

**BEFORE A COMMISSIONER APPOINTED
BY THE SOUTHLAND REGIONAL COUNCIL**

IN THE MATTER the Resource Management Act 1991

AND

IN THE MATTER of resource consents to occupy the Coastal Marine Area
with a tide gate and weir and to dam and divert water

AND

IN THE MATTER of an application by **SOUTHLAND REGIONAL
COUNCIL**

**SUBMISSIONS OF COUNSEL FOR THE APPLICANT
29 August 2024**

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MAY IT PLEASE THE COMMISSIONER

1. The Catchment Management Division of Environment Southland (**Applicant**) is responsible for Council-owned flood protection. It aims to manage and protect the integrity and operational effectiveness of its assets.
2. This application relates to existing set of tide gates, weir and diversion located on the Titiroa Stream (**Gates**), about 160m upstream of the Tokanui-Gorge Road Bridge on State Highway 92.¹
3. The weir and tide gates are a long-standing part of the Lower Mataura Catchment Flood Scheme.² Together, they help control the water table upstream and improve drainage of low-lying farmland. The weir dams the incoming tide and diverts water into the diversion, pushing the tide gates shut.
4. The Applicants have previously held resource consents for the Gates, the most recent being a coastal permit granted to occupy the Coastal Marine Area (**CMA**) and permit to dam and divert water (2015). Regrettably, those consents lapsed without an application within the timeframes contemplated by s 124. Thus, this application is for a retrospective consent.
5. Much of the surrounding farmland is owned by Council and leased. Council ownership provides the opportunity to offer a mitigation package on that Council-controlled land, and has also enabled wetland and native bush enhancement and riparian fencing throughout the catchment. I will come back to it, but these enhancements are supported by the Gates' presence.

The Plans

6. There relevant planning documents are set out by the s 42A report writer and witnesses and are not repeated. I agree with the s 42A report writer that the PSWLP rules have legal effect.

¹ See Appendix 1 to Mr Connor's evidence.

² Refer Mr Young's evidence.

7. I note for completeness there is also the Southland Flood Control and Drainage Control Management Bylaw 2020. The Gates are identified in the bylaw as flood control works. The bylaw's purpose is to manage, regulate and protect the effective operation and integrity of flood control works owned by, or under the control of the Council. The bylaw does not impact on this application other than to signal the importance of, and the Gates, role in drainage of the region.

Resource Consents Required

8. The tide gates and weir occupy private land owned by the Southland Regional Council and Crown land, respectively. Both are in the CMA.
9. The following consents are sought:
 - (a) Discretionary activity - rule 9.11 Regional Coastal Plan for Southland for exclusive or preferential occupation of Crown land in the CMA by a weir structure.
 - (b) Innominate discretionary activity under s 87B RMA - to occupy land in the CMA.
 - (c) Discretionary activity - rule 4 PSWLP to dam water outside the CMA.
 - (d) Restricted discretionary activity - rule 49(b) PSWLP to divert water.
10. I agree with the s 42A report writer that the activity should be bundled as a discretionary activity.
11. Regarding the present occupation of the Stream by the Gates, I note Mr McSoriley's evidence that removal of the Gates would require resource consents, including for the diversion of water from the existing tide gate diversion channel.³
12. Additionally, the works involved in establishing the Mataura Catchment flood scheme over time have permanently altered the Titiroa Stream. A

³ See Mr McSoriley's evidence at paragraphs [39] - [40].

resource consent would be required to return the stream to its former course, as appears to be sought by Awarua Rūnanga.

Issues

13. The s 42A report writer identified key issues for the Applicant to address in its evidence. These are (my summary):
 - (a) Adverse effects on river values, including ecosystem health, indigenous biodiversity and cultural and spiritual values.
 - (b) Adverse effects on fish passage, including lack of mitigation of the barrier to fish passage and velocity effects.
 - (c) Adverse effects on inanga spawning.
 - (d) Potential effects on water chemistry (particularly the extent of the saltwater wedge).
 - (e) A lack of evidence as to the beneficial effects of the Gates, including the economic value of the productive pastoral land.
 - (f) A lack of evidence as to the extent of inundation were the gates to be removed (i.e. necessity for the gates) and the impact of sea level rise.
14. Attached as an appendix is a table providing some guidance on how these matters have been addressed.

An Amended Proposal & the Applicant's Position

15. Council has carefully considered the evidence it has received. It remains open to exploring mitigations to address the concerns of Ngāi Tahu but the ways that their concerns can be accommodated, and the gates remain, is unfortunately not apparent. I will return to this matter.
16. Ms Drummond's evidence has responsibly conceded from the outset that an ecologically preferable position would be removal of the Gates. As already noted, and for obvious reasons, that is not compatible with the Council's objectives to re-consent the Gates.

17. As an alternative, various forms of fish-friendly gate have been considered. What has become apparent is that what one means by fish-friendly gates depends greatly on the circumstances. There is no single structure that can authoritatively be called a 'fish-friendly gate', as it depends on the circumstances of the water body, the species that are present and, dare I say it, budget.
18. Modelling has been undertaken by Mr Gardner to show the effect of the gates remaining open longer, meaning more water gets upstream impacting water levels within the catchment. The model indicates the if all three gates were left open for two hours longer a day there will be an impact on the drainage network and, therefore water levels.⁴
19. After careful consideration Council is proposing a letterbox opening (vertical slot), or similar, to provide for native fish passage when the gates are closed (**Letterbox**). It is proposed the Letterbox be installed on at least one gate, although this will not prevent additional installations if it is found to be effective. This proposal allows relatively small amounts of additional water to flow upstream when the Gates are closed but still provide for some fish passage and is offered in the context of the Gates being open for approximately 12 hours a day already.
20. Accompanied with this proposal is a suite of monitoring conditions that allow, in a cost-effective way, the effectiveness of the fish-friendly gate to be monitored. While the suite of monitoring conditions proposed in the expert ecological evidence for the Minister would provide a very helpful data set, the time and cost associated with them *in toto* are prohibitive. Instead, Council has attempted to strike a balance between addressing the concerns raised by that witness while improving fish passage and achieving Council's goals.
21. In addition to these amendments, Council proposes a change to its proposal to install baffles⁵, which were intended to provide fish refuge when swimming upstream. Instead, Council is now proposing the use of boulders within the main channel to provide that fish refuge, with accompanying monitoring conditions. This approach has the added advantage of providing better protection from predators.

⁴ See Mr Gardner's [46] and scenario 4 in his attached modelling report.

⁵ Refer Ms Drummond's EIC at [56].

22. Finally, the inanga habitat enhancement works remain on the table. Below is a table that shows the proposed areas, details of which can be found in Ms Drummond's rebuttal evidence, along with an updated map. Importantly, it is now proposed that the works be undertaken pursuant to a management plan to be certified by the Consent Authority.

Table 1: Mitigation and compensation summary

Option	Area/Location
Inanga spawning habitat enhancement upstream of the gates	0.6 ha
Tributary enhancement for inanga spawning and native fish habitat downstream of the gates	0.5 ha
Boulder cluster installation in the diversion channel to provide fish resting zones and refugia habitat from predators	In diversion channel
Gate retrofitting to provide letterbox opening or another form of improved passage when gates are closed	Improved fish passage

23. The consent term sought is 10 years from the date of the decision. The primary reason for the term is to ensure the capital and operational investment Council will need to make to comply with the conditions can be justified over the life of the consent.
24. This term also enables careful consideration of the future of the Gates and, importantly, consultation with parties who may be affected by any decision to remove, redesign or retain the gates. The monitoring that is proposed and the regular check-ins with Council are going to improve the information base for making any decision.
25. Finally, I highlight the review condition which is being offered to allow the Consent Authority to review the effectiveness of the Letterbox (or similar), if monitoring identifies concerns with the same.
26. Turning to conditions of consent, I have had Mr McSoriley prepare draft conditions, which are attached. I expect there may be issues arising as we progress, so I am proposing a direction be made before the hearing is closed, for a further, refined, set of conditions to be provided.

27. Council acknowledges and appreciates there may be some frustration from the submitters as to the timing of this amendment. I have been asked to acknowledge that and to communicate that the amendments are an attempt to find a way to address submitters' concerns while providing for the crucial infrastructure the local community depends upon for their livelihood and lifestyle.
28. In summary it is the Applicant's position that the Gates be consented because:
- (a) The activity has positive effects, including social and economic effects associated with rural land use contemplated and enabled by the PSWLP.
 - (b) There is a functional need for the Gates to occupy the CMA.
 - (c) The mitigation package proposed is comprehensive and will lead to enhancement. It now provides for mitigation of the 12 hourly restrictions on fish passage.
 - (d) Short of building new gates or removing them entirely, this proposal represents a robust and comprehensive response to the concerns of submitters, and the direction found in the planning instruments.

The Law

29. I am aware that the Commissioner is an experienced RMA decision-maker and will therefore not spend any time addressing the fundamentals of part 2 and 104. I will focus on what I think are material legal issues you may wish to highlight in your decision.

Retrospective Consents

30. The law is clear on retrospective consents. The fact the activity is currently operating without consent does not influence the outcome of

the process; nor does the Applicant's failure to fulfil previous consent conditions have an impact.⁶

31. Section 124 is a transitional provision allowing for an existing activity to continue operating until a new consent is granted.⁷ The Applicant cannot rely on s 124 as that section requires an application no less than 6 months before the expiry of a consent; the previous permits lapsed 29 October 2020 and application was not lodged until after that. Mr Connor has addressed this and explained that once the matter was brought to the Applicant's attention it urgently applied for new consents.
32. It was this urgency that has led to some of the criticisms from the submitters. Council has taken on board those submissions and has provided additional evidence and material to respond to those matters, as noted above. Additionally, the monitoring conditions proposed are, in part, a pragmatic response to concerns from submitters about, what they say are, information gaps.⁸
33. Finally, it is noted, that an abatement notice has been issued to the Applicant. An extension to comply with the notice has been given to allow this process to take its course.

What is the environment under s 104(1)(a)?

34. As you know, the *Hawthorn* environment, embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a plan.⁹ This has been deemed to include unimplemented resource consents and existing use rights.¹⁰
35. In *Bay of Plenty Regional Council v Fonterra Co-operative Group Limited*¹¹ the *Hawthorn* principle was paraphrased as:

⁶ *Colonial Homes Limited v Queenstown Lakes District Council* W104/95 and *Hinsen v Queenstown Lakes District Council* [2004] NZRMA 115.

⁷ Section 124(3)

⁸ Refer evidence to Mr Connor.

⁹ *Queenstown Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [84].

¹⁰ *Rodney District Council v Eyres Eco-Park Ltd* HC Auckland CIV-2005-485-33, 13 March 2006 at [55] and *Hawthorn*.

¹¹ [2011] NZEnvC 73.

... the existing environment is the environment *as it exists at the time of hearing* including all operative consents and any consents operating under s 124 of the Act, overlain by those future activities which are committed activities and also unimplemented consents (which can be considered at the discretion of the authority). [Emphasis added].

36. Here, the gates are longstanding, existing infrastructure. However, to avoid 'locking in' water permits, the Environment Court has found that decision makers must imagine the environment, for the purposes of s 104(1)(a), as if the activity was not there.¹²

37. The High Court *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*¹³ upheld this approach, stating relevantly:

Accordingly, the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, *unless it would be fanciful or unrealistic* to assess the existing environment as though those structures authorised by the consent being renewed did not exist [*emphasis added*].¹⁴

38. The longstanding existence of the gates does not make such an assessment fanciful or unrealistic by itself.¹⁵

39. The Applicant has no quarrel with the way the s 42A reporting officer has characterised the existing in-stream environment at his paragraph 2.2.16. If it is understood correctly, he is saying that the gates are not lawfully occupying the bed of the Titiroa Stream and therefore the environment should be assessed as if the structures and diversion were not in place. This is useful but does not quite go far enough. The material issue to be addressed is what is the wider environment that will be affected by "allowing the activity"?¹⁶

¹² *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72.

¹³ [2016] NZHC 2948.

¹⁴ [65].

¹⁵ *Ngāti Rangī* at [66].

¹⁶ Refer s 104.

40. Firstly, it is noted that as a matter of fact the existing environment is a highly modified productive pastoral landscape. Pastoral agriculture is generally permitted under the relevant plans.¹⁷
41. In the well-known *Contact Energy* case¹⁸ the effects on the environment to be considered were those that actually existed at the time of the application, including, there, the effects of past geothermal extraction. It is submitted this case provides a principle applicable here that the wider environment is as found at the time of this application, excluding the Gates (see *Ngāti Rangī*). That wider environment is a pastoral agricultural landscape.
42. Thus, it is lawful for you to acknowledge the effect of the Gates removal, which the evidence establishes would be a reversion back to wetland habitats. That is not to characterise that reversion as an adverse effect of not granting the application, which would be flawed. Rather, it is, in the view of my client, a positive effect of granting the application, being the continued utilisation of the land resource for pastoral agriculture.

The Applicant's Position

43. The Applicant says that the presence of these gates enables the use of land in a way that is beneficial to the entire community (not just the 11 ha suggested in the evidence for Rūnanga) through its contribution to the wider Southland economy and the enabling of retirement of Council-owned land, fencing and other activities described in evidence.
44. While it accepts that in a perfect world the gates would not be present and fish passage would be unimpeded, its evidence shows that, in respect of ecological values and effects, the biodiversity and functioning of the Titiroa Stream remains robust. A position that will be improved by the amendments discussed above.
45. Mr Young's evidence also notes the Gates have an effect on keeping water levels high below the bridge, where there is significant wetland habitat on Council-owned land. It is not clear what would happen to downstream water levels if they were removed.

¹⁷ Rule 24 PSWLP, which relates to incidental discharges from farming, is subject to Court of Appeal proceedings and subject to a stay.

¹⁸ *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1.

46. Notwithstanding the amended proposal, I highlight that fish passage is not completely impeded by the current gate design. Passage is available for half of the day, a factor not seriously acknowledged by some submitters in opposition. Furthermore, upstream the Titiroa cut-off also provides for fish passage to the Mataura River.
47. There is a robust whitebait fishery. A direct response to a significant identified adverse effect, upon inanga spawning, has been addressed by the Applicant by way of habitat enhancement on available land controlled by Council.

Cultural Effects & the Applicant's Response

48. Mr Connor is an employee of the Catchment Division of Environment Southland and is giving evidence as the project sponsor. Mr Connor's evidence addresses engagement with Awarua Rūnanga.
49. My client is prepared to concede that its earlier engagement was not as effective as it could have been. Mr Connor's evidence suggests the reason the attempts to engage were not successful may have been on account of the two parties talking past each other. I express no view on that and do not think it is helpful to go any further.
50. Recent engagement attempts have been an attempt to address how the application could provide for Ngāi Tahu values, rights and interests. Rūnanga evidence has confirmed it seeks a "more natural use of the flood plan" and then cites the restoration of bush, wetlands and waterways through the repurposing of land owned by Environment Southland.¹⁹ This is exactly what is already happening with the Gates in place, although it may not go far enough from Nga Rūnanga's perspective.
51. The evidence furthermore explains the relationship between Ngāi Tahu and water, and criticises the Application for not starting from the point of asking what a healthy state for each water body is. This is not accepted and if the answer to the question "what is a healthy state?", is a stream with no Gates, this shines a light of the task for you, which is the classic balancing of competing values.

¹⁹ Evidence of Mr Whaanga & Ms Blair.

52. There is no policy support for a position that, taken to its logical conclusion, would require reversion of the surrounding land back to some historic state. In my submission that is not what is required and the analysis undertaken below is intended to demonstrate that.
53. This Application has *not* fallen into the trap of assessing effects as being minor or less than minor from a western scientific perspective. The difference between that and Ngāi Tahu conceptions of values are understood. That there is an impact on mauri is likewise accepted and understood and the cultural effects are acknowledged by the Applicant.
54. I submit a more appropriate understanding of the relationship set out in the PSWLP between cultural values, including mauri, and the sustainable use of resources, including the land, can be expressed in less binary terms. This is reflected in the PSWLP, over which Te Mana o te Wai is draped like a korowai or cloak, expressing the paradigm shift spoken of in *Aratiatia*.²⁰
55. The Council would like to re-engage with Ngai Tahu on its aspirations for the area over the proposed term of the consent sought. It is clear that longer-term decision-making must be done in partnership with Ngai Tahu, like, I am told, the Council has successfully done elsewhere in the Region. Additionally, that longer-term approach must consider the views of all those potentially affected by decisions on the Gates.

The Model & Lay Evidence

56. Turning briefly to Mr Gardner's model, at the time of writing no party has taken issue with that model. Nonetheless, it may be helpful to explain the basis upon which the Applicant is putting the evidence before you.
57. It has been well explained that models are tools to aid with decision making – captured in the aphorism all models are wrong, but some are useful.²¹ In other words, models are artificial and always fall short of real life's complexities.

²⁰ *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208.

²¹ A paraphrasing of Professor George Box – cited by Parliamentary Commissioner for the Environment in *A review of freshwater models used to support the regulation and management of water in New Zealand* June 2024 p 28.

58. What Mr Gardner's model allows you to conclude is that the removal of the gates will lead to an increase in the water table upstream. Further, it shows that changing the amount of time the gates are open will do the same thing, an issue particularly important because of the extensive tile and mole drain network that has been developed over the years.
59. Mr Gardner's conclusions as to the extent of an inundation can be compared to those in Mr Frisby's and Mr Young's evidence where they suggest the degree of inundation from removal of the gates would be much further upstream. The two views can be reconciled on the basis of a finding that the evidence of two lay witnesses, who are very familiar with the area, shows that water level increase will be at least as far as Mr Gardner models, but probably further.

Policy Settings

Te Mana o te Wai

60. Te Mana o te Wai is now an integral part of freshwater management. I am aware through your decision on the Proposed Otago Regional Policy Statement that you will be alert to how this water-centric approach is given effect to in plan making, and, by extension, how it should be had regard to under s 104. Nonetheless, I thought it might be helpful to set out my understanding because it is so important for the PSWLP.
61. Te Mana o te Wai is, as explained by Judge Borthwick in the *Aratiatia* line of cases, a move away from the effects-based assessment that was previously driving decisions on freshwater. Rather, it is a move toward an approach that values, first of all, the health of the water itself. Thus, that is the first and foremost consideration we must be guided by.
62. The way the Applicant has approached this is to assess and address the impact the Gates are having upon the Stream, recognising that a no gates scenario would be the optimum outcome. Clearly however, that proposition is incompatible with this application. This is where the focus on the health of the freshwater body and the wider ecosystem comes into play, as embodied by the PSWLP. It is to be remembered, that Te Mana O te Wai is not a Māori-centric view, it is water-centric (see *Aratiatia*). Thus, we must analyse the activity's wider effects, crystallised

once we have satisfied ourselves that the health of the water body is first and foremost protected.

63. In my submission the way you can do this is through the lens of what the PSWLP is attempting to achieve, as an instrument that has given effect to Te Mana O te Wai, and in light of the evidence provided by the Applicant, especially Ms Drummond and Mr McSoriley.

Proposed Southland Water and Land Plan

64. The objectives of the PSWLP were made operative in 2021.
65. In the *Port Otago* case the Supreme Court took the view that conflicts in the NZCPS are likely to be rare if those policies are properly construed, even where they appear to be pulling in different directions. It follows that any apparent conflict between policies may dissolve if “close attention is paid to the way in which the policies are expressed”.²²

66. It said a *structured analysis* to resolving conflicting policies should be applied and that:

All relevant factors must be considered in a structured analysis to decide whether, in the particular factual circumstances, the resource consent should be granted. This means assessing which of the conflicting directive policies should prevail, or the extent to which a policy should prevail, in the particular circumstances of the case.²³

67. While there are not conflicting directive policies per se, this application attempts to apply a structured analysis to the interpretation of the PSWLP and Regional Coastal Plan for Southland. My focus in these submissions is the PSWLP and the structure of the Plan as a whole, applying *East/West Link*.²⁴

²² *Port Otago Ltd v Environmental Defence Society* [2023] NZSC 112 at [63].

²³ [78].

²⁴ *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.

68. The integration of resources (land, the coast and water in all its forms) contemplated by objective 1 is important and is an expression of the ki uta ki tai philosophy.²⁵
69. Objective 2 is the second part of the korowai and appears, on my understanding to identify at least one key issue. Objective 2 says:
- The mauri of water provides for te hauora o te taiao (health and mauri of the environment), *te hauora o te wai* (health and mauri of the water body) and te hauora o te tangata (health and mauri of the people). [emphasis added]
70. Whether this Application can achieve the emphasised part of objective 2 seems to me to be a material matter that needs to be resolved.
71. Mauri is defined in the plan, but not terribly helpfully. The definition found in the proposed Otago Regional Policy Statement decision is perhaps more helpful. I understand your Panel to have summarised it as a combination of physical and ecological elements, as well as amenity aspects, including physical and metaphysical concepts from te ao Māori.
72. When it comes to the balancing of competing values of this nature it is often appropriate to review and consider the alternatives that are available that could address those effects. Regrettably in this case that option is not available to us. There are competing interests that need to be balanced, an exercise to be undertaken pursuant to the values inherent in the various policies and objectives and the circumstances of the application.
73. Objective 3 recognises water as an enabler of economic, social and cultural wellbeing, which includes its management for the purposes of pastoral agriculture.
74. Importantly, objective 4 recognises the importance of identifying and reflecting tangata whenua values in freshwater management.
75. Notwithstanding objective 4, there is, in my submission a conflict between objective 3 and evidence for Awarua Rūnanga that the manipulation of water to sustain land uses leads to the conclusion that “we are not managing the awa in a healthy and resilient state” and that

²⁵ *Aratiatia* at [72].

we must allow each water body to “do what it needs to do”.²⁶ I do not accept that follows when the PSWLP is read as a whole.

76. Moving to more specific objectives, in terms of objective 17, seeking the preservation of rivers and their margins, including channel form, from inappropriate use and development, that objective is to be interpreted by understanding what is sought to be protected.²⁷ It is submitted the reference to protection from inappropriate development and the use of the word *preserve* are important. *Preserve* means maintain or keep something in its existing state.²⁸ So, the values to be preserved are to be protected from *inappropriate* development. The Applicant has endeavoured to demonstrate that the values of the Titiroa Stream can co-exist with the Gates in place. In other words, tide gates are not inappropriate development if done in the right place with the right mitigations.
77. I also highlight the objective to maintain or improve fish passage (objective 19), along with the maintenance of indigenous ecosystems and habitats within rivers through the maintenance of the life supporting capacity of those rivers (objective 14). Mr McSoriley discusses these from his paragraph 107.
78. Starting with policy 26A, Mr McSoriley notes the gates are regionally significant infrastructure, relying on the evidence of Mr Young and the economic assessment provided in Mr Connor’s evidence.
79. Policy 28 is a management policy directing management of effects when undertaking activities in the beds of rivers.
80. Turning to river extent and values, as set out in policy 28A, uplifted from the NPSFM, Mr McSoriley addresses functional need for the gates and Ms Drummond applies the mitigation hierarchy. The modification of the proposal now provides for a more straight-forward application of the hierarchy as it applies to values effected by fish passage because there is now mitigation of the effects on fish passage.

²⁶ Evidence of D Whaanga and S Blair at [66].

²⁷ *Environmental Defence Society v NZ King Salmon Company Ltd* [2014] NZSC 38 at [105].

²⁸ *Aratiatia* at [272].

81. Moving to policy 33A, also introduced in accordance with the NPSFM, I note it highlights the *promotion* of restoration of wetlands. It fits hand and glove with policy 34, which again encourages the restoration of existing wetlands and the creation of new wetlands.
82. What is overlooked by the submitters who raised concerns with the Gates enabling of historic loss of wetland habitat is that the Plan does not direct land use change required to enable the reversion back to wetland. Instead, it is submitted the restoration of riparian habitat (as contemplated in policy 34) and the creation of spawning habitat downstream of the gates aligns with the policy direction in the Plan. The restoration of wetland habitat enabled through the lease income enabled by the Gates is also relevant.
83. In terms of other river values, in *East/West Link* the Supreme Court noted that plans are often mindfully drafted to provide for true exceptions to avoid policies to enable the sustainable management purpose of the RMA.
84. In their analysis of the phrase, 'having regard/particular regard to any relevant provisions of the [Auckland Unitary Plan]', the Supreme Court considered that a fair objective appraisal of the objectives and policies should be taken under s 104. They said isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the drafters must be avoided.²⁹
85. It is submitted the PSWLP policies demonstrate a planning framework, giving effect to Mana o te Wai that seeks to balance competing interests within the context of the objectives of the Plan. It is submitted infrastructure of the sort proposed by this Application is precisely the type of activity that a close reading of the Plan allows, if appropriate mitigation or compensation/offsetting can be provided.
86. My client accepts there are effects on the Stream and its values but says it is still putting the health of the water first. These two concepts are not mutually exclusive. The Applicant therefore seeks a consent that provides for its responsible operation of vital infrastructure that

²⁹ See *East/West Link* at [79] – [80].

enhances knowledge of the waterway and ensures values are provided for.

Te Tangi a Tauria

87. Turning to the fish passage “avoid” policy setting in Te Tangi a Tauria, if that must be applied strictly, I cannot see how that can be consistently read with the PSWLP. Put simply, if, for instance, fish passage must be provided for in all circumstances that leaves no room for weirs, dams and, potentially culverts in the entire region. It is my submission that that cannot be the correct interpretation.³⁰
88. The planning evidence for Nga Rūnanga makes, in my submission, a leap in its the analysis of two objectives and five policies to a point where it is opined there is an avoidance directive in the PSWLP. I cannot see how that argument can be sustained in the context of a sustainable management and resources as contemplated by the NPSFM and the Act.³¹ The policies that have been cited are management and protection policies that also recognise the importance of other hydrological units such as wetlands. Importantly, there is no discussion about enabling policies, particularly for pastoral agricultural land uses.

Evidence

89. The Applicant is calling the following witnesses:
- (a) David Connor – Council project sponsor.
 - (b) Colin Young - long standing Council employee.
 - (c) Leslie Frisby – local farmer.
 - (d) Laura Drummond– expert ecologist.
 - (e) Mathew Gardener – water resources engineer and modeller.
 - (f) Luke McSoriley – expert planner.

³⁰ See *King Salmon* and discussion about choices in respect of preservation and protection of identified resources within the overall context of sustainable management.

³¹ *Ibid.*

90. I have raised with Counsel for the Minister of Conservation the potential usefulness of expert conferencing between the ecologists. Unfortunately, this was unable to be arranged before the hearing on account of availability constraints. I remain of the view that conferencing would likely assist you and propose it be discussed at the hearing.



CP Thomsen
Counsel for the Applicant
29 August 2024

Appendix 1

Issue Identified in s42A Report	Witness	Comments
Adverse effects on river values – ecosystem health and indigenous biodiversity.	Laura Drummond – EIC and EIR. ³²	See amended proposal.
Adverse effects on cultural and spiritual values and river function.	Mr Gardner – hydrological functioning.	Matters relating to cultural and spiritual values are addressed in Mr McSoriley’s evidence. Addressing cultural effects requires a balancing of competing values.
Adverse effects on fish passage and monitoring.	Laura Drummond – EIC and EIR.	See amended proposal.
Adverse effects on inanga spawning.	Ms Drummond – EIC and EIR. Mr McSoriley – conditions of consent.	Ms Drummond’s EIR confirms the extent of the inanga spawning habitat enhancement now proposed (see Table 1 and Figure 1). The details of the enhancement is to be undertaken pursuant to a Habitat Enhancement Plan. Note what Council can achieve is limited by amount of land it controls.
Potential effects on water chemistry and saltwater wedge.	Ms Drummond – EIC. Mr McSoriley – conditions of consent.	The amended proposal proposes a monitoring regime.

³² Evidence in chief and evidence in reply.

Issue Identified in s42A Report	Witness	Comments
Application of the mitigation hierarchy.	Ms Drummond – EIC & EIR.	The application of the mitigation effects hierarchy has been modified by the amended proposal. Some effects that under the original proposal that could not be avoided, remedied or mitigated are now mitigated through the use of fish-friendly gates.
Beneficial effects of the gates.	Mr Young – EIC. Mr Connor – EIC. Mr Frisby – EIC. Mr Gardner – EIC.	
Extent of inundation if the gates were to be removed.	Mr Gardner – EIC. Mr Young – EIC. Mr Frisby – EIC.	See submissions on the reconciliation between the lay evidence and that of Mr Gardner demonstrated through his model. Earlier runs of the model contemplated sea level rise – see from [43] and section 4.3 of the modelling report in Mr Gardener’s EIC.

Appendix 2

Draft Conditions of Consent

Schedule of Draft Conditions Titiroa Weir and Tide Gates APP-20211135

Expiry date: September 2034 (10-year term)

Habitat Enhancement

1. The consent holder shall undertake inanga spawning habitat enhancement upstream of the tide gates over a minimum area of 0.6 ha as detailed on Diagram ...
2. The consent holder shall undertake 0.53 ha of tributary enhancement for inanga spawning and native fish habitat downstream of the gates as detailed on Diagram
3. Habitat enhancement shall commence within 2 years of grant of this consent and be in accordance with the Habitat Enhancement Plan detailed in condition 4 - 7.

Habitat Enhancement Plan

4. Prior to habitat enhancement required under conditions 1 and 2 commencing, the Consent Holder shall submit a Habitat Enhancement Plan (HEP) to SRC for certification. The main objectives of the HEP are to:
 - (a) To ensure habitat enhancement is undertaken in an appropriate and effective manner to improve the current bank conditions for inanga spawning. For example, by reducing the bank angle to optimise the potential spawning area to increase tidal level fluctuations in proximity to the salt wedge.
 - (b) To ensure native fish habitat enhancement is undertaken to improve current instream conditions within the unnamed tributary, downstream of the tide gates.
5. The HEP shall include, as a minimum, the following details:
 - (a) An assessment of habitat enhancement options for inanga spawning, including methodology, timing to minimise adverse effects of works, and pre and post enhancement monitoring.
 - (b) Detailed identification of the areas and sites for restoration, including baseline condition data for post enhancement comparison.
 - (c) Detail on how enhancement is going to be undertaken, including any instream works and associated mitigation (fish salvage etc.) and culvert remediation.

- (d) Follow up reporting on the success of enhancement works, via post works inanga spawning surveys (as per Condition 6).
- 6. The certification process for the HEP shall be confined to confirming the Plan gives effect to its objectives, consent condition requirements, and contains the required information.
- 7. The HEP may be submitted in parts or in stages to reflect a staged implementation of the habitat enhancement.

Inanga Spawning Surveys and Mapping

- 8. Inanga spawning surveys are to be undertaken on two occasions over the peak spawning months of March to June once pre-enhancement and once post enhancement and a report provided to the Consent Authority after each survey. Inanga spawning surveys are to include observations on egg development. The surveys and monitoring shall be supervised by a suitably qualified and experienced person.
- 9. The consent holder shall undertake further inanga habitat mapping upstream and downstream of the tide gates based on this survey information to further quantify the amount of habitat potentially impacted by the activity. This information shall be provided to SRC within 2 years of grant of consent.

Fish Passage

- 10. The consent holder shall undertake boulder cluster installation in the diversion channel downstream of the tide gates to provide refugia habitat from predators and resting zones for fish.
- 11. The consent holder shall fit the tide gates to provide a letterbox opening (vertical slot) or similar opening, to provide for unimpeded native fish passage when the gates are closed on at least one of the tide gates.

Fish Passage Monitoring

- 12. The consent holder shall monitor of the effects of the tide gates on fish passage three times within 24 months of fitting the letterbox opening (vertical slot) or similar opening on the tide gate. This shall be undertaken via a fish survey targeting native fish moving through the provided opening during migratory periods and provision of a report of the monitoring to the Consent Authority after each survey. The monitoring shall be undertaken by a suitably qualified and experienced person.

Water Quality Monitoring

- 13. The consent holder shall undertake three salinity surveys in the Titiroa Stream over a range of flow conditions to determine the salt wedge location and provide a report on these surveys to the Consent Authority within 1 year of grant of this consent.
- 14. The consent holder shall monitor dissolved oxygen and temperature along the river during summer low flows and provide a report of this monitoring to the Consent Authority annually.

Standard Conditions

15. This consent authorises occupation of the coastal marine area and the damming of tidal waters with a weir and tide gate structure, as described in the application for resource consent dated 8 March 2021.
16. The consent holder shall always during the term of this consent maintain the weir and tide gate structures in good repair, appearance and condition.
17. The consent holder shall notify the Consent Authority (escompliance@es.govt.nz), of any alteration to the structure which is carried out without resource consent pursuant to a permitted activity rule in an operative regional plan.
18. In consideration of the right to occupy Crown Land in the coastal marine area for the activity specified above, the consent holder shall, each year, pay to the Consent Authority the appropriate coastal occupation charge specified in the Regional Coastal Plan. Each financial year, commencing 1 July, the charge shall be adjusted for inflation in accordance with the Consumer Price Index. The sum payable in the first year of this consent (or the proportion thereof for which the consent is current) is \$..... plus GST, and shall be payable in advance on invoice. The revenue from this charge shall be used only for the purpose of promoting the sustainable management of the coastal marine area.
19. The Consent Authority may, in accordance with Sections 128 and 129 of the Resource Management Act 1991, serve notice on the consent holder of its intention to review the conditions of this consent during the period 1 February to 30 September each year, or within two months of any enforcement action being taken by the Consent Authority in relation to the exercise of this consent for the purposes of:
 - (a) determining whether the conditions of this consent are adequate to deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.
 - (b) If the monitoring undertaken under condition 10 of this resource consent identifies adverse effects on the ecological values of the Titiroa Stream, determining whether the conditions of this consent are appropriate to any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.
 - (c) ensuring the conditions of this consent are consistent with any National Environmental Standards Regulations, relevant plans and/or the Environment Southland Regional Policy Statement