

BOARD OF INQUIRY

**Te Mihi Geothermal
Power Station Proposal**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Resource Consent Applications by Contact Energy Limited in respect of the Te Mihi Geothermal Power Station Proposal

**HEARD BEFORE JUDGE G WHITING (CHAIR), DR P BROWNE,
MR D NUGENT AND MS G PAINE, MEMBERS OF THE BOARD**

MONDAY 21 JULY 2008

HEARING OPENED [10 am]

APPEARANCES

Mr Robinson and Ms Dixon, Contact Energy Limited

Mr Hickman, Taupo District Council

Mr Kirkpatrick, Geotherm Group Ltd (in receivership)

Mr Lang, AS McLachlan, AM McLachlan and MacPower Ltd

Mr Brockelsby, Environment Waikato

Ms Bain, Transit New Zealand

Ms L Koster, Neighbour

Miss L Price, Neighbour

Mr and Mrs Ellery, Neighbours (apologies)

CHAIRPERSON: Well welcome everyone to this Board of Inquiry which is, for me, a relatively new creature. So we're here of course to hear this application by Contact Energy Limited.

The Board is made up of myself and I'm an Environment Court Judge and I have been for the past eleven years now so I've been there for a wee while. On the far left is Dr Pat Brown who is a geologist and geochemist specialising in geothermal fields from the University of Auckland. On my left is Glenice Paine of Ngai Tahu descent who has resource management experience and has experience in Māori issues. And on my right is Denis Nugent who is probably well known to those of you who have been appearing in the Environment Court over the years. And he is, of course, a consultant planner formerly of Auckland but now very proud of the fact that he's now living in Wanaka. And we're very envious of him.

What we propose to do is to hear the opening, and I think you've all be told, is to hear the opening submissions of Contact this morning. Then we propose to retire and read the evidence because we thought it would be a much more efficient way of having the evidence presented. And we're going to read all of the evidence.

We're going to be staying here this week, but most of you can then - oh I suppose all of you will return to your homes for the week. We'll read all that evidence. I've had a look at the totality of it and I think we'll probably finish reading that evidence some time about Thursday.

So what we thought we would do on the Friday morning is have a further site visit. We've had one quite extensive site visit. A site visit which included both on land and by air. We would just do a site visit on land. We have two cars so we can travel and take our own cars. But having read the evidence, we would then have a better knowledge and

understanding of what to look at and we thought we would like to have a look at the site again before cross-examination starts next week.

What I propose to do is to ask all the parties if they could communicate with the hearing manager after Contact have completed their opening submissions this morning, with suggestions as to where they would like us to particularly visit. For example, it may be that some neighbours would like us to visit their properties so as we can view the site from their point of view. Now that's the sort of thing we want.

During the course of the week we're going to be meeting from time to time to discuss the evidence and we may ourselves have some suggestions which someone from the Board, either our hearing manager or our CEO who is Kim Morgan, will get in touch with you, or some of the parties to see if that can be facilitated.

It's a Board of Inquiry and I'm going to run it very similar to the way I run my court in the Environment Court, simply because we need to have everything done in a proper way and it's probably the most efficient way of handling a lot of people. So the process will be very, very similar. On the other hand, I want everyone to feel totally relaxed, particularly those who are not members of the legal profession who may wish to be before us and make submissions or give evidence and they're not represented by counsel. I want you please to feel at home and this is your opportunity to present what you want to tell us your views of the matter and if there is any problems you may have at any time please do not hesitate to ask. It's simply a matter of standing up and asking a question or asking our hearing manager or one of the Board staff during the course of the hearing and we will try and facilitate any problems you may have. But you shouldn't have any problems it's pretty straightforward.

Now I'll call on Mr Robinson to start the proceedings with presenting the submissions on behalf of the applicant.

MR ROBINSON: Thank you Your Honour. I'll just ask Miss Dixon to hand out the pile of papers that have been assembled and get under way.

CHAIRPERSON: Just while the hearing manager is handing those matters out, the hearing manager has presented a timetable for the cross-examination of witnesses starting from next week. That's an indicative timetable because sometimes crosses take longer than expected and other times they take shorter so could I ask the parties to try and be flexible. For those who are going to be here for the full hearing it's not a problem, but anyone who is going to be just coming along for the purposes of presenting their submissions, then if they could just remember that this is indicative and things may sometimes arrive a little quicker or sometimes a little slower depending on the case. But we'll try and jiggle things around as we go so as we don't waste any Board sitting time.

MR BROCKELSBY: Excuse me sir?

CHAIRPERSON: Yes.

MR BROCKELSBY: Is this the right time then to raise issues about availability of witnesses?

CHAIRPERSON: Yes

MR BROCKELSBY: Dr Bruce Graham is our, Environment Waikato's air specialist. He's not on the list of parties to be cross-examined, but my understanding is that the Board would like all witnesses to be available should questions arise. He's had some long-standing appointment for

surgery on the 29th which is next Tuesday and that's going to apparently take him out of action for about a week. I just wanted to raise that with the Board now in the event that it decided it would want to ask him some questions. Hopefully we can work around the dates.

CHAIRPERSON: Yes. Well thank you for that Mr Brockelsby. So far as witnesses who have not had notice of cross-examination is concerned, I felt that they should be available just in case there's some member of the Board wishes to ask questions. We should be in a position to know whether we wish any of those witnesses to come to the Board of Inquiry by Thursday of this week. Perhaps the simplest way of doing it would be this: unless any party hears from the Board by 5pm on Thursday of this week then their witnesses who have not been asked to be cross-examined do not need to attend. That saves the Board having to ring every party, because in the look through the evidence that I have had so far I doubt whether there's going to be a lot of Board questions.

MS BAIN: Sir, Yeah it may be an appropriate time also to indicate that Transit New Zealand had requested leave to cross-examine Mr Daysh and Mr Harries for Contact.

CHAIRPERSON: Well I presume because of the memorandum I read this morning that that will not now be necessary.

MS BAIN: That's correct, so it would, it's not necessary now for Transit New Zealand to cross-examine, so I'll just indicate that at this point.

CHAIRPERSON: Thank you.

MS BAIN: Thank you.

CHAIRPERSON: Is there any other preliminary matter that any person wishes to raise? Mr Robinson.

MR ROBINSON OPENS: Thanks sir. I should say at the outset that when communicating with the hearing manager I predicted, before I'd written my opening that it would take in the order of two to two and a half hours and I think it's probably fair to say I think that that will be conservative and that it will be shorter than that.

So I should start and say that "the purpose of these submissions is to outline the case...(Reads opening submissions for Contact Energy Limited)...from the proposed Power Station".

Now, sir it's a little earlier, but I wondered if you - the Board were in mind for a cup of tea before I return to discuss Geotherm groups, since that's the next major section in my submissions?

CHAIRPERSON: Yes. Is that okay to have morning tea at this time?

ADJOURNED [11 am]

RESUMED [11.30 am]

CHAIRPERSON: Before I ask you to resume Mr Robinson I understand there are a number of people who have filed submissions and are giving evidence who have felt a bit confused at the beginning when I asked for appearances, is there any of those who wish to let the Board know that they're here and have an interest in the matter? It's not just the province of lawyers these Boards of Inquiry, it's the province of everyone who's involved. If you wish to just formally have it entered on the record that you are appearing.

LINDA KOSTER: Yeah, Linda Koster, neighbour.

CHAIRPERSON: Yes.

LYNLEY PRICE: Lynley Price. I'm a neighbour as well.

CHAIRPERSON: Yes. The first one was –

LYNLEY PRICE: And an apology from the Ellery's who are also neighbours.

CHAIRPERSON: Then there's who sorry?

LYNLEY PRICE: The Ellery's, Grant – an apology from Grant Ellery.

CHAIRPERSON: I didn't catch the first name.

LINDA KOSTER: Linda Koster.

CHAIRPERSON: Koster?

LINDA KOSTER: Yeah.

CHAIRPERSON: And Miss Price?

LYNLEY PRICE: Price.

CHAIRPERSON: Yes. Is there anyone else? Thank you. Mr Robinson.

MR ROBINSON CONTINUES OPENING: Thank you sir. So, turning to page 21 in my submissions to address the series of interrelated Geotherm Group issues.

“The starting point for determining...(continues reading opening submissions for Contact Energy Limited from paragraph 84)...Geotherm Group consents are likely to be exercised.”

CHAIRPERSON: What does the position of the relevant policies and plan have in relation to more than one operator and one, what effect does it have on those decisions because they wouldn't have had anything of a similar nature and two, how should we look at the matter having regard, and I was thinking of policy five. And also policy four --

MR ROBINSON: I think it's --

CHAIRPERSON: -- which relates to multiple operators.

MR ROBINSON: I think the starting point is that these cases relate to the determining of effects, so that's 104(1)(a) of the Act. If the Geotherm Group contends they are not part of the environment then they're -- then whatever might happen is not an effect on the environment for that purpose. But of course Your Honour is right, that the consideration of policy issues arises under a different head of 104 and -- and that -- and so you'd still have to consider it. The interesting thing would be -- if the effect is not an effect on an environment whether there is a basis for conditions not withstanding the policy framework. And I think I'd better think about that particular conundrum quite a lot more before I gave Your Honour a considered answer to this. But I think you're right, there's more to it than meets the eye.

CHAIRPERSON: You see what I'm thinking of is this, that it's a question of fact isn't it, as to what amounts to the existing environment which may be a factual journey that we may have to enter on. But on the other hand if we enter on it and it doesn't achieve any purpose because we are bound in applying the divisions of the relevant statutory instruments to have regard to the Geotherm matter, it seems to be an unnecessary exercise, doesn't it?

MR ROBINSON: Well I'm not sure that –

CHAIRPERSON: I'm not saying we are, I'm just wanting to know what the answer is.

MR ROBINSON: I think the – it's still a necessary exercise because if there is no effects on the environment that is relevant to the determination of conditions. Relevant, but not determinative, in the light of the Supreme Court decision in the – it must have been two years ago, Suburban Estates? I'm reaching for the name, but it –

CHAIRPERSON: Yes, the one in the Waitakeres.

MR ROBINSON: The one in the Waitakeres about financial contributions. State Homes.

CHAIRPERSON: Is multiple operators defined –

MR ROBINSON: That's right.

CHAIRPERSON: -- in statutory instruments?

MR ROBINSON: And so I think it's relevant – it goes to the issue of conditions, but in terms of application of policy that requires an in-substance approach on the issue, not a purely technical approach as to whether there is an effect on the environment. As to how those intermesh, as I say, I would need to think about that before I could give Your Honour a more considered answer. But it is a – it is a reasonable question and I'm sure that Your Honour's right that the policies apply alongside the determination of effects – I'm repeating myself I apologise, but I'll just summarise it, that it comes back to the determination of conditions.

CHAIRPERSON: Yes well I'm – it was just a matter that was going through my mind when I was reading your preliminary remarks about the matter, so I went and had a look at the policy, because in the past I've spent some time looking at this document and I knew there was something there and what I hadn't been able to find was whether or not there has been a definition of the term "multiple operator". Because Irrespective of whether they're in the environment or not there is what's deemed to be within that definition. Anyway, I don't expect you to do it on your feet.

MR ROBINSON: But I will look at it

CHAIRPERSON: I raised it now so that you've got plenty of time to look at it.

MR ROBINSON: I'm grateful sir.

CHAIRPERSON: It's an important – it could be an important point.

MR ROBINSON: Indeed. So I believe that the submissions I'm presenting are relevant because they go to conditions, but Your Honour's point is a fair one and that there may be policy overtones that mean that the issue is broader than I'm presenting it.

CHAIRPERSON: Or it may be an issue which no matter what we decide is going to have not much effect in the final analysis.

MR ROBINSON: Well, it may be an academic point. Certainly I'm not presenting it on --

CHAIRPERSON: No I appreciate that.

MR ROBINSON: -- that basis. But I'll mull over what you've put to me. So - but in terms of is there an effect on the environment, it is submitted that the question is, "Are the Geotherm Group consents likely to be exercised?" Now, "in this regard it is submitted that there is a material distinction...(continues reading opening submissions for Contact Energy Limited from paragraph 94)...as presented to the Environment Court hearing", and I think that's incorrect, I think it might be in the first instance Environment Waikato hearing. "...indicates that this is feasible...(continues reading opening submissions for Contact Energy Limited from part way through paragraph 104)...before the witnesses give evidence next week".

CHAIRPERSON: Just putting aside to one side what we discussed earlier Mr Robinson, I'm just wanting to understand the thrust of these submissions. Do I understand you to say that if after an evaluation on the factual evidence we think that it's unlikely that Geotherm will proceed to production, then the Geotherm area is outside – then the geothermal – the expected production of that consent is not part of that existing environment? That's as I understand your argument.

MR ROBINSON: That's correct. And the –

CHAIRPERSON: And if we hold that it is not part of the existing environment, as you submit that it's not, does that mean that the policies that you've just referred to don't apply?

MR ROBINSON: No it doesn't because the - what I've referred to are not in fact policies, those are how the policies have been translated into the consent conditions and the draft conditions proffered by Mr Daysh explicitly suggesting that those same conditions governing the discharge strategy would apply equally to the Te Mihi reinjection consent being sought.

CHAIRPERSON: Yes well that was the very point I raised. If that is the case why worry about whether it's part of the existing (inaudible)?

MR ROBINSON: I think it goes to – as I was presenting my submissions - I think that if I could just develop another point and then come back to the issue Your Honour's posed to me. The discharge strategy as it's been framed – or the discharge strategy provision as it's been framed in the Wairakei consent conditions reflects the policy environment which Your Honour was talking about, which includes – has that - includes that provision for multiple operators and that read with an eye to the existence of multiple operators the objectives of the discharge strategy, as I've endeavoured to outline, already provide for those issues - those policy issues that relate to multiple operator management. The difficulty that I have with the case that's been advanced in the evidence of Mr Matthews is that he is asserting what you might call a pure effects argument, rather than at a policy position and I would say the pure effects argument is met by firstly at a legal level, if Your Honour and colleagues find that my submissions are correct both in fact and law, and that Geotherm Group is not part of the existing environment, the pure what I would call, pure effects provision would fall away. I also submit that those same policy provisions provide

all the effects management that you need anyway. So where I got to as I was thinking it through was that I think it is still relevant, but it is part of a matrix and the Board could reason a way – reason its way to decide that it doesn't have to decide whether or not Geotherm Group is part of the existing environment, but it all depends on the view you take of the force of the current provisions and the extent to which they already address policy issues.

CHAIRPERSON: As I understand those policy issues, they are designed to protect the environment which is the environment - which may include another operator in the field.

MR ROBINSON: In future.

CHAIRPERSON: Or existing.

MR ROBINSON: Or existing. And I think that what a retrospective reading of the discharge strategy objectives would suggest is that – I have to confess that I cannot remember thinking about – thinking from this direction at the time, but I can only assume that Mr Brockelsby and Mr Daysh who were the principle authors of those conditions might have had an eye to potential future conflicts between multiple users. Because perhaps read with the benefit of hindsight the discharge strategy provisions clearly provide for them.

CHAIRPERSON: My point is I think, notwithstanding whether technically within the Hawthorn decision Geotherm is part of the existing environment. Nevertheless, we have to be satisfied that Geotherm, which has a consent is protected in accordance with the provisions of the plan which provides for it.

MR ROBINSON: And in my submission in a policy sense it clearly is by the way the discharge –

CHAIRPERSON: And in the rules.

MR ROBINSON: And in the rules.

CHAIRPERSON: We must be satisfied that your consent application meets the policy and the rules. Irrespective of whether Geotherm is part of the environment or not.

MR ROBINSON: And that comes back to the – and I think rhetorical question Your Honour, as to whether how the term “multiple operator” is in fact defined in those policy documents.

CHAIRPERSON: Yes, I don’t even know if it is.

MR ROBINSON: And like I – I suspect – well, I cannot recall there being a definition. I could stand to be corrected. And if that’s the case, how then those provisions are interpreted. But certainly I think it’s more than just a straw in the wind that the Geotherm Spring consents provide that it becomes a participant in the System Management Plan process when it crosses a trigger of 6,000 tonnes per day of extraction which would suggest that at that point it is a multiple operator for the purposes of the policy provisions required to be factored into, and all the decisions that are made in terms of the discharge strategy and indeed all other system management considerations.

MR ROBINSON CONTINUES OPENING: So, if I could go on then to discuss the next subsidiary Geotherm point relates to “Cumulative Effects of

Contact Air Discharge...(continues reading opening submissions for Contact Energy Limited from paragraph 125)...Geotherm Group site post the lapse date in 2013”.

I should perhaps spend a moment outlining the thrust of the condition that Contact has proffered which is a buffer within which no reinjection should occur without Geotherm Group approval until the lapse date in 2013 and then not occur if Geotherm Group are taking more than 6,000 tonnes per day after that date, again without Geotherm Group approval.

“Mr Burton’s point is that Geotherm Group...(continues reading opening submissions for Contact Energy Limited from second sentence, paragraph 142)...appropriately protects its potential output”

In my final section of my submissions I’ve listed the 16 briefs of evidence and nine further briefs of rebuttal evidence which Contact has provided and I will take Your Honour’s guidance, I inserted those in my submission in order that as Board members of the Board of Inquiry lead into the evidence it will in effect provide a rough road map about the scope of the evidence - I’m happy to take that as read --

CHAIRPERSON: Yes thank you for that.

MR ROBINSON: -- as a guide to the evidence the Board will read itself in the next few days. Given the nature of the Board’s procedure, I don’t think it’s necessary for me to take you through them.

CHAIRPERSON: Thank you.

MR ROBINSON: So, subject to further questions Your Honour or members of the Board might have, those are my submissions in opening.

CHAIRPERSON: Yes, thank you Mr Robinson. Thank you for that. It was good timing, it's well and truly before lunch. Thank you Mr Robinson so we will adjourn until 10 o'clock on today week and read the evidence and we'll resume on that day to hear the cross-examination.

ADJOURNED [12.53 pm]

HEARING ADJOURNED UNTIL 10 AM, MONDAY 28 JULY 2008