

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I MUA I TE KOOTI TAIAO O AOTEAROA  
KI OTAUTAHI**

ENV-2018-CHC-34

**IN THE MATTER OF** the Resource Management Act 1991

**AND**

**IN THE MATTER OF** appeals under clause 14 of the First Schedule to the Act

**BETWEEN** **BEEF+LAMB NEW ZEALAND LIMITED**

Appellant

**AND** **SOUTHLAND REGIONAL COUNCIL**

Respondent

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**STATEMENT OF EVIDENCE OF CHRISTINE ANNE FOSTER FOR  
BEEF+LAMB NEW ZEALAND LIMITED  
22 February 2022**

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FLETCHER VAUTIER MOORE  
LAWYERS  
PO BOX 3029  
RICHMOND 7050

Telephone: (03) 543 8301  
Facsimile: (03) 543 8302  
Email: [cthomsen@fvm.co.nz](mailto:cthomsen@fvm.co.nz)  
[cluisetti@fvm.co.nz](mailto:cluisetti@fvm.co.nz)

Solicitor/Counsel: CP Thomsen/ CH Luisetti

## **QUALIFICATIONS AND EXPERIENCE**

1. My name is Christine Anne Foster. I am a planning consultant and sole director of CF Consulting Services Limited, based in Wellington. I hold a Bachelor of Regional Planning and have worked as a resource management planner in New Zealand for over 35 years.
2. My qualifications and experience remain as stated in my statement of evidence in chief dated 20 December 2021.
3. This statement of evidence is within my area of expertise as a resource management planner, except where I state that I rely on the evidence of others. I have read the Code of Conduct for Expert Witnesses set out in the 2014 Environment Court Practice Note (and, in particular section 7 in relation to an expert's duty to the Court) and confirm that the opinions I have expressed represent my true and complete professional opinions. I am aware of the obligations imposed on expert witnesses by the Code and reaffirm my commitment to comply with the Code. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

## **SCOPE OF EVIDENCE**

4. I have been asked by Beef+Lamb NZ Limited (**B+LNZ**) to consider the amendments proposed in the evidence of other planning witnesses since the conclusion of planner expert conferencing. This statement of evidence addresses one matter raised by amendments proposed by Linda Kirk (for the Director General of Conservation) and Matthew McCallum-Clark (for Southland Regional Council). That is, amendments they propose to the version of Rule 70 (a) that was agreed in the Planning Joint Witness Statement dated 10 December 2021 (*Planning JWS*).

## **DECISIONS VERSION RULE 70 (a)**

5. The Decisions Version wording of Rule 70 (a) is as follows:

### **Rule 70<sup>106</sup> – Stock exclusion from water bodies**

- (a) From 1 July 2020, the disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river (including an ephemeral river), modified watercourse, or natural wetland by stock including cattle, deer, pigs or sheep is a prohibited activity.
6. The Planning witnesses agreed, in the Planning JWS, the following amendments to the Decisions Version of Rule 70 (a) (shown in bold underlining and strike-through text):

**Rule 70<sup>106</sup> – Stock exclusion from water bodies**

- (a) ~~From 1 July 2020,~~ The disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river (~~including an ephemeral river~~), modified watercourse, or ~~natural wetland~~ by stock including cattle, deer, pigs or sheep is a prohibited activity.
7. There had been extensive discussion at Planner conferencing about replacing the defined term ‘ephemeral river’ with ‘ephemeral flow path’. The wording agreed in the Planning JWS reflects the outcome of that discussion (that neither expression should be included and these words are shown struck through in green font). I note, in reference to the change to the conferencing outcome promoted by Ms Kirk discussed below, the actual extent of amendment of the Decisions Version of the rule is as shown above and does not include the words ‘flow path’.

**FURTHER AMENDMENTS PROPOSED TO RULE 70 (a)**

8. Ms Kirk has proposed the following amendment to Rule 70 (a):
- ~~From 1 July 2020, t~~ The disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river (~~including an ephemeral river~~) (including an ephemeral waterbody), modified watercourse, or ~~natural wetland~~ by stock including cattle, deer, pigs or sheep is a prohibited activity.

9. Ms Kirk has also proposed replacing the definition of 'ephemeral river' with the expression 'ephemeral waterbody' as follows:

**Ephemeral waterbody rivers**

**Rivers Swales or depressions** which only contain flowing or standing water following rainfall events or extended periods of above average rainfall.

10. Ms Kirk's reasons for this further amendment are discussed in paragraphs 35 and 36 of her statement of evidence dated 4 February 2022.

11. Mr McCallum-Clark proposes slightly different wording:

~~From 1 July 2020, t~~ The disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river ~~(including an ephemeral river)~~ **(including ephemeral flow paths)**, modified watercourse, or ~~natural wetland~~ by stock including cattle, deer, pigs or sheep is a prohibited activity.

12. Mr McCallum-Clark's reasons for this further amendment are discussed in paragraph 49 of his statement of evidence dated 11 February 2022. Mr McCallum-Clark does not propose a definition of 'ephemeral flow path'. Rather, he supports the Planning JWS approach that refers to 'ephemeral flow paths' (not a defined term) within the definition of 'critical source area' and he supports the treatment proposed in the Planning JWS B5 provisions for 'critical source areas'<sup>1</sup>.

**THE ISSUE**

13. Rule 70 (a) is a rule that controls activities in the beds of waterbodies. It sits under the heading 'Bed disturbance activities in river and lake beds' in the Plan. It is a prohibited activity rule. The expression 'ephemeral river' in Rule 70 (a), and the Decisions Version definition of that expression, confirm that the resource being managed is beds of rivers

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<sup>1</sup> Paragraph 42 and 43 of the statement of evidence of Matthew McCallum-Clark dated 11 February 2022.

and lakes. This is also clear from the report of the Hearing Panel (in paragraphs 248 to 258 and, particularly, paragraphs 254 and 257).

14. Gerard Willis has explained comprehensively in his statement of evidence dated 4 February 2022 why areas of land that become inundated and pond periodically ('ephemerally') should not be considered to be rivers or waterbodies<sup>2</sup>. His conclusions are supported by the evidence of Craig Depree<sup>3</sup>. I agree with Mr Willis' conclusion that areas of land (including swales and depressions in farm paddocks) that become inundated and pond periodically or ephemerally should not be considered to be rivers. I note that this was also the approach recommended in the section 42A report (at paragraph 10.326 and in the recommended wording of Rule 70 in paragraph 10.346).
15. Dr Depree's evidence supports my view that ephemeral ponding areas are terrestrial environments that do not have 'beds'. In my opinion, they do not fall within the scope of environments addressed by section 13 of the Act. In my opinion, areas of land that are not beds of rivers should not be captured by Rule 70 (a). Rule 70 (a) is a rule controlling activities that have the potential to damage, destroy, disturb or remove the habitats of certain bird species in, on, or under the bed of a lake or river. That is, a rule addressing the matters prescribed in section 13 (2A) (d) of the Act.
16. Given the geography of the Southland region, my expectation is that there will be extensive areas of land within individual farms and the region that could become inundated and contain flowing or standing water following rainfall events or extended periods of above average rainfall. Rule 70 (a) does not address the disturbance of actual nests and roosting sites or the times when nesting and roosting is actually occurring. It addresses 'areas'. If areas of land within a farm that periodically pond are captured by the wording Ms Kirk proposes, as areas where nesting or roosting may have occurred in the past or may potentially occur in the future, there may be large areas of land within

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<sup>2</sup> Paragraphs 7.1 to 7.32 of the statement of evidence of Gerard Willis dated 4 February 2022.

<sup>3</sup> Paragraphs 5.1 to 5.18 of the statement of evidence of Craig Depree dated 4 February 2022.

farms on which stock farming is prohibited. The evidence of Cain Duncan (paragraphs 38 to 50) demonstrates that the costs of excluding livestock from ephemeral flow paths would be significant and, for some operators in some areas, would challenge the continued viability of farming.

17. Ms Kirk states (in paragraph 35 of her statement of evidence dated 4 February 2022) that she understands that the threatened species of birds named in Rule 70 (a) do roost and nest in ephemeral waterbodies/flow paths. I have not been able to identify the ecological evidence on which Ms Kirk relies for that understanding. There remains a question, in my opinion, as to whether the nesting and roosting of these bird species occurs within swales and depressions within farm paddocks and, if it does, how extensive that occurrence is. In other words, what the nature of the issue actually is for these bird species within farm paddocks that are not rivers or waterbodies but which periodically pond with water.
18. In the absence of this evidence it is difficult to undertake a s 32AA analysis of the amendments to the rule proposed by Ms Kirk and Mr McCallum-Clark. All I can conclude, in reliance on the evidence of Mr Duncan, is that there will be economic and opportunity cost if Rule 70 (a) is amended as proposed by Ms Kirk such that it applies to broad areas of land within farms. I have no evidence on which to base an assessment of the environmental benefits of such a rule. The amendments were not discussed at planning witness conferencing and it is not clear which submission or appeal point the proposed amendments seek to address.
19. I do not oppose the intention of Rule 70 (a). I agree that stock should be prevented from disturbing and damaging the beds of rivers where the named bird species nest or roost. The unanswered question is to what extent there is a risk of bird nesting and roosting habitat damage and destruction on land within farms where ponding occurs. This risk is not explicitly discussed in the analysis of Rule 70 (a) in the section 42A

report or the Hearing Panel's report on Rule 70<sup>4</sup> and, as noted above, is not the subject of any evidence before the Court.

20. The policy and rule framework proposed in the Planning JWS largely seeks to control stock access to ephemeral ponding areas and ephemeral flow paths so as to minimise the risk that soil disturbance and the presence of animals could contaminate water (with sediment and animal wastes). This is consistent with the section 30 (c) (i) and (c) (ii) functions of regional councils under the Act. The amendments Ms Kirk and Mr McCallum-Clark propose are for a different, new, purpose. That is: to avoid the risk of stock damaging nesting and roosting sites, not on the beds of rivers and lakes, but on land.
21. I support the Planning JWS framework for managing contaminant risk associated with ephemeral ponding areas and ephemeral flow paths (through the management of 'critical source areas'). I note that Ms Kirk and Mr McCallum-Clark also support that approach<sup>5</sup>.
22. I do not consider that any new definitions are necessary to retain the original intention of Rule 70 (a), being to prevent damage and destruction of bird nesting and roosting habitat within rivers. The expressions 'ephemeral water body' or 'ephemeral flow path' are not necessary to effect this intention. Rule 70 (a) should continue to refer to rivers and it is appropriate that it should apply to ephemeral rivers.
23. The RMA definition of 'river' includes intermittently flowing bodies of fresh water which, in my opinion, includes ephemeral rivers. Reliance on the RMA definition of 'river' should be sufficient to ensure the rule can be enforced in ephemeral rivers. For that reason, I am comfortable that the Planning JWS wording of Rule 70 (a) is appropriate. I understand that Rule 70 (a) would be one of very few provisions in the Planning JWS framework that uses the expression 'ephemeral river'. It may be that no definition is required at all. If greater specificity is necessary my view is that, for the express purpose of Rule 70 (a) and de-coupled from the

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<sup>4</sup> Paragraphs 10.279 to 10.346 of the section 42A report and paragraphs 248 to 258 of the Report of the Hearing Panel.

<sup>5</sup> For example at paragraph 33 of the statement of evidence of Linda Kirk dated 4 February 2022 and at paragraph 47 of the statement of Matthew McCallum-Clark dated 11 February 2022.

management of water contamination and critical source areas, the Decisions Version definition of 'ephemeral river' is workable. That is because it simply refers to rivers and falls within the intended scope of Rule 70 (a) and the Council's RMA section 13 functions in relation to the beds of lakes and rivers.

24. My conclusion is that the simplest approach is to delete all of the words in brackets after the word 'river', as proposed in the Planning JWS. I also note that there appears to be a redundant word 'or' in Rule 70 (a) and I suggest it should be deleted:

**~~From 1 July 2020, t~~** The disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river ~~(including an ephemeral river)~~, modified watercourse, ~~or natural wetland~~ by stock including cattle, deer, pigs or sheep is a prohibited activity.

CA Foster

22 February 2022