

BEFORE THE BOARD OF INQUIRY

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Board of Inquiry appointed under section 146 of the Resource Management Act 1991 to consider an application by Mighty River Power Limited for resource consents to construct, operate and maintain a wind farm at Turitea

**MEMORANDUM OF COUNSEL FOR MIGHTY RIVER POWER LIMITED
REGARDING EVIDENCE OF STEPHEN BROWN AND MATERIAL PROVIDED
TO MIGHTY RIVER POWER LIMITED**

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MAY IT PLEASE THE BOARD:

- 1.1 This memorandum addresses issues raised on 4 August 2009. It also anticipates events when the landscape hottub witnesses appear commencing 11 August 2009.

The Issues

- 1.2 The issue of principle is the status of advice given to Mighty River Power by persons consulted during the process of deciding whether to and how to proceed with the Turitea project.
- 1.3 A second issue relates to the obligation of a witness when giving evidence regarding other material generated by that witness and relevant to the issues before the Board.

Short Timeline

- 1.4 The Council called for proposals for development within the Turitea Reserve for wind energy in March 2005. Mighty River Power responded and in or about September 2005 was selected as the preferred party of interest.
- 1.5 A contract with Mighty River Power was entered into on 30 September 2005.
- 1.6 Since that time, Mighty River Power has been engaging experts regarding a potential role in support of the project either in advising and/or as potential witnesses.
- 1.7 Stephen Brown provided reports in 2006, Exhibits 9 and 10, regarding landscape considerations within the Turitea Reserve. The précis of February 2006 (Exhibit 10) discussed the Turitea "Landscape Setting", "Local Landscape Values", "Local Amenity Effects", and discussed 15 viewpoints. It expressed views including cumulative effects and referred to the Turitea proposal being "an incremental step closer to Tararua Forest Park". It referred to an "energy landscape" and in the penultimate paragraph, to the importance of "ascertaining at what point an appropriate balance between natural and modified landscapes is reached". It reached no clear conclusion.

- 1.8 An application for judicial review in respect of Council's decision to change the purpose of the Turitea Reserve was subsequently filed and determined by High Court judgment dated 25 July 2007.
- 1.9 The AEE was filed on 8 August 2008.
- 1.10 The Motorimu application was filed on **17 October 2006**, heard by Commissioners, and decision delivered on **25 June 2007**. Taken on appeal, the Environment Court decision was delivered in **September 2008**.

The 'Report' in Question

- 1.11 Leading up to the preparation of the AEE with landscape and visual assessment, Mr Brown was engaged to advise, through ChanceryGreen. He made a draft report which sought to account the effect of Motorimu. He identified Motorimu as a significant complicating factor. The **cumulative effect of Motorimu with Turitea** and other wind farms precluded his support on that issue.
- 1.12 The fate of Motorimu is said by Mighty River Power to have been effectively sealed by the scale consented. Unless it can be removed from the "existing environment", it remains just that, a complicating factor for the Mighty River Power case. It was however Mr Brown's opinion at that stage as one expert. His draft report for the AEE was never concluded although its import was clear. Mr Wyatt was engaged, and supported the project.

Mighty River Power's election

- 1.13 Mighty River Power like any other potential applicant is engaged in stages of development from initial inquiry through to preparation of a case for consent, in discussions with experts, as witnesses and potential witnesses, preparation of reports going to the AEE, then evidence. Like any party, it takes decisions based on evidence available to its cause, and does not expect experts to support its potential projects in all respects. Experts often cannot support a case. Advice shapes the case. The involvement of ChanceryGreen in this case was direct, in reviewing versions of what may have become Mr Brown's report for the AEE, but which was not formally concluded.

- 1.14 Mighty River Power chose to call Mr Brown but not in relation to his view regarding cumulative effect. He does not provide support on the basis of cumulative effects with Motorimu included. Mr Wyatt gives evidence in support, including cumulative effects. Mr Brown's evidence was filed on this basis, and the rebuttal process began.
- 1.15 The position is recognised, that while privilege could properly be claimed, **Mr Brown's views could not be so privileged when he gave evidence.** As such it was expected that he would be properly cross-examined on his reports made in 2006 and his opinion would become known. The **fact** of his getting advice would have been understood. There is nothing to preclude that evidential enquiry. Mighty River Power made a decision to claim privilege on the draft report but cannot of course claim privilege as to his evidence regarding his **opinion** then and today.
- 1.16 At the opening of the hottubbing, Counsel would have advised this position, the privilege would have been claimed and he would be cross-examined no doubt adversely to Mighty River Power on cumulative issues.

The witness' obligations

- 1.17 **Mr Brown has not filed evidence called to advance a case regarding cumulative effects.** He is being called for a different and discrete purpose, of regional landscape assessment. If it is suggested that he had to go further and disclose his report of June 2008, or his opinion expressed, then that is incorrect.
- 1.18 In the same way, applicants and other parties do not routinely disclose expert or other evidential responses made as they build up their applicant's position or in opposition. That has never been the case, and nor is it required in the context of contemplated litigation, advice in that regard, or discussion with witnesses or potential witnesses.
- 1.19 Further, Mighty River Power did not take any point regarding the use of Mr Brown's reports made in the context of Reserves Act challenge. While Mr Maassen courteously asked if they could be used, there was no reason they should not be as they were not legally privileged. Council and any other party was entitled to build on that material under cross-examination and Mr

Brown's thoughts regarding cumulative effects and other issues would have become known.

Decision taken

1.20 While the above is submitted to correctly analyse the legal position, and there is no element of impropriety in the production of evidence which did not refer to Mr Brown's contrarian view expressed in 2008, the nature of questions put to Mr Henry and raised in re-examination regarding the apparent contest over obligations, has resulted in Mighty River Power choosing to waive privilege, on advice. Accordingly Mr Brown's draft report in its latest iteration (date June 2008) is provided to this Board and to other parties. It records what he wrote at the time and the influence of Motorimu will be identified. The Mighty River Power decision is taken in the context of advice that it need not waive privilege, but it does so, adding to its opponent's cases. It does so mindful that cross-examination will be aided by this material in addressing this issue before the Board.

Correction

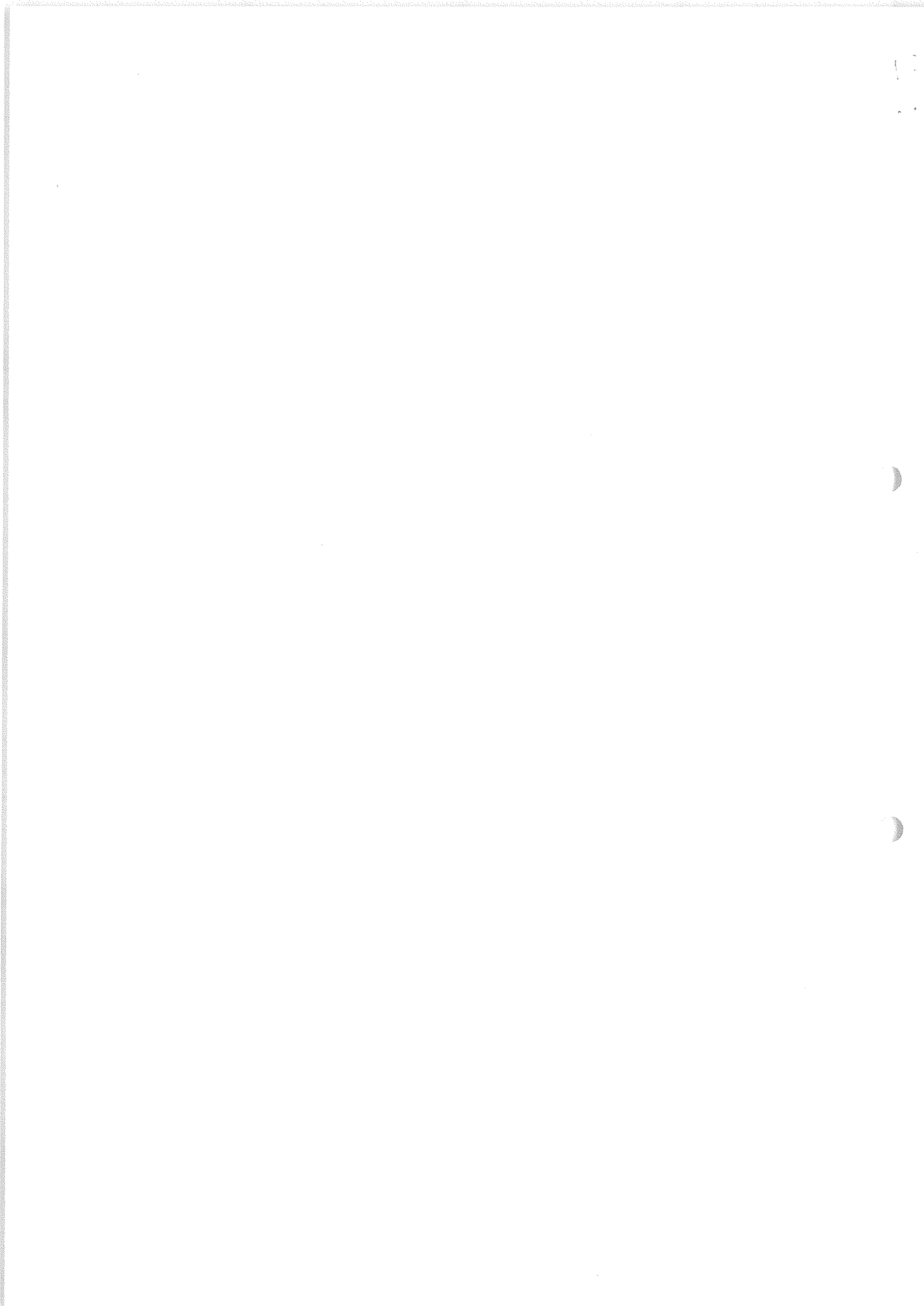
1.21 In evidence Mr Henry made an incorrect statement at the end of a long day. He advised that there was no other advice from landscape architects. Mighty River Power did receive other advice that was also not employed in the case and such is privileged.

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7 August 2009



Privilege

1. Experts opinions/reports prepared when there is a definite prospect of litigation are privileged as a branch of legal professional privilege: Cross on Evidence 8th ed. Para 10.26.
2. No adverse inference is to drawn from claiming the privilege and the decision to waive the privilege is that of the party **and not of the Court**: Cross para 10.4.
3. The privilege is deeply entrenched and "*a statute cannot abrogate the privilege in an indirect way*": Cross para 10.23.
4. Privilege is not waived by referring to the existence of a report anymore than the nature of legal advice is waived by a client having referred to receiving advice: Cross para 10.29.
5. Because this expert is giving evidence on a discreet area to that of cumulative effect in an earlier report there is no risk of the Court being misled from not having the earlier unrelated report: Cross para 10.29 top of page 346 (here his opinion on those issues would be given in evidence).
6. A party calling an expert witness does not thereby impliedly consent to disclosure of the instructions given to that witness: Cross para 10.29 footnote 5- a fortiori there is no waiver in respect of earlier reports from the same witness in the same matter.

Evidence of expert witness

Rule 5.3.1(f) of the Practice Note requires a statement as to there being no other material facts known which might alter or detract from the opinions expressed. Mr Brown's opinion of the views he expresses are not affected by his opinions on other issues.

