lines 17-32.
398 C Vivian evidence-in-chief at para 6.36 [Environment Court document 26].
399 C Vivian evidence-in-chief at para 6.39 [Environment Court document 26].

(a) Integrating built form and earthworks so that it nestles within the landform and vegetation.

(b) Planting local native species and/or non-wilding exotic species and managing wilding tree spread.

(c) Maintaining a sense of isolation from other development.

(d) Built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing.

(e) Mitigating the adverse effects of light spill on the night sky.

(f) Avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance.

(g) Installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

(3) Ensuring new residential or rural residential zones in areas of low lesser landscape sensitivity or medium visual vulnerability achieve Objectives 1, 2, 4, 7, 8 and 11 of the Rural chapter;

6.6 Policy 3B5 – Landscape aspects of subdivision

[327] This policy in PC13(s293V) as modified (in red) by PC13(pc) reads:

(1) In order to minimise its adverse effects, subdivision in the Mackenzie Basin Subzone will not be encouraged except in Farm Base Areas:

~~(2) There should be a minimum lot size of 200 hectares (except in Farm Base Areas);~~

(2) Further subdivision of Lakeside Protection Areas, ~~(except for existing Farm Base Areas)~~, Scenic Viewing Areas and Scenic Grasslands will not be allowed;

(3) All subdivision shall address the need to remove exotic wildings from the land being subdivided;

(4) All subdivision should have regard to topographical and ecological constraints. ...

The words in red are added to, and strike-throughs are deleted from PC13(s293V).

Subpolicy 3B5(1)

[328] Ms Stevens wrote[400] that the proposed policy does not provide for subdivision where it will enable the recognition and protection of the Ngāi Tahu relationship with Te Manahuna, e.g. for protection a wāhi tapu site[401]. She proposed amendments to the policy by adding:

400 T J Stevens evidence-in-chief at para 5.34 [Environment Court document 31].
401 T J Stevens evidence-in-chief at para 5.36 [Environment Court document 31].

(1) In order to minimise its adverse effects, subdivision in Te Manahuna/the Mackenzie Basin Subzone will not be encouraged, except:

(i) in Farm Base Areas; or

(ii) where subdivision is for the purposes of enabling the recognition of and provision for the Ngāi Tahu relationship with Te Manahuna/the Mackenzie Basin;

...

Ms Harte agreed with that change. We accept it is more effective (and appropriate) than its absence. It is easy to see how a subdivision of land would assist Ngāi Tahu in that a subsequent purchase would allow Ngāi Tahu to take legal possession of a part of Te Manahuna. That is rather different from the unfocused change requested for Policy 3B4 which we rejected.

[329] As for subpolicy 3B5(2) relating to the special areas, we consider first that a preferable form of words to the phrase "will not be allowed" is "should be avoided". Second, we accept Ms Smith's evidence endorsed by Ms Harte that all the special areas should be listed here including SONS and land above 900 masl.

[330] Therefore Policy 3B5 should read:

Policy 3B5 – Landscape aspects of subdivision

(1) In order to minimise its adverse effects, subdivision in the Mackenzie Basin Subzone will not be encouraged except:

(i) in Farm Base Areas:

(ii) where subdivision is for the purposes of enabling the recognition of and provision for the Ngāi Tahu relationship with Te Manahuna/the Mackenzie Basin;

...

(3) Further subdivision of Lakeside Protection Areas, ~~(except for existing Farm Base Areas)~~, Scenic Viewing Areas and Scenic Grasslands, SONS and areas above 900 masl should be avoided;

(4) All subdivision shall address the need to remove exotic wildings from the land being subdivided;

(5) All subdivision should have regard to topographical and ecological constraints. ...

6.7 Policy 3B6 - Lakeside Protection Areas

[331] This policy is unchanged in PC13(pc) from PC13(s293V). We accept TRoNT's

proposed change because it would achieve protection in part[402] of the values set out in the Statutory Acknowledgements and gives effect to Chapter 4 and Appendix 4 of the CRPS. With the addition of a new phrase (in bold below) at the beginning of the policy, suggested by TRoNT's planner Ms Stevens and not opposed it reads:

> **Policy 3B6 – Lakeside Protection Areas**
>
> (a) To recognise **the significance of the lakes of Te Manahuna/the Mackenzie Basin, their margins and settings to Ngāi Tahu and** to recognise the special importance of the Mackenzie Basin's lakes, their margins, and their settings in achieving Objective 3B;
> (b) Subject to (c), to avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins;
> (c) To provide for the upgrading maintenance and enhancement of the existing elements of the Waitaki Power Scheme;
> (d) To avoid, remedy or mitigate the adverse impacts of further buildings and structures required for the Waitaki Power Scheme on the landscape values and character of the Basin's lakes and their margins.

We consider that is an effective change.

6.8 Policy 3B7 – Views from State Highways and Tourist Roads

[332] This reads in PC13(s293V) with the modifications proposed in PC13(pc) in red:

> (a) To avoid all buildings, ~~other structures, large~~ irrigators and exotic trees in the Scenic Grasslands and the Scenic Viewing Areas;
> (b) To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of ~~structures and large~~ irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;
> (c) To avoid clearance, cultivation or oversowing of Scenic Viewing Areas and Scenic Grasslands, including tussock grasslands, adjacent to and within the foreground of views from State Highways and the tourist roads;
> (d) subject to Policy 3B13, to minimise the adverse visual effects of irrigation of pasture adjacent to the state highways or tourist roads.

The use of "avoid" in this policy is reflected in the non-complying status of all buildings, including farm buildings, irrigators and pastoral intensification in the relevant areas.

402 The protection of all values set out in the Statutory Acknowledgements is outside of the scope of this Plan Change.

[333] Anticipating, we note that proposed Policy 3B12(2) provides:

> (2) To avoid pastoral intensification [and agricultural conversion] in Sites of Natural Significance, Scenic Viewing Areas and Scenic Grasslands (including tussock grasslands) adjacent to and within the foregrounds of views from State Highways and the tourist roads.

Obviously there is some repetition there which should be eliminated.

Scenic grasslands

[334] The concept of scenic grasslands to protect foreground views from roads was suggested by the court in the First Decision[403]. The MDC had adopted the idea and has identified areas which it says require special controls to retain their natural values (primarily landscape values). As described earlier (in Chapter 2.8) 13 scenic grasslands have now been identified by Mr G Densem on aerial photos that can be incorporated into the Council's GIS system and planning maps as an overlay. These areas are proposed to have relatively strict controls which are either the same or very similar to those applying to Sites of National Significance ("SONS"), Scenic Viewing Areas ("SVAs") and Lakeside Protection Area ("LPAs"). Most activities and building are non-complying in these areas.

[335] The farming interests were concerned about the very concept of Scenic Grasslands, their extent as shown in Appendix "A", and on the apparent inclusion of SVAs and SGAs in the wider area comprised by the area "... adjacent to and within the foreground of views from state highways and the tourist roads". In addition policies 3B7(a) and (c) seeking "avoidance" of activities are considered by FFM and the farming parties to be too onerous for landowners. FFM is supported by Braemar, Mt Gerald and Glenmore in requesting removal of the word "avoid" from these policies. In contrast, EDS and the Mackenzie Guardians want "avoid" to be retained.

403 [2011] NZEnvC 387 at [189].

[336] The questions asked by FFM are:

- whether there is good landscape basis for these areas and their boundaries, given that some include improved grasslands and other development?
- whether the economic impact of the restrictions in these areas has been understood and acknowledged?
- whether controls over buildings and pastoral intensification should be reduced?

(1) Is there a good landscape basis for the SGAs?

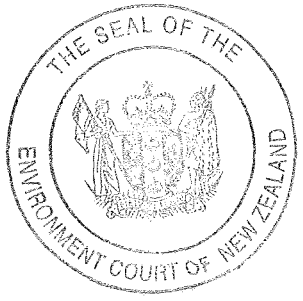
[337] We described the process by which Mr Densem identified the SGAs in Chapter 2 of this decision. He wrote[404]:

> I support the strong controls on the [SGA] as a method for identifying and maintaining areas of significant open grassland character seen from the road. I see the controls as assisting the minimising of tree planting, pasture development and the erection of structures in these priority areas. Also as signalling their values to landowners when planning property improvements. Mr Harding has referred to the botanical state of each area. From a landscape perspective, it is desirable that the combined SG, Scenic Viewing Area and Lakeside Protection Areas ensure the character of these priority areas be maintained.

The witness was not cross-examined on that. His SGAs were supported by other landscape architects being Mr S K Brown and Ms D J Lucas. Most criticisms are site specific and we consider those later. We find that the SGAs are an effective mechanism for implementing Objectives 3A and 3B of the MDP.

(2) Economic Impact

[338] As is often the case the question "whether the economic impact of the restrictions has been understood?" is not quite what FFM means – it is referring, so far as we can tell, to the financial impact on farmers, not to the much more relevant issue of the total social economic costs and benefits of the proposed policies and rules. We discuss that in Chapter 8 later but record for now that the producers' costs and surpluses are only part of the costs and benefits which need to be taken account of.



404 G H Densem evidence-in-chief at para 50 [Environment Court document 19].

(3) Whether controls over buildings and pastoral intensification should be reduced?

[339] Questions of control over pastoral intensification are best left to the Pastoral Intensification and Agricultural Conversion Policy 3B13 so we will consider this point there. However, we accept the evidence of Mr Reaburn and Ms Harte that a policy of avoidance is appropriate in SGAs (and in SVAs).

[340] However there is some strength in one aspect of FFM and the other farming interests case. Where we struggle with the avoidance policy in respect of buildings is in relation to its proposed application to all areas adjacent to the state highways or tourist roads. Being an area of tussock grassland adjacent to such a road is a pre-requisite for being in a SGA but is not a sufficient condition. Further as Ms Harte observed[405] the policy potentially captures a significant area of land, depending on the interpretation of the term "tussock grasslands". Her first concern was that it is not clear what constitutes "tussock grasslands"; second, she questions in what way the values of these "tussock grasslands" are not addressed through existing and proposed controls relating to identified Scenic Viewing Areas and Scenic Grasslands. She wrote[406]:

> ... there will be issues with where such tussock grasslands begin and end. In my opinion the uncertainty created by this provision means that this status is not the most appropriate option for managing this 1 km area. Rather pastoral intensification [and agricultural conversion] should be treated the same as the remainder of the Basin, that is, as a discretionary activity. This status will enable full consideration of any adverse effects on the outstanding natural landscape values.

We accept that evidence, so the 1 kilometre protection zone should be deleted.

Conclusions

[341] Accordingly the most effective version of Policy 3B7 is when it is rewritten as follows:

> (a) To avoid all buildings and the adverse effects of irrigators in the Scenic Grasslands and the Scenic Viewing Areas;
>
> (b) To require buildings to be set back from roads, particularly state highways, and to manage the sensitive location of irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin;
>
> (c) To avoid clearance, pastoral intensification on agricultural conversion of Scenic Viewing

405 P Harte rebuttal evidence 7 October 2016 at para 63 [Environment Court document 25A].
406 P Harte rebuttal evidence at para 65 [Environment Court document 25A].

Areas and Scenic Grasslands;

(d) Subject to Policy 3B13, to otherwise minimise the adverse visual effects of irrigation of pasture adjacent to the state highways or tourist roads.

6.9 Policy 3B12 – Pastoral Farming

[342] In PC13(s293V) this proposed policy reads:

> **Policy 3B12 – Pastoral Farming**
> Traditional pastoral farming is encouraged so as to maintain tussock grasslands, subject to achievement of the other Rural objectives and to Policy 3B7.

No changes are sought to this policy, although Ms Murchison considered the word "traditional" was not helpful.

[343] The explanations and reasons state:

- A distinctive character has developed from the land use practices and social pattern of run-holders, workers and extensive stations in the Mackenzie Basin.
- Traditional dry-lands farming on brown grasslands (including browntop) should continue to be enabled. The golden-brown landscape enjoyed by tourists and other visitors to, and residents of, the Mackenzie Basin are in considerable part maintained by the ever-day farming operations on the stations scattered around the Basin.

The definition of "tussock grasslands"

[344] This policy and Objective 3B1 refer to "tussock grasslands" as one of the particular characteristics or values of the ONL. There seemed to be general agreement this term should be defined.

[345] The landscape architect, Ms Lucas suggested a very simple definition "low stature dryland communities"[407]. That seems a little too uninformative and would include whole fields of cultivated exotic grasses. Mr Head, the ecologist called by the DGC proposed a definition as follows[408]:

> Areas generally supporting native tussock grasses but typically comprising a mosaic of vegetation types that could include considerable areas of bare/stoney ground, mixed exotic/native herbfield, native shrubs and exotic species such as browntop and hawkweed.

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407 D J Lucas evidence-in-chief at para 27 [Environment Court document 24].
408 N J Head evidence-in-chief at para 18.11 [Environment Court document 14].

This was endorsed[409] by the DGC's planning witness Ms V M Smith.

[346] Ms Murchison, the planner for FFM criticised Mr Head's definition because[410] "... appears to include bare, stoney ground, unimproved grazing land, and areas of predominantly exotic vegetation species such as browntop, which are common across the Mackenzie Basin; along with all indigenous vegetation". She observed that in her opinion that is not appropriate because the CRPS[411] directs only the identification and protection of significant areas of indigenous vegetation, not all tussock grassland and all indigenous vegetation as proposed in Ms Smith's amendments.

[347] It was FFM's case that the recognition of significant areas of indigenous vegetation is a matter for the district plan review and is not the subject of this appeal. That is correct to a point. However, we have also found that as a matter of fact much of the ONL is a significant area of indigenous vegetation under the CRPS[412] because of the 83 indigenous plants which are threatened or at-risk in the Basin.

[348] In any event the real issue is how can the important natural science components (and here particularly the flora) of the ONL be adequately identified in a way that goes beyond recognition of their mere scenic qualities and includes their intrinsic values.

[349] Accordingly, we consider that term should be defined as suggested by Mr Head with the addition after a "herbfield" of the phrase "cushion and mat vegetation" to be consistent with the MDP. Further identification of the core landscape values of the Basin would, in Ms Murchison's words, "... better ... implement Objective 3B1 ...". The definition assists with the identification of a core attribute of the ONL – its indigenous vegetation – as required by the policy CRPS Policy 12.3.1.

6.10 Policy 3B13 – Pastoral Intensification and Agricultural Conversion

[350] The PC13(pc) version – unchanged from PC13(s293V) apart from the addition of subpolicy (5) – proposes this policy:

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409 V M Smith evidence-in-chief at para 6.20 [Environment Court document 28].
410 L M W Murchison evidence-in-chief rebuttal evidence at para 30 [Environment Court document 33A].
411 Referring to Policy 9.3.1 [CRPS p 91].
412 But possibly not under the MDP where "indigenous vegetation" is a defined term [MDP p 3-6].

(1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification [and/or agricultural conversion] maintain the outstanding natural landscape of the Mackenzie Basin and meet all the other relevant objectives and policies for the Mackenzie Basin Subzone (including Rural Objectives 1, 2 and 4 and implementing policies);

(2) To avoid pastoral intensification [and/or agricultural conversion] in Sites of Natural Significance, Scenic Viewing Areas, and Scenic Grasslands (including tussock grasslands) adjacent to and within the foreground of views from State Highways and the tourist roads;

(3) To enable pastoral intensification [and/or agricultural conversion] in Farm Base Areas and of land for which irrigation consent was granted prior to 14 November 2015 and the effects on the outstanding natural landscape have been addressed through the regional consenting process;

(4) To manage pastoral intensification [and/or agricultural conversion] elsewhere in order to retain the valued characteristics of the Mackenzie Basin Subzone:

(5) To take into account any agreement between the Mackenzie Country [Charitable] Trust and landowners which secures protection of landscape and biodiversity values [as compensation for intensification of production].

[351] There are some preliminary matters:

- as a result of our redefinitions the policy should now be read by substituting for the phrase: "pastoral intensification" in the Mackenzie Basin, the phrase: "pastoral intensification and/or agricultural conversion" – which is why we have placed those words in square brackets in the appropriate places;
- the last part of subpolicy (2) is obviously no longer necessary since the 1 kilometre policy has been ruled out as ineffective. Nor are the references to SVAs and SGAs are necessary because that duplicates Policy 3B7;
- in subpolicy (5) the correct name for the Mackenzie Country Charitable Trust has been included (and the concluding words excluded[413].

Subpolicies (1), (2) and (4)

[352] This is obviously a key policy for the implementation of Objective 3B and the MDP in general.

[353] The case for the farming interests was that topdressing and oversowing

413 D Caldwell closing submissions at para 132 [Environment Court document 48].

develops a thick sward of tussocks and introduced grasses through which wilding conifer seeds and hieracium are unlikely to grow through. Thus in their view weed control and landscape values coincided. Ms Murchison – relying on the evidence of an agronomist Dr W R Scott[414] quoted earlier and the landscape architect Mr Glasson[415] – considered that all topdressing and oversowing should be excluded[416] from the provisions for pastoral intensification.

[354] Mr Glasson's evidence in chief for FFM states[417]:

> In my opinion, while the Council has virtually "locked up" the Basin for non-complying activities in the objectives and policies, through the ONL and by applying broad Scenic Grassland (SG), Tussock Grassland (TG) and Lakeside Protection Area (LPA) statuses to the landscape, there is a lack of understanding around the specific landscape values for each farm.

Consequently he considers that individual analysis for each farm should be undertaken. It is really far too late to make such a suggestion. Mr Glasson then described one of the characteristics of the basin is that there are many types of landforms making for discrete locations of development[418].

[355] Mr Glasson was critical of the generality of the various categories of area on Attachment "A". We find his own opinions too general and unhelpful (except for his specific evidence[419] on Mt Gerald Station), particularly since it shows minimal recognition of any important part of the ecological component of the landscape: its threatened plants and fauna.

[356] What is of concern here and elsewhere about FFM's case is the near total absence of reference to some valuable components of the ONL and of the adverse effects on those of pastoral intensification. It is as if the expert witnesses for FFM have not read the evidence of the ecologists.

[357] As for the other aspects – cultivation and direct drilling – of what we have described as agricultural conversion, FFM considers that they should be provided for in

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414 W R Scott evidence-in-chief at paras 8.3 and 8.4 [Environment Court document 16].
415 C R Glasson evidence-in-chief at para 36 [Environment Court document 22A].
416 L M W Murchison evidence-in-chief at para 6.22 [Environment Court document 33].
417 C R Glasson evidence-in-chief for FFM at para 25 [Environment Court document 22A].
418 C R Glasson evidence-in-chief for FFM at para 27 [Environment Court document 27].
419 C R Glasson evidence-in-chief for Mt Gerald [Environment Court document 22].

the Mackenzie Basin outside of the Farm Base Areas under the same conditions as in the remainder of the District. Referring to the concern of the court, in the First (Interim) Decision, that "... further conversion of brown grasslands to green introduced grasses (whether irrigated or not) is generally inappropriate in the Mackenzie Basin[420]. FFM relied on the evidence of Ms Murchison that[421]:

> ... I readily accept cultivation may affect the colour of the landscape in areas where it occurs. In this instance I believe that effect must be considered alongside the need to grow improved pastures and fodder crops for animal health and to enable runholders to make reasonable use of their interest in their land.

[358] As we have recorded, the existing definition of "Pastoral Intensification" in the MDP includes topdressing and oversowing.

[359] As we have recorded, the other landscape architects agreed that oversowing and topdressing can have both adverse and positive effects on landscape values[422]. We prefer the evidence of the other landscape architects who gave evidence on this issue notably that of Mr Brown and Ms Lucas who supported the policy.

[360] Evidence supporting management of "oversowing and topdressing" and their retention in the definition of pastoral intensification was provided by several of the ecologists[423]. This evidence sets out the positive and adverse impacts it; can have on indigenous inter-tussock species, many of which are "at-risk" species. In the opinion of the ecologists Dr Walker and Mr Harding pastoral intensification can involve modes of subdivision fencing and changes in stock type with adverse effects on ecological components of natural landscape character[424] and that failure to manage these practices (for example by omitting the practices from the PC13 definition[425]) could reduce the security of ecological values. Dr Walker considered the same applies to herbicide-spraying and earthworks (used to re-contour the land, infill depressions, and install utilities), which have become common modern pastoral intensification practices with adverse ecological effects, in her experience.

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420 *High Country Rosehip,* above n 6, at [205].
421 L M W Murchison evidence-in-chief at para 6.32 [Environment Court document 33].
422 Transcript p 326, lines 17-22 (G H Densem): p 448 lines 16-22 (C R Glasson): p 505, lines 4-15 (D J Lucas).
423 Summarised in the rebuttal evidence of M A C Harding at paras 7 to 14 [Environment Court document 12A].
424 M A C Harding evidence-in-chief 15 July 2016 at para 88 [Environment Court document 12].
425 The proposed definition was *'Pastoral intensification within the Mackenzie Basin Subzone means cultivation, irrigation, topdressing and oversowing and/or direct drilling'.*

[361] More subtle points that emerged from the ecological evidence were that where both those adverse effects are minor there exists the potential for ongoing practice to result in a gradual degradation[426] and that oversowing and topdressing effects are very location specific.

[362] The PC13(pc) policy was supported by most of the planners – Ms P Harte, Ms V M Smith for DoC[427], and Mr P D Reaburn (rather indirectly)[428] for EDS.

[363] We conclude that based on our amended findings as to the qualities of the ONL in Chapter 2, and of the threats posed to it by pastoral intensification and agricultural conversion, the most effective method of managing those activities in a way that achieves Objective 12.2.1 of the CRPS and Objective 3B of the MDP is Policy 3B12(1), (2) and (4) as stated in PC13(s293V).

The cut-off policy: 3B13(3)

[364] The MDC wished to prevent a "gold rush" of applications to avoid the rules which had legal effect for notification. Ben Ohau submitted the "gold rush" period has passed due to the 'threat' of using the notification date[429]. However we accept Mr Caldwell's submission that the effects of the last 18 months of consent activity require appropriate control. As recorded in Chapter 12 water permits for irrigation were granted by the Canterbury Regional Council between November 2015 and November 2016[430] and the total area authorised to be irrigated under those consents is about 13,000 hectares[431]. Council wishes to manage the proposed land use in an appropriate consenting framework guided by this and other policies in PC13.

[365] Mr Caldwell submitted[432]:

> 112 The reality is that the Basin has undergone significant change as a result of irrigation consents, and other factors. Various expert evidence addressed the degree of change, with reference to the concept of a "tipping point". Mr Densem and Ms Lucas consider the Basin is at or at least approaching its tipping point in

426 Transcript, pp 180-181, lines 24-5.
427 V M Smith evidence-in-chief at para 9.83 [Environment Court document 28].
428 P D Reaburn evidence-in-chief at para 77 [Environment Court document 29].
429 A J Schulte submissions Ben Ohau 23 February 2017, para 6.2 [Environment Court document 39].
430 Affidavit of Matthew McCallum-Clark, sworn 17 February 2017 [Environment Court document 35].
431 Ibid, above n 139 Affidavit M McCallum-Clark [Environment Court document 35].
432 D Caldwell closing submissions at para 112 [Environment Court document 48].

> terms of landscape effects[433]. Mr Brown opined the Basin was almost beyond it[434]. Using the operative date will only increase the area in the Basin that is subject to less stringent control, and will further threaten the Basin breaching its tipping point. It is therefore submitted restricting the exemption for water permits to those granted prior to 14 November 2015, and reserving control over matters that relate to landscape protection, is most appropriate.

We accept that submission and consider a policy along general lines of 3B13(3) would be the most effective way of addressing the issues.

[366] However, we accept Ms Smith's criticisms[435] for the DGC that the policy is neither well-worded nor takes into account the greater depths and importance of the ONL's natural scenic components.

Tangata Whenua concerns

[367] Ms Stevens, for TRoNT sought[436] that a policy be added after 3B13(5) to read:

> (6) To provide for the relationship of Ngāi Tahu with Te Manahuna/Mackenzie Basin.

She justified[437] this on the basis that "... pastoral intensification may be one way for Ngāi Tahu to express their contemporary relationship with Te Manahuna".

[368] The MDC opposed that change on the grounds that "providing" was essentially enabling as Ms Stevens accepted[438] and that was not the thrust of the policy. We find it difficult to see why a "contemporary relationship" for TRONT should enable it or its members to cut corners. If tangata whenua want to undertake contemporary activities such as pastoral intensification or agricultural conversion (which in many ways do not appear to be tikanga maori) then they must follow the same policies and rules.

Conclusions

[369] We conclude that the most effective form of Policy 3B13 is:

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433 Transcript pp 325-326, lines 24 to 5 (Graham Densem); p 496, lines 14-18 (Diane Lucas).
434 Transcript p 456, lines 17-19.
435 V M Smith evidence-in-chief at paras 8.17 to 8.31 and 9.87 [Environment Court document 28].
436 T J Stevens evidence-in-chief at para 5.40 [Environment Court document 31].
437 T J Stevens evidence-in-chief at para 5.41 [Environment Court document 31].
438 Transcript, p 746, lines 5-6.

(1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification [and/or agricultural conversion] maintain the outstanding natural landscape of the Mackenzie Basin and meet all the other relevant objectives and policies for the Mackenzie Basin Subzone (including Rural Objectives 1, 2 and 4 and implementing policies);

(2) To avoid pastoral intensification [and/or agricultural conversion] in Sites of Natural Significance, ...

(3) Enabling pastoral intensification (subject to any further conditions necessary to avoid, remedy or mitigate adverse effects on the characteristics and/or values in Objective 3B(1)(a) to (f)) in specific areas where water permits for irrigation activities have been approved before 14 November 2015;

(4) To manage pastoral intensification and/or agricultural conversion elsewhere in order to retain the valued characteristics of the Mackenzie Basin Subzone;

(5) To take into account any agreement between the Mackenzie Country [Charitable] Trust and landowners which secures protection of landscape and biodiversity values [as compensation for intensification of production].

6.11 Wildings (Policy 3B14)

[370] The court declared in the Sixth Decision[439] that the subject of "Wildings is not 'on' PC13". The Council did not, at that time, argue otherwise.

[371] Despite that in PC13(s293V) the Council notified a Policy 3B14 as follows:

> To manage wilding trees and their spread by prohibiting the planting of wilding prone trees and, where possible, by requiring their removal:
>
> (a) at the time of subdivision;
>
> (b) when consent is required for housing or development;
>
> (c) when new zones are proposed.

Further the DGC and EDS both requested that provisions be added or amended to better manage and reduce the impact of wilding trees within the Basin and to avoid tree planting in sensitive areas.

[372] Mr Caldwell submitted[440], somewhat ambiguously, that "The Public Notice identified Wilding Trees as a matter to be addressed". If the public notice he referred to is the November 2015 notification of PC13(s293V) that is far too late: wildings were never 'on' PC13 and so could not be introduced in 2015. We agree with Mr Maassen's submission that proposed Policy 3B14 is beyond our jurisdiction. It should be struck

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439 [2013] NZEnvC 257 at [76] (and see Order 6C(2)).

440 D Caldwell closing submissions at para 126 [Environment Court document 48].

out. We add that we still see considerable merit in policies dealing with wilding trees. Indeed the MDP is deficient in policy direction on this very important issue.

6.12 Proposed Policy 3B15

[373] Ms Murchison proposed the use of "Integrated Farm Management Plans" to manage development and in particular farm related development. She suggested[441] a new Policy 3B15 seeking to ensure that all integrated farm management plans achieve all the rural objectives and policies of the District Plan including those which recognise and protect the outstanding natural landscape values of the Basin. The process for developing and finalising an "Integrated Farm Management Plan" was not identified.

[374] Ms Murchison's proposed new Policy 3B15[442] reads:

> (1) To provide for an integrated approach to managing land in the Mackenzie Basin for its farming, ecological, landscape, cultural, recreational and economic values through the development and implementation of integrated farm management plans for farming properties; and
>
> (2) To ensure an integrated farm management plan achieves the Rural objectives and policies of this plan, including but not limited to the objectives and policies to recognise and protect outstanding landscape values of the Mackenzie Basin as set out in Objectives 3B(1) to (3) and policies 3B1 to 3B14, taking into account the areas of Visual Vulnerability shown on Appendix V (Areas of Landscape Management) and Densem 2007 *The 'Mackenzie Basin Landscape: character and capacity'*.[443]

Ms Murchison's general idea appears to be that the status of an activity should be more relaxed if it is provided for in an Integrated Farm Management Plan or that "approval of the Integrated Farm Management Plan" is matter of Council's discretion. Other witnesses also proposed a "farm plan" approach to dealing with whole properties[444]. None provide any specific policies or rules to implement this concept. The term was also used by Mr Harding in reference to a possible approach to be adopted in the forthcoming District Plan review relating to addressing biodiversity matters[445].

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441 L M W Murchison evidence-in-chief at paras 9.1 to 9.6 [Environment Court document 33].
442 L M W Murchison evidence for Federated Farmers, 9 September 2016 at paras 9.1 to 9.6.
443 L M W Murchison evidence for Federated Farmers, 9 September 2016, Attachment 1, at p 10.
444 C Glasson evidence for Federated Farmers, 9 September 2-016 at paras 45 to 49; and B E Allan evidence for Mackenzie Guardians, 9 September 2016 at para 33.
445 Mackenzie Country Trust Deed of Trust 19 February 2016 at 3.1(b) and (c), 3.2(b) and Schedule 1 clause 1(j).

[375] We accept that there may be merit in the concept of a "whole of property approach" to address resource management matters, preferably dealing with both regional and district matters. However, we foresee formidable difficulties in dealing with section 6 matters of national importance because they almost inevitably cross property boundaries. We agree with Ms Harte[446] that it is not clear from Ms Murchison's suggested amendments what exactly an "Integrated Farm Management Plan" is and how or whether it is to be approved or consented. We accept Ms Harte's opinion that: "this approach needs to be very carefully crafted both conceptually and legally". Ms Murchison's proposed amendments do not satisfy those requirements[447] particularly since no rule is proposed directly requiring consent for such a plan. In any event it is too late to propose an entirely new policy and rule in PC13. They are beyond our jurisdiction since it was not addressed in either PC13(s293V) or PC13(pc).

6.13 Mapping issues

The visual vulnerability map

[376] An A3 copy of the visual vulnerability map is attached to this decision as Appendix "A". FFM claims with some justification, first, that the map is too small in scale: that is, it shows too large an area of land on too small a map so the topographic detail cannot be ascertained. The map does not adequately assist farmers when they are trying to locate a boundary between (say) a LVV area and a MVV area. They say that the map has not been checked on the ground and contains inaccuracies.

[377] We are sympathetic to those complaints but considerate sufficiently accurate transfers on to larger maps should be possible in cases of doubt as to the boundaries. Otherwise we consider the map is sufficiently effective to be added to the MDP.

The Wolds

[378] The Scenic Grasslands Areas ("SGAs") are mapped at a larger scale as we described earlier. Mr Murray gave evidence, supported by the landscape architect Mr Craig that the SGA on The Wolds – GA11 – is inappropriate because it takes in too great an area of productive land compared with its value in protecting views. Mr Craig pointed out the parallax effect whereby the SGA removes a considerable area from

446 P Harte rebuttal evidence 7 October 2016 at para 76 [Environment Court document 25A].
447 P Harte rebuttal evidence 7 October 2016 at para 76 [Environment Court document 25A].

(say) pastoral intensification while achieving little more than the existing SVA already protects. Further, much of the SGA is behind a row of morainic mounds which run approximately parallel to SH8, and is not necessary.

[379] Mr Densem's evidence was that[448] GA11 encompasses an area that has important landscape values, including both natural science aspects and scenic values. When cross-examined by Ms Forward on whether GA11 is in the foreground or distance he was initially unclear[449] (because he was asked two questions at once) but a little later explained of GA11:

> "I regarded it as an extension of the foreground view and I believe that the closest parts at least are quite significant in the foreground view where possible"[450].

He did accept that GA11 is "distant in the furthest parts of it"[451].

[380] In relation to the criticism that much of GA11 could not be seen behind the mounds we described earlier, he said enough of the area behind was visible to make it important because any intensification would be very obvious through gaps in the mounds[452].

[381] One aspect of all this that The Wolds case has ignored is the importance of connectivity in the ONL. The vast expanses of non-green space to the southeast of GA11 and SH8 are important not only visually but because of their natural science values and especially because they are still (just) connected to the SVA and GA11 itself.

[382] Our site inspection from SH8 suggested that towards the southern boundary of The Wolds (and for at least half the distance north towards its northern boundary) the mounds are high enough (and close to SH8) that the SVA would be sufficient to protect the visual values, and perhaps the area beyond their marginally less important for natural science values in connectivity terms than the area further north on The Wolds. The morainic mounds rather disappear (west of SH8) on The Wolds as one travels north, so the extension that GA11 gives to the SVA becomes increasingly important

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448 G H Densem rebuttal evidence at paras 35 to 39 [Environment Court document 19A].
449 Transcript, p 335, lines 3-7.
450 Transcript, pp 335-336, lines 30 to 16.
451 Transcript, p 336, line25.
452 G H Densem rebuttal evidence at paras 79 and 80 [Environment Court document 19A].

both in visual and (potentially) in natural science connectivity terms. We consider the GA11 map should be redrawn so that it is wedge-shaped: narrow at the southern end (so that it includes the far side of the mounds but no further) and widens as it goes north so that in effect it runs right through to the (out of sight from SH8) wetland that is at the northern end of The Wolds.

Mt Gerald Station

[383] Mt Gerald Stations seeks[453] changes to the Scenic Grassland overlay on its land (GA7). The court needs more time to consider that issue and, possibly, a further site inspection to resolve whether there should be a GA7 and if so where its limits should be. This question will be adjourned.

Blue Lake Investment (NZ) Limited ("Blue Lake")

[384] Blue Lake seeks an alternative FBA footprint and changes to the LPA relating to Guide Hill Station[454]. As explained earlier the extent and locations of FBAs are not the subject of this decision: the Council is still hoping to resolve these with landowners on a site by site basis.

[385] As for the LPA at Guide Hill, Mr Espie[455] was concerned about the area that could be caught by a lake's "setting", but agreed the LPAs do not include vast tracts of land included in the view of the lake[456]. We prefer Mr Densem's evidence that the LPAs in this area effectively protect the Basin's lakes, margins and settings[457]. We consider the evidence before us does not support any changes to the LPA boundary on Guide Hill Station even if we had jurisdiction to do so (which is doubtful). However, the Council did not consult on the LPA mapping and no changes were proposed in PC13(s293V). Mr Caldwell submitted that any request to amend the boundaries of an LPA is outside of the scope of the section 293 process. We accept that.

Summary as to the maps

[386] Subject to the changes addressed above and the reservation of the Mt Gerald

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453 Ms Forward closing submissions for Mt Gerald and The Wolds, dated 23 February 2017, at para 90.3 [Environment court document 40].
454 C Vivian evidence-in-chief, dated 9 September 2016, at paras 81-87.
455 B Espie evidence-in-chief for Blue Lake, dated 19 August 2016 at paras 5.1-5.17 [Environment Court document 20A].
456 Transcript, pp 356-357, line 29-2.
457 Referring to Policy 3B6 and associated rules.

questions we approve both Appendix 1 and the SGA maps for addition to PC13.

Tourist roads

[387] Mr Densem's map included much of Haldon Road which runs from Dog Kennel Corner on SH8 near Burkes Pass southwest to close to Lake Benmore as a "tourist road". He accepted that was a mistake, and the road should only be a tourist road to the intersection with Mackenzie Pass Road.

7. Are the proposed rules effective in achieving the policies?

7.1 Status of farm buildings

Farm buildings generally

[388] It seems to be generally accepted that there should be a distinction between farm buildings (a defined term) and non-farm buildings which are all other buildings. There is an issue we need to resolve about whether a farmer's residence (or retirement home) should be regarded as a farm building or not, but first we consider the more general issues about whether farm buildings should be managed and if so, how.

[389] The proposed status of farm buildings under PC13(s293V) is:

- controlled[458] if outside a FBA but in an area of low visual vulnerability; and
- discretionary[459] in areas of medium and high visual vulnerability.

At first sight those rules are effective at implementing the policies confirmed (as to effectiveness) in Chapter 6 of this Decision. That is because we have not accepted the appropriateness of using the broader concept of landscape vulnerability, and consequently have made policy changes to PC13(pc) – basically reverting to a modified PC13(s293V) with its use of the visual vulnerability classification[460]. We now have to consider whether any amendment to the rules about the status of farm buildings would make them more effective.

[390] Farmers are concerned about the controlled activity status of farm buildings outside FBAs. Mr Murray was concerned that if he wished to build a new woolshed on

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458 Rule 3.2.1 PC13(s293V).

459 Rule 3.3.3 PC13(s293V).

460 We will use the following abbreviations:
LVV = Low Visual Vulnerability
MVV = Medium Visual Vulnerability
HVV = High Visual Vulnerability

The Wolds it would require consent. FFM's planning expert Ms Murchison, proposed that farm buildings outside FBAs be permitted activities[461]. She pointed out[462] that accessory buildings such as hay barns, pump sheds, stockyards, and mustering huts would be located away from the Farm Base Areas and close to the blocks they are servicing. She also considered it would be appropriate to distinguish between those farm accessory buildings and larger farm buildings (with a footprint greater than 600m^2) such as woolsheds and milking sheds. Due to their function and the need for power, water, effluent disposal, and other infrastructure, those larger buildings tend to be located close to the homestead and within the FBAs. Ms Harte remained of the opinion that all buildings – including farm buildings – outside Farm Base Areas should be subject to scrutiny as to their design and how they sit within the landscape. However, her opinion was based on the proposed change in landscape analysis which we have not accepted. Accordingly on this issue we prefer Ms Murchison's evidence at least in relation to farm buildings in areas of low visual vulnerability.

Farm buildings in LVV areas

[391] We consider that within the LVV areas the controlled activity status is appropriate for larger buildings (with a less than 10m x 10m and with a maximum height of 8m) but smaller farm buildings in LVV or MVV areas should be permitted subject to the Standards and Terms in rule 3.2.1 PC13(s293V) with any necessary modifications.

Larger Farm buildings in MVV and all farm buildings in HVV areas: restricted discretionary

[392] Based on the evidence we consider rule 3.3.3 PC13(s293V) is the most effective alternative open to us, with one exception (discussed next) and, of course with an alteration to reflect the reversion to a visual vulnerability analysis.

[393] PC13(pc) contains a rule (3.3.3e) which specifies that all farm buildings outside a FBA must be at least one kilometre apart. This rule was suggested by the court in the First (Interim) Decision. Mr Vivian and Mr Espie's suggestion was that the standard for farm buildings outside Farm Base Areas be amended to require the farm buildings to be either within 50m or more than 1 kilometre from an existing farm building. Ms Harte

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461 L M W Murchison evidence–in-chief, 9 September 2016, Attachment 1 at p 12 [Environment Court document 33].

462 L M W Murchison evidence-in-chief at para 7.11 [Environment Court document 33].

agreed[463] because that provides for farm buildings to be clustered where this works for the farming operation but avoids them being scattered more broadly.

Farm buildings in the special areas

[394] We accept that farm buildings which are proposed to be located in any one of the overlays of SONs, LPAs, SVAs, SGAs and above 900 masl and/or Hazard Areas should have more stringent controls[464] to implement policies 3B6 and 3B7.

Farm buildings within FBAs

[395] Ms Harte reported that the status of buildings is changed slightly as a result of issues raised in consultation. As an incentive to establish within farm base areas rather than outside, their status has been changed (rule 3.2.2) from a restricted discretionary to a controlled activity. To ensure certain adverse effects are avoided, there are an increased number of standards for these buildings to meet, specifically:

- minimum building height of 8m;
- minimum setback from state highways of 100m and 20m from other roads;
- minimum setback from internal boundaries of 20m;
- minimum setback of 20m from rivers and 50m from wetlands;
- maximum gross floor area of a single building of 550m^2;
- farm buildings greater than 100m^2 to be setback 3.6 metres from other buildings.

[396] Ms Smith, for the DGC considered that there should be a maximum size limit for farming buildings within Farm Base Areas and this could be the same 550 m^2 limit that applies to non-farm buildings[465]. We accept Ms Harte's criticism of this approach. The point of the Farm Base Areas is to provide for and encourage farm related buildings to locate in these areas. A large woolshed is completely appropriate within a Farm Base Area. Most FBAs are sufficiently extensive that farm buildings housing a large number of animals and/or involving many heavy vehicle movements could establish some distance from the homestead[466].

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463 P Harte rebuttal evidence at para 60 [Environment Court document 25A].
464 Rules 3.2.1(vii), (viii), (ix), (x), (xi) PC13(s293V) and rule 3.3.3a and 3.3.3j PC13(s293V).
465 V M Smith evidence for DoC, 9 September 2016 at paras 11.14 to 11.21 [Environment Court document 28].
466 P Harte evidence for the Council, 15 July 2016 at para 97 [Environment Court document 25].

7.2 Non-farm buildings

[397] The status of non-farm buildings, such as residences, homesteads and visitor accommodation, outside farm base areas is controversial (they are currently discretionary). A number of submitters were concerned that with non-complying status the test for obtaining consent is as onerous as if it was in a more sensitive area such as a Lakeside Protection Area, and that this did not seem reasonable.

[398] Mr Vivian for Fountainblue questioned the blanket non-complying status of non-farm buildings in the Mackenzie Basin (outside FBAs). He opined[467] that with strong objectives and policies and assessment matters (which he proposed) there is no reason why consideration of non-farm buildings could not be processed as a discretionary activity (as this would provide the Council with the ability to decline consent) in situations where there is no subdivision and the building is not located within a Scenic Grassland, Scenic Viewing Area or Lakeside Protection Area. Here as elsewhere we are faced with the difficulty that no consideration was given to the Visual Vulnerability analysis (it seems to have been assumed that would be replaced).

[399] Mr Espie, the landscape architect called for Fountainblue, supported that approach. He noted[468] that it is not uncommon for large stations in the Basin to have a number of dwellings and other non-farm buildings. He observed that stations have often been run by several generations of a family. They may also accommodate the families of farm managers[469] and these residences are not always clustered in one area. He considered that the fact buildings are separated from the main farm base does not necessarily mean they will adversely impact on landscape values and so discretionary activity status is appropriate[470].

[400] Ms Harte accepted[471] that if non-farm buildings the Council would retain a broad discretion to reject an application. Ms Smith[472] and Mr Reaburn[473] continued to maintain that non-complying status was more appropriate.

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467 C Vivian evidence for Fountainblue Limited, 19 August 2016 at paras 4.3 and 8.1 to 8.15.
468 B Espie evidence for Fountainblue Limited, 19 August 2016 at paras 3.15 to 3.16.
469 Ibid at para 3.17.
470 Ibid at para 3.17.
471 Transcript p 590, lines 9-11.
472 Transcript p 656-657.
473 Transcript p 702, line 22 to p 703, line 9.

[401] Consideration of this issue is complicated by the facts that the witnesses were contemplating the status of the activity under the looser, incompletely defined landscape sensitivity concept. An advantage of the second-best approach the court has adopted is that the areas of low and medium visual vulnerability can be used to distinguish discretionary activities from non-complying.

[402] We consider non-farm buildings should be discretionary in both the low and medium visual vulnerability areas, but non-complying elsewhere. New rules will need to be drafted to give effect to that using the suggestions in Mr Vivian's evidence-in-chief[474] but adding an extra precondition for discretionary status: that the building is within an area of low or medium visual vulnerability.

Retirement dwellings and subdivisions for retirement dwellings

[403] PC13(s293V) reintroduced retirement dwellings as a recognised exception to the general controls on buildings and subdivision outside farm base areas. PC13(pc) then removed that special provision for farm retirement dwellings and the 50 hectare subdivision standard to accommodate these dwellings. A number of submitters requested their reinstatement to provide for the handing down of the responsibility for stations from one generation to the other without forcing the older generation off the land.

[404] While there are social and possible economic benefits of enabling retiring owners to remain living on a station, it is difficult in Ms Harte's view[475] to make these provisions sufficiently robust to avoid misuse of this provision. We accept that. Further, the FBAs are likely – some of them are proposed to be 20 hectares or more as we recall – to be more than large enough to cater for retirement dwellings.

7.3 Tree planting

[405] PC13(pc) proposes that tree planting (which would include shelterbelts) be managed[476] as a discretionary activity in Scenic Grasslands in addition to Scenic Viewing Areas ("SVAs"). Ms Murchison was concerned about the effect of this rule on shelterbelt planting. In her opinion[477]:

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474 C Vivian evidence-in-chief for Fountainblue Ltd at para 8.14 [Environment Court document 26].
475 P Harte evidence-in-chief dated 15 July 2016 at para 85 [Environment Court document 25].
476 Proposed amendment to rule 6.4.2 [PC13(pc) p 30].
477 L M W Murchison evidence-in-chief at paras 6.56 and 6.57 [Environment Court document 33].

> ... shelter planting is a basic element of pastoral farming. Any effects on landscapes in Scenic Grasslands should be considered alongside the need to provide stock with shelter and make reasonable use of farm land.

In that context she pointed out that rule 6.1.4 of the MDP[478] contains conditions for the planting of shelter belts in the Mackenzie Basin as a permitted activity subject to standards requiring them to be set back 300m from the road or planted at 90° to the road. If planted at 90° to the road, a separation distance of at least 1000m between shelter belts is also required. In her view that was sufficient.

[406] We recall that Ms Murchison uniformly used a broad concept of pastoral farming so that it includes almost any regimen for growing grass and crops, and for raising and feeding stock of any kind. Traditional pastoral farming in the Mackenzie Basin was at different scales and intensity and some activities were limited as she recognised[479]. Her concept differs from the concept of pastoral farming implicitly used in the MDP. Given the importance of openness to the values of the ONL we consider the restrictions in rule 6.4.2 in PC13(s293V) to manage shelterbelts in Scenic Grasslands is more effective for achieving Objective 3B and the rural policies.

[407] Other changes proposed by EDS[480] as to the list of prohibited tree species are beyond jurisdiction. These should be looked at in the district plan review.

7.4 Proposed rule 15A (pastoral intensification)

[408] PC13(pc) proposed to renumber the old rule 15.1.1.a which dealt with pastoral intensification (as defined) generally, as rule 15A.1.1 and apply it to rural zones outside the Mackenzie Basin. Then it proposed to add rules 15A.1.2, 15A.2.1, and 15A.3.2 within the Basin. Modified (in red) to re-accommodate the visual vulnerability analysis and our redefining of some farming activities as "Agricultural Conversion" new rules read (provisionally) as follows:

478 Rule 6.1.4 [MDP p 7-58].
479 L M W Murchison evidence-in-chief at para 58 [Environment Court document 33].
480 P D Reaburn evidence-in-chief at para 98 [Environment Court document 29].

15A PASTORAL INTENSIFICATION

15A.1 Permitted Activities

...

15A.1.2 Pastoral Intensification and Agricultural Conversion (refer definitions) within the Mackenzie Basin Subzone which is:

(a) within a defined Farm Base Area (refer Appendix R) and is setback at least 20m from the bank of a river and 50m from a wetland; or

(b) within an area for which ~~resource consent~~ a water permit to take and use water for the purpose of irrigation has been granted by ~~Environment~~ the Canterbury Regional Council prior to 14 November 2015 ~~authorising irrigation~~, the consent has not lapsed and effects on the outstanding natural landscape have been addressed through the regional consenting process.

15A.2 Discretionary Activities

15A.2.1 Pastoral Intensification and Agricultural Conversion (refer definitions) in the Mackenzie Basin Subzone other than as provided for as a Permitted Activity or Non-complying Activity.

15A.3. Non-Complying Activities

...

15A.3.2 Pastoral Intensification and Agricultural Conversion (refer definitions) in the Mackenzie Basin Subzone within a Site of Natural Significance identified on the Planning Maps and schedule in Appendix I, Scenic Viewing Areas, Scenic Grasslands or Lakeside Protection Areas identified on the Planning Maps or in Appendix V (Areas of Landscape Management) or tussock grasslands within 1km of State Highway 8, Haldon Road, Godley Peaks Road or Lilybank Road.

[409] The scheme of the rule is that pastoral intensification and agricultural conversion within the Mackenzie Basin subzone are proposed to be:

- generally discretionary;
- non-complying in special areas[481];
- permitted in certain specific situations, e.g. within a FBA, or where a water permit has been issued by the CRC.

481 Including SONS, Scenic Grasslands, Lakeside Protection Areas, and Tussock Grasslands within one kilometre of some roads.

[410] There are three sets of issues:

(1) is the general discretionary rule effective?
(2) is the non-complying rule for special areas effective?
(3) are the permitted activity exceptions effective?

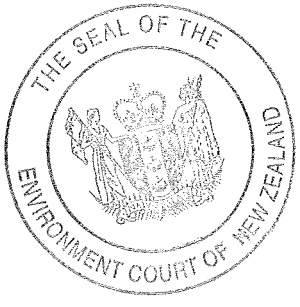
We consider each in turn.

(1) Is the general discretionary rule 15A.2.1 effective?

[411] The application of the pastoral intensification definition (in particular because of its reference to oversowing and topdressing) to the Mackenzie Basin has been challenged as it involves requiring consent for everyday farming operations.

[412] Mr Murray of The Wolds gave us his opinion that oversowing and topdressing on his land has raised the phosphate levels resulting in healthier tussocks with greater ground cover and consequently lower soil losses from bare ground. He considered that the ability to oversow and topdress must be retained as a tool to combat soil loss which is one of the greatest threats to the Basin. He stated that oversowing and topdressing should not be put in the same category as irrigation and cultivation which have far more effect on landscape and biodiversity. He believes that the high landscape values associated with the identified Scenic Grassland on The Wolds are a direct result of continued oversowing and topdressing[482].

[413] We have recorded that Mr Simpson of Balmoral Station expressed his opinion that oversowing and topdressing have an important role in maintaining pasture free of wilding trees. He stated[483] that tussock grasslands are highly vulnerable to infestation from wilding conifers and other woody weed species and that grazing these is the "only way" to reduce the risk of pest spread. If animals are to graze these areas then regular oversowing and topdressing is necessary[484] so that the vegetation is not taken over by unpalatable species. He qualified that by saying even with this approach there is still a lot of expense involved in reducing wilding tree infestations. To show how complex all this is in reality, on our site inspection we were shown an area on Braemar (higher and



482 J B Murray evidence-in-chief at para 14 [Environment Court document 5].
483 A Simpson evidence-in-chief at paras 3.5 to 3.6 [Environment Court document 7].
484 Ibid at paras 3.5 to 3.6 [Environment Court document 7].

with greater rainfall) where oversowing, and topdressing and grazing are apparently all that are required to keep wilding pines down.

[414] In contrast we have summarised the evidence of the ecologists[485]. That evidence described both the positive and the adverse impacts topdressing, oversowing and subdivisional fencing can have on indigenous inter-tussock species, many of which are "at-risk" species. We consider on balance that we generally prefer the scientific evidence over the anecdotal evidence, and thus there is evidence supporting the wider management of pastoral intensification (including oversowing and topdressing).

[415] As an extra complication Ms Harte reminded us of the (existing) rules[486] in Chapter 7 of the MDP which set limits on clearance of short tussock grasslands and cushion and mat vegetation (set out in Chapter 3 of this decision). She explained that[487]:

> These rules contain an exemption where there has been oversowing and topdressing at least three times in the last 10 years. If the definition of pastoral intensification includes oversowing and topdressing this will support the operation of the vegetation clearance rules in the sense that it will require consent. If, on the other hand, there is no limit on oversowing and topdressing through the pastoral intensification control then it is easier for landowners to fall within the exemption contained in the vegetation clearance rules and therefore easier to clear this vegetation without the need for consent. This is an issue I was very aware of when assisting with the preparation of the PC13 (s293V) package. ...
>
> The proposed pastoral intensification rule is so that an assessment ((assessment) of the natural science values, including whether the indigenous vegetation present has significant value) may occur as part of a resource consent process.

[416] Because of the differing frequencies and intensities of oversowing and topdressing with different impacts Ms Harte considered that the proposed pastoral intensification (including agricultural conversion) rule is appropriate as it allows an assessment of the effects to occur on a case by case basis[488]. Mr Reaburn the planner for EDS generally supported[489] the changes to rule 15A as proposed by the Council (but excluding an exception – which we come to shortly). Ms Smith took approximately the same approach as Mr Reaburn. Mr Gimblett for Meridian expressed no view, nor

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485 Summarised M A C Harding rebuttal evidence, 7 October 2016, at paras 7 to 14 [Environment Court document 12A].
486 Rules 12.1.1.g and h [MDP pp 7-69 and 7-70].
487 P Harte rebuttal evidence, 7 October 2016 at para 40 [Environment Court document 25A].
488 P Harte rebuttal evidence at para 41 [Environment Court document 25A].
489 P D Reaburn evidence-in-chief at para 99 [Environment Court document 29].

did Ms Stevens for TRoNT. Mr Vivian for Fountainblue Ltd and others supported the intent of these rules[490]. Mr Glasson, the landscape architect called for Mt Gerald Station and The Wolds, and for FFM also considered that each application should be considered on a case by case basis.

[417] Ms Murchison for FFM took a different view but we find much of her evidence too broad to be useful. In particular she regarded pastoral farming as covering many forms of farming with little consideration of the scale, intensity and character with which each has traditionally been undertaken in the Mackenzie Basin.

[418] We consider that the proposed discretionary rule is the most effective way of implementing the policies. We bear in mind that because most of the Mackenzie Basin was, at least until recently, held in pastoral leases (and a considerable area still is) consent to topdress and oversow was needed under section 16 CPLA 1998, so the need for some sort of consent should not require too much of a change in practice.

[419] We acknowledge that, as Mr Murray pointed out in his rebuttal evidence, most tenure reviews have been accompanied by increasingly thorough landscape and ecological reports. However, the outcomes of tenure reviews have been both legalistic and binary rather than landscape and ecosystem oriented. They are legalistic in the sense they seem to relate largely to the property in question and give little obvious consideration to concepts of landscape or related ecological connectivity. They are binary in the sense that much of the land is either retained in Crown ownership, or is freehold free of broad covenants. The difficulty is that so many of the small native plants are, as we have described, sparsely spread through in areas which are on the evidence before us, very important to the survival of (many) species but have been given no protection in large areas of freehold land.

(2) Is the non-complying activity rule 15A.3.2 effective?

[420] PC13(pc) also proposes that the activities we have described as either pastoral intensification or agricultural conversion (other than subdivisional fencing) should be non-complying in special areas.

[421] FFM criticised the rule on the basis that it does not "enable" pastoral intensification or agricultural conversion. That argument assumes we have found in

490 C Vivian evidence-in-chief at para 9.11 [Environment Court document 26].

FFM's favour that pastoral intensification should be enabled. We have judged when settling Policy 3B13 that to achieve Objective 3B(3), pastoral intensification should be managed rather than enabled, so FFM's general position on non-complying status cannot stand. Lumping all pastoral intensification and agricultural conversion in together as a discretionary activity would be poor practice.

[422] Mr Craig, the landscape architect called for The Wolds, stated that oversowing, topdressing, weed control and grazing results in maintenance of the grassland in its present form which is a quality that the proposed Scenic Grassland overlay seeks to achieve[491]. He recorded that opinion related to achievement of the desired landscape outcomes for the scenic grassland, rather than to protection of ecosystems[492]. However, that rather ignores that ecosystems are an important part of ONLs, and that there are very subtle ecosystems within the Mackenzie Basin ONL.

[423] Several parties have questioned another aspect of rule 15A.3.2 which specifies that pastoral intensification is non-complying, not only in lakeside protection areas, scenic grasslands, scenic viewing areas and sites of natural significance, but also "within tussock grasslands within 1 kilometre of State Highway 8, Haldon, Road, Godley Peaks Road or Lilybank Road". This of course must be deleted in view of our discussion of this issue in relation to the policies.

(3) The permitted activity rule (15A.1.2)

[424] A number of parties were concerned about pastoral intensification rule 15A.1.2 which sets out when pastoral intensification is a permitted activity. This rule exempts pastoral intensification from the general discretionary activity if:

> Within an area for which a water permit to take and use water for the purpose of irrigation has been granted by the Canterbury Regional Council prior to 14 November 2015, the consent has not lapsed and the effects on the outstanding natural landscape have been addressed through the regional consenting process.

[425] The proposed permitted activity status for land with "irrigation" consent (i.e. consent to use water from the CRC) applies to consents granted prior to 14 November 2015. That date was chosen as the date on which the section 293 package was notified.

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491 A W Craig evidence-in-chief at para 34 [Environment Court document 21].
492 Ibid at para 34 [Environment Court document 21].

[426] A number of parties/landowners (including Ben Ohau, Mt Gerald, Classic Properties, Federated Farmers, Kidd Partnership and Aoraki Downs) who have been in the consent process for many years with the CRC (and the Environment Court) want that date extended to cover consents which are at an advanced stage but which have not been granted or are in the appeal process.

[427] Ms Murchison (for Federated Farmers) proposed an amended rule which simply removes reference to the irrigation consent having to address landscape values, so that all that is needed to be permitted pastoral intensification is to have irrigation consent[493]. Ms Harte did not support such an approach as in her opinion it would enable pastoral intensification to occur in a situation where no consideration has been given to landscape effects.

[428] Ben Ohau Station challenged the rule due to its arbitrary cut-off date for irrigation consents that qualify as an exemption for the new pastoral intensification rule[494]. Its owner/manager Mr S Cameron described how Ben Ohau has recently obtained an irrigation consent after nearly seven years from the start of the consenting process. It wishes to have the benefit of the proposed permitted activity rule. Mr Cameron's request is for the cut-off date for irrigation consents to be extended out to the date of the Court's final decision on Plan Change 13[495].

[429] Witnesses for EDS (Mr Reaburn), FFM (Ms Murchison) and the Department of Conservation (Ms Smith) all considered that PC13(pc)'s proposed rule 15A1.2(b) is either inappropriate or not sufficiently certain[496].

[430] The lack of certainty comes from the reference to consents having to address the effects on the outstanding natural landscape. Ms Harte described[497] how she assessed (most of) the irrigation consents granted by Environment Canterbury for the Mackenzie Basin in recent times:

> Some of these consents clearly have been subject to a landscape assessment which indicated that some modification to the proposed irrigation was required. This usually took

493 L M W Murchison evidence-in-chief at para 6.50 [Environment Court document 33].
494 S Cameron evidence-in-chief, 9 September 2016 at para 2 [Environment Court document 6].
495 S Cameron evidence-in-chief 9 September 2016 at para 32 [Environment Court document 6].
496 P D Reaburn evidence-in-chief at para 29 [Environment Court document 29].
497 P Harte rebuttal evidence at para 46 [Environment Court document 25A].

> the form of a reduced area and/or increased setback from roads for irrigators or the area to be irrigated. Other consents did not appear to have been subject to this scrutiny. It was on the basis of this research that the rule was developed.

[431] Ms Harte went on to say[498]:

> That there may be some situations where it is not clear whether landscape considerations have been taken into account in granting the irrigation permit. The intention is that in such a situation consent would be required under the District Plan as a discretionary activity (rule 15A.2.1). The reason for this approach was to avoid landowners effectively having to go through two processes involved to date had taken a very long time and were very costly for all parties.

[432] Mr Reaburn[499] and Ms Smith[500] both proposed that the current permitted activity rule relating to land for which irrigation consent has been granted be deleted and replaced with a controlled activity rule enabling the Council to look at a variety of different aspects of the proposed pastoral intensification.

[433] Ms Harte's concern was that[501]:

> ... the landowner could end up with two consents for the same activity which are inconsistent. The Environment Canterbury consents are quite detailed in relation to the technical aspects of irrigating as well specifying the area involved. The District Council land use consent could potentially require irrigation in a different form and in different areas. It also of course involves the landowners in getting two consents for the same activity, although the primary environmental effects of concern for each of the consents are different. I also note there can be issues associated with controlled activities regarding the extent to which conditions can be applied to effectively alter the activity applied for.

[434] Ms Harte advised us that any cut-off date is necessarily arbitrary, and that she did not have information on how many additional consents are likely to be granted if this date is extended.

[435] During cross-examination Ms Harte[502] and Mr McCallum-Clark[503] both acknowledged that:

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498 P Harte rebuttal evidence at para 47 [Environment Court document 25A].
499 P D Reaburn evidence-in-chief at para 28 [Environment Court document 29].
500 V M Smith evidence-in-chief paras 8.23 to 8.25 [Environment Court document 28].
501 P Harte rebuttal evidence at para 48 [Environment Court document 25A].
502 Transcript p 555 line 6 – p 556 line 13.
503 Transcript p 757 lines 10-30.

- the permitted activity exception for pastoral intensification – "on land for which irrigation consent was granted prior to 14 November 2015"[504] – is ambiguous and unsatisfactory[505];
- the regional planning provisions do not specifically address ONL protection[506];
- parallel consenting regimes are not unusual[507];
- controlled activity status would overcome issues of ambiguity and fairness to existing consent holders[508].

[436] The proposed matters of control are set out in Mr Reaburn's proposed rule 16XX[509]. Conditions may only be imposed in respect of those matters over which control is reserved[510]. We doubt that simply controlling the extent of area to be irrigated is adequate; we consider that there should be an assessment matter:

> (vii) whether any threatened or at risk plants are present.

[437] We find that with the amendments to the proposed rule which we have accepted – including Mr Reaburn's proposed assessment initiative – it is an effective way of implementing Policy 3B7 and of giving effect to the CRPS.

[438] One point we should emphasise is that pastoral intensification and agricultural conversion are fully discretionary. All relevant objectives and policies in Chapter (Section) 7 Rural Zone of the MDP will be important to any application including those that protect the natural science values of the ONL. So the test for determining whether farming intensification should occur will go beyond looking at the visual vulnerability of the site. All aspects of the sensitivity of a site will need to be looked at in terms of the relevant objectives and policies of both the MDP and the CRPS.

7.5 Irrigators and fences

[439] PC13(s293V) adds these rules (with the PC13(pc) proposed changes in red):

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504 Policy 3B14 and corresponding rules.
505 Transcript p 555 line 6 – p 556 line 13.
506 P Harte at Transcript p 536 lines 12-15; Mr McCullum-Clark at Transcript p 760 lines 15-19.
507 P Harte at Transcript p 535 lines 19-29; Mr McCullum-Clark at Transcript p 760 lines 8-9.
508 P Harte at Transcript p 555 lines 25-31; Mr McCullum-Clark at Transcript p 757 lines 10-30.
509 P D Reaburn Exhibit 29.1 (at pp 20-21).
510 Section 104A RMA.

15.1.1.a Irrigators ~~and fences~~

i there shall be no ~~large~~ irrigators (including centre pivot and linear move irrigation systems) ~~or fences (other than replacement fences)~~ within Scenic Viewing Areas, Scenic Grasslands, Sites of Natural Significance or Lakeside Protection Areas identified on the Planning Maps within the Mackenzie Basin Subzone ~~or in Appendix V (Areas of Landscape Management)~~.

ii In all other areas of the Mackenzie Basin Subzone ~~large~~ irrigators (including centre pivot or linear move irrigation systems) shall be setback at least 250m from State Highway 8, the Haldon Road, Godley Peaks Road and Lilybank Road.

Note: Controls on Pastoral Intensification in the Mackenzie Basin Subzone are contained in Clause 15A of the Rural Zone.

Irrigators

[440] The MDC accepted that the reference to the length of Haldon Road is a mistake and the rule should refer to "Haldon Road from Dog Kennel Corner to the intersection with Mackenzie Pass Road".

[441] It also proposed to amend the Rural Zone "Other Activities" rules 15.2.1 list of Discretionary Activities as follows:

15.2.1 Any Activity, other than those specified in Clauses 3 to 14 of the Rural Zone, which do not comply with one or more of the following standards for Permitted Other Activities:

15.1.1.a.ii Irrigators ~~and Fences~~
15.1.1.b Noxious and Unpleasant Activities
...

[442] Finally, PC13(s293V) proposed to add the following new rule to Rural Zone rule 15.3 Other Activities – Non-complying activities:

15.3.1 All ~~large~~ irrigators (including centre pivot and linear move irrigation systems) ~~or fences (other than replacement fences)~~ within Scenic Viewing Areas, Scenic Grasslands, Sites of Natural Significance or Lakeside Protection Areas identified on the Planning Maps within the Mackenzie Basin Subzone ~~or in Appendix V (Areas of Landscape Management)~~ shall be a Non-complying activity.

[443] FFM and supporting parties generally accepted[511] that irrigation should be a discretionary activity, so we generally confirm the rules in that respect (subject to minor amendments recorded below).

Fences

[444] We observed earlier that the existing definition of "Pastoral intensification" includes "subdivisional fencing". One disadvantage of using the MDC's definition – despite its other advantages of consistency and simplicity – is that prima facie fencing within the Mackenzie Basin would require resource consent. We accept the impracticality of that and will direct that the rules referring to pastoral intensification in the ONL generally should contain an exception for fencing (subject to the next paragraph).

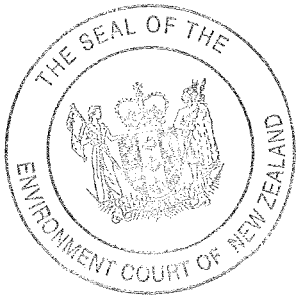
[445] However, we have accepted the evidence of the ecologists that subdivisional fencing can (in conjunction with oversowing and topdressing) have adverse ecological effects. We find that controlling fencing in the special areas is an effective method of managing those effects. We consider no change is needed to the rules for these areas since pastoral intensification includes subdivisional fencing.

Conclusions

[446] The prima facie appropriate form of:

- Rule 15.1.1.a is therefore as in PC13(s293V), i.e. without most of the changes proposed by PC13(pc), except that "large" should be deleted and "Haldon Road" qualified as explained above;
- Rule 15.2.1 should refer to "Irrigators and Fences";
- Rule 15.3.1 is as above but omitting "large"

— provided in each case the words "in Appendix V (Areas of Landscape Management)" are preceded by "areas of high visual vulnerability".



511 R Gardner opening submissions at para 23 [Environment Court document 2.2].

7.6 Other rules and methods

Subdivision

[447] Mr Vivian identified an oversight in Subdivision rule 3a which specifies controlled activity subdivisions[512]. This rule still contains reference to subdivision with Farm Base Areas, whereas these subdivisions are proposed to be restricted discretionary activities in PC13(s293V). Ms Harte agreed[513] with his suggested amendment.

[448] Mr Vivian also identified a matter that should be resolved in relation to subdivision within the Mackenzie Basin Subzone which do not comply with the listed "Primary and Secondary Subdivision Standards"[514]. Ms Harte agreed[515] that his proposed amendment makes the status of these activities as non-complying activities clear. We accept that change is appropriate.

Mining

[449] We accept the changes suggested by Ms Smith for the DCG.

Assessment matters – resource consents

[450] Rule 16 (assessment matters) is proposed to be amended by adding:

> 16.2 Buildings
> 16.2.k Farm buildings
> ...
> i. Whether the farm building(s) would be located away from main surfaces, ridgelines and skylines of landforms. (Refer to the report "The Mackenzie Basin Landscape: character and capacity" Graham Densem Landscape Architects November 2007, and "Intensification and Outstanding Natural Landscape: Landscape Management of the Mackenzie Basin in the Light of Court Decisions" Graham Densem Architects November 2015 for descriptions of areas to be avoided in terms of their vulnerability to change).

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512 C Vivian evidence-in-chief for Fountainblue Limited at para 9.14 [Environment Court document 26].
513 P Harte rebuttal evidence at para 73 [Environment Court document 25A].
514 Ibid at para 9.18 [Environment Court document 25A].
515 P Harte rebuttal evidence 7 October 2016 at para 74 [Environment Court document 25A].

[451] We accept that there should be some changes, as sought by the tangata whenua to the assessment matters in PC13(s293V)'s proposed rule 16.2k to ascertain[516]:

(xii) whether wāhi toanga sites are affected.

[452] In addition, to assist assessment of the precise location of buildings, a matter should be added as follows:

(xiii) whether there are threatened or "at-risk" plants (including those in the Plant List in the Mackenzie District Plan) on the building site or within 30 metres of it.

[453] Similar matters should be added to the list for non-farm buildings and to the discretionary lists for restricted discretionary activities.

Appendices

[454] We consider it would be useful if two lists were added as Appendices to the MDP:

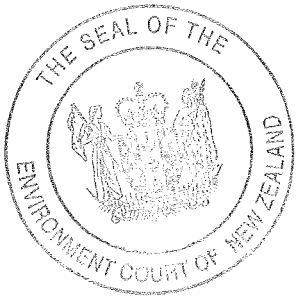
- the list of threatened and "at-risk" plants[517] produced by Dr Head; and
- the list of geomorphological features[518] produced by Dr Walker.

[455] Then there should be a reference in the rural assessment matters to those lists so that they would be referred to in any future Assessment of Environmental Effects.

8. The efficient use of resources and the section 32 analysis

8.1 What does section 32 require in respect of efficiency?

[456] We have considered the effectiveness of the proposed policies and rules in parts 6 and 7 respectively. We now consider their efficiency under section 32 RMA (in its relevant form). When discussing efficiency in section 32 (and under section 7(b)) the most useful concept to apply is the economic concept – as the only objective and



516 T J Stevens evidence-in-chief at paras 5.42 to 5.45 [Environment Court document 31].
517 N J Head evidence-in-chief Appendix 1 [Environment Court document 14].
518 S Walker evidence-in-chief Appendix 12 [Environment Court document 17].

independent measure under the RMA of efficiency[519] in production (for example[520]) as meaning[521]:

> ... allocating the available resources between industries so that it would not be possible to produce more of some goods without producing less of any others.

There are various refinements of that test but we do not need to go into Pareto efficiencies of Kaldor-Hicks improvements here.

[457] Section 32 approaches the question of efficiency by requiring analysis of three components of efficiency:

(a) the benefits and costs of the proposed provisions[522];
(b) the benefits and costs of the alternative[523] (in this case the status quo);
(c) the risks of acting or not acting[524].

[458] As for the second bullet point we should explain why alternatives are still relevant since in its pre-2009 version express reference to alternatives has now been largely omitted from section 32. The exception is the heading which still refers[525] to *Consideration of benefits, alternatives and costs.* In addition to that we hold that consideration of alternatives is implicit for three reasons. First, section 32 RMA requires the local authority to assess whether each objective, policy or method provision is the most appropriate. "Most" is a comparative term: it requires that the provision in contention be evaluated against at least one alternative. Second, section 32(4)(b) requires the local authority to take into account the risk of acting (i.e. introducing PC13(pc)) or not acting (e.g. reverting to the status quo). That requires comparing (at least) those alternatives. Third, section 32 is a procedural provision. It must be applied in accordance with the purpose and principles of Part 2 of the RMA. The principles include the requirement in section 7(b) RMA to have particular regard to the efficient use of the relevant natural and physical resources. We will discuss the efficient use of the resources of the Mackenzie Basin next. It is sufficient to record at this point that economic efficiency involves a comparison of the net social benefits of

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519 This is the only objective measure of efficiency we know of: see the *Lammermoor* Decision: *Maniototo Environmental Society Inc v Central Otago District Council* (EnvC) C103/2009 at [745].
520 Efficiency in consumption has a similar meaning.
521 *Oxford Dictionary of Economics* p 139 (OUP, 1997).
522 Section 32(4)(a).
523 Section7(b) RMA.
524 Section 32(4)(b) RMA.
525 Note that in the current (2017) version of section 32 it has a different heading.

the objective in question with the social benefits of the best alternative (often but by no means necessarily, the status quo).

[459] Independent expert confirmation of those points can be gained from an excerpt from the New Zealand Treasury's *Guide to Social Cost Benefit Analysis*[526] ("*The Treasury Guide*") which was referred to by Dr Fairgray[527]. A relevant excerpt was produced[528] by Mr Gimblett, the planning consultant called for Meridian. That document – "Step 1: Define policy and counterfactual" – states[529] that:

> ... Having established the potential need for a policy, the next thing to do is to clearly define the policy, alternative solutions and the counterfactual. The counterfactual is the situation that would exist if the decision is not made, if the policy does not go ahead. It is sometimes described as the "do nothing" or as the "do minimum" scenario. It is important to charactise the counterfactual accurately and to use it consistently, as the benefits and costs of the policy alternatives are measured against the counterfactual. This is often not straightforward, in particular where the "do nothing" or the "do minimum" scenarios are likely to evolve over the evaluation period. In those situations it will be necessary to forecast the evolution of behaviours and technologies.

[460] *The Treasury Guide* then gives a very interesting example which, in our view, needs to be understood by everyone responsible for a section 32 assessment:

> **Example: Bridge over river**
>
> Suppose that the bridge costs $20 million, and that it will save travellers $25 million worth of travel time and vehicle operating costs, in present value terms. The bridge would appear to have benefits that exceed the costs. The net present value (NPV) of the bridge is $5 million.
>
> But suppose that in the absence of a bridge being built, there is every expectation that a private ferry operator will start business. The cost is $10 million in present value terms, and the social benefits are $20 million in present value terms. The ferry operation has an NPV of $10 million.
>
> Compared with the ferry operation, a bridge would cost $10 million more, and would produce $5 million more benefits. Against this counterfactual, the bridge has an NPV of -$5 million.

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526 http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/guide/... sourced 3/02/2017.

527 J D M Fairgray supplementary evidence 22 December 2016 [Environment Court document 9B].

528 Exhibit 30.1.

529 http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/guide/... sourced 3/02/2017.

> Against the "no bridge, no ferry" counterfactual, the bridge would seem worthwhile. But against the "ferry" counterfactual, the bridge is not.
>
> Equivalently, the ferry could be presented to decision-makers as an alternative to the bridge. This would still show the ferry to be the better option, despite the fact that the bridge has greater total benefits.

The analogy in this case is the consideration of:

- no PC13, allowing unfettered irrigation; up to the limit of available water, of land in the Mackenzie Basin (this is the 'bridge'); and
- PC13(s293V) with consequent use of the water foregone to run through the WEPS to generate electricity and then to use it for irrigation (this is the 'ferry' in the analogy).

We consider the quantified evidence on these alternatives in 8.3 below.

[461] *The Treasury Guide* continues[530]:

> 10. As the example above suggests, it is good practice to consider several alternative options for solving a problem or achieving an objective. Each of these should be treated as a separate policy to be evaluated against the counterfactual.
>
> 11. Finding the best alternatives is an art rather than a science. It relies on creativity and innovative thinking, and should include the best from an economic perspective even if they are not consistent with decision-makers' objectives. It is important for decision-makers to know what alternative policies or solutions they are rejecting.
>
> 12. Whether a policy is a good one is often not known until the CBA has been carried out. In such cases, and where an apparently good option is found to be not good, it may be necessary to go back to the first step and define and analyse additional alternatives. (Underlining added)

The underlined words are important because they confirm that the policies of the district and regional plans are irrelevant to the assessment of the proposed plan (change) and the alternatives if the true social benefits and cost of each are to be ascertained. We return to that point shortly.

530 http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/guide/... sourced 3/02/2017.

8.2 The benefits and costs of using the land and the landscape

The debate between Dr Fairgray and Mr Copeland

[462] The Council called economic evidence from Dr J D M Fairgray, a geographer with special expertise in economics and a very experienced witness on the economics of the RMA. Dr Fairgray gave careful and nuanced evidence on how "location is never neutral" when matters of non-monetarised values like landscapes are concerned. His initial analysis compared the efficiency of the status quo with pastoral intensification and agricultural conversion of land under PC13. He concluded that there was efficiency of process[531] and scale[532]: "... PC13 is supported by efficient processes and good information; especially in terms of where change may not occur, and where [it] can potentially occur; and the provisions against which it will be assessed" [533].

[463] Mr M C Copeland another very experienced economist agave evidence for Mt Gerald Station. In his opinion PC13(s293V) would impose large costs on the district economy. In particular he wrote that PC13(s293V) limits on pastoral intensification "will lower the 'critical' mass of the of the District economy"[534] and lead to a raft of negative economic effects. Further, "consents for pastoral intensification will be onerous to achieve"[535].

[464] Dr Fairgray's disagreed[536] with Mr Copeland, on both the extent and the likelihood of the potential loss. In his opinion Mr Copeland had not considered several matters fully[537]:

> The agricultural industry in Mackenzie District has been decreasing in relative importance. Even in the absence of PC13, over the last decade and a half the employment in agricultural industries has decreased by over -20% ... Mr Copeland has not recognised this steady decline in the industry nor how it affects the 'critical mass' that he highlights as an issue.
>
> Second, as can be observed most agricultural land in the Mackenzie Basin has not been intensified to date. This indicates that even in that absence of PC13 (s293V), it has not been viable (profitable) for farmers to use the land more intensively. The implication of this

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531 J D M Fairgray evidence-in-chief at paras 6.15 to 6.20 [Environment Court document 9].
532 J D M Fairgray evidence-in-chief at para 6.21 [Environment Court document 9].
533 J D M Fairgray evidence-in-chief at para 7.3 [Environment Court document 9].
534 M C Copeland evidence-in-chief, 19 August 2016 at para 33 [Environment Court document 10].
535 Ibid at para 35 [Environment Court document 10].
536 J D M Fairgray rebuttal evidence at para 11 [Environment Court document 9A].
537 Evidence of Doug Fairgray (J D M Fairgray) for the Council, 15 July 2016 at para12 [Environment Court document 9A].

> rational decision by farmers is that the restrictions set out in PC13 (s293V) on intensification may not be what has determined the decision to not intensify - specifically it is not profitable to use the land for intensive uses. In those circumstances, PC13 (s293V) will have limited impact. I consider that Mr Copeland has not recognised the prospect that large areas of agricultural land covered by PC13 (s293V) that would not be viable for more intensive uses. The introduction of PC13 (s293V) will not by itself change this. Nevertheless, the combined effect of greater availability of water from Meridian and the freeholding of land has enabled significant intensification within the District.
>
> Third, farmers are not precluded from applying for consent to intensify. There will be locations within the Basin which have little or low ONL on which intensification is feasible. In these situations consent to intensify should be enabled. In aggregate, the foregone agricultural production will be minimised, though not avoided. Mr Copeland appears to not recognise this likely result.
>
> Fourth, the nature of PC13 (s293V) is that it applies on a case by case basis, such that where intensification is viable without degrading the ONL values then it can be expected to occur. This will mean intensification outcomes which are specific to the conditions and opportunities within each farm. Unless or until such assessment is undertaken, it is not possible to provide an estimate of the cumulative or aggregate effects on farming. Mr Copeland has not offered an overall assessment, from the aggregate opportunity costs across all farms subject to PC13 (s293V).

We find that evidence on the costs of PC13(s293V) more convincing.

[465] Mr Copeland was of the opinion that the economic benefits of PC13(s293V) would be minor. In particular it is unlikely there will be negative effects on tourism if the status quo continues because pastoral intensification and agricultural conversion "... have not previously deterred tourists visiting the District"[538].

[466] Dr Fairgray disagreed[539]. In his opinion Mr Copeland failed to adequately consider:

- the rapid growth in tourism activity in the Mackenzie District so that it is now "the most important contributor to the District's economy"[540];
- forecasts that tourism is likely to grow by over 7% per annum in the near future[541];

538 M C Copeland evidence-in-chief 19 August 2016 at para 38.4 [Environment Court document 10].
539 J D M Fairgray rebuttal evidence 7 October 2016 at 16 [Environment Court document 9A].
540 J D M Fairgray rebuttal evidence 7 October 2016 at 16.1 [Environment Court document 9A].
541 J D M Fairgray rebuttal evidence 7 October 2016 at 16.2 [Environment Court document 9A].

- that "a major influence on international visitors' decisions to come to New Zealand is the country's natural beauty. The most recent data from the International Visitor survey shows that 51% of respondents list "Its spectacular landscapes and natural scenery" as a reason for being interested in visiting New Zealand"[542];
- the importance of the Mackenzie Basin as an important component of the natural features of New Zealand[543].

[467] Ultimately we find that we have far too little evidence to assess the benefits and costs of either PC13(s293V) on the status quo in relation to the tourism industry.

[468] Further neither Mr Copeland nor Dr Fairgray has valued the externality represented by adverse effects on the non-market (i.e. not tourism related) values of the ONL. Dr Fairgray quoted from a text by D Moran on *The Economic Valuation of Landscapes*[544]:

> the production of landscape falls under the rubric of market failure[545]. In essence the public cannot easily transact to satisfy a demand for landscape as a good. In the absence of a demand backed by a willingness to pay, land owners, predominantly but not exclusively farmers, may not be motivated to provide the features that might match demand. This is because landscape is a public good and they cannot capture benefits from all forms of users. Accordingly, and provided landscape is valuable to the public, there is a rationale for government intervention to stimulate the supply of features that are deemed to be in the public interest.

[469] Dr Fairgray's summary was that[546]:

> Mr Copeland's focus on the "farming vs tourism" comparison is not appropriate in my view. Both industries are important to the community, but the overall value of the ONL and other aspects of the natural environment is not limited to the economic role of tourism. The rationale for PC13 (s293V) is not some simple weighing up of the relative contributions of farming and tourism to the Mackenzie economy.

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542 J D M Fairgray rebuttal evidence 7 October 2016 at 16.3 [Environment Court document 9A].
543 J D M Fairgray rebuttal evidence 7 October 2016 at 16.1 [Environment Court document 9A].
544 *The Economic Valuation of Rural Landscapes*, D Moran, Scottish Agricultural College, 2005.
545 If landscape value was perfectly capitalised in land prices then the market could be relied on to deliver an optimal allocation of landscape but markets do fail.
546 J D M Fairgray rebuttal evidence 7 October 2016 at para 19 [Environment Court document 9A].

[470] We trust we are not being unfair to these witnesses if we say that we consider Dr Fairgray and Mr Copeland have rather talked past each other (and over our heads) on the important issue of externalities. If we understand Dr Fairgray he says that Mr Copeland has not put values on the costs of the externalities (with no PC13) and so his evaluation is insufficient. Mr Copeland replies in effect that Dr Fairgray has not priced the benefits of PC13 either. Further he says the assessment of those matters "... should be left to appropriately qualified experts and not considered within an economic assessment framework"[547].

[471] We respectfully disagree with Mr Copeland's confusion of what he says ought to be the case ("should") with what is the case. His normative judgment that the values are inherent and cannot be priced may or may not be correct. We consider the attempt would be useful if made.

[472] However, we do accept that in these proceedings no attempt whatsoever has been made to quantify the cost (or probability) of the potential loss of one or more native species of plant or animal, or of the "inherent value"[548] of the landscape. Consequently Mr Copeland is correct that ultimately this case comes down (subject to Chapter 8.3) to the court having to weigh:

- no PC13 – the financial benefits to farmers minus the environmental costs to the landscape; against
- PC13(s293V) – the financial costs to farmers minus the environmental costs for the landscape.

The debate between Dr Fairgray and Mr Cooper

[473] FFM called evidence from Mr D J Cooper, a policy advisor for Federated Farmers of New Zealand and a more junior economist. He quite properly acknowledged his advocacy role but put forward what we accept is an honest professional opinion.

547 M C Copeland rebuttal evidence at para 15 [Environment Court document 10A].

548 "Inherent value" is in quotes for two reasons: first, many economists do not accept there are any such things – only values to one or more people; second, they are recognised expressly by section 7(d) RMA in least in the context of ecosystems.

[474] Mr Cooper stated that he agreed with much of Dr Fairgray's evidence. However, he was concerned[549] with "unnecessary restrictions"[550] on economic growth and with the costs imposed by regulation.

[475] Some of Mr Cooper's evidence was rather theoretical. In a section headed *IV Economic Theory and RMA* Mr Cooper described how there can be a tension between the overall need to regulate to provide for optimal net outcomes, and the shape of the regulatory approach adopted because the distribution of cost is not the same as the distribution of benefits. We accept that but as Dr Fairgray observed[551] the issue for the local authority (and this court) under section 32 is "the efficiency and effectiveness of the mechanism(s) applied to achieve the desired social outcomes".

[476] Dr Fairgray agreed[552] with Mr Cooper, that the costs associated with any regulation "... are relevant considerations ...". Dr Fairgray wrote:

> It is not uncommon that ownership of land or other asset which has a significant public good component (including landscape, heritage and environmental protection values) will incur private costs associated with maintaining or enhancing that value, often in proportion to the size or value of the asset ... while PC13 (s293V) may highlight the issues, in my view it is not appropriate to expect that PC13 (s293V) itself would include any mechanism to resolve such issues.

In any event the costs associated with securing a consent for a discretionary activity[553], are similar[554] to the types of cost which any business would face when investigating and evaluating options for expanding production. Dr Fairgray wrote[555] that "While these costs are real, I do not see that PC13(s293V) would mean that such costs would be out of kilter with the same types of costs in a different setting".

[477] On balance we prefer the evidence of Dr Fairgray that PC13(s293V) is a more efficient use of the land and landscape of the Mackenzie Basin than the status quo. That is particularly so since Mr Cooper did not even attempt to identify, let alone to quantify, the costs of the status quo, i.e. of the externalities which are the adverse

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549 D J Cooper evidence-in-chief at para 20 [Environment Court document 11].
550 D J Cooper evidence-in-chief at para 22b [Environment Court document 11].
551 J D M Fairgray rebuttal evidence at para 25 [Environment Court document 9A].
552 J D M Fairgray rebuttal evidence at para 26 [Environment Court document 9A].
553 D J Cooper evidence-in-chief for Federated Farmers, 9 September 2017 [sic] 2016 [Environment Court document 11].
554 J D M Fairgray rebuttal evidence at para 30 [Environment Court document 9A].
555 J D M Fairgray rebuttal evidence at para 30 [Environment Court document 9A].

effects of pastoral intensification and agricultural conversion on the scenic qualities of the ONL or on its natural science values. What price should be placed on the extinction of a small plant species?

8.3 Use of land and water

[478] In fact the land and the landscape are not the only resources which are to be considered in relation to the efficiency of PC13(pc). Another essential resource is the (piped) water which is to be used for irrigation. The use of that water for irrigation raises the question of the two further opportunities foregone which we identified earlier:

- to generate electricity through the WEPS; and
- to use the water downstream of the Waitaki Dam.

[479] The simple point about using water in the Mackenzie Basin is that at first sight it appears inefficient. The options are simple. When the water is taken for irrigation from the Waitaki catchment above any of the power stations in the HEPS it is then lost for power generation. Alternatively that water resource could be left in the river and canals to generate power. After the water flows out of the penstocks at Waitaki Dam it could then be used for irrigation in the lower Waitaki to produce the same or more grass or other crops than in the Mackenzie Basin. Clearly the first option is suboptimal because less "goods" are produced. We elaborate on both the reasons why that is relevant and on the evidence of the market value of the difference in what follows.

The reasons for considering the efficiency of using water for irrigation

[480] Before we address the (limited) evidence on benefits and costs we must clear up some misconceptions by the two local authorities involved in the proceedings. For the MDC Mr Caldwell submitted:

> The costs and benefits of the take and use of water and the allocation of water to different activities is the mandate of the Regional Council and is outside the scope of this hearing. This process is not an opportunity to readdress the appropriateness of regional consents, or allocation plans.

For the CRC Ms Wyss submitted similarly "that a district plan, including Plan Change 13, cannot contain provisions to effectively "reallocate" water that is properly the subject

of regional planning provisions"[556]. We record immediately that this court is not attempting to "readdress the appropriateness of regional consents or allocation plans". We accept that would be completely inappropriate (and beyond our jurisdiction in these proceedings).

[481] Our reason for raising of the allocation of water is not to question the legality of what has been done or to try and change it but simply to look at the efficiency of use of all of the natural resources being affected by farming development in the Mackenzie Basin especially if that has not been done before. There are three, possibly four, independent reasons for doing that in this case.

(1) Efficiency under section 32 should be established regardless of policy

[482] The principal point is that the two Councils have misunderstood what section 32 requires which is an analysis of the efficient use of all relevant resources regardless of policy considerations, as *The Treasury Guide* pointed out. That important point is a complete answer to attempts to say the question of the efficient use of water is not before the court, so in a sense the next three points do not need to be made.

(2) Is use of water on land a territorial function?

[483] The previous paragraph contains the general principle for assessing efficiency, but as it happens there may be another general (and independent) reason why the efficiency of the use of the water for irrigation should be taken account of. It is that the 'use' of water taken from a river or water body may, as a matter of law, not be managed by the CRC. We raised this[557] with counsel but did not receive full submissions on the issue. The MDC took the position that the issue was irrelevant based, as we shall see, on a misconception as to why the court was concerned about this issue.

[484] There are two aspects to the argument. First, the reference to the 'use' of water in section 14 RMA may not be to the general use of water but to its 'use' within a waterbody. This issue was discussed in *P & E Limited v Canterbury Regional Council*[558] ("*P & E*") where the Environment Court wrote:

> [26] We consider, without deciding, that "use" in section 14 is confined to "use in the river" for several reasons:

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556 K J Wyss closing submissions at para 38 [Environment Court document 47].
557 Transcript p 660.
558 *P and E Limited,* above n 253 at [26].

- "use" is defined quite generally in section 2 where the word is used in a number of identified sections but section 14 is not one of them. That suggests that the word "use" in section 14 has its own specialised meaning;
- "use" in section 14 means to employ the properties of water in its natural state (or other state authorised by a consent to dam or take). Examples are the use of the potential energy of water to generate electricity or to use the heat absorption capacity or for subsurface recreation;
- once taken from the river, water can no longer be used in a section 14 sense; ...

The third bullet looks circular to us, but the first two seem valid.

[485] The Environment Court also observed[559] that in fact the CRC does (sometimes) understand section 14 in the narrower sense. For example the definition of [water] "use" in the Waimakariri River Regional Plan ("WRRP") is[560]:

> "Use" means the utilisation of water in a water body for a purpose of exclusive value to the user which cannot be described as a take, a dam, a divert, or a discharge; including the use of the flow in a water body to operate a turbine, a waterwheel, sluicing equipment or other mechanical devices; but not including a use in relation to the surface of the water body, such as swimming, fishing or boating.

[486] The more recent CLWRP does not define "use" or "water use", and nor does the WCWARP. The CRC seems to have now changed its general approach and now reads 'use' in section 14 in a wider (and more problematic) and undefined way. For example, the CLWRP appears[561] to use the word 'use' for irrigation.

[487] The second aspect is that water in a pipe (and all water to large modern irrigators is piped) is not "water"[562]. Consequently it is no longer subject to section 14 RMA: *Wheeler Forrest Associates Ltd v Farquhar*[563]. Conversely the use of piped water on land appears to be a territorial function since there is no restriction on uses which may be managed by a territorial authority under section 31. We did not receive argument on this but it appears to us that piped water is an "associated natural ... resource" in section 31(1)(a) RMA.

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559 *P and E Limited,* above n 253 at [27].
560 Footnote 15 [WRRP p 35].
561 Rule 5.123 pLWRP.
562 According to the definition (c) of "water" in section 2 RMA. This point was also made in *P and E Limited,* above n 253 at [26] fourth bullet.
563 *Wheeler Forrest Associates Ltd v Farquhar* [2001] 2 NZLR 417 (HC) at 424.

[488] We do not, in the absence of submissions on those points, put any weight on this argument by itself. However, there are important issues here which need to be considered by the Senior Courts at some stage.

(3) Efficient allocation of water under the Waitaki Catchment Regional Plan

[489] This and the next point are specific to the Waitaki catchment and concern the efficiency of use of the water of the upper Waitaki River. The efficient use of water in the upper Waitaki catchment (including the Mackenzie Basin) could have been considered at two stages: in the formulation of the Waitaki Catchment Water Allocation Regional Plan ("the WCWARP") by a Special Board in 2006, or on the granting of water permits to take and/or use water in the Mackenzie Basin. We consider each in turn. We raised these points with counsel at the hearing and they responded in their final submissions.

[490] The WCWARP also sets out an allocation regime for different activities in the catchment[564] 275 m^3/s of water was allocated to irrigation above the Waitaki Dam by Table 5 of the WCWARP (as a discretionary activity). Ms Wyss submitted[565] that "the costs and benefits of the allocation of water has occurred in formulation of the WCWARP. The WCWARP was heard by a Board of Inquiry with extensive evidence and analysis on competing uses of water". The section 32 Report attached to the Special Board's Report on the proposed WCWARP contains two relevant references to efficiency of water.

[491] The first concludes[566]:

> **5.5.5 Efficiency**
>
> Following the consideration of the benefits and costs of the provisions, it is the Board's judgement that the provisions relevant to the division of the annual allocation of water between activities:
>
> - upstream of the outlets of Lakes Tekapo, Pūkaki and Ōhau, and including Lakes Tekapo, Pūkaki and Ōhau are of moderate efficiency

564 K Gimblett Supplementary Statement of Evidence dated 7 February 2017 [Environment Court document 30A].
565 K J Wyss closing submissions at paras 36 and 37 [Environment Court document 47].
566 Waitaki Catchment Water Allocation Regional Plan – Section 32 Report at p 37.

- upstream of Waitaki Dam but downstream of the outlets of Lakes Tekapo, Pūkaki and Ōhau are of moderate efficiency
- downstream of Waitaki Dam but upstream of Black Point are of high efficiency
- downstream of Waitaki Dam but downstream of Black Point are of high efficiency.

That analysis suggests that if only[567] economic efficiency was being considered water for the Upper Waitaki would have been allocated to the Lower Waitaki. In other words, the Upper Waitaki allocations were relatively (and all considerations of efficiency are relative) inefficient.

[492] The second relevant point is the discussion of Benefits and Costs in the section 32 Report on the WCWARP. It assesses the "economic" benefits and costs as follows[568] (relevantly):

Economic [Benefits]	Economic (Costs)
Enables an increased number of economic enterprises to access the allocated water, potentially achieving higher overall economic gains.	High levels of technical efficiency in the use of water may not result in an economically efficient use of resources. However, the resource consent process allows consideration of this.
Achieves greater economic returns from the allocated water by reducing waste.	Individual water users and communities may face capital expenditure requirements to upgrade existing water management (irrigation, stock water, community water and water race) systems. However, the resource consent process allows consideration of this.
	...
	(Underlining added)

We note that the Section 32 Report expressly relies on the resource consent process to consider efficient use of the resources. That makes it important to check that was done (since the Councils are relying on that).

[493] There is an additional reason we consider that the WCWARP was inconclusive about the efficiency of water use and that is because the Plan was primarily concerned with quantity allocation of volumes of water, not with water quality and not with

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567 Of course under the RMA efficiency considerations are never the only considerations. They are only one of many matters to be had regard to under section 7, and in turn that is subservient to sections 5 and 6 RMA.

568 Waitaki Catchment Water Allocation Regional Plan – Section 32 Report at p 49.

intervening land use. Thus in several ways – as discussed recently in *Infinity Investment Group Holdings Limited v Canterbury Regional Council* (Final)[569] – the WCWARP was necessarily incomplete and that reflects in the discretionary activity status of specific consents to take and use water from the Waitaki catchment (including from within the Mackenzie Basin).

[494] Those considerations are reinforced by the fact that since the WCWARP commenced operation in 2006, the NPS for Renewable Electricity Generation 2011 ("NPSREG") has come into force. Its policy B(a) makes " ... continued availability of the renewable energy resource" (i.e. water) a matter to have particular regard to[570] by decision makers.

[495] We conclude that the efficient use of water from the Waitaki catchment was only provisionally determined by the Special Board setting the WCWARP. To the extent it did determine efficiency issues it found that the allocation of water for irrigation in the Upper Waitaki was inefficient (i.e. of medium not high efficiency). It dealt with that by providing that all takes (except for stockwater, etc.) are discretionary activities.

[496] In relation to that discretionary status of water use, Ms Forward cited *Swindley v The Waipa District Council*[571] for the proposition that:

> ... the fact that a particular class of activity is recognised by a district plan as a permitted, controlled, or discretionary activity implies that in general that class of activity is an efficient use and development of the resources for the purposes of Part [2 RMA].

That may be correct of discretionary status of land use activities under a district plan given the assumed efficiency of existing property law conferred by section 9 RMA – see the Procedural Decision in *Infinity Investment Group Holdings Limited v Canterbury Regional Council*[572].

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569 *Infinity Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36 at [216].

570 NPSREG Policy B(a).

571 *Swindley v The Waipa District Council* (PT) Decision A75/94 at p 23.

572 *Infinity Investment Group Holdings Limited v Canterbury Regional Council* (No. 1) [2017] NZEnvC 35 at paras [32] and [35].

[497] We doubt that the *Swindley* principle applies to section 14(2) RMA water permits. There are no real markets with pricing of water under the RMA. Consequently there are no market prices which can be used to assess the benefits and costs of alternative uses of the resources. We infer it is for those reasons that the question of the efficient use of water was left open in the WCWARP.

(4) Was efficient use of the water considered when water permits to use were granted?

[498] Finally the question of the efficient use of the water resource could have been determined when individual water permits to take and/or use were granted in the Mackenzie Basin. Ms Wyss submitted that[573]:

> The efficiency of the take and use of water is also a relevant matter for the consent authority to consider under WCWARP when assessing an application for resource consent to take and use water.[574]

In fact they have not been considered for many of the resource consents in the Mackenzie Basin.

[499] The Environment Court recorded in *Glentanner Station Ltd v Canterbury Regional Council*[575] ("Glentanner") that many water permits to "use" water for irrigation in the Mackenzie Basin were granted in a tranche of 104 applications for water permits to take water from the Upper Waitaki catchment[576] considered in 2009/10 by Commissioners appointed by the CRC. The CRC's Commissioners issued one generic Part A decision and a series of farm-specific Part B decisions thereafter. There were 50 appeals to the Environment Court. In neither did they consider the efficiency of use of the water. Paradoxically they did consider the efficient use of land. For example in another appeal the Environment Court observed[577] in that 'Part B' decision that "the CRC's Commissioners appeared to go off-track in their section 7(b) analysis by comparing (irrelevantly) the value of Lone Star's land for dryland farming versus its value for irrigated farming. The proper comparison for the purposes of the water take applications would appear to be of the different uses for the water"[578]. In fact, there is

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573 K J Wyss Closing submissions at para [37].
574 WCWARP, Policies 15-20.
575 *Glentanner Station Ltd v Canterbury Regional Council* [2014] NZEnvC 147 at para [9].
576 Above the Waitaki Dam.
577 *Lone Star Farms Ltd v Canterbury Regional Council* [2014] NZEnvC 247 at para [4].
578 The second sentence in this passage is on reflection incorrect. That analysis was relevant, simply incomplete, as we discuss next.

nothing wrong with considering the land use options: that should be part of the assessment of benefits and cost. However, it is axiomatic that all benefits and costs must be taken into account. The more obvious costs to take into account on a water take application were the opportunity costs of the water, and those were not factored in.

[500] The court stated in *Glentanner* (relevantly)[579]:

> [14] The court has expressed concerns in its minute of 29 January 2014 about [an] apparent error ... of law in the Commissioners' Part A and part B decisions:
>
> - when considering section 7(b) of the RMA the decisions did not consider more appropriate uses of the water which was to be taken[580];
>
> ...

The court then required evidence[581] and submissions on that issue. Rather than supply those the appeal was withdrawn on 25 November 2014. The same issue had earlier been raised in *Meridian Energy Ltd v Canterbury Regional Council*[582] and again (subsequently) in *Lone Star Farms Ltd v Canterbury Regional Council*[583]. Again resolution of the efficiency issue was avoided as described by the court.

Opportunity cost of hydroelectricity not generated

[501] A supplementary brief of evidence[584] from Dr Fairgray lodged at the request of the court[585] assisted us. Dr Fairgray referred to a study[586] undertaken by Opus in 2014 of what was called the "Tekapo Transfer Scheme". The proposal there was to transfer water out of the Waitaki catchment through Burkes Pass and into the Opihi catchment to irrigate land there. Dr Fairgray described the results of the study's comparison of farm production for irrigated land compared with existing dryland farming as follows[587]:

> On the basis that irrigation would mean the intensified land is used primarily (70%) for dairy farming (with arable, sheep and beef and dairy support each 10%), the study estimated a net difference of +$2,600 to +$2,800 per hectare in annual profit[588]. On a Net

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579 *Glentanner Station Ltd v Canterbury Regional Council* [2014] NZEnvC 147 at para [14].
580 Commissioners' Decision on *Glentanner* Part B paras 16.10 and 17.4.
581 *Glentanner Station Ltd v Canterbury Regional Council* [2014] NZEnvC 147 at para [27] Order [A].
582 *Meridian Energy Ltd v Canterbury Regional Council* [2013] NZEnvC 70 at para [15].
583 *Lone Star Farms Ltd v Canterbury Regional Council* [2014] NZEnvC 135.
584 J D M Fairgray Supplementary Brief 22 December 2016 [Environment Court document 9B].
585 Minute 3 November 2016 at [8].
586 The Opus Study (2014).
587 J D M Fairgray Supplementary Statement 22 December 2016 at 4.8 [Environment Court document 9B].
588 The Opus Study (2014) at 9.5.2 Cost Benefit Analysis, p 41.

Present Value (NPV)[589] basis (applying the Opus base case 25 year horizon at 8%) this equates to $21,500 to $22,500.

[502] Then on the "key issue"[590] of the opportunity cost of using the water for irrigation instead of hydroelectricity he wrote[591]:

> The Opus Study identified an annual opportunity cost of $2.6 million per m^3/s of water used for irrigation. This was on the basis of a long run marginal cost (LRMC) of $122.40 per MWh. It also allowed for water to be abstracted from Lake Tekapo, which means that it would otherwise be available for hyrdo-generation at all 8 of the dams on the Waitaki system (Tekapo A and B, Ohau A B and C, Benmore, Aviemore, Waitaki). Accordingly the $2.6 million cost represents a high estimate of the opportunity cost. Water which was abstracted from below Lake Pukaki, for example, would reduce hydro-generation from only the 6 dams downstream from that point.

[503] Opus' conclusions, based on a calculation[592] that each cubic metre of water is sufficient to irrigate in excess of 5,000 hectares, were[593] as summarised by Dr Fairgray:

> 4.14 The foregone electricity production due to irrigation equated to a cost of $485 per hectare per year[594]. In NPV terms, this cost is $3,800 to $3,900 per ha.
>
> 4.15 This indicates that the net outcome from irrigation (additional farm profit less opportunity cost of foregone/more expensive electricity) is in the order of +$2,100 to +$2,300 per hectare per year. On an NPV basis this equates to $17,500-$18,500 per irrigated ha, after allowing the opportunity of $3,800-$3,900 per ha.

[504] Mr Copeland agreed[595] that there is a positive net return from irrigation even when the opportunity cost of electricity production foregone is taken into account.

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589 Dr Fairgray's footnote reads: Net Present Value (NPV): is an applied method used in economics to assess projects which result in benefits and cost over many time periods. The term 'net' in the NPV refers to the summing of costs and benefits over the entire life of the project to produce a net position. The team 'present' in NPV refers to fact that there is a time preference or time value of money, in the NPV the future costs are 'discounted' to a comparable present value. Intuitively people generally prefer receiving a dollar today over receiving a dollar in a year's time. To account for this time preference the future values associated with a project are 'discounted'. The application of NPV is a standard method applied when assessing policies and projects. The Treasury of New Zealand provides an extensive outline of the method in – *Guide to Social Cost Benefit Analysis* (2015).

590 J D M Fairgray Supplementary Brief 22 December 2016 at 4.9 [Environment Court document 9B].

591 J D M Fairgray Supplementary Brief 22 December 2016 at 4.13 [Environment Court document 9B].

592 J D M Fairgray Supplementary Brief 22 December 2016 at 4.16 [Environment Court document 9B].

593 J D M Fairgray Supplementary Brief 22 December 2016 at 4.14 and 4.15 [Environment Court document 9B].

594 The Opus Study at p 31 Table 7-3.

595 M C Copeland rebuttal evidence at para 16 [Environment Court document 10A].

Opportunity cost of not using the water for irrigation below Waitaki Dam

[505] However, Dr Fairgray did not consider before the hearing – and in fairness he was not asked to – whether there was another opportunity foregone by using water for irrigation in the Mackenzie Basin. That opportunity is to use the water in the WEPS to generate electricity and then to take it out of the Waitaki River for irrigation below the bottom power station at the Waitaki Dam. For example, a recent decision of the court has found that there is demand for more water for irrigation on the Hakataramea catchment that that tributary of the Waitaki can provide: *Infinity Investments Group Holding Limited v Canterbury Regional Council*[596].

[506] We put to the economists Dr Fairgray, and Mt Gerald's economist Mr M C Copeland that there was a further opportunity lost by using water to irrigate in the Mackenzie Basin rather than downstream of the Waitaki Dam (after using it to generate hydroelectricity).

[507] First, the court had this exchange with Dr Fairgray[597]:

> Q. … [A]ssume there is insufficient water downstream in the Waitaki and indeed what has been allocated already is over-allocated and it has to be pulled back, so they'd love some water from somewhere, then when you're talking about the net benefits of irrigation in the Mackenzie Country, that has to take into account, well if you like you have to subtract not only the benefits foregone of extra water flowing through the turbines all the way down the Waitaki but the benefits foregone in the Lower Waitaki.
>
> A. Yes.
>
> Q. Which is likely, would you say, to be equal or greater the benefits in the Upper Waitaki of irrigation.
>
> A. I have to say I haven't look specifically at the Lower Waitaki but the work I have, the studies I have looked at in terms of irrigation values generally, more or less you'd expect them to be about the same.

[508] A similar exchange occurred with Mr M C Copeland the economist called by Mt Gerald Station. The court asked:

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596 *Infinity Investments Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36 at [80].

597 Transcript p 102 line 30, p 104 line 9.

Q. ... Now, I think you agree with me here that in national benefit terms as opposed to district ... benefit terms, you could achieve the same benefits, more or less, by irrigating downstream, below the Waitaki dam?

A. Yep, yep.

...

Q. ... I'm just concerned about the national benefit under section 7(b) the efficient use of resources. So in effect the benefit of this proposal cancels, out because there's ... cost foregone, all right?

A. Accepted so far, yes.

Q. So there is no other benefit is there?

A. Not that I can recall right now.

Q. And then if you can look at paragraph 4.14 of Dr Fairgray's first supplementary [evidence].

A. Yes.

Q. There's a cost of irrigating farmland in the Mackenzie of around $3,800 to $3.900 per hectare ... isn't there?

A. Correct.

Q. So on a national basis there is no benefit to the economy from irrigating land in the Mackenzie. There is, in fact, a not insignificant cost of nearly $4,000 per hectare?

A. Correct, I mean, I accept – I haven't done the sum, I mean, this figure here was only a fraction, as I recall something like one-sixth of the additional farm benefit, so I'm having to accept your assumption that downstream and upstream are about the same but it could well be that upstream was better than downstream.

Q. It could be the other way around?

A. It could be, yeah, well, you know, it can – hypothetically, accepting your assumptions.

...

Q. ... So ... if we're dealing with the economics of it under section 7(b) as far as we can quantify, the net benefit is actually a net cost and it's nearly $4,000 per hectare?

A. Because of foregone electricity generation, yes.

Q. And because you could substitute the water by using it downstream?

A. Yeah, I accept that, that's so far so good.

[509] As those passages show that, while the economists were understandably cautious about endorsing the proposition that the benefits from conversion of dryland to irrigated farming would be the same in the lower Waitaki as in the Mackenzie Basin, they did not dissent from the proposition. Further, two independent studies suggest that the benefits (if not the costs) of conversion to irrigated farming are approximately comparable throughout Canterbury. First the Opus study showed, accordingly to Dr

Fairgray[598] that the benefits of irrigating land in the lower Waitaki would likely be $20,000 + per hectare since Dr Fairgray wrote "the figures are generally comparable"[599] when comparing the Mackenzie Basin with the Opihi Catchment. Secondly, a report by NZIER referred to by Dr Fairgray in his evidence-in-chief shows that NZIER considered it was meaningful to analyse and report on Canterbury as a whole, reporting[600] in Dr Fairgray's words:

> NZIER[601] (2014) estimated gross revenue from irrigated dairy farming in Canterbury of $11,593 per ha, assuming a pay-out of $6.59 per kg. At the current dairy pay-out of around $4 per kg, this would equate to around $7,400 per ha. While the additional revenue per ha from irrigation will vary from location to location, and between different farming type (for example, dairying vs dairy support vs irrigated cropping and finishing) it is clear that irrigation and pastoral intensification does generate considerable additional farm income.
>
> Irrigation is also associated with considerable additional operating costs.

[510] Dr Fairgray did not overlook transaction costs since, as Mr Copeland pointed out[602] and Mr D J Cooper elaborated[603], they are important. They are taken into account as part of the producer's costs when establishing the producer's surplus as part of the NPV calculation.

[511] Mr Gimblett usefully commented on *The Treasury Guide* in some notes he wrote overnight after hearing the economists' evidence. He produced the notes[604] which include the statement:

> ... when doing the overall evaluation under S32 (1) (b) (ii) and more broadly under S32 (1), if one was to assume there is credible evidence of an alternative that:
>
> a. would serve to deliver, say, benefits of the protection of landscape and biodiversity values in the upper catchment, and
> b. as well as benefits under, say, s 7(j), and
> c. whilst also enabling economic benefits of pastoral intensification to occur in the lower catchment through land use change,

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598 J D M Fairgray Supplementary Statement 22 December 2016 at 4.8 [Environment Court document 9B].
599 J D M Fairgray Supplementary Statement 22 December 2016 at 4.8 [Environment Court document 9B].
600 J D M Fairgray evidence-in-chief at para 5.21 [Environment Court document 9].
601 Value of irrigation in New Zealand: an economy wide assessment. NZIER and AgFirst Consultants November 2014.
602 Transcript p 130 line 5.
603 D J Cooper evidence-in-chief [Environment Court document 11].
604 Exhibit 30.2 at para 5.

> then one would properly assess efficiency and effectiveness of the provisions under s 32 (1) (b) in a manner that recognises that those benefits identified under s 32(2) as being lost by restricting provisions are simply local benefits lost. The same economic benefits may be achieved regionally or nationally by that credible alternative without the same environmental costs. That is because the identified costs under s32(2) that are focused on the effect of the provisions locally should not lead to the invalid evaluative premise that benefits lost locally mean benefits are lost nationally or regionally. In such a case the national or regional focus may be appropriate in the evaluation under s 32 (1) (b) where taking this wider perspective better serves Part 2 including s 7(b).

That is not entirely clear, but we give credit to Mr Gimblett (a planner) for attempting to understand and explain to us what section 32 RMA and section 7 require. It seems to us that the important point in Mr Gimblett's analysis is his last sentence with the effect that the benefits and costs should not be assessed simply on a district basis.

[512] Based on the evidence of the economists and Mr Gimblett we hold that the alternatives we have to compare the net benefits of are:

(1) irrigation of one extra hectare in the Mackenzie Basin; and
(2) PC 13 and the potential for irrigation of one extra hectare below Waitaki Dam.

[513] On the evidence the NPVs are:

(1) $17,500 to $18,500 per irrigated hectare in the Mackenzie Basin
(2) $21,500 to $22,500 per irrigated hectare below Waitaki Dam.

This per hectare comparison is particularly useful since we do not have complete figures for the extent of potentially irrigable land[605]. However, we found in Chapter 2 of this decision that there are over 10,000 hectares of as yet ungranted applications before the CRC. Assuming that the same area could be irrigated below the Waitaki Dam then the difference in NPVs is ($3,000 x 10,000 =) $35 million which is not an insignificant figure.

[514] Accordingly we find that PC13 is likely to be more efficient than the status quo because it would enable the more efficient use of the land and water and other component resources to be considered on a case by case basis. We note that analysis

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605 D J Cooper evidence-in-chief at para 40 [Environment Court document 11].

disregards – because they are unquantified – the cost of any externalities which are likely to be higher in the Mackenzie Basin with its ONL and tourism industry, (quite apart from any cost benefit advantages in pushing nutrient loadings (much) further down catchment).

[515] Finally we note that in closing submissions for FFM Mr Gardner suggested that the *Mackenzie Agreement* would be a better course of action than PC13. There is no economic evidence on which we can assess that in a quantitative way. Qualitatively it is possible that may have been correct in 2011 when less of the Mackenzie Basin had been affected by pastoral and agricultural intensification, although it appears there are ambiguities in that document which may undermine its utility. In any event if complete reliance on the *Mackenzie Agreement* was a possibility then, it is no longer so. The accumulative actions of farmers throughout the Basin have as several of the witnesses said, brought the Mackenzie Basin to a point where its landscape values have been modified and its values (and status) as an ONL is being threatened. We consider management by the Council is overdue.

[516] In any event there is no evidence about the net benefits and costs of this alternative, so there is completely inadequate information on which to assess it.

8.4 The risk of acting or not acting

The risks to farming viability

[517] On the risk to farmers Mr Gardner submitted[606]:

> ... that the risks to the New Zealand community of the Council getting planning in the Mackenzie District wrong are much higher than they are in many, if not most other parts of the country. There seems little doubt that the Council is able to regulate farmers out of business, if doing so best promotes the purpose of the RMA.

[518] We accept, on the evidence of Mr Murray, that earnings from farming are low[607]. Little has changed: we found – again on Mr Murray's evidence – in the First Decision[608] that "... high country farming is generally an unprofitable activity at present". As a matter of fact the "viability" of a farm depends on, for example, the payment of interest on large (speculative) borrowings. That is particularly likely at present with New

606 R Gardner Opening Submissions at para 16 [Environment Court document 2.2].
607 J B Murray evidence-in-chief at para 8 [Environment Court document 5].
608 [2011] NZEnvC 387 at para 42.

Zealand's dairy farming bubble. The position taken by Ms Murchison appeared to be that[609] if the viability of a farm is at risk then protection of the ONL was inappropriate. That approach is incorrect for a number of reasons.

[519] The difficulties of assessing viability[610] are compounded in the Mackenzie Basin where large prices are paid for stations which may have little to do with price earning ratios and much more to do with lifestyle choices. Mr Caldwell produced[611] a memorandum listing recent sales prices in the Mackenzie Basin. It advised of three recent sales within the Basin.

- *Rhoborough Downs*

  Rhoborough Downs Station which was at the time of sale (substantially covered in wilding conifers) has sold twice since 2011, and is now operating in two separate ownerships:

  (a) sold in 2011 for $3,200,000 to the Wigley family; and
  (b) re-sold in 2014 for $8,000,000, comprising $7,260,000 the bulk of the farm and $740,000 for a transfer of ownership of a smaller parcel (approximately 800 hectares) within the Wigley family.

- *Guide Hill*

  The MDC advised that Guide Hill Station sold in 2015 for $14,500,000. Guide Hill is a relatively small station.

- *Mount Cook*

  The High Court has recently declared it could be sold[612]. Mr Caldwell advised that the media has previously reported an offer of $4,700,000-$4,800,000 was accepted prior to the hearing[613].

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609 Transcript p 779, lines 23-26 and p 780, lines 30-33.

610 To the extent that is relevant: the real calculation should be of the farmers' producer surpluses (after taking proper costs into account). As usual we received no specific evidence on these but assume they are taken into account in the Opus and other reports referred to in Chapter 8.

611 [Environment Court document 1D].

612 *Re Burnett Mount Cook Station Charitable Trust* [2016] NZHC 2669 at [139].

613 http://www.stuff.co.nz/ article *Mt Cook Station can be sold, Court rules* 21 November 2016, Charlie Mitchell; http://www.stuff.co.nz/ article *Tourism could be an option at Mt Cook station, buyers may sue* 5 October 2016, Charlie Mitchell.

[520] The viability of a farm should be assessed objectively rather than on a landowner's subjective view. We find that the dire results predicted by Mr Gardner for FFM are unlikely to occur on a basin-wide basis if a farmer cannot afford to apply for resource consent for pastoral intensification or agricultural conversion or cannot afford to comply with conditions of consent. It is more likely than not that a "lifestyle" or northern hemisphere "bolthole" purchaser will come in and pay the sort prices that have been achieved in the recent sales.

[521] Just as there can be no blanket approach requiring that all use and development be prohibited, there can be no doctrinaire approach that says if a farm is made financially non-viable then there must be no protection of the ONL. Clearly, a local authority (and the court) will do all it can to avoid that consequence, but it may be a possibility in some situations. The Environment Court considered a comparable situation in *Day v Manawatu-Wanganui Regional Council*[614]. There the court discussed the possible outcome of a situation where nitrogen loss limits are put in place and a farmer was not able to meet them. The Environment Court asked:

> - Should that farmer be given some sort of exemption from a regime that his or her colleagues can comply with? or;
> - At the other end of the spectrum, should he or she be told that the category of farming, or the management regime, or the intensity of the operation being conducted on that particular type or class of land, is simply unsustainable because of the quantity of apparently irreducible nutrient loss?

Its answers were:

> ... If the latter, the farmer will have a decision to make: to seek a resource consent for a more stringent activity status; to change the category of farming or the management regime or intensity; or to move somewhere else.
>
> Those are the same options that might face the operator of any business in a changing rules regime, and there is nothing that gives farmers a privileged place in the scheme of things.

The risks to tourism

[522] On balance we prefer the evidence of Mr Copeland on the risks of the two options to tourism in the Mackenzie Basin. We consider the probability of a serious fall

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614 *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at 5-176.

in producers' surpluses (producers being all operators in the tourism and supporting industries) if PC13(s293V) is low. This factor suggests there is no need to confirm PC13 in any form.

The risks to weed and pest control

[523] Mr Gardner also submitted:

> Mr Simpson's and Dr Scott's evidence make it plain what is likely to happen if that scenario was to arise in the Mackenzie District[615], that wilding pines, rabbits and hieracium would overcome the land quickly, which raises the question, would the outstanding natural landscape that the Mackenzie Basin now is still be outstanding natural landscape if that was to happen? It is Federated Farmers submission that the scenario is far less likely to arise if the changes proposed to PC13 in the attachment to Ms Murchison's evidence are to be adopted, than if the Council's proposals are confirmed by the Court.

[524] Mr Gardner put that to Dr Walker and she answered that "that's a value judgement, which way you want to lose your biodiversity"[616]?

[525] We find it hard to believe that there is a high probability of many farmers in the Mackenzie Basin simply abandoning their weed and pest programmes. There is now a Regional Pest Strategy and various other initiatives set out by Mr Briden. We consider the risks of serious extra costs being imposed on society if PC13(s293V) is confirmed, are low.

The risks to the living natural science components of the ONL

[526] Third, there are often some components of an ONL which are matters of national importance in their own right – the natural science values may include areas of significant indigenous vegetation or habitats of significant fauna which should be protected under section 6(c) RMA. In fact both those provisions are relevant in this case.

[527] Much of the flat and easy country within the Basin is the set of ecosystems which is the home of the suite of endemic plants listed earlier. For the MDC Mr Harding considered that the natural science values especially the ecological values of the

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615 A W Simpson Statement of Evidence on behalf of Federated Farmers of New Zealand Inc at 3.5; P J Boyd Statement of Evidence on behalf of Federated Farmers of New Zealand Inc at 3.10; W R Scott Statement of Evidence on behalf of Federated Farmers of New Zealand Inc at 7.11.

616 Transcript p 285, line 12.

Mackenzie Basin would be "substantially provided for" in PC13(pc). On the other hand FFM said PC13 would be going too far. However, the Guardians witness Dr Walker did not[617] agree with Mr Harding[618] that PC13 will substantially provide for the protection of the ecological components of the natural landscape character of the Mackenzie Basin, for reasons set out below:

59.1. Objective 3B inadequately describes these ecological components (it refers only to 'tussock grasslands")[619];

59.2. PC13 proposes to make pastoral intensification a non-complying activity in Site of Natural Significance (SONS), Scenic Viewing Areas (SVAs), Lakeside Protection Areas and Scenic Grasslands (SGs). [They] together cover an insignificant fraction of the ecological components of the Basin's natural landscape character, including areas likely to be significant indigenous vegetation or insignificant habitats of indigenous fauna. They plainly fail to provide for the diversity, connectivity, and scale that sustain these values in the landscape, being principally focussed on localised, non-representative features adjacent to roads and lakes.[620]

59.3. As determined by Mr Harding,[621] the District's identified SONS are out of date and very seriously inadequate.[622] Most uncultivated and unirrigated areas on glacially and alluvially derived depositional landforms (moraines, outwash gravels, and river terraces) in the Mackenzie District, including severely degraded areas, are likely to be significant indigenous vegetation or significant habitats of indigenous fauna, and are not recognised.

59.4. Many District Plans in eastern South Island have inadequate schedules of SONS, and this has abetted recent widespread loss of significant indigenous vegetation or significant habitats of indigenous fauna, in my experience. Because of the extent, distinctiveness, and increasing rarity of ecological values, and current development pressures, I consider this situation in Mackenzie District to be exceptionally acute.

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617 Dr S Walker evidence-in-chief at para 59 [Environment Court document 17].

618 M A C Harding evidence-in-chief at para 90 [Environment Court document 12].

619 A list of subzone-wide ecological features that Dr Walker considers to be ecological components of the natural landscape character is appended to her evidence at Appendix 12. In her opinion, the special geomorphological and landform components that underpin the ecological components are also inadequately described in Objective 3B.

620 Dr Walker mapped these areas in Figure 5 of Appendix 4 to her evidence. SVAs, LPAs, and SGs together cover 18,900 ha, which is 10.5% of the district's land area. They cover 13.3% of moraines and 8.5% of outwash gravels.

621 M A C Harding evidence-in-chief 15 July 2016 at para 22 [Environment Court document 12].

622 Dr Walker mapped these areas in Figure 5 of Appendix 4 to her evidence. Mapped SONs add 13,600 hectares of land to the area covered by SVAs, LPAs, and SGs together, which is a further 7.5% of the district's land area. They cover a further 2.9% of the district's moraines and a further 6.1% of the district's outwash gravels.

59.5. Mr Harding identifies four practical barriers to undertaking survey to identify and map SONS.[623] I consider that these barriers are insurmountable, at least within a timeframe that would realistically protect the District's significant areas. Survey and listing is a protracted process: those in Waitaki and Queenstown Lakes Districts are incomplete after >9 and 15 years respectively.[624] Furthermore, assessment context is changing rapidly with the increasing loss and rarity of these ecosystems and species. SONS survey and mapping would therefore become outdated before it was complete.[625]

59.6. I have had experience of the Council's capacity and preparedness to intervene and apply District Plan provisions to protect ecological values over the last six years. This experience does not make me confident that PC13's proposed discretionary activity status for pastoral intensification across most of the district's unrecognised significant sites[626] will be applied in a way that will provide for their protection in practice and is commensurate with their national importance.

[528] We have found that pastoral intensification and agricultural conversion have already adversely affected those ecosystems, and predicted that further pastoral intensification and agricultural conversion may lead to the extirpation of some of those species from the Mackenzie Basin. The risks of this are quite high on the unopposed evidence of the ecologists. Indeed on Dr Walker's evidence each discretionary application would need to be carefully considered.

Risks to tangata whenua

[529] For completeness we find in this case the values to tangata whenua are either very specific and protected by the Statutory Acknowledgements or very broad and require no particular restrictions on how the land (outside the specific sites) is developed and used.

[530] Overall we consider the risks of acting or not acting, push us to confirm PC13(s293V) subject to the changes we have directed.

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623 M A C Harding evidence-in-chief 15 July 2016 at para 83 [Environment Court document 12].

624 No new SONS have been scheduled in Waitaki District. Queenstown Lakes District notified a new Significant Natural Area (SNA) schedule in late 2015 but some SNAs are being appealed.

625 This changing context is described in paragraphs 50 to 52 of Dr S Walker's evidence. Her footnote added: "For the same reason, identification of Significant Inherent Values (SIVs) in tenure review rapidly become outdated, as noted in Appendix 10 to that evidence.

626 Those sites outside mapped SONS, SVAs, LPAs, SGs and *'tussock grasslands' within 1 km of the highway, Haldon Road, Godley Peaks Road and Lilybank Road.*

9. Overview and results

9.1 Introduction

[531] We have evaluated the effectiveness of the proposed policies and rules in Chapters 6 and 7, and their efficiency compared with the status quo in Chapter 8 above. It remains to assess whether each provision is, overall, the more appropriate policy or method.

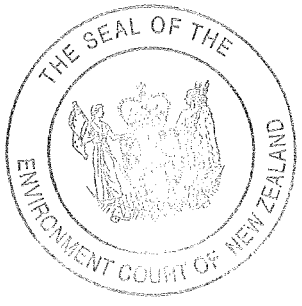
9.2 Do the policies and rules achieve the objectives of Chapter 7 MDP and of the CRPS?

[532] One of the difficulties we have in these proceedings is to work out the extent to which the policies to implement Objective 3B should also reflect other relevant objectives in the MDP. We have already referred to that issue in relation to the tangata whenua's issues. It also arises in relation to biodiversity.

[533] Earlier[627] we quoted Mr Gardner's submission that Rural Policy 1A of the MDP and its methods must be taken as working. On the evidence given to us, and from which we have quoted at length, Mr Gardner's submission is quite wrong.

[534] We accept that many landowners in the Basin have or are proposing (often as part of tenure review under the CPLA) to protect specific areas of their land from any further use and development. We read and heard evidence from Mr Murray (The Wolds), Mr Simpson (Balmoral) and Mr Boyd (Haldon) about the admirable projects on the land they own or manage, and Mr Simpson showed us his 'Red Tussock' reserve on our site inspection.

[535] However, simply because some land is protected, does not mean that the natural science components of the ONL are sufficiently protected. Pastoral farming may be generally appropriate to protect those values, but we judge that pastoral intensification is often inappropriate, and that agricultural conversion is usually unsustainable in the Mackenzie Basin when sustainability is properly understood to include all components of the ONL's character. That comprehends both the threatened endemic flora, and the traditional pastoral farming practices embodied (or caricatured) in the "Mackenzie Country" image projected in advertisements.



627 In Chapter 4.2 of these Reasons.

[536] Mr Gardner submitted in opening, and repeated in closing[628] that:

> ... landowners are proactive resource managers who rely on their properties' natural and physical resources in undertaking their farming business, and that it is in their best interest to manage their land sustainably, in particular by recognizing that the best defence against invasion by wilding pines (and other weeds and pests) is profitable farming, which involves a degree of intensification of land use.

We accept that it is in farmers' best interests to manage their land sustainably. What "sustainably" means varies from place to place. Sustainable management is made more difficult when the land is within an ONL, because then, under the question arises as to "what in terms of section 6(b) of the RMA is inappropriate development?"

[537] But there is a more fundamental objection to FFM's case on this issue. In *Man O'War Station Ltd v Auckland Council*[629] the Court of Appeal held that it "would be illogical or contrary" to the intent to section 6(b) if an area is only classified as outstanding if unsuitable for other activities such as farming[630]. It also accepted that "The result of this approach may mean that, in some cases, restrictions of an onerous nature are imposed on the owners of the land affected"[631].

[538] We have found that there is a further nationally important aspect of sustainable management of the ONL of the Mackenzie Basin which FFM has nearly turned a blind eye to and that is the maintenance of the lowland and easy country habitats of threatened indigenous flora and fauna (outside specific protected areas). We accept that there is a risk that we might put too much emphasis on that issue, and we have carefully balanced our decision in relation to it.

9.3 Integrated management

[539] FFM and its planning witness looked at PC13 as an aesthetic issue (protection of the attractiveness of the scenery) versus the values of the farmers who are largely responsible for maintaining the tussock grasslands. We have accepted the evidence that the ONL is much more than simply its visual attributes, and PC13 needs to protect

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628 R Gardner closing submissions at para 5 [Environment Court document 41].

629 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24.

630 The factual context of the proceedings was a mixed landscape comprising significant vegetation, pastoral land, buildings, vineyard and olive grove activities. *Man O'War,* above n 629 at [66].

631 *Man O'War,* above n 629 at [63].

those values as well as the scenic qualities against inappropriate development and use.

[540] In deciding what is inappropriate we must achieve integrated management[632] of the effects of the use and development (and protection) of the land of the Mackenzie Basin. That integrated management requires that we consider not only the protection of the visual qualities of the landscape but also the natural science values[633] including the areas containing the long list of threatened and "at-risk" indigenous plants. As the witnesses pointed out, the latter values can only be managed suitably on a case by case basis which supports the general discretionary regime in PC13(s293V).

[541] As Mr Head wrote[634]:

> Ecological connectivity is an important feature of the Mackenzie Basin (though in some parts I acknowledge that it is significantly reduced). This means that retaining the remaining linkages is an imperative. It is well documented in both national and international research that larger interconnected ecosystems are necessary for the maintenance (and evolution) of indigenous biodiversity[635]. Among other things, large interconnected ecosystems typically have higher species diversity with more viable populations. This is because of the greater range of environmental gradients and associated habitats present that have greater resilience owing to improved ecological functioning. Aspects of ecological functioning include natural plant succession, the existence of corridors for species movement and the ability of ecosystems to absorb and recover from disturbance. (Underlining added)

[542] The need for "large interconnected ecosystems" to achieve CRPS Objectives 9.2.1, 9.2.1., 9.2.3 complements the recognition in Objective 3B(1) of the values of "the openness and vastness of the landscape" and "the tussock grasslands". PC(s293V) as modified by this Decision will assist to integrate the management of the landscape and ecosystems resources. This may be particularly important to allow the threatened and at risk species move up-contour as a reach to climate change (as Dr Walker mentioned in her evidence).

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632 Section 31(1) RMA and Policy 9.3.3 CRPS.
633 CRPS Policy.
634 N H Head evidence-in-chief at para 10.8 [Environment Court document 14].
635 Citing O'Connor, K. K.; Overmars, F. B.; Ralston, M. M. 1990. Land Evaluation for nature conservation. A scientific review compiled for application in New Zealand. *Conservation Sciences Publication Number 3*. Department of Conservation, Wellington.

9.4 Result

[543] Weighing all the factors we have identified in this decision we conclude that Objective 3B(3), the policies in Chapter 6, and the rules and other methods in Chapter – all as reworded in these reasons – are each the most appropriate provision under section 32 RMA. Accordingly, PC13(s293V) can be confirmed subject to the modifications we have made which are to ensure that the CRPS is not departed from in more than a minor way, and the objectives of the MDP are given effect to in an integrated way.

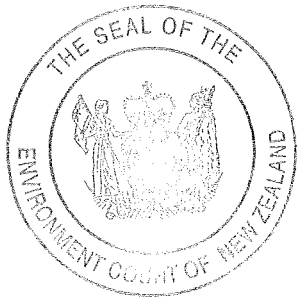
[544] In making those changes to PC13 we have been guided by the general principles stated in *Mackenzie (HC 2014)* and by two other practical principles: the first is that no specific changes should be made to any of the lines drawn on Appendix "A" (attached to this decision) which might adversely affect landowners not before the court; and second that more generally the wider farmers' and landowners' concerns have been fully represented and comprehensively addressed by FFM and the groups of landowners represented by Ms Forward and Mr Schulte.

[545] We consider we should confirm PC13 in the form identified in this decision and we will make orders accordingly.

Washup provisions

[546] Mr McCallum-Clark suggested[636] that to avoid confusion and ensure consistency the "Mackenzie Basin Subzone Boundary" should be specifically identified on the planning maps as an "Outstanding Natural Landscape". Ms Harte agrees[637] and we accept this should occur.

[547] In case there are any other consequential changes sought by any party, or if there is any incompleteness or inconsistency in the proposed rules and methods we will reserve leave for any party to apply to remedy or correct those if the MDC does not accept them when they are served with notice of them.



636 M E A McCallum-Clark evidence-in-chief at para 21 [Environment Court document 32].
637 P Harte rebuttal evidence 7 October 2016 para 83 [Environment Court document 25A].

9.5 Afterword

[548] Finally there are three aspects of tenure review in the Mackenzie Basin under the CPLA it may be useful to comment on. First, it is apparent that an unintended consequence of the CRC's method of managing discharges of (especially) cattle excreta gives a strong incentive to a pastoral lessee to freehold as much land as they can even if it is subject to covenants (e.g. under section 80 CPLA), because the CRC's method of calculating the nutrient balance is based on the total area of the farm. (We commented on the prima facie illogicality of that in relation to Mt Gerald Station above). That means there appears to be a strong financial incentive for a pastoral farmer to frustrate section 24(b)(ii) CPLA which seeks to enable the protection of the significant inherent values of land held in pastoral leases by maximising the freehold areas of their farm. A further consequence is that it appears likely to lead to potentially greater discharge of nitrogen and phosphorus (products of cattle excreta) to the Waitaki catchment over the next decade.

[549] Our second comment is in relation to the "significant inherent values" of the Mackenzie Basin. The term "inherent values" is defined in section 2 CPLA as meaning:

> " ... a value arising from —
>
> (a) a cultural, ecological, historical, recreational, or scientific attribute or characteristic of a natural resource in, on, forming part of, or existing by virtue of the conformation of, the land; or
>
> (b) a cultural, historical, recreational, or scientific attribute or characteristic of a historic place on or forming part of the land

"Significant inherent value" is defined as:

> ... in relation to any land, means inherent value of such importance, nature, quality, or rarity that the land deserves the protection of management under the Reserves Act 1977 or the Conservation Act 1987

[550] Clearly the geomorphological and ecological characteristics we described in Chapter 2 of this decision are inherent values. It is not for us to say whether or not they are "significant" for the purposes of the CPLA. However, on the evidence before us – including that from the DGC – large areas with those inherent values are being lost

quickly. In particular any of the stations with pastoral leases contained "outwash gravels"[638] need to be looked at very carefully. In our view there is quite a strong ecological (and economic) case for an immediate moratorium (by the CCL on further freeholding of any land in the Mackenzie Basin containing such gravels while a comprehensive "all-station" review is carried out and plan formulated including of course the MDC's review of Rural Policy 1A and its implementing methods.

[551] Third, it seems counterproductive for the Crown to freehold land without imposing a continuing obligation (as a covenant under the CPLA) to remove wilding pines from the freehold land. That would reduce the rather unfortunate catch 22 facing the community at present, in which farmers argue they need to change the ONL and in particular some of its inherent values (under the CPLA[639]) or intrinsic values (under the RMA[640]) in order to control wildings (and rabbits). Without such a covenant it is difficult to see how the CCL can justify freeholding as consistent with the purpose of tenure review under the CPLA.

For the court:

J R Jackson
Environment Judge

Appendices:

A: Areas of Landscape Management
(G H Densem evidence-in-chief Maps p 4 [Environment Court document 19])

B: List of Threatened and At Risk Plants
(N J Head, Attachment 1 [Environment Court document 14])

C: Appendix 12
(S Walker evidence-in-chief Appendix 12 [Environment Court document 17])

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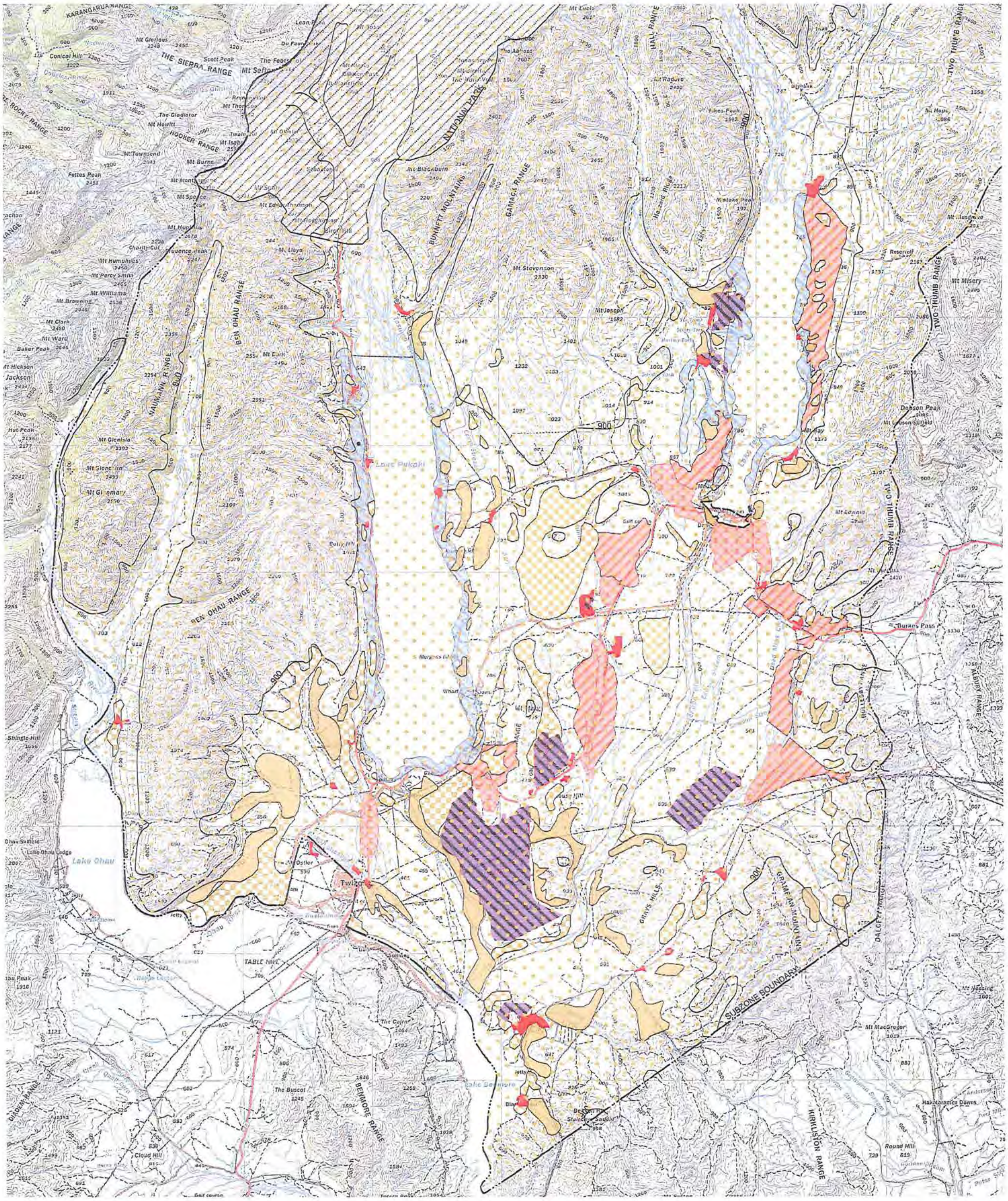
638 A critically endangered habitat (M A C Harding evidence-in-chief at para 17 [Environment Court document 12] discussed in Chapter 2 of this Decision.

639 Under section 24 CPLA.

640 Under section 7(d) RMA.



KEY

High Visual Vulnerability Areas

Medium Visual Vulnerability Areas

Low Visual Vulnerability Areas

Scenic Grassland Areas

Scenic Viewing Areas

Lakeside Protection Area

Farm Base Areas

Consented Irrigation Sites

900m Contour

Scale: 1:30,000 @ A3
Date: 26 Aug 2015
Map No: 201501 V4

N

Mackenzie District Plan Change 13

2015 SERIES, **MAP 1**

AREAS OF LANDSCAPE MANAGEMENT

GRAHAM DENSEM
LANDSCAPE ARCHITECTS

APPENDIX "B"

LIST OF THREATENED AND AT RISK PLANTS IN HABITATS THAT OCCUR IN BASIN FLOOR MORAINE AND OUTWASH HABITATS.

Extinct
Dysphania pusillum (refound 2015)
Nationally Critical
Carmichaelia curta
Ceratocephala pungens
Chaerophyllum colensoi var. delicatulum
Chenopodium detestans
Crassula peduncularis
Leptinella conjuncta
Pseudognaphalium ephemerum
Triglochin palustris
Nationally Endangered
Cardamine (a) (CHR 312947; "tarn")
Centipeda minima subsp minima
Crassula multicaulis
Wurmbea novae-zelandiae
Lagenifera montana
Leonohebe cupressoides
Lepidium sisymbrioides
Lepidium solandri
Myosurus minimus subsp. novae-zelandiae
Ranunculus brevis
Nationally Vulnerable
Carex cirrhosa
Carex rubicunda
Carmichaelia kirkii
Hypericum rubicundulum
Isolepis basilaris
Sonchus novae-zelandiae f. novae-zelandiae
Lachnagrostis tenuis
Myosotis brevis
Olearia fimbriata
Rytidosperma merum
Senecio dunedinensis
Declining
Aceana buchananii
Aciphylla subflabellata
Amphibromus fluitans
Carex albula
Carex tenuiculmis
Carmichaelia corrugata
Carmichaelia crassicaulis subsp crassicaulis

Carmichaelia nana
Carmichaelia uniflora
Carmichaelia vexillata
Convolvulus verecundus
Coprosma acerosa
Coprosma intertexta
Coprosma virescens
Deschampsia cespitosa
Hypericum involutum
Lobelia ionantha
Luzula celata
Muehlenbeckia ephedroides
Olearia lineata
Parahebe canescens
Pimelea sericeo-villosa subsp pulvinaris
Pterostylis tanypoda
Pterostylis tristis
Raoulia monroi
Rytidosperma telmaticum

Data Deficient

Carex decurtata

Naturally Uncommon

Achnatherum petriei
Agrostis imbecilla
Anthosachne falcis
Botrychium australe
Carex berggrenii
Celmisia graminifolia
Centrolepis minima
Colobanthus brevisepalus
Convolvulus fracto-saxosa
Einadia allanii
Epilobium angustum
Euchiton paludosus
Hebe pimeleoides subsp faucicola
Korthalsella clavata
Leonohebe tetrasticha
Leptinella serrulata
Leucopogon nanum
Montia angustifolia
Montia erythrophylla
Myosotis uniflora
Pimelea prostrata
Pimelea sericeo-villosa subsp alta
Plantago obconica
Pleurosorus rutifolius
Ranunculus maculatus
Raoulia beauverdii

Appendix 12. Ecological components of the natural landscape character of the Mackenzie Basin subzone

The purpose of this appendix is to provide a list of ecological features which contribute to the biological diversity of the basin floor and its natural landscape character across the whole subzone.

'Ecosystems' including historically rare ecosystems based on geomorphological features
NOTE: Parentheses indicate the land types of Lynn (1993) and Environment Canterbury (2010) within which these ecosystems are mainly (bold type) or more occasionally found.
Lake margins and deltas (**H3**)
Connected sequences of moraines of different ages (**H3**)
Striated moraines framing lakes (**H3**)
Terminal moraines (**H3**)
Rugged and hummocky young moraines (**H3**, H4)
Subdued older rolling moraine surfaces (usually further from lakes) (**H3**, H4)
Erratic boulders and boulderfields (**H3, H4**)
Kettlehole tarns and ephemeral wetlands (**H3**, H4)
Seepages and flushes (**H3, H4**)
Ephemeral streams (**H3, H4**)
Other wetland types and systems on and within depositional surfaces (**H3, H4**)
Outwash gravel terraces and fans (H3, **H4**)
Braided dry meltwater outwash channels (H3, **H4**)
Inland sand dunes (**H1**)
Terraces separating different depositional surfaces (**H3, H4**)
Series of terraces (H3, **H4**)
Braided rivers and associated alluvial surfaces (**H3, H4**)
Rivers, streams and associated alluvium issuing from surrounding ranges (**H3, H4, H17**)
Ice-sculpted hills within basin (**H7**)
Footslopes of ranges and hills (**H3, H4, H7**)
Alluvial and colluvial fans (**H3, H4, H7**)

Gradients, sequences, patterns, ecotones and transitions
Wet north-west to drier south-east aridity gradient
Sequences of different soils across the aridity gradient
Sequences of moraines of different ages
Moist western moraines with tall and short tussock grassland
Drier moraines with short tussock grassland and herbfields
Moraines cut by outwash and meltwater channels of different ages
Extensive, continuous, undeveloped moraine-outwash-alluvium sequences
Complexes of outwash and alluvial gravel surfaces of different ages
Transitions or ecotones between different depositional (glacial and alluvial) landforms
Series and flights of terraces (high and/or low, and different ages)
Terrace brows, scarps, and toes
Micro-habitat and soil variation (including aspect-related) within moraines

Ridge and hollow micro-topography on outwash gravels

Vegetation and flora
Extensive and little-fragmented sequences of vegetation
Tall and short tussock grasslands and their native inter-tussock flora
Matagouri shubland and wild spaniard
Ephemeral wetlands and their turfs
Lakeshore and delta plant communities
Wetlands, wetland complexes, and their vegetation
Alternation of sparse and better-vegetated surfaces on outwash gravels and alluvium
Braided vegetation patterns on outwash and alluvium
Grey and mixed shrublands and their native flora
Mat and cushion vegetation, including hawkweed-dominated
Mossfields, lichenfields, and non-vascular crusts
Exposed stonefields
Prostrate or low-growing native flora
Spring annual and seasonal geophytes (orchids, ferns) and their habitats
Non-vascular species (including lichens, mosses, and fungi) in all habitats
Xerophytic (drought-adapted) endemic flora
At risk and threatened flora

Fauna (including habitats)
Native and endemic wading birds, terns and gulls of braided rivers, outwash surfaces and moraine wetlands
Extensive seasonal breeding habitats of banded dotterel and pied oystercatcher, especially sparsely-vegetated outwash and alluvial surfaces
Native wetland bird fauna
Grey shrubland native bird fauna
New Zealand pipit and their mixed grassland habitats (especially moraine)
Endemic lizards and their habitats including mixed grasslands, erratics and bouldery surfaces
Endemic insect species characteristic of different habitats
Endemic freshwater fish fauna of clear unpolluted streams
Xerophytic (drought-adapted) endemic fauna
At risk and threatened fauna

REFERENCES

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Lynn IH 1993. Land types of the Canterbury Region. Landcare Research New Zealand and Lucas Associates.

TAB 5

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-356

	BETWEEN	FREDA PENE REWETI WHANAU TRUST Appellant
	AND	AUCKLAND REGIONAL COUNCIL Respondent

Hearing: 13 July 2005

Appearances: K A Palmer for Appellant
S Fraser & R Enright for Respondent
J Brabant & R Brabant for Auckland Yacht & Boating Association and the Port Fitzroy Protection Society
A Hopkinson for Maritime Safety Authority

Judgment: 9 December 2005

RESERVED JUDGMENT OF COURTNEY J

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Table of Contents

Introduction

[1] In July 2001 the appellant (the Trust) applied to the respondent (the ARC) for a coastal permit to allow a marine farm in Stony Bay within Port Fitzroy on the western coast of Great Barrier Island. The ARC refused the application. The Trust appealed unsuccessfully to the Environment Court.

[2] The Trust now appeals pursuant to s 299 Resource Management Act (RMA) which permits an appeal from the Environment Court on a point of law only.

Approach to Appeal

[3] It is well established (*Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 153) that this Court will only interfere in the decision of the Environment Court where it:

a) Applied a wrong legal test; or

b) Came to a conclusion either without evidence to do so or to which, on the evidence, it could not reasonably have come; or

c) Took into account matters it should not have taken into account; or

d) Failed to take into account matters that it should have taken into account.

[4] Further, even where there has been an error of law, the error must materially affect the outcome of the Environment Court's decision before this Court would interfere.

[5] In *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) NZRMA 419 at 426, Fisher J referred to the decision in *Countdown* and commented further that:

> It follows that the Court should resist attempts by litigants disappointed before the Planning Tribunal/Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law…….This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it….

[6] The Trust relies on 16 specific grounds of appeal. The ARC and the other opposing parties, Auckland Yacht & Boating (Inc) (AYBI), the Port Fitzroy Protection Society (PFPS) and the Maritime Safety Authority (MSA) assert that not all of these grounds are justiciable errors of law. I deal with this question in relation to each ground of appeal as I come to it.

Relevant Statutory Provisions / Planning Instruments

[7] The relevant statutory provision is the Resource Management Act 1991 (RMA) as it stood prior to the Resource Management Amendment Act 2003. Of particular significance are:

- Section 5: the purpose of the RMA, namely sustainable management of natural and physical resources

- Section 6: matters of national importance to be recognised and provided for, especially s 6(a) - preservation of the natural character of the coastal environment, 6(b) - protection of outstanding natural features and landscapes and 6(e) - relationship of Maori with their ancestral lands

- Section 7: other matters to which particular regard must be had, especially s 7(a) - kaitiakitanga

- Section 8: principles of the Treaty of Waitangi to be taken into account

[8] Also relevant is Section 10 Hauraki Gulf Marine Park Act 2000 (HGMPA). By virtue of s 10 of that Act ss 7 and 8 constitute a New Zealand coastal policy statement under the RMA. By virtue of s 9(4) the ARC was obliged, when considering an application for resource consent in the Hauraki Gulf to have regard to ss 7 and 8 in addition to the matters provided for in the RMA. Section 7 provides for recognition of the national significance of the Hauraki Gulf. Of relevance in this case is s 7(2) which states that the life-supporting capacity of the Gulf and its islands

includes the capacity for the social, economic and cultural wellbeing of people and communities

[9] The following planning instruments are relevant:

- The New Zealand Coastal Policy Statement prepared under s 57 RMA and gazetted 5 May 1994

- The Auckland Regional Policy Statement (ARPS), which has been in place since 1999 and establishes policies for the integrated management of natural and physical resources in the Auckland region.

- The Auckland Regional Plan: Coastal (ARPC) which, at the relevant time, was the proposed Auckland Regional Plan: Coastal (PARPC). Proposed variations to the PARPC were publicly notified in October 2002.

First, Second and Third Grounds – Wrong legal test for discretionary activity/ Inappropriate weight given to PARPC

[10] The first three grounds overlap and I propose to deal with them together. They are:

a) The Environment Court applied the wrong legal test for considering a discretionary activity and, as such, the activity was not solely assessed as a discretionary activity; and

b) Greater weight should have been given to the PARPC as it stood prior to the proposed variations; and

c) Less weight should have been given to the Aquaculture Management Area provisions of the proposed variations.

[11] Under the PARPC as it stood in July 2001 aquaculture was a discretionary activity by virtue of Rule 22.5.2. Section 88A(1A) RMA provides that any application made must be considered and decided as an application for the type of activity that it was for at the time the application was first lodged. The Environment

Court explicitly recognised this and stated at [18] that it would treat the application as one for a discretionary activity.

[12] The thrust of the Trust's argument arose out of the application of s 88A(2) RMA which, in its pre-2003 form, provided that:

> Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with s 104…

[13] Section 104 RMA (in its pre-2003 form) relevantly provided that:

> Subject to Part II, when considering an application for resource consent and any submissions received, the consent authority *shall have regard to*:…
>
> (f) *Any* relevant regional plan or *proposed regional plan*, where the application was made in accordance with a district plan.
>
> (emphasis added)

[14] The first issue is whether the Environment Court should have treated the proposed plan to which regard was to be had for the purposes of s 104 as being the PARPC as it stood before the variations were notified or afterwards. The proposed variations to the PARPC provided for aquaculture management areas (AMAs). Under Variation 2 (Rule 22.5.12) aquaculture activities outside the AMAs would be prohibited. Variation 5 proposed AMAs for the waters around Great Barrier Island but only in respect of existing marine farms. So the Trust's proposed marine farm would be a prohibited activity under Variation 2.

[15] I understood the Trust's main complaint to be that, although the Court said it was treating the application as one for a discretionary activity, the weight it gave to the proposed variations effectively meant that it was not so treated. The Trust submitted that as categorisation of an activity must take place under the unvaried proposed plan and the activity therefore assessed as discretionary, less consideration, if any, should have been given to the proposed variation.

[16] It seems clear that, as a matter of law, it was the PARPC in its varied form to which regard was to be had under s 104 RMA. Clause 16B(1) and (2) first schedule RMA provides:

Merger with proposed policy statement or plan

(1) Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.

(2) From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.

[17] These clauses disclose an apparent conflict. Under cl 16B(1) the variations would become part of the proposed plan once they had both reached the same procedural stage. In comparison, the effect of cl 16B(2) would be to treat the plan as having been varied upon notification of the variation, regardless of what procedural stage had been reached.

[18] This conflict was considered by the Environment Court in *Awly Investments Ltd v Christchurch City Council* (EC. C103/2002, 29 August 2002, Judge Allin) which concluded that:

- Clause 16B(1) and (2) could be reconciled by limiting cl 16B(1) to the procedural aspects of the passage of a proposed plan and variation through notification, submission, decision and reference date. This would allow changes or even the withdrawal of a variation without affecting the status of the proposed plan; and

- The effect of cl 16B(2) is that from notification of a variation in the resource consent process, regard is to be had to the proposed district plan as if it had been altered so that it is not necessary to have regard to the proposed district plan as it was before the variation. This allows the procedural aspects provided for in cl 16B(1) to continue.

[19] Although the Environment Court in the present case expressed concern about this conclusion because there was no reference to s 88A RMA, it did not actually criticise or disagree with it. The Court then referred to s 20A RMA (inserted by s 5

Resource Management (Aquaculture Moratorium) Amendment Act 2002) under which:

> (1) A regional council may, before publicly notifying a proposed regional coastal plan, resolve that any rule in the plan relating to aquaculture activities does not have effect until the plan becomes operative…

[20] The ARC had not made a resolution of the type provided for in s 20A RMA. The Court attempted to reconcile the position under these provisions as follows:

> [21] In the present case that approach [in *Awly*] might seem to be mirrored by the new s 20A noted above, but a glaring inconsistency emerges regarding the status of the proposed activity, because while the ARC has expressly refrained from resolving that the rules proposed in Variation 2 should not have effect until they become operative, the scheme of legislation concerning prohibited activities, as previously discussed, cannot be ignored. The issue carries as its consequence that either the activity remain a discretionary activity, or it becomes some sort of innominate activity. We consider that the apparent impasse is capable of being resolved in either of two ways: either by having regard to s 5 of the Interpretation Act 1999, and ascertaining the meaning of the enactment not only from its text but also **in the light of its purpose**; or by having regard to the doctrine of implied repeal and regarding clause 16B, the earlier and more general enactment (1993) as impliedly partially repealed by the later express enactment (in 1997) of the wording in the definition of the term "prohibited activity".
>
> (emphasis in original)

[21] There are difficulties with this paragraph. First, the suggestion that the activity could become some sort of innominate activity cannot be right. It is clear that the application was to be treated as one for a discretionary activity. The proposed variations could not change that. The possibility of "*some sort of innominate activity*" is not contemplated by the RMA.

[22] Secondly, having referred to s 5 Interpretation Act 1999, the Court failed to actually consider how this might affect the interpretation of cl 16B or to suggest an interpretation. Finally, there is no indication as to how the Court considered cl 16B should be impliedly repealed by the definition of "*probihited activity"*. That phrase was amended in 1997, but not in any way that could affect the issues in this case.

[23] However, I do not consider that these various unsatisfactory statements had any material effect on the outcome because they were overtaken by the conclusion that:

> [22] As to other provisions of the Aquaculture Chapter in the ARCP, the findings of the Court in *Awly*, supported by the approach apparently taken by the ARC under s 20A RMA, might mean that we should have regard to the Chapter 22 aquaculture provisions as altered by the variations, and not have regard to the (then) proposed plan as it was before the variations, but in case that is not the proper approach, we record that we have considered not only the provisions amended and added by the variations but also the provisions of Chapter 22 as they previously stood. Happily, our conclusions overall under both regimes are the same.

[24] Notwithstanding the rather tentative words "might mean", I infer that the Court did, in fact, opt for the approach in *Awly* i.e. that it must have regard to the Chapter 22 aquaculture provisions as if it were altered by the variations rather than having regard to the proposed plan as it had been prior to the variations and ignoring the variations. This is indicated by the fact that it then refers (in comparison) to having regard to the provisions of Chapter 22 as it stood before the variations.

[25] The Trust submitted because of the introduction of s 20A RMA Parliament could not have intended that the proposed variations would have effect if a resolution under s 20A RMA had not been made, particularly when the PARPC was still open to public submissions.

[26] However, if the *Awly* approach is applied, (which I consider it should be) the proposed plan to which the Environment Court was to have regard under s 88A must be the plan as varied by the publicly notified variations in Chapter 22. *Awly* was, of course, decided before s 20A RMA was enacted. However, if Parliament had intended s 20A to affect the operation of cl 16B there would have been some indication of that. I do not consider that s 20A RMA was intended to have or has any effect on cl 16B. There is no basis on which the Trust could argue that the Environment Court was not entitled to have regard to the proposed variation in Chapter 22.

[27] This brings me to the next aspect of these grounds of the appeal, namely that the Environment Court gave an inappropriate amount of weight to the PARPC in its varied form. The thrust of the Trust's submission was that the Court erred in according greater weight to the PARPC in its varied form than the words "have regard to" entitled it to do. The Trust acknowledged the statement in *Murphy v Rodney District Council* [2004] 3 NZLR 421 at [11] that the Environment Court is the sole decision maker of the balance among the s 104 factors, including the weight

to be given to successive plans. However, it asserts that because of the factors it identifies dominant weight should have been given to the plan in the form that existed at the time of the application and little weight to the variations. These factors included:

- At the time of the application the activity was discretionary
- The ARPC did not become operative until October 2004, over three years after the application was made in July 2001
- The provisions of the ARPC are still open to public submission and the Trust is itself a party to those submissions
- Legislative direction from the Maori Commercial Aquaculture Claims Settlement Act 2004, the purpose of which is to allocate to Maori 20% of new space in aquaculture areas
- The jurisprudence behind the Maori Commerical Aquaculture Claims Settlement Act 2004 acknowledging the nature and extent of Maori rights within the marine environment
- At the time of the application AMAs had not been proposed
- Location of the AMAs and prohibited activity outside them might yet change.

[28] The Trust submitted that the Court was not entitled to embark on a weighting exercise between outgoing and incoming plans and variations. It relied for this submission on the decision of the Court of Appeal in *Body Corporate 97010 v Auckland City Council & Anor* [2000] NZRMA 529 at [79]. However, that decision actually recognises the exact opposite of the Trust's submission, noting that under s 104(1) it might, in fact, be appropriate to give decreasing weight to the outgoing plan as the process advances towards the time when a proposed plan will become operative. Clearly, not only was the Environment Court entitled to take account of proposed variations but it was also entitled to engage in a weighting exercise between that plan and the plan in its previous form.

[29] The learned Judge in *Murphy v Rodney District Council* made it clear that the weight to be accorded to the various factors identified under s 104 was a matter for the judgment of the Environment Court. The Environment Court was entitled to take into account the variations to the PARPC. The weighting it then gave to those various factors was a matter entirely for it and one in which this Court will not interfere.

[30] The only issue under these grounds can be whether the Court treated the application as one for a discretionary activity and took into account only those things it was entitled to. I am satisfied that it did. It properly directed itself on the manner on which it was to approach the application under s 88A. The weight it gave to the various factors cannot give rise to an error of law.

Fourth Ground – Too much weight given to New Zealand Coastal Policy Statement

[31] The fourth ground is that the Environment Court gave too much weight to the New Zealand Coastal Policy Statement 1994, given that it is over ten years old and now generally accepted as being outdated. In particular, it did not recognise a number of the factors that arise in this case, including the growth of marine farming, the need to establish AMAs, the Aquaculture Reform Act 2004 and the Maori Commerical Aquaculture Claims Settlement Act 2004. The Trust says that the Coastal Policy Statement should not have been relied on at all because of its emphasis on conservation as opposed to aquaculture.

[32] Reference to the Coastal Policy Statement in the decision is very limited; it was referred to as being relevant and in the context of s 6(a) and (b) RMA, as being a matter to which regard was to be had under s 104(1)(c) RMA. However, it was not referred to in the Court's statement of its conclusions.

[33] Mr Palmer acknowledged that because the Environment Court did not refer to the Coastal Policy Statement in stating its conclusion it was difficult to say exactly how much weight had been given to it. However, he says that because the Court, in the body of its judgment, focused on the natural landscape aspect of the Coastal Policy Statement and failed to recognise that it had been produced at a time before

aquaculture was well developed, this must have formed at least part of the background of the case.

[34] The Coastal Policy Statement was clearly something the Environment Court was entitled to take into account. The weight accorded to it (and it seems to have been slight) was a matter entirely for the Court and cannot amount to an error of law.

Fifth Ground – Hauraki Gulf Marine Park

[35] The fifth ground is that the Environment Court failed to recognise the provisions of s 7(2)(a)(ii) HGMPA, which recognises that the life supporting capacity of the Hauraki Gulf includes the social and economic wellbeing of people. Further, since the term "economic" is defined in s 4 as including "marine commerce", the Act clearly intended to recognise the commercial needs of the Hauraki Gulf as well as the "natural character reserve" objectives.

[36] Failure to take the social and economic wellbeing of people into account could amount to an error of law. However, I do not think that the Court fell into error in this way. It referred to s 7(2)(a)(ii) as a relevant statutory provision. In addition, it referred to s 5 RMA, which also speaks of the social and economic wellbeing of people and communities. Mr Palmer accepted that there was nothing under s 7(2) HGMPA Act that did not also arise under s 5(2) RMA.

[37] At [64] to [66] the Environment Court considered the competing evidence about the economic benefits from mussel farming, concluding that:

> [66]…While we agree with [Mr Brabant on behalf of the parties opposing the appeal] that the employment benefits likely to be derived from establishment of this particular marine farm would be miniscule, we do not overlook that there might be some (unquantified) financial benefit from the sale of mussels or the granting of a lease to others.

[38] It is clear that the Environment Court was alert to the relevance of the social and economic wellbeing of those represented by the Trust and did take it into account. The fact that it did not specify that it was doing so under s 7(2)(a)(ii) could have made no difference to the final result. I therefore consider that there was no error of law of the type asserted. Further, even if there had been such an error, it would not have materially affected the outcome.

Sixth Ground – Amendment to application to include mooring plan

Error in dealing with application

[39] Prior to the hearing before the Environment Court the ARC, the MSA and AYBA provided evidence in support of their objections showing that the Trust's proposed marine farm would result in the loss of safe moorings in Stony Bay. In response the Trust sought to amend its proposal prior to the hearing to include the placement of six swing moorings within the bay, though not connected to the marine farm. The Environment Court elected to hear the evidence relating to all issues before making a decision on the application. As part of its substantive decision it refused to allow the amendment because it did not satisfy the jurisdictional requirements.

[40] Both parties were agreed that the test to be applied was whether the change was fairly and reasonably within the scope of the original application and whether, plausibly, it could have resulted in more objections. Counsel referred to the earlier decision of the Environment Court in *Zakara v Rodney District Council* (EC Auckland, A118/2004, 2 September 2004, Judge Whiting), citing *Darroch v The Whangarei District Council* (Planning Tribunal, A018/93, 1 March 1993):

> In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond the scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effect of the proposal they cannot be permitted as an amendment of the original application. A fresh application would be required.

and *South British Auckland Property Co Ltd v Auckland City Council* 12 NZTPA 94:

> The question arises as to whether persons other than the parties to the proceedings might have intervened if the changed or amended plans had been the basis of the public notification…
>
> The answer to that question requires an assessment of whether buildings constructed in accordance with the new plan are likely to affect the public generally or any individuals in a manner different from or to any degree greater than buildings constructed in accordance with the original plans…

[41] The Court held, first, that the mooring plan was not within the scope of the original application because the definitions of the two types of infrastructure in the ARPC indicate that they were quite different in concept and the proposed moorings were not to be fastened in any way to the infrastructure of the marine farm. The Trust says that this was an error of law because the mooring plan was within the proposed site and would have resulted in a slight scaling down of the proposed farm with slightly fewer lines and less growing space. Therefore, it could not be said to increase the scale or intensity of the activity or significantly alter the character or effect of the proposed activity to such an extent that the public generally or any individual would be affected.

[42] The contents page of the ARPC shows that moorings are specifically provided for in Chapter 24. In comparison, Chapter 22, which deals with aquaculture, does not refer to moorings at all. So it seems likely that a separate application would have been required even if part of an overall proposal. I therefore find that there was no error of law in relation to this ground.

[43] Secondly, the Court held that opposing parties had raised significant doubts about the efficacy and safety of the use of the swing moorings and it was plausible that others might also have sought to comment on the application had the moorings been applied for and publicly notified. The Trust says that because the basis for the opposition to the application was the farm itself rather than to moorings offered to enhance safety it could not be said that the change would have resulted in more objections.

[44] This submission does not actually deal with the point being made by the Environment Court, namely that a proposal for new swing moorings in the bay might, in itself, have attracted more objections beyond those who responded to the original application. I do not consider that the Court erred in its approach to the application.

[45] In any event, it is clear that the Court's ultimate decision would not have been altered even if the amendment had been allowed; the Environment Court went on to consider, hypothetically, what impact the six swing moorings might have had on the application. It referred to evidence that boaties might be reluctant to use them

and of the possible safety issues in high wind conditions which was when the bay would be most used for anchoring. As a result of these problems, the Court considered that the proposed swing moorings would not adequately replace the anchoring spaces lost to the marine farm.

Possible bias

[46] The Environment Court had postponed dealing with the application until it had heard the substantive evidence. In its decision at [131] it recorded the position as follows:

> On being asked to rule on a jurisdictional point, we conferred amongst ourselves and announced that we preferred to hear the substantive evidence in its totality before making a final ruling, but had misgivings about it.

[47] The Trust submitted that this statement showed that the Court was opposed to the application even before it had heard any evidence. It referred to *Turner v Allison* [1971] NZLR 833, submitting that the Court had erred in not allowing the application, presumably on the ground of bias.

[48] Bias was not indicated as a ground of appeal in the Notice of Appeal and the limited scope of the submissions were not adequate to deal with such a serious assertion. I therefore decline to deal with this submission. In any event, I would not consider the Court's comments that it had misgivings as being indicative of bias. There is nothing in the decision and counsel did not refer to any evidence or fact which would satisfy the test propounded in *Turner v Allison.*

[49] This is an appropriate point to mention a submission Mr Palmer made at the outset of the hearing. He said that the experience of the Environment Court was of yachting and that the judgment exhibited a tendency against aquaculture. He considered that the decision disclosed a theme that protection of the water for yachting purposes was more important than aquaculture. I specifically asked Mr Palmer whether he was advancing this argument as one of bias on the part of the Environment Court but he said that he was not. There was no other legal framework by which to deal with such a submission and I have therefore not attributed any weight to it in my consideration of the issues.

Failure to consider trade competition

[50] The Trust made a final submission that issues of safety and moorings were allowed to be coloured by self-interested demands of boat operators of recreational tours and this could introduce an element of trade competition, which is not discussed by the Environment Court. The Trust relied on s 104(8) RMA which provides that:

> When considering an application for resource consent, a consent authority must not have regard to trade competition

[51] This ground was not signalled in the Notice of Appeal. In submissions the Trust asserted that the Court had failed to take account of the interest of AYBA witness, Mr Bouzaid, who was referred to at [123] of the decision as the proprietor of a guesthouse in Port Fitzroy from where he undertakes eco-tourism ventures. The Trust submitted that the Environment Court had erred in law by not assessing and then disregarding this trade competition element.

[52] The issue of trade competition does not seem to have been raised by any of the parties before the Environment Court. I was not referred to any evidence of trade competition issues that the Court could or should have taken account of and there is no indication that the Court turned its mind to s 104(8) RMA. However, the Trust's real complaint does not seem to be the failure to observe s 104(8) RMA so much as accepting Mr Bouzaid's evidence without recognising that he may have had a vested interest in the outcome. I note, though, that this possibility did not seem to have been put to the witness nor any submission made at the hearing.

[53] Even if Mr Bouzaid did have an interest in the outcome, I am satisfied that the outcome would have been no different. Mr Bouzaid was one of five witnesses called by the opposing parties. Their evidence was consistent and was preferred to that of the Trust's witness. On the information before me I do not consider that there was any error of law, much less one that would have affected the outcome.

Seventh Ground – Use of Stony Bay

Mr Anderson's evidence

[54] The Trust submits that the Environment Court came to a decision regarding the nature and use of Stony Bay and the proposed moorings which it could not reasonably have reached on the evidence and by inappropriately disregarding evidence.

[55] This ground focuses on the evidence of Mr Anderson, the Trust's witness. As already noted, the Environment Court preferred the evidence of the various witnesses called by the respondent and objectors to that of Mr Anderson. Mr Palmer indicated that the Trust accepted the Environment Court's findings on the various pieces of evidence and witnesses but says that on the face of the decision the Court erred in not giving greater weight to Mr Anderson's evidence.

[56] The Court spent some time reviewing the evidence of the respective witnesses and referred to their experience and qualifications. It then concluded at [128] that:

> We found that not only was Mr Anderson's evidence in chief, brief and assertive, but his answers in cross-examination tended to be dismissive and to downplay the opinions of others. It is true that he has been a resident of Port Fitzroy, and he has a view across to Stony Bay from where he moors his yacht in Kaiarara Bay. Comparing his evidence to that of the other five witnesses, we have come to the view that their evidence is to be preferred because of their extensive personal experience of using the anchorages, their knowledge and abilities as mariners, and the fact that their testimony was ultimately unshaken. By contrast, Mr Anderson, because he lives in Port Fitzroy, has spent less time on his boat in the various recreational anchorages. Furthermore it was established to our satisfaction that the several cruising guides to the area either denote Stony Bay as a good anchorage by symbols on charts, or succinctly and positively describe its qualities in the manner fully confirmed for us by the five witnesses for the opposing parties.

[57] The Trust challenges the conclusion that Mr Anderson had spent less time on his boat in the various recreational anchorages than the other witnesses. They say that, having accepted that Mr Anderson was a long-standing resident of Port Fitzroy with unimpeded views across Stony Bay and also moors his boat in Kaiarara Bay, the Environment Court could not reasonably have come to this conclusion.

[58] It seems clear to me, however, that the Environment Court did not reject Mr Anderson's knowledge and experience of the area but merely compared it in certain respects with the five witnesses called for the opposing parties. Although the facts

referred to by the Court do indicate that Mr Anderson had substantial knowledge and experience of the area, the other witnesses referred to also demonstrated a wide knowledge and experience of the area. The Court was entitled to prefer the evidence of some witnesses over others. There is nothing on the face of the decision to suggest that the Court could not reasonably have come to the conclusion that it did on the evidence it referred to.

Maritime Safety Authority guidelines

[59] At [44] of its decision the Environment Court referred to the Maritime Safety Authority guidelines. The Trust made the point that these were only guidelines and should be given appropriate weight as such. But it did not go on to identify any aspect of the decision which it says shows that undue weight was given to the guidelines. Nor could it have done; the guidelines were merely mentioned. There is no indication as to what weight (if any) they were given. No error of law arises from this aspect.

Construction of proposed moorings

[60] The Trust submitted that at [133] the Environment Court expressed the view that the proposed safety moorings would not be properly constructed. However, [133] does not make any such finding or assumption. It refers to the likelihood of competent boaties being suspicious of an unknown mooring and therefore being hesitant to use it. This does not reflect at all on the actual construction of the mooring but the perception of it by potential users. The Court also identified possible safety issues arising from the proximity of the moorings to one another and to the anchor ropes of the marine farm. Again, this did not indicate any assumption as to the quality of the moorings themselves. No error of law arises in relation to this part of the decision.

Eighth Ground – Definition of environment

[61] As already discussed, s 6(a) RMA required the Court to recognise and provide for the natural character of the coastal environment area and the protection of it from inappropriate development. The Trust contends that the Environment Court applied the wrong legal test for the definition of "environment" because it took

into account some likely future changes to the area while not taking into account others.

[62] The Court examined the competing evidence between the witnesses. The ARC's witness (Mr Goodwin) had expressed a view that the Port Fitzroy area would score at the high end of a natural character spectrum, even allowing for existing development such as the marine farms and airstrip. The Trust's witness (Ms Buckland) focused on areas of exotic vegetation, a house and jetty, airstrip, campsites and headquarters for DOC, describing the area as having a "quite modified" appearance.

[63] After a lengthy review of the evidence of these witnesses the Environment Court preferred Mr Goodwin's evidence. It was entitled to do so. It then concluded at [85] that "those parts of Kaikoura Island in the vicinity of Stony Bay, the waters of Stony Bay and most of the wider Port Fitzroy area, exhibit high natural character and qualify for the protection offered by subsections (a) and (b) of s 6 RMA". The Trust submits that the Environment Court erroneously took into consideration the likely future changes that would result from the gazetting of Kaikoura Island as a scenic reserve:

> [87] We consider that it is relevant for us to take into account, likely future improvements to the level of natural character on the adjacent part of Kaikoura Island, deriving from its acquisition by the Crown and the virtual certainty that it will be gazetted as a scenic reserve.

[64] In concluding that it was entitled to take account of likely future changes to the Environment, the Court relied on the decision of the High Court in *Wilson v Selwyn District Council & Canterbury Regional Council* [2005] NZRMA 76 in which future changes to neighbouring land were taken into account considering s 104 RMA factors.

[65] The Trust resisted the relevance of *Wilson* on the basis that it was distinguishable on the facts. *Wilson* involved an application to enlarge a chicken farm, which was opposed by a neighbour on the ground that such development would adversely affect the potential to subdivide the neighbouring property. The Trust submitted that because its application relates to a passive submerged activity, with minimal visual impact and no effect on land-based activities, *Wilson* should not

have been applied. The Trust did not submit that Fogarty J's analysis in *Wilson* was incorrect. It merely pointed to the factual differences. The Environment Court was entitled to refer to and rely on *Wilson* in concluding that, as a matter of law, it could take account of the probable acquisition of Kaikoura Island by the Crown. This submission therefore fails.

[66] The Trust went on to develop the second limb of its submission; accepting the threshold testadopted by Fogarty J in *Wilson* of "not fanciful" the Trust claimed that various other probable changes should also have been taken into account. Mr Palmer said that the Environment Court gave too much weight to future environmental considerations and not enough weight to the existing environment and in particular that it took an idealistic view of what might happen in the future. Although the Trust says that other factors should have been taken into account, it did not make submissions on the likelihood of those events occurring so as to satisfy the threshold in *Wilson*. I deal with each below:

- The impending Treaty of Waitangi claim. The ARC says (and I accept) that the impending Treaty of Waitangi claim is a matter for negotiation between the Crown and the claimant, not an aspect arising under s 104 RMA. In any event, whatever the outcome of the Treaty claim, it is not a matter that one could say with any certainty would result in a particular change to the environment.

- Existing objections from Ngati Wai on the classification of Kaikoura Island: these objections have been overtaken by the actual gazetting. So it could not be said that the view of the Court as to the likelihood of that happening was unjustified or was an error that could have materially altered the outcome of the hearing.

- Recognition of the nature and extent of Maori rights which have been directly reflected in the Maori Commercial Aquaculture Claims Settlement Act 2004 in the form of 20% allocation of sea space to Maori: again this enactment does not, in itself, provide any basis on which to predict probable future change to the environment to the threshold propounded in *Wilson*.

- The airstrip on top of Kaikoura Island: this was referred to at [76].

- Six identical marine farms within close proximity: these were referred to at [76].

- Existing resource consent for a mooring within Stony Bay. This is not referred to in the decision and I was not referred to any evidence of it, apart from a reference in an unrelated Environment Court decision, so it is not clear whether it was actually raised in the Environment Court. But I do not consider that failure to refer to it could amount to an error of law that would have materially affected the outcome.

- Development in the island area and the fact that under s 19 Reserves Act 1977 a scenic reserve allows for public access and with consent, camping grounds, amenities, caretakers building and leases where compatible. Again, there is no evidence that this was a matter to which the Court's attention was drawn. But I would not consider it an error to fail to refer to it. In any event, the mere fact that there could be development, with consent, is insufficient without some indication that such an event might occur, to satisfy the *Wilson* threshold. The likelihood of any such development must be considered in the context of Kaikoura Island being a scenic reserve, which was a probability at the time of the hearing and a reality now.

- The nature of the environment not being pristine, including wilding pines: this was referred to at [76] and [79].

[67] In relation to these various factors, they were either taken into account or were not of such significance in terms of *Wilson* that a failure to take them into account could amount to an error of law that would have materially affected the outcome.

Ninth Ground – Priority wrongly given to s 6(a) and (b) over s 6(e)

[68] Sections 6 (a), (b) and (e) RMA provide that:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area); wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision use and development:
>
> …
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga.

[69] The Trust asserts that the Environment Court wrongly gave priority to s 6(a) and (b) over s 6(e).

Section 6(a) – Preservation of the natural character of the coastal environment

[70] I have already referred to the Environment Court's finding that those parts of Kaikoura Island in the vicinity of Stony Bay, the waters of Stony Bay and most of the wider Port Fitzroy area exhibited high natural character and qualified for protection under s 6(a) and (b) RMA. I did not understand the Trust to challenge this finding. However, it submitted that much of the evidence of the natural character of the coastal environment rested upon an assumption that the coastal sea area was a de facto public reserve and should not be used for productive farming purposes. It complained that there appeared to have been an assumption by the Environment Court that commercial tour boat operators and recreational users have an entrenched entitlement to unrestricted use of the seacape and that this assumption may have given rise to an unjustified and erroneous presumption against commercial use.

[71] I took the submission to be that the Environment Court had treated the preservation of the natural character of the area as a matter to be achieved in preference to those matters provided for in s 6(e). The Trust relied heavily on Greig J's decision in *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 for the proposition that there is no priority between the various subsections in s 6. The interface between various factors identified in s 6, which

requires all of them to be recognised and provided for as matters of national importance, was considered at some length in that case:

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the primary purpose.
>
> "The protection of them", in its terms means and refers to the coastal environment, wetlands, lakes, rivers and their margins, the items listed, but the protection is as part of the preservation of the natural character. It is not the protection of the things in themselves but in so far as they have a natural character. The national importance of preserving or protecting these things is to achieve and promote sustainable management…It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
>
> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skill, is established and appointed to oversee and promote the objectives and the policies and the principles under the Act.
>
> In the end I believe that the tenor of the appellant's submissions was to restrict the application of this principle of national importance, to put the absolute preservation of the natural character of a particular environment at the forefront and, if necessary, at the expense of everything except where it was necessary or essential to depart from it. That is not the wording of the Act or its intention. I do not think that the Tribunal erred as a matter of law. In the end it correctly applied the principles of the Act and had regard to the various matters to which it is directed. It is the Tribunal which is entrusted to construe and to apply those principles, giving the weight that it thinks appropriate.

[72] Although the Trust relied on this decision to support its submission that the Environment Court had placed too much weight on the preservation of the natural character of the coastal environment under s 6(a) RMA, the approach it describes is to be applied generally to the various factors under s 6, not just s 6(a). The effect of Greig J's decision is to show that, while all s 6 factors must be recognised and

provided for, this exercise is not an end in itself but is an accessory to the primary purpose of the Act, namely sustainable management of this country's natural and physical resources. It is for the specialist tribunal to accord the weight to the various factors that it considers appropriate.

[73] It is true that the Environment Court considered the natural character of the coastal environment at some length. But it considered the s 6(e) issues at length as well. The fact that it then embarked on a weighting exercise between the s 6 factors is evident from [144] – [146] and [148]. In essence, it found that, although some important aspects of s 6 were met by the proposal they were outweighed by the aspects of s 6 which were not met. This is quite plainly a conclusion to which the Environment Court came after considering the relevant factors and deciding on the weight to be given to each factor. There has been no error of law which would entitle this Court to interfere.

Section 6(b) – Landscape issues

[74] The Trust's submissions in relation to s 6(b) were essentially that:

- The proposed site is adjacent to an area of land identified by the ARC as a "Regionally Significant Landscape", the definition of which refers to the focus being on integration and marriage of new use and development rather than preservation. This definition, it says, provides a window which should allow for development in the coastal environment.

- That five of the existing marine farms in this area are adjacent to an area classified by the ARC as an "Outstanding Landscape", the definition of which includes reference to the focus being on the protection of the status quo.

[75] The Trust submits that given the existence of the other marine farms in the area (particularly those adjacent to a landscape with a higher classification than the proposed site) and the fact that the activity does not require any further land-based development (thereby limiting the visual effect of the marine farm), the Environment

Court could not reasonably have come to the conclusion that the proposed marine farm would be inappropriate for the purposes of s 6(b).

[76] The Trust's submission really comes down to a complaint that its proposed marine farm should not be regarded as an inappropriate development because other marine farms already exist in the area. It is clear from the decision that the Environment Court was considerably influenced by the evidence of Mr Goodwin (called by the opposing parties) and the concessions made by the Trust's witness, Ms Buckland, about the visual effect of the proposed mussel farm. These included an acceptance that people travelling along the recreational route to Port Fitzroy and the DOC headquarters could experience a "significant adverse visual effect from the mussel farm" and the fact that people on boats proceeding from Man-of-War passage, rounding Kaikoura Island and into Stony Bay would be viewing the farm substantially against the higher rated backdrop in the northern portion of the bay.

[77] The conclusion that the Environment Court reached about the effect on the landscape by the proposed marine farm was quite plainly one that it was entitled to reach on the evidence before it. The Environment Court considered the s 6(b) factor at some length. It subsequently considered the s 6(e) factors at some length and, after weighing them all up, reached the conclusion to which I have already referred. It properly directed itself and followed the appropriate process in reaching its conclusion. There is no error of law.

Tenth Ground – Giving s 6(e) matters lower priority

[78] The Trust says that the matters of relationship with hapu under s 6(e) RMA were given lower priority than they should have been because the Environment Court wrongly came to the conclusion that the benefits that might flow from establishing the marine farm could still accrue as a result of the whanau's extensive interest in the area.

[79] At [145] the Court held that:

> …aspects of part II that the proposal would satisfy, are not location-dependent, in the sense that because the rohe of the whanau is so extensive, the benefits of establishing the marine farm could accrue in places within it,

> to the same extent as they would accrue in the precise location proposed in the application.

[80] The Trust says that this finding was reached in error. First, it says that the Environment Court failed to take into account the fact that the PARPC does not recognise any new sites as suitable for AMAs. Secondly, it says that the Environment Court proceeded in the erroneous belief that the Trust had interests in the existing marine farms in the area. It is the second ground which is central to the submission.

[81] At [65] of the decision the Court said that:

> …What the evidence did establish was that the whanau already has interests in at least two of the six existing mussel farms in the locality, as have some other related Maori entities on Aotea.

[82] The Trust did not seem to be challenging this finding and I take its submission to be that the Trust itself, which is the appellant in this proceeding, has no interest in the existing marine farms, although the whanau which is the beneficiary of the Trust does have such interests. I find the submission somewhat disengenuous. Later in its submissions the applicant was referred to as "Ngati Rehua whanau". The submissions made in respect of s 6(e) matters were directed towards this whanau generally, not the strict legal entity that is the Trust.

[83] It is clear that the case before the Environment Court was put on the wider basis; at [46] the Court refers to the appellant as a "Maori whanau", a description that is not challenged. At [60] and [61] the Court referred to the evidence of one of the trustees who talked about the rohe of her whanau and the old traditions of her whanau. Against this evidence I consider that it was reasonable for the Court to have taken into account that this whanau did have interests in some of the other mussel farms, even if the Trust itself does not.

[84] The Court did refer to the fact that there were submissions by related Maori interests seeking to expand AMAs around Great Barrier Island. It is clear from what I have just discussed that this whanau does have access to other possible sites. I do not see why the Court should have been precluded from taking that factor into account in weighing up the various s 6 factors. I do not consider there is any error of law in the Court's approach to this issue.

Eleventh Ground – Waitangi Tribunal report

[85] The Trust claims that the Environment Court incorrectly minimised the relevance of the Waitangi report, whilst accepting recommendations from the Board of Enquiry on the New Zealand Coastal Statement, which has no more status than a Waitangi Tribunal report.

[86] I do not think that the submission fairly reflects the approach of the Environment Court to the report of the (Waitangi Tribunal Ahu Moana – *Aquaculture and Marine Farming: WAI Y953* (1991)), which I simply refer to as the Waitangi Tribunal report. At [55] – [58] the Court recorded submissions from the Trust's counsel to the effect that the granting of the application would demonstrate that the Court had taken into account the principles of the Treaty of Waitangi as required by s 8 RMA. The decision further records Mr Turley's submission that the Court should place "extremely great weight" on the duty of active protection identified by s 8 RMA (though conceding that the weighting given to s 8 matters must be in the context of the relative weighting to be applied to all Part II matters). The Court then said:

> [59] We have a concern about the use of Waitangi Tribunal Reports in the way that Mr Turley seemed to be submitting. They are not decisions of Courts and they do not have legislative quality. They are recommendations to Government. While their contents should be accorded respect, and while they may be helpful in gaining an understanding of issues, they should be used with care.

[87] The Trust acknowledged in submissions that the decisions and reports of the Waitangi Tribunal were not binding on the Environment Court. Its submission was that where a report acts as a precursor for subsequent legislation such as the Maori Commercial Aquaculture Act 2004, the Environment Court's approach resulted in it incorrectly minimising its relevance.

[88] However, it is unclear what weight the Trust asserts should have been placed on the Waitangi Tribunal report, given that the Maori Commercial Aquaculture Act 2004 had not come into force at the time of the hearing. I cannot see anything objectionable to the approach taken by the Court to the submissions made in respect of the Waitangi Tribunal report and there is certainly nothing that could support a

ground of appeal. The weight to be placed on this report, as on any other evidence, was a matter entirely for the Court.

[89] Nor does the submission that the Environment Court accepted recommendations from the Board of Enquiry on the New Zealand Coastal Statement, fairly reflect the Environment Court's decision. At [54] the Environment Court records Mr Turley's submission in which he referred to the High Court decision in *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496. The Environment Court noted the fact that the *Takamore* case had (unknown to counsel) been referred back to the Environment Court and that there had been a subsequent further appeal to the High Court resulting in McKenzie J's decision in *Waikanae Christian Holiday Park & Ors v Kapiti Coast District Council* (HC WN CIV-2003-485-1764, 1774 and 1805, 27 October 2004, MacKenzie J).

[90] MacKenzie J cited from the report and recommendations of the Board of Enquiry on the concept of kaitiakitanga. After a brief description of that part of the judgment the Court in this case simply said:

> [54] …Rather than set out the full passage, we commend the reader to consider the passage, as we have.

[91] This falls well short of accepting the recommendations of the Board of Enquiry. Indeed, on my reading that report would have been accorded less weight than the Waitangi Tribunal report.

Twelfth Ground – Procedural unfairness

[92] This ground of appeal was abandoned at the hearing and I do not need to consider it.

Thirteenth Ground – Relationship of Maori with their environment

[93] The Trust says that the Environment Court failed to recognise and provide for the relationship of Maori and their culture and traditions with ancestral lands, water, sites, wahi tapu and other taonga as required by s 6(e) RMA. In particular, it is said that the Court failed to take into account matters it should have, including but not limited to:

- The history of the area: the Trust referred to its claimed exclusive ownership, mana whenua and mana moana, over Aotea (Great Barrier Island), based on conquest, marriage, tikanga (knowledge and customary practices passed down from Te Puna prior to the conquest of the island), wahi tapu (knowledge and guardianship of traditional resources), mahinga (uninterrupted harvesting of traditional resources) and ahi ka roa (maintenance of the exclusive occupation of the island). There was reference to these factors having been recognised in other cases. I do not know what evidence was before the Environment Court; there was no objection from the respondent to these facts and I have therefore proceeded on the assumption that these facts were before the Environment Court.

- Existing man-made structures: the Trust asserts that, contrary to the references to the area as being pristine and devoid of man-made structures, in fact there were a number of man-made structures on the island. The Trust points to a wharf which is used for the transport of freight, logging and passengers. It refers to the fact that the Department of Conservation has an office on Kaiarara Bay with a commercial garage. It also refers to existing resource consents for at least six wharves and the fact that in Stony Bay there is a resource consent for a mooring. Again, it was unclear to me whether all of this evidence was before the Environment Court but, in the absence of any objection to these references from the opposing parties, I have proceeded on the assumption that it was.

- Maori perception of the environment: the Trust submitted that from the Maori perspective a mussel farm is a beautiful object as it means food, and further, for this Trust it also means employment and an opportunity to return home and restore mauri to the whanau. Taking these considerations into account and looking at them against the strong relationship the whanau has with the site and the existence of other man-made structures nearby it could not really be said that the

development of this area as a marine farm would compromise the landscape. From a Maori perspective it would in fact enhance them.

- The decision in *John da Silva v Aotea Maori Committee & Hauraki Maori Trust Board*, (MLC, 25 Tai Tokerau MB212, 23 February 1998, Judge Spencer).

- Foreshore and Seabed Act 2004, Aquaculture Reform Act 2004, Resource Management Amendment Act (No 2) 2004, Resource Management (Foreshore & Seabed) Amendment Act 2004, Maori Commercial Aquaculture Claims Settlement Act 2004 before Parliament at the time of the Environment Court hearing.

[94] The only issue for this Court can be whether the Environment Court properly took into account the various matters under s 6, including those under s 6(e). After referring to the decision of the Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577 at 594 the Court commented that:

> [48] In our view it is important to note the reference in that passage to the Act having a single broad purpose, a theme to which we will return when undertaking the weighing exercise that is required under the Act. We simply signal that now because ultimately our task is to weigh the matters strenuously urged upon us by the appellant, and others strenuously urged upon us by parties opposing the appeal.

[95] The Court went on to consider various issues relevant to Maori under ss 6, 7 and 8 culminating in a review of evidence adduced on behalf of the Trust. This included evidence by a trustee, Ms Toki, about her whanau's connection with and use of the area. There was also evidence from an unrelated whanau on the east coast of the Coromandel Peninsula about the financial and employment benefits from the kind of business that the Trust wishes to establish. It appeared that, ultimately, the Trust's witnesses accepted that the establishment of the proposed mussel farm would only provide very minor employment. Notwithstanding this fact the Court thought that there could nevertheless be some unquantified financial benefit from either the sale of mussels or granting of a lease to others.

[96] The Court reached the following conclusion on ss 5, 6 and 7 issues relevant to Maori:

> [69] In conclusion on Maori cultural issues and social and economic benefits, we are left with the situation on the evidence that there may be some very minor employment benefit, and an unquantified economic benefit (meeting to a small degree some elements of s 5(2)); there would be the prospect of fostering cultural wellbeing (an aspect of s 5(2)) but that does not have to be in the precise proposed location in order to occur; s 6(e) matters have been firmly established and indeed not questioned by other parties (but again are not location-dependent); elements in relation to s 7(a) are also established; but s 8 elements are of limited relevance. A common theme running through these matters is that there is nothing special about **this** site as opposed to any other area of water around Great Barrier Island, from which cultural, social and economic benefits could be derived**.**

[97] It is clear from this part of the judgment that the Environment Court heard and accepted evidence about the s 6(e) factors. However, it then went on (as I have discussed) to consider in some detail the s 6(a) and (b) issues as well.

[98] In oral submissions Mr Palmer said that the Environment Court had effectively viewed mooring and landscape issues as more important than the Maori issues. He says that the ARC is the agent of the Crown and obliged to observe the Treaty, though he accepted that this factor was not absolute in the context of an RMA application; he could only go so far as to say that Maori were in a stronger position than non-Maori.

[99] It is not for this Court to review the weight attached to the s 6(e) issues by the Environment Court. I am satisfied that the Court properly directed itself to the relevant issues. It recognised the significance of the s 6(e) issues and, indeed, accepted that the proposed development would have satisfied s 6(e). However, in its weighing up of the other s 6 factors it clearly considered that the proposed development would not meet those provided for in s 6(a) and (b). It is not a question of law as to whether, in that exercise, greater weight should have been accorded to s 6(e). That is the very exercise entrusted to the Environment Court and in which this Court will not interfere.

Fourteenth Ground – Failure to take into account the principles of the Treaty of Waitangi

[100] In this ground the Trust asserts that in refusing to grant consent the Environment Court failed to take into account the principles of the Treaty of Waitangi under s 8 RMA. It identified particular ways in which Treaty of Waitangi

principles could have been taken account of. It drew my attention to Chapter 2 of the NZCPS and to the principle of the right to development as it was discussed in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553. Section 8 provides:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (tiritio Waitangi).

[101] Clearly, a failure to take into account the principles of the Treaty of Waitangi would constitute an error of law. However, it does not follow that simply because s 8 would be satisfied by the granting of consent, the failure to grant consent must amount to an error of law.

[102] There is specific reference to s 8 in that part of the judgment dealing specifically with Maori issues. It is clear from [148] that the Environment Court not only had regard to s 8 but perceived that the proposal would meet the requirements of s 8. It is true that, having referred to the matters provided for in ss 5(2), 6(e) and 7(a) the Court did comment that "s 8 elements are of limited relevance". However, the factors provided for in ss 6, 7 and 8 are subordinate to s 5 and of descending significance as between one another. The weight to be given to each is to be determined by the Environment Court and this Court will not interfere in that exercise in the absence of an error of law.

[103] The only question open for consideration is whether the Environment Court took account of s 8. I am satisfied that it did. Once that point has been reached it must be a matter entirely for the Environment Court as to whether, having considered and weighed up all of those factors, consent should be granted or not.

Fifteenth Ground – Incorrect application of *Waikanae Christian Holiday Park v Kapiti Coast District Council*

[104] The Trust submitted that the Environment Court wrongly applied McKenzie J's decision in *Waikanae Christian Holiday Park v Kapiti Coast District Council*. The Environment Court referred to this decision at [54] in response to a submission from the Trust's counsel that the High Court in *Takamore Trustees v Kapiti Coast District Council* had interpreted s 7(a) as requiring the decision maker to have

particular regard to Maori views regarding the way in which land is to be used. In response, the Court referred to MacKenzie J's decision in *Waikanae Christian Holiday Park*, which was a sequel to *Takamore*, and specifically to MacKenzie J's discussion of the concept of kaitiakitanga.

[105] The ground of appeal is that the Environment Court was wrong to apply MacKenzie J's decision because it was made in the context of opposition to a road designation and factually unrelated to the current application. It says that the earlier decision in *Takamore* correctly states the matters of principle on admission of oral evidence of kaumatua.

[106] I do not accept this submission. First, it would be overstating the position to suggest that the Court actually applied McKenzie J's decision; it referred to it in response to the Trust's submission in relation to kaitiakitanga under s7(a), and noted that the High Court in *Takamore* had interpreted s7(a) as requiring the decision-maker to have particular regard to Maori views regarding the way in which land is to be used. But there was no suggestion that the Court was applying MacKenzie J's decision in preference to that in *Takamore*. Nor, indeed that there was any need to choose between them; there is no indication in the decision of any issue as whether the oral evidence from the Trust should be accepted. It was referred to at length and quite clearly accepted.

[107] Secondly, the decision in *Takamore* was also made in the context of opposition to a road designation; it was, in fact, part of the same litigation. Mr Palmer did not submit that MacKenzie J's approach was wrong. Nor did he suggest that applying *Takamore* rather than *Waikanae Christian Holiday Park* could have made any difference to the outcome of the case.

Sixteenth Ground – Error in distinguishing *Buchanan v Northland Regional Council*

[108] The Trust submitted that the Court should not have distinguished the decision in *Buchanan v Northland Regional Council* (EC AK A66/2002, 22 March 2002, Judge Newhook) from the present case. *Buchanan* involved an application for a coastal permit for the construction of a mussel farm near the mouth of the Whangape

Harbour. The permit had been granted by the Northland Regional Council and that grant was the subject of an appeal by a local resident on the grounds that the proposal was contrary to the purpose and principles of the RMA, the NZCPS and the relevant coastal plan and Regional Policy Statement. In that case the granting of the coastal permit was confirmed; in doing so the Environment Court traversed in detail many issues similar to those arising in this case. Ultimately it concluded that the positive benefits to the local community in terms of economic and social wellbeing outweighed the adverse effects on the natural character of the coastal environment, which the Court considered would be no more than minor.

[109] The Trust pointed to factors its application had in common with that in the *Buchanan* case namely:

- The application was one for a marine-based activity incorporating the cultivation of mussels;
- Had the positive benefit of enabling local people to provide for their economic and social wellbeing;
- Had some flow-on economic and social benefits;
- Could have some effects on the natural character of the coastal environment in terms of visual effects however these were no more than minor;
- Adjacent landscape comprised wilding pines with regenerating bush;
- Adjacent landscape not classified as outstanding;
- Consistent with the policies in the NZCPS;
- Manages relevant resources so as to enable people and the community to provide for their social, economic and cultural wellbeing while meeting the requirements of sub-section (a), (b) and (c);
- The applicant was tangata whenua.

[110] It is self-evident that the each decision of the Environment Court must be viewed in relation to its own factual situation. The common features relied on by the Trust are insufficient for the Court to overcome the many significant differences between the cases. I consider that the Environment Court's distinction of *Buchanan* was correct. The Court said:

> [148] We might observe in passing that this case represents almost the reverse of the situation found to prevail on the fact by this Court in a decision cited to us by Mr Turley, *Buchanan & Anor v Northland Regional Council* where iwi interests had applied for consent to a small mussel spat collection farm in a remote harbour with few navigation and safety issues as against a land backdrop that was somewhat modified and accordingly not of high natural character.

[111] On the reading of the two decisions it is plain that the facts on which the Court based its decision in this case were significantly different from those as described in the *Buchanan* decision. The Court has specifically identified the fact that in *Buchanan* the proposed site held few navigation and safety issues. In the present case navigation and safety issues assumed considerable importance in the Court's assessment of the application. The Court also noted that *Buchanan* was decided in relation to a land backdrop that was modified and therefore not of high natural character. In comparison the Environment Court in this case specifically preferred the evidence of the ARC's witnesses as to the high character of the location. There was no error of law in relation to this issue.

Result

[112] The appeal fails. The issue of costs is reserved. Counsel may file memoranda on this issue as follows:

a) The ARC by 23 January 2006

b) The Trust in reply by 7 February 2006

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P Courtney J

TAB 6

Summary ✓ 50pp 1/3/99

Decision No **A 10/94**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **J J HANTON and others**

(Appeal RMA 280/93)

Appellants

AND **THE AUCKLAND CITY COUNCIL**

Respondent

AND **B P OIL NEW ZEALAND LIMITED**

Applicant

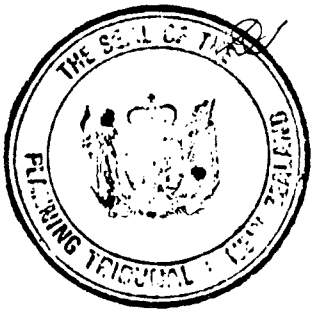
BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr J R Dart
Mr F Easdale

HEARING at AUCKLAND on 13, 14, 15, 16, 17 and 20 December 1993

APPEARANCES

Dr K A Palmer for the appellants
Mr D A Kirkpatrick for the respondent
Mr R E Bartlett and Mr D A Allan for the applicant
Mr J B Childs for Waitemata Health Limited (leave to withdraw)



DECISION

INTRODUCTION

This is an appeal under section 120 of the Resource Management Act 1991 against a decision granting land-use consent (subject to conditions) for a new service station on a site at 1380 Great North Road, Waterview, Auckland City. By an amended notice of appeal the appellants sought that the respondent's decision be reversed and the application declined. It was common ground among the parties that by section 230 of the Resource Management Amendment Act 1993 the appeal is to be considered and decided as if that Act had not been passed. We accept the correctness of that.

The appellants are nine residents of the Waterview suburb. Waitemata Health Limited, which has premises in the vicinity of the site, appeared at the commencement of the appeal hearing and announced that it did not wish to take part in the hearing.

The applicant had previously applied unsuccessfully for planning consent under the former Town and Country Planning Act 1977 for a service station on the same site, the Planning Tribunal's decision disallowing its appeal being Decision A46/91 given in June 1991. There was no challenge to the applicant being free to make the present application despite the fate of the previous application.

Since the previous decision the installation of traffic signals at the intersection of Herdman Street and Great North Road, and proposals by the respondent for improvements to Great North Road (especially proposals for a raised or painted median, redesign of a deceleration lane leading to the service station, a separate lane for traffic turning right from Great North Road into Herdman Street, a splitter island to the south of the intersection on Great North Road, and a recessed bus stop) have altered circumstances that were material reasons for the Tribunal's earlier decision to disallow that appeal.

The Site and its Environs

The site fronts the eastern side of Great North Road about 500 metres south of the Waterview interchange with the North-Western Motorway. The site is owned by

the applicant, which purchased it from the former Auckland Area Health Board in 1989. The legal description of the land is Lot 1 on Deposited Plan 139519 being part Allotment 61 Parish of Titirangi and being the land comprised and described in Certificate of Title 82 D/616 North Auckland Registry.

The site has an area of 1.6250 hectares (reduced to 1.3540 hectares after proposed road widening) and is currently undeveloped. It has a frontage to the eastern side of Great North Road of 338 metres, and a maximum depth of about 70 metres. The eastern boundary runs more or less parallel to, and about 20 metres east of, the western bank of the Oakley Creek. The southern boundary runs at right angles to Great North Road, some 60 metres south of the intersection with Herdman Street, to meet the boundary of an esplanade reserve adjoining Oakley Creek.

The site is presently in pasture, and some small trees have been planted on it near the road frontage. The northern two-thirds of the frontage is marked by a row of trees, being acmenas between 6 and 10 metres high and eucalypts and poplars reaching about 20 metres in height. The remainder of the road frontage is open, except for a small acmena tree in the road reserve.

Great North Road is elevated about 5 metres above the Oakley Creek at the northern end of the site. The south-western portion of the site contains a generally flat area of some 20 metres by 70 metres, from which the land falls about 15 metres to the Oakley Creek. There is a walking path through the reserve near the creek from the northern part of which the site is screened from view by trees and shrubs between the path and the creek. The southern end of the site is more open, and views of the site can be gained from that part of the walking path.

To the east of the site beyond the esplanade reserve there are institutional buildings formerly Carrington Hospital and associated health-care facilities and to the south-east there is Carrington Technical Institute. To the west of the site, on the other side of Great North Road, is the residential suburb of Waterview, which comprises mainly single-storey detached houses, 40 to 50 years old, with some infilling development of sites, particularly those fronting Great North Road.

Great North Road is a busy arterial road carrying on average more than 45,000 vehicles per day with a peak two-way flow of up to 4,100 vehicles per hour (in the evening peak); and has a sealed carriageway width of 13 metres marked in two

lanes in each direction. Herdman Street carries about 1,600 vehicles per day. The 85th percentile of the speed of traffic on Great North Road between Herdman and Cowley Streets is in the vicinity of 64 kilometres per hour.

Although there have been injury accidents on the stretch of Great North Road in the vicinity of the site, the marking of four traffic lanes, the provision of a central refuge for pedestrians using the crossing just south of Herdman Street, and the installation of traffic signals at the Herdman Street intersection are likely to be leading to a substantial reduction in accidents there.

The Proposal

The main features of the proposal are an office and shop building about 3.5 metres high with a floor area of 150 square metres (containing retail space of about 70 square metres for retailing convenience goods - limited by condition to 30 square metres - and motor vehicle accessories); an 8-lane vehicle service forecourt with dispensers for petrol, diesel and LPG; a canopy over the forecourt 5.7 metres high measuring 29 metres by 9.5 metres with a cover for access to the shop measuring 9 metres by 6.1 metres; and a separate automatic car wash approximately 7 metres by 11 metres and 3.9 metres high. LPG would be stocked in a 4-tonne (7,500-litre water capacity) vessel in the usual fenced compound beyond the public area of the forecourt and driveways, about 40 metres from the front boundary and about 55 metres from the nearest residential boundary, at a level 3.5 metres below the forecourt level where it would not be visible from the road or from the service station forecourt. Except for the LPG, the stocks of fuel would be underground. Although it was not mentioned, we expect that motor oils would also be sold. No workshop, lubrication or tyre bays are proposed, and no servicing or repairs to motor vehicles is proposed to be carried out on the site. It is intended that the service station would be open for business 24 hours a day, 7 days a week; but it was acknowledged that in practice the noise level condition imposed by the respondent would have the effect that the car wash would not be open for business after 9 o'clock at night.

The service station has been designed for one-way flow of traffic through it, from the north to the south. The entry would be from a 90-metre deceleration lane from Great North Road leading into the forecourt; and the exit would be to Great North

Road from the south of the site at a point 24 metres south of the Herdman Street intersection. Nine parking spaces would be provided on the site.

The respondent has current proposals for widening Great North Road in the vicinity of the site, providing a slot for traffic waiting to turn right out of Great North Road into Herdman Street, and a bus-stop bay recessed off the moving traffic lanes, south of the Herdman Street intersection. Funds have been allocated for that work in the 1993/94 financial year, and the work is expected to be completed in the following year. At the time of the appeal hearing, the respondent had not decided whether those works would include provision of a raised median in the centre of the road or merely a painted median. However, even if the median in Great North Road generally is not to be a raised structure but merely painted on the road surface, there is to be a raised "splitter island" median in Great North Road extending south from the Herdman Street intersection past the exit driveway from the service station. The applicant's proposal had been designed to fit with the respondent's improvement proposals for Great North Road.

There would need to be earthworks for preparing the platform for the service station itself, for the driveways and for the LPG compound. To support the filling required for the service station there would be a timber crib wall up to 5 metres high around the eastern edge of the forecourt.

The service station itself (including all paved areas) would occupy about 3,000 square metres, which is about 20 per cent of the total site area; and would have a frontage of about 100 metres. The proposal the subject of the current application was that of the rest of the site about 11,000 square metres be planted in trees and the balance in low shrubs, to the intent that it would appear an addition to the adjoining public reserve, being land owned by the respondent and zoned Open Space Activity. There would be a raised garden with trees and shrubs along the road frontage. Landscape designers have been engaged to provide a landscaping plan and a plan for the ongoing maintenance of the planting.

Lighting would be focused and of low intensity to minimise light spill outside the canopy area and shop front. There would be a BP sign 7.5 metres high located in the road frontage planting strip north of the forecourt. Illumination of signs would be by back-lit plastic facings to ensure that no light spill occurred. No flashing illuminated signs are proposed. A condition imposed by the respondent would

prohibit signs visible to motorists travelling north on Great North Road, so as not to encourage right turns across southbound traffic lanes into the service station.

The underground fuel storage would conform to the national code of practice, and the installation of the storage and dispensing equipment would be supervised by qualified engineers. The proposal is to store 100,000 litres of petrol. The tanks and pipework would be double-skinned and the entire system pressurised with automatic shutdown on loss of pressure and monitoring wells to detect escape of hydrocarbons. Vent pipes for the main storage tanks would be designed to entrain air to dilute and help disperse vapour discharged on refilling. Valves and overspill chambers would preclude spillage of excess fuel, and the management system would require daily reconciliation of stocks to identify any losses.

A stormwater management plan would involve separation of stormwater catchments within the site to enable disposal of contaminants and avoid any significant discharge of pollutants into receiving waters. There would be a three-stage oil interceptor trap and a sediment detention pond.

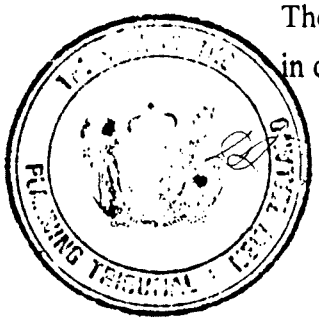
PLANNING INSTRUMENTS

It was not suggested that any regional planning instrument contains provisions applicable to the appeal. The relevant planning instruments are the transitional district plan and a proposed new district plan.

Transitional District Plan

The relevant transitional district plan is the former Auckland City district scheme. By that plan the land is in the Residential 5 zone, in which service stations on arterial roads are conditional uses. Great North Road at Waterview is classified as an arterial road. It was common ground that under the Resource Management Act and in terms of the operative transitional district plan, the proposal is a discretionary activity. We therefore hold that the application requires land-use consent in terms of the transitional district plan.

The plan contains some general criteria for consideration of conditional uses, and in clause 3.5:2.4 there are specific criteria for consideration of service stations.



In Residential 5 zones a range of activities are permitted as of right including (as well as dwelling units) homes for the aged, pensioner housing, private hospitals for up to 21 patients, and private schools; and conditional uses (now discretionary activities) include (as well as service stations) buildings for arts and recreation, community welfare services, educational institutions, and private hospitals for 21 patients or more patients.

Proposed District Plan

The respondent has prepared a proposed district plan under the Resource Management Act for the section of its district that includes the subject site, that is, the Auckland isthmus excluding the central area. The plan was publicly notified on 1 July 1993, and numerous submissions were received within the period prescribed (which elapsed on 30 September 1993); but at the time of the appeal hearing the respondent had not published a summary of the submissions to allow further submissions in support or opposition in the way provided for by clause 7 of Part I of the First Schedule to the Act. Indeed, although the period for lodging submissions had closed on 30 September 1993, by the time of the appeal hearing in mid-December the respondent informed us that it was unable to state whether it had received any submissions challenging any of the provisions of the proposed district plan that might bear on the applicant's proposals or on the proposed zoning of its land.

At the time it granted consent, in June 1993, the respondent had not yet notified its proposed district plan, so the service station application had been considered by it solely in terms of the transitional district plan. However, we accept the respondent's submissions that on this appeal, now that the proposed plan has been notified, the application needs to be considered in terms of that plan as well: see the reasoning in *Ireland v Auckland City Council* (1981) 8 NZTPA 96 and the reference in section 9(1) to a use of land that contravenes a proposed plan.

By the proposed district plan as originally published, the site would be in the Residential 6a zone (which would also apply to the existing residential development on the western side of Great North Road. The proposed plan does not provide for service stations as permitted or discretionary activities in the Residential 6a zone or in any other residential zone. No reason for omitting provision for them in those zones is stated. Service stations are provided for as

discretionary activities in the Business Activity zones. The provisions of the proposed plan about performance standards for hazardous facilities would also effectively prevent service stations in residential zones.

Although the respondent was unable to inform us of any relevant submissions received by it on the proposed plan, the applicant's planning witness was able to depose that submissions had been lodged seeking that service stations be provided for in residential zones; and a consultant planner called for the respondent deposed to his understanding that there had also been submissions from the public seeking rezoning of the subject site as Open Space.

The principal objectives for achieving sustainable management of the resources of the isthmus area are stated in section 2.3 of the proposed plan. They include conserving, protecting and enhancing the district's natural environment; conserving the district's resources to meet the needs of the community; protecting the district's resources from significant effects of activities and development; protecting, preserving and enhancing significant habitats; achieving a healthy and safe living environment; protecting and enhancing residential amenities; giving recognition to the status of the tangata whenua and providing for their interest; providing for economic growth and development which does not unduly compromise environmental values; and allowing for new service provision where it does not compromise environmental protection and enhancement.

In the chapter on residential activity, objectives are stated of identifying, maintaining and enhancing the recognised character and amenity of residential environments; recognising the need for supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents (paragraph 7.3.4); and specifically in respect of the Residential 6 zones there are policies of imposing controls on developments which protect the external environment of the site, and of permitting a wider range of activities than permitted in the lower intensity residential zones, while maintaining the appreciated amenity (paragraph 7.6.6.1), and under the title "Strategy" an explanation that provision is made for a range of activities to operate within the zone; that in general the activities provided for would be expected to include a residential component or to be of benefit to the community; that activities which attract significantly more people to a site than would be anticipated from the density permitted in the zone would be discouraged as they can cause increased traffic generation, noise and

other adverse environmental impacts; and that conditions may be imposed on activities seeking resource consent to ensure that generated effects do not extend beyond the boundaries of a site and that measures are undertaken to mitigate any adverse impact on personal privacy and on the visual amenity of the vicinity (paragraph 7.6.6.2).

In the chapter on transportation there is an objective of improving access, ease and safety of movement within the city (paragraph 12.3.2) and a policy of improving the capacity and safety of existing facilities through the use of appropriate traffic management techniques.

It was common ground that the proposed service station, while not provided for in the relevant zone under the proposed plan, is not a prohibited activity as defined; and even if it were, by section 105(2)(c) the proscription against granting resource consent for a prohibited activity in a proposed plan would not take effect until the relevant part of the plan is beyond challenge. It was common ground therefore that the proposal must be considered as a non-complying activity in respect of the proposed district plan, and we so hold.

Other Resource Consents Required

Discharge of stormwater

The applicant had applied to the Auckland Regional Council for a permit for the discharge to the Oakley Creek of stormwater from the service station premises, and on 16 December 1993 the regional council granted the discharge permit accordingly. The applicant informed us that it accepted the conditions and did not intend to appeal against any part of the decision. Because the application had not been notified, no third parties were entitled to lodge submissions or to appeal against that decision.

Discharge into air

At the start of the appeal hearing the applicant advised that the Auckland Regional Council had considered (apparently on advice from the Ministry for the Environment) that no resource consent was required for discharge into air of vapour from the fuel tanks when being refilled (apparently understanding that to be

the effect of section 392), so no application had been made. However after considering questions from ourselves, the applicant subsequently applied to the Auckland Regional Council and on 16 December 1993 was granted a permit to discharge contaminants (hydrocarbons and related substances in quantities less than 5 kilograms per hour) into air. The applicant informed us that it had accepted the conditions and did not intend to appeal against any part of the decision. Because the application had not been notified, no third party was entitled to lodge submissions or to appeal against that decision.

THE APPELLANTS' CASE

The main grounds advanced for the appellants in opposition to the service station were:

1. That concerns expressed in the 1991 appeal decision about traffic safety remain substantially applicable, traffic densities having compounded at least 3 per cent per annum in the intervening period.

2. That service stations are not permitted in residential zones under the proposed district plan, and although decisions on submissions may affect the final content of the plan, it is unlikely that service stations will be added back in any residential zone; that neither of the threshold tests for grant of non-complying activity consent can be satisfied and that granting consent for a service station in a residential zone would compromise the objectives and policies of the proposed plan, bring its integrity into question, and affect public confidence in its administration.

3. That the proposal would have adverse effects on the amenities of the area by the impact of a large corporate service station on the residential environment, the loss of a significant area of "green belt", and detraction from the amenity of the Oakley Creek walkway; and the site has come to be regarded as part of the public estate to be used for public purposes.

4. That there would be discharges of contaminants in the stormwater runoff to the Oakley Creek, and venting of fumes during the refilling of fuel tanks.

5. — That the proposal does not (in terms of section 5(2)(c)) adequately avoid, remedy, or mitigate the adverse effects of the activity on the environment.

6. That the proposal conflicts with principles in Part II in that the scale of the development abutting the Oakley Creek, which has a natural habitat function, could raise matters of national importance, in particular: preservation of the natural character of wetlands and rivers and their margins (section 6(a)); protection of areas of significant habitats of indigenous fauna (section 6(c)); and the relationship of Maori and their culture and traditions with their ancestral lands (section 6(e)); and matters under section 7 which are relevant to the achievement of sustainable management, namely maintenance and enhancement of amenity values (section 7(c)); recognition of the heritage value of the site, its original purchase from Ngati Whatua and continued public purpose and use (section 7(e)); and maintenance and enhancement of the quality of the environment in that as a large structure, the service station would not maintain and enhance amenity values, nor enhance the quality of the environment (section 7(f)).

7. That duties under section 8 which apply to the territorial authority in the first instance, which may have a responsibility to alert an applicant of the duty of serious consultation with iwi and local hapu where a proposal could affect Maori interests in ancestral land, have not been complied with.

8. That storage of 100,000 litres of petrol would substantially exceed the maximum safe volume for the locality.

9. That the applicant's agreement for purchase of the site had originally been conditional on obtaining approval for a service station, but without obtaining that approval the applicant had waived the condition, so it must be taken to have assumed the risk that consent might not be granted.

10. That the Tribunal having refused the previous application, the council's subsequent grant of a similar application affects public confidence in the resource management decision system.

11. — That an isolated small area should not be spot zoned, and although the current proposal is not formally a zoning, the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

On ground 2, counsel for the appellants accepted that it would not be proper for the Tribunal to speculate about the outcome of submissions on the proposed plan.

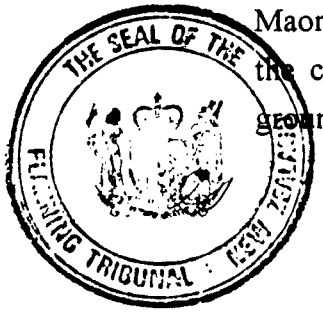
On ground 4, counsel for the appellants acknowledged that because the discharges had been the subject of separate applications which had not been notified, and no appeals arising from them were before the Tribunal, the Tribunal could not address those claims in these proceedings. We accept that because the requisite discharge permits have been granted, we should consider the proposal on the footing that any discharges of contaminants to the waters of the creek, and into the atmosphere, would be insignificant.

The appellants offered no direct evidence to support ground 8, which was based on the amount of petrol to be stored exceeding the limits prescribed in the proposed district plan. In that respect, Mr Palmer accepted that the limit on the quantity of petrol that may be stored is not particularly reliable pending decision on submissions on the plan.

In support of their case, the appellants called no fewer than 16 witnesses. Regrettably, much of the testimony of many of those witnesses was not properly evidence but assertions of aspects of their case which had been fully presented by their counsel in his address to the Tribunal, and did little to provide a basis for judicial findings or otherwise advance their case.

THE APPLICANT'S PURCHASE OF THE SITE

The circumstances in which the applicant came to be the owner of the site are relevant to several references in the appellants' grounds of appeal, namely the claim that the site has come to be regarded as part of the public estate to be used for public purposes (see ground 3); the claimed applicability of the relationship of Maori with their ancestral lands, and the heritage value of the site (see ground 6); the claim that the proposal would affect Maori interests in ancestral land (see ground 7); and the reference to the applicant having waived a condition of



purchase of the site (see ground 9). Despite those claims, there was not any conflict of primary fact on those topics, and we set out our findings on them.

Carrington Hospital land (which included the subject site) was formerly owned by the Auckland Area Health Board, successor to the former Auckland Hospital Board, being part of a 13,000 acre block (covering a large part of the Auckland isthmus) that had been acquired by the Crown from Ngati Whatua for valuable consideration in 1841, and most of which was purchased for public health purposes from various intervening owners.

The subject site had originally been set aside for school purposes in 1878 and was transferred to the Crown for health purposes in 1892. It was transferred to the Auckland Hospital Board in about 1980, and its successor, the Auckland Area Health Board sold it to the applicant by conditional agreement for sale and purchase that was made in 1989, made unconditional in November 1990, and completed in December 1990; and the transfer to the applicant was registered in 1991.

The land is subject of a general Waitangi Tribunal claim (WAI 121) by W and E Manukau made in January 1990 (after the agreement for sale of the subject land to the applicant had been entered into) which relates to all land from Otahuhu to the Bay of Islands. Claim WAI 388 by the Ngati Whatua o Orakei Trust Board was made to the Waitangi Tribunal on 17 August 1993 and related to the land in the Tamaki isthmus generally.

Neither of those claims under the Treaty of Waitangi Act 1975 has been reported on or heard by the Waitangi Tribunal, and there is no evidence that the land is excluded from the effect of section 6(4A) of that Act (as inserted by section 3 of the Treaty of Waitangi Amendment Act 1993) by which that Tribunal is precluded from recommending return to Maori ownership of any private land. We consider that the existence of those broad claims should not therefore influence this Tribunal's decision on this appeal.

A witness for the appellants who is deputy chairman of the Ngati Whatua o Orakei Trust Board, Mr G P Hawke, deposed that the Auckland Area Health Board had not informed or consulted with Ngati Whatua o Orakei about the Health Board's intention to sell land in the vicinity; and that the Trust Board would have expressed

opposition on the grounds that the land was designated for health and educational purposes, not for development by a multi-national oil company.

A local resident who gave evidence for the appellants, Ms S C Abernethy, deposed that the land "should not be derogated from in any way by grants to commercial interests".

The respondent council has formally resolved not to purchase the site to add it to the adjoining reserve at this time.

By their counsel the appellants accepted that for the purposes of this appeal it should be assumed that the applicant has a valid and lawful title to the property. We accept that, and add that there was no evidence before us to suggest otherwise.

There is no basis for treating the land as part of the public estate to be used for public purposes; or for holding that its sale to commercial interests was a derogation from any special legal status precluding such a transaction. There is no evidence of probative value before us to suggest any particular relationship by Maori with the service station site, or that the site has any heritage value; and there is nothing to support the claim that the proposal would affect Maori interests in their ancestral land.

We accept that the applicant waived the condition of its purchase agreement and completed the purchase without having obtained approval for a service station on it, and thereby assumed the risk that consent might not be obtained. That was a commercial judgment, and we do not consider that it diminishes the applicant's case nor advances the appellants' case.

CONSULTATION WITH THE TANGATA WHENUA

One of the issues raised for the appellants was that there had been no, or no adequate, consultation with the tangata whenua. In that regard, their counsel submitted that under section 8, a duty of serious consultation with iwi and local hapu may be applicable where a proposal could affect Maori interests in ancestral land; and that the duty may apply to the territorial authority in the first instance, who may have a responsibility to alert an applicant.

In support of that submission, Mr Palmer relied on two Planning Tribunal decisions, *Gill v Rotorua District Council* (1993) 2 NZRMA 604 and *Haddon v Auckland Regional Council* (Report A77/93); and contended that section 8 overrides narrower obligations under the regulations and that the omission from the regulations of provision for consultation on a resource application with iwi may be overridden by the general obligation under section 8. Counsel also argued that the reference in section 8 extends the duty of consultation of the type referred to in *NZ Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) to the consent authority, relying on section 5(j) of the Acts Interpretation Act 1924 for construction of section 8 to achieve the purpose and spirit of the provision. Mr Palmer observed that under section 93(1)(f) there is a discretion to require service of a resource consent application on an iwi authority.

It was established (and not challenged) that Ngati Whatua are the tangata whenua in the vicinity of the site, and it was common ground that they had not been consulted over the service station proposal, and had not been separately served with the application. Their attitude is that land surplus to requirements of public authorities in Auckland should be returned to Maori ownership and not used for activities that the iwi consider unsuitable. It was also established that the applicant had given notice of the resource consent application to everyone on the list supplied to it by the respondent for that purpose, and had also sent copies of the application to everyone who telephoned for them.

Ngati Whatua are not parties to these proceedings. The deputy chairman of the Trust Board, Mr Hawke, stated in evidence that the Trust Board considered that the respondent had been in breach of the Resource Management Act in that as tangata whenua and owner of adjacent land the Trust Board had never been notified of the application. In cross-examination he acknowledged that the adjacent land referred to has access to Carrington Road; and that the Trust Board's objective is retention of the site as open space.

The subject site was held in separate freehold title by a private company at the time when the present application was lodged. The respondent, as consent authority, had no knowledge of the site containing any waahi tapu; and it is not shown in the proposed district plan as containing any archaeological feature or Maori Heritage site. Neither the Department of Conservation nor the Auckland Regional Council

records show the site containing archaeological or historic sites. There is nothing to indicate that the adjacent land vested in the Trust Board would be affected in any way by the proposed service station. In the circumstances, we hold that the respondent had no duty to notify the Ngati Whatua o Orakei Trust Board of the resource consent application.

Mr Palmer accepted that any omission of service can be cured by the appeal hearing, and announced that the appellants were not asking that processing of application be declared invalid.

To the extent that the Planning Tribunal held, in *Gill v Rotorua District Council*, that the Act requires consent authorities actively to consult with tangata whenua on applications for resource consent, counsel for the respondent submitted that that finding was wrong in law, and urged us not to follow it. He contended that while territorial authorities have an obligation under clause 3 of the First Schedule to consult with tangata whenua during the preparation of proposed policy statements and plans, they are not required to consult with anyone when considering applications for resource consents. Counsel observed that applicants for resource consents are obliged by section 88(6) and clause 1(h) of the Fourth Schedule to identify in their assessments of environmental effects those interested in or affected by a proposal, the consultation undertaken and any response to the views of those consulted. He also observed that consultation by a consent authority with tangata whenua would also be inconsistent with its position as the decision-maker in a judicial or quasi-judicial process, resulting in a degree of active participation by consent authorities which would be contrary to the principles of natural justice. Mr Kirkpatrick submitted that if Parliament had intended consent authorities engage in consultation on resource consent applications, it would have explicitly provided for that in the code of procedure for processing those applications. Counsel for the applicant adopted those submissions.

The text of section 8 is:

> "In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

In *~~NZ~~ Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) the learned President, delivering the Judgment of the Court, added some observations (at page 152):

> "In the judgments of 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument ... it would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale [of forestry cutting rights] without consultation."

In *Gill v Rotorua District Council*, the Tribunal said (at page 616):

> "One of the nationally important requirements of the Act under the Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840: Section 8 of the Act. One of these principles is that of consultation with the tangata whenua: see *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).
>
> The council itself does not appear to have actively consulted with the tribe over the proposal. In its report to council, the Statutory Hearings Committee stated, in the light of allegations that the council had not adequately consulted the Trustees, that: '... the records clearly indicate that the necessary advice was conveyed to the Trust, and from there it was a matter for the Trust to deal with'.
>
> This is not what the legislation requires. The council's actions appear to have been merely passive. The test which the council has to meet under all provisions of s 7 is a high one. It is required to have *particular regard* to the issues listed. We have no evidence that the council gave especial regard to the Maori issues in its investigations into the proposal. The section imposes a duty to be on inquiry. The evidence disclosed that the Maori people of the area had supported the Scenic Reserve designation in 1979. The council, had, until this point, supported the Scenic Reserve designation also. It should have investigated further why the Maori people supported it originally and been on the alert as a consequence."

In its report to the Minister of Conservation in *Haddon*'s case, the Tribunal said (at pages 20-22):

> "...it is clear to us that the parties had not taken into account the principles of being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed, or of how to give effect to some of the hapu's customary practices, early enough in the decision-making process.
>
> It would appear that the duty 'to take into account' indicates that a decision maker must weigh the matter with other matters being

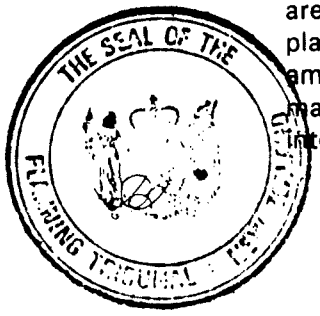
considered, effect a balance between the matter at issue and be able to show he or she has done so. In this case the concerns which seem to have been taken into account are the general social concerns of the community. The cultural concerns of the Maori community and its relationship with traditional resources do not seem to have been weighed and shown to be weighed (apart from in one small aspect).

The Court of Appeal has established that consultation is a principle of the Treaty. *NZ Maori Council v Attorney-General* [1989] 2 NZLR 142, 152 (CA). That principle was not cited by any of the parties before us but as a party exercising a function and power under the Act, we too are required to take into account the principles of the Treaty. We have thus taken judicial notice of the existence of this principle and hold that it was applicable in this case. It is our view after hearing Mr Haddon, that had all the parties entered into a dialogue with him and the hapu even before the formal notification had taken place, such consultation might well have circumvented the inquiry process or at least some of the issues raised before us.

We gained the clear impression that he should have been part of the process which formulated the application instead of, as he put it, being brought in only at the 7th stage in a 9 stage process. Your counsel drew our attention to the Treaty principle of the Crown making informed decisions. To be informed all the parties under the RMA, including the ACC and ARC, must be informed where the interests of a Treaty partner is concerned and demonstrate in their various functions that they have taken those interests into account. To be properly informed therefore the parties must consult at the initial stages in the process."

In its decision in *Ngatiwai Trust Board v Whangarei District Council & ors* (Decision A7/94) the Tribunal (differently composed) addressed the passages quoted above from *Gill*'s case and *Haddon*'s case and said (at page 5):

"We do not think that, by these passages, it was intended to be understood that, in all cases where Maori people are known to reside in the vicinity of a site the subject of a resource consent application, or otherwise where local Maori community interests have registered some viewpoint or concern about the application, the council to whom the application is addressed must first consult with those involved, or their representatives, before proceeding to hear and determine the matter. Rather, the Tribunal appears to have focussed in the cases mentioned upon the local authority parties' failure to follow up the special background of Maori significance present in each instance - both cases being intimately related to apparently long-standing cultural issues of which the councils concerned could not have been unaware. We pause here to emphasise that nothing we are about to say should be construed as suggesting that a council planning officer, in preparing a report for pre-hearing distribution among the parties and for the council's assistance at the hearing, may not be under a duty (depending on the circumstances) to enquire into the views of the tangata whenua by consulting with their

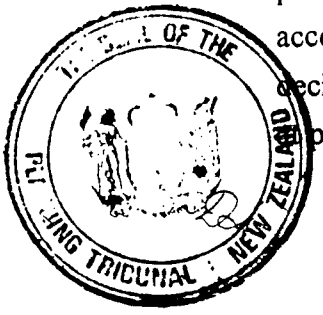


> representatives, so as to ensure that the report is suitably comprehensive as to relevant issues upon which the council needs to be informed. If this point was, in effect, conveyed in the previous cases before the Tribunal, we likewise endorse it."

Then, after referring to the *Maori Council* case and the recent Judgment of the Privy Council in *NZ Maori Council v Attorney-General* delivered 13 December 1993, and quoting the text of section 8, the Tribunal continued (at page 6):

> "...in approaching s 8 the particular function or power requiring to be performed or exercised by a particular person pursuant to a particular section or part of the Act must be considered in its context in order to analyse the nature and extent of the responsibility incumbent on the person under the section. In the process of such consideration, the underlying obligations and responsibilities of the Treaty, collectively explained in the line of well-known cases of high authority, and going to its essence and hence its workability as a living document, need carefully to be borne in mind. If the person's particular function or power requiring to be performed or exercised is perceived as affecting or likely to affect a matter founded upon or arising out of the Treaty, then the person concerned must take into account such Treaty principle or principles as are relevant to ensure that the intent of the Treaty in relation to the matter is maintained, insofar as that is practicable in achieving the Act's purpose under s 5.
>
> In this instance, the respondents proceeded to exercise their functions and powers, in relation to the applications made to them, by requiring the applicants to furnish supporting information and plans, and by requiring that various interested parties be notified, including the appellant. As bodies required to act judicially in hearing and determining the applications in the light of the evidence forthcoming from the applicants and others electing to participate, we do not see that either respondent, having regard to its relevant functions and powers, was under a duty to consult with the appellant (or with others within the appellant's auspices) before proceeding to hear the applicants and representatives of the appellant."

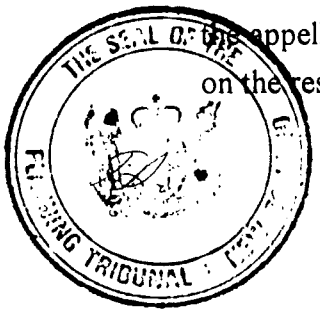
Because of its place in Part II of the Act, and because of its subject matter, section 8 is an important provision, to be given fair, large and liberal construction, and not read down. Yet we would not be entitled to give it effect beyond the scope of the words used. Consent authorities receiving and processing resource consent applications, such as the respondent in this case, are undoubtedly exercising functions and powers under the Act, and are bound to take into account the principles of the Treaty. That duty would include, in appropriate cases, taking into account the Crown's duties of active protection of Maori interests, and of informed decision-making, where relevant: *Re applications by Sea-Tow and others* A129/93 p 23.



Although section 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. Where, as in *Haddon*'s case, the consent authority is a Minister of the Crown, then it is to be expected that the Minister's decision would take into account those obligations. But where the consent authority is not a Minister of the Crown, but a local authority or some other person, we do not find authority in section 8 for the proposition that by exercising functions and powers under the Act it is subject to the obligations of the Crown under the Treaty. Rather the consent authority is to take those principles into account in reaching its decision.

The Crown's duty of consultation referred to by the Court of Appeal in the 1989 Judgment was found to exist in a context of sale by the Crown of assets in respect of which the good faith of partners was involved. In our view, the case of a consent authority, not being a Minister of the Crown, receiving and processing a resource consent application is distinguishable in three ways. First, in such a case a consent authority is not disposing of Crown assets in a way that might place them beyond reach of being available to compensate for grievances under the Treaty. Its function is confined to deciding whether a proposed use may be made by whomever of natural and physical resources consistent with their sustainable management. Secondly, the consent authority is following quite a detailed code of procedure which does not overlook the place of the tangata whenua, but which omits any express duty of consultation. Thirdly, the consent authority's function is to act judicially, and consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its function. With respect, we do not find in the Judgment of the Court of Appeal anything which would support Mr Palmer's submission.

We would adopt, with respect, the discussion in the *Ngatiwai* decision of the earlier Tribunal decisions, and would follow the conclusion that a consent authority is not obliged to consult with the tangata whenua on a resource consent application. We hold that no such duty is to be inferred from section 8 or the *Maori Council* case; and we do not accept the submission made by Mr Palmer for the appellants that the respondent was under a duty to consult with Ngati Whatua on the resource consent application.



We also agree that where it is known that natural or physical resources the subject of a resource consent application are the object of a valued relationship by Maori people, an adviser preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship. However that was not required on the facts of this case.

Criteria

We now consider the proposal by reference to the criteria set out in section 104 that are applicable.

Actual and potential effects

First we are required by section 104(1) to have regard to any actual and potential effects of allowing the activity.

We accept Mr Bartlett's submissions that consideration may be given to any positive effects as well as to any adverse effects of allowing the activity; and we find that positive effects of allowing it would include not only the service and convenience for customers of the fuel and other goods and services provided by the service station, but also the extensive planting proposed, which would add to amenity values of the area, and the ability for the council to recess the bus bay on the applicant's land, so that stopped buses do not restrict passing traffic.

Planning

We now consider whether there would be any actual or potential planning effects of allowing the activity.

It was the appellants' case that an isolated small area should not be spot-zoned, and although counsel acknowledged that the proposal is not for a zoning as such, he argued that the issue is not dissimilar in that the emphasis of the Resource Management Act is on the effects of activities.

We do not accept that analogy. In terms of the zoning under the operative district plan, a service station may be permitted on the site as a discretionary activity. If a service station is established there, no change to the Residential 5 zoning of the

land would be needed for the plan to retain its integrity. We do not overlook that a service station would not be an activity that the proposed district plan provided for on the site. To avoid prejudging an issue that may yet have to be decided by the Tribunal, our consideration of the planning effects in that respect should proceed on the assumption that the relevant provisions of the proposed plan will remain unchanged when that plan becomes operative. However a service station on the subject site would not be a prohibited activity there. If a service station is established pursuant to resource consent granted on the basis of it being a discretionary activity under the operative (transitional) plan, then even though it may be a non-complying activity in terms of the proposed plan (which had not been published at the time resource consent was applied for), a grant of consent for it would imply that a judgment had been reached that despite being a non-complying activity, land-use consent deserved to be granted in all the circumstances. Any effect on the integrity of the proposed plan would be reduced by the facts that the application had been made (and originally decided) before the proposed plan had been published; that the reasons for omitting provisions allowing service stations in the Residential 6a zone are not stated in the plan; and that the relevant provisions of the plan had been challenged, but those challenges had not been heard let alone decided. In addition, the planning suitability of the site for a service station by its physical characteristics, and in particular its large size, its location on an arterial route, and the lack of immediate neighbours; and the absence from the proposal of workshop and vehicle servicing facilities, would further reduce the planning effect of allowing the activity.

We find that the planning effect of allowing the proposed activity would be minimal.

Traffic

Several witnesses for the appellants asserted that the proposed service station would create a dangerous traffic situation leading to a substantial increase in traffic accidents, and accidents involving children crossing Great North Road to buy confectionery or snack food that may be sold at the service station. Mrs D Persson, Mr J J Hanton, Ms S Abernethy, Mr C R Corsbie, Mr B King, Mrs J A Corsbie, and Mrs S W Morris Upton, all local residents, gave anecdotal evidence of difficulties with the Great North Road carrying heavy flows of traffic and of accidents of which they had knowledge.

Mr Corsbie offered a critique of the evidence of Mr B Harries, a qualified traffic engineer called for the applicant, and although Mr Corsbie acknowledged that he possessed no qualifications in traffic engineering himself, he referred to examples in which, he asserted, the advice of experts has been found deficient, citing the Auckland Harbour Bridge extension welding, the construction of the Newmarket viaduct, the building of the Clyde Dam on fault lines, and allowing use of arsenical and dieldrin sheep dips, DDT, hormone sprays and a particular brand of motor oil. In cross-examination, Mr Corsbie stated that he did not agree with the opinion of Mr F S Green, the qualified traffic engineer called for the appellants, on the entrance to the service station; that he had deliberately not read a report on the proposal that had been prepared by another traffic engineer, Mr R Dickson, at the request of previous counsel for the appellants, because he had wanted to keep his evidence "devoid of conflict", and that study of other reports might have changed his mind; and that he did not accept some of the opinions of the four traffic engineers who did give evidence about the proposed road widening and the proposed traffic management techniques for the service station.

A qualified planner called for the appellants, Mr Brehmer, expressed the view that the proposed service station would impede traffic flows on Great North Road, reported accidents on that stretch of road, and was critical of the design of the entrance and exit to the service station. However in cross-examination that witness accepted that he had no qualifications in traffic engineering (except that his course for his diploma in town planning had covered traffic matters), and that he did not agree with the opinions expressed in evidence by Mr Green.

Mr King, too, stated that he would argue with some of Mr Green's views, although he acknowledged that he would not be in a position to contradict them. Mr King's profession is that of a musician.

In this case where we had the benefit of four witnesses who possess specialist professional qualifications and experience in that field of knowledge, we prefer their opinions to those that were beyond the expertise of the witnesses who offered them.

We find that Mr Green is qualified to give opinion evidence on traffic engineering, being a registered engineer with specialist experience in that field. Mr Green stated

that if a kerbed median was constructed on Great North Road it would resolve the major traffic concern he had, and he considered that further design work on the upgrading of the road would ensure that the proposal would not prejudice traffic safety and efficiency. However he acknowledged that a raised median would restrict access into frontage properties from the southbound lanes. In cross-examination he acknowledged that in general signs are effective in controlling traffic; that right-turn entries into the proposed service station would not create undue traffic hazards; that the public is becoming familiar with one-way service stations; and that if found desirable, the proposed splitter island could be lengthened, which, together with appropriate signs and suitable design of the exit, would further discourage vehicles leaving the service station turning right into the northbound lanes.

Consistent with the opinions expressed by Mr B Harries, Mr B L Hall and Mr G J Tuohey, all qualified traffic engineers, we find that the present application differs from the previous one in that the service station layout incorporates traffic management measures associated with the proposed widening of Great North Road, has enhanced access and egress arrangements, is improved by the recent installation of traffic signals at the intersection at Herdman Street, and proposes an enhanced bus stop facility. The service station has been designed to be developed as an integral part of the frontage road and traffic environment; the site is strategically well placed in the road network, and has sufficient frontage length to accommodate particularly high quality access and egress driveways. The relevant standards are capable of being met for ingress, deceleration lane and egress, and the proposal would have the capacity to handle all the associated traffic activity well removed from interaction with passing traffic. The design would not compromise, but be complementary to, the respondent's proposed road widening and improvement plans, and we accept the expert evidence that the service station as proposed could be established without any undesirable impact on traffic safety or traffic flow on Great North Road or Herdman Street.

Children crossing Great North Road to buy confectionery or snack food would have the protection of a pedestrian crossing and traffic signals.

The respondent has authority for traffic management measures on Great North Road itself. Those are within its executive functions, and are not matters on which this Tribunal has jurisdiction. However we find that the respondent is aware of the

advantages and disadvantages of installing a kerbed median in Great North Road instead of a painted median, and is making a decision after consultation with the local community and with the benefit of qualified advice. We are content with that, and are confident that if a raised median, or any other traffic management measure, is found desirable for the safe and efficient use of Great North Road, the respondent will act appropriately. It would be impertinent for us to express any opinion on that subject in this document.

In summary, we find that the proposal would not cause any adverse effects on the safe and efficient flow of traffic.

Visual

The first-named appellant, Mr J J Hanton, asserted in evidence that the proposed service station would be a blot on the countryside. He did not explain his opinion by reference to the drawings of the proposal.

Mr Brehmer claimed that the proposal would have significant visual effects, replacing a pleasant open space with buildings, concrete areas and retaining walls, thereby completely changing it; that the structures of the station could not be concealed by the planting proposed; and referred to the proposed planting of trees as a major unnecessary change of natural resources. However in cross-examination the witness acknowledged that he had not considered the visual effects on a site-by-site basis; that he had been one of the crusaders against the service station, had himself lodged a late objection to it (although he resides 3 kilometres from the site), and was opposed to the zoning of the subject land for housing or for any purpose other than open space.

Local residents called for the appellants, Mr B King, Mrs J A Corsbie, Mrs S W Morris Upton, and Mr C Kiwi, all deposed to the enjoyment that they had experienced in walking along the pathway beside the Oakley Creek, and expressed concern that their future enjoyment would be spoiled by the presence of the service station. Mr King explained that from the walkway no buildings are visible now, and that a view of service station buildings would be an effect. Mrs Morris Upton claimed that the "oil company means to despoil their most prized amenity". Another witness for the appellants, Mr P Tucker, said: "The superimposition of an industrial style complex on this particular site presents such a juxtaposition of opposites in

terms of land use as to appear almost surreal. The psychological effect of this development on hundreds of thousands of passing commuters who have enjoyed this rural window for decades should be taken into account." In cross-examination he acknowledged that he did not have training in psychology or behavioural sciences and did not have data to present to the Tribunal that would enable it to consider the psychological effect.

We were more assisted by the careful and professional analysis of the likely visual effects in the evidence of a qualified landscape architect (called for the applicant) Mr J L Goodwin. He referred to the trees along the Great North Road boundary towards the northern end of the site about 5 metres from the eastern kerb of the road, and deposed that the canopy of the eucalyptus trees hangs over the carriageway; that the trees are reaching maturity; that it is characteristic of eucalyptus trees that they drop branches; and that additional stress caused by the proposed road widening (which is independent of this proposed development) encroaching on their root zones would increase the likelihood that they would have to be removed. He explained that when those trees are removed the view from the houses opposite would be to the mature trees along the Oakley Creek and, in a few years, to the maturing native trees proposed as part of the service station development, in that the existing trees would be replaced with a new line of trees in front of the forecourt.

Mr Goodwin deposed that the properties directly opposite the service station would have their view of the service station largely obscured by the proposed tree planting between the forecourt and the road, around the shop and to the south of the entrance; and that other residents located further north would be able to view the service station canopy through the vehicle entrance and over the low planting required to maintain sight lines, but that the shop and forecourt would be partly obscured by the proposed planting.

The witness gave the opinion that there would be some moderate short-term adverse visual effects associated with the development due to loss of vegetation, and the new structures, but in 3 to 5 years, once the proposed planting had become established, the perceived adverse visual effects would be minimal.

It was Mr Goodwin's evidence that the view of the service station from the Oakley Creek walkway would generally be glimpses through trees or sideways glances,

that it would not be the focus of views from the walkway; that in the short term there would be an adverse effect on the visual amenity of the walkway, but that in 3 to 5 years the planting would screen the retaining wall and substantially screen the building and carwash from that view so that the visual effects would be minor and in the long term would be improved.

In summary, it was Mr Goodwin's professional opinion that there would be no more than minor adverse effect on the residential character in the immediately adjacent Waterview area; that the proposal would maintain a 'green belt', and when the proposed planting has matured, would provide an improvement to the green belt.

Having ourselves visited the site and viewed it from the opposite side of Great North Road and from the parts of the Oakley Creek pathway from which it may be seen, we find the concerns expressed by the appellants' witnesses to be overstated and unsubstantiated; and we accept Mr Goodwin's assessment of the likely visual effects of the proposal. Although the current rural aspect of the land is attractive, the zoning would allow for development as of right; and we accept the applicant's submissions that the attitude of the appellants to the applicant's land as a green belt does not invest it with status by which the private owner of that land is to keep it free from development. We find that the proposed planting would leave an appearance that would not have adverse visual effects and would eventually screen the service station from view from the southern part of the path where the site and the wirescape and traffic on Great North Road are visible now; and that although the proposal would change the visual environment from the western side of Great North Road, the extensive planting proposed would be beneficial and enhance that environment.

Noise

It was the applicant's case that the service station would comply with the noise limits in conditions imposed by the respondent, which are consistent with the provisions of the operative and the proposed district plans; and reminded us that there are no residential neighbours of the service station.

The applicant's case was not accepted by the appellants. Mrs Persson deposed to being annoyed by the noise from cars using another service station near her home late at night and the peculiar noise of the carwash there.

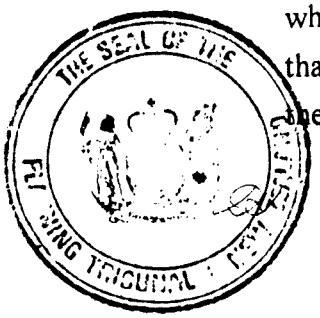
Mr Brehmer acknowledged that he had no expertise in acoustics, and stated that he did not recognise the NZ Standards for the Assessment of Environmental Sound referred to by the applicant's qualified and experienced acoustics engineer, Mr N I Hegley. He had no evidence that the proposed activity would not meet the standards, but considered that if there is no activity on the site then there would be no noise and no need to impose noise restrictions.

However as the site is privately owned and zoned residential, we do not find that witness's evidence realistic or helpful to our assessment of the issue before us.

The transitional district plan prescribes that average maximum noise level (L_{10}) from uses on commercially zoned land at a residential zone boundary is not to exceed 50 dBA on Mondays to Fridays from 7 am to 10 pm and on Saturdays from 7 am to 12 noon; and 40 dBA at all other times. The proposed district plan 1993 would allow the 50 dBA level all day on Saturdays and from 9 am to 6 pm on Sundays and public holidays.

The applicant's case was supported by Mr Hegley. He deposed to measurements of the existing daytime noise environment at the boundary of the residential property closest to the service station site on a Saturday afternoon, being a L_{10} of 72 dBA and a L_{95} of 53 dBA. The witness explained that the noise sources from the proposed service station would be the LPG unit, the carwash, the air compressor, and general forecourt noise. The noise from the carwash when operating would be an L_{10} of 48 dBA at the closest house (which would require doors on the carwash to be able to comply with the night time noise limit), and he deposed that the air compressor, LPG pump, and general forecourt noise would be likely to comply with the noise limits in the district plan, and that the total service station operation would comply with the limits for residential zone.

We prefer Mr Hegley's opinion to those expressed by witnesses for the appellants, who lacked qualifications or relevant expertise in environmental noise; and we find that (subject to the restrictions referred to by Mr Hegley on the use of the carwash) the operation of the proposed service station would not be likely to give rise to any



significant adverse noise effects, assessed by reference to the existing and proposed district plan provisions about noise in residential zones.

Other effects

Other environmental effects relating to emissions to air, emissions to ground, and stormwater control are subject to control under the discharge permits granted by the Auckland Regional Council and the conditions imposed by that council, which are not before the Tribunal in these proceedings. We note that fumes from refilling the main petrol storage tanks would be dispersed through vent pipes specially designed to dilute and disperse the vapour, so there would not be effects on neighbouring properties. We also note that a stormwater management plan would be required, and that a detention pond would be created on the site to allow solids to settle out of the stormwater before discharge. There is nothing before us on which we might suspect that the emissions of petrol vapour or stormwater from the proposed service station would have adverse effects on the environment.

Although not part of the appellants' case as put by their counsel, their planning witness, Mr Brehmer, claimed that in the event of a calamity occurring with hazardous goods on the site, rescue efforts could be hampered by congestion on Great North Road, the only access to the site. The witness did not profess to have expertise in dealing with emergencies, and we prefer the opinion expressed by the Fire Service Technical Liaison Officer, Mr A J Haggerty, that access and water supplies to the site are adequate.

Another matter that was raised by one of the appellants' witnesses, Mr N Boyd, but not by their counsel, was the applicant's allowance for spillage and evaporation of petrol, which he reported as being 0.04%. Mr Boyd described that as completely unacceptable. However in cross-examination he accepted that the design of the fuel storage incorporates the latest practice, that it may well be one of the safest service stations, that the figure quoted was based on experience at other service stations, and that the proposed station should be able to achieve a zero loss. In the light of that we do not find any reason for concern about the subject proposal in that respect.

The appellants' planning witness, Mr Brehmer, described the reference in the application to preventing light spill beyond the site as wishful thinking, posing the

rhetorical question how potential customers would find the service station if it were not visible from beyond the site. In our view that does not address the issue. It is not suggested that when lit at night the service station would not be visible from the road beyond the site. What was claimed (and on the evidence we accept) is that the lighting would not light up any area beyond the site.

We accept the evidence of the applicant's planning witness, Mr H F Bhana, and find that the topography would minimise any difficulty with wash of car headlights over the residential properties on the opposite side of Great North Road; that the only house that might be affected (No 1431) would be screened by the planting in the south-western corner of No 1429 and by a bus shelter in front of No 1429; and that any effects would be further mitigated by adjusting the site levels so that vehicle headlights point downwards as the vehicles leave the site.

Mr Brehmer also referred to the replacement of natural contours by retaining walls and fill as loss of amenity values. We accept that the proposal would involve some alteration to the existing ground contours, although we do not know whether they are natural contours. There have already been alterations to natural contours in the formation of Great North Road and the development of the residential area of Waterview on the western side of that road. By its zoning of the subject land, the district plan contemplates private development that would be likely to require some earthworks to provide building sites, and possible roads. In our judgment, the alteration of the ground contours of part of the applicant's property required for the establishment of the proposed service station would not be disproportionate in the context of the size of the property as a whole or its situation in an established suburb of Auckland City; and we find that it would not be an adverse effect on the environment.

Relative weight of the proposed plan

The criteria set out in section 104(4) include relevant rules, policies or objectives of a plan or proposed plan (paras (a) and (b)). In this case both an operative (transitional) plan, and a proposed plan exist. As mentioned already, those plans are not consistent in a material respect, in that the operative plan provides for a service station on the subject site to be a conditional use (so that by section 374 it is deemed to be a discretionary activity), but the proposed plan does not provide for a service station on the subject site at all, whether as a permitted activity or as a

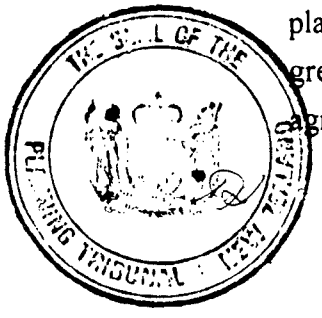
discretionary activity; and does not provide for storage of the quantity of petrol proposed to be stocked on the site, whether as a permitted or discretionary activity.

In the light of that difference, the parties made submissions about the way in which we should perform the duty imposed by section 104(4) of having regard to those provisions of the plan and the proposed plan.

Counsel for the appellants submitted that we could well consider the proposed plan to be the dominant document. He observed that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and argued that there is a clear inference of an intent to upgrade the importance of the proposed plans and to accord them equal importance. He relied on a Planning Tribunal decision in *Peng Lee Lim v Hutt City Council* W102/93.

Counsel for the respondent observed that the proposed plan is at a very early stage in the planning process, and submitted that it may be regarded as "inchoate" as that term was used in the Tribunal's decisions in *Stevens v Tasman District Council* W43/92 and *Banks v Nelson City Council* W15/93. Mr Kirkpatrick also submitted that the correct approach is to consider which is the dominant plan. He argued that it would be in the interests of justice to regard the operative plan as dominant, given that the provisions of the proposed plan may be altered significantly. Counsel contended that it is also relevant to consider the expectations of the applicant, which had acquired the site at a time when the service station was a conditional use, and has been continuing attempts to obtain consent. He submitted that it would be unfair to deny those expectations, referring to the Tribunal's decisions in *Northern Contractors v Mt Eden Borough Council* 11 TPA 151; *Brewster v Dunedin City Council* C30/87; *Warde v Howick Borough Council* A88/83; and *Clark v Christchurch City Council* C36/83.

That approach was endorsed by an experienced consultant planner called for the respondent, Mr R M Dunlop. That witness deposed that until the new plan can no longer be altered through the submission and appeal processes, it would be good planning practice that the operative should form the dominant document; and that greater weight should be placed on the transitional plan. In cross-examination he agreed that the Act does not differentiate, giving one more or less weight.



Counsel for the applicant announced that he did not ask for a finding that the existing plan is the dominant document, explaining that the use of that term could be an apology for lack of clear thought. He observed that the proposed plan is at an early stage in the process of coming into force; that submissions have been made about absence of provisions for service stations in residential zones; that the applicant takes issue with the appellants' claim that it is unlikely that service stations will be added back as a discretionary activity; and that by contrast the operative plan has been the subject of a lengthy and relatively recent review process. Mr Bartlett submitted that there is no basis for preferring proposed provisions that have not been tested, that cannot be tested in these proceedings, and which are subject to strenuous opposition; and that the present application can proceed as a non-complying activity.

In *Peng Lee Lim*'s case, the Tribunal considered the reference in section 105(2)(b)(ii) to the objectives and policies of the plan or proposed plan, and said (at page 3):

> "We consider that this wording allows flexibility as to what weight the Tribunal would give to a proposed plan as opposed to an operative plan, that weight generally being greater as a proposed plan wends its way further through the notification and hearing processes. There may be occasions when regard must be had to the provisions of both."

In respect of the proposed variation in that case, the Tribunal took note of the fact that the variation was subject to many submissions which had not been heard by the council, and expressed the view that it could not hold that its provisions were sufficiently tested to influence the decision on that appeal.

We agree with the view expressed in that decision that there may be cases when regard is to be had to the provisions of both an operative plan and a proposed plan; and that the weight to be given to a proposed plan would in general be greater the further the relevant provisions have been exposed to testing along the statutory course prescribed by Part I of the First Schedule. We also agree with the proposition that there is a limit to the extent that description of an operative plan as the dominant document is useful in the new regime under the Resource Management Act. That term was used in cases under the Town and Country Planning Act 1977 as a shorthand for indicating that a proposed measure had not

been sufficiently exposed to testing to prevail over the corresponding provisions of the operative scheme. However, the Resource Management Act provides a regime that, although similar in many respects, is different from that of the Town and Country Planning Act. It would avoid merely applying the thinking appropriate to the previous regime if the shorthand term was not applied in the new regime.

We accept Mr Palmer's submission that the Resource Management Act does not distinguish between weight to be accorded to an operative district plan and to a proposed plan, and that it gives provisions of a proposed plan more significance; but we do not accept that the new Act accords proposed plans equal importance with operative plans for the purpose of deciding resource consent applications. Rather, the Act expects that consent authorities are to have regard to any relevant rules, policies and objectives (and, in cases to which the Resource Management Amendment Act 1993 applies, other provisions) of an operative plan or a proposed plan, implying that when there are rules, policies or objectives in any such plan, regard is to be given to them. That is not to say that those contents of plans are necessarily to be given full effect. That cannot be done where the proposal is a non-complying activity; nor can it be done in cases like this, where there has been a deliberate change of policy and the two plans are inconsistent.

We observe that the requirements of section 104 for having regard to various matters are related to the exercise of discretions conferred by section 105(1). That indicates that, rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, or vice versa, each case is to be decided individually according to its own circumstances. The extent (if any) to which the proposed measure may have been exposed to testing and independent decisionmaking may be relevant; so may circumstances of injustice (though not every case of disappointed aspirations or even expectations would create an injustice); and the extent to which a new measure (or, as in this case, the absence of one) may implement a coherent pattern of objectives and policies in a plan may be relevant too.

We therefore proceed to have regard to all relevant rules, policies and objectives of the operative (transitional) district plan, and of the proposed district plan. After we have had regard to them and to all other relevant considerations, we will then attempt to take into account all relevant matters in reaching a discretionary

judgment whether to grant or refuse land-use consent to the proposed service station.

Rules of Transitional and Proposed Plans

Transitional plan

The relevant rules of the transitional district plan are the rule by which service stations are conditional uses in the Residential 5 zone; and the criteria for assessing service station applications set out in Ordinance 3.5:2.4. We now consider the extent to which the present proposal meets those criteria.

> "(a) The development is capable of satisfying the Dangerous Goods Act and Regulations"

There was no issue on this respect. We find that the proposal has been designed in accordance with the requirements of the Dangerous Goods Act and Regulations; and that the petrol storage tanks are to be constructed in accordance with the Code of Practice for Underground Petrol Storage Systems.

> "(b) The site must be of adequate size and frontage to accommodate the use plus off-street parking and landscaping."

Again there was no contest in this respect. We find that the site has ample size and frontage to accommodate the service station and off-street parking and manoeuvring areas and an unusually large extent of landscaping.

> "(c) The site must be sufficiently remote from intersections and corners to ensure adequate sight distance and to prevent congestion caused by the ingress and egress of vehicles to and from the site."

The service station site itself fronts onto the intersection of Great North Road and Herdman Street. However that is not an impediment to the proposal because the proposal provides for one-way traffic which would not enter the intersection at all; there are no intersections on the subject side of the road within the vicinity of the site; the sight distances are greater than normally required; there would be no restrictions to impede visibility; and there would be no potential for congestion caused by the ingress or egress of vehicles to and from the service station.

"(d) The entry/exit points must be so designed as to permit easy access to the site and to prevent on-street congestion."

The deceleration lane for entry to the service station is to be lengthened to allow vehicles entering the station to slow down and enter the forecourt at a safe speed. That is required by a condition imposed by the respondent. The location of the exit point is not expected to impede vehicles leaving from the intersection with Herdman Street, and vehicles are not expected to have problems turning left out of the service station site. We find that the entry and exit points have been designed so as to permit easy access to the site and to avoid on-street congestion.

"(e) The development must generally observe underlying principles of the published recommendations of the Ministry of Transport, for both typical and innovative service station layouts with respect to site (sic) distances, minimum depth of forecourt, width of frontage, location and width of footpath crossings and pedestrian refuges."

The only respect in which the recommendations of the Ministry of Transport are not met is that the width of the exit crossing is 8 metres (along the kerb line, 6.3 metres at right angles) which is wider than the 6-metre maximum width recommended for one-way crossings, to avoid them being used as two-way crossings. However the extra width is necessary for tanker movements, and use of the exit as an entrance would be discouraged by signs and by the splitter island or kerbed median. The traffic engineer called for the respondent was satisfied with the design of the service station, as were the traffic engineers called for the applicant.

"(f) The scale of development must have regard to the bulk and location controls for the zone."

The general bulk and scale of the proposed building would comply with the ordinances for the Residential 5 zone; the design would provide ample space for tanker movements without requiring reverse manoeuvres or complex turns; and we find that the scale of the development is acceptable in the context of the size of the site.

"(g) The site must be landscaped and adequately fenced and screened from adjacent properties, particularly where the adjacent land is zoned residential."

The land adjoining the applicant's property is held for reserve purposes, and residential development of it is not expected. The landscaping proposed would provide adequate screening, and fencing would serve no purpose. Views of the service station from dwellings opposite would be broken by trees that are to reach the service station canopy height of 5 metres and would provide significant screening. The eastern and southern boundaries are to be heavily planted to screen the buildings, and the retaining wall is to be planted in trailing plants.

> "(h) All signs and lighting must be approved as part of any application. They must be in keeping with the intent of the zone and the existing development of the area. In residential zones, particularly rigorous standards will apply."

The signs proposed would involve use of yellow lettering on a dark green background which would produce a relatively soft tone while enabling clear identification of the service station. The forecourt lighting would be relatively subdued and there would be no overspill. We accept the opinion of the consultant planner called for the respondent that the proposed signage would not be excessive, but would be appropriate for identifying the proposed use and the range of services available.

> "(i) The site must have adequate off-street parking and adequate manoeuvring space for tankers and service vehicles."

Nine parking spaces would be provided, and there would be ample space for manoeuvring of tankers and other service vehicles. The filling points for the fuel storage tanks are accessible, and it is expected that petrol and LPG tankers would be able to pass through the forecourt without reversing.

> "(j) Restrictions may be imposed on the hours of operation of service stations in residential zones where noise is likely to be a problem."

It is proposed that the service station be operated continuously, 24 hours per day. If the carwash is unable to meet the required night-time noise limits, it would be switched off from 9 pm to 8 am the following day. With the noise limits imposed by the respondent's condition, and the relative isolation of the site from residential properties, there is no need for restrictions on the hours of operation of the service station.

Criterion (k) applies to service stations in shopping centres and is not applicable.

> "(l) Any compressor or machinery must have adequate sound insulation. In particular any development must comply with the noise standards set out in clause 6.5:3 of the statement."

The compressor would be able to comply with the noise standards, and the respondent's condition would ensure that the development would comply with the noise standards.

> "(m) The location of any LPG storage tank must be at an appropriate distance from site boundaries consistent with safety requirements."

The segregation distance from the site of the proposed LPG tank to the nearest residential boundary would be 55 metres, much greater than the separation distance normally considered acceptable. Any LPG reaching the atmosphere would flow downhill from the service station and dissipate. The LPG installation has been designed to meet the requirements of relevant legislation, the New Zealand Code of Practice, and best industry practice.

Proposed plan

The relevant rules of the proposed plan are those by which service stations are not provided for in the Residential 6a zone, and the storing of more than 200 litres of petrol is not permitted in that zone. Both of those rules are subject to challenge by submissions on the proposed district plan.

The isolation of the site from other activities would mean that hazards from the storage of petrol at the service station would be lower than those from service stations on many sites in Business Activity zones; and the risks of possible groundwater contamination and other policies sought to be implemented by the restriction on petrol storage are addressed by the National Code of Practice for Underground Storage of Petrol, with which the proposal is designed to comply.

Policies and Objectives of Transitional and Proposed Plans

Transitional Plan

The transitional district plan contains an objective (at clause 3.1:2.5) of recognising:

> "the need for certain acceptable non-residential uses and activities required to promote the economic and general welfare and convenience of residents"

to be achieved by policies of which the following are relevant:

> "(a) By providing for specified auxiliary uses to service residential areas.".

That explains the limited provision for service stations in residential zones under which the present application is to be considered.

Proposed plan

The proposed plan contains statements of objectives and policies of a general character, but none which directly addresses the omission of provision for service stations in residential zones.

Mr Brehmer referred to objectives of the proposed plan (paragraph 2.3.1) of protecting and enhancing the natural environment, of protecting the district's resources from significant adverse effects of activities and development, and of conserving the district's significant landscape features. He claimed that the proposed planting would be inconsistent with those objectives, because it would completely change the pleasantness of the amenities of the area, and claimed that the site is a significant landscape feature.

Mr Brehmer referred to a further objective in the proposed plan (paragraph 2.3.3) of achieving a healthy and safe living environment for the citizens of the district, and asserted that health and safety would be compromised by the proposal to place a commercial facility on the opposite side of Great North Road from a housing area and a school because people, including children, would be "enticed to cross the dangerous road to buy trivialities, not only a danger to themselves, but also to

motorists [who would be] unnecessarily delayed in their journey". The witness also referred to an objective (in paragraph 2.3.3) to give recognition to the status of the tangata whenua, and asserted that the objective had not been met because there had been no consultation with the tangata whenua.

Mr Brehmer also considered that the proposed development would not meet an objective in paragraph 2.3.4 of providing for economic growth and development which does not unduly compromise environmental values. A further objective referred to by that witness was paragraph 2.3.5: "to allow for new service provision where it does not compromise environmental protection and enhancement". He asserted that changing the pleasant open landscape and filling it with concrete and buildings, propped up by retaining walls, would be "anything but environmental protection and enhancement".

We consider that those objectives, cast in such general language, are to be seen in the context of the plan as a whole. They are not absolute goals, but expressions of the value the community places in them. In relation to the present application we have addressed the substance of the matters raised by Mr Brehmer in previous parts of this decision.

Objectives and policies that are more specific to residential activity are found in part 7 of the proposed district plan. They include an objective (clause 7.3.4):

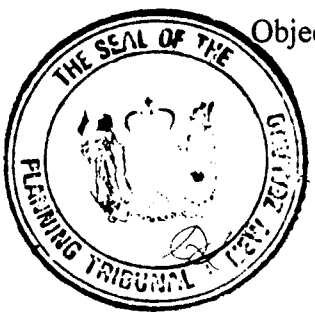
> "To recognise the need for certain supporting activities to be located in residential areas to promote the economic and general welfare and convenience of residents."

The following policies are relevant to achieving that objective:

> "By providing for non-residential activities in certain residential areas where they provide benefit or support for residential activity.
> ...
> By taking into account the impact of location, scale, and generated effect on neighbouring sites and the local environment when administering development controls in relation to non-residential activities in residential zones."

Objective 7.3.2 is:

> "To identify, maintain and enhance the recognised character and amenity of residential environments."



The policies stated for achieving that objective do not bear on non-residential activities, such as the present proposal, and are therefore not applicable.

Reference was made to a strategy for the Residential 6 zones set out at paragraph 7.6.6.2. However the proposed plan carefully identifies objectives and policies (as expected by section 75(1)(b) and (c)) and it is clear that clause 7.6.6.2 is not intended to fall into either category.

In the section of the proposed plan on transportation there is a relevant objective at paragraph 12.3.2:

> "To improve access, ease and safety of movement within the city, while ensuring that adequate provision is made for the various transport needs of the region."

In the chapter of the proposed plan on hazardous facilities, there are the following expectable objectives:

> "5E.4.1 Objective
> To control any actual or potential adverse effects of hazardous facilities and substances on the natural and physical environment, and the people of the district."

A relevant policy for achieving that objective is:

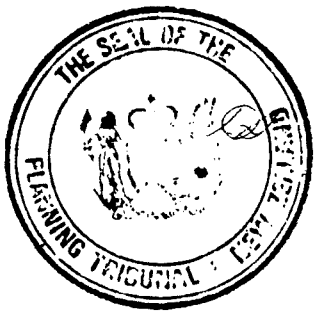
> "By requiring operators of hazardous facilities to manage their activities in such a way as to avoid, remedy or mitigate adverse effects on the adjoining area"

A further relevant objective is:

> "To minimise the adverse effects of site contamination and to prevent future site contamination."

A relevant policy for achieving that objective is:

> "By applying measures which seek to minimise and control the adverse effects of discharges into or on to land."



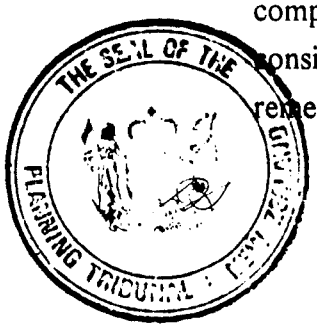
Part II

The following provisions of Part II are potentially applicable in this case: avoiding, remedying or mitigating any adverse effects of activities on the environment (section 5(2)(c)); the relationship of Maori and their culture and traditions with their ancestral lands etc (section 6(e)); the maintenance and enhancement of amenity values and the quality of the environment (section 7(c) and (f)).

It was the appellants' case that the proposal would not adequately avoid, remedy or mitigate the adverse effects of the activity on the environment in that the proposed service station would be a serious detraction from the visual appearance of an open green-belt area, would compromise the Oakley Walkway and natural habitat, would be a continuing disturbance for residents from 24-hour activities, would create risk of water and air pollution, would cause detrimental effects on traffic flow and safety, and increased interruption of traffic from the Herdman Street intersection, and increasing hazard to young people attracted to convenience goods.

By contrast it was the applicant's case that the proposal would promote the sustainable management of natural and physical resources in that the site is a physical resource with development potential; that it has no significant visual, cultural, social, botanical or other factors that warrant consideration of it as an important open-space resource; that the Tribunal is entitled to take as conclusive the residential zoning under both plans by which the site is zoned for development; and that the proposal would provide efficient and effective means of providing fuel to motorists.

For reasons given in earlier parts of this decision, we do not accept that the proposal would have the adverse effects cited by the appellants. In our judgment, if established and operated in accordance with the conditions imposed by the respondent, the service station would be a management of the resource represented by the applicant's property in a way which would enable people and the community to provide for their economic wellbeing in the refuelling of their vehicles without compromising the values expressed in paragraphs (a) to (c) of section 5(2). We consider that the proposal, established and carried on in that way, would avoid, remedy, or mitigate any adverse effects of the activity on the environment.



We accept that the relationship of Maori and their culture and traditions with their ancestral lands etc is a matter of national importance (section 6(e)). However the evidence did not establish that the service station site is the object of any such relationship, even though we accept that it was once part of a larger area of land possessed by Ngati Whatua.

In our judgment the applicant's proposal, if established and carried on in compliance with the respondent's conditions, would maintain and enhance the amenity values and the quality of the environment.

Threshold Tests

Because the proposed service station activity on the site would be a non-complying activity under the proposed district plan, resource consent may not be granted unless we are satisfied on one or other of the threshold tests set out in section 105(2)(b).

Effects on the environment

The first of those threshold tests is whether any effect on the environment would be minor. In that regard an issue was raised whether the effects of the proposal should be considered against any effects generated by the existing disuse of the land, or in terms of effects that could be generated by an activity permitted on the site as of right.

Counsel for the applicant submitted that when assessing effect on the environment for the purpose of section 105(2)(b)(i), the Tribunal should have regard not to the existing pastoral state of the site, but to the intensity and nature of development that would be permitted on the site as of right pursuant to the district plan. He reminded us that the Residential 5 zoning under the operative plan, and the Residential 6a zoning under the proposed plan, both provide for ranges of activities permitted as of right. Counsel submitted that a zero-based approach would be impractical and potentially inequitable; and contended that it cannot have been the intention that a non-complying activity that would have less effect than a permitted activity could not be considered. Mr Bartlett referred to three Tribunal decisions in which the potential of the site for other development as of right had been considered: *Thomson v Queenstown-Lakes District Council* 2 NZRMA 189;

Design No 4 v Queenstown-Lakes District Council 2 NZRMA 161; *Van Erkel v Queenstown-Lakes District Council* A57/93. He argued that the effect should be seen in context (referring to *Darroch v Whangarei District Council* A18/93) so that we should take into account the nature and intensity of the development that could be permitted on the site as of right, when determining whether the effects of the proposal would be minor.

The passage in the *Darroch*'s case to which Mr Bartlett referred was the following (at page 22):

> "The actual and potential effects of the proposal are to be seen in context. The proposal is to make regular, but intermittent, use of stockyards that already exist for a permitted activity on an ample site in a rural area. We find that in the normal round of farming activities, it is not uncommon for hundreds of cattle to be mustered and yarded for various purposes such as drenching and weighing. That kind of activity could occur in the normal course of farming as frequently as twice a month or more often. It is against the background of that finding that we have regard to the actual and potential effects of the proposal."

It is evident that the passage related to consideration, under section 104(1), of the actual and potential effects of the proposal; and not to consideration of the threshold test under section 105(2)(b)(i) whether any effect on the environment would be minor. The same is true of the Queenstown cases relied on by counsel. The distinction was made by the Tribunal in *Paynter Horticultural v Hastings District Council* W25/93.

We are not persuaded that assessing, for the purposes of section 105(2)(b)(i), whether any effect on the environment of a non-complying activity would be minor is necessarily to be gauged against possible effects of hypothetical activities that according to the rules of the district plan would be permitted on the site. Although by use of the word "minor" section 105(2)(b)(i) implies a comparative judgment of degree, we have found nothing in the section to indicate a comparison with the effect of permitted uses on the environment. We remember that those carrying on authorised activities have duties to avoid unreasonable noise (section 16) and to avoid, remedy or mitigate adverse effects on the environment (section 17). Rather, we consider that the judgment is to be made in the circumstances as they exist. In the present case, those circumstances include the absence of environmental effects from the current disuse of the site, and also its location fronting a busy road,

adjacent to public open space used for informal recreation, and opposite an established residential area.

We make our judgment on the footing that the activity would be established and carried on in compliance with the conditions imposed by the respondent. The establishment works and the service station itself would be visible from certain houses fronting Great North Road, and from the path beside the creek, until the proposed screen planting becomes established. The proposal has been designed so that effects on traffic flow and safety would be minimal. Other effects on the environment, such as emissions of noise, light, and contaminants, would be restricted by the conditions. Considered overall, in its situation and circumstances already described, it is our judgment that the effects on the environment would be no greater than minor.

Objectives and Policies of Plans

By section 105(2)(b)(ii) we have to consider whether we are satisfied that granting the consent would not be contrary to the objectives and policies of the district plan or those of the proposed plan. We have already referred to the relevant objectives and policies of those instruments. The understanding to be given to the word "contrary" has been explained in the Tribunal's decision in *NZ Rail v Marlborough District Council* C36/93 and in the judgment in the High Court in the same case (Wellington AP 169/93 4 November 1993 Greig J).

Despite Mr Brehmer's opinion that the proposal would be contrary to some objectives expressed in very general language, from our own findings about the proposal there is no basis for us to conclude that it would be contrary (in the sense mentioned) to any of the objectives or policies of either plan.

We are therefore satisfied that the proposal meets both the threshold tests in section 105(2)(b), and that consent to the activity could be granted even though it is a non-complying activity in respect of the proposed district plan.

DISCRETION

Having now addressed the various criteria and conditions stipulated by the Act, we now approach the discretionary judgment to grant or refuse consent (section

105(1)(b)). We start by considering various matters raised at the hearing which have not already called for consideration.

Geological Stability

A witness called for the appellants, Mrs Persson, deposed that there is some doubt about the underlying geological structure, that some (unidentified) authorities consider the area unstable, that earthmoving to form a site for the service station would cause quite serious movement of soil strata, and that the site for the proposed building would be below the floodline of the Oakley Creek.

The consultant planner called as a witness for the respondent, Mr Dunlop, deposed that the respondent's Natural Hazards Register, which records areas of known and potential instability, shows an area adjacent to the site between its eastern boundary and Oakley Creek (in common with the banks of all the city's principal streams) as potentially unstable because of the potential for peak flows to trigger erosion along their margins. Mr Dunlop also deposed that here the esplanade reserve contains the flood plain of the Oakley Creek; that the subject site is at a higher elevation; and that a geotechnical report by engineers engaged by the applicant had indicated no geological impediment to the service station development proposed.

In our judgment the doubts raised by Mrs Persson's assertions were adequately addressed by Mr Dunlop's evidence; and there is no basis for a finding that the service station site is unsuitable for the purpose, or that the necessary earthmoving would have any adverse effects.

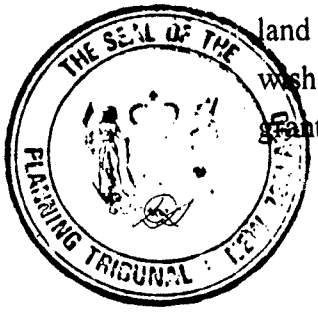
Reserves in Vicinity

The first-named appellant, Mr J J Hanton, claimed that his lifestyle would be negatively impacted by changing a reserve area to one that is commercial; that to take away the only bit of green belt reserve left in the area, and cutting off access to the Oakley Creek and its amenities was offensive to him, and an insult to Maori people's generosity; and that the service station would be a blot on the countryside and a white elephant.

Ignoring the rhetoric, we record that there was no evidence that the site is or ever was a reserve for public recreation, nor that the proposal would cut off access to the Oakley Creek and its esplanade reserve. In cross-examination Mr Hanton acknowledged that the proposal would not affect his access to the creek, that the city council had acquired the adjacent property for reserve, and that he did not use the pathway by the creek very often. Mr King agreed that the service station would not prevent access to routes on either side of the stream, and acknowledged that there are ample opportunities to introduce further access which would not be foreclosed by the service station.

The Avondale area in general, and Waterview in particular, are not deficient in open space, and are well served by active and passive reserves. In particular the site, on its southern boundary, abuts a public reserve of some 3.9 hectares, and, on its eastern boundary, the esplanade reserve of 2.5 hectares. Both the applicant's property and the surrounding land have traditionally been zoned Residential. The applicant offered to sell to the respondent the residue of its property not required for the service station site, but that offer has not been accepted. However, one of the conditions imposed by the respondent would exclude residential development of the balance of the property, so that it would in effect become a private open space, which would visually appear as an extension of the adjoining reserve.

In Part VIII the Act provides a technique (designation) by which use, subdivision or changing the character, intensity or scale of the use of land that would prevent or hinder a public work is restricted. The procedures in that part provide safeguards for owners of land affected, including rights of appeal (sections 174 and 179), lapsing of designations (section 184), and rights of seeking that the land be taken (section 185). The applicant's property is not subject to such a designation in either the operative plan or the proposed plan. Even if we were persuaded that the applicant's property should be made reserve (which we are not), for us to refuse consent on that ground in the absence of a designation would be to deprive the applicant of safeguards that the legislation provides for such cases. In principle we do not consider that it is a valid ground for opposing resource consent to an activity on undesignated private land that the opponents wish the land to have the status of public reserve. In any event, in this case we are not persuaded that the land should have that status. For those reasons we decline to take the opponents' wish into account in deciding whether the resource consent sought should be granted or refused.



Proposed Planting

Although it was not part of the appellants' case as presented by their counsel, several witnesses for the appellants expressed dissatisfaction about the planting of the remainder of the site proposed by the applicant.

The appellants' planner, Mr Brehmer, described the effect as turning an open sunny glade into a dark gully, a change of pleasant semi-open space to a dark woodland; and claimed that it would detract from the present pleasant environment. Mr King said that the planting proposed would be unacceptable because it was restricting the view of the open sky; but in cross-examination he acknowledged that on that topic some of the appellants agreed with him, and others disagreed. Mrs Corsbie expressed her concern that it would become a dark gulch. Mrs Morris Upton preferred open pasture but agreed that the residents could not come to one mind about how much planting was desirable. Mr Kiwi considered that the planting proposed would be desirable to screen the building from being obvious from the valley, but if the building and associated structures were screened from that view with a continuous row of shrubs around the base of the crib wall, that would be ample planting. He believed that the group could speak with a single voice on the amount of planting that would be desirable. Mr Tucker described the proposed planting as a dense and dark woodlot that would change the character of the walkway irreparably, encouraging street kids and providing cover for thieves or muggers; and that very dense planting would cut the area right off from the rest of the park, creating a hard boundary with the reserve land.

In response, counsel for the applicant proposed that inner and outer planting areas might be distinguished, to separate steps to mitigate adverse effects, from unrelated bonus or compensation planting elsewhere on the site.

Having heard the evidence of the appellants' witnesses we do not share Mr Kiwi's view that the group could speak with a single voice on this topic. We record that neither the original notice of appeal nor the amended notice of appeal sought relief in respect of the extent of the proposed planting. We accept that the planting was part of the proposal the subject of the application for resource consent; and that persons who might otherwise have opposed the application may have refrained from doing so on being satisfied that the proposed planting would adequately

mitigate any adverse effects. We also observe that there is no restriction in any relevant planning instrument on the applicant planting its property as it wishes. In the circumstances we consider that a decision should be made on the proposal which was the subject of the original application and we will refrain from requiring any amendment to the landscaping proposed.

Integrity of proposed plan

Mr Brehmer asserted that granting consent to a service station in the Residential 6a zone under the proposed district plan would seriously impair the integrity of that plan and would set a dangerous precedent for further exceptions to the plan.

In our opinion that overstates the position. It is to be remembered that the present application was made before the proposed plan was published; that the omission of provision for service stations in residential zones and the restrictions on the amount of petrol that may be stored in those zones have been challenged by submissions on the proposed plan; and that the respondent has not yet had the opportunity to consider those submissions and give its primary decision on them. The possibility of a reference on the topic to this Tribunal cannot be excluded.

It is also to be remembered that the applicant was entitled to apply for land-use consent for its proposal; that we have found that the effects of the proposal on the environment would be minor; and that it would not be contrary to the objectives or policies of the operative district plan or those of the proposed district plan.

In those circumstances, although we will take into account that the proposal is a non-complying activity in terms of the proposed district plan, we do not accept that granting consent would seriously impair its integrity, or set a dangerous precedent.

Previous application

We refer to the appellants' claim that the Tribunal having refused the previous application, the subsequent grant of a similar application would affect public confidence in the resource management decision system.

We do not accept that submission. The present proposal, while similar, is not identical with the previous application. In the meanwhile, relevant circumstances have changed, particularly the installation of traffic signals at the Herdman Street intersection and the respondent's proposals for other road works and traffic management measures. The Act does not restrain repeat applications, and it was not suggested that any rule of estoppel precluded the present application. We do not see that granting consent on the subsequent application, if that is in accordance with the law, and is held to be deserved on the merits, should affect public confidence in the resource management decision system. We decline to take into account the fact that a previous application for a similar service station on the same site was refused.

General

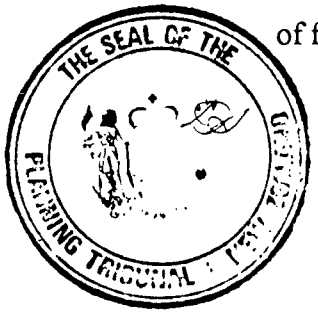
In our judgment, little weight should be placed on the provisions of the proposed district plan in the circumstances mentioned above. As a discretionary activity in terms of the operative district plan the proposal meets with criteria stipulated in that plan; the actual and potential effects of allowing the activity would be minor; the proposal would promote the sustainable management of natural and physical resources; and would not be contrary to the objectives or policies of either of the district plans. In our judgment, resource consent for the proposed service station deserves to be granted.

CONDITIONS

Some minor improvements to the conditions imposed by the respondent arose during the course of the appeal hearing.

References to NAASRA standards are now obsolete, as are references to Ministry of Transport recommendations.

The definition of the convenience goods that may be sold from the service station requires refining to delete motorists' accessories from the schedule (the sale of them being part of the definition of a service station) and to stipulate that the sale of food should be ancillary to the service station activity.



A condition should be added to require that an archaeological survey of that part of the site to be developed for the service station be carried out prior to development.

Counsel are asked to agree on the drafting of an amended set of conditions accordingly. Failing agreement, the Tribunal will receive memoranda from the parties and settle the conditions itself.

DETERMINATIONS

For the foregoing reasons the Tribunal makes the following determinations:

1. The respondent's decision is amended to the extent of substituting a revised set of conditions in accordance with the preceding section of this decision.

2. To that extent only the appeal is allowed; and in all other respects it is disallowed.

3. The question of costs is reserved.

DATED at AUCKLAND this 1st day of March 1994

DFG Sheppard
Planning Judge

TAB 7

McGuire v Hastings District Council

Judicial Committee [2000] UKPC 43
9 May; 1 November 2001
Lord Bingham of Cornhill, Lord Cooke of Thorndon, Lord Hobhouse of Woodborough, Lord Millet and Sir Christopher Slade

Maori and Maori land – Maori Land Court – Jurisdiction – Designation of Maori land for roading – Whether Maori Land Court had jurisdiction to grant injunction restraining designation – Trespass or any other injury to Maori freehold land – Collateral attack on alleged ultra vires decision of district council – Alleged lack of consultation – Direct challenge for alleged breach of public law duties compared to collateral challenge – Te Ture Whenua Maori Act 1993, ss 2, 6, 18 and 19(1)(a) – Resource Management Act 1991, ss 5(1), 6, 7, 8, 168, 168A, 171, 174, 251, 252, 253, 255, 269, 296, 299, 305, 310 and 314.

These proceedings concerned a challenge to the issuing of a note of requirement for the designation of a road through Maori land by the Hastings District Council (Hastings). The applicants obtained an interim injunction restraining the designation in the Maori Land Court. In response Hastings sought judicial review of the decision of the Maori Land Court in the High Court claiming that the Maori Land Court had no judicial review jurisdiction to grant the injunction. It was not disputed that Hastings had the power to designate Maori land for roading under s 168A of the Resource Management Act. In the Maori Land Court the applicants had alleged that the decision was ultra vires on the ground of failure to meet consultative requirements. The Maori Land Court had jurisdiction under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 to grant an injunction against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land. The applicants sought to invoke the line of authority headed by *Boddington v British Transport Police* [1999] 2 AC 143 to the effect that a collateral challenge to the validity of an administrative decision could be raised in civil proceedings. Specifically the applicants claimed the Maori Land Court had jurisdiction to entertain a collateral challenge to the validity of Hastings' decision on the basis that the decision, if invalid, amounted to an actual or threatened trespass or other injury to Maori freehold land. The High Court and Court of Appeal found that the Maori Land Court lacked jurisdiction.

Held: It was not possible to stretch the Te Ture Whenua Maori Act to uphold the injunctions. This was not a collateral challenge to the validity of an administrative act in the context of an injunction application against a threatened injury to Maori land. Rather it was direct challenge seeking to establish breaches of public law duties arising under the Resource Management Act. There was adequate protection under that Act for Maori land rights. The Maori Land Court had a specialised and limited jurisdiction and was not vested

with a judicial review jurisdiction to enable it to make the injunction (see paras [10], [12], [13], [29]).

Boddington v British Transport Police [1999] 2 AC 143; [1998] 2 All ER 203 discussed.

Appeal dismissed.

Observations: (i) In the context of the Te Ture Whenua Maori Act 1993, with its emphasis on the treasured special significance of ancestral land, activities other than physical interference might constitute injury to Maori land (see para [10]).

(ii) It might be useful to have available for cases raising Maori issues a reserve pool of alternate Environment Judges and Deputy Environment Commissioners. If practicable, there should be a substantial Maori membership if this case reaches the Environment Court (see paras [27], [28]).

Other cases mentioned in judgment

Adeyinka Oyekan v Musendiku Adele [1957] 1 WLR 876; [1957] 2 All ER 785 (PC).

Attorney-General v Maori Land Court [1999] 1 NZLR 689 (CA).

McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277; [2000] 4 All ER 913.

R v Secretary of State for the Home Department, ex p Daly [2001] 2 AC 532; [2001] 2 WLR 1622.

R v Wicks [1998] AC 92; [1997] 2 All ER 801.

Appeal

This was an appeal by M A McGuire and F P Makea from the judgment of the Court of Appeal (reported at [2000] 1 NZLR 679) dismissing their appeal from the judgment of Goddard J (High Court, Napier, CP 11/99, 3 September 1999), granting an application by the Hastings District Council, first respondent, for judicial review of the decision of the Maori Land Court, second respondent, to issue an injunction under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 restraining the district council from acting under ss 168 and 168A of the Resource Management Act 1991.

P F Majurey and *C N Whata* for McGuire and Makea.

The Rt Hon Sir Geoffrey Palmer and *M von Dadelszen* for the Hastings District Council.

P F Majurey and ***C N Whata*** for the appellants. It is impossible to overemphasise the importance of land to Maori, especially in the spiritual context. They are descended from the land and identify with it. The Te Ture Whenua Maori Act 1993 (TTWMA) represented an unprecedented recognition of Maori land as taonga tuku iho (land passed down through generations since time immemorial) and heralded a change of direction from prior legislation, which facilitated the taking of Maori land, to an emphasis on the retention and control of Maori land by Maori land owners. This special regime exists because of the Crown's guarantee of the Treaty of Waitangi and because less than five per cent of land remains "Maori freehold land".

Parliament through the TTWMA unequivocally recognised the special status of Maori land and identified the Maori Land Court as the mechanism by which Maori land is protected. No other Court, including the Environment Court and the High Court, is specifically mandated and required to seek to protect the retention and control of Maori land as taonga tuku iho. Consequently, the Maori Land Court exercises a unique jurisdiction which should only be circumscribed by clear and express language to that effect. The only potentially express limitation on the jurisdiction is contained in s 359 of the TTWMA which sets out a list of enactments which are stated not to be affected by the Act: the Resource Management Act 1991 (RMA) is not mentioned. Both the TTWMA and the RMA should be interpreted in a manner which best furthers the guarantee of protection affirmed by the Treaty of Waitangi: see *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) at pp 516 – 517. It could not be right that this special form of protection could be watered down by an implication of procedural exclusivity. On standard principles of interpretation there is no need for an express statement that the Maori Land Court has jurisdiction.

On the plain words of s 19(1)(a) of the TTWMA, the Maori Land Court may injunct the council (or any other designating authority) in respect of any actual or threatened trespass or other injury to Maori freehold land consequent upon the purported exercise of its requirement and/or designation powers under the RMA. That construction of s 19(1)(a) will best further the principles set out in the preamble to the TTWMA, as required by s 2 of that Act. More specifically, affirming the capacity of the Maori Land Court to injunct an unlawful exercise of the requirement and designation powers under the RMA will best further: (a) the spirit of exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi; (b) the recognition that land is taonga tuku iho of special significance to Maori people; (c) the retention of that land in the hands of its owners, their whanau and their hapu; and (d) the maintenance of a Court and the establishment of mechanisms to assist the Maori people to achieve the implementation of these principles. A power to injunct a council from improperly notifying a requirement over Maori freehold land will facilitate and promote the retention, use, development and control of Maori land as taonga tuku iho by Maori land owners consistent with s 2(2). The meaning of the Maori words is critical as the English translations are often inaccurate. In the event of a conflict between the English and Maori versions of the Treaty of Waitangi the Maori version prevails.

The RMA does not itself expressly or by necessary implication exclude the jurisdiction of the Maori Land Court. Part VIII, dealing with designations and heritage orders, does not identify a process by which the procedural or substantive merits of a decision to notify a requirement can be tested. There is no right of appeal. Part XII, relating to declarations and enforcement orders, enables the Environment Court to address contravention or likely contravention of the RMA, but this Part does not purport to confer exclusive jurisdiction on the Environment Court in such matters. Section 296 excludes the jurisdiction of the High Court where there is a right to refer any matter for inquiry to the Environment Court or to appeal to the Court against a decision of a council. "Inquiry" in this context is used as a term of art and cross refers to the statutory provisions in the RMA which deal with inquiries by the Environment Court:

see for example s 210. Accordingly, there is nothing in those parts of the Act dealing with requirements and remedies which ousts or requires the ousting of the jurisdiction of the Maori Land Court.

If the Maori Land Court has a discretion to grant an injunction against an unlawful exercise of powers to notify a requirement pursuant to the RMA, it is bound to give effect to the statutory directive to exercise any discretion so as to promote the retention and control of Maori land as taonga tuku iho by Maori. Both the Environment Court and the High Court are to have regard to a wider set of considerations in exercising their discretion. The Environment Court in particular is governed by s 5 of the RMA which states that the purpose of the Act is the sustainable management of natural and physical resources. A consequence of this is that "such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues": *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at p 305. Therefore, the relief afforded by the Resource Management Act does not provide the same guarantee of protection as the Maori Land Court pursuant to s 19(1)(a) of the TTWMA.

It would be open to the Maori Land Court exercising its broad discretion to say that a designation is capable of being an injury to Maori land given Maori sensitivity to land, and therefore a tort in the sense of a wrong, that is, designation can be a tort in Maori eyes, and therefore in the eyes of New Zealand law, under the Act even if it is not a tort under the common law.

There are no Environment Court Judges who are also Maori Land Court Judges, although there is one Commissioner. However, even if there were Maori Land Court Judges sitting in the Environment Court they would not be able to have recourse to the relevant sections of the TTWMA when sitting in that capacity.

Whata following. Assuming a tortious trespass has occurred Maori should have available to them the best opportunity to vindicate their rights in respect of Maori freehold land. This is consistent with the common law and the approach taken in a series of cases dealing with collateral challenge: see *Boddington v British Transport Police* [1999] 2 AC 143 at pp 160 – 161 and pp 172 – 173; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 at p 654; *Wandsworth London Borough Council v Winder* [1985] AC 461 at p 477; *Steed v Secretary of State for the Home Department* [2000] 1 WLR 1169; *Tamaki v Baker* [1901] AC 561 and *R v Wicks* [1998] AC 92. The recurring theme in these cases is the affirmation of the right of individuals to vindicate their rights in the face of executive action through Courts which provide the best possible remedy for the individual. The Maori Land Court is concerned with the land rights which are protected by the TTWMA whereas the Environment Court is not concerned with property rights at all. Therefore, the Environment Court under the RMA does not provide a comprehensive nor full set of remedies for unlawful decision by the council to notify a requirement. There is no "positive prescription of law by statute or by statutory rules" which prohibits the appellants from enforcing their rights to protect Maori freehold land from unlawful trespass or other injury by action against the council in the Maori Land Court: see *Davy v Spelthorne Borough Council* [1984] 1 AC 262 at pp 276 – 278.

The two jurisdictions are not in conflict. The RMA is irrelevant when it comes to interference with the property rights of Maori. When assessing the interface between two separate statutes, it is reasonable to construe the provisions so as to give effect to both. The construction argued for by the appellants is consistent with the purpose of s 19(1)(a) of the TTWMA and s 168A of the RMA. The purpose of s 19(1)(a) of the TTWMA is to prevent "unlawful" trespass or other injury to Maori freehold land. The purpose of s 168A is to enable "lawful" requirements to proceed to notification. There is therefore no prima facie conflict between the two enactments.

By contrast, the construction adopted by the district council and approved by the Court of Appeal directly derogates from the clear imperatives of the TTWMA to promote the retention and the control of Maori land as taonga tuku iho by Maori. Indeed that construction involves derogating from the key purpose of the TTWMA by process of implication, where such implication is neither necessary nor warranted by the RMA. The two Acts are not in conflict but complement each other. Where the RMA does not expressly derogate from the protection afforded by the TTWMA, that protection subsists.

"Trespass or other injury" includes conduct wider than actual or threatened physical damage or interference with physical possession of land. Section 2 of the TTWMA directs that the meaning given to "trespass or other injury" must best further the principles set out in the preamble to the Act. Based on that clear statutory direction, the word "trespass or other injury" should not be given the limited or narrow meaning of "physical trespass or other injury", as this would not best further those principles. The conception of "trespass or other injury" which best furthers those principles includes interference with the relationship that Maori have with the land as taonga tuku iho and this would include the imposition of controls which removed the ability of Maori to exercise their rangatiratanga in respect of the land.

Support for a broader rather than narrower statutory construction can be found in *R v Kensington and Chelsea Royal London Borough Council, ex p Lawrie Plantation Services Ltd* [1999] 1 WLR 1415. By contrast, a focus on physical injury only, using case law in support of such an approach, is Anglocentric and reminiscent of native land legislation which sought to assimilate the rights of natives according to British law. The "planning blight" caused by designation of land has became known as a special kind of injury to land.

The Rt Hon Sir Geoffrey Palmer and ***M von Dadelszen*** for the district council. In the instant case there is no ground on which an injunction can be issued, but more importantly, there is no jurisdiction for the Maori Land Court to grant an injunction at all.

The Te Ture Whenua Maori Act 1993 and the RMA are two large, modern statutes which are unique to New Zealand. There is no equivalent to either of them in the United Kingdom. The RMA is a huge piece of legislation which consolidates more than 50 statutes and provides a new framework compared to the old Town and Country Planning Act 1977. It was designed with great care and designed to fit in with the Public Works Act 1981, under which Maori land can be taken. The New Zealand legislature deliberately considered the interface between the TTWMA, the RMA and the Public Works Act 1981. The jurisdiction of the Maori Land Court to injunct the district council is

circumscribed by the scheme and provisions of the RMA. The legislature designed the TTWMA and the RMA to provide concomitant jurisdictions for the Environment Court and the Maori Land Court. Each is a specialist Court of record: see s 247 of the RMA and s 6 of the TTWMA. The RMA contains procedures and processes to protect all interests involved, including Maori interests, and this cannot be reconciled with the purported jurisdiction of the Maori Land Court under the TTWMA to make orders that would cut across the administration of the RMA: see Part II of the RMA, including in particular ss 6(e), 7(a), 8, 14(3)(c), 168A and 171. Parliament contemplated some potential involvement on the part of Maori Land Court Judges in resource management matters, but determined that such involvement should occur under the jurisdiction of the RMA and its Court system: see ss 249, 250, 252 and 254.

This is supported by the Parliamentary Debates on the Te Ture Whenua Maori Bill. At the Bill's second reading in 1992 the Hon Doug Kidd, the Minister of Maori Affairs, stated: "Finally, since the Bill was introduced in 1987, changes have occurred that have required the Bill to be updated. For example, the area of Maori affairs has undergone substantial restructuring, and the Resource Management Act has been passed. Those areas of change have been taken into account" (*Hansard* vol 531, 12367, New Zealand Parliamentary Debates, 17 November 1992). The implication from the provisions of the RMA is that the requirements of that Act apply to Maori land unless specific alternative provision has been made: see ss 11(1)(c), 11(2), 108(9)(b) and 353.

When land is acquired following designation under Part VIII of the RMA, the Public Works Act 1981 provides the statutory framework for acquisition by either the Crown or by local authorities: see ss 17, 18, 23(2), 41 and 42A of the 1981 Act.

Parliament has also carefully considered and limited the interface between the Te Ture Whenua Maori Act 1993 and the Public Works Act 1981. The TTWMA does not change the legal position that Maori land is subject to the 1981 Act: see ss 4, 130, 134(2), 183(6)(d) and 320 of the TTWMA; ss 16(2), 17(4) and 18(5) of the 1981 Act; *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129.

The Te Ture Whenua Maori Act 1993 strictly prescribes the jurisdiction of the Maori Land Court and does not grant jurisdiction in respect of matters arising under the RMA. The only interrelationships between the Maori Land Court and the Environment Court are those that are specified. The RMA's requirements and designation provisions are not subject in any way to the TTWMA. When the TTWMA was enacted Parliament specifically addressed the application of the RMA: see ss 4, 99(3), 123(6A) and 301 – 305 of the TTWMA. Conversely, Maori values have been particularly recognised and elevated under the RMA: see Part II – "Purpose and Principles" and ss 14(3)(c), 39(2)(b), 42(l)(a), 51, 61, 66, 74, 77, 104, 168(3), 168A, 171, 191, 199, 253(e), 269(3), 276(3) and 345. In determining the jurisdiction of the Maori Land Court, the right approach is to conduct an extensive analysis of the TTWMA, having regard to the particularity with which the legislature defined the scope of the Maori Land Court: see *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA).

The three Acts constitute a carefully balanced system which is fair, open and transparent and takes into account a variety of competing interests. The provisions of the RMA providing for designation are clear and precise. The exceptions to the designation process were revisited in 1997 when the Act was amended and further provisions were added. Nothing in any of the three statutes exempts Maori land from normal planning control: see Boast, Erueti, McPhail and Smith, *Maori Land Law* (1999) at pp 257 – 268. Maori freehold land can lose its status. The very procedures under attack by the appellants are contemplated by the statutes.

The Court of Appeal decision is plainly correct and the appellants have demonstrated no legal error in its reasoning. A literal interpretation of the Maori phrasing used in the Treaty of Waitangi and the TTWMA means that nothing can be done to Maori land without Maori consent. That is not what the law of New Zealand provides. In essence the appellants' argument consists of extending the application of the TTWMA in a way which has never been contemplated before in New Zealand and which is contrary to the recent approach of the Court of Appeal: see *Attorney-General v Maori Land Court*; *Grace v Grace* [1995] 1 NZLR 1 (CA). It has been rejected by all the Judges below.

The appellants' reliance on the preeminent place of the Treaty of Waitangi is misplaced, the references to the Treaty in the TTWMA do not extend the reach of the Act, and nor does the statement of purpose in the preamble. For a neutral analysis see Boast, Erueti, McPhail and Smith, *Maori Land Law* at p 285.

There are deep and significant policy implications if the appellants' case is accepted. It will be disruptive to local government if the Maori Land Court can intervene in the manner the appellants are arguing for. If Courts of similar status but with different specialist jurisdictions both have jurisdiction over the same matter it will lead to chaos, delay, confusion and expense. The Board should have regard to the practical results as well as the legal arguments.

In order for there to be a trespass, there must be some unlawful act and physical entry or use of force. Section 19 of the TTWMA, which grants jurisdiction in respect of "trespass or other injury", should be read in conjunction with s 346. The same logic should apply to s 18(l)(a) which confers the equivalent jurisdiction in relation to injunctions: see Boast, Erueti, McPhail and Smith, *Maori Land Law* at p 114. Under the principle ejusdem generis the term "or other injury" is to be limited by the same criteria that apply to the word "trespass". The phrase "trespass or other injury" has been in statutes since the Native Land Act 1909 (s 24(l)(d) and the Maori Affairs Act 1953) and, because the words were not changed in the drafting of the TTWMA, a change in meaning should not be inferred from the purpose of the Act.

The district council's actions are authorised by statute: see ss 168 and 168A of the RMA. Civil liability cannot arise in respect of actions authorised by statute. If the actions of the district council are ultra vires, the requirement and/or designation will be a nullity and hence there will be no trespass without physical entry. If the actions are intra vires, they do not by definition amount to

a trespass because they are lawful. Cases like *Boddington v British Transport Police*; *R v Wicks* etc can be distinguished. The New Zealand statutory scheme provides the appellants with plenty of opportunities to challenge the district council's decision.

von Dadelszen following. [Submissions were made on the facts: the roles of the district and regional councils were outlined; the history of the planning process in Hastings, the consultation which takes place and the current situation were described.]

Majurey in reply. The public consultation on planning decisions is inadequate as is the available appeal procedure. There is already a concurrent jurisdiction between the Environment Court and the High Court. There is no pragmatic reason not to add the Maori Land Court to the equation. The fact that there is no similar United Kingdom legislation is not a reason for the Board to follow the New Zealand Courts. The Board is a manifestation of the Crown and its advisory role to the Crown symbolises the Treaty between the Crown and Maori.

The following was said to mark the last appearance at the Board of Lord Cooke of Thorndon:

The Rt Hon Sir Geoffrey Palmer: My Lords, this is the occasion of Lord Cooke's last sitting at the Judicial Committee of the Privy Council and I think he has already had his last sitting as a Lord of Appeal. And it is therefore an occasion to acknowledge His Lordship's contribution to the law and it is a felicitous occasion that this was an appeal from New Zealand on the occasion of his last sitting. We New Zealand lawyers feel grateful and humble that we can be here on this occasion. New Zealand is a small country, My Lords, but there are those who love her, and His Lordship is one of them. He has served the bulk of his career in New Zealand when a man of his talents could easily have served it elsewhere in larger places, but he elected to serve for many years as a New Zealand Judge and his contribution to New Zealand has been of inestimable value. One of his former judicial colleagues, lately the Governor-General of New Zealand, Sir Michael Hardie-Boys, has described Lord Cooke as, and I quote, "Undoubtedly one of New Zealand's intellectual giants. His influence has been vast".

My Lords, at this point it must recognised that Lord Cooke is the greatest Judge that New Zealand has produced and his qualities have been recognised far beyond New Zealand's shores. His Lordship graduated LLM with first class honours from Victoria University of Wellington; he won the travelling scholarship in law in 1950 and went to Cambridge as a research fellow; he won the Yorke Prize; he got a PhD when he returned to practice law in New Zealand and he took silk in 1964. He was appointed a Judge at a relatively early age in 1972. He was appointed, after it was clear that he had unusual juridical ability, to the Court of Appeal in 1976. He was President of the New Zealand Court of Appeal from 1986 to 1996. He was then appointed a Lord of Appeal in the United Kingdom, something that has never occurred to any other New Zealand lawyer, and now that the ties that bind us are becoming less it will probably never happen again. My Lords, it has been a glittering legal career. Lord Cooke has always been able to see the human and social consequences of legal rules and not to be afraid to be robust and bold on occasion. Lord Cooke's contribution to the law and to life will live in the pages of the Law Reports

forever and there are some jurisdictions who are fortunate enough to be able to continue receiving his judicial services because they don't have these retirement laws that infect some countries including New Zealand and (it seems) the United Kingdom, though the age here is a little higher. Oliver Wendel Holmes I recall sat on the Supreme Court of the United States until well into his 90s. Lord Cooke has rendered the state some brilliant, long and distinguished service. And on behalf of the New Zealand lawyers I would like to pay a tribute to him for that. I have been asked by the New Zealand Law Society on this occasion to say on their behalf the following:

> "Christine Grice, the President of the Law Society, wishes to say that the Society itself and the legal profession as a whole join with these remarks that I have made. Lord Cooke's long and distinguished career as a lawyer, Judge and jurist is recognised justifiably and warmly by us all as extraordinary and unsurpassed."

I have also been asked to convey the following message to Your Lordships by the Attorney-General of New Zealand, The Honourable Margaret Wilson. She says, and I quote:

> "Lord Cooke has made a seminal contribution to the development of New Zealand jurisprudence at a critical time in the development of New Zealand's nationhood."

That says it all My Lords. The hour has come when Your Lordships must say farewell to Lord Cooke. Perhaps he will now have more time to watch cricket, of which he is particularly fond, and perhaps the pages of the law reviews will see even more of his legal analyses than they have seen in recent times. I certainly hope so. It has been an honour to be able to make these remarks, I am very grateful for the opportunity, and could I say that my learned friend Mr Majurey would like to say a few words.

LORD BINGHAM OF CORNHILL: Thank you very much indeed. Mr Majurey.

Majurey addressed the Board in Maori and then continued as follows: May it please Your Lordships, at this time I want to pay homage to My Lord, Lord Cooke, supporting the words of my learned friend which are fully endorsed by our people. I do not need to go through the many achievements that have been achieved by Lord Cooke. He is a mountain of a man in our country. Oftentimes the tributes in our country, which perhaps reflects our society, are placed on those who achieve exploits in the sporting field and elsewhere in the world. But it is also important that the deeds of Lord Cooke are recognised. It is somewhat of a humbling experience to convey the appreciation and love of the Maori people to Lord Cooke. His is a lofty position in the world of Maoridom. One needs only think of the famous cases of *New Zealand Maori Council* (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641), *Tainui Maori Trust Board* (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)) and his judgment in the *Maori Broadcasting* case (*New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA)); and on a personal note, as a very young junior counsel – Lord Cooke would not probably remember – of the famous *Kerikeri* case (*Environmental Defence Society Inc v Mangonui County*

Council [1989] 3 NZLR 257 (CA)), a case of some moment to Maori in the Court of Appeal. Those cases are a testament to the shining light that this individual has been in our country. There was many a tear that fell when Lord Cooke left our shores and brought his skills to this country.

It is a tradition in our country for speeches to have a song.

Majurey, ***Whata*** and the tangata whenua of Karamu, Hastings then sang *E Toru Nga Mea*, a Maori hymn.

Majurey: Thank you, Your Lordships.

LORD BINGHAM OF CORNHILL: Sir Geoffrey, Mr Majurey, I'm afraid that my capacity to respond musically is as deficient as my capacity to respond in Maori, but his British colleagues would wish to pay tribute to Lord Cooke. He is very easily the longest serving member of this Board, having sat on the Judicial Committee since 1978, shortly after his appointment to the Court of Appeal of New Zealand. Happily we have been privileged to welcome him on very many occasions since then and we have valued more than I can say his erudition which has marked him out as one of the outstanding jurists of the common law world; and we have valued also his long and broad experience, his humane and radical vision, his commitment and his youthful zest for the case in hand. I think it is true of Lord Cooke as it is of every legal addict that his pulse still quickens as he opens a new bundle of papers. We've enormously valued him as a colleague, never backward in forming or expressing opinions but never seeking to overbear or dominate as a man of lesser quality with his record of achievement might have been tempted to do. This is, as Sir Geoffrey suggested, a slightly sombre occasion not only because we must bid a reluctant professional farewell to a cherished colleague and friend but also because Lord Cooke's career in its British dimension seems very, very unlikely ever to be repeated. That will be our loss. But we have been uniquely privileged to enjoy his company and his contribution for so long. So we offer him our congratulations on his birthday yesterday, our profound thanks for all that he has done, our continuing good wishes and our recognition that the law is yet another field in which the southern hemisphere has proved itself a world beater.

LORD COOKE OF THORNDON: Thank you all for those very kind messages, however undeserved. Since retiring from the New Zealand bench five years or so ago, I have been fortunate to have had a sort of judicial Indian summer in this place and the Lords. That experience I greatly value and from it I have learnt. Now, subject to a useful collection of reserved judgments the composition of which will sustain me into the summer, statute puts me out to judicial grass in the United Kingdom and rightly so. I leave not with sadness but with gratitude and there could have been no more appropriate last case than this very New Zealand one, sitting with a Board of English judicial friends presided over by Lord Bingham of Cornhill and with the New Zealand Bar lead by Sir Geoffrey Palmer, who bore political responsibility for my appointment as President of the Court of Appeal. I appreciate too the messages that Sir Geoffrey and Mr Majurey have conveyed from other New Zealand sources. I have also appreciated the amicable surveillance of Mr Registrar John

Watherston, and am glad that he is here today; and finally there has been the delightful accompaniment of some beautiful Maori singing. For all of that I am truly grateful. Tena koutou, tena koutou, tena tatou katoa.

Cur adv vult

The judgment of Their Lordships was delivered by

LORD COOKE OF THORNDON. [1] This case raises an issue about Maori land rights. The Hastings District Council (Hastings) was proposing at a meeting to be held at 1.00pm on 29 April 1999 to issue notice of a requirement under s 168A of the Resource Management Act 1991 (the RMA) for the designation of a road (the northern arterial route) intended to link the Hastings urban area and Havelock North to a motorway between Hastings and Napier which was opened that month. The proposed route would run through inter alia Maori freehold lands known as Karamu GB (Balance), Karamu GD (Balance) and Karamu No 15B. On 23 April 1999 representatives of the owners filed in the Maori Land Court applications for injunctions under s 19(1)(a) of the Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993) preventing Hastings from so designating their lands. The applications were heard by Judge Isaac, on short notice, on the morning of 29 April 1999. He had before him affidavits by the applicants Mr Frederick Pori Makea and Mrs Margaret Akata McGuire, and from Hastings' Policy Manager, Mr Mark Anthony Clews; and he heard the applicants in person and Mr Mark von Dadelszen, counsel for Hastings. He granted interim injunctions. They were only interim, until the further Order of the Court, to enable further discussion by the applicants with Hastings: a substantive hearing was to be arranged if necessary. But on 22 May 1999 Hastings filed a judicial review application in the High Court seeking declarations that the Maori Land Court had acted ultra vires and an order setting aside its decision.

[2] In the High Court the judicial review application came before Goddard J. A brief agreed statement of facts and a series of agreed questions of law came to be placed before the Judge. In a judgment delivered on 3 September 1999 she decided these questions in favour of Hastings. The Maori applicants appealed to the Court of Appeal, where the case was heard by Richardson P, Henry, Thomas, Keith and Tipping JJ. In a judgment delivered by the President on 16 December 1999 the appeal was dismissed: [2000] 1 NZLR 679. The Maori applicants have appealed to Her Majesty in Council by leave granted by the Court of Appeal.

[3] The case turns partly on the relationship between the Te Ture Whenua Maori Act 1993 (henceforth referred to as "the MLA") and the Resource Management Act 1991. The directly or indirectly relevant provisions of both were reviewed very fully by Goddard J and to a large extent by the Court of Appeal; and the Board has had the advantage of helpful wide-ranging reviews of these and other enactments by Mr Majurey and Mr Whata for the appellants and Sir Geoffrey Palmer and Mr von Dadelszen for Hastings. (The second respondent, the Maori Land Court, abides the decision of the Board.) Their Lordships think that no good purpose would be served by their reciting and commenting on all the statutory provisions having arguably some degree of relevance. They will concentrate, rather, on the main provisions which they regard as of importance for this case.

The Maori Land Act

[4] Certainly the preamble to the MLA and the directions about interpretation in s 2 are important and should be set out in full. There are both Maori and English versions of the preamble, and it is sufficient to quote the latter, with a preliminary explanation of some of the terms. Some meanings are or may be contentious, but for the purposes of the present case it is enough to say that kawanatanga approximates to governance, rangatiratanga to chieftainship, and taonga tuku iho to land passed down through generations since time immemorial. Whanau may be rendered as family, and hapu as subtribe. The English version of the preamble reads:

> "Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles."

[5] Section 2 reads:

> **2. Interpretation of Act generally –** (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble to this Act.
>
> (2) Without limiting the generality of subsection (1) of this section, it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu and their descendants, and that protects wahi tapu.
>
> (3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

[6] The MLA is, by its long title, an Act to reform the laws relating to Maori land in accordance with the principles set out in the preamble to this Act. Previous statutes relating to the Maori Land Court had tended to be seen as giving that Court the role of facilitating the ascertainment and division of title, and the alienation of Maori land. The jurisdiction was perceived as linked with the former goal of assimilation. The Act of 1993 has manifestly a different emphasis, which must receive weight in its interpretation.

[7] Section 6 provides that there shall continue to be a Court of record called the Maori Land Court. It is to have all the powers that are inherent in a Court of record and the jurisdiction and powers expressly conferred on it by this or any other Act. Thus it is a specialised Court of limited (though important) jurisdiction – a consideration which underlay the decision of the Court of Appeal in a case not otherwise closely relevant, *Attorney-General v Maori*

Land Court [1999] 1 NZLR 689. Section 17(1), another section new in the Act of 1993, states that the primary objective of the Court in exercising its jurisdiction shall be to promote and assist in:

> (a) The retention of Maori land and General land owned by Maori in the hands of the owners; and
> (b) The effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

Some further objectives, which need not be quoted, are then set out in subs (2).

[8] In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, s 18(1) then lists in (a) – (i) a range of powers, including "(c) To hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land". None of these powers are expressed to include judicial review of administrative action or anything tantamount thereto. Subsection (2) provides that "any proceedings commenced in the Maori Land Court may, if the Judge thinks fit, be removed for hearing into any other Court of competent jurisdiction."

[9] Section 19 gives jurisdiction in respect of injunctions. Section 19(1)(a), whereunder the interim injunctions were sought and granted in the present case, empowers the Court at any time to issue an order by way of injunction "(a) [a]gainst any person in respect of any actual or threatened trespass or other injury to any Maori freehold land". Thus it is the counterpart of s 18(1)(c) already mentioned. Historically s 19(1)(a) goes back to 1909 and Sir John Salmond; but until 1982 the jurisdiction was restricted to granting injunctions against any native or (in more contemporary language) any Maori. Originally "trespass or other injury" may well have had quite a restricted ambit, confined to traditional torts; but in its new context the phrase may well have a new reach. The question is analogous to that which arose in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 as to the contemporary meaning of "public meeting", which was held to include a press conference such as occurred in that case. Lord Bingham of Cornhill put it at p 292:

> "**4** Although the 1955 reference to 'public meeting' derives from 1888, it must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today."

And Lord Steyn said at p 296 that, unless they reveal a contrary intention, statutes are to be interpreted as "always speaking"; they must be interpreted and applied in the world as it exists today, and in the light of the legal system and norms currently in force. In law, he has said elsewhere, context is everything: *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, p 447.

[10] The Court of Appeal preferred to leave open the question whether s 19(1)(a) can be read as embracing conduct wider than actual or threatened physical damage to or interference with the possession of land. The Board is disposed to think that in the context of the Act of 1993, with its emphasis on the treasured special significance of ancestral land to Maori, activities other than physical interference could constitute injury to Maori freehold land. For example activities on adjoining land, albeit not amounting to a common law nuisance, might be an affront to spiritual values or to what in the RMA is called tikanga Maori (Maori customary values and practices). But it is indeed

unnecessary to decide the point. Clearly if there was a physical interference, as by unlawful bulldozing in anticipation of the taking of Maori freehold land or as incidental to roadworks on adjoining land, the Maori Land Court would have jurisdiction under s 19(1)(a). The first respondent (Hastings) does not dispute this. Nor can it be disputed that a notice of designation, whether lawful or unlawful, and though appealable, can have a blighting effect which might well be described as an injury. The fundamental difficulty for the appellants lies deeper. It is that, as already mentioned, the Maori Land Court is not given judicial review jurisdiction. There are remedies under the RMA, to which Their Lordships will turn later, and there is the residual judicial review jurisdiction of the High Court. But, like both the High Court and the Court of Appeal in New Zealand, the Board is unable to stretch the scope of the MLA so far as would be needed to uphold these interim injunctions.

[11] For the appellants reliance was placed on *Boddington v British Transport Police* [1999] 2 AC 143 and the line of recent English cases there applied. In *Boddington* the House of Lords held that in a summary criminal prosecution the defendant was entitled to raise before the Magistrates for adjudication a defence that the bylaw under which he was being prosecuted, or an administrative act purportedly done under it, was ultra vires. The actual decision does not apply to the present case, as the Maori Land Court was not exercising any criminal jurisdiction. What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings also, as when the defendant is being sued civilly by a public authority: see the observations of Lord Irvine of Lairg LC at p 158 and pp 160 – 162, and Lord Steyn at pp 171 – 173. These passages are qualified, however, by recognition that a particular statutory context or scheme may exclude such collateral challenges, *R v Wicks* [1998] AC 92 being an example in the planning field. *Wicks* itself, a case of a criminal prosecution and statutory provisions different from those of the present case, is not particularly helpful for present purposes. Still, as will appear from the discussion of the RMA later in this judgment, there are strong grounds for regarding the RMA as an exclusive code of remedies ruling out any ability of the Maori Land Court to intervene in this case.

[12] But in any event there is the earlier and more basic obstacle already discussed, that is to say the limited and specialised jurisdiction of the Maori Land Court. In the typical case where the *Boddington* principle applies, a collateral challenge arises incidentally to proceedings in a Court of general (albeit often "inferior") criminal or civil jurisdiction. The width of the jurisdiction of magistrates in England was emphasised in *Boddington* by both the Lord Chancellor and Lord Steyn. The latter described them at pp 165 – 166 as "the bedrock of the English criminal justice system: they decide more than 95 per cent of all criminal cases tried in England and Wales". By contrast the Maori Land Court has a range of quite precisely defined heads of civil jurisdiction in matters pertaining to Maori land, a range not extending to issues of the invalidity of administrative action. Although dressed up as a claim for an

injunction against a threatened injury to Maori freehold land, the pith and substance of the present proceeding is a contention that express or implied requirements of consultation in the RMA have not been or will not be complied with.

[13] The Board does not consider that this can properly be described as a collateral challenge within the ambit of the reasoning in *Boddington*. It is essentially a direct challenge. The whole purpose of the injunction claim is to establish a breach of public law duties arising in the administration of the RMA. In *Boddington* at p 172 Lord Steyn distinguished "situations in which an individual's sole aim was to challenge a public law act or decision". The facts of this case relating to Maori land and the structure of the New Zealand judicial system are remote from anything under consideration in the *Boddington* line of cases. In the opinion of Their Lordships, both the substance of the proceeding in question and the background judicial system have to be taken into account in deciding whether those authorities apply; and this case is outside their purview and spirit.

The course of the litigation

[14] The history of the case in New Zealand calls for some further explanation. When the injunction applications came on so suddenly before Judge Isaac, he correctly addressed himself to the questions appropriately considered at the interim stage, the first two of which are commonly described as whether there is a serious question to be tried and the balance of convenience. Apart from the fact that the owners were strenuously opposed to the proposal and were concerned that there might be actual or intended trespass or damage to the land, he gave no express indication of why he thought there was a serious question. The affidavits of the applicants alleged lack of consultation. Mr Clews countered in his affidavit by deposing to a wide-ranging consultative and publicity process, including the obtaining of a report from consultants suggested by Maori interests but paid for by Hastings. He spoke also of unsuccessful attempts to arrange meetings with some of the applicant owners. The details of the affidavits were not canvassed in argument before the Board, but it is plain that there had been at least considerable consultation with Maori and that the evidence of insufficient consultation with the applicants was less than overwhelming. Moreover there was the argument for Hastings that the Maori Land Court lacked jurisdiction. At a minimum it was an argument requiring careful consideration. Nevertheless the Judge's decision to grant interim injunctions is understandable. Hastings' meeting was scheduled for that afternoon, but the route of the northern arterial road had been under debate for years and the matter may not have appeared particularly urgent. Also, as he stressed in his decision, the applicants were not that day represented by counsel, although it was said that counsel had been appointed and would be appearing at a substantive hearing. Evidently the Judge saw his decision as no more than a holding operation.

[15] When the judicial review proceeding initiated by Hastings was before Goddard J the following agreed questions of law were propounded on behalf of the parties at para [8]:

> "**[8]** The questions of law to be determined in the proceeding can be characterised at several different levels of generality but the fundamental common element is ultra vires:

(a) Does the Maori Land Court have jurisdiction to issue injunctions under s 19(1)(a) of Te Ture Whenua Maori Act 1993 that restrain a territorial authority from the purported exercise of its powers under the processes and procedures specified in the Resource Management Act 1991 to make designations where those designations if made under s 168A would apply to Maori freehold land?

(b) Can preparation for a decision whether valid or invalid by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or other injury to Maori freehold land'?

(c) Can a decision, whether valid or invalid, by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 amount to an 'actual or threatened trespass or injury to Maori freehold land'?

(d) Does the first respondent have the power to determine the validity of a decision by a territorial authority to designate Maori freehold land under s 168A of the Resource Management Act 1991 on the ground that the action amounts to an 'actual or threatened trespass or injury to Maori freehold land'?

Note: it is not intended that the adequacy of any consultation be determined in these proceedings. It is agreed by counsel that there will be no need for the second respondents to plead to the statement of claim."

[16] In those questions the phrase "whether valid or invalid" in (b) and (c) was unhappily chosen. It was made crystal-clear in the argument before the Board that the appellants do not contend that implementation of a valid decision by a local authority can be restrained by an injunction from the Maori Land Court. It is common ground, furthermore, that Maori freehold land can be validly designated under the RMA and can be acquired compulsorily under the Public Works Act 1981. This accords with a proposition of Lord Denning, giving a judgment of a Judicial Committee of the Privy Council comprising Earl Jowitt, Lord Cohen and himself, in *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876 at p 880, which has been quoted previously in the Court of Appeal in Treaty of Waitangi litigation:

> "In inquiring . . . what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it . . .."

Lord Denning was speaking in a case concerning a ceded territory (Nigeria), and whether New Zealand is in that category has long been the subject of academic controversy. There can be no doubt, however, that in the absence of some constitutional provision to the contrary the same must apply prima facie to a state with a legislature of plenary powers such as New Zealand.

[17] As Their Lordships understand it, the present appellants also accepted in the Courts in New Zealand that the Maori Land Court could not question the lawful exercise of powers under the RMA. Goddard J said at p 19:

> "It is axiomatic that powers conferred under the RMA are lawful because they are legislatively provided. Therefore, a territorial authority cannot commit a 'trespass' or 'other injury' to land by the simple lawful exercise of its powers to notify requirements and propose designations. A prima facie unlawful exercise of powers, such as would merit injunctive relief and pose a serious question for trial, is therefore only likely if the Council's actions appear to be ultra vires. Conceivably, the appearance of ultra vires might arise if the process upon which the decision to notify or designate was based seemed demonstrably flawed. In the present case, however, the fact or adequacy of any consultation to date is specifically exempt as an issue and there is no evidence that the procedure is flawed in any other way."

[18] With regard to Goddard J's reference to the possibility of a decision to notify or designate seeming demonstrably flawed, Their Lordships likewise reserve the possibility of a purported decision under the RMA so egregiously ultra vires as to be plainly not justified by that Act and conceivably within the scope of the Maori Land Court's injunctive jurisdiction. But that is no more than a hypothetical possibility. It is certainly not the present case.

[19] In the Court of Appeal the confusion apt to be created by the phrase "whether valid or invalid" was also noticed. The Court accordingly, with the agreement of counsel for the appellants, rephrased the issue (at para [25]) as being:

> ". . . whether the Maori Land Court has jurisdiction to entertain a collateral challenge to the validity of the decision by the council to make and notify a requirement under ss 168 and 168A of the RMA on the basis that such decision, if invalid, amounts to an 'actual or threatened trespass or other injury to Maori freehold land'."

This is an alternative way of expressing the original question (d). The Board's opinion upon it has already been stated.

The Resource Management Act

[20] While what has been said may be strictly enough to decide the case, it is desirable for two reasons to turn more particularly to the RMA. The first reason is that, with the possible exception of an extreme case such as the hypothetical one previously postulated, the Act of 1991 provides a comprehensive code for planning issues, rendering it unlikely that Parliament intended the Maori Land Court to have overriding powers. The second is that this code contains various requirements to take Maori interests into account. The Board considers that, faithfully applied as is to be expected, the RMA code should provide redress and protection for the appellants if their case proves to have merit. It would be a misunderstanding of the present decision to see it as a defeat for the Maori cause.

[21] Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far

from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, Their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

[22] Some features of the RMA code will now be mentioned. By s 168A and sections thereby incorporated, when a territorial authority proposes to issue notice of a requirement for a designation, public notification is to be given, with service also on affected owners and occupiers of land and iwi [tribal] authorities. That stage has not yet been reached in the present case; the injunctions applied for were aimed at preventing its being reached. By s 168(e) notice of a requirement for a designation must include a statement of the consultation, if any, that the requiring authority has had with persons likely to be affected. There is provision for written submissions and for discretionary prehearing meetings. Persons who have made submissions have a right to an oral hearing. By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. Hastings has in effect the dual role of requiring authority and territorial authority, so in a sense it could be in the position of adjudicating on its own proposal; but, by s 6(e), which Their Lordships have mentioned earlier, it is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

[23] The function of the territorial authority under this procedure, after having regard to the prescribed matters and all submissions, is to confirm or cancel the requirement or modify it in such manner or impose such conditions as it thinks fit. From the authority's decision there is a right of appeal to the Environment Court, available to any person who made a submission on the requirement (s 174). The Environment Court is specifically required by s 174(4) to have regard to the matters set out in s 171; but Their Lordships have no doubt that the provisions thereby incorporated and the general scheme of the Act, including ss 6, 7 and 8, apply in the Environment Court and that a full right of appeal on the merits is contemplated. Under s 174(4) the Court has wide powers of decision. It may confirm or cancel a requirement or modify one in such manner or impose such conditions as the Court thinks fit.

[24] Section 299 gives any party to any proceedings before the Environment Court a right of appeal to the High Court on a point of law. Section 305 enables a further appeal on law, by leave, to the Court of Appeal.

[25] Provisions of significance in this case are to be found in s 296. In summary that section stipulates that, where there is a right of appeal to the Environment Court from a decision, no application for judicial review may be made and no proceedings for a prerogative writ or a declaration or injunction may be heard by the High Court unless that right of appeal has been exercised and the Environment Court has made a decision. Thus the administrative law jurisdiction of the High Court (or the Court of Appeal on appeal), though naturally not totally excluded, is intended by the legislature to be very much a residual one. The RMA code is envisaged as ordinarily comprehensive. In the face of this legislative pattern the Board considers it unlikely in the extreme that Parliament meant to leave room for Maori Land Court intervention in the ordinary course of the planning process.

[26] Before the Board counsel for Hastings also drew attention to ss 310 and 314 of the RMA. Section 310 gives an Environment Judge sitting alone or the Environment Court original jurisdiction in proceedings brought for the purpose to grant declarations, including in (c) whether or not a proposed act contravenes or is likely to contravene the RMA. Section 314 and the following sections similarly authorise enforcement orders. Under s 314(a) such an order may prohibit a person commencing anything that in the opinion of the Court (or the single Judge) contravenes or is likely to contravene the Act. While it may be that the more normal route – submissions to the local authority and, if necessary, a hearing at that level and a subsequent appeal to the Environment Court – would offer the best way of having this dispute determined on the merits, Their Lordships accept the proposition of counsel for Hastings that, if there are any questions about whether Hastings is acting in accordance with the RMA, a declaration can be sought under s 310 or an enforcement order applied for under s 314.

[27] Another factor to which the Board, like both the High Court and the Court of Appeal in New Zealand, attaches importance is the composition of the Environment Court. The relevant provisions are in Part XI (ss 247 to 298) of the RMA. The Court consists of Environment Judges (or alternate Judges) and Environment Commissioners (or Deputies). There are to be not more than eight Judges and any number of Commissioners. The quorum generally for a sitting of the Court is one Judge and one Commissioner, although (as already noticed)

in declaration and enforcement proceedings a single Judge may sit, as may also happen with certain incidental matters. Of course a greater number than a bare quorum can sit, and commonly does; usually the Court comprises one Judge and two Commissioners; occasionally a larger Court is convened. A Judge must either be already a District Court Judge or be appointed as such at the time of appointment to the Environment Court. Appointments as Environment Judges and Commissioners are made by the Governor-General on the recommendation of the Minister of Justice, after consultation with the Minister for the Environment and the Minister of Maori Affairs. Section 253 states that the appointment of Commissioners is to ensure that the Court possesses a mix of knowledge and experience, including knowledge and experience in matters relating to the Treaty of Waitangi and kaupapa Maori. An alternate Environment Judge may act as an Environment Judge when the Principal Environment Judge (appointed under s 251), in consultation with the Chief District Court Judge or Chief Maori Land Court Judge, considers it necessary for the alternate Environment Judge to do so (s 252). A Deputy Environment Commissioner may act in place of an Environment Commissioner when the Principal Environment Judge considers it necessary (s 255). Section 269, dealing with the powers and procedure of the Court, includes an express direction that the Court shall recognise tikanga Maori where appropriate. These various provisions are further evidence of Parliament's mindfulness of the Maori dimension and Maori interests in the administration of the Act.

[28] Counsel for the appellants made the point that at present there are no Maori Land Court Judges on the Environment Court and only one Maori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Maori as an alternate Environment Judge or a Deputy Environment Commissioner. Indeed more than one such appointment could be made. Alternate Environment Judges hold office as long as they are District Court or Maori Land Court Judges; Deputy Environment Commissioners may be appointed for any period not exceeding five years. It might be useful to have available for cases raising Maori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events Their Lordships express the hope that a substantial Maori membership will prove practicable if the case does reach the Environment Court.

[29] For these reasons Their Lordships are satisfied that Maori land rights are adequately protected by the RMA and will humbly advise Her Majesty that the appeal ought to be dismissed. They adopt the suggestion of counsel that any question of costs may be raised by subsequent memoranda to the Board.

Appeal dismissed.

Solicitors for for McGuire and Makea: *Russell McVeagh* (Auckland).
Solicitors for the Hastings District Council: *Bannister & von Dadelszen* (Hastings).

Reported by: James Kirk, *Barrister*
Reported by: Barbara Scully, *Barrister*

TAB 8

DOUBLE SIDED ORIGINAL

Decision No. A039/01

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **THE MINISTER OF CONSERVATION**

(RMA902/95)

FEDERATED FARMERS OF NEW ZEALAND (SOUTHLAND PROVINCE) INCORPORATED

(RMA909/95)

RAYONIER NEW ZEALAND LIMITED

(RMA917/95)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

(RMA919/95)

Referrers

AND **THE SOUTHLAND DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at Invercargill on 4, 5, 6 and 7 December 2000.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

APPEARANCES:

R H Ibbotson and C M Lenihan for the Minister of Conservation

No appearance on behalf of Federated Farmers

J Campbell for Rayonier New Zealand Limited

S Maturin for Royal Forest and Bird Protection Society

B J Slowley for the Southland District Council

B J Arthur for the Crown and the Minister of Forestry

D McPhail for the Maori Trustee

K Dell for South Wood Export Limited

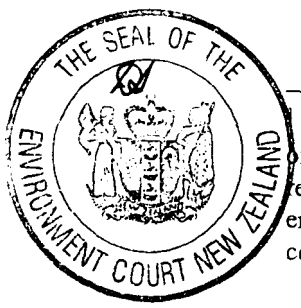
DECISION

Introduction

[1] These four references relate to contents of the Southland District Council's district plan, including provisions about clearing of indigenous vegetation. The references were lodged by the Minister of Conservation, Federated Farmers of New Zealand (Southland Province) Incorporated, Rayonier New Zealand Limited, and the Royal Forest and Bird Protection Society of New Zealand Incorporated.

[2] When the district plan was publicly notified, it contained Rule COA.4 which provided that within a part of the district identified as the Coastal Activity Area any activity which had the effect of destroying, modifying, removing or in any way adversely affecting any native vegetation or the habitat of native fauna was to require resource consent as a discretionary activity.

[3] The rule was the subject of submissions. Having considered the submissions, the District Council amended the plan by extending the control over clearing indigenous vegetation to the whole of the district, and by inserting specific recognition in respect of land in the district that had been granted under the South Island Landless Natives Act 1906.[1] Those amendments were contained in the provisions of the district plan identified as Method HER.9 and Rule HER.3. A consequential amendment was made to Rule COA.4.



[1] By s 2 of the Maori Purposes Act 1947, where the term "Native" appears in any Act as descriptive of any person, it is to be read as "Maori". Accordingly the short title of the 1906 Act should now be read as the South Island Landless *Maori* Act 1906. However, perhaps unaware of the 1947 enactment, in the hearing of these references counsel and witnesses used the original title. To avoid confusion, in this decision we do the same.

[4] Those amendments were the subject of these references. Two of the references challenged the validity of the new rule. That question was argued as a preliminary issue that was finally determined by the High Court which held that the amendments to the district plan made by the Council were not ultra vires.[2]

[5] Subsequently, most of the issues raised by the references were resolved by consent and were the subject of determinations by the Court.[3]

[6] The referrers and the District Council have also reached settlement on the issues raised by the references of Method HER.9 and Rule HER.3, and have submitted a proposal to the Court for further amendments of the district plan to resolve those issues. The Minister of Forestry has also consented to the proposed amendments. However the Maori Trustee, South Wood Export Limited and a Mr W R Austin did not consent to the proposed amendments.

[7] A question arose whether the Court had jurisdiction to entertain relief sought by any of the additional parties (namely the Maori Trustee, South Wood Export Limited or the Minister of Forestry)[4] beyond the relief sought in the reference or references on which each had sought to be heard. Following consideration of submissions the Court decided that it had jurisdiction to grant the relief sought by the Maori Trustee and South Wood Export Limited.[5] The Court therefore held a hearing of the references to consider the proposal of the principal parties for directions to make further amendments to the district plan to dispose of the remaining issues; and to hear the cases of the Maori Trustee and South Wood Export Limited.

[8] The Maori Trustee sought to be heard on these references as a person having an interest greater than the public generally. The ground for that claim was that the Maori Trustee is Ahu Whenua Trustee under Te Ture Whenua Maori Act 1993 for 5079 beneficial owners of some 7037 hectares of Maori freehold land in the West Rowallan, Rowallan and Alton areas in the Southland District; and also advisory Ahu Whenua Trustee for about 1400 beneficial owners in respect of a further 4928 hectares of land held under the Waimumu Trust. Those lands, and other land, had

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[2] *Royal Forest and Bird Protection Society Inc v Southland District Council* (High Court, Christchurch, AP198/96 (INV); 15 July 1997, Panckhurst, J).

[3] See Environment Court Records of Determinations C78/98; C100/98; C53/99; and C87/99.

[4] At the time Mr Austin had consented to the determination proposed by the principal parties, but later withdrew his consent.

[5] Environment Court Decision A119/2000 given on 4 October 2000. By then it was clear that the Minister of Forestry was not seeking relief other than the amendments proposed by the principal parties.

been granted to Maoris under the South Island Landless Natives Act 1906. (We refer to land granted under that Act as SILNA land.)

[9] The Maori Trustee had lodged a submission in respect of provisions of the proposed district plan, including Rule COA.4. No party sought to challenge the Maori Trustee's claim to be entitled to be heard in the proceedings.

[10] South Wood Export Limited has about 1350 hectares of land in exotic forest in the Rowallan Alton area of Southland. Much of the land on which those exotic forests are growing has an understorey of indigenous vegetation. Some of the planted exotic trees are surrounded by indigenous vegetation and access is only available through indigenous vegetation.

[11] South Wood Export Limited had lodged submissions on the proposed district plan seeking (among other things) amendments in respect of land exempt from the Forest Amendment Act. No party sought to challenge South Wood Export Limited's claim to be entitled to be heard in the proceedings.

[12] The Ministry of Forestry had made submissions on the proposed district plan. The Minister of Forestry had joined in the proposal by the principal parties for disposal of the references. His counsel (Ms Arthur) also represented the Crown, which sought to be heard in respect of submissions on behalf of the Maori Trustee to the effect that the District Council does not have authority to impose restrictions in its district plan on SILNA land.

[13] The Southland Province of Federated Farmers had lodged a reference, and joined the other principal parties in seeking amendments to the plan to satisfy their concerns. They did not appear or take part in the substantive hearing of the references.

[14] Mr W R Austin had advised the Court that he has an interest in the proceedings as an owner of SILNA land in Rowallan-Alton area, and as representing some other owners who were not represented by the Maori Trustee. Mr Austin had joined in seeking the amendments now before the Court, but had subsequently withdrawn his consent. However Mr Austin did not appear at, or take part in, the Court hearing of the references.

The relief sought

[15] The context is the relevant provisions of the district plan following amendments made on consideration of submissions. We quote Method HER.9 and Rule HER.3 as so amended:

> *Method HER.9 – Significant Indigenous Vegetation and Fauna Assessment Criteria*
>
> *(a) In determining whether or not indigenous vegetation is significant or habitats of indigenous fauna are significant regard shall be had to such of the following criteria as may be relevant in the circumstances.*
> *(i) Whether that habitat or vegetation has been specially set aside by statute or covenant for protection or preservation.*
> *(ii) Whether the habitat or vegetation supports indigenous species that are rare, threatened or endangered.*
> *(iii) Whether that indigenous vegetation or habitat is important in the recovery of an indigenous species that is rare, threatened or endangered.*
> *(iv) Whether the vegetation or habitat is unusual and is influenced by factors such as historical cultural practices, altitude, water table or soil or rock type.*
> *(v) Whether it is important that a particular habitat or vegetation should be represented within a district.*
> *(vi) Whether the vegetation is subject to a registered sustainable Forest Management Plan under the Forests Amendment Act 1993.*
> *(vii) Whether the vegetation is exempted from the Forest Amendment Act 1993.*
>
> *(b) In determining the criteria set out in paragraphs (a)(ii), (iii) and (iv) regard shall be had to the availability or otherwise of the species, vegetation or habitat in question in areas outside the district.*
>
> *(c) Nothing in paragraphs (a) and (b) shall limit or preclude the consideration of other relevant factors*
>
> *Rule HER.3 – Indigenous Flora and Fauna*
>
> *(a) Any activity which has the effect of destroying, modifying, removing or in any way adversely affecting any:*
> *(i) Significant indigenous vegetation or*
> *(ii) Significant habitats of indigenous fauna*
> *shall, except to the extent set out in this Rule, be considered to be a Discretionary Activity.*
>
> *(b) Any activity which has the effect referred to in Clause (I) but which is:*
> *(i) The taking of timber from an area to which the Forests Amendment Act 1993 does not apply or*
> *(ii) The carrying out of recognised and appropriate agricultural practises on land which is primarily used for agricultural production purposes*
> *shall, except to the extent set out in this Rule, be considered to be a Controlled Activity*
>
> *(c) Any activity which has the effect referred to in Clause (a) but which is:*
> *(i) The taking of timber from an area subject to and managed in accordance with a registered sustainable forest management plan under the Forest Amendment Act 1993 or*
> *(ii) The taking of timber from an area to which the Forest Amendment Act 1993 does not apply in accordance with an Approved Sustainable Yield Plan or*

(iii) The carrying out of recognised and appropriate silvicultural or horticultural practises with the intention of properly managing significant indigenous vegetation or
(iv) Part of the ordinary incidence of gardening or
(v) The carrying out of recognised and appropriate agricultural practises on land not involving the felling of trees or clearance of bush which is primarily used for agricultural production purposes

shall be considered to be a Permitted Activity.

(d) In assessing an application under this Rule, the Council shall consider the following matters:
- *The significance of and impact on the indigenous vegetation and habitats*
- *The visual impact of the activity and resulting from the activity*
- *The impact on water and soil quality.*

Reason
Indigenous flora and fauna are major contributors to the natural character of the District. In places they are threatened and where this is so they are considered a non-renewable resource.
In other places such as the Coastal Resource Area the land has, in the past, been so developed for urban or rural purposes that the natural character of the coast in the sense of tracts of unspoilt bush and indigenous trees has been irretrievably lost. The Rule recognises that within the District there are significant areas of land granted under the South Island Landless Natives Act 1906 intended as settlement of obligations under the Treaty of Waitangi and which are specifically exempt from the sustainable forest management regime of the Forests Amendment Act 1993.
While Council acknowledged that it has a responsibility under the Act to promote the sustainable management of its natural and physical resources of this land, its history and status which cannot be ignored.

[16] The amendments proposed by the principal parties (and consented to by the Minister of Forestry) are that Method HER.9 is to be deleted; Rule HER.3 is to be deleted and a new rule substituted; and consequentially Rule COA.4 is to be deleted and Policy RU.4 is to be amended. We quote the text of the replacement Rule HER.3 proposed by them:

HER.3 – Indigenous Vegetation and Habitats of Indigenous Fauna

1. No person shall carry out any activity which involves the clearance, modification, damage, destruction or removal of indigenous vegetation or habitats of indigenous fauna otherwise than in accordance with this Plan.

Permitted Activities

2. The following shall be permitted activities:

(a) The harvesting of indigenous trees with diameters of not less than 25 cm at breast height yielding not more than 50 m^3 of timber per ten year period per Certificate of Title.

(b) The clearance, modification or harvesting of indigenous vegetation which:
(i) has been planted and managed specifically for the purpose of harvesting or clearing; or

(ii) has grown naturally within the boundaries of any area of planted indigenous or exotic vegetation and its clearance or modification is necessarily incidental to the management of that planted vegetation; or
(iii) has been planted and/or managed as part of a garden or gardens or has been planted for amenity purposes.

(c) The clearance, modification or destruction of indigenous vegetation which has grown naturally on land cleared of vegetation in the 15 years immediately prior to this Plan becoming operative.

(d) The clearance, modification or destruction of indigenous vegetation necessary for the operation and/or maintenance of those permitted activities in rule PWN.1 but excluding the expansion or upgrading of those permitted activities or the erection of any building as part of those permitted activities.

(e) The clearance, modification or destruction of indigenous vegetation for the purpose of maintaining existing road, traffic, marine or aviation safety and which is undertaken by or on behalf of the authority responsible for maintaining that safety.

(f) The removal of wind thrown trees or dead standing trees which have died as a result of natural causes.

(g) The clearance, modification or removal of plant pests undertaken for the purpose of maintaining or enhancing the existing state of the remaining indigenous vegetation.

(h) The clearance or modification of indigenous grass lands where the percentage canopy of tussock species is less than 50 %.

Discretionary Activities

3. Any activities which do not comply with Rule HER3(2) shall be discretionary activities.

Applications for Resource Consent

4. An Application made in accordance with Rule HER3(3) shall, in addition to any other information, include:
(a) The details of any water body in, or adjacent to the site.
(b) Details of any area within or adjacent to the site which has been set aside by statute or covenant for conservation or sustainable management purposes.

Criteria for Assessment

5. In assessing an Application for resource consent under Rule HER 3(3) the Council shall have regard to the following matters:
(a) The significance of the affected indigenous vegetation or habitat of indigenous fauna in terms of ecological, intrinsic, cultural or amenity values, and the effects of the proposed activity on these values.
(b) The representativeness of the affected indigenous vegetation or habitat of indigenous fauna and its relationship with other habitats or area of vegetation.
(c) Whether the vegetation is subject to a sustainable Forest Management Plan or permit under Part IIIA of the Forests Act 1949.
(d) Whether the application includes a forest management plan and system of implementation prepared to a standard at least equivalent to a plan approved under Part IIIA of the Forests Act 1949.

(e) Whether the habitat and/or vegetation are important to indigenous species which are regionally rare or nationally threatened, and the effects of the proposed activity on these values.
(f) Whether the area has been identified in Schedule 6.14 to this Plan or by the Protected Natural Areas Programme administered by the Department of Conservation.

Explanation
Indigenous flora and fauna are major contributors to the character of the District. In places they are threatened and where this is so they are considered a non-renewable resource. In other places, such as the Coastal Resource Area the land has, in the past, been so developed for urban or rural purposes that the natural character in the sense of tracts of unspoiled bush and indigenous trees have been irretrievably lost.
The Rule is considered an interim measure by Council, with which to endeavour to provide for some indigenous vegetation modification in specific circumstances; while also requiring that specific assessments be undertaken in situations where proposed activities have discretionary activity status.
The Council recognises that its knowledge of significant indigenous vegetation and significant habitats of indigenous flora and fauna is far from complete and that the process of improving this knowledge will be ongoing. In order to do this Council will make use of the best available technology with specialised information. The Council is also aware that the Minister for the Environment is currently preparing guidelines for councils in relation to their duties under section 6(c) of the Act. The Council recognises the ongoing need for plan changes to ensure that the district plan recognises increasing knowledge of significant natural areas; and to ensure that the provisions of the Plan remain current and relevant and continue to provide an appropriate level of protection.
This rule, being an interim rule, will cease to have effect from the date at which a plan change containing a schedule of Significant Natural Areas produced from a detailed survey of remaining indigenous vegetation and associated landowner consultation, is notified as operative in terms of the First Schedule of the Act.

[17] The relief sought by the Maori Trustee was that Rule HER.3 be amended to exempt from its application all SILNA land. In the alternative, the Trustee sought that the rule be amended to exempt from its application all SILNA land which is not subject to a long-term protection agreement with the Crown.

[18] In addition the Maori Trustee sought that the Court confirm that in any case forestry use of the SILNA land was lawfully established as an existing use before the district plan was notified.

[19] There was no formal application before the Court for a declaration about those claimed existing use rights. The District Council and the other parties had not prepared to respond to that claim. Existing uses are only protected in respect of activities that contravene a rule in a district plan or proposed district plan.[6] Therefore the issues before the Court about the content of the rules should be determined first. Accordingly at the hearing of the references the Court did not call

[6] Resource Management Act 1991, s 10(1).

on the parties to address the existing use claim. If the Maori Trustee wishes to pursue it, then (once the contents of the relevant rules of the proposed district plan have been finally settled) application might be made to the Court for a declaration, or other appropriate proceedings might be commenced to have that issue adjudicated on. Nothing in this decision should be taken as expressing any opinion on that issue.

[20] The amendments sought by the Maori Trustee seeking exemptions from the application of Rule HER.3 were opposed by the Crown.

[21] Rayonier confirmed that it joined the other principal parties in seeking the amendments to Rule HER.3, and in particular clause 2(b)(ii) about clearing indigenous understorey as a permitted activity. It submitted that if that is not to be a permitted activity, then the rule should be deleted in its entirety, as without that clause the rule would be broader than is necessary to achieve the purpose of the Act.

[22] South Wood Export Limited sought two amendments to the new Rule HER.3 proposed by the principal parties. First, it sought that proposed clause 2(b)(ii) be deleted and the following class of activity substituted as a permitted activity:

> *The clearance or modification of indigenous vegetation which is reasonably necessary to the management, harvesting, or replanting of any area of planted indigenous or exotic vegetation.*

[23] Secondly, South Wood Export Limited sought that proposed clause 2(c) be amended by deleting the expression "15 years" and substituting the expression "30 years".

[24] The amendments sought by South Wood Export Limited were opposed by Forest and Bird.

Scope of District Council's authority over SILNA land

[25] It was part of the case for the Maori Trustee that as a matter of law, the District Council does not have authority to make a rule in its district plan controlling the clearance of indigenous vegetation on SILNA land. That was not accepted by the Crown or the District Council. We address that question now.

[26] The heart of the Maori Trustee's submission lay in the exemption of SILNA land from application of Part IIIA of the Forests Act 1949.[7] Counsel submitted that the District Council does not have power to make the proposed rule in respect of SILNA land on three main grounds. The first was that the general power to make such a rule was impliedly repealed *pro tanto* in respect of SILNA land by the exemption of SILNA land from the application of Part IIIA of the Forests Act. The second ground was that application of the rule to SILNA land would fail to take into account the principles of the Treaty of Waitangi, in particular the principles of partnership, active protection in the use of Maori land, undisturbed possession and protection of taonga. The third ground was that in purporting to apply to all indigenous vegetation, the proposed new Rule HER.3 is beyond the District Council's powers under the Resource Management Act.

The Maori Trustee's case

[27] The first ground was that the proposed new Rule HER.3 would impose a regime similar to that of Part IIIA of the Forests Act from the application of which SILNA land had been specifically exempted. Counsel contended that the Resource Management Act was general legislation, and the Forests Amendment Act was a later special act which is inconsistent with it, so as to create an exception to the general power to make rules in district plans, by curtailing the power to make rules affecting the exemption. It was argued that the intent and effect of the proposed new Rule HER.3 would be to permit only sustainable management of the forest assets of SILNA land, which is exactly the opposite of the exemption.

[28] Counsel for the Maori Trustee also relied on the judgment of the High Court in *Alan Johnston Sawmilling v Governor-General*[8] in which it had been held that the Crown had commitments to SILNA landowners regarding their right to use the land and forests provided for them in a manner that would ensure their economic and social well-being. It was argued that this case established the "full compensation" nature of the SILNA land, bringing with it the obligation to permit full use of the land; and that the proposed rule would prevent SILNA owners from optimal use of the forest and be repugnant to the exemption from Part IIIA of the Forests Amendment Act. It was also argued that the proposed rule would be imposed for an improper purpose, to enforce sustainable management of the forest by a backdoor route.

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[7] Part IIIA was inserted in the Forests Act 1949 by s 3 of the Forest Amendment Act 1993.
[8] High Court, Wellington, CP140/97; 9 June 1999, Wild J.

[29] The second main ground of the Maori Trustee's submission was that the rule would offend principles of the Treaty of Waitangi contrary to the duty imposed by section 8 of the Resource Management Act. Several particulars were given.

[30] First, it was contended that it would breach the principle of partnership (a relationship creating responsibilities akin to fiduciary duties) to prevent owners of SILNA land from utilising their land in any manner they would otherwise be permitted to, as a result of the exemption from Part IIIA of the Forests Act. It was also contended that it would breach the principle of partnership (a relationship founded on trust) to fail to take into account that the land was compensation land granted for the economic benefit of Maori, and that it enjoys exemption from the sustainable management provisions of Part IIIA of the Forests Act.

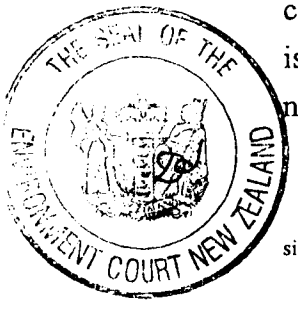
[31] Secondly it was contended that it would breach the duty of active protection to restrict the ways in which the indigenous forest on the SILNA land can be used.

[32] Thirdly it was contended that Rule HER.3 (both as inserted by the Council and as proposed to be replaced) would breach the Treaty principle of undisturbed possession of land by preventing full utilisation of it.

[33] The fourth respect in which it was contended that the rule would offend the Treaty principles was that it would fail to recognise the right of Maori to deal with their lands as a taonga.

[34] The third main ground of the Maori Trustee's submission was that the proposed new Rule HER.3 purports to apply to all indigenous vegetation, and it was contended that this is beyond the District Council's powers under the Resource Management Act. The basis for that submission was the contention that the Resource Management Act authorises protection of "*significant* indigenous vegetation", not *all* indigenous vegetation.

[35] Counsel for the Maori Trustee acknowledged that the definition of the term "sustainable management" in the Resource Management Act is much different from the definition of the same term in the Forests Act, the latter being more focussed. Counsel submitted that there is nothing in the former Act which requires the continuing existence of all indigenous vegetation, and that the proposed Rule HER.3 is directed at giving effect to sustainable management as defined in the Forests Act, not as defined in the Resource Management Act.



[36] Counsel argued that it is not sufficient to say that the rule is interim, submitting that lack of knowledge is not a legitimate reason for blanket rules outside the District Council's authority under the Resource Management Act.

The response to the Maori Trustee's Case

[37] The Crown challenged the first two of the submissions made on behalf of the Maori Trustee, namely that the Resource Management Act 1991 was impliedly repealed in part by the Forests Amendment Act, and that application of the proposed rule to SILNA land would fail the District Council's duty under section 8 of the Resource Management Act to take into account the principles of the Treaty of Waitangi. Submissions in that respect were presented by Crown counsel, Ms Arthur. Counsel for the Minister of Conservation, Mr Ibbotson, presented separate argument on the first submission, and also presented argument in opposition to the Maori Trustee's third submission, namely that it is beyond the District Council's powers to apply vegetation clearance control to all indigenous vegetation. In addition, counsel for the District Council and the advocate for Forest and Bird also presented submissions on those issues. We have been assisted by all those submissions, as well as those of counsel for the Maori Trustee, Mr McPhail, in our consideration of these issues, which we now consider in turn.

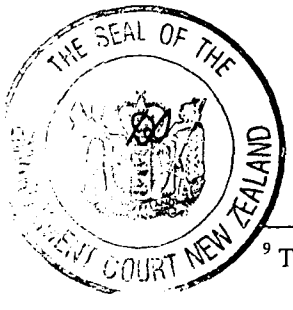
Implied part repeal of the Resource Management Act

[38] In considering the question raised by the Maori Trustee's first submission, we start with the three enactments concerned, the South Island Landless Natives Act 1906, the Resource Management Act 1991, and the Forests Amendment Act 1993. We will then identify the principles for deciding whether an enactment is impliedly repealed by another enactment, and apply them to the case.

South Island Landless Natives Act 1906[9] –

[39] The title of the Act described it as–

An Act to make Provision for Landless Natives in the South Island.



[9] The Act was repealed by the [Maori] Land Act 1909.

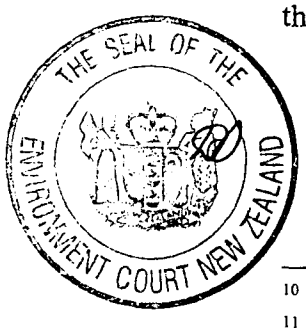
[40] The Act authorised the Governor to reserve Crown land and allocate it to Maoris in the South Island[10] who are not in possession of sufficient land to provide for their own support and maintenance.[11] The land so granted is absolutely inalienable except amongst the persons or their descendants who are so entitled.[12]

[41] Counsel for the District Council remarked that there is nothing in the South Island Landless Natives Act that indicates that the land granted under it was allocated for the purpose of timber extraction. We accept that. Crown Counsel submitted it can be inferred from the language "Maoris ... who are not in possession of sufficient land to provide for their own support and maintenance ...", that the purpose of granting land was so that the grantees might provide for their own support and maintenance. We accept that too.

[42] In *Alan Johnston Sawmilling Limited v Governor General*[13] Justice Wild cited a draft Cabinet paper in which it was stated that the SILNA lands had been granted "as compensation for their treatment by the Crown in the preceding decades". In these proceedings counsel for the Crown did not accept the correctness of that statement, and submitted that there is no evidence that the SILNA land was granted as compensation of that kind, but was more in the nature of the provision of practical welfare.

[43] However the draft Cabinet paper was not produced in evidence in this Court. With respect, the Environment Court is not bound to adopt findings of fact made by the High Court in other proceedings and based on evidence that is not before the Environment Court.

[44] The submissions made by the Crown about the purpose of the grants of SILNA land were consistent with the language of the 1906 Act. There being no evidence to the contrary before this Court, we accept Ms Arthur's submissions in that respect.



[10] See s 7.
[11] See the definition of "Landless Natives" in s 2.
[12] See s 9.
[13] High Court, Wellington, CP140/97; 9 June 1999, Wild J.

Resource Management Act 1991

[45] The purpose of the Resource Management Act 1991 is the sustainable management of natural and physical resources, as those terms are defined in the Act.[14] The definition of the term "natural and physical resources" includes " ...land ... all forms of plants and animals (whether native to New Zealand or introduced) ..." The term "sustainable management" is defined[15] as follows:

> *In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –*
> *(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> *(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
> *(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

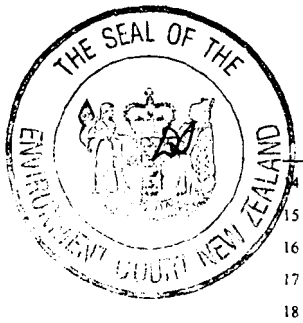
[46] For the present purpose, it is relevant to note the exclusion of minerals from the goal stated in paragraph (a). Subject to exceptions that are not significant in deciding this point, the Resource Management Act 1991 binds the Crown. There are other exceptions provided by section 4A in respect of ships and aircraft of foreign States. Subject to those express exceptions and to other specific enactments[16] (none of which is material to these proceedings) the Resource Management Act 1991 is an Act of general application.

[47] The Resource Management Act does not express any exemption in respect of SILNA lands. It does provide [17]–

> *Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.*

[48] We respectfully adopt the findings of Justice Barker in *Falkner v Gisborne District Council*[18] that –

> *The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea and air. There is nothing ambiguous or equivocal about this.*
> ...



[14] Resource Management Act 1991, s 5(1).
[15] Ibid, s 5(2).
[16] Eg the Local Government (Millennium Events) Amendment Act 1999.
[17] Resource Management Act 1991, s 23(1).
[18] [1995] 3 NZLR 622, 632, 633; [1995] NZRMA 462, 477, 478.

The Act is simply not about vindication of personal property rights, but about the sustainable management of resources.

...

The relevant statute in the present proceedings deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights.

[49] The Act stipulates that there is to be a district plan for each district prepared by the territorial authority[19] to assist it to carry out its functions in order to achieve the purpose of the Act.[20] For the purpose of carrying out its functions under the Act and achieving the objectives and policies of the plan, a territorial authority is empowered to include in its district plan rules which prohibit, regulate or allow activities.[21] In making a rule, the territorial authority is to have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.[22]

Forests Amendment Act 1993

[50] The Forests Amendment Act 1993 inserted a new Part IIIA in the Forests Act 1949.[23] The purpose of Part IIIA is stated[24]–

The purpose of this Part of this Act is to promote the sustainable forest management of indigenous forest land.

[51] The term "sustainable forest management" is defined as follows[25]–

'Sustainable forest management' means the management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest's natural values.

[52] The term "indigenous forest land" is defined as follows[26]–

'Indigenous forest land' means land wholly or predominantly under the cover of indigenous flora.

[19] Resource Management Act 1991, s 73(1).
[20] Ibid, s 72.
[21] Ibid, s 76.
[22] Idem, subs (3).
[23] Forests Amendment Act 1993, s 3.
[24] Forests Act 1949, s 67B (as inserted by the Forests Amendment Act 1993, s 3).
[25] Forests Act 1949, s 2(1) (as amended by the Forests Amendment Act 1993, s 2(1)).
[26] Idem.

[53] Counsel for the Maori Trustee contended that Part IIIA effectively prevented the use of products from indigenous forest except within the confines of a sustainable management plan approved by the Minister of Forests. Crown counsel stated that Part IIIA had been the Crown's response to uncontrolled felling of indigenous trees throughout the country by imposing controls on exports and sawmilling and providing for sustainable forest management plans.

[54] The effect of Part IIIA was summarised by Justice Wild in *Alan Johnston Sawmilling* as follows[27]:

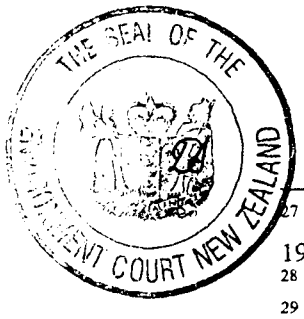
> *... prohibiting the export of indigenous forest produce unless logged from an area managed under a registered sustainable forest management plan or permit, and by prohibiting the milling of indigenous timber unless taken from an area managed in accordance with a registered sustainable forest management plan*

[55] We respectfully adopt that summary of the effect of Part IIIA, and find that the statement of its effect contended for by Mr McPhail was too broad and not supported by the terms of the enactment. It does not contain controls on the *use* of products from indigenous forest, but on milling[28], and on export from New Zealand[29], of indigenous timber. Counsel for the District Council (Mr Slowley) submitted that nothing in Part IIIA of the Forests Act prevents the felling of indigenous timber on any land, provided that the timber is not milled or exported. Counsel for the Minister of Conservation (Mr Ibbotson) observed–

> *Nothing in Part IIIA relates directly to or purports to impose controls on the clear felling for waste, firewood, farming or replanting [in] exotic forests.*

[56] There are certain general exceptions to the application of Part IIIA. When Part IIIA was originally inserted in the Forests Act, the specific exceptions to the application of Part IIIA were defined as follows[30] –

> ***67A. Application of this Part** – (1) Nothing in this Part of this Act applies to the following:*
> *(a) Any West Coast indigenous production forest:*
> *(b) Any indigenous timber from or on any land permanently reserved under the South Island Landless Maori Act 1906 and having the status of Maori land or General land owned by Maori under Te Ture Whenua Maori Act 1993:*



[27] *Alan Johnston Sawmilling Limited v Governor-General* (High Court, Wellington, CP140/97; 9 June 1999, Wild J) page 5.
[28] Forests Act 1949, s 67D (as inserted by Forests Amendment Act 1993, s 3).
[29] Forests Act 1949, s 67C (as inserted by Forests Amendment Act 1993, s 3).
[30] Forests Act 1949, s 67A (as inserted by Forests Amendment Act 1993, s 3).

(c) Any indigenous timber from or on any land held, managed, or administered by the Crown under the Conservation Act 1987 or any of the Acts specified in the First Schedule to that Act:
(d) Any indigenous timber from any planted indigenous forest.
(2) Except as provided in subsection (1) of this section, this Part of this Act binds the Crown.

[57] Paragraph (b) of that section was replaced in 1996 by the following [31]–

(b) Any indigenous timber from or on any land originally reserved or granted under–
(i) The South Island Landless Maori Act 1906; or
(ii) Section 12 of the Maori Land Amendment Act 1914; or
(iii) Section 88 of the Reserves and other Lands Disposal and Public Bodies Empowering Act 1916; or
(iv) Section 110 of the Maori Purposes Act 1931–
and having the status of Maori land or General land owned by Maori under Te Ture Whenua Maori Act 1993:

[58] Part IIIA contains certain provisions that indicate the interface between it and the Resource Management Act 1991.

[59] Section 67L of the Forests Act[32] prescribes –

The approval or registration of a sustainable forest management plan shall not constitute a subdivision of land for the purposes of the Local Government Act 1974 or the Resource Management Act 1991.

[60] Section 67V [33]provides –

Before cutting or felling any indigenous timber pursuant to a sustainable forest management plan, the owner shall obtain the resource consents (if any) required under the Resource Management Act for that activity.

Principles of implied repeal

[61] We have now to identify the legal principles by which to decide the question whether the Resource Management Act 1991 was impliedly repealed *pro tanto* by the enactment of the Forests Amendment Act.

[62] The concept is described in *Burrows Statute Law in New Zealand*[34] in this way–

If a general provision is followed by a later special one that is inconsistent with it, the effect of that special statute is to engraft an exception on to the general one. It

[31] Forests Amendment Act (No 2) 1996, s 2.
[32] Inserted by the Forests Amendment Act 1993, s 3.
[33] Inserted by the Forests Amendment Act 1993, s 3.
[34] Second edition, Wellington, Butterworths, 1999, page 277.

takes away part of its subject-matter and deals with it specially. The general provision remains intact, for not a word of it is truly repealed or changed, but it is now inapplicable to one situation which it previously covered. The second provision is said to impliedly repeal the first "pro tanto", as far as its subject-matter extends.

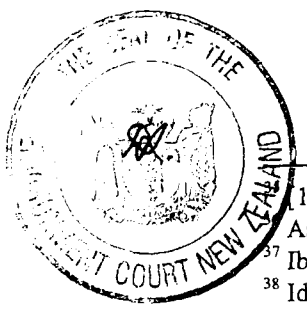
[63] An example of the application of this principle arose over the relationship between the Town and Country Planning Act 1953 and the Mining Act 1971. In *Stewart v Grey County Council*[35] the Court of Appeal held that although the Town and Country Planning Act 1953 was general in application, the provisions of the Mining Act formed a special code exclusively applicable to mining, and took mining out of the general provisions of the earlier the Town and Country Planning Act, and dealt with it specially.

[64] In delivering the judgment of the Court of Appeal, Justice Richardson[36] said[37]–

The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail.

[65] Applying the principle to the two enactments, the learned Judge said[38]–

... the Mining Act 1971 is special legislation governing the use of land for mining purposes. The Act provides a clear and detailed statutory code determining and controlling, under the direction of the Minister, the use and development of land for mining purposes. There are express provisions involving catchment authorities. There are express provisions barring mining operations where the land is being used in particular ways. And in s 152 Parliament directed its attention to the application of other legislation and provided that where conflict appeared between any provision of Part VI of the Act and the provision of the Quarries Act 1944 or the Construction Act 1959, the provisions of the Quarries Act or the Construction Act, as the case might be, should prevail. So far as land use is concerned, the scheme of the Act is that mining may and must be carried out in accordance with the provisions of the 1971 Act. There is no suggestion or implication that the use of land for mining purposes is also subject to other and possibly inconsistent controls imposed by territorial authorities. And it would be surprising if the Minister, having determined as he did in this case that it was in the national interest for land to be declared open further mining as if it were Crown land, and having then granted a mining licence, the town planning legislation could then be invoked to negate that decision. We are satisfied that that would be contrary to the purpose of the legislation. On our analysis, the Mining Act 1971 was intended to be an exclusive code in respect of the use of land for mining purposes under mining licences granted under that Act. Whatever the position as at the dates the Town and Country Planning Act 1953 and ss28D and 38A were enacted ... the 1971 Act must



[35] [1978] 2 NZLR 577.
[36] As he then was (now President of the Court of Appeal).
[37] Ibid, page 583.
[38] Idem.

be taken to have pre-empted the field and not to be subject to the land use control provisions of the Town and Country Planning Act.

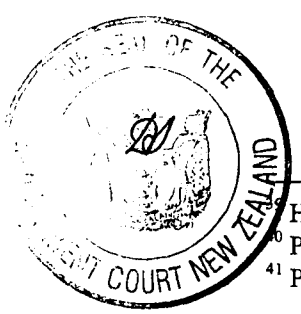
[66] In considering an argument founded on the opinion of the Privy Council in a New South Wales decision, the learned Judge identified material differences between the legislation involved in that case and the New Zealand legislation. He observed that there was an express statutory provision making Crown land subject to the New South Wales planning legislation, and that in New Zealand the Crown (with certain immaterial exceptions) was not subject to the Town and Country Planning legislation. Justice Richardson also remarked that there was no such express exclusion from that Act of other named statutes; and that it would be inconsistent with the scheme of the Mining Act to allow territorial authorities, instituting and implementing land use controls, to derogate from the rights and obligations in that respect provided for in the Mining Act.

[67] The relationship between the Civil Aviation Act 1990 and the Resource Management Act 1991 was considered by the High Court in *Director of Civil Aviation v Glacier Helicopters*[39] which the extent to which air safety issues should be considered on a resource consent application for a proposed heliport near an existing airport. Justice Ellis said[40]–

> *Where two statutes deal with the same matter, the proper approach to interpretation is to try to give each its effect without creating conflict. If conflict cannot be avoided, then the special statute will usually prevail over the general:* Stewart v Grey County Council *[1978] NZLR 57. In my view the two statutes here are not in conflict.*

[68] The reason for that conclusion was set out in this passage[41]–

> *In this case the [Planning] Tribunal directed itself precisely to these matters and concluded that an air accident in this area, although of low probability, would have a high potential impact on the social and economic conditions of the local communities dependent on the tourist trade. Plainly air safety must be considered by the Council and the Tribunal. While the essential function of the Director [of Civil Aviation] is to set the minimum safety standards that are acceptable, and that must involve some degree of risk, and while in the ordinary situation that would normally satisfy a council or the Tribunal, nevertheless the Tribunal is entitled to take a more particular look at the communities affected. I think too as a matter of law it is open to the Tribunal to require a higher degree of safety than required by the Director. A Council and the Tribunal is not necessarily thereby contradicting the Director as the issues are not identical.*



[39] High Court, Wellington, CP128/95; 27 June 1997, Ellis J.
[40] Page 10.
[41] Page 9.

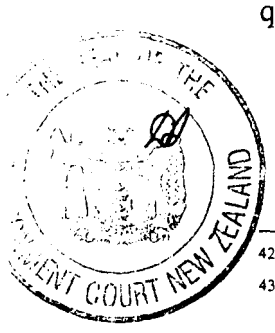
[69] The principles about implied repeal have been applied by the Environment Court to the relationship between the Fisheries legislation and the Resource Management Act 1991 in *Challenger Scallop Enhancement Co v Marlborough District Council*[42] and in *Ngati Kahu Ki Whangaroa v Northland Regional Council.*[43]

[70] From the Court of Appeal and High Court decisions cited, we discern these steps in the process of deciding whether the Resource Management Act 1991 was impliedly repealed *pro tanto* by the Forests Amendment Act 1993, so that the former no longer applies to SILNA land. The Court first has to find whether or not it is reasonably possible to construe the enactments so as give effect to both. If it can, then repeal *pro tanto* of the former by the latter is not to be inferred. Some relevant indications are evident from the decisions.

[71] One is the extent of overlap of issues. (Compare *Stewart,* where the *use* of land was common to both enactments, with *Glacier Helicopters,* where setting minimum safety standards was the function of the Director, and deciding whether the heliport would promote sustainable management of resources was the function of the Council and Tribunal, issues that were not identical).

[72] Another indication that may be influential is the scope for inconsistent controls. In *Stewart*, the possibility that a licence to use land for mining might be negated by a territorial authority acting under town planning legislation was an indication of inconsistency. But in Glacier Helicopters, the possibility that a functionary under the Resource Management Act might require safety standards higher than the minima set by the Director did not mean that the two enactments were inconsistent with each other.

[73] An indication may also be found where an enactment expressly deals with the relationship between it and other legislation. So, in *Stewart* the Court of Appeal noted that in the Mining Act Parliament had directed its attention to the application of other legislation and made provision in that respect. In *Glacier Helicopters* the question did not arise.



[42] [1998] NZRMA 342.
[43] Environment Court Decision A95/2000.

[74] A further consideration is where one of the enactments is so comprehensive as to be a special code excluding other legislation, as the Mining Act was found to be in *Stewart*.

[75] If it is found that one of the enactments is so inconsistent with, or repugnant to, the other that they are incapable of standing together, then the Court has to determine which is to prevail, as in *Stewart* where the Mining Act was held to have pre-empted the field.

Application of principles

[76] We now follow those steps in respect of the Forests Amendment Act 1993 and the Resource Management Act 1991, starting with consideration of the extent of overlap of the issues.

[77] The stated purpose of each Act refers to sustainable management. The definition of sustainable forest management in Part IIIA shows that it is concerned with the sustainability of the forest. By comparison, the definition of sustainable management in the 1991 Act shows that it is concerned with effects on all natural and physical resources of the environment, particularly effects on resources that are external to those being managed.

[78] The subject matter of the regulation imposed by Part IIIA is export and milling of certain forest products. The subject matter of the regulation imposed under the 1991 Act is the use of all natural and physical resources of land, water, and air, including land and all forms of plants.

[79] The intended relationship between Part IIIA and the 1991 Act is indicated by the duty imposed by Part IIIA that any resource consent required under the 1991 Act for cutting or felling any indigenous timber pursuant to a sustainable forest management plan is to be obtained.

[80] Although Part IIIA provides that it does not apply to indigenous timber from or on certain SILNA land, it contains no indication of an intention to exempt that land (or the owners of it) from regulation imposed under the 1991 Act.

[81] The purpose of Part IIIA may overlap to an extent with the purpose of the 1991 Act, in that sustainability of an indigenous forest may also be part of sustainability of management of natural and physical resources generally. However exempting certain SILNA land from the control for the purpose of sustainability of the forest does not conflict with applying to that land the control for the purpose of promoting sustainable management of natural and physical resources generally, particularly in respect of external effects.

[82] In that Part IIIA controls export of certain forest products, it does not overlap any control under the 1991 Act, which does not provide for control over exports. The control in Part IIIA over milling of certain forest products does not overlap with the 1991 Act either. As an activity, milling of forest products might be controlled under the 1991 Act, but that control would be for the wider purpose of promoting sustainable management of natural and physical resources generally, with particular reference to external effects of the activity itself, not for the sustainability of the source forest.

[83] There is no overlap of control over cutting or felling indigenous timber. That is not controlled at all by Part IIIA, which expressly stipulates that any resource consent required under the 1991 Act is to be obtained.

[84] From that consideration we find that although there is some overlap of issues between the two enactments, they are capable of being construed so that they stand together, each having its effect without creating conflict between them.

[85] We also consider the important question of scope for inconsistent controls. Authority for milling certain indigenous timber under Part IIIA does not imply that cutting and felling that timber is immune from any applicable control under the 1991 Act, because section 67V expressly states otherwise. Authority for milling certain indigenous timber does not imply immunity from control under the 1991 Act of the activity of the particular mill. The one relates to the source and nature of the timber being milled, the other to the location of the timber mill and the effects of the milling activity, particularly those on the external environment. The 1991 Act is permissive, and expressly states that compliance with it does not remove the need to comply with other applicable Acts etc. So the fact that the operation of a particular timber mill may conform with the 1991 Act would not create any inconsistency with control

under Part IIIA by which milling of certain indigenous timber may be prohibited. For those reasons we do not perceive any scope for inconsistent controls.

[86] By requiring (in Part IIIA) the obtaining of any resource consent required for cutting or felling indigenous timber pursuant to a sustainable forest management plan, and declaring (in the 1991 Act) that compliance with that Act does not remove the need to comply with other applicable Acts etc, Parliament has expressly dealt with the relationship between the two enactments. Those provisions are indicative of an intention that they should stand together and each take effect on its own terms. We have not found inconsistency between those terms (let alone conflict between them) that would frustrate that intention.

[87] Part IIIA might be described as a special code as far as it goes, that is, for the sustainability of the indigenous forests to which it applies. However the express provision to obtaining any resource consent required under the 1991 Act negates any notion that Part IIIA was intended to be a comprehensive code excluding other legislation, in the way that the Mining Act 1991 was held (in *Stewart's* case) to be.

[88] The grant of the SILNA lands so that the grantees (and their descendants) might provide for their own support and maintenance is not inconsistent with application to those lands of the district rules regulating clearance of indigenous vegetation. The proposed rule would not prohibit that activity, but would control it for the general purpose of the 1991 Act. That regulation does not conflict with exempting certain SILNA lands from application of the regulation over milling and exporting of indigenous timber for the purpose of forest sustainability.

[89] In short, we find that Part IIIA is not inconsistent with, or repugnant to, the 1991 Act, and that each can be given effect without creating conflict. We do not accept that the 1993 enactment of Part IIIA was intended to create an implied exception to the Resource Management Act 1991 so that it would not apply to the cutting or felling of indigenous timber, the milling or export of which is regulated by Part IIIA. That would conflict with section 67V of Part IIIA.

[90] For those reasons we reject the Maori Trustee's submission that the general power of the District Council to make the proposed rule was impliedly repealed *pro tanto* in respect of SILNA land by the enactment of Part IIIA by the Forests Amendment Act 1993.

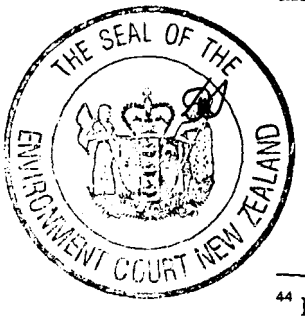
[91] We now consider the Maori Trustee's subsidiary submission that the District Council is proposing the replacement Rule HER.3 for an improper purpose, that is, to impose restrictions for sustainable management on SILNA lands which Parliament has exempted from sustainable management.

[92] We accept that the purpose for which the District Council is proposing the replacement rule is one of sustainable management. The purpose is that of the Resource Management Act, namely, the promotion of sustainable management of natural and physical resources. Later in this decision we compare the meaning given to the term 'sustainable management' in the Resource Management Act with the definition of the term 'sustainable forest management' in the Forests Act. It is sufficient for the present purpose to record that they are quite different. In short, the latter is concerned with the sustainability of the forest; the former with promoting sustainable management of all natural and physical resources.

[93] The proposed rule is to be inserted in a district plan under the Resource Management Act to assist the District Council in carrying out its functions in order to achieve the sustainable management purpose of that Act.[44] There is no evidence on which we could find that this is not the District Council's true purpose, but "a backdoor route" (to use Mr McPhail's words) to sustainable management of forests, which is the purpose of Forest Act controls from which some SILNA lands are exempt. We reject the Maori Trustee's charge of impropriety on the part of the District Council.

Taking into account the principles of the Treaty of Waitangi

[94] The second ground of the Maori Trustee's challenge to the District Council's authority to make the proposed rule was that application of the rule to SILNA lands would, contrary to the duty imposed by section 8 of the Resource Management Act 1991, fail to take into account the principles of the Treaty of Waitangi, particularly the principles of partnership, of active protection, of undisturbed possession of land, and of dealing with lands as taonga.



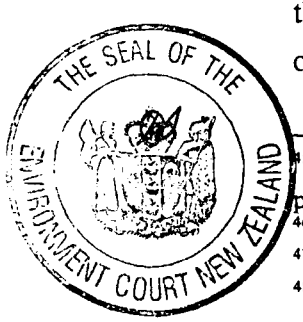
[44] Resource Management Act 1991, s 72.

[95] For the principles of partnership, active protection, and undisturbed possession of lands, Mr McPhail cited passages in judgments in the Court of Appeal in the *Maori Council* case.[45] In respect of the principle about treating Maori lands as taonga, counsel cited the report by the Waitangi Tribunal on the Mohaka River case and the Tribunal's Orakei Report.

[96] Mr Slowley announced that the District Council recognised that there may be matters to be addressed between owners of SILNA land and the Crown, but that the District Council does not accept that it is a Treaty partner, or that it must take over the Crown's obligations under the Treaty. Counsel also observed that even if it is held that the SILNA lands should be exempt from proposed Rule HER.3, that would not leave the owners of that land the right to clear it of indigenous vegetation untrammelled by the district plan. Mr Slowley drew attention to other general rules that would constrain forestry roading activities that would disturb soil and have effects on water.

[97] The representative of the Royal Forest and Bird Protection Society Incorporated (Forest and Bird), Ms Maturin, submitted that the Council is not subject to the same obligations as the Crown under the Treaty, but rather to take into account the principles of the Treaty in reaching its decision.[46] She reminded us that section 8 of the Resource Management Act is not to be read independently of section 5 as an end in itself, but is to promote the Act's central purpose of sustainable management.[47]

[98] Ms Maturin submitted that the Council had to include in its district plan provisions that were considered necessary to fulfil the purpose of the Resource Management Act in relation to Maori, while maintaining a proper balance in achieving the Act's purpose with regard to other sections of the community.[48] In that regard, Ms Maturin observed that Rule HER.3 would not have the effect of preventing the clearance of indigenous vegetation on SILNA land. Rather, in order to sustainably manage the resources of those lands in the way stated in section 5 of the Act, the rule would require that in defined circumstances resource consent be obtained.



[45] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664 per Cooke P as to the principles of partnership and active protection, and at 715 per Bisson J as to undisturbed possession.
[46] Citing *Hanton v Auckland City Council* Planning Tribunal Decision A10/94.
[47] Citing *Mahuta v Waikato Regional Council* Environment Court Decision A91/98.
[48] Citing *Nicholas v Western Bay of Plenty District Council* Environment Court Decision A3/00.

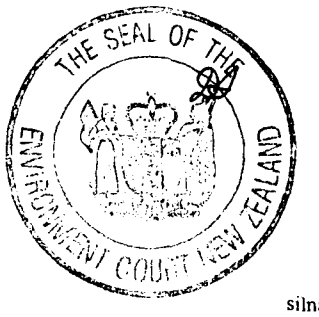
[99] Crown Counsel, Ms Arthur, announced that the Crown accepted that the District Council was required to take into account the principles of the Treaty of Waitangi. However counsel submitted that the principles invoked by the Maori Trustee are not exclusive; and they do not give the Maori owners of land a power of veto over a rule in a plan. Like Ms Maturin, Ms Arthur contended that section 8 is only one of the matters identified in Part II of the Resource Management Act that have to be considered in achieving the purpose of that Act. They have no greater weight because some of the land affected is owned by Maori, however that land was acquired.

[100] Ms Arthur submitted that the District Council's duty under the Resource Management Act to promote the sustainable management of natural resources is an exercise of Article the First of the Treaty (the right to govern, kawanatanga). The Council's exercise of its powers, functions and duties includes taking into account the principles of the Treaty. However having done so, the Council is able to impose controls on land owned by Maori, however that land was acquired, provided the controls are in accordance with the purpose of the Resource Management Act.

[101] This second ground of the Maori Trustee's challenge to the District Council's authority to make Rule HER.3 was, of course, founded on section 8 of the Resource Management Act 1991 which imposes an important duty in these terms:

> ***8. Treaty of Waitangi–*** *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

[102] The language of the section leaves no room for a person exercising a function or power under the Act to have immunity from the duty imposed on the ground that the person is not a Treaty partner, and has not assumed the Crown's obligations under the Treaty. Persons exercising functions and powers under the Act do not thereby have the Crown's obligations of giving effect to the Treaty. Even so, Parliament has directed that, in the cases described by the section, they are to take into account the principles of the Treaty. We hold that, in deciding the contents of its district plan the District Council was required to do so; and that in deciding these references, the Court is required to do so.



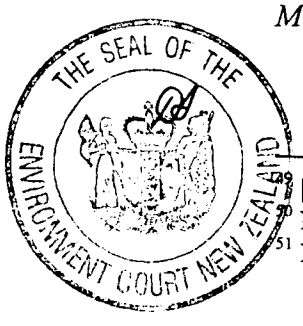
[103] We also accept that the principles of partnership, of active protection, and of undisturbed possession of land, that were identified in the *Maori Council* case,[49] are indeed principles of the Treaty. However the reports by the Waitangi Tribunal that were relied on for the claim for a principle about Maori land being a taonga were not produced to the Court, nor were references provided to the passages relied on. Although reports by the Waitangi Tribunal may deserve respect, they are not a source of law. The Tribunal's findings are not binding on the Court. In short, we do not accept that there is a principle of the Treaty of classifying land owned by Maori as a taonga, separate from the principles of active protection and of undisturbed possession of land.

[104] The principle of partnership is that the Crown is to act towards the Maori race "with the utmost good faith which is the characteristic obligation of partnership".[50] The Maori Trustee submitted that it is a breach of that relationship to prevent owners of SILNA land from utilising their land in any manner which they would otherwise be permitted to as a result of the exemption from Part IIIA of the Forests Act. It was also submitted that it is a breach of trust to fail to take into account that the land was compensation land granted for the economic benefit of Maori owners.

[105] We do not accept that those submissions represent the effect of performing the duty cast on the District Council by section 8 for these four reasons.

[106] First, we do not accept that the exemption of certain SILNA lands from Part IIIA of the Forests Act has anything to do with the District Council's functions and powers under the Resource Management Act. The exemption was no more than an item in the list of exemptions by which Parliament defined the boundaries of the controls over the milling and export of indigenous timber introduced by Part IIIA. We do not consider that section 67A(1)(b) of Part IIIA can be read as expressing an intention that SILNA land would also be exempt from regulation of clearance of indigenous vegetation under and for the purpose of the Resource Management Act.

[107] Secondly, we remain of the opinion that we expressed in our decision in *Mahuta v Waikato Regional Council*[51] (cited by Ms Maturin) that



[49] [1987] 1 NZLR 641 (CA).
[50] Ibid, at 664, per Cooke, P.
[51] Environment Court Decision A91/98.

> *The Resource Management Act has a single purpose. Consistent with that we hold that the provisions of sections 6 to 8 are subordinate and accessory to the primary or principal purpose of the Act.*

[108] Accordingly the duty to take into account the principles of the Treaty does not necessarily prevail over the duties to have regard to other contents of Part II of the Act. All relevant matters have to be identified and weighed so that a balanced judgment can be made for achieving the statutory purpose of promoting sustainable management of natural and physical resources as defined.

[109] Thirdly, we do not accept that adopting the proposed Rule HER.3 would fail to take into account the Treaty principle of partnership. That principle is that the Crown should act towards the Maori race with the utmost good faith. The rule would not discriminate against the Maori race: it would apply generally. Even if the SILNA land had been granted as compensation (which, as we have stated,[52] we do not accept) it would not be a breach of the good faith with which the Crown is to act towards the Maori race for a District Council to have the proposed rule in its district plan.

[110] The rule would not prohibit clearing of indigenous vegetation, but would regulate it in a way that allows for the circumstances and effects of a specific proposal to be considered by elected officials by an open process against stated criteria, and for a clearly stated public purpose, with a right of appeal to an independent Court with membership and experience appropriate to its task.

[111] The principle of active protection is a duty of "active protection of Maori people in the use of their lands and waters to the fullest extent practicable".[53] The principle of undisturbed possession is a duty of "full, exclusive and undisturbed possession [by Maori] of their lands".[54] These seem different ways of expressing the one principle, and we treat them in that way. It was the Maori Trustee's case that placing restrictions on the way in which indigenous forest on the SILNA lands can be used is a breach of this principle.

[112] Plainly the proposed rule would not in any way affect the possession of the lands. The only effect it would have would be to regulate a particular activity on them. The nature of the regulation would not be to prohibit the activity. Obtaining resource consent is a well-established and open process, involving stated criteria and

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[52] See paragraph [44] *ante*.
[53] *NZ Maori Council v Att-Gen* [1987] 1 NZLR 641, 664, per Cooke P.
[54] Ibid, at 715, per Bisson J.

appropriate decision-makers, directed for a statutory purpose. We accept the Crown's submission that to the extent that the rule would impose some constraint on the use of the SILNA lands by Maori people, making the rule is an exercise of the Treaty right to govern.

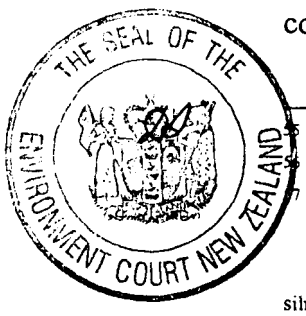
[113] In deciding on the merits whether the District Council should be directed to include the proposed rule in its district plan, this Court will have to take into account among other relevant considerations) the extent to which the rule would constrain the use by Maori of their lands (whether or not the lands were granted under the 1906 Act). However, we do not accept that the regulation of clearance of indigenous vegetation of SILNA lands is necessarily a contravention of the Treaty principles of active protection and undisturbed possession so that the application of the rule to such lands would be beyond the District Council's lawful authority under the Resource Management Act.

Regulating clearance of all vegetation

[114] The third ground of the Maori Trustee's challenge to the District Council's authority to make the proposed rule was that it would be beyond the District Council's powers in regulating clearing of *all* indigenous vegetation, rather than being confined to regulating clearing of *significant* indigenous vegetation. As we understood it, this submission was founded on two arguments. One was based on the direction in the Resource Management Act that functionaries are to recognise and provide for stated matters of national importance, among which are the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.[55] The other argument was based on the difference between the definition of 'sustainable management' in the Resource Management Act 1991[56] and the definition of 'sustainable forest management' in Part IIIA of the Forests Act.[57] We address each of those arguments in turn before deciding on the submission as a whole.

Regulating clearing of *all* indigenous vegetation

[115] It was the Maori Trustee's case that in law the District Council can only control the use of *significant* indigenous forest and not *all* indigenous forest.



[55] Resource Management Act 1991, s 6(c).
[56] Resource Management Act 1991, s 5(2).
[57] Forests Act, s 2(1) (as amended by the Forests Amendment Act 1993, s 2(1)).

[116] For the District Council, Mr Slowley observed that the proposed Rule HER.3 does not regulate clearance of *all* indigenous vegetation, as clause 2 sets out a broad range of exclusions from the rule. Counsel submitted that one way of reading the rule is that there is a definition of significant indigenous vegetation by exclusion.

[117] Mr Slowley also contended that while section 6(c) deals with protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as matters of national importance, that is not conclusive of a territorial authority's powers under the Act. He argued that in undertaking the purpose set out in section 5, regard is to be had to all of Part II which includes (in section 7) matters relating to managing the use, development and protection of natural and physical resources. Counsel submitted that there is nothing in the Act that prevents the Council from seeking to control the removal of indigenous vegetation in the way proposed.

[118] Ms Maturin (for Forest and Bird) contended that there is no mechanism for control of logging on SILNA land except that which may arise from the plan. In the absence of a comprehensive survey of areas of significant indigenous vegetation and significant habitats of indigenous fauna in the district, the criteria in the proposed Rule HER.3 for assessing resource consent applications could be applied to comply with the direction in section 6(c) to recognise and provide for them.

[119] Like Mr Slowley, Ms Maturin submitted that section 6(c) has to be applied in the context of the purpose in section 5 to sustainably manage *all* natural resources, not just the significant ones. She argued that the significance of areas of vegetation or habitat should be measured against their functional value in contributing to the sustainable management of a natural resource of an indigenous species population, or to the sustainable management of other natural or physical resources.

[120] Counsel for the Minister of Conservation, Mr Ibbotson, observed that nothing in section 6 of the Resource Management Act relates to private rights of ownership, nor to the manner in which land was acquired from the Crown.

[121] We start our consideration of this argument by observing that the proposed Rule HER.3 does not purport to regulate clearance of *all* indigenous vegetation. By its own terms (quoted in paragraph [16] of this decision) the rule defines[58] ten cases in which clearance of indigenous vegetation is expressly classified as a permitted

[58] In clause 2.

activity, so that it may be carried out without a resource consent if it complies with stipulated conditions.[59]

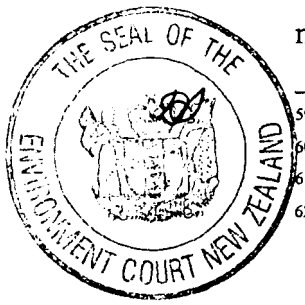
[122] Next we quote the relevant provision of section 6 of the Resource Management Act –

> ***6. Matters of national importance–*** *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> ...
>
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
>
> ...

[123] In this part of this decision we are not addressing the question whether on its merits the proposed rule should be included in the district plan. The question we are addressing is whether as a matter of law, a territorial authority has authority to include in a district plan a rule that regulates clearance of areas of indigenous vegetation that do not qualify for the epithet 'significant'.

[124] Consistent with the submissions on behalf of the District Council and Forest and Bird, it is our understanding that the subject-matter of regulation by district rules is not limited to the specific topics listed in sections 6 and 7 of the Resource Management Act. Because of their importance, those topics have been selected for specific attention: where applicable, they are not to be overlooked. However they do not occupy the entire field of the matters that need to be provided for to enable the Council to carry out its functions under the Act so that the purpose of the Act is achieved.

[125] In particular, in addition to providing for the protection of areas of indigenous vegetation that may have been identified as significant, a territorial authority may also need to regulate clearance of other areas of indigenous vegetation in case they might also qualify to be so classified, or (as Mr Slowley and Ms Maturin submitted) for other goals such as sustaining the potential of natural resources to meet the reasonably foreseeable needs of future generations;[60] safeguarding the life-supporting capacity of air, water, soil and ecosystems;[61] avoiding, remedying or mitigating adverse effects of activities on the environment;[62] the maintenance of



[59] See the definition of 'permitted activity' in the Resource Management Act 1991, s 2(1).
[60] Resource Management Act 1991, s 5(2)(a).
[61] Ibid, s 5(2)(b).
[62] Ibid, s 5(2)(c).

amenity values;[63] the intrinsic values of ecosystems;[64] or maintenance of the quality of the environment.[65]

[126] We acknowledge the Maori Trustee's submission that lack of knowledge by the District Council should not be treated as justifying blanket rules outside the District Council's authority under the Act. We understand the Maori Trustee's reference to a blanket rule as being one that controls activities indiscriminately and without justification, so that it has unreasonable effect being a major interference with the rights of owners of SILNA lands.

[127] We find that the proposed rule HER.3 before the Court is not a blanket rule in that sense. The rule has been developed over a period of several years with opportunities for participation by all interested parties. In the form in which it has now to be considered by the Court, it classifies ten classes of case as permitted activities; it prescribes five criteria for assessment of applications for discretionary activity consent; and it contains an explanation of the rule that acknowledges the limits to the Council's knowledge of areas of significant indigenous vegetation and records its future plans for surveying indigenous vegetation. We do not accept that proposed rule is beyond the Council's powers as being indiscriminate, unjustified, or unreasonably interfering with the rights of owners of SILNA lands.

[128] In summary, we do not accept the Maori Trustee's submission in this respect. We hold that the proposed rule is not beyond the District Council's power at law to include in its district plan.

Definitions of 'sustainable management' and 'sustainable forest management'

[129] Mr McPhail observed that the definition of 'sustainable management' in the Resource Management Act is much different from the definition of 'sustainable forest management' in the Forests Act; that the latter is more focussed and deals with sustainability of forests; and the former is more general. Counsel submitted that the District Council had misinterpreted its duty in formulating Rule HER.3 which, he contended, is directed at enforcing a definition of sustainable management from the Forests Act, not that from the Resource Management Act, in that the criteria refer specifically to the Forests Act requirements, from which the SILNA lands are exempt.

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[63] Ibid, s 7(c).
[64] Ibid, s 7(d).
[65] Ibid, s 7(e).

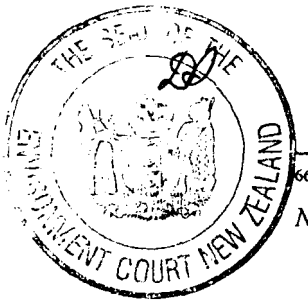
[130] Mr McPhail contended that economic and cultural well-being of Maori owners of SILNA lands are at stake, and that the definition of sustainable management in the Resource Management Act 1991 includes these elements, but does not give any prominence to indigenous vegetation, although he acknowledged that it is part of natural and physical resources. Counsel submitted that there is ample leeway for exercise of the principle of sustainable management in a manner which recognises Treaty rights to permit various types of utilisation of forests.

[131] Mr Ibbotson observed that the definition of 'sustainable forest management' in the Forests Act is about providing for sustainable yield, to keep the forest intact; and that this differs from the sustainable management of natural and physical resources in that the Resource Management Act has no interest to ensure that a forest continues to be productive, but contemplates a broader purpose than the export of unsustainably harvested indigenous timber and timber products.

[132] Counsel compared the interface between the Forests Act and the Resource Management Act with the interface between the Fisheries Acts and the Resource Management Act. The latter had been held to be that the sustainability of the fishery itself was controlled under the Fisheries Acts, not under the Resource Management Act.[66] Mr Ibbotson submitted that in a similar way the Forests Act provides a code for the sustainability of indigenous forests (by which certain SILNA lands are exempt), leaving the broader responsibility for promoting sustainable management of indigenous forests as natural and physical resources for the Resource Management Act.

[133] We quoted the definition of 'sustainable management' in the Resource Management Act in paragraph [45] of this decision, and the definition of 'sustainable forest management' in the Forests Act in paragraph [51]. From comparing them, we accept the submissions of both Mr McPhail and Mr Ibbotson that the two definitions differ in substance as well as in wording.

[134] The breadth of the Resource Management Act definition is evident from passage from Justice Barker's judgment in *Falkner's* case that we quoted in paragraph [48]. It extends to effects of forestry activities beyond the forest itself.



[66] See *Challenger Scallop Enhancement Co v Marlborough District Council* [1998] NZRMA 342 and *Ngati Kahu Ki Whangaroa v Northland Regional Council* Environment Court Decision A95/00.

[135] By its very language the Forests Act definition of 'sustainable forest management' is limited to maintaining the ability of the forest to continue to provide a full range of products and amenities.

[136] The similarity of the interfaces of the Resource Management Act with the Forests Act and with the Fisheries Acts may not have been deliberate, and is not complete. Even so, there is a similarity in that the Fisheries Acts and the Forests Act are focussed on sustainability of the particular resources to which they relate. The purpose of the Resource Management Act is promoting sustainable management of all natural and physical resources.

[137] We quoted the Rule HER.3 proposed to the Court by the principal parties in paragraph [16] of this decision. The criteria on which counsel for the Maori Trustee relied are specified in clause 5 of the rule. We repeat them here for reference in considering the Maori Trustee's submission.

[138] Criterion (a) is –

> *The significance of the affected indigenous vegetation or habitat of indigenous fauna in terms of ecological, intrinsic, cultural or amenity values, and the effects of the proposed activity on these values.*

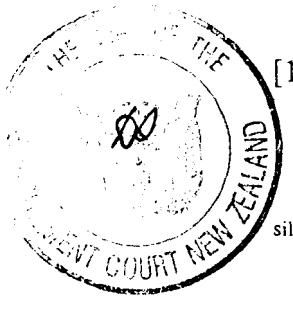
[139] Those words use the language of sections 5, 6 and 7 of the Resource Management Act. Their meaning does not refer to the meaning given by the Forests Act to the term 'sustainable forest management'. It does not refer to the sustainability of a forest to provide products. We do not accept that this criterion refers to Forests Act requirements.

[140] Criterion (b) is –

> *The representativeness of the affected indigenous vegetation or habitat of indigenous fauna and its relationship with other habitats or area of vegetation*

[141] Those words refer to qualities that may qualify an area of indigenous vegetation or habitat as significant, a matter specifically required to be considered by section 6(c) of the Resource Management Act, and outside the sustainable forest management purpose of the Forests Act. We are not able to uphold the Maori Trustee's submission in respect of this criterion either.

[142] Criteria (c) and (d) are –



(c) Whether the vegetation is subject to a sustainable Forest Management Plan or permit under Part IIIA of the Forests Act 1949.
(d) Whether the application includes a forest management plan and system of implementation prepared to a standard at least equivalent to a plan approved under Part IIIA of the Forests Act 1949.

[143] These criteria both refer to instruments under Part IIIA of the Forests Act. However that does not by itself make them objectionable. Rather they call for a consent authority to address the interface between the Resource Management Act and the Forests Act where applicable. Some of the contents of a forest management plan or system of implementation under the latter Act may be relevant and useful to the consent authority, and reference to existing documents may avoid pointless duplication. That would not disadvantage owners of SILNA lands that may be exempt from Part IIIA of the Forests Act. We see no basis in these criteria for holding that Rule HER.3 is beyond the District Council's powers under the Resource Management Act.

[144] Criteria (e) and (f) are –

(e) Whether the habitat and/or vegetation are important to indigenous species which are regionally rare or nationally threatened, and the effects of the proposed activity on these values.
(f) Whether the area has been identified in Schedule 6.14 to this Plan or by the Protected Natural Areas Programme administered by the Department of Conservation.

[145] Like Criterion (b), these criteria refer to qualities that may qualify an area of indigenous vegetation or habitat as significant, and to sources of information potentially helpful in making such a judgment. They do not refer to, nor does their substance relate back to, the sustainable forest management purpose of Part IIIA.

[146] In short we do not accept the Maori Trustee's submission that Rule HER.3 is directed at the sustainable forest management purpose of Part IIIA, from which certain SILNA lands are exempt. We accept Mr McPhail's submission that the economic and cultural well-being of Maori owners of SILNA lands are capable of being included in the meaning given in the Resource Management Act of 'sustainable management'. We also hold that there is scope for exercise of the judgment in deciding specific resource consent applications for consideration where relevant of the relationship of Maori and their culture and traditions with their ancestral lands;[67] of kaitiakitanga;[68] and the principles of the Treaty of Waitangi.[69]

[67] Resource Management Act 1991, s 6(e).
[68] Ibid, s 7(a).
[69] Ibid, s 8.

Conclusion on authority for application of proposed rule to SILNA lands

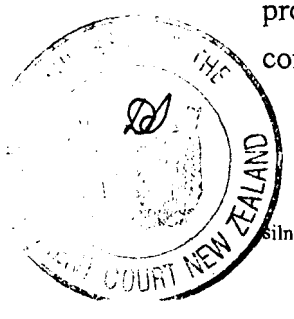
[147] We have considered each of the three grounds of the Maori Trustee's challenge to the District Council's authority at law to make a district rule regulating clearance of indigenous vegetation applying to SILNA lands. We have not accepted that the exemption of certain SILNA lands from Part IIIA of the Forests Act (by the Forests Amendment Act 1993) impliedly repealed *pro tanto* the general power conferred by the Resource Management Act on territorial authorities to make district rules. We have not accepted that the proposed rule would necessarily fail to take into account the principles of the Treaty of Waitangi relied on by the Maori Trustee. We have not accepted that the proposed rule exceeds the District Council's lawful authority either by applying to the clearance of indigenous vegetation that is not categorised as significant, or by stating criteria that relate to the sustainable forest management purpose of the Forests Act, rather than to the sustainable management purpose of the Resource Management Act.

[148] In short we do not accept the Maori Trustee's claim that the proposed rule would exceed the District Council's authority at law, on any of the grounds advanced. Therefore we now address the cases of the parties about the provisions that should be made in the district plan about clearance of indigenous vegetation.

Rule proposed by the principal parties

[149] In paragraph [16] we set out the replacement Rule HER.3 proposed by the referrers and the District Council, with the assent of the Minister of Forestry. There would need to be consequential amendments to the district plan: deletion of Rule COA.4 (which would become unnecessary), and amendment of Policy RU.4. Although the Maori Trustee, and South Wood Export Limited sought amendments to the proposed Rule HER.3, there was no challenge to the appropriateness of the consequential amendments if that opposition is unsuccessful. Accordingly we consider first the case for the replacement Rule HER.3, then the cases for amendment of it.

[150] It was the case for the District Council that the proposed rule is a temporary filtering measure until more detailed empirical evidence has been obtained from the proposed survey of indigenous vegetation and landowner consultation, and a new control devised that may depend less on discretionary judgments.



[151] The Council's Manager of Resource Planning, Mr B G Halligan, gave evidence that no comprehensive database exists of the quality and quantity of indigenous vegetation in the district (which occupies an area of land equivalent to more than 10% of the total area of New Zealand). He also testified that the Council had considered that a precautionary approach was appropriate, until significant natural areas have been carefully identified, and landowners consulted.

[152] Mr Halligan deposed that the Council had seen merit in the resource consent process providing opportunity for those with expertise (such as local iwi and local Department of Conservation botanical staff) to have input to the decision-making process, leading to better environmental outcomes that more appropriately reflect the purpose of the Act. The witness explained that the rule establishes trigger points by which certain activities can be classified as permitted activities.

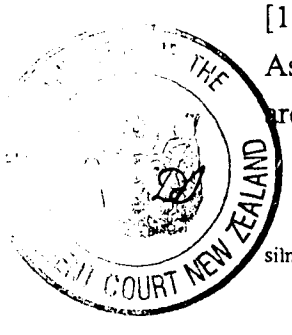
[153] In cross-examination by Mr McPhail, Mr Halligan confirmed that the economic and cultural well-being of owners of SILNA lands had been considered by the Council committee in considering the proposal; and that the Council would have regard to the status of the land in considering a resource consent application.

[154] In cross-examination by Ms Campbell, counsel for Rayonier, Mr Halligan deposed that the Council had never intended that resource consent would be required for clearing understorey.

[155] Rayonier submitted that clause 2(b)(ii) of the proposed rule is important to allow as a permitted activity clearance or modification of indigenous understorey beneath or within plantation forest. It contended that if this is not provided for, the rule would be broader than is necessary to achieve the purpose of the Act, and would have serious implications for activities that do not warrant regulation under the Act.

[156] Mr L S Cawood, Regional Manager for Rayonier, explained that during the period between harvests of pine trees, the understorey contains native species which are usually shrubs, including manuka, kanuka, cabbage trees, tree ferns, and wineberry. He gave the opinion that damage to the understorey is inevitable during harvesting plantation forest.

[157] Mr Cawood deposed that Rayonier is a member of the Forest Owners Association which is a signatory to the New Zealand Forest Accord, by which they are committed to exclude from clearing and disturbance certain areas of naturally



occurring indigenous vegetation. In cross-examination by Ms Maturin, Mr Cawood gave the opinion that the amendment to the rule suggested by South Wood would be consistent with the Forest Accord.

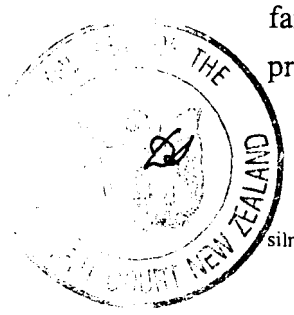
[158] The Minister of Conservation supported the proposed replacement rule recognising the Council's duty to make interim provision pending carrying out of the proposed survey to identify and define all significant areas of indigenous vegetation and significant habitats of indigenous fauna.

[159] Mr Ibbotson drew our attention to passages in the Southland district plan in which the Council had identified the significant resource management issue as being areas of significant ecosystems that are under threat from clearance; had stated an objective of protection of natural heritage sites for the enjoyment of present and future generations; and policies of identifying and listing significant areas of indigenous vegetation and indigenous habitat, developing methods of protecting them, and requiring resource consent for activities that may have adverse effect on the quality of those areas. Those parts of the district plan are beyond challenge.

[160] It was the evidence of an experienced environmental consultant, Mr M A Harding, that the Southland District supports areas of indigenous vegetation and habitats of indigenous fauna that are regionally and nationally important; that indigenous vegetation and habitat of indigenous fauna are substantially depleted in many parts of the district; that indigenous vegetation and habitat are threatened by a range of activities, including logging; that information about many remaining area of indigenous vegetation and habitats of indigenous fauna is insufficient to determine with certainty the ecological values present at particular sites; and that assessments of areas of indigenous vegetation and habitats of indigenous fauna are required to ensure that proposed activities do not affect ecological values. The witness gave the opinion that the proposed Rule HER.3 would provide an opportunity to ensure that such assessments are made.

Relief sought by the Maori Trustee

[161] As mentioned in paragraph [17], the relief sought by the Maori Trustee was that Rule HER.3 be amended to exempt from its application all SILNA lands, or failing that, to exempt all SILNA lands that are not the subject of a long-term protection agreement with the Crown.



[162] Mr G A Kuru, a forestry consultant called as a witness on behalf of the Maori Trustee, criticised the proposed rule as placing severe and unreasonable restrictions, particularly on owners of SILNA lands. The basis for his opinion was the witness's understanding of the effect of criteria (d) and (f) (in clause 5) for assessment of applications for consent for clearance of indigenous vegetation. He claimed that those criteria impose on owners of SILNA lands restrictions from which they should be exempt.

[163] In cross-examination by Mr Ibbotson, the witness was asked whether that was a fair assessment of the proposed rule. He answered that it was his understanding of the practical and operational effect, but he could not speak of the legal implications. He confirmed that paragraphs (d) and (f) in clause 5 are items in a series of assessment criteria, not pre-requisites.

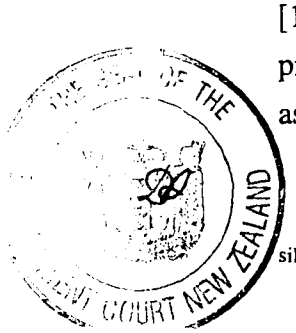
[164] Mr Kuru also gave the opinion that the effect of making the rule would be large economic loss to the owners of SILNA lands in devaluation of their forest resource, high compliance and organisational costs, and inability to fully utilise lands originally granted as compensation. He added that there would be a significant effect on wood harvesting and processing infrastructure specially configured for indigenous timber.

[165] In cross-examination by Ms Maturin, Mr Kuru agreed that a chip mill to which he had referred is not totally dependent on indigenous timber, and that it processes radiata and plantation hardwood as well. He was unable to say what proportion of the capacity of the sawmills is used for exotic timber.

[166] Mr Kuru also asserted that it would impact on current negotiations between owners of SILNA lands and the Crown as part of a Treaty of Waitangi claim.

[167] In cross-examination by Mr Slowley, the witness was also critical of the process by which Significant Natural Areas are identified. He testified that there is no process that is documented by reference to standards, and no objectives or clear criteria, no transparent process, no documented standards for qualifications of assessors, and no clear description of a process for audit and review.

[168] In cross-examination by Mr Ibbotson, Mr Kuru stated that it is a good programme for a volume process, agreed that it is only one of a series of criteria for assessment, but maintained that for removal of rights a higher standard is required.



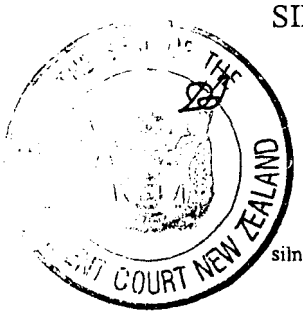
In cross-examination by Ms Maturin, he agreed that the significance of an area of forest the subject of a resource consent application could be assessed at the time the application was considered. However when asked whether, if it was found that an area of forest was not significant, it is possible that consent would be given for the area to be logged, he stated that it was not his understanding. In explaining that answer, Mr Kuru gave his understanding that the intent of the rule is that landowners should meet the criteria of the proposed rule.

[169] In response to Mr Kuru's evidence, Mr Harding deposed that there are a number of species of indigenous flora and fauna in Southland District that are threatened, that some of them are endemic to the Southland District. The witness gave the opinion that the loss of those important populations of those species could be irretrievable, and that they can be regarded as a non-renewable resource. Mr Harding also gave the opinion that less than 10% of the remaining area of coastal hardwood-podocarp forest on the south coast of mainland Southland (excluding the Fiordland coast) is protected.

[170] In response to Mr Kuru's criticism of the protected natural areas programme, Mr Harding cited the publication in which the methodology for those surveys is prescribed, and deposed that surveys are undertaken according to that methodology, supervised by external experts, carried out in consultation with landowners, and the results peer-reviewed.

[171] Mr Harding also deposed that forests on SILNA lands are, for the most part, lowland forests (situated below 300 metres altitude); and that lowland forest is substantially depleted in all areas of Southland District except Stewart Island and Fiordland. The witness added that indigenous forests vary significantly in structure in composition throughout the district, so the relevant significance of areas of indigenous vegetation cannot be determined by extent alone.

[172] Another witness for the Maori Trustee was Mr R K McAnergney, of the Waitaha people, who with other members of his family is an owner of an interest in SILNA land in the Alton Rowallan district, chairman of the management committee of the Rowallan Alton Maori Incorporation (having 1313 hectares of land), and honorary secretary of Rau Murihiku Whenua Maori, a committee of owners of SILNA lands elected to represent them in negotiations with the Crown.



[173] Mr McAnergney deposed that the result of the process of succession is that ownership of the SILNA lands is very fragmented

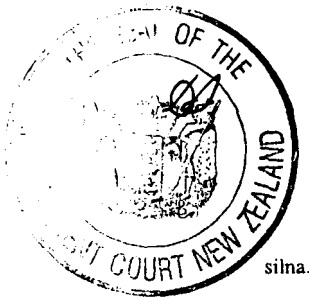
[174] Mr McAnergney gave his opinions that a rule requiring District Council consent for use of their indigenous forest would not be taking into account the principles of the Treaty of Waitangi of partnership, of active protection, of undisturbed possession. He also asserted a Treaty principle of protection of taonga and deposed that for many owners of SILNA land their share in their land is their taonga, representing their Maori heritage.

[175] Mr McAnergney asserted that it is the right of the owners of the SILNA lands to decide how they wish to deal with that resource and that land; and that the rule is seen as removing from them the ability to make decisions with respect to the land granted to their ancestors, and as opening up the decision process to the interference of others who have no rights in respect of that land, no connection with that land, and no umbilical cord that binds them to the land of the ancestors.

[176] Mr McAnergney reported the view of many owners of SILNA land that the clearing of forests and replanting in plantation species should be a permitted activity, providing much needed work opportunities, an ongoing source of income, and promoting a sustainable use of the land resource. The witness gave the opinion that leaving the land and its indigenous forest untouched would not be a sustainable use of the resource, would provide nothing for the owners, and no income to support the costs of being a owner of a visual resource gradually being degraded and modified by forest pests.

[177] In cross-examination by Mr Ibbotson, Mr McAnergney accepted that clearing indigenous vegetation in areas of SILNA land that have already been cleared and planted in production forest would be a permitted activity under clause 2 of the proposed rule. He confirmed that they had received advice that the forest could be better managed by forest enhancement programmes involving large-scale thinning, and selective logging.

[178] Mr McAnergney also stated that the SILNA owners do not have access to the resources to prepare the documentation for the resource consent process.



[179] In responding to the case of the Maori Trustee, counsel for the Minister observed that the rule would not impose a total restriction of the use of forests on SILNA lands without the Council's consent, because the various classes of activity listed in clause 2 are classified as permitted activities. Mr Ibbotson acknowledged that the protection of areas of indigenous vegetation is not absolute;[70] but cited Environment Court decisions in which the national interest in protecting areas of indigenous vegetation had been held to prevail over the economic interests of landowners.[71]

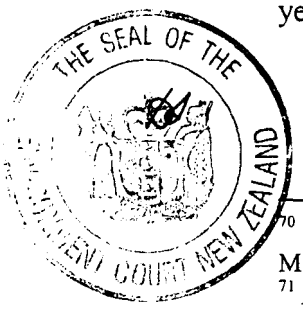
[180] The Council maintained that except to the extent required by Part II of the Resource Management Act, Treaty issues and grievances are matters for Maori and the Crown, and not the province of local authorities. Forest and Bird also maintained that the social and political issues surrounding the SILNA lands are not matters that should be resolved or addressed through the district plan process. Ms Maturin submitted that they are complex matters and ones that should be dealt with by central Government in a way that does not erode the fundamental core of the Resource Management Act.

Relief sought by South Wood Export Limited

[181] South Wood Export Limited (South Wood) maintained that the proposed replacement Rule HER.3 is unnecessarily restrictive and sought that it be amended to allow clearance or modification of indigenous vegetation to enable harvesting of exotic timber plantations. Specifically two amendments were sought. The first was deletion of subclause 2(b)(ii) and substitution of the following:

> *The clearance or modification of indigenous vegetation which is reasonably necessary to the management, harvesting, or replanting of any area of planted indigenous or exotic vegetation.*

The second amendment relates to subclause 2(c). It would delete the expression "15 years" and substitute the expression "30 years".



[70] Citing *Environmental Defence Society v Mangonui City Council* [1989] 3 NZLR 257 (CA) – see eg McMullin J at 272.

[71] *Leith v Auckland City Council* [1995] NZRMA 400; *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [1996] NZRMA 241; *Minister of Conservation v Gisborne District Council* Environment Court Decision A16/00.

[182] The grounds advanced for the first of those amendments were that subclause 2(b)(ii) is unsatisfactory in three respects. It was submitted that it is not clear what is meant by the word "boundaries"; it is not clear whether the word "management" includes harvesting and replanting; and it is not clear what is meant by the words "necessarily incidental". It was claimed that those words could be capable of an unnecessarily restrictive meaning.

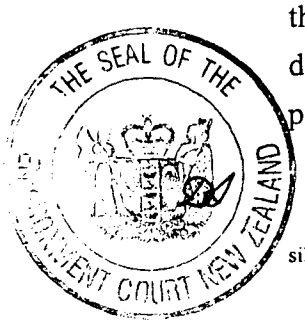
[183] It was contended for South Wood that the amended subclause would continue to allow clearance or modification of understorey, and would allow clearance for access.

[184] The ground for extending the period since previous clearance was that there are areas of pine and eucalyptus trees planted on land that had been cleared more than 15 years prior to the plan becoming operative, some up to 30 years. It was claimed that there is a possibility that those older eucalyptus and pines would not be able to be harvested without obtaining resource consent.

[185] The General Manager of South Wood, Mr G H Manley, explained that areas where exotic plantings had failed, and where indigenous vegetation was regenerating, might isolate areas of exotic plantation from access unless the regenerating vegetation can be cleared as a permitted activity. In cross-examination by Mr Ibbotson, Mr Manley confirmed that the areas he was concerned with would be modified forests, not virgin forests.

[186] In cross-examination by Ms Maturin, Mr Harding deposed that 30-year-old forest in the East Rowallan block and fertile lowland sites would be likely to contain beech trees up to 6 metres in height. He also deposed that depending on the site and location of the road, removal of trees for access could have impacts beyond the site by affecting breeding habitat for threatened bird species, by erosion of exposed soil, and by invasion of new plant and animal pests.

[187] Forest and Bird opposed the amendment sought by South Wood on two grounds. First it referred to negotiations between the parties leading to the proposal of the new Rule HER.3, and submitted that in the spirit of the negotiations it was not good form to attempt to relitigate the results of the negotiations. That may be, but this is not private law litigation. Negotiations and agreements among parties cannot deprive the Court from considering relevant representations and evidence from a person who is entitled to be heard.



[188] The second ground of opposition by Forest and Bird was that the amendment would provide for activities that would have environmental effects beyond and greater than those contemplated by Forest and Bird when it joined in proposing the form of Rule HER.3 before the Court.

Consideration

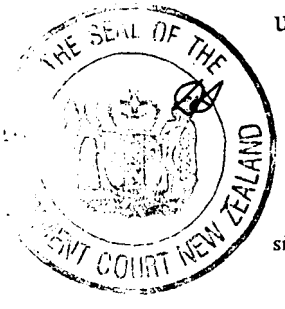
[189] The foundation of the case for the proposed rule is section 6(c) of the Resource Management Act –

> *6. **Matters of national importance**– In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
> ...
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
> ...

[190] Accepting the evidence of Messrs Halligan, Cawood and Harding, we find that there are within the Southland District areas of significant indigenous vegetation and significant habitats of indigenous fauna; that in general these are worthy of protection as directed by section 6(c) of the Resource Management Act; and that the District Council does not currently possess sufficient information about the locality and extent of those areas and habitats to define them conclusively.

[191] We accept that until it is able to define those areas and habitats, the District Council is justified in resorting to imposing an interim measure combining permitted activities and discretionary activities in order to carry out its duty to recognise and provide for the protection of the areas and habitats. That is justified on two conditions: that the Council intends to survey at least the parts of the district where protection may be needed, and (to provide certainty wherever it can) that the regulation is devised so that the extent of the discretionary activities is no greater than is necessary for the purpose.

[192] On Mr Halligan's evidence we find that the first condition is established. In his testimony he described a methodical process of identification, verification, and consultation that would lead to notification of a change to the district plan, with the usual rights of submission and appeal.



[193] We cannot make a finding on the extent to which the rule now proposed would meet the second condition until we have considered the proposals for amendment by the Maori Trustee and South Wood.

[194] We recognise that the duty imposed by section 6(c) is not absolute. It is one of many matters listed in Part II of the Act that have to be addressed, and where there is conflict, judgments may have to be made about the best way of reconciling them in the particular circumstances so that the district plan best serves its purpose of assisting the Council to carry out its functions to achieve the single statutory purpose of promoting the sustainable management of natural and physical resources.

[195] That is the context in which the Maori Trustee's case has to be considered. The duties imposed by section 6(e) to recognise and provide for the relationship of Maori with their ancestral lands, and by section 8 to take into account the principles of the Treaty of Waitangi, are no less important than the other matters described in section 6 as being of national importance. We quoted section 8 in paragraph [101] of this decision. Section 6(e) reads –

> ***6. Matters of national importance–*** *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> ...
>
> *(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*

[196] We find that Mr Kuru's criticism of the proposed rule as placing severe and unreasonable restrictions on owners of SILNA lands was based on a misunderstanding of the rule, and particularly the contents of clause 5. When asked about them in cross-examination Mr Kuru accepted that they are criteria for assessment, not conditions. On our own reading of clause 5, we hold that, on the ordinary meaning of the words –

> *5. In assessing an application for resource consent under Rule HER.3(3) the Council shall have regard to the following matters...*

they are assessment criteria, not conditions. We do not accept the witness's suggestion that the practical or operational effect would be that they would be treated as conditions, because the process for considering a resource consent application is prescribed by law, is carried out in public by an elected public authority (or its delegate), a written decision is given with reasons, and is subject to rights of appeal to this Court. These features reduce the scope for misapplying the criteria as if they

were conditions. Therefore we do not accept Mr Kuru's criticism of the rule in that respect.

[197] Mr Kuru was also critical of the process by which Significant Natural Areas are identified. Mr Harding largely refuted that criticism. However even if Mr Kuru's criticism is justified, that would not provide a sound ground for exempting the SILNA lands, or some of them, from the proposed rule. The Council's intention is that identification of Significant Natural Areas would be a basis for a future plan change. By clause 5(f) of the proposed rule, identification of an area the subject of a resource consent application by the Protected Natural Areas Programme is a matter to which the consent authority is to have regard. However identification as such is not instrumental in granting or refusing consent: it is merely one of the criteria. If a party had evidence to show that the identification was erroneous or misleading, they would be free to present it. Accordingly we do not accept that the proposed rule is objectionable in this respect.

[198] Both Mr Kuru and Mr McAnergney urged that the proposed rule would result in economic loss to the owners of the SILNA lands, in depriving them of the ability to harvest trees as and when they choose. We accept that there is potential for loss of opportunity to all owners of indigenous trees to the extent that consent to felling them might be refused.

[199] In considering a resource consent application for clearance of indigenous vegetation, the economic and cultural interests of Maori people (including owners of SILNA lands) affected by the proposed clearance would be able to be the subject of evidence and consideration by the consent authority. Those interests would not necessarily prevail in all cases. However the features of the process mentioned in paragraph [193] would ensure that they would be given due weight.

[200] The same is true of the concern expressed by Mr Kuru for effects on wood harvesting and processing infrastructure. The consequential impact of granting or refusing consent for a particular clearance proposal could be the subject of evidence and consideration.

[201] We also accept that there would be some cost in making and presenting an application for resource consent, and providing the necessary assessment of environmental effects and evidence. We note Mr McAnergney's statement that the owners of SILNA lands do not have access to the resources to do so.

[202] We do not accept as relevant for the present purpose the claim under the Treaty of Waitangi Act referred to by Mr Kuru. It would not be appropriate for the Court to presume any particular outcome of that process.

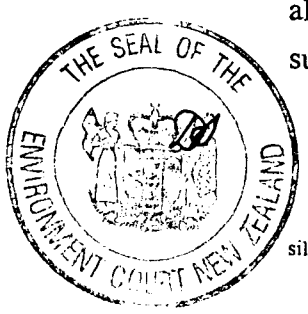
[203] Mr McAnergney claimed that the application of the proposed rule to the SILNA lands would fail to take into account certain principles of the Treaty of Waitangi. We associate with that the witness's claim that it is the right of the owners to decide for themselves how to deal with their lands and any trees on them, and the rule removes their ability to do so, and opens the decision process to interference by others with no ancestral connection with the land.

[204] We addressed the Treaty principles in the context of the Maori Trustee's challenge to the lawfulness of the proposed rule. In short, it is our opinion that the rule would represent an act of government under Article the First of the Treaty, and would not offend any of the principles invoked by Mr McAnergney.

[205] Although we understand the rhetoric of landowners claiming the exclusive right to decide how to use their land, that has not been an untrammelled right in this country for many decades. The quality of the environment in which future generations will live and work depends on regulation of the use of natural and physical resources.

[206] We do not accept that "interference" is the appropriate description for the opportunity for making submissions on resource consent applications. It is our own experience that the process of deciding whether resource consent should be granted or refused is more complete, and leads to better decisions, when others have the opportunity to make submissions and gave evidence. Succession to land held by one's ancestors is not the only source of knowledge about the effects of particular activity on it.

[207] In summary, although we accept that there would be cost in making resource consent applications, and uncertainty whether a particular application might be granted or refused, it is our judgment that the proposed rule provides a restrained and proportionate interim regulation of clearance of indigenous vegetation, classifying many activities as permitted, and providing a reputable process for others that would allow for the relevant interests of owners of SILNA lands (among others) to be the subject of evidence and due consideration.



[208] For those reasons we do not accept the case for the Maori Trustee that the SILNA lands, or some of them, should be exempted from application of the proposed rule.

[209] We accept that the first of the amendments to the proposed rule sought by South Wood (a replacement subclause 2(b)(ii)) would allow clearance of indigenous vegetation that obstructs access for plantation forestry. Although that was opposed by Forest and Bird, its case was based on the effect of the amendment allowing more clearance of indigenous vegetation than would the form of the subclause previously agreed on. Clearly that is so, but it does not provide a reason for rejecting the amendment now proposed.

[210] We accept that the application of the word 'boundaries' in the rule as proposed may in some cases be capable of debate. To avoid repetition, we have recast the amendment so that subclause 2(b)(ii) would read–

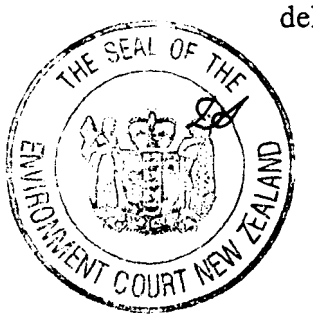
> *(ii) is reasonably necessary to enable the management, harvesting or replanting of any area of planted indigenous or exotic vegetation; or*

[211] The case by South Wood for amendment of subclause 2(c) was to enable clearance of indigenous vegetation that stood in the way harvesting exotic forest. It is our understanding that in practice the amendment to subclause 2(b)(ii) set out in paragraph [207] would also meet that need. It would also meet the case presented on behalf of Rayonier for clearance of indigenous understorey.

[212] With that amendment it is our judgment that the proposed rule would provide for discretionary activities to no greater extent than is necessary for the purpose.

Determinations

[213] Therefore the Court allows the references to the extent that it directs the Southland District Council to delete Rule HER.3 from its district plan and substitute the Rule HER.3 set out in Schedule 1; consequentially to delete Rule COA.4; and to delete Policy RU.4 and substitute the Policy RU.4 set out in Schedule 2.



[214] The question of the costs of the parties to these references is reserved. However the Court is aware of no reason why it would not be appropriate to follow the general practice of not awarding costs on references about the contents of planning instruments.

DATED at **AUCKLAND** this 19th day of April 2001.

For the Court:

D F G Sheppard
Environment Judge

SCHEDULE 1

Rule HER.3 to be substituted in district plan

HER.3 – Indigenous Vegetation and Habitats of Indigenous Fauna

1. No person shall carry out any activity which involves the clearance, modification, damage, destruction or removal of indigenous vegetation or habitats of indigenous fauna otherwise than in accordance with this Plan.

Permitted Activities

2. The following shall be permitted activities:

(a) The harvesting of indigenous trees with diameters of not less than 25 cm at breast height yielding not more than 50 m^3 of timber per ten year period per Certificate of Title.

(b) The clearance, modification or harvesting of indigenous vegetation which:
(i) has been planted and managed specifically for the purpose of harvesting or clearing; or
(ii)) is reasonably necessary to enable the management, harvesting or replanting of any area of planted indigenous or exotic vegetation; or
(iii) has been planted and/or managed as part of a garden or gardens or has been planted for amenity purposes.

(c) The clearance, modification or destruction of indigenous vegetation which has grown naturally on land cleared of vegetation in the 15 years immediately prior to this Plan becoming operative.

(d) The clearance, modification or destruction of indigenous vegetation necessary for the operation and/or maintenance of those permitted activities in rule PWN.1 but excluding the expansion or upgrading of those permitted activities or the erection of any building as part of those permitted activities.

(e) The clearance, modification or destruction of indigenous vegetation for the purpose of maintaining existing road, traffic, marine or aviation safety and which is undertaken by or on behalf of the authority responsible for maintaining that safety.

(f) The removal of wind thrown trees or dead standing trees which have died as a result of natural causes.

(g) The clearance, modification or removal of plant pests undertaken for the purpose of maintaining or enhancing the existing state of the remaining indigenous vegetation.

(h) The clearance or modification of indigenous grass lands where the percentage canopy of tussock species is less than 50 %.

Discretionary Activities

3. Any activities which do not comply with Rule HER3(2) shall be discretionary activities.

Applications for Resource Consent

4. An Application made in accordance with Rule HER3(3) shall, in addition to any other information, include:

(a) The details of any water body in, or adjacent to the site.
(b) Details of any area within or adjacent to the site which has been set aside by statute or covenant for conservation or sustainable management purposes.

Criteria for Assessment

5. In assessing an Application for resource consent under Rule HER 3(3) the Council shall have regard to the following matters:
(a) The significance of the affected indigenous vegetation or habitat of indigenous fauna in terms of ecological, intrinsic, cultural or amenity values, and the effects of the proposed activity on these values.
(b) The representativeness of the affected indigenous vegetation or habitat of indigenous fauna and its relationship with other habitats or area of vegetation.
(c) Whether the vegetation is subject to a sustainable Forest Management Plan or permit under Part IIIA of the Forests Act 1949.
(d) Whether the application includes a forest management plan and system of implementation prepared to a standard at least equivalent to a plan approved under Part IIIA of the Forests Act 1949.
(e) Whether the habitat and/or vegetation are important to indigenous species which are regionally rare or nationally threatened, and the effects of the proposed activity on these values.
(f) Whether the area has been identified in Schedule 6.14 to this Plan or by the Protected Natural Areas Programme administered by the Department of Conservation.

Explanation
Indigenous flora and fauna are major contributors to the character of the District. In places they are threatened and where this is so they are considered a non-renewable resource. In other places, such as the Coastal Resource Area the land has, in the past, been so developed for urban or rural purposes that the natural character in the sense of tracts of unspoiled bush and indigenous trees have been irretrievably lost.
The Rule is considered an interim measure by Council, with which to endeavour to provide for some indigenous vegetation modification in specific circumstances; while also requiring that specific assessments be undertaken in situations where proposed activities have discretionary activity status.
The Council recognises that its knowledge of significant indigenous vegetation and significant habitats of indigenous flora and fauna is far from complete and that the process of improving this knowledge will be ongoing. In order to do this Council will make use of the best available technology with specialised information. The Council is also aware that the Minister for the Environment is currently preparing guidelines for councils in relation to their duties under section 6(c) of the Act. The Council recognises the ongoing need for plan changes to ensure that the district plan recognises increasing knowledge of significant natural areas; and to ensure that the provisions of the Plan remain current and relevant and continue to provide an appropriate level of protection.
This rule, being an interim rule, will cease to have effect from the date at which a plan change containing a schedule of Significant Natural Areas produced from a detailed survey of remaining indigenous vegetation and associated landowner consultation, is notified as operative in terms of the First Schedule of the Act.

SCHEDULE 2

Policy RU.4 to be substituted in district plan

Policy RU.4

To avoid, or if unavoidable, minimise the adverse effects of clearing indigenous vegetation provided that nothing in this Policy shall prevent the clearing of regenerating indigenous vegetation underneath a commercial forestry activity.

Explanation

Indigenous vegetation is one form of vegetation which can play a significant role in mitigating the adverse effects of development. It stabilises hillsides, reduces adverse effects on water quality and provides habitat for indigenous fauna. It is not the intention of this Policy to provide protection for indigenous vegetation regenerating underneath commercial forestry. (Refer Rule PRA.5 and 6, Method PRA.2 and Section 3.4 Heritage)

TAB 9

ORIGINAL

Decision No. A 067/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Appeals under Section 120 of the Act

BETWEEN **NGATI RANGI TRUST**

(RMA 874/01)

TAMAHAKI INC SOCIETY

(RMA 875/01)

WHANGANUI RIVER MAORI TRUST BOARD, HINENGAKAU DEVELOPMENT TRUST, NGATI HIKAIRO HAPU FORUM, NGATI TAMA O NGATI HAUA TRUST, PUNGAREHU MARAE INCORPORATED SOCIETY ON BEHALF OF NGATI TUERA HAPU & NGATI RANGI TRUST

(RMA 877/01)

Appellants

AND **THE MANAWATU-WANGANUI REGIONAL COUNCIL**

Respondent

AND **GENESIS POWER LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner A H Hackett
Environment Commissioner S K Prime
Environment Commissioner O M Borlase

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

HEARING at Taupo on 29 and 30 September 2003, 1-3 October 2003 and 6-10 October 2003; at Ohakune on 20-24 October 2003 and 28 and 29 October 2003; at Tirorangi Marae on 4-7 November 2003; at Taumarunui on 10-12 November 2003; at Wellington on 8-10 December 2003, 12, 17 and 18 December 2003.

APPEARANCES

Mr P F Majurey and Ms K Broughton for Genesis Power Limited
Mr J Milne for the Manawatu-Wanganui Regional Council
Mr J P Ferguson and Mr M Mahuika for Ngati Rangi Trust, Tamahaki Incorporated Society and Whanganui River Maori River Trust Board & Others
Mr B J Cowper for Mighty River Power Limited
Mr D Soper, Mr M Hickford and Mr A Irwin for the Attorney-General and the Minister in Charge of Treaty Negotiations

TABLE OF CONTENTS

DECISION

Introduction

[1] The essence of this case concerns the recognition of Maori cultural matters and how those matters can be accommodated and provided for under the provisions of the Resource Management Act 1991. Pertinent to this important issue is the extent to which Maori and other interests may be reconciled under Part II of the Resource Management Act 1991.

[2] The issue arises in the context of applications for Resource Consents to enable the Tongariro Power Development Scheme to continue in operation. The conflict with Maori stems from the diversion of water from the headwaters of the Whangaehu, Whanganui and Moawhango Rivers into Lake Taupo and thence into the Waikato River. Such diversions are culturally unacceptable to Maori.

[3] This case involves the hearing of three appeals against the decision of the Manawatu-Wanganui Regional Council to grant water-related resource consents to Genesis Power Limited. The Council's decision was made as part of a joint hearing committee process involving the Waikato Regional Council. The joint decision granted 53 resource consents in total.[1]

[4] The Genesis applications relate to specific water-related activities throughout the TPD as well as macro-operational activities such as scheme-wide maintenance. A summary of the applications is set out in Appendix 1.

[5] Fifteen appeals were lodged in respect of the joint decision. Nine appeals have been withdrawn and three have been settled. As a result of the settlement reached with those appellants who have either withdrawn or settled, consent memoranda[2] have been lodged with the Court for approval. The three appeals that remain are the subject of this hearing. All of the consents opposed by the three Appellants are within the territory of the Manawatu-Wanganui Regional Council.

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[1] Waikato Regional Council – 23 resource consents; Manawatu-Wanganui Regional Council – 30 resource consents.

[2] RMA 873/01 – Director General of Conservation; RMA 880/01 – M Birch; RMA 882/01 – NZ Recreational Canoeing Association.

The hearing

[6] The hearing of the three remaining appeals took place at Taupo, Ohakune, Tirorangi Marae, Taumarunui and Wellington between 29 September 2003 and 18 December 2003. We heard from 44 witnesses, read the briefs of 7 witnesses and sat for 25 sitting days. We undertook a three-day site visit during the first week of the hearing, which covered the whole of the TPD scheme. This was carried out using a four-wheel drive motor vehicle. We also viewed the scheme from the air by helicopter. This site visit was organised by Genesis.

[7] We carried out a one-day site visit of the Eastern Diversion, organised by Ngati Rangi, during the week we sat on the Tirorangi Marae. Finally we carried out a one-day site visit of the Whanganui River from Taumarunui to Pipiriki during the week we sat in Taumarunui. This was organised by the Whanganui iwi. The site visits helped us to further understand and evaluate the evidence.

[8] In addition, we received 4 lever arch folders containing the agreed bundle of documents, which included the ***Whanganui River Report***[3] delivered by the Waitangi Tribunal in 1999 and the ***Planning Tribunal Decision on Whanganui River minimum flow appeals 1990***[4]. We found both of these documents helpful as background and will refer to them at times during the course of this decision.

[9] We heard detailed opening and closing submissions from Counsel, for which we are grateful. It is not practicable in this decision to refer to all that was said in evidence or by way of submission. We have had regard to all the evidence, the exhibits and documentation produced and the submissions of Counsel, in reaching our decision.

The Tongariro Power Development

[10] The TPD is located in the central North Island, south of Taupo. It is a hydro-electric power generation scheme planned and constructed progressively between 1960 and 1983[5]. It is situated on, and partially encircles, a scenic and interesting landscape, the

[3] Wai 167, Waitangi Tribunal (1999).
[4] *Electricity Corporation of New Zealand Ltd v The Manawatu-Wanganui Regional Council* (W70/90, unreported, Judge Sheppard, 29 October 1990).
[5] Drinkrow, EiC, paragraph 3.1.

geologically active Scenic Plateau. The mountains of the Tongariro National Park, Ruapehu, Tongariro and Ngauruhoe, lie in its centre.

[11] In broad terms, the scheme operates by channelling water from head water streams flowing from the mountains of the central Volcanic Plateau, to two power stations: Tokaanu and Rangipo, before discharging into Lake Taupo and from there into the Waikato River. Water is channelled through two major diversion schemes lying either side of the Ruapehu/Tongariro mountain chain: the Eastern and Western diversions. A schematic overview of the scheme is attached as Appendix 2.

[12] Mr Denis Drinkrow, the manager of the TPD, described its operation in some detail. For ease of explanation he divided the scheme into four geographical sections: the Eastern diversion, the Tongariro section, the Western diversion and the Rotoaira section.

The Eastern Diversion

[13] The Eastern diversion collects water from the streams and rivers draining the southern flanks of Mt Ruapehu. The water is collected from 22 tributaries of the Whangaehu River by way of separate intake structures into an underground aqueduct, known as the Wahianoa aqueduct. It is then transferred through the Mangaio Tunnel into Lake Moawhango.

[14] Lake Moawhango is an artificial storage lake, created by the damming of the Moawhango River with a high concrete arch dam known as the Moawhango Dam. Lake Moawhango is the only major storage area within the TPD and nearly all the water collected is taken northward to the upper Tongariro River through the 19.2 kilometre Moawhango Tunnel, for electricity generation at the underground Rangipo power station and the Tokaanu power station.

[15] A continuous minimum flow of 0.6 cumecs[6] at Moawhango Village is being maintained by Genesis through a special release valve located in the dam.[7]

[6] Cumecs means cubic metres per second.

[7] This is a condition of the consents appealed against and Genesis has been operating to this minimum plan voluntarily, as an act of good faith, since January 2001. In addition, the new consents require the release of four flushing flows of 30 cumecs from the dam, each for nine hours duration over the summer months.

[16] One of the appellants, the Ngati Rangi Trust, were primarily concerned about the taking of water from the tributaries of the Whangaehu River and the damming of the Moawhango River.

The Tongariro Section

[17] The Tongariro section begins at the Waihohonu intake and tunnel, which transports water from the Waihohonu Stream on the eastern side of Mt Ruapehu to the Rangipo dam on the Tongariro River. The head pond impounded by the dam is relatively small and in addition to receiving water from the Waihohonu tunnel and Moawhango tunnel, it receives the natural flow of the Tongariro River.

[18] Water from the Rangipo head pond is conveyed through an 8.6 kilometre head race tunnel to the underground Rangipo power station, located 230 metres below ground within the Kaimanawa Forest Park. The station has an installed capacity of 120 MW, comprising two 60 MW machines and is operated via remote control from the Tongariro control centre at the Tokaanu Power Station.

[19] There is currently a minimum flow requirement to maintain a 0.6 cumec flow downstream from the dam structure at all times. The Rangipo tail race tunnel discharges into the Tongariro River below the Waikato Falls. Downstream of the discharge is a relatively large intake called the Poutu intake, which collects water for diversion to Lake Rotoaira via the Poutu tunnel and canal and thence into the Rotoaira Channel. There is a minimum flow requirement of 16 cumecs below the Poutu intake which applies unless the natural flow of the Tongariro River is less, in which case no water can be diverted.

[20] The diverted water is discharged into the Rotoaira Channel adjacent to the Poutu Dam which dams the Poutu River, which was the natural outflow for Lake Rotoaira. Downstream a residual flow of 0.6 cumecs is maintained through a remotely operated valve set into the dam. The 2001 resource consents impose a new minimum flow regime of:

- 0.6 cumecs during the months February to October;
- 0.3 cumecs during November to December; and
- 0.5 cumecs during January.

We were not directly concerned with the consents relating to the Tongariro section as the appeals relating to this section have been settled.

The Western Diversion

[21] The Western diversion collects water from the Whanganui River and its tributaries which drain the western side of Mt Tongariro and Mt Ruapehu. The water so taken is diverted through the 16.5 kilometre Whakapapa-Tawhitikuri-Whanganui tunnel. Following separate collection of water at a series of intakes, including one on the Whanganui River, the water is conveyed by way of Lakes Te Whaiau and Otamangakau to the Wairehu canal that flows into Lake Rotoaira.

[22] The headwaters of eight Whanganui tributary streams and rivers are intercepted and diverted to Lake Rotoaira from where the water is taken to generate power at the Tokaanu Power Station. Appendix 2 shows the layout of the Western diversion, including those points at which water is diverted. These are the Whakapapa, Okupata, Taurewa, Tawhitikuri, Mangatepopo and Whanganui intakes and the Te Whaiau and Otamangakau streams.

[23] Since 1992, a minimum flow of three cumecs has been maintained below the Whakapapa intake. In addition there is a requirement to maintain a flow of 29 cumecs on the Whanganui River at Te Maire, approximately 20 hours flow time below the Whanganui intake. This rule applies from 1 December to 31 May each year.

[24] The appellants, the Whanganui Maori Trust Board and the Tamahaki Incorporated Society, were primarily concerned about the taking of the waters from the Whanganui River and its tributaries.

The Rotoaira Section

[25] The Rotoaira section is the northernmost section of the scheme. It includes Lake Rotoaira, which lies between Mt Tongariro and Mt Pihanga, southwest of Lake Taupo. The Lake acts as a reservoir for the Tokaanu Power Station. From there the water is taken through the Tokaanu intake and tunnel to the Tokaanu Power Station and thence into the Tokaanu tail race.

[26] The Tokaanu Power Station is a 240 MW capacity station situated at the base of Mt Tihia at the southern end of Lake Taupo. The station utilises the 207 metre head between Lake Rotoaira and Lake Taupo to generate electricity. Water from the power

station passes into the Tokaanu tail race channel, a 3.8 kilometre channel that discharges into Lake Taupo in Waihi Bay.

[27] From Lake Taupo the water then passes into the Waikato River where it is used by the Waikato hydro system, which consists of eight hydro dams and nine generating stations, owned and operated by Mighty River Power Limited.

[28] We were not directly concerned with the consents relating to the Rotoaira section, or the effect on the Waikato River, as appeals relating to this section were settled. However, Mighty River Power Limited supported Genesis in these proceedings, as in hydrological terms the water diverted from the TPD scheme into Lake Taupo comprises approximately 20% of the average flow in the Waikato River at the Taupo gates.

The Resource Consents

[29] As we have said, the Council's decision granted a total of 53 resource consents. As a result of the settlements reached between Genesis and other appellants many of the 53 resource consents are no longer at issue. The resource consents that concern us are summarised in Appendix 1. Generally they relate to:

(i) ***The Wahianoa Aqueduct and Mangaio Tunnel*** – to dam, divert and take water into the Wahianoa aqueduct; and to discharge this water into the Mangaio Stream (and thence into Lake Moawhango);

(ii) **The Moawhango section** – to dam the Moawhango River; to discharge (spill) water to the Moawhango River; to take water from Lake Moawhango into the Moawhango tunnel; and to discharge this water into the Tongariro River;

(iii) **The Whakapapa to Mangatepopo intakes – Western diversion** – to dam and take water from the Whakapapa River and the Okupata, Taurewa, Tawhitikuri and Mangatepopo Streams; and to discharge all water taken into Lake Te Whaiau;

(iv) **Whanganui intake** – to dam and take water from the Whanganui River; and to discharge this water into the Te Whaiau Stream (and thence into Lake Te Whaiau).

Proposed conditions of consent

[30] The consents granted by the Council were subject to extensive conditions. Many of the conditions have been amended, subject to the Court's approval, following

agreement reached with some of the appellants who have either withdrawn or lodged consent memoranda. The proposed amendments to the conditions apply in some instances to the "live" appeals subject to these proceedings. Also, during the course of the hearing, further proposed amendments have been proffered by Genesis and the Council, in an endeavour to meet the concerns of the appellants. The latest edition of the proposed conditions is attached as Appendix 3.

The Tongariro Power Development – a historical perspective

[31] The historic development of the TPD is set out in some detail in the ***Whanganui River Report.***[8] We summarise as follows.

[32] The Crown's right to use water for hydro electricity was initially laid down in the Water-Power Act of 1903. That Act vested in the Crown, subject to any rights lawfully held, the sole right to use water for electricity with the power to delegate rights to local authorities. That right remained with the Crown through a succession of Acts up to and including the Electricity Act 1945, administered by the State Hydro-electric Department – a responsibility that passed to the Ministry of Electricity in 1958.

[33] In 1955, the Government commissioned a technical appraisal for the Tongariro scheme. In 1958 the Crown issued an Order in Council authorising it to take water from the Whanganui, Tokaanu, Tongariro, Rangitikei, and Whangaehu Rivers and their tributaries and to raise or lower water levels. There was no limit on the duration. A further Order in Council was also issued in 1958 enabling work to be undertaken on land without giving prior notice or obtaining consents.

[34] The Government approved the scheme in principle in 1964 and according to the ***Whanganui River Report***:

> "At that point, there had been no public consultation. Although there were pros and cons, the advantages were seen considerably to outweigh the disadvantages – of which six were foreseen. One was the effect of reduced flows on the Whanganui, Rangitikei and Whangaehu Rivers, and another was the effect on trout fisheries, particularly in the Tongariro River and Lake Rotoaira. The Ministry was directed to undertake discussions and further studies and to negotiate compensation with those whom it thought could be affected." [9]

[8] The Whanganui River Report, page 233 onwards.
[9] Whanganui River Report, page 236.

[35] Agreement in principle was reached with the relevant government departments as to the effects on fish in the rivers and their tributaries and compensation was negotiated with the Tuwharetoa Maori Trust Board, who owned Lake Rotoaira. In 1965, the Electricity Department agreed with the Department of Internal Affairs to maintain minimal flows in the Whakapapa River, that would ensure a water temperature safe for fish. In 1973, the Minister of Electricity authorised a minimum flow of 0.57 cumecs.

[36] Because of reduced flows in the Whanganui River at Taumarunui, the Taumarunui Borough Council and the Minister of Electricity reached an agreement on compensation. Liquidated damages were payable if the main daily flow at Piriaka dropped below 9.9 cumecs. It was also agreed:

- The flows in the Whanganui and Whakapapa River would not be allowed to fall so low as to endanger fish;
- The river bed was to be kept clear of plant growth; and
- All reasonable steps were to be taken to ensure that jets boats could continue to operate on the river.[10]

[37] In other settlements, the Whanganui Harbour Board was to be compensated for any adverse effects that had to be made good, and the National Historic Places Trust was to enter into an agreement with the Tuwharetoa Maori Trust Board, to carry out an archaeological programme to record and protect sites at Lake Rotoaira and on the lower Tongariro River.

[40] There was no consultation with either Ngati Rangi or the Whanganui iwi. Mr Archie Taiaroa, Chairman of the Whanganui Maori Trust Board, gave evidence. He told us:

> At no time during the development of the Tongariro Power Project were Whanganui iwi or any of its representatives consulted, although the Crown were fully aware of Whanganui iwi claims.[11]

[41] Mr Taiaroa then went on to tell us that the only meeting about the TPD construction decisions that he was aware of occurred in the late 1960s. This was a meeting in 1968 arranged by the Taumarunui Borough Council to advise the public of the

[10] Whanganui River Report, page 237.
[11] Taiaroa, EiC, paragraph 15.

diversion of the headwaters of the Whanganui River and the likely impact of that on the town. A number of Maori residents of Taumarunui led by Hikaia Amohia were present at the meeting. After an explanation of the diversion of the headwaters given by the Mayor, and the then Minister of Electricity, Mr Amohia stood and addressed the meeting. He raised the issue of Maori ownership of the Whanganui River, and asked why they were taking water out of the river without the approval of the Whanganui iwi. He was asked by the chairman of the meeting, who was the Mayor, to sit down because he was out of order. There was no response from either the chairman or the Minister about concerns raised by Mr Amohia. Of this Mr Taiaroa said:

> There was nothing particularly unusual about this reaction from the chairman of the meeting and the Minister to an explanation of the iwi point of view. It reflected the common failure or unwillingness of the Crown, local authorities and developers to understand the Maori perspective.[12]

[42] As we have said, the TPD was planned and constructed progressively between 1960 and 1983[13]. It first became operative in 1971[14]. At that time, the diversion was controlled by the Electricity Department, a division of the Crown. The Crown had a perpetual right to divert water by the 1958 Order in Council, as validated by section 31 of the Water and Soil Conservation Amendment Act 1973.

[43] In March 1988, the Crown agreed, pursuant to section 23 of the State-Owned Enterprises Act 1986 and section 3 of the Electricity Operators Act 1987, to transfer all its assets and business in electricity generation to the Electricity Corporation of New Zealand Limited (ECNZ). As part of its agreement with the Crown, ECNZ agreed to apply within 15 years for water rights to replace those formally held in perpetuity.

[44] In 1977, the New Zealand Canoeing Association applied to the National Water and Soil Conservation authority, which pursuant to section 14(3)(o) of the Water and Soil Conservation Act 1967, was empowered to fix the minimum acceptable flow of any river on the recommendation of Local Catchment Boards constituted as Regional Water Boards – s20(5)(d). It fixed minimum flows at Te Maire at 22 cumecs from 1 December to 14 February and for the days of Easter of each year, and at 16 cumecs for the rest of the year. The decision applied for five years, expiring in 1988.

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[12] Taiaroa, EiC, paragraph 19.
[13] Drinkrow, EiC, paragraph 3.1
[14] Whanganui River Report, page 247.

[45] In March of 1987, the catchment board sought to fix new minimum flows before the 1988 expiry date. In March 1988 the Authority was abolished and the Catchment Board itself was empowered to do this. An appeal could be made to the then Planning Tribunal. The Board fixed minimum acceptable flows for five years expiring on 31 October 1993 as follows:

1. The intake to the upper Whanganui River immediately downstream of the Western diversion was fixed at 100% of the natural flow;
2. The intake to the Whakapapa River at the footbridge recording site was fixed at a minimum flow of 8.5 cumecs between 1 December and 30 April and 4.2 cumecs for the rest of the year, subject to the flows being naturally available;
3. ECNZ was able to seek a lower minimum flow at times of national power shortage.[15]

[46] Both ECNZ and the Whanganui River Maori Trust Board filed appeals with the Planning Tribunal against the Board's decision. The Trust Board sought the rivers natural flow as the acceptable minimum flow. ECNZ sought restoration of the 1983 levels for a five-year term.

[47] The Planning Tribunal sat for 84 sitting days, travelled extensively and heard from 105 witnesses. The Tribunal delivered its decision on 29 October 1990. The Board's decision was cancelled and the Tribunal:

(i) Fixed the minimum flow of the Whakapapa River at the footbridge flow-gauging station from 1 June 1991 at 3 cumecs or the natural flow of the river, whichever is the lower;

(ii) Fixed the minimum flow of the Whanganui River at the Te Maire flow-gauging station from 1 June 1991 for the period from 1 December in each year to 31 May in each following year at 29 cumecs, or the natural flow of the river, whichever is the lower.[16]

[15] Whanganui River Report, page 249.
[16] Whanganui River Report, page 253.

[48] Genesis was formed on 1 April 1999 following the split of ECNZ into three state-owned enterprises. The shareholding ministers of Genesis are the Minister of State Owned Enterprises and the Minister of Finance. Genesis lodged Resource Consent applications for the TPD on 30 June 2000, being more than six months prior to the expiry date of the exiting authorities (30 September 2001).

[49] The committee of commissioners jointly appointed by the councils, under section 114(5) of the Local Government Act 1974 and holding delegated authority under section 34(3) of the Resource Management Act, heard evidence for a total of 23 hearing days from 30 October 2000 to 3 August 2001. In a decision, dated 30 August 2001 it granted a total of 53 consents subject to extensive conditions. Relative to these appeals, the conditions of consent provided for a minimum flow regime. As a result of agreements reached by Genesis with a number of other appellants, the flow regime has been amended slightly. It is now proposed:

(i) To maintain a flow of 29 cumecs on the Whanganui River at Te Maire, approximately 22 kilometres below Taumarunui, from 1 December to 31 May each year, or the natural flow whichever is the lesser. This is to be achieved by a combination of releases from either or both the Whakapapa intake or through the Lake Otamangakau release valve. Because Te Maire is about 20 hours flow time downstream of the releases some flexibility in the release is to be allowed;

(ii) A minimum flow down the Moawhango River of 0.6 cumecs below the Moawhango dam;

(iii) A minimum flow down the Tongariro River of 0.6 cumecs below the Rangipo dam; (not subject to appeal)

(iv) A minimum flow down the Tongariro River of 16 cumecs below the Poutu intake; (not subject to appeal)

(v) A minimum flow down the Poutu Stream of 0.6 to 0.3 cumecs below the Poutu dam; (not subject to appeal)

(vi) A minimum flow down the Whanganui River of 0.3 cumecs below the Whanganui intake;

(vii) A minimum flow down the Mangatepopo Stream of 0.5 cumecs below the Mangatepopo intake; (not subject to appeal)

(viii) A minimum flow down the Whakapapa River of 3 cumecs below the Whakapapa intake.

[50] The minimum flow of 29 cumecs at Te Maire reflects the decision of the Planning Tribunal hearing in 1990. The committee had this to say:

> The 1990 Planning Tribunal Hearing for the Whanganui River resulted in the fixing of a minimum flow for the upper Whanganui River at 'Te Maire' of 29 cumecs. This minimum flow is required to be met during the period 1 December to 31 May each year.
>
> The 1990 Planning Tribunal process was exhaustive involving many weeks of hearings and the presentation of vast amounts of technical evidence from local and international experts, together with local iwi and other members of the community. There was no substantive challenge to this minimum flow during TPD Hearing process,...
>
> Given the lack of opposition to the existing minimum flow for the Whanganui River at Te Maire, the Committee sees no reason to alter the status quo established by the Planning Tribunal in 1991.[17]

[51] The minimum proposed flows have been determined following a lengthy consultation process between Genesis and a number of appellants and submitters to mitigate the effects of the diversion of the waters on such matters as:

(i) the natural character of rivers and streams;
(ii) the physical and biological environment; and
(iii) the protection of indigenous habitats such as native fisheries and the blue duck.

[52] While these matters relate to and, in some respects underlie Maori cultural matters, and to that extent tend to mitigate the appellant's concerns, nevertheless, from our understanding of the evidence, the primary reason for fixing the minimum flows was not for the purpose of mitigating Maori concerns.

The Maori appellants

[53] The Whanganui iwi, Ngati Rangi and Tamahaki are all appellants in this case. Ngati Rangi and Tamahaki are both hapu of the Whanganui River. We were told that Tamahaki has the mandate to represent hapu with interests along the Whanganui River from the Pipiriki area to the Whakaharo Maraekowhai area. Their interests are interrelated with those of Whanganui iwi who object to the diversion at the headwaters of the Whanganui River.

[17] Paragraph 8.2.5, page 99, TPD Hearings Committee Decision.

[54] Ngati Rangi's interests are similarly interlinked with the Whanganui River iwi, but in addition, Ngati Rangi has a special interest in the Eastern diversion, particularly the diversion of the tributaries of the Whangaehu River and the headwaters of the Moawhango River.

[55] The nub of the Appellants appeal is, that the diversion of the waters, by both the Western and Eastern diversions, is culturally offensive and debilitating to the Maori people represented by the Appellants. The effect of the diversion on Tikanga Maori has both a spiritual and physical dimension. The spiritual dimension underlies the genealogical and ancestral ties of the people to their river and tributaries, from their ancestral mountains to the ocean. This includes such concepts as mana, mauri, kaitiaki and tapu. These spiritual concepts are linked to and interrelated with such physical concepts as the form and ecology of the river, which affect important cultural pursuits such as fishing. As the Waitangi Tribunal said:

> The river is thus seen as a taonga – as an ancestral treasure handed down, as a living being related to the people of the place, where that relationship has been further sanctioned and sanctified by antiquity and many ancestral beings. It governed their lives, and like a tūpuna, it served both to chastise and to protect.[18]

The issues

[56] The notices of appeal filed were quite wide-ranging and extensive in the grounds of appeal. The issues were narrowed a little by the notices filed in response to a direction from the Court. They have been further narrowed by a process of elimination during the course of the hearing.

[57] As stated, the nub of the case is the effect on Maori and their culture. Effects on the physical environment were raised by other appellants. These physical effects cover a wide range of matters from ecology to recreational sporting activities. The concerns raised in some of those appeals have been settled by the adoption of mitigation conditions. However, a number of matters raised by the other appellants are of concern to Maori – for example the effects on water quality and the ecology of the rivers.

[58] From a synthesis of Counsel's submissions we identify the following matters that require our consideration and determination:

[18] The Whanganui River Report, page 46.

1. The legal basis for our decision;

2. The statutory instruments;

3. Consultation;

4. The effect on Maori;

5. The effect of the TPD on the national interest;

6. Should the effect on Maori (if any) be accommodated under the Act? and

7. If so – how?

Legal basis for our decision

[59] The TPD activities require resource consents for the taking, diverting, damming and discharging of water into lakes and rivers in terms of sections 13, 14 and 15 of the Act. Sections 104, 105 and, with respect to discharges only, section 107 provides specific guidance as to the appropriate matters for consideration.

[60] The status of the activities, subject to the appeals, was discussed at some length by Mr John Kyle, a Planning Consultant called by Genesis. Their status is to be determined by the relevant statutory instruments that apply in the Manawatu-Wanganui Region. It was Mr Kyle's view, that the activities for which resource consents are required are either controlled or discretionary activities. It was agreed by all parties, that the appropriate way to deal with the consents is by bundling them together, and applying the "lowest common denominator" approach to deciding the appropriate activity classification for the entire activities. This means all consents are to be considered as discretionary activities.

[61] The relevant matters for us to consider under section 104(1) are:

(i) Part II – section 104(1) "*subject to Part II*";
(ii) Any actual and potential effects on the environment of allowing the activity – section 104(1)(a);
(iii) The relevant statutory instruments.

[62] As a number of the consents are for discharge permits we are also required, in appropriate cases, when having regard to the actual and potential effects on the environment, to have regard to the matters set out in sections 104(3) and 107. However, the appellants have not taken issue with either of those sections and, indeed for this reason, no evidence was adduced in respect of them. For the purposes of this decision we say no more about them.

[63] Against that statutory background, and within the confines of the issues and the evidence presented, we have to broadly consider and determine:

(i) First, as a matter of fact, the negative effects of the diversion on Maori;

(ii) Secondly, as a matter of fact, the positive effects of the diversion; and

(iii) Evaluate and weigh our findings in (i) and (ii) above, guided by the statutory instruments and the provisions of the Act, particularly Part II.

[64] The cardinal and pivotal matter for us to bear in mind in weighing and evaluating the evidence and exercising our discretion, is the Act's single purpose as set out in section 5.

> 5. Purpose
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[65] The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources.[19] Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.[20]

[66] In ***North Shore City Council v Auckland Regional Council*** the Environment Court held that where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in sub-sections 5(a), (b), or (c), it would be wrong to conclude that the latter overrides the former with no judgement of scale or proportion.[21]

[67] The remaining sections in Part II, subsequent to section 5, inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing considerations under Part II, bearing in mind the purpose of the Act. We agree with Mr Cowper, that these subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should be approached as factors in the overall balancing exercise to be conducted by the Court.[22]

[68] As would be expected in a development of this size, Counsel for the respective parties emphasised one or more of the various matters to be considered under sections 6 to 8 of the Act. For example, Mr Majurey, for Genesis, supported by Mr Cowper and Mr Milne, emphasised section 7(b) which concerns the efficient use and development of resources. Mr Ferguson for the appellants emphasised those matters in Part II that are of sensitivity to Maori – sections 6(e), 7(a) and 8.

[69] Where Part II matters compete amongst themselves, we must have regard to the statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise. However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act. The High Court laid down this principal in ***NZ Rail***, in relation to section 6(a). The Court stated:

> A recognition and provision for the preservation of the natural character of the coastal environment in the words of s.6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical

[19] *Aquamarine Limited v Southland Regional Council* 3 NZED1 (C126/97) at 141; recently endorsed in *Independent News v Manukau City Council* A103/03.
[20] *North Shore City Council v Auckland Regional Council* [1997], NZRMA 59 at 93; *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 HC at 72.
[21] *Aquamarine Limited* at 141.
[22] Cowper, opening submissions for Mighty River Power, paragraph 4.6.

> resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose.[23]

The Court went on to state that:

> It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management...[24] and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

[70] As Mr Cowper pointed out, the High Court recently reiterated this principle in ***Auckland Volcanic Cones Society Incorporated v Transit New Zealand***.[25] In that case, the Court held that, while section 6 matters are to be recognised and provided for, this is in the context of achieving the purpose of the Act as is set out in section 5.

[71] The Environment Court stated ***in Minister of Conservation v Western Bay of Plenty District Council***[26], in a passage sited with approval in ***Mighty River Power v Waikato Regional Council***[27]:

> In weighing the evidence of the witnesses on all sides, we have borne constantly in mind the Act's single purpose of promoting the sustainable management of natural and physical resources. Section 6 matters, nationally important by prescription as they are, plainly need to be recognised and provided for in conjunction with the many other considerations contemplated by the legislation in the district planning process ... The sections subsequent to section 5 are designed more fully to inform and assist a body such as the Council in following through and applying Parliament's intents in achieving the Act's purpose for its district. Expressed in the reverse context, those sections are not intended to be applied as a series of competing considerations liable to undermine the achievement of the purpose laid down in section 5.

[72] We thus propose to consider the relevant evidential matters, make decisions on the facts, and then apply a balancing and weighting process to determine what best achieves the single purpose of the Act. In so doing, we are mindful of the fact that while adverse effects may involve Part II matters, it is still nonetheless proper for such effects to be mitigated, as opposed to being avoided or remedied under section 5(2)(c). As the Environment Court said in ***Kemp v Queenstown Lakes District Council***[28]:

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[23] *NZ Rail Ltd v Marlborough District Council* (1994) NZRMA 70 HC at 85.
[24] *NZ Rail Ltd* at 86.
[25] [2003] 7 NZRMA 316.
[26] A71/01
[27] A146/01 at pages 20-21.
[28] [2000] 7 NZRMA 289 at 323

> [S]ome of the possible adverse effects related to national importance can be avoided or perhaps mitigated under section 5(2)(c). For example, the effects on the significant habitat for wrybills, banded dotterel and black fronted tern is only a potential effect and may be controlled by application of a monitoring condition with a review of the resource consent if the risk of harm is shown to exist and be significant.

The statutory instruments

[73] We are to have regard to the relevant statutory instruments,[29] the various objectives and policies of which are subject to Part II of the Act.[30]

The relevant planning instruments comprise:

- The Manawatu-Wanganui Regional Policy Statement – made operative on 18 August 1998;
- The Manawatu-Wanganui Regional Air Plan – made operative on 30 January 1999;
- The Manawatu-Wanganui Land and Water Regional Plan – effectively operative (no remaining relevant challenges);
- The Manawatu-Wanganui Regional Plan for the Beds of Lakes and Rivers and Associated Activities – made operative on 14 March 2001.

[74] There are a large number of objectives and policies contained in the relevant instruments, which were addressed in detail in the evidence of Mr Kyle,[31] Planning Consultant for Genesis, and Mr Robert van Voorthuysen,[32] Planning Consultant for the Council. We have regard to that evidence and to the provisions of the relevant instruments.

[75] The relevant instruments acknowledge the existing structures of the TPD, as being permitted activities. They contain objectives and policies which generally reflect Part II matters and which are designed to protect existing water quality and the natural character and values inherent in the rivers, lakes and wetlands and their margins, including ecological, cultural, intrinsic and amenity values.

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[29] s104(1)(c)-(h) of the Act.
[30] *Kaikaiawaro Fishing Co., v the Marlborough District Council* (1999) 5 ELRNZ 417; an application by *Canterbury Regional Council; Paihia and District Citizens Association Inc., v the Northland Regional Council* 2 ELRNZ 23 (1995).
[31] Kyle, EiC, paragraphs 10.1-10.33 and Kyle, Supplementary evidence.
[32] van Voorthuysen, EiC, paragraphs 39-60 and 67-43.

[76] Mr Ferguson, on behalf of the Appellants, took no issue with the relevant statutory instruments and acknowledged during his closing, that the applications were not contrary to any of the statutory instruments[33]. Nor did he, apart from Maori matters, point to any objective or policy which is not in accord with the proposals. Mr Ferguson's concession is reasonable and proper having regard to the evidence of the planning witnesses and the provisions of the relevant instruments. We therefore do not intend to address them further.

[77] Notwithstanding Mr Ferguson's concession, he quoted verbatim extensive statements in the planning documents, which reflect the relationship of iwi with their waters and rivers. In particular, he referred to provisions in the Regional Policy Statement, the Land and Water Plan and the Lakes and Rivers Plan. Those provisions reflect and elaborate on, but take no further, the provisions sensitive to Maori contained in Part II. We have regard to them when considering the evidence relating to the effects of the proposal on Maori.

Consultation

[78] A failure to adequately consult was central to Tamahaki's appeal. While it supported the substantive issues advanced by the Whanganui iwi, it was clear from the evidence of Mr Ross Wallis, who gave evidence for Tamahaki, that Tamahaki consider that they have not, to date, had the opportunity to engage properly in the process.

[79] Neither Ngati Rangi nor the Whanganui iwi advanced a failure to adequately consult as a ground for appeal. The Whanganui iwi have been consistent in their approach – while requested by Genesis to engage in consultation they refused to go down that path unless the water is first returned to the headwaters of the Whanganui and until they have reached a settlement with the Crown in respect of their Waitangi claim.

[80] Ngati Rangi at first adopted the same stance on consultation as the Whanganui iwi – but more recently, in the last three years or so, has attempted to enter into a consultation process. This attempt never really got off the ground, due to a failure to agree on an appropriate protocol. We heard a lot of evidence about this particularly from Ms Tracey Hickman the Environmental Manager Hydro for Genesis and Ms Aneta Rawiri, a

[33] Transcript, pages 1406 and 1407.

volunteer legal researcher for Ngati Rangi Trust. We do not deem it necessary to discuss this evidence.

[81] It seems to us, from the evidence we heard, that Ngati Rangi had the perception that Genesis were not prepared to even consider a shift from a 35-year consent term. On the other hand, Genesis perceived Ngati Rangi's position as being implacable on absolute closure of the Wahianoa Aqueduct. However, it was apparent on the evidence before us, that neither was sufficiently entrenched in their position to reject the consultative process. A process, which Genesis proposed entering into by the signing of a formal consultative document called a "Memorandum of Understanding". Because of Ngati Rangi's perception of Genesis intentions, no form of protocol was signed.

[82] Both Ngati Rangi and the Whanganui iwi have taken the opportunity of presenting full and extensive evidence before us, advancing their specific concerns. Tamahaki's underlying position has been to support the evidence adduced by the Whanganui iwi. Despite the opportunity, Tamahaki has not advised us of any additional issues or concerns, nor disagreed with any of the substantive issues put forward by either Ngati Rangi or Whanganui iwi.

[83] Consultation, or the need to consult, arises from the principle of partnership which requires the Treaty partners to act reasonably and to make an informed decision. Even if the process of consultation has not adequately taken place, provided that at the end of the day, we consider we are in a position to act reasonably and make an informed decision – that is all that is required.

[84] We heard a considerable amount of evidence on the question of consultation. We do not consider it necessary to prolong this decision by referring to that evidence in detail. Both Genesis and the Council went to considerable lengths to consult with those they considered affected. However, at the end of the day we are satisfied that the process has enabled all parties, including Tamahaki, to address their concerns. Further all parties, including Tamahaki, have had every opportunity of addressing their concerns before us. In our view, consultation, or the lack of it, is not an issue.

Treaty of Waitangi claim

[85] Mr Ken Mair gave evidence for Whanganui iwi. He is a mandated negotiator for the Te Awa Tupua (Whanganui River) Negotiating Committee, that is presently engaged

in settlement negotiations with the Crown, through the office of Treaty Settlements, in relation to Te Awa Tupua (the Whanganui River).

[86] He told us of the current advanced stage of negotiations as between the Crown and Whanganui iwi with respect to their Waitangi Tribunal claim. The Whanganui iwi claim that they are entitled to the river's ownership, management and control. To them, the foreign management of their headwaters is in direct conflict with their claim - a claim that has been upheld by the Waitangi Tribunal.

[87] Mr Mahuika, in opening for the Whanganui iwi, raised the issue as to whether Treaty negotiations between the Crown and Whanganui iwi are relevant to our consideration of these consents under the Resource Management Act. However, this matter was not taken further by Mr Ferguson in his closing submissions. Mr Mair stressed in his evidence, that...*these parallel developments between the Crown and Whanganui iwi are of relevance and warrant careful consideration by the Environment Court*[34]...in these proceedings. As we understand Whanganui iwi's position, they see the resolution of their claim as a must, before negotiating the terms of the resource consents with Genesis.

[88] We can understand their position. As Mr Mair pointed out, to the Whanganui iwi:

> ...Te Awa Tupua cannot be divided into severable rights and interests such that the diversion of waters can be considered and addressed in isolation from the overarching relationship between the Whanganui iwi and Te Awa Tupua that is the subject of settlement negotiations with the Crown. Whanganui iwi view Te Awa Tupua as a unified whole. In effect, the River cannot be separated from the people nor the people from the River. The River is an integral part of the Whanganui iwi and it provides for them physically, spiritually and culturally.[35]

[89] Further, any settlement with Genesis may pre-empt their settlement with the Crown. From a non-legal point of view, there is a link between the Waitangi Tribunal claim and Genesis' application for resource consents. To Whanganui Maori, the link is their cultural entity and its preservation and protection.

[34] Mair, EiC, paragraph 21.
[35] Mair, EiC, paragraph 14.

[90] However, we must apply the law as it is prescribed by Statute. Under Statute the two processes are separate. It is well settled that the legal regime under the Treaty of Waitangi Act 1975 is quite distinct and separate from the regime under the Resource Management Act.[36]

[91] In ***Banks v Waikato Regional Council***[37], the Planning Tribunal (as it then was) stated:

> Although consent authorities are directed, by section 8, to take into account the principles of the Treaty of Waitangi, that does not invest them with authority to decide whether the Crown is in breach of its obligations under the Treaty in any respect; let alone to decide what redress might be appropriate.

[92] We are circumscribed by the statutory provisions which govern us, and in particular, the single purpose of the Resource Management Act as expressed in section 5 and Part II.

The effect on Maori customary and traditional values

[93] For approximately eight hundred years the Maori people have lived on the land and by and in the rivers affected by the waters taken by both the Western and Eastern diversion. To the Maori people the severing of the headwaters of their rivers is a sacrilege resulting in a denigration of Maori values and beliefs affecting their self-esteem. It has, as Ms Rawiri said, resulted ***in the devastation to the mouri***[38] ***and mana of our tupuna awa, and the mana and well-being of our people.*** [39]

[94] To give genuine and meaningful consideration to Maori concerns, it is necessary for us to consider how Maori saw and related to the rivers in the context of their customary and cultural values. To this end, we heard evidence from a number of Maori witnesses, when we sat on the Tirorangi Marae and in the Taumarunui Hall near the Ngapuwaiwaha Marae. We have also been referred to a number of texts and Waitangi Tribunal reports. As well, much of Maori culture is reflected and expressed in art, song

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[36] See *Director-General of Conservation and ors v Waikato Regional Council*, A232/2002; *Electricity Corporation New Zealand Limited v Minister for the Environment*, W60/91; *Greensill v Waikato Regional Council*, W17/95;*Sea-Tow Limited v Auckland Regional Council*, NZRMA [1994] 204; *Ngati Wai Trust Board v Whangarei District Council* NZRMA [1994] 269.

[37] A31/95 at 13.

[38] Ngati Rangi spelling for the word mauri.

[39] Rawiri, EiC, paragraph 7.2.

and proverbs. We were able to observe, and have explained to us, carvings on tribal meeting houses at some of the Marae we were welcomed on to, and heard many waiata and proverbs, the English translation of which we were given.

[95] The evidence and experiences on our site visits made it clear to us, that in the world as conceptualised by Maori, the spiritual and physical realms are not closed off from each other, as they tend to be in the European context. We are thus mindful of the warning given by Mr Ferguson in his opening submissions for Ngati Rangi, when he said:

> Unfortunately, the tendency is often to pigeonhole Maori cultural and spiritual values and treat them in isolation from other factors under the RMA. Thus, environmental effects are largely viewed from the monocular and technical perspective of Western science and doctrine (in terms of, for example, water quality, biological habitats and landscape), with Maori cultural and spiritual values sidelined for consideration in principally intangible and detached terms.[40]

[96] The Maori appellants adduced evidence that described the losses to Maori occasioned by, what they alleged to be, a despoliation of the river and the denigration of their cultural values, by the diverting of the water occasioned by the foreign management of the Tongariro Power Scheme.

[97] To understand their losses it is necessary to consider how Maori saw and related to their river and how their waterways affected their lives and impacted on their culture and traditions.

The rivers

I rere mai te awa nui
mai i te Kaahui Maunga ki Tangaroa
ko au te awa, ko te awa ko au[41]

The river flows from the mountain to the sea
I am the river
The river is me

[98] The above aphorism is an oft-cited pepeha by many of the Whanganui River people over many years. It enhances their "ahi ka" status of continuous occupation.

[40] Opening submission for Ngati Rangi Trust, 5 November 2003, paragraph 13.
[41] Awa Tupua-Whanganui Policy Statement, June 1999, page 4.

[99] We were told by a number of witnesses how the Whanganui River, the second longest in the North Island, was populated by many marae strung out along its banks. The river provided communication by its navigability; and sustenance with its eels, fish, freshwater shellfish and crayfish. For centuries it was the home of the Whanganui people – a home built around the river.

[100] The first paragraph of the executive summary of the Whanganui River Report, by the Waitangi Tribunal, gives a concise brief of the historic context regarding the river and its people.

> For nearly a millennium, the Atihaunui hapu have held the Whanganui River. They were known as the river people, for uniquely amongst the rivers of New Zealand, the Whanganui River winds through a precipitous terrain that confined most of the large Atihaunui population to a narrow margin along its banks. There were, last century, some 140 pa and many large, carved houses that tell of substantial and permanent settlements. The river was central to Atihaunui lives, their source of food, their single highway, their spiritual mentor. It was the aortic artery of the Atihaunui heart. Shrouded in history and tradition, the river remains symbolic of Atihaunui identity. It is the focal point for the Atihaunui people, whether living there or away. Numerous marae still line its shores.[42]

[101] It was the river that bound the people together. This was exemplified, by the carvings on the tribal meeting house at Ngapuwaiwaha – where we were officially welcomed by the Whanganui iwi – which depicted a rope of three strands signifying unity and illustrating a tribal saying, that the people are "a spliced rope entire from source to mouth".

[102] Ngati Rangi also maintained a deep spiritual and cultural relationship with the Whangaehu River and with the Moawhango River. They also have lived on their banks for centuries and the rivers and their tributaries have provided sustenance. As Mr Keith Wood, an uri of Ngati Rangi said:

> Whangaehu is precious to us as she derives from our tūpuna maunga, her waters originating from Te Wāi-a-Moe (Crater Lake) and the springs that rise from Ruapehu, bringing their spiritual and physical sustenance to our people. For centuries our people have practised our rituals in her sacred waters. Her water is highly mineralised and carries a distinct mix of health giving qualities. We have bathed in her waters and used her healing power to heal mauiui.
>
> Her tributaries remain an important food basket for our people. As our pāhake have explained, she is the focus of many valued Iwi activities that contribute to the cultural and spiritual wellbeing, and social cohesion of our people.

[42] Whanganui River Report, page xiii.

> Our tūpuna awa Moawhango, once magnificent and awe-inspiring, her mouri has been decimated by the TPD. She was traditionally an important fishing ground and a key waterway for our people of Ngati Rangi and Whanganui iwi when travelling to Ngāti Kahungunu to trade.[43]

The river as ancestor

[103] The basis of Maori relationship is genealogical. Ancestral ties bind the people to each other and the people to their river. The rivers were constantly referred to in the Maori evidence as their *"tūpuna awa"*.

[104] This genealogical relationship is one of the foundations upon which the Maori culture is based. It is known as *"whanaungatanga"*. Whanaungatanga in its broadest context could be defined as the interrelationship of Maori with their ancestors, their whanau, hapu and iwi as well as the natural resources within their tribunal boundaries eg mountains, rivers, streams, forests, etc. Mr Buddy Mikaere, an environmental consultant well versed in Maori studies, who gave evidence for Genesis, summarises this view quite succinctly:

> For most iwi therefore, ancestors and landscape are inseparable. As an example, Ngati Tuwharetoa speak of "their" mountain, Tongariro, as an ancestor while Waikato Tainui, as we have seen, cast the Waikato River in the same role. So it is with the Whanganui River and the Whanganui iwi.
>
> It is apparent to me that the Whanganui River was not only the embodiment of the ancestors but because of its central role in traditional life as food source, protector, highway, it was also central to the survival of the iwi itself. It is no surprise therefore that against these historical associations, perceptions and conceptual beliefs that the Whanganui River took on a totemic status which is deeply religious in nature.[44]

[105] Ms Julie Ranginui, an original member of the Whanganui River Maori Trust Board, giving evidence at Taumarunui for Whanganui iwi, described the ancestral ties as follows:

> The Whanganui River people are all inter-related by whakapapa and if we go back to the whakapapa of the river then we go back to our ancestors, Tamakehu and Ruaka. From Tamakehu and Ruaka came three children – Tamaupoko (the central area where I come from), Hinengakau (the daughter and second child) who married into the top part of the river so her area comes as far down as Whakahoro and then just below Matahiwi, which is called Paparoa. From Paparoa to the mouth of the river was the third child – Tupoho.

[43] Wood, EiC, paragraphs 4.9-4.11.
[44] Mikaere, EiC, paragraphs 3.12 and 3.13.

> So Tamaupoko, Hinengakau and Tupoho were the three children of these tūpuna and from these three children derive the people of the river. The inter-relationship is whakapapa. The river for me is like my mother and my father; it's my grandfather and grandmother; it's my tūpuna. Irrespective of the condition of the river, the little water that remains is still my tūpuna, but its wairua (spirit) is dying.[45]

[106] Mr Tūrama Hawira, an uri of Ngati Rangi, giving evidence at Tirorangi Marae put it this way:

> As Ngati Rangi uri, when we stand to speak, we always begin by acknowledging our ancestral mountain, our ancestral rivers and our ancestral land as the very source of who we are as a people.
>
> As our pāhake have explained, we are defined by our ancestral mountain, our ancestral rivers and our ancestral land. They are the source of our wellbeing – spiritually, intellectually and physically. We do not separate our wellbeing from the wellbeing of our taonga tūpuna. Nor can we possess them. They do not belong to us – we belong to them.
>
> The kōrero of our pāhake is not to be taken lightly. It expresses our sense of being – our very humanity. We jealously protect and care for our korero.[46]

[107] In a statement made by the late Mr Whakataumatatanga Mareikura before he died and read to the Court by his son Mr Whetumarama Mareikura, it was said:

> The Ngati Rangi people, we reach to the mountain, for the mountain has, to us, the spiritual essence of our ancestors. It was there from the beginning of time. As the people of the river, we speak of the teardrops, the teardrops of Ranginui and one of the teardrops was our river. Our river is the Whanganui River, and some people claim the Whanganui River comes out of the Tongariro Mountain. That's right, if they don't know how Tongariro got there. Before Tongariro was there, the river was there. So if we go back in history, we find that the teardrops of Ranginui were given to Ruapehu.
>
> And so we go back to the river, and the river is the beginning, the beginning for our people from the mountain to the sea. It ties us together like the umbilical cord of the unborn child. Without that, it dies. Without that strand of life it has no meaning. The river is ultimately our mana, our tapu, our ihi, our wehi, all these things make up what the river means to us. It is our life cord, not just because its water – but because it's sacred water to us.[47]

[108] The written statement of Ms Ida Taute, a Pāhake of Ngati Rangi, read by her sister Ms Ngahuia McDonnell made reference to their tupuna awa in saying:

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[45] Ranginui, EiC, paragraphs 44 and 45.
[46] Hawira, EiC, paragraphs 2.1-2.3.
[47] Mareikura, EiC, paragraphs 2.7 and 2.8

> Our old people felt very deeply about our tūpuna awa and our tūpuna maunga. They were and continue to be gifts from our atua, part of who we are as Ngati Rangi. They have a life force, as we do, and we share in each others sustenance.[48]

In paragraph 2.4, she goes on to say:

> ...respecting and sustaining the whanaungatanga relationships with all the living entities around us, including our tūpuna awa and puna, and our tūpuna maunga.

Mauri

[109] A number of witnesses who gave evidence for Ngati Rangi, referred to the ***"mauri"*** or ***"mouri"***. For example Mr Wood said:

> Mouri is the essence of life. It is the vital life principle that binds together the spiritual and physical elements of all things, both creating and sustaining life. The cultural and spiritual derivations of our mouri kōrero are steeped in our ancient customary knowledge,[49] and I respectfully leave these for explanation within the customary domain.
>
> Water holds a special place in the mouri it carries, bringing spiritual and physical well-being and vitality to all life it encounters along its journey. Our tūpuna responsibility as tāngata tiaki, is to sustain the integrity and flow of this connective life-force within all aspects of our tūpuna awa. The intangible values of our tūpuna awa are just as important to us as the tangible indicators of biophysical health that reflect a healthy mouri. Our tūpuna awa are inclusive of river beds, catchment land, habitat, fish and other biodiversity.[50]

[110] The regional policy statement defines mauri as:

> The essential essence of all being.[51]

In the body of the section at page 64 the policy statement says this:

> Mauri – all things, both animate and inanimate, have been imbued with a mauri generated from within the realm of te kore. Nothing in the natural world is without this essential element – the mauri represents the interconnectedness of all things that have being. Just as human kind received the mauri from Tane, so did he inherit the mauri from Ranginui and Papatuanuku. Therefore all natural things, including human kind, share a common whakapapa (genealogy). Humans have an added responsibility to ensure that the mauri inherent natural resources are maintained. Inappropriate use of resources, for example discharge of sewage to water, impacts directly on the mauri of that waterway and therefore all factors

[48] Taute, EiC, paragraph 2.1.
[49] Wood, EiC, paragraph 2.1.
[50] Wood, EiC, paragraph 2.2.
[51] Regional Policy Statement, Part 4, Te Ao Maori – He Ritenga Mo Nga Takoha O Te Tao- Ao (the Maori world – management of resources), page 49.

> associated with it. The natural balance which exists amongst all things is disturbed and in many cases irreversibly damaged.

[111] It would thus appear that mauri is an extension of, or at least flows from the ancestral ties or whakapapa that link the people together and to the rivers, the land and the sky.

[112] Mr Mikaere was critical of the use of the word in the context that it was given by the witnesses of Ngati Rangi. In his opinion such a claim as made by Mr Wood in his evidence "represents a fundamental misunderstanding of the traditional concept base underpinning among other things, the institution of mauri".[52]

[113] He opined that the concept of water as a life-giving agent from Ranginui – "the sky father" is not a traditional one, but derives from a modern interpretation[53]. What he meant by modern we are not quite sure. He then went on to say:

> Conceptually, mauri is a very complex subject because the concept itself has been subject to enormous evolution. In traditional times the whole of the natural and cultural world and everything possessed its own essential vitality: people, crops, fish, forests, birds, land, ocean, rivers, streams and lakes, stars, and natural phenomena such as lightning, wind and rain. This universal quality, this vitality, was known as the hau.
>
> When the activities of humans in the use of a natural resource intersected, the hau was protected by being ritually placed within a mauri, normally an object such as a stone. The hau was further protected by the ritual location of an atua, God, usually an ancestral figure, inside the mauri object as well. It was the mana of the atua that provided the mauri (and therefore the hau), with its spiritual protection.
>
> ...
>
> The mauri objects were believed to become the "thing" they represented in a belief system so powerful that loss or damage to a mauri object could mean the mate or death of the "thing" it represented. If the mauri of a pa was lost or stolen for example it was inevitable that the pa would fall in battle.
>
> ...
>
> Because the traditional rituals associated with mauri are no longer practised there has been a recasting of mauri into its role as a "life force" present in all things and this change has added to the complexity of dealing with mauri as an issue.[54]

[52] Mikaere, EiC, paragraph 4.53.
[53] Mikaere, EiC, paragraph 4.54.
[54] Mikaere, EiC, paragraphs 4.57, 4.58, 4.60 and 4.64.

[114] Mr Mikaere went on to describe the Ngati Rangi position in respect of the mauri of the waterways as a reference to the "naturally" occurring metaphysical phenomenon, present in all things and which is present without interference or intervention by humans[55]. He considered the mauri issue, as advanced by Ngati Rangi, could best be explained by substituting the word "health" for "mauri".

[115] However we note the following exchange between Mr Mikaere and Commissioner Prime:

> Q. ...in your expert opinion, would you think that the absence of water in the stream, would that affect the mauri of the waterway?
>
> A. Well, it will be most unusual to have a stream without water being described as a stream.
>
> Q. Well, I guess what I am referring to is the fact that there is a stream, say the Whanganui Headwaters.
>
> A. Yes.
>
> Q. That has been closed off so no water goes so in that short area where there is no water, where the water has been diverted, do you think that the mauri in that small area would be affected?
>
> A. Well, if there is no water flowing through it, there is no Maori [mauri] associated with it. So it is pleasing, I think, that there is going to be a minimum flow go through that area.[56]

[116] We listened carefully to the evidence of Mr Mikaere. He comes to the Court with an experienced and knowledgeable background in matters of Maori. His view would appear to cast a shadow over the evidence of Mr Wood and also the evidence of Mr Colin Richards[57] of Ngati Rangi and Mr Taiaroa[58].

[117] At the end of the day, we doubt whether we need to make a determination on the philosophical niceties of the distinction between mauri, hau and health. Of one thing we are certain – and that is, that the customary evidence satisfied us that the people of Ngati Rangi and Whanganui iwi had, and still have, a special cultural empathy with their rivers by reason of their ancestral links. Their tūpuna awa were considered by them to be sacred in the fullest meaning of that word – they have a close physical and spiritual association to the river.

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[55] Mikaere, EiC, paragraph 4.65.
[56] Transcript, pages 239 and 240.
[57] Richards, EiC, paragraph 2.16.
[58] Taiaroa, EiC, paragraph 34.

[118] We note that the Waitangi Tribunal had this to say about the mauri of the Whanganui River:

> From the detailed cosmogony of the Maori, it follows further that all things have a mauri, a life force and personality of their own, and it was certainly the case that a river was seen to be so endowed.
>
> ...
>
> Conversely, if the mauri of a river or a forest, for example, were not respected, or if people assumed to assert some dominance over it, its will its vitality and force, and its kindred people, those who depend on it, would ultimately suffer. Again, it was to be respected as though it were ones close kin.[59]

[119] The Tribunal also adopted the overview from Professor James Richie in evidence before the Waitangi Tribunal on the Te Whanganui – a - Orotu claim:

> Water has mauri, essential sanctity, both a wai maaori and wai tai. Water must be kept in its natural state as far as it is possible to do so. The explanations of the origin of water, its different forms, types and so on, in Maaori science, emphasise that ethic.[60]

Kaitiaki

[120] The kaitiaki responsibility to protect spiritually significant dimensions of the Whanganui River is an important imperative to Whanganui iwi. The fundamental principle to that imperative, is that iwi and hapu retain control. Within the Whanganui iwi, there is a clear distinction between "tangata kaitiaki" (human guardians) and the kaitiaki mentioned by Ms Anihira Henry, a kaumatua affiliated to all hapu of Hinengakau ancestress pertaining to the upper reaches of Whanganui, when she says in her evidence:

> ...I can do no less than affirm that all hapu of Whanganui iwi as true and rightful tangata kaitiaki a te Awa Tupua o Whanganui; the true guardians of the Whanganui River. This guardianship (kaitiakitanga) precedes the time of signing the Treaty of Waitangi on Whanganui soil in May 1840;...
>
> The responsibilities of tangata-kaitiakitanga mo te Awa o Whanganui precede the arrival of Europeans and English to the river and on any lands of Aotearoa...[61]

[121] In paragraph [5] she says:

> Guardianship of the river's locals has always been shared process between uri (descendants living on and akin to the river) and kaitiaki (River guardians). There

[59] Whanganui River Report, page 39.
[60] Whanganui River Report, page 45.
[61] Henry, EiC, paragraph 3.

> are many kaitiaki of the Whanganui Awa seen by those who acknowledge the signs; and, some hidden or lost due to human influence in the changing of the river courseway.

She named three of the kaitiaki (river guardians), *Tutangatakino, Ngapuwaiwaha and Titipa.*[62]

[122] On our site visits organised by Ngati Rangi and the Whanganui iwi, we experienced entreaties to the ancestors and kaitiaki (river guardians) of the river, in the form of karakia and karanga. On our trip down the Whanganui we stopped at a large flat rock on the upper river to lay a placatory branch. The rock is called Petipetiaurangi and underneath is the lair of Tutangatakino.

[123] With regard to the "tangata kaitiakitanga", Ms Dardanella Metekingi had this to say:

> ...the Maori are the kaitiaki of the river. We have to look after this. It is what we leave for you the next generation. From what I have seen, the government, local authorities and power companies have not been doing a good job in controlling the river...[63]

She asks the rhetorical question:

> What has happened to people? The people having the power to discharge their effluent into the awa. The people have the power to reduce and divert the natural flows of the awa. These things have upset the natural balance of the river and its ability to regenerate and to purify itself.[64]

And

> I believe that we are the kaitiaki of the river. We want to look after it in our generation so that we can say when we go, "this is what we leave for you the next generation"...[65]

[124] Mr Taiaroa assumes his peoples obligations as kaitiaki and maintains that:

> ...the Whanganui iwi cannot conscionably resile from their obligations as kaitiaki of the Whanganui River when the Crown – or in the present case a Crown company, Genesis Power Limited – seeks to continue actions that denigrate the river.[66]

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[62] Henry, EiC, paragraph 11.
[63] Metekingi, EiC, paragraph 10.
[64] Metekingi, EiC, paragraph 16.
[65] Metekingi, EiC, paragraph 19.
[66] Taiaroa, EiC, paragraph 12.

[125] Mr Mareikura in paragraph 2.42 and 2.43 of his written statement says:

> You know to take away my kaitiaki you might as well take away my life. I might as well give you my hand to sever from my arm because that's what you do to me.
>
> ...
>
> The kaitiaki is, very, very important for us because he is our connection to our rights to go to the river...

[126] Examples of human kaitiakitanga are apparent in such evidence as Mr Arthur Anderson a kaumatua, kai korero and kai mahi who gave evidence for Whanganui:

> ...at Tawata where I was brought up, we were taught to catch for our immediate needs. And when we had got the catch we needed, we left it at that and made sure that our fish were left undisturbed...[67]

Tapu

[127] The concept of tapu is interwoven into the tapestry of almost every facet of the Whanganui iwi social structure. Acknowledgement of the river kaitiaki[68] prior to, and during travel on the river involves recognition of tapu[69]. Imposing of rahui[70] because of a drowning or death on the river is another example of tapu – a temporary tapu placed on an area to allow "recovery". The action of having to build an utu piharau or a patuna without partaking of food is another[71]. So are the rituals of blessing children and healing the sick. Likewise will be trips to the river for cleansing of the mind[72], spiritual sustenance, spiritual cleansing[73] or even the spiritual call of the river to those living away to return[74].

[128] In Ms Taute's written statement she spoke of:

> Our people bathed in particular spots in the Whangaehu for her healing properties. Our parents and other whanau used to bathe us in the Whangaehu to treat hakihaki (sores) and burns...[75]

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[67] Anderson, EiC, paragraph 7.
[68] Henry, EiC, paragraph 10.
[69] We experienced this on our journey down the Whanganui River where karakia were said requesting the assistance of the river kaitiaki.
[70] Ranginui, EiC, paragraphs 27-30.
[71] Anderson, EiC, paragraphs 26-28.
[72] Anderson, EiC, paragraph 17.
[73] Potaka, EiC, paragraph 23.
[74] Potaka, EiC, paragraph 3.
[75] Taute, EiC, paragraph 2.10.

And she went on to say:

> The Ringatu faith utilised the water of the streams in Karioi for healing and baptism – particularly the Tokiahuru and the Tomotomo Ariki.
>
> As the illness inflicted on our awa from the diversion of water has crept in, so too has illness amongst our people. The diminished life force of our tupuna awa affects us as her whanaunga. This illness takes many forms affecting the physical, spiritual and cultural aspects of who we are.[76]

[129] Mr Anderson gave evidence of the value of the river for spiritual cleansing. He said:

> We were taught by our grandmother the need for spiritual cleansing. This was a great assistance to our spiritual wellbeing... Our grandmother would say prayers and she would take us down to the river.
>
> When we got down there she would say prayers, she would get a stone pebble and she would draw it across our foreheads in the sign of the cross and then she would discard it back into the water. That would take away any hurt, cleanse our minds and we could feel the cleansing...[77]

The mixing of the waters

[130] A number of Ngati Rangi witnesses expressed concern about the transfer of water through the Tongariro Power Scheme. Mr Mareikura, in his statement read to the Court, put it this way:

> Ultimately, by diverting the water away from us, Whanganui iwi, they have severed the cord of our unity. You see – we follow the river, and once we follow the river, we carry on up to the mountain.
>
> Now the spiritual cord has been cut because they have taken the water away from us, and that to us is sacrilege. And then to give it over and put it into another tribal area is equally bad, because the water was not meant for those people. It doesn't belong to those people, it belongs to us. We all share, but this is not sharing.
>
> ...
>
> And so you know the spirituality of that has untold heartaches; tears have flowed. I remember the old man crying, our koro, Taitoko shedding his tears because he said that "my river has been severed, the head has been cut – what is there left for me?[78]

[76] Taute, EiC, paragraphs 2.11 and 2.12.
[77] Anderson, EiC, paragraphs 16 and 17.
[78] Mareikura, EiC, paragraph 2.13 read by his son.

[131] Mr Mikaere also took issue with this claim. He said:

> ...I do challenge this issue if it relies on the premise that the diversion and subsequent mixing of water from different river catchments is unacceptable on traditional cultural grounds and furthermore impinges on the asserted position of Ngati Rangi as kaitiaki for the rivers and waters in question.
>
> Traditional Maori literature, waiata, pepeha, whakapapa, offers no information about the mixing of waters from different river systems. This is not only because of the technological limitations of traditional culture but because there was absolutely no practical or ritual reason for doing so.
>
> ...
>
> It is clear to me that while in the modern world, some Maori might now object to the diversion of water and its subsequent mixing with other waters, that objection has no traditional or cultural base. ...[79]

[132] Again, on the face of it, it would appear that Mr Mikaere's evidence is in conflict with Ngati Rangi's claim that the mixing of waters is culturally offensive, if that claim is based on traditional cultural grounds. However, it would also appear to be in conflict with the findings of the Waitangi Tribunal in other instances. Of water purity the Waitangi Tribunal had this to say:[80]

> Water, whether it comes in the form of rain, snow, the mists that fall upon the ground and leave the dew, or the spring that bursts from the earth, comes from the longing and loss in the separation of Rangi–o–te-ra and Papatuanuku in the primal myth. The tears that fall from the sky are the nourishment of the land itself. The life-giving water is founded upon a deep quality of sentiment that, to Maori, puts it beyond the realm of a mere useable commodity and places it on a spiritual plane.

Speaking of the mixing of waters it had this to say:

> Referring back to earlier evidence in the Manukau claim in 1984, Professor Ritchie described the difficulties created for Maori when modern works mix water regimes. In this case, we are concerned with the transfer of Whanganui River water to Lake Taupo and the Waikato River through the Tongariro Power Scheme. If not mediated in an appropriate Maori way, this is spiritually offensive to Maori people, as the Tribunal in the Manukau claim was to find. It also violated the political harmony between the people of different places, disturbed the exercise of their rangatiratanga over their traditional resources, and affected conservation practices and the productivity of the resources in question.[81]

[79] Mikaere, EiC, paragraphs 4.34, 4.35 and 4.41.
[80] Whanganui River Report, page 44.
[81] Whanganui River Report, page 45.

[133] We do of course have a great deal of respect for what the Waitangi Tribunal finds in its determination on Maori customary usage. It would appear from reading their report that it received a much greater amount of evidence on Tikanga Maori issues than we received during the course of this hearing. It would be, in our view, inappropriate for us to hold that the Tribunal had erred on a matter of Tikanga Maori unless there was clear additional evidence before us that clearly showed the Tribunal was wrong. However, again it is not really necessary to resolve the apparent conflict as we are satisfied of the spiritual and cultural significance of the rivers both to Ngati Rangi and to the Whanganui iwi. We also note the findings of the Waitangi Tribunal that:

> The spiritual and cultural significance of a river can only be determined by the tangata whenua who have traditional rights over the river. It cannot be assessed in any other way.[82]

Physical changes to the rivers

[134] The Maori appellants claimed, that the diversion of the waters from their rivers has adversely affected their cultural traditions in a number of ways, including: a change to the hydrology of the rivers by reduced flow and water levels; an effect on water quality; an increase in siltation; and a change to the ecological system affecting the food chain. All of these factors have, they say, inhibited their cultural practices, reduced the numbers of native fish dramatically, and affected their fishing practices.

[135] Genesis maintained that if there was any physical effect on the river impacting on cultural traditions, then any such effect was not caused by the Tongariro Power Development. It was caused by other factors unconnected with the diversion of the waters. We heard extensive and detailed evidence relating to both the eastern and western diversion from a range of expert witnesses called by Genesis. They addressed such matters as hydrology, siltation, river flows, river levels and ecology.

[136] As the eastern and western diversions are independent and in different catchments we look at the effects, if any, of their diversion on the rivers separately.

[82] Waitangi Tribunal (1989), Report of the Waitangi Tribunal on Kaituna River claim (Wai 4), 2nd ED. Department of Justice, Wellington, page 41.

The western diversion

Customary evidence

[137] We heard evidence from eight witnesses called by the Whanganui iwi. All were stressed by the change they see in the Whanganui River, which, for the most part, they claimed to be the result of reduction in flow and lowered water levels caused by the diversion of water through the Tongariro Power Development structures. They emphasised how their cultural and religious practices have been profoundly affected by the deterioration in the state of the river.

[138] Ms Ranginui gave evidence about how the TPD had *...changed the whole flow of the water...*[83] and the level of the water in the river, leaving channels and affecting rapids and shallows. This has had an effect on traditional fishing practices for eel, smelt and white bait, which are no longer being caught in the numbers and the way they used to be caught right up until 1970. She said, that where you could catch the smelt and white bait was where the rapids are, and where the rapids are, is where the shallow water is – half water.[84]

[139] She told us, that another effect caused by the lowering of water levels, has been the effect on sacred areas *Nga Puna Mo Nga Tika*, including: the drying out and loss of a baptising pool at Matahiwi (below Pipiriki); the loss of *...wash back...* places where women would give birth to a child; and areas where Maori would bless the ones who had been sick[85]. Ms Ranginui also gave evidence of how she noticed the changes in the river after the TPD came into operation, in particular the loss of five Piharau Utu, including the main one at Nga Poutama[86]. She also described the relationship of her ancestors and whakapapa with the river, and was of the view that the wairua (spirit) of the river could revive if the water was given back to the river.[87]

[83] Ranginui, EiC, paragraph 12.
[84] Ranginui, EiC, paragraph 8.
[85] Ranginui, EiC, paragraphs 44-46.
[86] Ranginui, EiC, paragraphs 39 and 40.
[87] Ranginui, EiC, paragraphs 14-21.

[140] Ms Dardanella Metekingi described her experiences of playing in the river as a child and of her mother's relationship with the river, especially if any of her family was sick[88]. She was of the view, that there had been a deterioration in the river and its spirit was dying. She considered the state of the water quality of the river, particularly the pollution, silt and sediment in the upper reaches around Taumarunui, to be appalling and a betrayal by the Government, Local Authorities and Power Companies. She maintained there is less bird life, particularly less shags and less fish too.[89]

[141] In the lower reaches, she said that the rains and tides don't clean the river any more[90]. She believed that control of the river should be shared, but in a respectful and supportive way and not just be used commercially.[91]

[142] Mr Hemi Takarangi gave evidence describing his early experiences as a child learning to swim, and of his reverence for the river near Putiki Marae which is upstream from the mouth of the river. He said, that the part of the river to which he was first introduced, is now mud flats and the water bears heavy residues of silt, pollutants and industrial effluent that are no longer washed away due to the reduced water level in the river. Silt now covers pupu (shellfish) beds and the pipi beds that used to be just outside Putiki Marae[92]. He also said that he could remember, just before the Second World War, seeing white bait, herrings and kahawai in the river, but they are not seen today.[93]

[143] He said, that the controlled flows of the TPD scheme are detrimental to the banks of the river because the normal flow can be seen by the rows of holes on both banks of the river. He considered, that the access by all their fish from the sea to the upper reaches has been affected by the reduced flow. He said that the iwi, hapu and whanau of the Whanganui River are grieving and will share the fate of the river unless the natural water flow of old is returned.[94]

[144] Mr Michael Potaka, of Whanganui said, that he has lived with the river for all his life and from time to time had observed changes in the river which he attributed to a variety of causes including; run-off from land clearances, pollution of one kind or another

[88] Metekingi, EiC, paragraphs 2, 3 and 5.
[89] Metekingi, EiC, paragraphs 8-10.
[90] Metekingi, EiC, paragraph 12.
[91] Metekingi, EiC, paragraph 21.
[92] Takarangi, EiC, paragraph 11.
[93] Takarangi, EiC, paragraph 9.
[94] Takarangi, EiC, paragraphs 15 and 23.

and the diversion of the headwaters. His evidence focused on the lower reaches of the river from Raorakia to Ruapirau just south of Matahiwi, the length of river with which he has had a close familiarity since his birth.[95]

[145] He said, that Maori people used to rely upon a number of species of fish from the river which became available at different times of the year[96]. Ngaore (smelt) and karohi (white bait) were traditionally caught in a race called a piharau utu or pa on the edge of the shingle bed. He described in detail how this was done[97]. During the years up to the 1970s, he and his family would expect to catch ngaore and karohi in pa located at: Pungarehu, Huiarere, Parikino, Whakahua Whaka, Upokopoiti, Atene and Koriniti. He said that before the 1970s, fishing in this river had been affected by the taking of metal from the shingle beds, but this had been replenished from upstream and the pa sites returned to usable form reasonably quickly. However, since the headwaters were diverted by the electricity scheme there has been insufficient shingle brought down to rebuild the beds into their original state. As a result the pa sites have in many cases simply become unusable and their catches of ngaore and karohi have been greatly reduced.[98]

[146] Mr Potaka also said he was particularly familiar with the kakahi (freshwater mussel) beds at Parikino and Paetawa, which were in both the eastern side (a large number of shorter beds) and the western side (100 metres long and some 18 inches wide) of the river. Before the diversion, the beds were covered in 6 inches to a foot of water and the shellfish flourished. Afterwards the beds have become exposed and dried out and the kakahi have dried out and died[99]. He also said, that koura (freshwater crayfish) used to be in the river and the side creeks but now the creeks are dry, and with the riverbed low the food is no longer available. He said, that while the situation has not been aided by the removal of trees and other ground cover, he believed that the shallowness of the awa since the diversion has also had an effect.[100]

[147] Mr Potaka also said, that tuna (eel) are still caught in parts of the awa, although in far fewer quantities than previously. He considered there had been some increase in catches of ngaore, karohi and also mullet since changes in pollution control at

[95] Potaka, EiC, paragraphs 6 and 7.
[96] Potaka, EiC, paragraph 8 onwards.
[97] Potaka, EiC, paragraph 11.
[98] Potaka, EiC, paragraphs 12-14.
[99] Potaka, EiC, paragraphs 15 and 16.
[100] Potaka, EiC, paragraph 17.

Taumarunui and Wanganui. The numbers certainly increase when the water flows are higher. However, the quantity of fish is nowhere near its former level.[101]

[148] He also spoke about the spiritual importance of the river to the Maori communities along the river and said that his concerns about fisheries are simply one manifestation of his greater concern about the health of the river. He said that his people see the cutting of the headwaters as a particularly grave attack upon the river, contrary to the laws of nature which they observe, and an attack upon their role as kaitiaki.[102]

[149] Mr Potaka's evidence was supported by Mr Titapu Henare, a local fisherman, and Mrs Anihira Henry, one of the oldest kaumatua of the hapu of Whanganui iwi. Mr Henare described traditional fishing practices for catching: piharau (lamprey), tuna (eels) including tunaheke, tunapa and tunatoke; kakahi (freshwater mussels), and inanga (whitebait), and of how the decline in the fisheries have been caused by the change in flow.[103]

[150] Mr Anderson, described his association with the river since his birth at Tawata, where his family lived and caught tuna heke and kakahi; the latter from the Whakapapa, Ohura and Kakahi Streams. He said that today the papa and rocks which used to be the home of the eel are all exposed. This does not lend itself to the habitat in which food could be sought by the eel.[104]

[151] He also described how his grandmother taught him the use of the river for spiritual cleansing and how over time he was able to gain value from it. He also described his experiences assisting his uncle to construct the Piharau Utu at Maraekowhai (below the confluence with the Ohura River).[105]

[152] On behalf of the Whanganui River Maori Trust Board appellants, Mr Archie Taiaroa stated:

> The mauri of the river, its life force, has been greatly trampled on by the abstraction of what are enormous quantities of water from its body. These effects are made worse by the fact that the waters come from the snow covered peaks and provide the freshest and clearest water to the river. The crucial impact is of the abstractions at times of lower flow when the river naturally has

[101] Potaka, EiC, paragraph 18.
[102] Potaka, EiC, paragraph 21.
[103] Henare, EiC, paragraphs 3-24.
[104] Anderson, EiC, paragraphs 4, 8, 9 and 13.
[105] Anderson, EiC, paragraphs 16-23.

> less water, and the effect of the taking of water from the body of the river is so much greater...
>
> The effect of this in the view of Whanganui iwi is a gross weakening of the strength of our awa (river).
>
> ...
>
> Also important are the river "freshes", or flow increases short of occasional major floods, which have been greatly reduced by the TPD. These flow variations are well known to our tupuna, and occurred right up to the time of the diversions.[106]

[153] With respect to fisheries Mr Taiaroa stated:

> Whanganui iwi's traditional fish tuna, piharau, ngaore, inanga, kakahi and all the other species with which the river abounded are very important to us but have been substantially destroyed. This includes our fishing methods used for harvest – pa tuna, and piharau utu. These have suffered from a succession of impacts from the excessive destruction of pa tuna, the discharge of sewage into the river at top and bottom, the run-off of pollutants from cleared land and more recently the serious reduction and interference with the river flows. Eel and other species are in short supply for these reasons. There is rarely sufficient to meet iwi traditional and customary requirements.[107]
>
> ...
>
> There is some commercial eeling carried out by non-Maori in the river and at the present time. The fishery cannot support our traditional uses, and commercial eeling as well. We perceive the whole river as our traditional fishery – there is no fishable part of it which has not been used for that purpose in the past, and there is insufficient in the river in any event to support any other significant use.[108]

[154] Both the people of Whanganui iwi and Ngati Rangi relied traditionally on the rivers for sustenance. Fishing still plays an important role in their hospitality[109]. Manaaki tangata (hosting visitors appropriately), is a key value and plays an important role in uplifting their peoples mana[110].

[155] All of the Maori witnesses lamented the effect the river has had on their cultural practices, the depletion of native fish and traditional fishing methods. From their evidence, we have identified a number of physical factors they assert are caused by the TPD that, they say, have had an impact. These are:

(i) The reduction of flow and the lower water levels;

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[106] Taiaroa, EiC, paragraphs 34-36.
[107] Taiaroa, EiC, paragraph 60.
[108] Taiaroa, EiC, paragraph 6.2
[109] Richards, EiC, paragraph 2.18.
[110] Taute, EiC, paragraphs 2.8 and 2.9.

(ii) The effect of reduced flow on water quality;

(iii) The effect of reduced flow on sedimentation, erosion and the morphology of the river; and

(iv) The effect of reduced flow on the ecological life of the river – invertebrates and fish.

Genesis evidence

[156] In response, Genesis called a number of expert witnesses to address the factors identified by the Maori witnesses. Their evidence was peer reviewed by Dr Brent Cowie, a freshwater biologist called by the Council, who gave an overview of both the Western and Eastern Diversions. The Genesis witnesses also identified other land uses, which they identify as factors that affect the distribution and abundance of fish species in the freshwater environs.

We will now deal with each of these matters in turn.

(i) Amount of reduced flow and lower water levels

[157] Mr Jarrod Bowler, an Environmental Co-ordinator/Hydrologist for Genesis since September 1999, gave evidence on the hydrology of the TPD and the derivation of natural flow records and modelled flow regimes. He described the computer model, which was developed by Mr R D Henderson of NIWA to cover the hydrology of the major components of the TPD[111]. Mr Henderson's evidence to the Joint Hearing Committee, which described the modelling process and conclusions, was appended to the evidence of Dr Cowie who appeared for the respondent.[112]

[158] Essentially a "natural flow regime" was simulated by the model which represented a flow regime that would have occurred if there had not been any hydro power development on the rivers. The record is in part synthetic, in that where water is diverted, natural flows have had to be computed generally by adding measured diversion flows to measured river flows downstream of diversion structures.[113]

[111] EiC, paragraphs 4.3 and 4.7.
[112] Dr Cowie, EiC, attachment R D Henderson (2000), Evidence to Joint Hearing Committee.
[113] Bowler, EiC, paragraphs 4.3 and 4.4.

[159] Other more complicated procedures were used where downstream flow records were too short or where site specific information was not available[114]. In this way a continuous natural flow series was constructed for a 42 year period from 1960 to 2002 and updated to June 2003[115]. This allowed the effects of the TPD scheme to be modelled as if the scheme had existed with the current rules for diversion for the full length of the records.

[160] The modelling assumed that the scheme will always operate to capacity and all available water will be used to generate power, even though this is not the case. In reality not all available water can be used, as such factors as generation demand, power scheme maintenance, volcanic eruptions, the peaky nature of flood hydrographs, and the difficulty in efficiently maintaining minimum flow requirements means that not all available water is used all the time.[116]

[161] Thus the modelled regimes may, at certain times, under-estimate the amount of residual flow in rivers downstream of diversion structures and over-estimate the amount of water taken for hydro power generation. But it was considered, by Mr Bowler, that the relative differences between the modelled regimes will be realistic and accurate.[117]

[162] In the Western Diversion, Mr Bowler said that the effects of the TPD diversions become less apparent with distance travelled downstream as a result of tributary inflows. The effect of the diversions on downstream flows are most significant at low to mean flows and have only a minor effect on flood flows. According to Mr Bowler, the flow reduction at mean flow, downstream of the Whakapapa Intake, is approximately 67% from the natural flow regime of 15.4 cumecs to the post 2001 regime of 5.1 cumecs; reducing to 38% (from 44.6 – 27.6 cumecs) by Piriaka, 19% (from 90.8 – 73.8 cumecs) by Te Maire and 7% (from 228.1 – 211.0 cumecs) by Paetawa. The corresponding reductions in water levels at mean flow are 183 mm at Piriaka, 145 mm at Te Maire and 96 mm at Paetawa. The above reductions in mean flows and water levels, due to the TPD diversions, are based on modelled data, consequent on the 2001 resource consents.

[163] Mr Bowler addressed the concerns of Maori arising out of the reduced water level of the Whanganui River. He referred to his figures JB1, JB2 and JB3 attached to his rebuttal evidence, to illustrate the relative changes in level with the natural flow and the

[114] Bowler, EiC, paragraph 4.4.
[115] Transcript, page 268.
[116] Bowler, EiC, paragraph 4.7.
[117] Bowler, EiC, paragraph 4.7.

base case regime (ie flows as per the 2001 resource consent decisions) at low, mean and high flows, respectively. In his view, the cross section of plots clearly show that any decrease in water level from the natural flow regime to the base case regime, is very small in relation to the river volume. He pointed out, that at low and mean flow, the change would be barely discernible in the Whanganui River at Piriaka and downstream, and only discernible in the Whakapapa River in those flatter sections of the river, where velocities are lower (such as the site at the footbridge). At flood flows he said, the difference is so negligible that it would be difficult to tell whether the water was being diverted out of the river or not[118].

[164] Mr Bowler also responded to Mr Henare's evidence that related to the effect of erratic flows. His response was, that such variations in flow, could be attributable to the operations of the power station at Piriaka. However, this effect becomes less apparent with distance downstream, as the flow attenuates as shown by the Te Maire flow trace[119].

[165] The erratic flows that Mr Henare was concerned about, related to four piharau weirs located at Pipiriki and two others downstream, at Matahiwi and Upokopioto[120], which are all localities well downstream of Te Maire. It is therefore unlikely that such erratic flows could be attributed solely to the power station at Piriaka. Mr Bowler did not specifically address the effects of flow at the locations mentioned by Mr Henare.

[166] In response to Mr Taiaroa, who stressed the importance of the freshes, which he considered had been greatly reduced by the TPD, Mr Bowler said, that significant amount of flow variability has been introduced by tributary inflow particularly from Te Maire onwards[121]. However, we understand that Mr Taiaroa was not concerned with the frequency of flow variability of naturally occurring flows as such; his concern was that the magnitude of the flow variability (ie freshes, or flow increases at less than major floods) have been greatly reduced by the TPD.

[167] Dr Graeme Smart, an engineering consultant and a senior scientist at NIWA, was called by Genesis. He provided information on water depths and flows in the lower Whanganui River, based on "the most common daily flow" and "the most commonly diverted daily flow" of 14 cumecs. He said, that the most common daily flow at Te Maire of 30 cumecs corresponds to a water depth of around 700 mm and without the 14

[118] Bowler, rebuttal, paragraphs 3.7 and 3.8.
[119] Bowler, rebuttal, paragraph 3.14 and JB4.
[120] Henare, EiC, paragraph 7.
[121] Bowler, rebuttal, paragraph 3.19.

cumecs TPD diversion, the water depth would be 170 mm deeper. This is equivalent to a 19.5% reduction in depth at this point in the river. At Paetawa, the most common daily flow is 53 cumecs which corresponds to a water depth of around 1,100mm and without the 14 cumecs TPD diversion the water would be 140 mm deeper[122].

[168] We note the distinction between Mr Bowler's "modelled mean flow" and "the most common daily flow", presented by Dr Smart; ie 73.8 and 30 cumecs respectively at Te Maire and 211 and 53 cumecs respectively at Paetawa. We also note their differences in the reductions in water depth, consequent on the TPD diversions, ie 145 and 170 mm at Te Maire and 96 and 140 mm at Paetawa, for the mean flow and the most common daily flow respectively. We heard no evidence to explain the different terms for different flows and levels, which we attribute to different interpretations and/or extrapolations of the flow data.

[169] Mr Bowler's evidence on the reduction in water levels, based on modelled mean flow, and Dr Smart's evidence on the reduction in water levels (ie a 19.5% reduction in water level at Te Maire and 11% reduction in water level at Paetawa), at "the most common daily flow", clearly shows that changes in water levels result from the TPD diversions. The issue is – whether the reduction in flow has an adverse effect on Maori cultural issues.

[170] Mr Bowler and Dr Smart did not consider the change in water levels to be significant. As we have said, Mr Bowler told us, that any reduction in water level is very small in relation to the volume. At low and mean flows it is barely discernible. However, to those living on the river it was, and is, discernible. Mr Potaka was concerned at a drop in water level of 6 inches (approximately 150 mm) and the effect it had on the kakahi beds at Parikino and Paetawa - a level closely akin to Dr Smart's 140 mm reduction in level at Paetawa based on the "common daily flow".

[171] We find that the reduction in flow and water level, resulting from the diversion, at times when the water level at Te Maire is 29 cumecs or above, does have an effect as described by the Maori witnesses. We note that the "common daily flow" of 30 cumecs, as described by Dr Smart, equates with the minimum flow of 29 cumecs. We appreciate

[122] Dr Smart, rebuttal, paragraphs 34-36.

that once the flow falls below 29 cumecs at Te Maire the TPD, technically at least, has no effect on flows and levels.

[172] The evidence of Dr Smart and Mr Bowler does not satisfy us that it is reasonable to infer, from their data and modelled results, that the lowering of the water levels is insignificant. This is particularly so, when we have regard to the evidence of those who live and work on the river.

[173] The inferences drawn by Dr Smart and Mr Bowler were never empirically tested at the particular locations referred to in the customary evidence.

(ii) Water quality

[174] Mr Paul Kennedy, a Biologist with Kingett Mitchell, was also called by Genesis. He presented a detailed brief of evidence to the Court, covering the waterways of both the Western and Eastern Diversions. He gave a very full bioassessment of the waters of the Whanganui River, selecting as a reference point a site at Te Maire since most of the significant changes in water quality occur downstream of this point.

[175] The Whanganui River catchment covers approximately 7,000km^2 [123]. Lahars and volcanic activity can have a significant effect on the natural resources and water quality of the river and its tributaries,[124] though present day activities on the catchment are considered to have an even greater effect. Over 500 resource consents are currently active within the catchment. These include sewage and trade water discharges, domestic septic tanks, dairy shed, industrial and domestic waste water and landfill leachates. Land use is predominantly primary pastoral and indigenous forest.

[176] It is unnecessary for us to review fully each of the parameters described by Mr Kennedy relating to the quality of the water in the river, though some details are worth reiterating:

(a) pH

- Information is available from 914 measurements of pH over the years. There is no systemic lowering of pH, in the main stem of the Whanganui River, that

[123] Kennedy, EiC, paragraph 3.1.
[124] Kennedy, EiC, paragraph 3.11.

might arise from any geothermal or volcanic activity in the catchment[125]. However, some tributaries are subject to infrequent lahars and will have very acidic pH at times[126]. All sites in the main body of the Whanganui River are within the range of pH6 – 9, considered suitable for domestic water supply and maintaining aquatic life[127]. According to Mr Kennedy, there is no activity of the TPD that could adversely effect the pH of the Whanganui River system.[128]

(b) Temperature

- The temperature lethal to fresh water fish is between 28 & 39^{0}C, and this level is, at no time, reached in the catchment, except in the presence of volcanic activity[129]. Mr Kennedy told us that the abstraction of water by the TPD can have no effect on temperature.

(c) Dissolved Oxygen

- The TPD does not alter the load of material transported by the tributaries that the intakes are located on. Direct addition of organic matter from other sources is likely to have a more significant effect in their demand on the oxygen supply of the water[130]. Abstraction does, however, result in some of the ability of the river to "dilute" or "assimilate" any of the discharges or activities that could result in depressed dissolved oxygen concentration below Te Maire. This indirect influence is rapidly reduced as the river flow increases downstream.[131]

(d) Clarity

- Turbidity is an important factor that can adversely influence the wellbeing of fresh water fish. Feeding ability is a good measure of any fish's ability to survive and feeding rates for all fish are reduced by increased turbidity.[132]

[125] Kennedy, EiC, paragraph 7.8.
[126] Kennedy, EiC, paragraph 7.9.
[127] Kennedy, EiC, paragraph 7.11.
[128] Kennedy, EiC, paragraph 7.12.
[129] Kennedy, EiC, pragraph 7.17.
[130] Kennedy, EiC, paragraph 7.20.
[131] Kennedy, EiC, paragraphs 7.23 and 7.25.
[132] Kennedy, EiC, paragraph 7.34.

- Clarity is a criterion that has been regularly measured in the Whanganui River and its tributaries. The upper reaches have good clarity as a result of drainage from the volcanic catchments[133]. The key change occurs in the reach from Taumarunui to Ohura, over which stretch there is a marked reduction in clarity, due to the inflow from the Ongarue River, the Hikumutu and Te Maire streams and the Ohura River[134]. The Ongarue River alone brings over one hundred thousand tonnes of fine sediment to the Whanganui River each year. Clarity remains fairly constant through the Whanganui National Park and then declines further in the lower reaches and estuarine section of the river.[135]

- The gradual decline is brought about by differences in the geology within the catchment, and the land use changes[136]. Those catchments, dominated by a base of grey papa mudstone[137], produce significant amounts of fine material that degrade the water clarity. The concentration of suspended solids increases with the amount of bush cover converted to pastoral land use, and as this is predominantly in the more erodable mudstone catchments, it tends to reinforce the relationship between pastoral activity and water clarity.[138]

- Although the TPD diversion has no direct effects on turbidity, the lack of the "dilution factor" below the intakes results in a small change in clarity down to Te Maire. Below this point other factors take over as the more important causes of turbidity increase.[139]

(e) <u>Microbiology</u>

- Although birds and wild animals will contribute bacteria to waterways, grazing animals and also human waste water are the principal contributors to bacterial numbers measured in the Whanganui River and its tributaries.[140]

[133] Kennedy, EiC, paragraph 7.30.
[134] Kennedy, EiC, paragraph 7.29.
[135] Kennedy, EiC, paragraph 7.29.
[136] Kennedy, EiC, paragraph 7.33.
[137] Smart, rebuttal, paragraph 6.
[138] Kennedy, EiC, paragraph 7.33.
[139] Kennedy, EiC, paragraph 7.35.
[140] Kennedy, EiC, paragraph 7.36.

- The microbiological water quality in the freshwater reaches of the Whanganui River is generally poor. The presence of significant amounts of pastoral activity in the catchment, along with other discharges and activities, contribute to the poor water quality[141]. The abstraction of water results in some reduction in dilution or assimilative capacity in the upper sections of the river. This possible effect does not extend far down the river and by the time major inflows of the Ongarue and the Ohura are reached any influence would, in the opinion of Mr Kennedy, be undetectable.[142]

(f) Phosphorus

- The measured concentration of "dissolved reactive phosphorus" in the Whanganui River is a reflection of natural phosphorus inputs from the volcanic geology in the Ruapehu catchments, inputs from pastoral lands and discharges. Opposed to this input is the seasonal uptake by plants and algae[143]. The TPD actually removes dissolved reactive phosphorus from the Whanganui River and is, in no way, responsible for any increase in the main stem of the river[144]. The same argument holds true for the concentration of chlorides, sulphates and nitrogen in the river

(g) Nitrogen

- Concentrations are typically only elevated by the addition of wastewaters (including sewage) and agricultural runoff in the form of animal wastes and fertilisers[145]. This is, to a limited extent, balanced by the uptake from plants and other processes. As it progresses downstream the increasing contamination of the water results in a marked increase. This is exaggerated by the poor water clarity which tends to reduce uptake of dissolved inorganic nitrogen by plants and algae.[146]

[141] Kennedy, EiC, paragraph 7.41.
[142] Kennedy, EiC, paragraph 7.42.
[143] Kennedy, EiC, paragraph 7.44.
[144] Kennedy, EiC, paragraph 7.46.
[145] Kennedy, EiC, paragraph 7.47.
[146] Kennedy, EiC, paragraphs 7.52 and 7.53.

[177] The readings of all the above parameters, relating to water quality, were taken in 1989 when the diversion was not operating, and again when it was. There was no significant difference in the various readings, and in all cases the concentrations were low compared with other New Zealand waterways.

[178] In Summary Mr Kennedy had this to say about the quality of water in the Whanganui River:

> It is my opinion that the diversion of water from the Whanganui River does not result in adverse effects on the water quality of the Whanganui River When the abstraction is considered in the context of additions of substances elsewhere in the river system....the lower flows in the upper reaches do not result in adverse effects in the reaches below Te Maire.[147]

[179] We find, that the TPD, situated as it is, in the headwaters of the Whanganui and its tributaries, syphons off clear water with low levels of microbial contaminants. There is, at times other than low flow, a reduction in the dilution effect of tributary inflows such as the Ohura River, which are often characterised by high levels of suspended solids and elevated levels of microbial contaminants.

[180] This adverse effect on dilution is insignificant in comparison to the adverse effects of land use in the catchment on water quality. We agree with Dr Cowie when he said:

> These very minor effects of the TPD are insignificant however in comparison to the adverse effects of land use in the catchment on water quality in the Whanganui River. These effects are demonstrated particularly by Tables 10 (suspended solids) and 11 (turbidity) in the evidence of Mr Kennedy, and the photograph at Figure 13 of his evidence showing a mixture of the Whanganui and Ohura Rivers. Other tributaries such as the Hikumutu and Te Maire Streams also carry sediment loads, with adverse effects on the Whanganui River itself. This is further demonstrated in the attached Figure 4 from the report by Mr Phillips which shows trends in water quality down the catchment. Note particularly the decline in clarity that occurs below confluence with Ohura River.[148]

(iii) Morphological changes

[181] A number of the witnesses referred to changes in the river's morphology (the form of the river or the way in which the river shapes the land and is itself shaped by the

[147] Kennedy, EiC, paragraph 7.59.
[148] Dr Cowie, EiC, paragraph 33.

total sediment load it moves). They alleged that this is due, at least in part, to the diversion of the waters by the TPD.

[182] A number of morphological changes were referred to in the customary evidence, including:

(i) changes to the river's channels;[149] and erosion of the banks;[150]

(ii) increase in sediment;[151] and

(iii) reduction of shingle deposits.[152]

[183] Dr Smart addressed these changes to the river's morphology in both his evidence in chief and rebuttal evidence. He explained how the river is dynamic in nature. He said that while these changes are particularly dramatic, there are changes going on all the time as the river erodes the landscape and carries sediments to the sea[153]. He gave as an example a former loop in the river near Atene Pa, where over many years the river eroded the banks at the neck of the loop, so that the river took a short cut that cut off the loop.[154]

[184] Dr Smart explained, that changes, particularly significant changes, are caused by significant floods[155]. A long period with no moderate or large floods will result in a relatively stable channel, whereas frequent floods will increase sediment transport and channel instability.[156]

[185] We were told, that during the initial 22-year period following the 1971 commissioning of the Western Diversion, there were only two significant floods (ie greater than a 5-year return period). However, in the 7 years, since 1993, there have been at least 8 significant floods, including a 100-year flood in 1998. These are likely to have caused significant changes to the Whanganui River morphology during this period[157]. Dr Smart presented to us the mean annual flood statistics for the Whanganui River[158]. Those

[149] For example Ranginui, EiC, paragraph 12.
[150] Takarangi, EiC, paragraph 15.
[151] Metekingi, EiC, paragraph 4.
[152] Potaka, EiC, paragraph 14.
[153] Smart, rebuttal, paragraph 5.
[154] Smart, rebuttal, paragraph 4.
[155] A significant flood was defined as being a flood of greater than a 5-year return period – Smart, EiC, 6.9.
[156] Smart, EiC, paragraph 6.8.
[157] Smart, EiC, paragraphs 6.9 and 6.10.
[158] Smart, EiC, Figure 2.

statistics show, that the effect of the TPD has reduced the mean annual flood by 12% at the Whakapapa footbridge, by 8% at Piriaka, by 5% at Te Maire and by 2% at Paetawa. The 5-year return period flood statistics, as presented in Dr Smart's Figure 3, show that as the flood increases in magnitude, and thus has a greater effect on the river's morphology, the effect of the TPD diversions becomes proportionally smaller[159].

[186] Dr Smart addressed the specific matters raised by the customary witnesses and we consider each in turn.

(a) Change in the river channels and erosion of the banks

[187] Dr Smart reiterated what he said in his evidence in chief with regard to the effects of flooding on the form of the river. He elaborated on the river's geological base in some detail and the effect of water movement on the sediment derived from that base. He concluded that the changes to the river channels are an ongoing process, are natural and are not caused by the TPD diversion[160].

(b) Increase in sediment

[188] Dr Smart explained that the reason for a buildup in sediment is[161]:

- Firstly, due to the decreased frequency of eruptions, the supply of coarse sediment to the river has declined. Consequently, the river is eroding more sediment from its bed and banks as there are fewer gravel bars in the river to filter fine sediment out of the water;

- Secondly, large quantities of sediment are brought into the Whanganui from tributaries such as the Ongarue and Ohura. The historic conversion of areas of these catchments from bush to pasture, combined with the increase in flood activity over the last 10 years, has increased the delivery of fine sediments from these tributaries;

[159] Smart, EiC, paragraph 6.4.
[160] Smart, rebuttal, paragraphs 8-14.
[161] Smart, rebuttal, paragraphs 15-19.

- Thirdly, because the river is currently eroding sediment from its bed, the level of the bed is slowly getting lower with time. This is exacerbated by the flooding. Consequently, the flushing capacity of the river is reducing year by year.

- Fourthly, the water diverted by the TPD also carries around 40,000 tonnes of fine sediment per year, which is removed from the river system.

[189] Consequently, it was Dr Smart's opinion that the return of TPD water and associated sediment would have little dilution effect.[162]

(c) Shingle reduction

[190] Dr Smart told us that the TPD diversions are not causing a deficit of shingle for three reasons:[163]

- Firstly, while the Western Diversion diverts quantities of fine sediment, it has little influence on coarse sediment, such as shingle. If the intakes were reducing the supply of shingle to downstream reaches there would be a major buildup of shingle. This is not the case.

- Secondly, the lull in coarse volcanic material supplied by eruptions.

- Thirdly, large excavations of shingle for roads and railways that have taken place near Taumarunui, will take many years to ameliorate, as shingle does not move far in floods.

[191] We accept the uncontradicted evidence of Dr Smart. The river is constantly in a dynamic state and the major cause of dramatic morphological changes is floods. The TPD has little influence on flood events. Other factors such as land use changes, natural events such as eruptions and lahars, also have an influence. We conclude that the Western Diversion has very little effect on the morphology of the river and its tributaries.

[162] Smart, rebuttal, paragraph 18.
[163] Smart, rebuttal, paragraphs 23-25.

(iv) Effect on ecology – invertebrates and fish

[192] A number of witnesses called by Genesis discussed in some considerable detail the effect on the ecology of the waterways and the affect of the diversion on the invertebrate and fish life. These witnesses included Mr Ian Jowett, a scientist with NIWA, Dr Jacques Boubee, a fisheries scientist, also from NIWA, Dr Kevin Collier, whose evidence was taken as read, a scientist with NIWA specialising in aquatic ecology, Mr Paul Kennedy, and we also heard from Dr Brent Cowie, called by the Council.

Mr I G Jowett

[193] Mr Jowett told us that since 1978 he had researched the factors that influence the abundance and distribution of fish and invertebrates in New Zealand rivers. From the surveys carried out he has developed methods to assess the flow requirements and instream habitat required for instream biota. His evidence described how these factors were related to a variety of fish and invertebrates in rivers and streams of the TPD. Mr Jowett first explained the background to his work.

[194] Although there are a number of methods for assessing river flow requirements, those that are based on the habitat itself, are the most favoured. Of these the one in most common use throughout the world, and the one favoured by Mr Jowett, and other scientists who gave biological evidence, is the "Instream Flow Incremental Methodology" (IFIM). He believed it to be the most consistently applied and detailed method of flow assessment in instream habitat modelling.[164]

[195] This methodology is based on a number of empirical assumptions. Each species living in a river has evolved to live best under certain combinations of depth, velocity, and bed substrate, water temperature and water quality[165]. The IFIM process considers all physical environmental changes including: physical habitat; water temperature; water quality; and river morphology[166]. The IFIM model is a way of using these relationships to determine optimum flows for each species at each stage of its life cycle within the river. It is a means by which a range of biological information can be introduced into the flow assessment process, thus allowing alternative flow regimes to be evaluated in a

[164] Jowett, EiC, paragraphs 2.12-2.13.
[165] Jowett, EiC, paragraph 2.24.
[166] Jowett, EiC, paragraph 2.24.

quantitative way[167]. It does not predict the numbers or biomass of organisms that will actually be in a river at any given time[168].

[196] The results are said to often contradict the belief that "more flow is better" or that "the natural flow is the best". This is because the existing or natural flow may not be the most ideal for every different instream use. For example, the flow requirements for trout spawning, fry and juveniles are quite different from the flow required for adult trout, such that the habitat suitability will vary greatly in different parts of the same river.[169]

[197] Cross-sections of the different habitats are selected at random and surveys of the different habitat criteria are carried out. These are most commonly depth, velocity and substrate, but the analysis is strongly influenced by the particular habitat criteria that are used[170]. The cross-sections are then computer summated over a reach, to give a final assessment of that part of the river.

[198] Although in the aquatic environment, instream habitat refers to the physical habitat, the quality of the habitat is better determined from the abundance of animals in them[171]. Habitat criteria needs to consider all the life stages of these animals and, where appropriate, include the production of food for those life stages. When many fish species and life stages are present in a river, there are usually conflicting flow requirements.

[199] Information on habitat suitability is gathered over a long period of time, and from a wide range of rivers. In some there is, or has been, abstraction of water and in others no abstraction. The suitability of the habitats of native fish were defined by surveys of 35 rivers around the whole of the North and South Islands[172]. These surveys confirmed overseas studies that have demonstrated a direct relationship between the fish population and the useable habitat and available food.

[200] Genesis Power commissioned Mr Jowett to carry out instream habitat surveys of the river system of the Western Diversion using the IFIM technique, and with minimum flows compared with the rivers' natural flows. Flow requirements were assessed for

[167] Jowett, EiC, paragraph 2.23.
[168] Jowett, EiC, paragraph 2.25.
[169] Jowett, EiC, paragraph 2.26.
[170] Jowett, EiC, paragraphs 2.37 and 2.40.
[171] Jowett, EiC, paragraph 2.40.
[172] Transcript, pages 395-396.

those fish species known to be present in the rivers, (i.e. longfin eel, rainbow trout, brown trout and Crans bully).

[201] In the Whakapapa River, the reduction in flow from its natural flow to a minimum flow of 3 cumecs has, in the 1 kilometre reach below the intake, reduced the average width of the river, and its depth by 20% and its velocity by 50%. According to Mr Jowett, this has no apparent effect on the native fish and juvenile trout, but has reduced the suitable habitat for adult brown trout by 20% and for adult rainbow trout by 70%.

[202] In the Whanganui River main stem, Mangatepopo, Tawhitikuri, Taurewa and Okupata Streams, the instream habitat surveys were made in the reaches up to 0.2 kilometres below the intakes of the three shorter streams and 1 kilometre below the intakes of the two larger rivers[173]. The areas immediately below the intakes were selected as locations because the relative change in flow is greatest in these sections of the rivers. No water was diverted through the intakes when the surveys were first made, but after appropriate measurements were completed flow diversion was recommenced and further measurements taken to establish a relationship between flow and water levels[174]. At the time of these investigations the minimum flow requirements for the Whanganui River and the Mangatepopo Stream had not been decided upon.

[203] In those sections of all the streams between 0.2 and 1.0 kilometre below the intakes, water surface widths and average depths were about 50% of "natural" flow. Average water velocity in these sections was 70 – 90% lower than at "natural" flow and the total area of fish habitat was 40 – 60% of that available at normal summer flow without diversion[175]. The effect of diversion on the Tawhitikuri, Taurewa and Okupata Streams was relatively minor because they are short[176]. The effect of flow reductions on stream width was most visible in the Mangatepopo Stream, where it was apparent until its confluence with the Whanganui River. However, the effect on native fish and rainbow trout fingerlings extended no further downstream than the first major tributary, about 3 kilometre below both the Mangatepopo and the Whanganui intakes.[177]

[173] Jowett, EiC, paragraph 4.5.
[174] Jowett, EiC, paragraph 4.6
[175] Jowett, EiC, paragraph 4.19.
[176] Jowett, EiC, paragraph 4.21.
[177] Jowett, EiC, paragraph 4.20.

[204] However, from the modelling, the reduction in habitat for native fish and juvenile trout was not found to be as great as the reduction in width and in some cases flow diversion has increased the amount of available habitat. Mr Jowett told us that the reason for this was that the maximum amount of habitat for smaller fish is provided by flows that are intermediate between the "natural" flow and the "residual" flow.[178]

[205] In both the Whanganui River and the Mangatepopo Stream, the amount of habitat available initially increases sharply with flow and then reaches a maximum, optimum value. As flow increases above this, the amount of habitat either remains constant or decreases.

[206] On the basis of these surveys Mr Jowett concluded that a minimum flow of 0.5 cumecs in the Mangatepopo Stream and 0.3 cumecs in the Whanganui River, would increase the available habitat for benthic invertebrates and provide near optimum habitat for native fish and juvenile trout. Such flows were also recognised as optimum for blue duck habitat.[179]

[207] Although minimum flows are specified in the Whakapapa and Whanganui Rivers, periodic wetting and drying of the margins occurs when the flow contribution from uncontrolled tributaries varies. Compared to these variations, Mr Jowett told us, the short duration reductions in water level, allowed by the resource consent conditions, will be insignificant, and have no significant effect on benthic invertebrates.[180]

[208] Based on these conclusions, Mr Jowett could not agree with the statements of evidence, adduced by the Whanganui iwi and Ngati Rangi, that stated that the reduction in the number of fish in the rivers had been caused by the TPD. He claimed that *if the quality and quantity of suitable fish habitat reduces with a change in flow, then fish abundance is also expected to*[181]. However, flow changes and resulting water levels are not sufficiently large to effect fish habitat detrimentally. Indeed, he reiterated that *the flow reduction has no negative effect on native fish, and in fact produces a slight benefit*[182]. Changes in fish population that have occurred, he states, have occurred for

[178] Jowett, EiC, paragraph 4.8
[179] Jowett, EiC, paragraph 7.5.
[180] Jowett, EiC, paragraph 5.13.
[181] Jowett, EiC, paragraph 4.
[182] Jowett, EiC, paragraph 9.

reasons not related to the operation of the TPD diversions, apart from potentially immediately below some intakes.[183]

Dr J Boubee

[209] Dr Boubee described for us the benthic invertebrates and the indigenous and introduced fish present in the Western Diversion streams and the effect the TPD has had upon them.

Benthic Invertebrates

[210] Benthic invertebrates form a major food source for fish. Their kind and density is largely determined by the type of habitat available, and their diversity can provide a measure of a stream's health[184]. As water quality decreases certain taxa become less well represented in the community.[185]

[211] As a part of his work for Genesis, Dr Boubee collected benthic invertebrate samples from 13 sites, upstream and downstream of the major rivers and streams of the Western Diversion[186]. These samples were identified and counted, so that their abundance and community composition above and below the intakes could be compared statistically.[187]

Whakapapa River

[212] Being considerably larger than the other streams the Whakapapa River was assessed separately by Dr Boubee.[188]

[213] A comparison of invertebrates above and below the intake showed that densities were significantly higher below the intake than above[189]. A "score" (the MCI index) indicating the quality of the water, given to the different sites of collection, were all below what would be considered as pristine (MCI 120), but typical of large catchments

[183] Jowett, rebuttal, paragraph 3.
[184] Boubee, EiC, paragraphs 3.1 and 3.2.
[185] Boubee, EiC, paragraph 3.9.
[186] Boubee, EiC, paragraphs 3.5, 3.6 and 3.8.
[187] Boubee, EiC, paragraph 3.9
[188] Boubee, EiC, paragraph 3.13.
[189] Boubee, EiC, paragraph 3.15.

with a moderate degree of development[190]. Dr Boubee compared his findings with 5 other surveys done above and below the intake, and all done prior to the establishment of the 3 cumec minimum flow. Two showed no significant difference and three showed higher abundance above than below, and the one survey with the present minimum flow showed higher numbers below than above. There is, therefore, good evidence to suggest that the minimum flow regime will ensure that habitat will be retained below the intake at all times.[191]

[214] Further downstream sampling has been carried out at least 14 times since the 1930s. In comparing these results with his own downstream sampling, Dr Boubee told us that although the invertebrate communities have varied markedly over time, there is nothing to suggest that there have been any significant changes in the composition and abundance of benthic invertebrates as a result of the TPD. Those changes that have occurred have been the result of lahars, the amount of sand transported by the river, and the periodicity and intensity of floods.[192]

Whanganui River, Mangatepopo, Tawhitikuri, Taurewa and Okupata Streams

[215] Dr Boubee told us that, from a visual assessment of the habitats above and below each intake, it became apparent that the reaches above the intakes were often morphologically different from those below. This he thought to be due to the differences in gradient and the degree of channel confinement. These differences have a principal role in determining the habitat of the invertebrate community present. Although, during the survey, stream channels were often dry immediately below the intakes, invertebrate communities had established within 200 – 900m of the intakes.[193]

[216] Comparisons of the invertebrate communities above and below the intakes did not show any consistent pattern. In some cases, invertebrate density and diversity were higher upstream, where flows were unmodified, yet in others, density and diversity were higher below the intakes[194]. However, MCI scores at all sites (42 in number) were 119, or higher, indicating pristine conditions[195]. Similarly, the periphyton community downstream of the intakes was counted at 14 sites, and at 20 sites in streams unaffected

[190] Boubee, EiC, paragraph 3.18.
[191] Boubee, EiC, paragraph 3.19.
[192] Boubee, EiC, paragraph 3.20.
[193] Boubee, EiC, paragraphs 3.24 and 3.25.
[194] Boubee, EiC, paragraph 3.26.
[195] Boubee, EiC, paragraph 3.27.

by the diversion. According to Dr Boubee, all counts indicated that the streams were in good health.[196]

[217] As Mr Jowett noted in his evidence, diversion does reduce the total area of available invertebrate habitat, but Dr Boubee confidently expected this to improve markedly with the proposed minimum flows below the Mangatepopo and Whanganui intakes.

Fish Ecology

[218] At the same time as the invertebrate study was done, the same 42 sites were electrofished for at least a 30m length of stream or river. Nineteen months later an additional 20 sites above the intakes were also electrofished. Much of the information collected was used to determine how far inland species that migrate between freshwater and the sea, had penetrated. It also allowed Dr Boubee to determine whether the distribution and abundance of different fish species was influenced by the Western Diversion, either as a result of flow and habitat changes, or by creating barriers to fish passage.[197]

[219] Most of the indigenous fish species found in the Whanganui catchment are diatromous (sea going). The distribution of the various species is, therefore, related to distance from the sea and elevation above sea level. Swimming and "climbing" ability will also determine whether a species can penetrate high gradient streams and pass over barriers such as waterfalls, road culverts and weirs. Suitability of habitat, fishing pressure and response to environmental factors will also influence distribution and density.[198]

[220] Dr Boubee discussed each of these limiting factors in detail and drew our attention to the studies of Woods (1964) and the records of the NZ Freshwater Fish Database, and compared them to his own findings. Woods' summary of the fish distribution in 1962 still applies today, except for one major difference. Brown trout are now also found above the Whanganui intake, whereas Woods reported that only rainbow trout and long-finned eels were present above the intakes.[199]

[196] Boubee, EiC, paragraph 3.30.
[197] Boubee, EiC, paragraphs 4.6-4.9.
[198] Boubee, EiC, paragraph 4.25.
[199] Boubee, EiC, paragraph 5.25.

[221] The reduction in eel density above the intake has its origin in two main factors. Firstly, a lack of eel recruitment from downstream[200], a reflection of the decline in eel recruitment world wide. Because they are slow growing, long lived, and are caught before they can reproduce and spawn at sea, excessive harvesting has reduced stocks and recruitment. This is especially the situation in NZ. Secondly, without minimum flows below the structures eels could not reach that high. With the provision of a minimum flow below the Whanganui intake it is thought possible that a few eels, especially elvers (who are particularly good climbers), will be able to pass over the structure in the future.[201]

[222] Dr Boubee told us, that the similarity in the distribution of native fish, before and after the Western Diversion was constructed, would seem to show that the diversions have had no significant downstream effect on the distribution of native fish. Dr Boubee found no evidence that eel numbers have declined in the catchment between the TPD intakes and Taumarunui since the TPD was installed. He went on to say that because of the inland distances and altitude, density and diversity above Taumarunui is limited. The most common species between the Whakapapa inlet and Te Maire are eels, Crans bullies, and rainbow and brown trout.

[223] In his conclusions Dr Boubee summarised his thoughts about fish distribution by saying:

> In respect of fish, the elevation of the TPD intakes and their distance from the coast, mean that there would naturally be very limited native fish populations in their vicinity. Natural barriers a short distance upstream of most intakes is a further factor limiting fish populations above the intakes. There are some localised and minor effects on fish populations in the vicinity of the intakes, however, there is no evidence to suggest that the TPD has had any effect on the distribution or abundance of fish in the river as a whole. Rather, changing land use, especially the loss of native forest cover, and over-fishing are both factors that have had serious implications for native fish in the Whanganui River and throughout New Zealand.[202]

[224] In the conclusions to his rebuttal evidence he reiterates these same beliefs that changing land use and over-fishing is the main cause of the poor catch experienced by the appellants. He agrees with the conclusion of Mr Jowett that:

[200] Boubee, EiC, paragraph 5.28.
[201] Boubee, EiC, paragraph 5.29.
[202] Boubee, EiC, paragraph 6.3.

> ....apart from areas immediately below some intakes, the TPD has actually increased, albeit slightly, the habitat available for native fish.[203]

[225] In response to questions from the Court, Dr Boubee re-emphasised that above 600 metres there are going to be very few fish anyway and said:

> You know, really it is the best place they could have put the intake as far as impact on fish.[204]

Fish abundance and land use

[226] Although there have been no specific studies carried out on the distribution of fish in the Whanganui River catchment in relation to land use, it is recognised that a number of factors control distribution and abundance of fish species in fresh water environs. These were listed by Dr Boubee as:

- Distance to migrate from the sea and the ability to penetrate inland over natural barriers. This favours species such as koaro and long-finned eels, with good climbing ability. Generally, diversity and abundance are highest at low elevations, near stream and river mouths, and lowest at higher elevations, where fish species that do not migrate are more common.

- Land use is also a factor though the relationship between species distribution and land use is a complex one. However, there is good evidence to show that the retention of riparian strips will protect native fish communities.

- Forestry induced changes include altering the stream flows, alteration of the channels, increased sediment, altered light, altered nutrient input and changing stream temperature. Forestry plantings near waterways will also impact the hydrogeologic balance due to the effect forestry trees will have on rainfall interception, water uptake and evapo-transpiration.

- Pastoral land, on the other hand, is likely to result in increased nutrient and light inputs which increase productivity of the streams. However, such land use has the potential to markedly increase the sediment load (from land clearance and pastoral activity) with a resultant negative input on native fish communities.

- Lahars and volcanic activity can have a very significant effect on fish population. Although many fish are quite tolerant of high concentrations of suspended particulates, the combination of a low pH and suspended solids are intolerable to most fish.

[203] Boubee, rebuttal, paragraph 8.1.
[204] Transcript, page 420.

[227] Table 2, attached to the evidence of Mr Kennedy, showed a comparison of land uses in the 1970s and the 1990s in the total Whanganui River catchment. Significant among the parameters tabled were:

(i) A 3% increase in planted forest (representing an area of 216 square kilometres,

(ii) The loss of 5% of indigenous forest (239 square kilometres);

(ii) And the loss of 9% of scrub land (635 square kilometres).

Each, of these are, in their own way, responsible for a significant alteration in overland flow to the rivers and streams of the catchment.

[228] As part of his summary[205] Mr Kennedy said:

> Overall, it is evident that when the abstraction of water for the TPD, via the Western Diversion, is examined in relation to the effect that the abstraction has on the water quality of the lower river, at and below Te Maire, that the abstraction does not have any significant effects on key aspects of water quality. This lack of change arises because the discharge from rivers such as the Whakapapa do not differ significantly from the normal quality in the river such that the resultant decrease in flow does not significantly change water quality.

Dr B Cowie – an overview of the Western Diversion

[229] Dr Cowie appeared as a witness for the Manawatu-Wanganui Regional Council, by whom he had previously been employed as Group Manager, Resources, and who he represented on the Consultative Core Management Group relating to the TPD.

[230] With regard to the water quality of the Whanganui River he accepted the evidence of Mr Kennedy with only very minor differences, regarding colour and clarity in the Whanganui River. Overall, he agreed that these differences are insignificant in comparison to the adverse effects of land use in the Whanganui River catchment. In cross-examination[206] he told the Court that what was originally native forest is now 30-39% in pastoral farm, much of which is in the upper reaches of the catchment on land that is highly erodable. As a result there is an enormous amount of sediment and point source

[205] Kennedy, EiC, paragraph 10.7.
[206] Transcript, page 726.

contamination in, and still entering, a lot of the rivers and streams. As a result, water quality is visibly highly degraded in the lower reaches of the Whanganui River.[207]

Fisheries

[231] In adopting the evidence of Dr Boubee, Dr Cowie stated that in his view no more comprehensive information was available than that summarised and presented to the Court, by Dr Boubee.

[232] Dr Cowie also pointed out, that most of the streams diverted for the TPD, have natural impassable barriers near the diversion structures. These include the Mangatepopo Gorge, immediately above the TPD diversion, and large waterfalls in the Whakapapa stream , which is one of the major tributaries of the Whakapapa River.[208]

[233] He concluded that:

> ....(as Dr Boubee concluded) ....The construction of the TPD has had no adverse effects on the distribution of native fish and trout in the upper Whanganui catchment.....As the formation of Lakes Te Whaiau and Otamangakau has created highly regarded trout fisheries, in my view the overall effects of the Western Diversion on trout distribution and abundance have been positive.

Invertebrate Communities

[234] Dr Cowie adopted the evidence of Dr Boubee in respect of the invertebrate communities in the Western Diversion. He makes only the point that macroinvertebrate communities in NZ are known to adapt to widely fluctuating flow regimes, probably because they can move laterally or downwards into the bed during high and low flows.

[235] In cross-examination Dr Cowie said:

> I think you can say that the TPD has had little effect or minimal effect on water quality, virtually no effect on invertebrate communities, and a very small effect on trout fisheries but not native fisheries. I believe you can separate those out, and then you look at what is causing the decline in other things in the catchment, and I think there are two things there. First of all, water quality has definitely declined, and that is largely because of the effects of land use. Secondly, I think there is no doubt that the fisheries, particularly the eel fishery in the catchment, has declined, but that is due to world-wide, and certainly New Zealand-wide declines in eel population.....and I think throughout the country eel populations have

[207] Transcript, page 726.
[208] Cowie, EiC, paragraph 40.

> declined dramatically in the last 20, 30, 40 years, predominantly due to overfishing.[209]

Decline of native fish

[236] The customary evidence stressed the decline in the native fish populations following the diversion of the Whanganui waters. This was addressed by the expert witnesses called by Genesis in their rebuttal.

[237] The situation regarding eels we have discussed in relation to Dr Boubee's evidence. In a document appended to Mr Taiaroa's evidence, is a reference to a Fisheries Environmental report[210], which states:

> In the Whanganui area, approximately five full-time and 25 part-time commercial eelers are known to base their operations in the Whanganui River.....Up to 400 fyke nets may be used in the river at any one time.

[238] Under such high fishing pressure, Dr Boubee and Dr Cowie expressed no surprise, that traditional fishers now find it hard to catch sufficient eels to meet their needs.

[239] Dr Boubee discussed the problems regarding lamprey, smelt and whitebait. He believes that the main cause of their decline is habitat degradation[211]. With regard to lamprey he told us that there is still a great deal to learn about them. There is, for example, very little information about the effect of land-use change and other environmental pressure on lamprey populations. With a relatively long life-cycle, the species is likely to be vulnerable to a variety of factors that may influence its population and survival. Without a better understanding of their life habits, he said, it is impossible to determine what affects them and if anything can be done to enhance the population.[212]

[240] Dr Boubee told us, that smelt and whitebait have markedly declined throughout the country[213]. Mr Potaka told us that it was his opinion that this was due to the TPD preventing shingle from being brought down the river. This was not specifically answered by any scientist, in rebuttal, but Dr Boubee gave it as his opinion that habitat

[209] Transcript, page 727.
[210] No. 24, September 1982.
[211] Boubee, EiC, paragraph 3.1.
[212] Boubee, EiC, paragraph 5.3.
[213] Boubee, EiC, paragraph 6.2.

destruction and, in particular, excessive pastoral drainage and the removal of bank-side vegetation along waterways, coupled with high fishing pressure, are the main causes of the decline.[214]

[241] Mr Kennedy, in rebuttal, told us that the kakahi or fresh water mussel is still to be found, though in a very seaward location. Although low in number, when surveyed in 1989, they were considered to be of good size and health. The surveyor[215] considered that in the middle reaches of the river the banks are too steep and flows too fast for freshwater mussels[216]. This is because sediments such as sand are the preferred habitat and in many sections of the river the flow is sufficiently fast as to prevent a build up of fine sediment[217]. He told us, that there is no scientific evidence to suggest that the flow changes arising from the abstraction of water by the TPD has played a part in the decline.[218]

[242] Mr Potaka notes that

> Koura (freshwater crayfish) used to be in the Whanganui River and its side creeks and we would take them as food from there. The creeks are dry, the riverbed low and the food is no longer available.[219]

[243] Mr Kennedy drew our attention to a series of surveys carried out from 1980 to 2003 showing that koura are widespread throughout the Whanganui River basin[220]. Their abundance can easily be under-estimated as they are night active[221]. He said there is little evidence that land-use changes affect koura abundance and distribution, though they are sensitive to pesticides and grow faster (with shorter life cycles) in the typically warmer waters of pasture land.

[244] Indigenous fish in the Whanganui catchment have supported traditional and recreational fisheries for generations. Traditional Maori knowledge recognised many species and several were highly valued as a food resource. This was especially true of eels but also lamprey, whitebait and others. Trout were introduced but have supported a valued recreational fishery. The New Zealand Freshwater Fish Database contained

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[214] Boubee, paragraph 6.2.
[215] Forsyth (1989).
[216] Kennedy, rebuttal, paragraph 3.10.
[217] Kennedy, rebuttal, paragraph 3.12.
[218] Kennedy, rebuttal, paragraph 3.13.
[219] Potaka, EiC, paragraph 17.
[220] Kennedy, rebuttal, paragraph 3.21.
[221] Kennedy, rebuttal, paragraph 3.19.

records of fish from 310 sites in the Whanganui catchment. Of all the fish caught in 1999; 46% were eels, 18% were bully of one type or another; koaro, kokopu, smelt and Torrentfish were each 1%.[222]

[245] Between 1960 and 1962 Woods investigated the distribution and density of fish in the upper Whanganui catchment. Above the planned diversion sites he found only small rainbow trout and longfinned eels. Below the sites he recorded brown and rainbow trout, long and shortfinned eels and Crans bullies. Upland bullies, smelt and torrentfish were found at Taumarunui. No koaro were found in the Whanganui River above Taumarunui.[223]

[246] This survey was repeated in 1999 and 2002 by Dr Boubee, together with an update in July 2003 of the NZ Freshwater Fish Database, and a comparison of these figures with those of Woods indicates that very little change has occurred. In the 1999 survey the average number of fish caught per $100m^2$ was 7.7 of which 7.0 were native fish and 0.7 were trout. The density compared well with other NZ rivers 150m or more above sea level.[224]

[247] The similarity of the surveys relating to the distributions of native fish, before and after the Western Diversion was constructed, led Dr Boubee and the other experts to conclude, that the diversions have had no significant downstream effect on the distribution of native fish.[225]

[248] There was no suggestion by the fishery experts that there has not been a marked reduction in fish numbers in the main stem of the river. However, they went to some lengths to explain that the habitat degradation causing this was not related to the structures of the TPD, but was instead due to overfishing, lack of juvenile recruitment, pastoral development, loss of forest, point source contamination and the enormous quantity of silt being introduced into the body of the river by its larger tributaries.[226]

[249] With the exception, that we find there has been a detrimental effect on the fisheries habitat of native fish and the traditional fishing methods by the reduced flow of the river we accept the evidence of the expert witnesses.

[222] Boubee, EiC, Table 2 (appended to evidence).
[223] Boubee, EiC, paragraph 5.11.
[224] Boubee, EiC, paragraph 5.14.
[225] Boubee, EiC, paragraph 5.26.
[226] Boubee, EiC, paragraph 6.3.

The Eastern Diversion – the Whangaehu Catchment

[250] As mentioned, the Eastern Diversion truncates the headwaters of 22 streams, all tributaries of the Whangaehu River. The Whangaehu itself is not diverted, because of its natural acidity,[227] caused by it being partially fed by the acidic Mt Ruapehu crater lake.

[251] A number of the Ngati Rangi iwi gave evidence about their cultural practices. We have discussed the spiritual dimensions of that evidence. They also gave evidence relating to the effects of the river on the manner in which they carry out their cultural practices, and in particular the effect on native fish populations and the quality of the water of the Whangaehu River.

Customary evidence – and Dr Shane Wright

[252] Mr Colin Richards told us, that there used to be giant eels in the streams of the Whangaehu and how their kuia used to talk about them.[228] He told us how fishing still plays an important role in their hospitality and how, still today, his tuakana goes out fishing for tangi or hui. He referred to...*tuna, inanga, ika – all our local delicacies*... .[229]

[253] Mr Richards made reference to the sulphur content of the Whangaehu and how the science of the western world says...*there can be no life essence*... . However, he said:

> Our tuna would travel up Whangaehu into her streams, and at certain times our people would catch those tuna. And also in the Tokiahuru.[230]

[254] Ms Taute told us, that fishing provided an important source of kai in the region.[231] She said, that in the Karioi region, it never took long to catch enough fish, crayfish or eel to fill a sack. However, it is much more difficult now to catch enough for a meal as the fish and eel are less numerous and the crayfish smaller[232]. Mr Edmonds told us, that in Karioi, the streams that run into the Whangaehu were teeming with eels and how the migrating eels, known as tuna heke, migrated out to sea and back again through the

[227] Kennedy, EiC, paragraph 13.1.
[228] Richards, EiC, paragraph 2.15.
[229] Richards, EiC, paragraph 2.18.
[230] Richards, EiC, paragraph 2.19.
[231] Taute, EiC, paragraph 2.5.
[232] Taute, EiC, paragraphs 2.5-2.7.

Whangaehu. He described how they used a particular method to catch the migrating eels in the Whangaehu. He also stated that there were plenty of crayfish in the creeks[233].

[255] Mr Wood referred to the tributaries of the Whangaehu being an important food basket for their people[234]. He interpolated his written evidence and named the Tokiahuru and the Waiharakiki Rivers as being affected[235].

[256] The customary evidence collectively emphasised the decline in native fish since the commissioning of the Eastern Diversion. We have no reason to doubt the sincerity and accuracy of that evidence. Unfortunately, the areas where the fish were caught were not delineated with any scientific exactness – but we can understand the difficulty of non-expert witnesses in this regard. The witnesses were not cross-examined on this part of their evidence.

[257] Dr Shane Wright, an ecologist/biogeographer and uri of Ngati Rangi, lent some support to the customary evidence. It was Dr Wright's opinion, that the eel is highly tolerant of acidic water and the removal of the ameliorating flow of the Waihianoa and other tributaries, might well be critical in determining when a "window of opportunity " may arise, when upstream migration would be open.[236]

[258] Dr Wright also emphasised the cumulative impacts of approximately 27 kilometres of overall dewatered stream length. He considered that cumulative impacts indicate a significant adverse effect on the intrinsic stream values of the Whangaehu tributaries[237]. These cumulative impacts include:

(i) changing some of the tributaries from a "stream-habitat" to a "wetland habitat";[238]

(ii) sediment impacts as indicated by the need to use artificial means to move "gravel buildup";[239]

(iii) the likely biotic impacts of the Whangaehu and its tributaries; and[240]

[233] Edmonds, EiC, paragraphs 2.2-2.8.
[234] Wood, EiC, paragraph 4.10.
[235] Transcript, pages 815 and 816.
[236] Transcript, pages 937-943.
[237] Wright, EiC, paragraph 3.2.
[238] Dr Wright referred to the findings of Kennedy, EiC, paragraph 19.2.
[239] Wright, EiC, paragraph 3.5.
[240] Wright, EiC, paragraph 3.4.

(iv) the likely effect on invertebrate populations and fish populations.[241]

[259] In addition to the effects on fishing, we also heard how the change in the Whangaehu River has affected its traditional healing capacity. Ms Wood told us of the very close healing relationship with the Whangaehu and how it is different now ... *the water is no longer as it naturally was.*[242]

[260] As we comprehend the customary evidence of Ngati Rangi, relating to matters other than spiritual, their main concern is the effect of the diversion on Mahinga Kai and the healing properties of the Whangaehu. There was a considerable amount of evidence about the morphology of the Whangaehu and its tributaries – while this is important with respect to the physical effects on the environment, it is not necessary for us to discuss that evidence further as it is not relevant to the concerns raised by Ngati Rangi. Their concerns in this regard were, the reduction in flow, the water quality and their combined effect on the river ecology, particularly the fish populations.

Genesis evidence

[261] Again, as for the Western Diversion, Genesis called a number of expert witnesses to address the factors identified by Ngati Rangi in their customary evidence. Their evidence was also peer reviewed by Dr Cowie.

[262] We discuss below the various factors in the same order as we discussed. Mr Kennedy used a three group classification[243] for the 22 streams affected by the Eastern Diversion as follows:

(i) Group 1: The Wahianoa River (Stream 18) which arises at an altitude of more than 2,000 metres and is partly glacier fed.

(ii) Group 2: Streams 5, 10 and 21 which originate from an altitude of approximately 1,800 – 2,000 metres but are not glacier fed (they are spring and runoff fed).

(iii) Group 3: Streams 1–4, 6–9, 11-17, 19 and 22 which arise at or below 1,000 metres and are predominantly spring-fed.

[241] Wright, EiC, paragraphs 3.2-3.8.
[242] Wood, EiC, paragraph 2.4.
[243] As classified by Hawes and Boubee (1993); Kennedy, EiC, paragraph 13.4.

(i) Water quality – the Whangaehu tributaries

[263] According to Mr Kennedy, the limiting factor in water quality is a decrease in pH below 5.0[244]. Although not a specific deterrent, ANZECC Guidelines (2000) state that soil and animal health will not generally be effected by water with a pH in the range of 4 – 9. Similarly, it is recommended that water for recreational use should not be below 5 or above 9. The effect of the crater lake discharge provides a degree of uncertainty to the water quality of the Whangaehu river, but this was present prior to the commissioning of the aqueduct.[245]

[264] The evidence of Mr Kennedy on water quality was taken from a number of surveys, particularly a 1998 survey done by Kingett-Mitchell. In this study, sampling sites were located to enable a comprehensive description of habitat conditions, macroinvertebrate communities, and the fishery in representative streams. Eight of the twenty-two tributaries, from which water is abstracted, were selected for the survey to assess the effects of water interception by the Wahianoa Aqueduct. The findings are as follows:

(a) pH

- The pH showed a wide variation ranging from 2.9 in the Wahianoa, and 8.0 in one of the Group 3 streams. The Wahianoa being the only stream outside the pH range of 6.5 – 9 being the range recommended for protection of aquatic ecosystems[246]. There were no significant differences in the upstream or downstream values for any individual stream.

(b) Temperature

- Allowing for temperature increases with decreased flow, and different catchment characteristics, there was no significant difference in water temperature for sites above or below the intakes.[247]

[244] Kennedy, EiC, paragraph 15.37.
[245] Kennedy, EiC, paragraphs 15.39-15.42.
[246] Kennedy, EiC, paragraph 15.4.
[247] Kennedy, EiC, paragraph 15.6.

(c) **Dissolved Oxygen**

- Only minor variations were noted, differences considered insignificant to healthy invertebrate and fish life. No significant differences were detected above or below the intakes.[248]

(d) **Conductivity**

- Conductivity is a measure of the concentration of the ionic constituents present in water. According to Mr Kennedy, the slight differences in conductivity here were due to the fact that the downstream sites were influenced by waters from other converging streams, or ground water seeps of different quality.[249]

(e) **Nutrients**

- Nitrates and dissolved reactive Phosphorus concentrations were at or below the median values for NZ rivers[250]. Slight differences observed in the concentration of nutrients in individual streams were, in Mr Kennedy's opinion, related to differences in immediate catchment type affecting surface runoff of nutrients, the presence of stock, sources of water and the uptake of nutrients by plants in the streams.

[265] With respect to the waters of the tributaries of the Eastern Diversion, Mr Kennedy said that the only comparable historic data (no date for the survey) is for 4 streams to the west of the aqueduct. A comparison with the analysis of those streams and the analyses of the streams affected by the aqueduct showed no significant difference for the parameters measured. Only very small differences were observed, and those relate to flow, catchment differences, the presence of stock and the source of the water, either spring or surface run off.[251]

[266] We accept the uncontroverted scientific evidence adduced by Mr Kennedy, and conclude that there is no significant difference in water quality of the Whangaehu tributaries, arising out of the diverted waters of the aqueduct.

[248] Kennedy, EiC, paragraph 15.7.
[249] Kennedy, EiC, paragraphs 15.8 and 15.9.
[250] Kennedy, EiC, paragraph 15.10.
[251] Kennedy, EiC, paragraph 15.44.

(ii) Water quality – Whangaehu River

[267] We were told by Dr Cowie[252], that the diversion of an average of 3.4 cumecs from the upper Whangaehu catchment to the Waihinoa Aqueduct, reduces flows in the Whangaehu River by about 36% at Tangiwai at State Highway 4, and by 20%, from a mean of 16.5 cumecs to 13.2 cumecs at the Karioi Recording Station, about 15 kilometres downstream of State Highway 4.

[268] Dr Cowie referred to a report by Smith and Fowles (1987), which predicted that the diversion of high quality headwater streams would result in the average pH of the Whangaehu River being lowered by about 0.4 pH units; that is, the river would on average be slightly more acidic. This was confirmed by a further report done by Phillips (1995), where the recorded pH had declined by 0.43 pH units as a result of the Wahianoa diversion.

[269] Dr Cowie told us, that the Council holds 725 records of water quality samples collected from the Whangaehu River. All but about 20 of these include measurements of pH. Pre-diversion, the lowest pH recorded by the former Rangitikei-Wanganui Catchment Board, at Tangiwai, was 1.7. Post-diversion, the pH of the river has been recorded as being as low as 1.8 at Tangiwai and 1.9 at the Whangaehu Valley Road bridge, which is about another 30 kilometres downstream. He opined, that the pH was probably much lower than this during the lahar events in 1995 and 1996. He also emphasised, that during times when the river is highly acidic, it also has very high conductivity, and this buffers any significant changes in pH.

[270] Dr Cowie concluded, that this occasionally high natural acidity is undoubtedly the major factor causing the river to be so devoid of life. In the context of such a low pH range occurring naturally, he considered any decrease in the average pH as a result of the diversion to be quite insignificant. We accept the evidence of Dr Cowie.

[252] Cowie, EiC, paragraphs 54-57.

(iii) Effect on ecology – invertebrates and fish – the Whangaehu tributaries

[271] Streams of the aqueduct drain predominantly barren alpine soils, covered in snow for part of the year. The aqueduct itself is located within the exotic Karioi forest[253]. The mean annual flow from the aqueduct is 3.4 cumecs, and it can carry a maximum of 9 cumecs in flood conditions.[254]

[272] Mr Kennedy said, that the surface flow patterns do not necessarily reflect the size of the individual streams or their catchment. Ground water recharge and discharge has a strong influence on the flow pattern of streams as they get close to the aqueduct.[255] Approximately 43% of the stream catchments are within the Karioi forest and the absorbtive forest carpet could account for a 25% reduction in water flow from the forest catchment, representing an 11% reduction over the entire catchment.

[273] The intake structures of all Group 2 and 3 streams are designed to divert 1.5 times their mean annual flow, into the aqueduct. The Wahianoa has twice its mean annual flow diverted.[256]. There are no residual flow requirements at any of the intakes, any excess flow continues down the natural watercourse. Three Group 3 streams are now permanently dry (1, 7, 20) above and immediately below the intakes.[257] There is a small amount of ground spring water to be found in their natural beds 0.5km below the intakes.

Habitat

[274] Mr Kennedy told us, that the habitat characteristics are related to the altitude at which the stream originates. The Wahianoa River is the largest of the waterways from which the aqueduct extracts water. The habitat of the river is influenced by large floods and the materials transported by the river. The riverbed substrate is dominated by boulder and large cobble sized material.[258] Habitat conditions below the aqueduct remain similar to those above because of the high water volumes continuing downstream.[259]

[253] Kennedy, EiC, paragraph 12.1.
[254] Kennedy, EiC, paragraph 13.5.
[255] Kennedy, EiC, paragraph 13.3.
[256] Kennedy, EiC, paragraph 13.5.
[257] Kennedy, EiC, paragraph 13.10.
[258] Kennedy, EiC, paragraph 14.1 and 14.2.
[259] Kennedy, EiC, paragraph 14.10.

[275] The upstream habitat of the Group 2 and 3 streams is, for the most part, very similar, with a preponderance of large and small cobbles and gravel. The Group 2 and several of the Group 3 streams have a preponderance of sand, such that the habitat becomes somewhat transitory as the substrate is easily mobilised with even moderate increases of flow.

[276] The Group 3 streams are generally small and spring fed. They drain catchments of tussocky grassland and plantation forest. Their instream habitat conditions are strongly influenced by riparian vegetation. Where forestry practices have removed riparian vegetation there has also been an alteration in the inputs of organic matter and light.[260]

[277] In his "Overall Conclusions" on habitat and hydrology, Mr Kennedy summarised by saying:

> The extent of habitat loss as a result of dewatering downstream of the Wahianoa Aqueduct, is reduced as a result of the high number of spring fed tributaries entering the streams downstream of the intakes. This is more pronounced in streams towards the eastern end of the aqueduct.
>
> The habitat conditions present upstream and downstream of the Aqueduct strongly reflect the land use within the catchment and riparian zone quality. Examination of the environments adjacent to the intakes shows that some local changes to wetland type habitat may have occurred immediately above and below the intakes, as a result of the presence of the intakes. This is in my opinion not considered to be significant.[261]

Macro - Invertebrates

(a) Wahianoa River

[278] Mr Kennedy discussed a number of empirically based reports carried out in each of the streams by Kingett Mitchell in 1999 and concluded:

- No macro-invertebrates were found in the Wahianoa River, at sites either above or below the aqueduct. Previous studies in the 1960s and 1970s did identify macro-invertebrates in this river and in numbers similar to nearby streams that were not intercepted by the aqueduct. Following the 1996

[260] Kennedy, EiC, paragraphs 14.7 and 14.8.
[261] Kennedy, EiC, paragraphs 19.1 and 19.2.

eruptions on Mt Ruapehu, the Wahianoa River was reported to be "lifeless", and this is the situation that appears to have persisted.[262]

(b) Group 2 Streams

- Overall, the examination of the macro-invertebrate samples collected (the quantity and variety of macro-invertebrates), above and below the aqueduct showed that there were no taxa absent downstream of the aqueduct that would indicate that the aqueduct was affecting the composition of the invertebrate communities present.[263]

(c) Group 3 Streams

- In those sections of streams below the aqueduct where there is sufficient flow to support macro-invertebrates, they are generally of similar or better quality to those located above the intakes. The downstream flow in some streams appears to be effected much more than in others. The amount of water necessary to re-establish macro-invertebrates is really quite small and, with one or two notable exceptions, there are only relatively short sections of stream that are not capable of supporting a macro-invertebrate community.[264]

[279] According to Mr Kennedy, there is no evidence from any of the surveys done, that the aqueduct is responsible for any deleterious effects on any macro-invertebrate life forms, provided that a small flow remains in the stream bed below the intakes. With one or two exceptions this remains the case. The analyses of the communities shows evidence that the macro-invertebrates in the downstream sites are in a healthier state than in the upstream sites. A range of factors, other than the TPD, have an important effect on the communities present. Of specific importance in the area concerned are forests and forest related activities.

Fish in the Wahianoa aqueduct streams and rivers

[280] Mr Kennedy told us, that a total of two species of fish were found at sites in the streams intercepted by the Wahianoa Aqueduct. These were rainbow trout and brown trout, no native fish were found at any site. Rainbow trout were the most commonly

[262] Kennedy, EiC, paragraphs 17.2 and 17.3.
[263] Kennedy, EiC, paragraph 17.7.
[264] Kennedy, EiC, paragraph 17..11 and 17.12.

found, both above and below the intakes, brown trout were only found at one downstream site[265], so there is no potential for them to enter the aqueduct from upstream.

[281] The comparison of the current data with historical data indicates that the trout densities are dependent on the timing of spawning, and whether there is sufficient flow in the streams to support them.[266]

[282] Mr Kennedy told us, that the Wahianoa Aqueduct reduces downstream flows and, therefore, has an influence on the amount of habitat available to fish. A number of streams were found to be dry in surveys conducted prior to the construction of the aqueduct, which would indicate that these streams may have had little potential of providing fish habitat at all.[267]

[283] He told us, that the aqueduct would also provide a barrier to the upstream migration of fish in any of the streams that would be capable of supporting their passage. However, several of the larger streams, by virtue of their origin, have extreme water chemistry and are uninhabitable. The upper Whangaehu River, for example, into which the streams intercepted by the Wahianoa Aqueduct drain, has poor water quality, and at certain times of the year would prevent fish migrating further upstream. Other physical barriers, unrelated to the aqueduct such as perched culverts, could also be preventing fish migration.[268]

[284] In summarising his evidence in regard to invertebrates and fish Mr Kennedy said[269]:

> Overall, it is acknowledged that the Aqueduct intercepts a large amount of water from the streams, reducing the amount of available downstream habitat. However, in light of the fact that the stream flows are highly variable and the range of fish species present prior to construction was limited; and the potential effects of other activities, such as forestry, on habitat quality, it is my opinion that the interception of water has had a very limited effect on the fish populations of the Aqueduct streams.

[285] He went on to say:

> There appears to be no differences in the macroinvertebrate communities indices and the water quality between sites above and below the intakes. In addition,

[265] Kennedy, EiC, paragraph 18.20.
[266] Kennedy, EiC, paragraph 18.21.
[267] Kennedy, EiC, paragraph 18.17.
[268] Kennedy, EiC, paragraph 18.18.
[269] Kennedy, EiC, paragraph 18.22.

> there appears to have been little change in the distribution of fish and the numbers of fish species present pre and post Aqueduct construction. Based on these observations it appears that the effects of the interception of water from streams by the aqueduct is limited.
>
> The only time when it is anticipated that the quality of water downstream of the intakes could change would be the "first flush" when water spills over the intake following periods of heavy rain, when materials such as sediment and organic matter in the channel would be entrained and transported downstream.[270] Information from all the streams (except the Wahianoa River) indicates that the water quality is such that it would not preclude its use for most common uses, such as potable water, stock water and recreation.

[286] On the basis of these assessments, Mr Kennedy considers that little, if any, mitigation is required. However, we note, that in his Kingett Mitchell (1999) report on the "Environmental Effects of the Wahianoa Aqueduct" he said:[271]

> Should mitigation be required, mitigation measures could include increasing the take of one of the larger rivers, such as the Wahianoa River, allowing either a reduction in take at some of the smaller streams to allow water to be spilled at less than 1.5 x mean annual flow, or the closure of a number of smaller intakes. A specific evaluation of environmental benefits would be required to identify what increases in flow would be required or intakes closed.

Dr Wright's criticism of Mr Kennedy's evidence

[287] Much of Dr Wright's evidence was, very largely, a critique of the evidence given by Mr Kennedy. He said in cross-examination that he had also read the evidence of Mr Bowler, but these were the only 2 statements of evidence he can remember being sent to him to review[272]. Although he admitted to not having read Dr Cowie's larger report in full, he believed it to be an *independent report...not couched in any way to obfuscate or to conceal information and, therefore, having an independence and a strength on that basis*[273]. He went on to say that he referred more correctly to the appendices of Dr Cowie, which were a part of his evidence.

[288] Dr Wright posed a series of questions or 'invitations' to Genesis, but made no assessment himself on water quality, fisheries, invertebrate communities or biota. He was critical of the work carried out by Kingett Mitchell, in particular asserting that there had been no assessment of hydrological or biotic impacts, or the effects of the removal of sediment. This assertion was made in his written statement where he said:

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[270] Kennedy, EiC, paragraph 15.15.
[271] Kingett Mitchell Report 1999, page 42.
[272] Transcript page 915.
[273] Transcript, page 921.

> The cumulative impacts which cause considerable changes in habitat, and significant adverse sediment impacts do, in my opinion, demonstrate significant adverse environmental impacts.[274]

[289] Dr Cowie said that these assertions were demonstrably incorrect[275]. The work undertaken on behalf of Genesis, on the effects of the Wahianoa diversions, he believed was very comprehensive. The work to which Dr Cowie referred has been discussed in this decision.

[290] Dr Wright raised concerns about the dilution of the Whangaehu River, stating that the river would be less acidic in the absence of diversion. He cast doubts on the contention of Mr Kennedy and Mr Philips, that the main impacts on the river are the natural Whangaehu catchment processes. This he thought was highly misleading. It is, he said:

> ... the impact of the TPD on the intrinsic values of the Whangaehu natural catchment processes that is important to assess and consider.[276]

He also said:

> In this respect it (Whangaehu River) is quite unique, and has a unique and distinctive adaptive ecosystem. [277]

[291] Regrettably, he took these statements no further and left us with no real understanding of what this really meant. His comments were not clarified during cross-examination. Dr Wright's frequent assertion that the Wahianoa River was a "traditional foodbasket" of the Ngati Rangi, suggested that without the TPD it would have remained so.

[292] A rebuttal brief by Mr Kennedy related largely to the evidence given by Dr Wright. Much of it was a repetition of his primary brief of evidence, which we do not think needs to be repeated. He agreed with Dr Wright that the interception of water by the aqueduct results in a decrease in the habitat available to macroinvertebrates. Where water is present and habitat is available the invertebrate populations are similar both downstream and upstream of the aqueduct[278]. Dr Wright, however, did not see this as

[274] Wright, EiC, paragraph 3.13.
[275] Cowie, rebuttal, paragraphs 19-21.
[276] Wright, EiC, paragraph 3.9.
[277] Wright, EiC, paragraph 3.9.
[278] Kennedy, rebuttal, paragraph 2.15.

being an acceptable conclusion, he believes the population should be greater. Mr Kennedy, in answer, pointed out that despite the food availability, in the waterways intercepted, the extent of the resident native and introduced fish population remains very limited[279]. It is, therefore, difficult for us to understand what influence a greater population might have on the quantity and variety of fish life.

[293] The effects of land use changes and forestry were re-emphasised by Mr Kennedy as prime factors in the amount and quality of water reaching a stream. Dr Wright was not prepared to accept that these activities were able to abstract "a large amount of water", which he then went on to relate to the de-watering of a number of the aqueduct streams. This was refuted by Mr Kennedy in his analysis of the 11% of total catchment flow that was intercepted by the Karioi forest alone.[280]

[294] Mr Kennedy stressed, that the only fish recorded in the tributaries diverted to the Wahianoa Aqueduct are stunted brown and rainbow trout, which are still present as a self-sustaining population. They were first recorded in surveys done prior to the aqueduct being built. No native fish have ever been recorded in these tributaries. Indeed, Woods (1964), in his assessment of the fisheries aspects of the potential TPD commented that no fish life is known to occur in the Desert Road streams of the upper Whangaehu River. The latest survey, done in 1999, found much the same fish distribution and density, with a few koura also found in a small number of tributaries, both upstream and downstream of the aqueduct.

Dr Cowie – an overview of the Eastern Diversion

[295] Dr Cowie adopted the evidence of Mr Kennedy regarding the fish and invertebrate life in the tributaries of the Eastern Diversion. In addition he told us that the 27 kilometres of stream that may be dry at times, and is due to the effects of the TPD, is none the less of little significance when compared to the more than 1000km of stream bed within the length of the streams tributaries[281]. None of the diverted streams have any significant ecological value. All are potentially effected by being located in a production forest, some would dry up naturally on occasions, and the largest, the Wahianoa River, is effected on occasions by water contaminated by the crater lake.

[279] Kennedy, rebuttal, paragraph 2.15.
[280] Kennedy, rebuttal, paragraph 2.39.
[281] Transcript, page 1335.

[296] In cross-examination[282] Dr Cowie emphasised the relative insignificance of the aqueduct streams by saying:

> ....if I was to score streams on a scale of 1 to 10 in terms of ecological significance, those tributaries would be likely to score 1. They are that insignificant. They don't hold populations of native fish. They are very small. The Wahianoa itself is acidic at times. It is the largest of those streams. The fish that are present are small and stunted trout, which shows that it is not good quality habitat in that way. Other streams within the TPD I would score much, much more highly on a scale of ecological value than I would those Wahianoa streams.....the Tongariro River I would score 9 or 10, not just for ecology but for recreational opportunities. These streams are insignificant.[283]

[297] In re-examination by Mr Milne the following exchange summarised Dr Cowie's evidence.[284]

> (Q) If the Wahianoa diversion were to be ceased and the water diverted into the Wahianoa River, would that have any beneficial effects for fish or fish habitats in the Wahianoa or the Whangaehu Rivers?
> (A) You may create a little more habitat for rainbow trout in the Wahianoa River. That would be about all. Go down to the Whangaehu River, the addition of that extra water, some of it at low pH, to a river that already has a low pH at times, along with high conductivity, will have negligible effect on the pH of the Whangaehu River. It will obviously add a little bit of flow, but in terms of effects on water quality, fish and fish habitat, or invertebrates, I would say it would have no effect.
>
> (Q) What would be the effects on indigenous fish species in the Wahianoa or the Whangaehu?
> (A) None. There are no indigenous fish in the Waihanoa River. There are none recorded in the Whangaehu above a point about 15km above the Mangawhero confluence.
>
> (Q) If one were to repeat that series of questions to you in respect of each of the other 21 diverted tributaries of the Wahianoa, would your answers be in any way different.
> (A) For the tributaries that go directly to the Whangaehu River my answers would certainly be no different whatsoever. For the 2 or 3 that go to the Tokiahuru Stream, there would be a very slight benefit for flows in that stream.....with very, very little benefit whatsoever.
>
> (Q) If all 22 diversions were to cease and all water returned to their natural flows, would there be some cumulative additional benefit.
> (A) There would obviously be an increase in the Whangaehu River of about 3.3 cumecs. That would have very little effect on the pH of the river. Adding that extra water will have almost negligible benefit for the biota of the Whangaehu River.[285]

[282] Transcript, page 1347.
[283] Transcript, page 1347.
[284] Transcript, pages 1314-1316.
[285] Transcript, pages 1314-1316.

[298] In rebuttal, Dr Cowie gave evidence to address Dr Wright's theory about the diverted waters possibly closing "a window of opportunity" for upstream migration of species such as eels and koaro (a species of eel). He told us, that both migrate into river estuaries in spring, when the Whangaehu River is likely to be just below or about neutral. It is highly probable that the fish avoid the acidic mainstem of the river by migrating into the Mangawhero River and its tributaries. He emphasised, that the Whangaehu River upstream of about the Mangawhero confluence is biologically dead. Insect life, relied on by fish for food, is almost entirely absent. Where there is no food there is no fish.[286]

[299] The evidence of the Ngati Rangi witnesses with regard to the depletion of fish in the Whangaehu and its tributaries was put to Dr Cowie. It is worth quoting this part of Mr Milne's re-examination.

> (Q) The Members of the Court have referred to the evidence given by certain of the kaumatua witnesses about fisheries that were previously enjoyed.....does that evidence describe the situation that exists in the Wahianoa and Whangaehu, and their tributaries, today?.
> (A) No,....nor does it describe the situation that was present in, say, the 10 or 20 years before the TPD was constructed. What we don't know is the situation before recorded history, perhaps going back to the middle of the last century. Prior to that, it may well have been that the Whangaehu was not a consistently acidic river.....(and) that fish such as eels and kaoro...did enter some of the tributaries. Prior to the TPD....we know that there were no native fish recorded, even eels, which might live 70, 80 years. We know that since the construction of the TPD there has been no change to that. ..... I think the before and after analysis...is very conclusive,(and) the effects of the TPD on those fisheries that may have been there once upon a time is negligible.[287]

[300] Dr Cowie reiterated the information of a world-wide decrease in the eel population, and in answer to a question

> If the resource consents authorising the diversion (of the aqueduct) were refused, would the indigenous fishery described by the kaumatua witness, re-establish?.

He replied:

> Not in the current situation where the Whangaehu River is heavily contaminated by low pH water for substantial periods in most summers, and receives episodic lahar events.[288]

[286] Cowie, rebuttal, paragraphs 25 and 26.
[287] Transcript, pages 1317 and 1318.
[288] Transcript, page 1318.

[301] Mr Ferguson further promoted the witnesses' evidence by referring to their experience in more recent times, certainly in the last 50 years. To which Dr Cowie answered,[289]

> In terms of the last 50 years I think it is fair to say it (the evidence) doesn't gel very well. .....I am not so familiar with the period from the mid 1950s through to the beginning of the 1980s.... but it appears that there weren't any major lahars during that time. However, I come back to the point that if eels had successfully got into the rivers in, say, the last 50 years, you would still expect to find some there, because of the very long lived nature of long fin eels, in particular. They are not there, that suggests that there have been no, or at most, very, very few successful migrations of any individuals in that last 50 year period.[290]

[302] In answer to questions put to him by the Court, Dr Cowie said that Karioi is, perhaps, a generic name for the area and might well include the Mangawhero River tributaries, where native fish are still found. He also pointed out that, over the decades, there is every possibility that streams, that were present during the youth of the witnesses, had either dried up or had been naturally diverted and might now be a considerable distance from their remembered site.

Summary of ecological effects of the Eastern Diversion

[303] The customary evidence of the Ngati Rangi witnesses, regarding fish population within the rivers and tributaries of the Eastern Diversion, referred to the former abundance of fish in the streams of which they spoke. Regrettably the exact, or near exact, location of these fishing grounds was never specified and it is not possible for us to relate this evidence to that of the scientists whose evidence related much more closely to the TPD intakes themselves.

[304] Dr Wright expressed his disappointment that surveys of the lower reaches of the Whangaehu River were not carried out. He believed that such a survey might well have more accurately indicated any reduction in fish population, and possibly the reasons for it.[291]

[289] Transcript, page 1329.
[290] Transcript, page 1329.
[291] Transcript, pages 925-926.

[305] Mr Kennedy in his 1998 survey recorded fish life above and up to 500m below the Wahianoa aqueduct. Woods in 1964 is presumed to have surveyed approximately the same area. There is certainly no evidence from Woods' tables to suggest he surveyed the lower reaches of the river.

[306] Since the findings of both surveys vary little, we do not believe any evidence from a survey downstream in the Whangaehu River would provide information that cannot be adduced from that of Mr Kennedy and Woods.

[307] Within the Whangaehu catchment, fish and invertebrates are, and historically have been, either absent or present in very low numbers well downstream.

[308] Further, there has been little or no variation of the type and density of native fish, below the intake area, in the 34 years between the surveys. In consequence, we are unable to conceive of circumstances that might result in a much altered fish population further downstream with the exception of volcanic or lahar activity, which would only cause a greater depression of the river's biomass.

[309] We have carefully listened to, and revised the customary evidence given to us by Ngati Rangi witnesses. We appreciate that the passage of time has altered the nature and content of their traditional waterways. We are unable to find in this evidence anything that specifically refers to the fish life of the tributaries of the Whangaehu River, much less the 22 tributaries that are intercepted by the aqueduct. There is general reference only to the Karioi region where, evidence suggests, there remains plentiful fish life in this part of the catchment.

[310] Because in the Whangaehu catchment fish and invertebrates are, and historically have been, either absent or present in very low numbers well downstream, the effects of the TPD diversions of headwater tributaries must be very minor at most.

The Moawhango River

(a) Effects on the water quality in the Moawhango River

[311] The construction of the Moawhango Dam in 1978 resulted in the truncation of the headwater catchment of the Moawhango River. Once the dam was built, the main tributary feeding the headwaters of the river was the Aorangi Stream. Dr Cowie told us, that this stream had a mean flow of 1.9 cumecs versus the average diversion from the headwater catchment of 9.6 cumecs, which equates to a 73% reduction in flow. He also told us that the Aorangi Stream rises and flows through land used for extensive agriculture, and as a result its water quality is slightly degraded.[292]

[312] Dr Cowie examined all the data held by the Council on water quality in the Moawhango River. Unfortunately, he said that information is of little value in ascertaining the effects of the TPD on water quality in the river[293]. He also referred to a report by Tonkin and Taylor (1999) which reports the results of an investigation into the effects of flow regulation on the Moawhango catchment. That report found that water quality was generally high, but that there was a small decline in water quality, reflected for instance in elevated levels of nutrients, downstream of the Aorangi Stream confluence, which Tonkin and Taylor considered reflected agricultural land use in that catchment.[294]

[313] Overall, Dr Cowie considered, that the information indicated that there is a minor adverse effect on water quality in the Moawhango River as a result of the diversion of its headwaters north to the Tongariro catchment. This minor effect he considered, will be mitigated to some extent by the new requirement on Genesis to provide for a minimum flow of at least 0.6 cumecs at all times. It was his view, that the construction of the Moawhango Dam has also led to some adverse effects on habitat quality in the river, particularly in its middle reaches around the Moawhango village. We accept Dr Cowie's conclusions.[295]

[292] Cowie, EiC, paragraphs 71 and 72.
[293] Cowie, EiC, paragraph 73
[294] Cowie, EiC, paragraph 76.
[295] Cowie, EiC, paragraphs 77 and 78.

(b) Effects on invertebrate communities

[314] Dr Cowie told us that work carried out for Genesis by Dr John Stark, an expert in freshwater community ecology, showed that arguably there was some small effect on stream invertebrate communities below the Moawhango Dam. This was one of the factors that led to Genesis suggesting that a minimum flow of at least 0.6 cumecs be provided below the dam at all times.[296]

[315] Dr Cowie concluded that the imposition of a minimum flow has led to any such effects now being less than minor[297]. Again we accept Dr Cowie's conclusions.

(c) Effects on fish populations

[316] Dr Cowie told us that the Moawhango River has major natural barriers to upstream fish migration. There are two significant waterfalls in the lower reaches of the river, one of which is 15 metres high, and a series of waterfalls downstream of the dam. It was his opinion that these latter waterfalls apparently prevented eels migrating into the headwaters of the river prior to the construction of the dam.[298]

[317] According to Dr Cowie, who had studied a number of reports relating to the fish populations of the Moawhango River, the only fish present in the river above the dam prior to its construction were rainbow trout and brook trout. These populations are, he said, self sustaining and are still present today. Seven species were recorded below the dam, prior to its construction, five of which are still present. In his view the diversity and abundance are above average in comparison with similar New Zealand rivers[299]. Again we accept Dr Cowie's conclusions.

Summary of findings of effects on Maori

[318] The most damaging effect of both diversions on Maori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people "grieving" for the rivers[300]. One needs to understand the culture of the Whanganui River iwi to realise

[296] Cowie, EiC, paragraphs 80 and 81.
[297] Cowie, EiC, paragraph 82.
[298] Cowie, EiC, paragraph 83.
[299] Cowie, EiC, paragraphs 85-87.
[300] Ranginui, EiC, paragraph 48; Takarangi, EiC, paragraph 23; and Potaka, EiC, paragraph 22.

how deeply ingrained the saying *ko au te awa, ko te awa, ko au* is to those who have connections to the river. The iwi see the river as a part of themselves, and themselves as part of the river. Their spirituality is their "connectedness" to the river. To take away part of the river (like the water or river shingle) is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people. The evidence of Mr Mareikura where he refers to comments by an elder Mr Taitoko shedding his tears bears repeating here:

> ...my river has been severed, the head has been cut – what is there left for me?[301]

[319] Because the rivers have provided their needs for centuries, both Ngati Rangi and the Whanganui iwi see their rivers as their tūpuna and heritage. To take away part of their rivers is to take away part of their tūpuna and part of their heritage. To desecrate their rivers is to desecrate their ancestors. To pollute the water is to pollute their ancestors. For example Ms Metekingi said:

> The awa is a beautiful thing. You need the people. It lives with the people. The spirit of the awa has to be the people. It is not a separate thing. It's part of who you are – like a soul partner; sharing everything with you and it gives it back to you.[302]
>
> ...
>
> Our awa is not separate, it's all part of us. We can't be separated. You don't just send your eyes to the concert.[303]

[320] Many witnesses expressed their "connectedness" to the rivers and their ancestral relationship. We again repeat what Ms Ranginui said:

> The river for me is like my mother and my father; as my grandfather and grandmother; it's my tūpuna. Irrespective of the condition of the river, the little water that remains is still my tūpuna. But its wairua (spirit) is dying.[304]

[321] We find that the TPD has had, and still does have, a significant effect on the Maori people – both the Whanganui iwi and Ngati Rangi. Clearly the loss of the headwaters of their rivers by foreign management has been like a scythe that has partly decimated the very central essence of their cultural being. This has been exacerbated by

[301] Mareikura, EiC, paragraph 2.13.
[302] Metekingi, EiC, paragraph 9.
[303] Metekingi, EiC, paragraph 11
[304] Ranginui, EiC, paragraph 45.

the peremptory and arbitrary manner by which the Tongariro scheme was implemented following the Orders in Council in 1958.

[322] As to the effects on the physical form of their rivers with its consequent effects on traditional practices, the customary evidence emphasised such things as, the decline in native fish numbers, the adverse effect on fishing practices and the loss of spiritual pools as a consequence of the water diversions. The expert witnesses called by Genesis were all strongly of the view that the TPD has had little physical effect, if any, on the rivers.

[323] With the exception of the effects occasioned by a reduction in flow and water level, we are satisfied from the extensive scientific evidence we heard that there is no evidential connection between the operation of the TPD and the decline in native fish life. Also, many of the physical effects on the rivers are caused by factors other than the TPD. In the overall context such physical effects are minor. The effects of the TPD are more greatly felt on Maori spiritual values.

[324] With regard to the effect on Maori spiritual values, and to a much lesser extent the effects caused by the reduced flow and levels of the waterways, we had some considerable difficulty in assessing those effects, raised by the Maori customary evidence, against the scientific evidence adduced by Genesis. We have no reason to doubt the veracity of the Maori witnesses. Equally, we do not doubt the sincerity and scientific accuracy of the Genesis witnesses.

[325] There appeared at times to be a conflict between the customary evidence and the scientific evidence. This apparent conflict intensified as the hearing progressed. The Maori witnesses who appeared before us, all impressed us with their close association and empathy with their rivers – an association and empathy which stems from many generations of living close to and with the rivers, and augmented by their ancestral interconnectedness with the rivers. The scientific witnesses had considerable knowledge about the rivers that came from empirical studies and data augmented by the application of recognised and tried methodologies and computerised modelling.

[326] Unfortunately, the two worlds did not link together – they did not intersect. While the scientific evidence addressed Maori concerns, it did so from a distance. For example, the evidence of Mr Potaka relating to the effect of reduced water levels on native fish and fishing was responded to: first, by Mr Bowler with his modelled figures JB1, JB2 and JB3; and secondly, by Mr Kennedy discussing the multi-factored national

decline of fish species. There has not been a direct meeting of the minds between the expert witnesses and the Maori witnesses, to establish with particularity, the locations and concerns that are of particular significance to iwi. It is only when that is done that both parties can explore the variety of options, that will assist in addressing values that require protection under Tikanga Maori.

[327] As an example we refer to the following exchange between a member of the Court and Dr Boubee:

> Q. In preparing your evidence, and indeed when you prepare a scientific report, you obviously carry out your own survey, but before doing that do you normally refer to earlier reports to find out the historical context of where you are going?
>
> A. Very much so. You look at – you try to look at all the information that has been published, or you know, in some cases, not published. We certainly looked at the fisheries database, and we looked at potential effects. And then decide where to go from there.
>
> Q. And do you limit that just to scientific reports?
>
> A. No.
>
> Q. Would you, for example, carry out inquiries or make inquiries, or find out from local fishermen whether they be...whether they be commercial fishermen or recreational fishermen?
>
> A. ... - if we are doing any fishing in any areas our permits require us to work in with the local authorities, for example the Department of Conservation, the Ministry of Fisheries.
>
> Q. Yes, I understand that, but what I am asking is do you find out as much information as you can from the people who fish the streams?
>
> A. We usually do, yes. Very much so.
>
> Q. Well, Mr Ferguson asked you a question if you had made any inquiries with the local Maori people, and you haven't?
>
> A. No I haven't, because – remembering that, you know, I was not commissioned to do the study as such in this area.
>
> Q. Would it have assisted you in your study if you had?
>
> A. If I was commissioned to go and do a survey on the Whangaehu River as such, yes I would definitely try to contact as many sources as possible.[305]

With regard to the Whanganui River he was asked:

[305] Transcript, pages 1245-1246.

Q. That you made no inquiries of the Maori people as to their fishing practices and the history...

A. I have a long history of actually contacting some of the Whanganui people on that river. So, no, I have not contacted them directly as to where they were fishing but the evidence is quite evident that there were eels and there were species that could have been fished there, yes. There was plenty of information on that side about that.[306]

[328] We also refer to rebuttal evidence of Mr Kennedy where he said:

> Dr Wright notes in paragraph 3.10 that I ignored tangata whenua in-stream values and uses. I consider it would have been inappropriate for me to presume what those values were as my evidence **is technical in nature**.[307](emphasis ours)

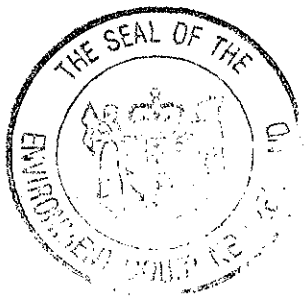
And:

> Although not qualified to address the healing powers of the water from a tangata whenua perspective, I am aware of various examples throughout the world where mineralised waters are used by humans. Set out below are the factors that affect water quality of the Whangaehu River **in a technical sense**.[308](emphasis ours)

[329] In our view, if the scientific witnesses had met with and discussed with the tangata whenua witnesses the Maori concerns, they would have had a better appreciation of the particulars as to time, place, species of fish and spiritual practices that they say have been affected. They could have then addressed those issues with that understanding and then apply their expert scientific knowledge. It is only by a meeting of the minds between iwi and those legally responsible for the river's management, that decision-makers can identify adverse effects on such cultural issues as Mahinga Kai and mauri, and then put into effect appropriate strategies to remedy any adverse effects so identified. Unfortunately, and notwithstanding who was to blame, this was not done.

[330] It is this very practice that is recommended in "Flow Guidelines for Instream Values" Volume A, published by the Ministry for the Environment,[309] a recommendation that we endorse

[306] Transcript, page 1249.
[307] Kennedy, rebuttal, paragraph 2.42.
[308] Kennedy, rebuttal, paragraph 2.46.
[309] Paragraph 13.2.4.



[331] After a careful consideration of all the evidence, we have come to the clear conclusion that the diversion of the waters by both the Western and Eastern diversions has had and continues to have deleterious effects on the cultural and spiritual values of the Maori people. We find that these effects are considerable.

Effect of TPD on national interest

(i) Electricity

[332] The strategic significance and economic importance of the TPD hydro electricity generating stations in contributing to the underpinning of the electricity supply system and the New Zealand economy, was stressed by several witnesses for Genesis.

[333] Genesis generates electricity from its generating assets which have a combined generating capacity of 1,600 MW, including the TPD, Huntly thermal power station, Waikaremoana hydro scheme, the Hau Nui wind farm, as well as a number of small generating plants including co-generation plants at the Te Awamutu dairy factory and the Kinleith pulp and paper mill. The major assets have an asset book value of approximately $992m.

[334] The company generates electricity in competition with other companies for sale to the wholesale market and to meet the needs of retail customers who presently number some 500,000. Additionally it manages some 96,000 gas customers and provides an integrated service for households and businesses covering gas, electricity, toll calls and internet services.

[335] As a generator, wholesaler and retailer of electricity Genesis operates within a deregulated highly competitive market. The New Zealand Electricity Market, which is administered by the Marketplace Company, requires Genesis to offer to sell electricity at a specific wholesale price, volume and location for the 48 half hour trading periods for the coming day by 1pm on the day prior. Any failures to meet the offer requirements can result in substantial penalties to Genesis. Additionally Genesis offers hedge contracts, which fix the forward price of electricity to its commercial customers.

[336] Nationally the electricity sector comprises many organisations involved in the regulation, provision and usage of electricity. The Government has recently established an Electricity Governance Organisation called the Electricity Commission, a Crown Entity which is tasked with governing the electricity industry sector. Under an amendment to the Electricity Act 1992 the Parliamentary Commissioner for the Environment is required to examine the environmental performance of the Commission.

[337] Historically New Zealand's electricity generation system is based predominantly upon hydro resources which have provided between 60 and 70% of New Zealand's electricity per annum. The remaining 30 to 40% of electricity per annum is mainly provided by geothermal and thermal (gas and coal fired generation). Any shortfall in hydro generation in a dry year is made up by thermal generation. Since 1993, when the Clyde Dam was commissioned, there has been no substantial increase in the capacity of hydropower stations and thermal plants have provided the bulk of the increase in electricity required to meet demand. In this situation hydro power stations, such as those supported by the TPD, are considered to be an essential, if not crucial, basis of the New Zealand electricity sector.

[338] The TPD produces approximately 3.5% of New Zealand's annual energy demand in an average year, but including the contribution made through the Waikato River hydro stations, this rises to approximately 5% of New Zealand's average electricity demand. However, when operating on full capacity, this can increase to 9% on an instantaneous basis.

[339] The Rangipo and Tokaanu power stations supply an average of 1,220 GWh's[310] of electricity annually. In addition the water diverted into Lake Taupo, supplementing the nine hydro power stations and eight dams[311] on the Waikato River, owned and operated by Mighty River Power Limited allows an extra 630 GWh's to be generated by these stations. This gives a total 1,850 GWh/yr or about 8% of national renewable energy. The court was told that this equates to sufficient energy to supply some 237,180 households, which represents a population approximately half the size of Auckland, five times the size of Hamilton or ten times the size of Rotorua, based on Statistics NZ 2001 Census.[312]

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[310] GWh means gigawatt hours.
[311] Truesdale, EiC, paragraph 3.1.
[312] Based on an average household consumption of 7,800 kWh/yr (ESANZ AD Jenkins Ltd Guide to Energy Units and Conversions 1997); Carroll, EiC, paragraph 5.6.

[340] Mr Dean Carroll, General Manager Generation and Trading Genesis Power Limited, who has been with the Company since its formation in 1999 said that in addition to the value of electricity generated by the TPD, the TPD provides several services that play an important role in maintaining the integrity of the national grid[313]. These are voltage support[314], fine tuning of North Island frequency by Tokaanu Power Station, the ability to black start[315] independently of the national grid[316] and the ability of the Tokaanu Power Station to provide 'spinning reserve'[317] capacity with a very rapid response to cover unforeseen shortfalls in demand[318]. The location and operation of the TPD makes it nationally important in these respects.

[341] We were also informed that the Tokaanu Power Station is an important source of reactive power[319]. In this regard the power station provides essential support to the North Island transmission grid by boosting voltage on its path north during the day and reducing voltage at night as the load alters. Such dynamic support is crucial to the security of the national grid and in maintaining security of supply to the North Island.[320]

[342] Mr James Truesdale, an electrical engineer and Director of Concept Consulting Group which provides consultancy services to the energy sector, gave evidence for Mighty River Power Limited. His evidence stressed the importance of the TPD to the Waikato River hydro system. He said that on average the TPD diversions currently account for around 11% of annual Waikato Hydro system electricity production, which on average generates around 12% of annual national electricity demand, and therefore any reduction in the TPD diversions would have adverse economic and environmental consequences for New Zealand, in respect of its electricity requirements.[321]

[343] Mr Truesdale highlighted some special characteristics of hydro supply, such as day-to-day and seasonal capability to increase electricity supply over peak demand periods, which limits requirements for more expensive generators and wholesale

[313] Carroll, EiC, paragraph 6.3.
[314] Dynamic (fast acting) reactive support essential to maintain a proper voltage profile under normal operation and contingent events; Carroll, EiC, paragraphs 6.4-6.9.
[315] The ability to start independently of the electricity transmission grid.
[316] Carroll, EiC, paragraph 6.13.
[317] The ability to pick up a block of generation assigned to another station if that station is, for any reason, unable to do so, or if there is a sudden outage elsewhere.
[318] Carroll, EiC, paragraph 6.11.
[319] Power transmitted to the load centre or generated there, in order to maintain the transmission system voltage. Is distinct from "active power" which can be equated directly with horsepower. Limited in the amount that can be transmitted, especially if the transmission lines are heavily loaded with active power.
[320] Carroll, EiC, paragraph 6.9.
[321] Truesdale, EiC, paragraphs 3.1 to 3.4.

electricity prices at times of peak demand. Any loss of water currently diverted into the TPD and Waikato hydro systems would reduce this important capability of both hydro systems which would have cost implications for the New Zealand economy in addition to replacement energy costs[322].

[344] He estimated the cost of electricity supply to replace the energy supplied from the TPD and Waikato hydro system, resulting directly from the TPD diversions, over a 35 year period to exceed $1.0 billion when discounted back to today's dollars.[323]

[345] For the purposes of his analysis Mr Truesdale assumed that investments in new supply capacity would need to be made earlier than otherwise; that extra thermal fuel would be required; that new thermal technologies would achieve significantly higher efficiencies than now; and that under its Kyoto commitments, New Zealand would face additional carbon costs from 2008 as a result of the extra fuel burnt at thermal power stations.[324]

[346] He also had regard for renewable technologies other than hydro, such as wind and biomass and noted that the costs of such developments are invariably high. In this regard he said that wind generation capacity in New Zealand is presently around 35 MW and on average represents around 0.4% of annual electricity demand.[325]

[347] He concluded that the economic and environmental consequences of any loss of water from the TPD and Waikato hydro systems is particularly significant with implications for New Zealand's competitive advantage and its Kyoto climate change commitments.[326]

[348] Mr Raymond Gatland, a consultant providing services to the electricity industry, highlighted the importance of a diverse hydro electricity resource to New Zealand and that any erosion of this resource, by increasing minimum flows, exacerbates any shortfall in dry year capacity.[327]

[322] Trusedale, EiC, paragraphs 7.1 to 7.5.
[323] Truesdale, EiC, paragraph 7.1.
[324] Truesdale, EiC, paragraph 7.1.
[325] Truesdale, EiC, paragraph 6.14.
[326] Truesdale, EiC, paragraph 8.4.
[327] Gatland, rebuttal, paragraph 10.7.

[349] He also stressed the role of the four main thermal power stations at Huntly, New Plymouth, Otahuhu and Taranaki. Collectively these four stations are providing "swing generation"[328] compensating for variations in rainfall and meeting the majority of new demand. Any reduction in average hydro generation, such as may result from an increase in regulatory spill from the TPD, will be made up through an increase in thermal generation.[329]

[350] He told us that, in 2003, for the first time, there was insufficient extra gas available from Maui to run all four of the large thermal stations at high outputs throughout the winter. Consequently, it is now proposed to run the New Plymouth station on oil which is understood will cost about 11c per kWh[330] which is around twice the average wholesale electricity price. To provide additional output at Huntly, previously provided on demand by gas, it was necessary to fuel the station increasingly using coal. Genesis also obtained short-term resource consents to utilise oil burners in continuous operation to augment available gas and coal.[331]

[351] Mr Gatland also highlighted the importance of retaining hydro electricity in order to maintain the base line for New Zealand's renewable energy target under the National Energy Efficiency and Conservation Strategy (an additional 30 PJ[332] of consumer energy from renewable sources by 2012). He also said that the practical reality is that the uptake of renewable energy options will rely on them being competitive with other alternatives and overcoming any other barriers discouraging their development.[333] The ability of hydro to meet peak demands is a function which, for example, wind generation cannot fulfil.

[352] Mr Gatland said he was not aware of any government initiatives that would lead to the type of development that had estimated wind generation could provide approximately 23% of the country's electricity needs, or 7,900 GWh/yr, within 10 - 15 years at 10c per kWh, which equates to more than 2,000MW of new installed capacity. The Centre for Advanced Engineering had stated that this would be a difficult task requiring the construction of one turbine set being installed and got into operation each

[328] Where thermal stations compensate for variations in rainfall and meeting the majority of new demand.
[329] Gatland, rebuttal, paragraphs 7.1 to 7.5.
[330] kWh means kilowatt hours.
[331] Gatland, rebuttal, paragraphs 11.4 - 11.6.
[332] PJ means petajoule – one PJ = 278 gigawatt hours.
[333] Gatland, EiC, paragraphs 3.5 and 3.6.

working day of the year for the next 10 years. A difficult ask in Mr Gatland's opinion.[334]

[353] A recent 2002 summary, by the Ministry of Economic Development, forecast 390MW of new wind power by 2020 generating 1,400GWh/yr. This compares with around 36MW of wind power developed to date.[335]

[354] Wind power has a plant efficiency factor of 40% compared to around 95% for geothermal and 60% for hydro. But hydro has the flexibility to deliver 100% to meet peak loads[336]. The water storage, albeit limited within the TPD, enables the TPD to meet peak demands, a function wind cannot fulfil.

[355] According to Mr Gatland the actual mix of generation that will develop over the long term is uncertain but the major determinant in the evolving blend will be the cost of new thermal generation, and this will significantly influence the uptake of renewables. However, as Mr Gatland said:

> .... under any future situation, the existing hydro generation base underpinning our supply system will continue to be of vital importance, and significant thermal generation will be required to make the most of this hydro energy[337]
>
> The key issue is that if flows of the Western Diversion are lost to the TPD and the stations on the Waikato, the consequences are the cost of the additional fossil fuel burnt every day, the advancement of investment in the construction of new thermal power stations, and the additional emissions of greenhouse gas as well as the loss of a renewable source of electricity generation.[338]

[356] On behalf of Ngati Rangi, Ms Marian Melhuish, an independent energy analyst, took issue with the evidence of Messers Carroll, Gatland and Truesdale and expanded her written evidence by way of verbal interpolations which were later admitted in evidence as written text.[339]

[357] Her evidence was to the effect that Genesis and Mighty River had demonstrated no active promotion of energy and economic efficiency; the Genesis request for a 35 year term is not appropriate; ECNZ's management of the TPD is based on a narrow set of 'national benefit' principles as defined by Western cultural values - which, since 1986,

[334] Transcript, page 615.
[335] Gatland, EiC, paragraphs 3.8 and 3.9.
[336] Gatland, EiC, paragraph 3.10.
[337] Gatland, EiC, paragraph 9.3.
[338] Gatland, EiC, paragraph 9.6.
[339] Transcript, page 964 and additional evidence received 26.11.03.

now included a Western corporate culture which treated river flows as a commodity to be brought and sold for profit, and which has led electricity companies to be more dismissive of environmental, social and cultural impacts in their management of the electricity industry.[340]

[358] Ms Melhuish was also of the view that promotion of alternative energy supplies, distributed generation and managing growth in electricity demand should be by way of promoting energy efficiency and active demand side participation in the electricity market. This was as proposed by the Parliamentary Commissioner for the Environment. She said that the consents should contain conditions for continuing consultation with the affected iwi, on flow management regimes, to ensure commercial values are balanced equally with cultural and spiritual values.[341] She was also of the view that there should be conditions that provide for significant funding for energy efficiency projects that benefit low income households and marae.

[359] Ms Melhuish was especially critical of corporatisation of the electricity market with participants consistently promoting large-scale power generation and transmission and ignoring sustainable energy options – both small-scale renewable energy supply and energy efficiency and other "demand side" options.[342]

[360] Ms Melhuish considered that granting even a 10 year consent term would be generous indeed to the applicants in the rapidly changing electricity industry and its regulatory environment.[343]

[361] In support of her arguments Ms Melhuish referred to the new Energy Commission to replace industry self-governance, and a two-part discussion document by the Parliamentary Commissioner for the Environment, "Electricity, Energy and the Environment" June 2003. This latter document proposes assessing the environmental performance of the electricity industry on an annual basis and to manage growth in electricity demand by promoting energy efficiency and active demand side participation in the electricity market taking into account the concerns of Maori. However, while the document provides useful background information, it is open for discussion at this stage and its findings and proposals are not binding on us.

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[340] Melhuish, EiC, paragraphs 2.3 and 3.22.
[341] Melhuish, EiC, paragraph 7.4.
[342] Melhuish, EiC, paragraph ?
[343] Melhuish, EiC, paragraph 7.4.

[362] Ms Melhuish also appended to her evidence the document "Electricity Supply and Demand to 2015".[344] She referred to this document as supporting the multiple benefits of distributed generation, from small scale power generators embedded in local networks, as an alternative to supply from large power stations, claiming a potential availability of 750MW of distributed generation within 12 years[345]. This document also contained much useful information but, similar to the Parliamentary Commissioner for the Environment's document, its findings and proposals are not binding on us.

[363] Ms Melhuish's additional statement of evidence related to the potential for capturing hydro energy within the Whangaehu catchment (the "Karioi power scheme"), as an alternative to what she calculated to be a 40% loss of water energy within the Wahianoa Aqueduct prior to it being utilised through the Rangipo power station, and her views on cost effective energy efficiency and renewable energy enhancements as an alternative to building new power stations.[346]

[364] In rebuttal Mr Drinkrow, for the applicant, demonstrated how Ms Melhuish's additional evidence, as it related to the Eastern Diversion, was based on a number of errors, both in terms of how the TPD operates and how the water from the Eastern Diversion is managed and used for electricity generation.[347] He stated that Ms Melhuish had also failed to recognise the national strategic importance of being able to store water from the Eastern Diversion in Lakes Taupo and Moawhango, and use it in 10 separate power stations.[348]

[365] He considered that her calculations of energy losses were flawed for two principle reasons: firstly, the purpose of the aqueduct is to supply water for storage rather than as a run of river flow to Rangipo Power Station; and secondly, that the minimum flow losses are not associated with the Wahianoa water but rather they are mitigation for the water taken from the Moawhango and Tongariro Rivers and these losses would exist irrespective of whether or not the aqueduct was present.[349]

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[344] Jointly published by Sinclair Knight Mertz and the Centre for Advanced Engineering (CAE) 6th Ed. 2002.
[345] Melhuish, EiC, paragraphs 3.5 and 3.6.
[346] Melhuish, additional statement, page 2.
[347] Drinkrow, rebuttal, paragraph 1.4.
[348] Drinkrow, rebuttal, paragraph 4.2.
[349] Drinkrow, rebuttal, paragraph 3.3.

[366] According to Mr Drinkrow, Ms Melhuish's postulated run of the river "Karioi power scheme" is entirely undefined, even conceptually, and the environmental effects have not been addressed. Even if it were able to supply some generation, all of the strategic benefits of being able to store water in Lakes Moawhango and Taupo and utilise it in 10 power stations would be lost. Mr Drinkrow went on to say:

> The water diverted via the Wahianoa Aqueduct (mean flow of 3.3 cumecs) is able to be utilised at both the Rangipo and Tokaanu Power Stations of the TPD and then again at 8 more hydro-power stations on the Waikato River, namely Aratiatia, Ohakuri, Atiamuri, Whakamaru, Maraetai, Waipapa, Arapuni and Karapiro. Water from the Eastern Diversion is the only water in New Zealand able to be utilised in 10 separate power stations. As such, it is recognised as being the most important water in the country.[350]

Mr Drinkrow also said that:

> Ms Melhuish has similarly failed to appreciate the exceptional efficiency at Rangipo Power Station that requires a flow of only 0.51 cumecs to generate 1 MW of electricity. This is in contrast to the undefined, conceptual Karioi Power Scheme proposed by Ms Melhuish that has no storage, limited generation potential, no national strategic benefits, unknown environmental effects and any number of technical and operational constraints.[351]

[367] In his closing submissions for Mighty River Power Limited Mr Cowper submitted that:

> In the broader context, Ms Melhuish was dismissive of the value of hydro electricity, and seemed to think that increasing power prices would bring with them a range of alternative supply options. That approach has an element of truth, but does not adequately consider the implications for New Zealand. Higher electricity prices will also reduce our international competitiveness, as Mr Truesdale showed. And the higher prices actually emphasise the increasing value of the cheap electricity provided by the TPD. Further, Ms Melhuish did not adequately explain what would replace any lost TPD (and Waikato) hydro generation. If all her demand side energy efficiency measures could stop further growth in demand, the evidence was that New Zealand currently derives about 30% of its supply from thermal sources: any reduction in hydro supply would therefore be met by an increase in thermal generation.[352]

[368] For the Respondent, Mr Milne submitted:

> Ngati Rangi contend that uncertainties in the electricity generation market mean a duration of 10 years is appropriate, as at the conclusion of that time there may be alternative forms of generation that reduce the national reliance on hydroelectric generation.

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[350] Drinkrow, rebuttal, paragraph 2.4.
[351] Drinkrow, rebuttal, paragraph 4.3.
[352] Closing submissions for Mighty River Power, paragraphs 5.17-5.19.

> It is submitted that the overwhelming expert evidence before the Court on that matter as presented by Mr Truesdale (for Mighty River Power) and by Mr Copeland, Mr Gatland and Mr Carroll (for Genesis) was that exactly the opposite situation would apply. With the rundown in Maui gas, and the high cost (financial and environmental) of alternative forms of power generation such as wind and coal, the national importance of hydroelectric generation capacity in 10 years time will be even more substantial than it is now.[353]

Assessment and findings on electricity

[369] Much of Ms Melhuish's evidence provided an alternative point of view to that of the applicant, but we would not go so far as to agree that Ms Melhuish was dismissive of the value of hydro electricity but rather that she holds the view that because the era of cheap hydro electric power is over, a more sustainable economy – financially, socially, environmentally and culturally – could be achieved through energy conservation and utilising smaller scale renewable energy sources.

[370] While, much of what Ms Melhuish says may have an element of truth, Mr Carroll has variously described her assertions as not being realistic, speculative and uncertain. We note that her apparent support for demand side energy efficiency measures are, according to the Centre for Advanced Engineering, ... *not likely to reduce electricity consumption by 10% or more without, in addition to other factors, major disruption to the economy and peoples lives.*

[371] As Mr Drinkrow demonstrated, Ms Melhuish's evidence as it related to the Eastern Diversion was based on a number of errors, both in terms of how the TPD operates and how the water from the Eastern Diversion is managed and used for electricity generation. Mr Drinkrow also demonstrated how Ms Melhuish's postulated run of the river "Karioi power scheme" and her calculations relating to the efficiency of hydro generation from the Wahianoa Aqueduct were flawed.

[372] We accept the evidence of Mr Carroll, Mr Truesdale and Mr Gatland as to the strategic significance and value of the TPD hydro electricity generating stations in contributing to the hydro stations on the Waikato River and underpinning the electricity supply system of New Zealand.

[353] Closing submissions for Respondent, paragraphs 13 and 14.

[373] We are also mindful of the statement in the Parliamentary Commissioner for the Environment's publication that reminds us of the vulnerability of the national transmission grid to the effect that if key lines should fail a critical failure of the system could result. Also long transmission distances mean that significant transmission losses occur[354]. This further stresses the strategic location and importance of the TPD to the national power supply system.

[374] It is accepted from the evidence that the TPD has strategic significance and value, particularly in relation to its location and special functions in the electricity system for voltage support, frequency control, black start and provision of spinning reserve and for meeting peak loads.

(ii) Economy

[375] Mr Michael Copeland, a consulting economist of Wellington, gave evidence for Genesis which considered the economic costs to New Zealand from the loss of hydro electricity generation if further additional constraints are imposed on the supply of water to the TPD[355]. His evidence was based on the modelled average annual potential generation of 1,435GWh/yr and used an average price of 4.5 cents/kWhr and an average household consumption of 7,800 kWh/yr, assuming the 2001 resource consent conditions were operative. His evidence also took into account the further power that would be lost by the Waikato River power stations, from the reduction in 'foreign' water diverted into Lake Taupo (and hence the Waikato River) by the TPD.[356]

[376] Mr Copeland concluded that environmental constraints to date, including the 2001 resource consent decisions, would result in approximately 486 GWh of lost generation annually by both the TPD and Waikato Scheme and that is enough power to supply 62,300 households[357]. This equates to an annual economic loss of $21.87m.

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[354] Electricity, Energy and the Environment. Part A: Making the Connections. Parliamentary Commissioner for the Environment Report, June 2003, page 10.
[355] Copeland, EiC, paragraph 2.1.
[356] Copeland, EiC, paragraph 4.2.
[357] Copeland, EiC, paragraph 5.16.

[377] Mr Copeland went on to say that the potential average loss in electricity generation from the closure of the Wahianoa Aqueduct would be an additional 180 GWh/yr affecting 23,100 households and equate to a loss of $8.1m[358] in today's terms; from the closure of the Whanganui River intake the additional average potential loss would be 45 GWh/yr and 5,800 households equating to a loss of $2.0m,[359] and closure of the Western Diversion would result in an additional average potential loss of 629 GWh/yr affecting 80,600 households equating to a loss of $28.3m.[360]

[378] According to Mr Copeland if the above losses were accumulated a loss in generation of between 531 and 1,115 GWh/yr would result in an economic loss of between $23.9m and $50.2m per year. But, if all appeals were upheld, a loss in generation of 1,359 GWh/yr affecting 174,000 households would be equivalent to an economic loss of $61.2m per year in today's terms.[361]

[379] Based on an average nodal price of 7 cents per kWh the cumulative economic efficiency losses would increase to $34.0m per year by 2011 as a result of the environmental constraints up to and including the 2001 resource consent decisions. This figure would increase to $95.1m per year if all appeals were to be upheld.[362]

[380] Mr Copeland advised the Court that, according to Genesis, the estimated cost to construct a similar development as the TPD, in today's dollar terms, would be at least $1.5 billion.[363]

[381] When questioned by Mr Ferguson on portraying the economic impact to Genesis in terms of gigawatt hours and dollar figures, Mr Copeland confirmed that the amounts identified are the bottom line impacts on Genesis in the first instance. However, they flow through to national economic consequences, since if Genesis profits are reduced the tax and dividend payments to the New Zealand government are reduced. That flows

[358] Copeland, EiC, paragraph 5.13.
[359] Copeland, EiC, paragraph 14.
[360] Copeland, EiC, paragraph 5.15.
[361] Copeland, EiC, paragraphs 5.16 and 5.17.
[362] Copeland, EiC, paragraph 5.18.
[363] Copeland, EiC, paragraph 4.1.

on to either increased taxation or a reduction of government services with ongoing consequences for our economy.[364]

He said:

> If Genesis doesn't produce that power then some other New Zealand entity has to produce the power or else people in New Zealand have to do without it. Now if some other entity has to produce it there is an additional cost -- **at least equal to the amount that I have identified**. So someone else, if you like, is incurring that cost and that additional cost is either reducing the profits of other electricity distributors or it is being added on to the price that electricity consumers have to pay.[365] [our emphasis]

[382] On the question of any loss of generation by the TPD being produced elsewhere in New Zealand, Mr Copeland was of the view that there will be a cost incurred in producing that electricity elsewhere, *.....so there is an incremental cost there which has to be identified.....any comparison between environmental effects versus those extra costs is something which will have to be traded off.* Mr Copeland made the point that the cost of building the TPD has been incurred and *.....even if we haven't paid it off, we can't sell it... we can't cash in on the capital which has been put in place... it is what economists call a sunk cost* and with the TPD *.... because of its large sunk cost, the future costs of generating electricity are effectively zero.*[366]

Assessment National Economy

[383] The evidence that Mr Copeland presented was based on the potential average annual energy generated from the TPD as opposed to the record of the actual average energy generation [367]. Under questioning, Mr Bowler confirmed that the actual generation was somewhat less than the total potential generation given by the modelling results.[368]

[384] Mr Copeland acknowledged, in answer to a question from Mr Ferguson,[369] that monetary losses based on a modelled average potential power generation scenario of 1,435 GWh/yr would not be as valid or legitimate as using the actual record of average

[364] Transcript, page 555.
[365] Transcript, page 555.
[366] Transcript, pages 566, 568, 570 and 563.
[367] Bowler, EiC, paragraphs 4.9 and 4.10.
[368] Transcript, page 1362.
[369] Transcript, page 560.

annual generation from the TPD power stations of 1,263 GWh/yr (or 1,246 GWh/yr, using Bowler's updated figures which are about 13% more or less than the modelled potential generation).

[385] It therefore follows, that Mr Copeland's assessments of economic effects on the power companies and the national economy and households effected, consequent on the constraints on the supply of water to the TPD, are somewhat overstated, probably in the order of 13%, more or less. This, we hasten to add, is no reflection on Mr Copeland as we understand he was relying on the figures for generation which were supplied by the applicant.

[386] We accept that both Genesis and Mighty River Power would be considerably affected should the supply of water to the TPD be further restricted and there would be a flow on effect to the national economy. The extent of any losses incurred by the respective companies would be proportional to the degree of restriction, if any.

[387] In response to a request from the Court the applicant advised that, based on a conservatively assessed real cost of generation from the TPD and Mighty River Power over the last three years of 6.3 cents/kWh, the release of one cumec from the Wahianoa A aqueduct would result in the loss of 54.5 GWh/yr of generation to the TPD and MRP at a cost of $3.5m and 7,000 households would be affected.

[388] Similarly, on the basis of the same unit cost, if one cumec was lost from the Western Diversion 37.3 GWh/yr of generation would be lost to the TPD and Mighty River Power, at a cost of $2.4m and 4,800 households would be affected.

[389] If these losses were combined a total 91.8 GWh/yr of generation would be lost to the TPD and MRP at a loss of $5.9m, with 11,800 households being affected. This represents about 0.24% of New Zealand's present annual electricity energy requirements.

Landscape and Natural Character

[390] During the course of the hearing, we heard evidence about the effect of the TPD on the sensitive landscape within which it is situated. Because of the landscape's sensitivity and the criticisms levelled at Genesis' landscape assessment we feel it is necessary to discuss this evidence.

[391] Mr Frank Boffa, a Landscape Architect and Director of Boffa Miskell Ltd, gave landscape evidence on behalf of Genesis. He focused on the effects of structures and the associated physical modifications to the landscape, and the general amenity values of the Eastern and Western Diversions of the TPD. Mr Boffa did not discuss the tangata whenua dimension, although he believes their values to be extremely important considerations.

[392] Leading from section 6(b) of the Resource Management Act, providing for *the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development,* Mr Boffa believes it is important to place the effects on natural character and features into the context of the years that have elapsed since the construction of the TPD. In his opinion the streams and landscape have adapted to the scheme, and assessment of natural character must, therefore, acknowledge the environments that are now present.[370]

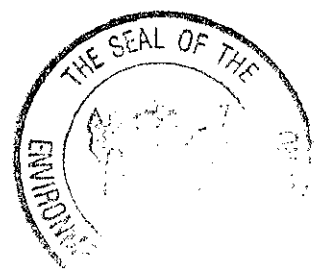
[393] In a specific evaluation of the 'landscape character areas' of the Western Diversion he concluded that the intakes and canal system had some effects, but did not feel they were out of keeping with the area's natural character, and that significant amenity benefits have accrued to the area as a result of the trophy trout fishing that has developed.[371]

[394] Of the Eastern Diversion, following a similar appraisal of each structure and area, he concluded that all effects were no more than minor, although he did recommend that the sediment dumps could be more sensitively managed[372]. From a land use perspective, Lake Moawhango was a distinctive landscape element and an attractive feature of the landscape.[373]

[395] Having completed the assessment of the individual landscape character areas he said:

> Visually the TPD scheme is well contained and in most instances the component elements of the project are not generally visible to the public at large, or residents within the area. I suspect most non-recreational visitors would pass through the area with little or no realisation that the TPD scheme exists. I consider the TPD scheme to have been well planned and sited with minimum adverse physical

[370] Boffa, EiC, paragraph 2.6.
[371] Boffa, EiC, paragraph 4.17.
[372] Boffa, EiC, paragraph 5.4.
[373] Boffa, EiC, paragraph 5.14.



landscape effects. I also consider the project has been well integrated within a high quality, diverse and sensitive natural landscape.[374]

[396] In regard to this summary Mr Boffa was questioned by Mr Ferguson, who asked:[375]

> (Q) In terms of tangata whenua values, for example, if it is the firmly held cultural view of tangata whenua groups that a waterway should not be diverted then the issue of whether the waterway is accessible or not doesn't mitigate whether in fact the water is diverted or not, does it? It is the mere fact that diversion, regardless of where it occurs impinges upon that view, or that value
> (A) As I have said, tangata whenua values are certainly important and should be seen as part of any mitigation or enhancement package.....But until the values are clearly articulated in terms of what they are, where they are, and what the significance of their importance is, I am in no position to say.

And later when questioned by the Court[376]

> (Q) Are you saying that when you wrote your evidence you did not have the cultural values identified by the tangata whenua.
> (A) I didn't have them, no, or they were not available.
> (Q) Having received the evidence of the relative tangata whenua – have you read the evidence that has been adduced by them?
> (A) Yes, I have.
> (Q) Did you find anything relevant so far as cultural values are concerned in that evidence, so far as your assessment of landscape is concerned?
> (A) I didn't find anything, your Honour, that would change my assessment and I didn't find anything specific enough that I could usefully offer any suggestion in terms of enhancement or mitigation that might help in mitigating any effects.

In his 'Conclusions' Mr Boffa said:

> The more significant landscape effects are those associated with variable river and stream flows. While the perceptual effects of these are quite apparent above and below some of the major in river and stream structures, the effects downstream are not as apparent, particularly if one was generally unfamiliar with the original flow regimes.....[377]

> Genesis has proposed flow releases and minimum flows in the Moawhango River, the Whanganui River and the Mangatepopo Stream. In my opinion these increased flows will enhance the natural appearance and character of these watercourses.[378]

[374] Boffa, EiC, paragraph 3.7.
[375] Transcript, page 520.
[376] Transcript, page 540.
[377] Boffa, EiC, paragraph 7.2.
[378] Boffa, EiC, paragraph 7.3.

[397] Mr Alan Titchener a landscape architect called by Ngati Rangi, gave evidence. His evidence was, regrettably, largely a critique of Mr Boffa's evidence as it related, or did not relate, to tangata whenua matters, and only in regard to the Eastern Diversion. We cast no blame on Mr Titchener for this, we understand that his instructions and the finance to cover the work and the time available, were limiting factors in the amount of field work that could be undertaken. However, the absence of a comparable assessment did not give the Court the opportunity to make a comparison which may have given us a practical assessment of those values most likely to represent the iwi's point of view. Mr Titchener was very critical of Mr Boffa's failure to personally consult with tangata whenua, despite Mr Boffa admitting, in his evidence-in-chief, that he did not feel that he had the necessary understanding to discuss Maori cultural and spiritual association with his basic landscape assessment. He told the Court that all the work he did was given to, and used by, Genesis in their discussions with the tangata whenua.

[398] Mr Titchener gave us the definition of 'landscape' that he believes is the most appropriate, namely; 'Landscape is the relationship between natural and human landscape patterns, human experience and perception of these patterns, and meanings associated with them'[379]. It was the failure to incorporate the "human landscape pattern" that he felt was most at fault with Mr Boffa's evidence. It is clear he said:

> that the consideration of cultural factors and in particular the value of landscape to tangata whenua is an essential consideration in a landscape assessment. In few landscapes of New Zealand is this more relevant than in the subject landscape which deals with a sacred ancestral mountain of the highest spiritual and cultural value and the land and waters associated with it.[380]

Mr Titchener, for his own part, said

> I do not purport in any way to speak for Ngati Rangi Iwi on tangata whenua values and I respectfully defer to Ngati Rangi authorities in this area.[381]

[399] It is regrettable that nowhere else in their evidence did the iwi make any reference to their own feelings on landscape matters.

[379] Titchener, EiC, paragraph 4.1.
[380] Titchener, EiC, paragraph 7.1.
[381] Titchener, EiC, paragraph 7.3.