

**SPECIAL TRIBUNAL  
BULLER WCO  
FISH AND GAME APPLICATION**

**IN THE MATTER** Of the Resource Management Act 1991  
**AND**  
**IN THE MATTER** Of an application to amend the Water  
Conservation (Buller River) Order 2001  
pursuant to section 216 of the Act  
**BY** **NEW ZEALAND FISHING GAME  
COUNCIL and NELSON  
MARLBOROUGH FISHING GAME  
COUNCIL**  
**Applicants**

**SECOND DECISION OF SPECIAL TRIBUNAL ON PRELIMINARY ISSUES**

**Introduction**

1. This is a decision on the application dated 20 March 2007 by New Zealand Energy Limited for variation of the directions ordering that evidence be provided to the Special Tribunal prior to the hearing.

**Notice of Hearing**

2. The Special Tribunal has issued a notice of hearing. It contained the following directions:
  - (a) Pursuant to section 41B(2) that the applicants (New Zealand Fish and Game Council and Nelson Marlborough Fish and Game Council) provide to the Special Tribunal briefs of evidence at least ten working days before the hearing; and

- (b) Pursuant to section 41B(4) that submitters intending to call expert evidence provide briefs of the evidence to the Special Tribunal at least five working days before the hearing.

### **Interlocutory Application by New Zealand Energy Limited**

3. New Zealand Energy Limited applied for directions that:
- (a) Three submitters who have expressed preferences be required to provide their evidence ten working days prior to the commencement of the hearing; and
  - (b) That the hearing sequence be as follows:
    - (I) Matters relating to Gowan River;
    - (II) Matters relating to the Matiri River and Lake Matiri;
    - (III) Matters relating to other preferences sought.

### **Submissions in Opposition**

4. The Special Tribunal has received a total of 49 submissions on the application by New Zealand Energy Limited:
- 45 submissions support the application by New Zealand Energy Limited for variation of directions. These are all submissions via email with the following or similar wording – *“We support the application for Variation of Directions ordering exchange of Evidence that has been made by New Zealand Energy Limited.”*
  - 4 submissions in opposition to the application by New Zealand Energy Limited for variation of directions.
5. Submissions in opposition were received from:
- (a) Royal Forest and Bird Protection Society of New Zealand Incorporated (“Forest and Bird”);
  - (b) New Zealand and Nelson Marlborough Fish and Game Councils;
  - (c) Royal Forest and Bird Protection Society, Golden Bay Branch;

(d) Department of Conservation, Nelson Marlborough Conservancy.

### **Consideration**

6. The Special Tribunal wishes to hear each party in a fair, reasonably informal and efficient manner. It is particularly important that each party be heard as fairly as is practical in proceedings such as these.
7. There are many parties and the substantive issues are diverse so there are procedural issues which may arise during the hearing process. The Special Tribunal will endeavour to address such procedural issues fairly as and when they arise and it seeks the co-operation of the parties to resolve such issues in advance as far as it is practical to do so.
8. The Special Tribunal made directions in accordance with section 41B(1) RMA that evidence be provided to the Special Tribunal before the hearing; under section 41B(2) the applicant must do so at least 10 working days before the hearing and under section 41B(4) submitters must do so at least 5 working days before the hearing. It is not persuaded that it should vary those directions. It believes the hearing can be conducted fairly on the basis of the directions given, its intention to put the evidence it receives on its website and its ability to deal with any issues as they arise.
9. The Special Tribunal has not directed parties to serve copies of briefs of evidence on other parties. The Special Tribunal will put on its website (refer to the Notice of Hearing for details) as soon as it is practical for it to do so copies of the evidence it receives.
10. The Special Tribunal records that it expects the parties to comply with its directions under section 41B requiring parties to provide evidence to the Tribunal prior to the hearing. A practical aspect is that when the Tribunal is preparing its schedule for hearing the parties it will take into account whether evidence has been supplied pursuant to its directions. If a party has not supplied any evidence then the inference may be taken that it does not intend to call any evidence.
11. Although the Special Tribunal has not given a direction that submissions of counsel in support of any party need to be provided in advance, it would be

- helpful if that were done. The Special Tribunal would be assisted by having an opportunity to read submissions of counsel outlining a party's case and the relevance of the various statements of evidence supplied in advance. Counsel could then provide supplementary submissions when opening for a party and in those supplementary submissions counsel could address any relevant matters, including in particular the evidence of other parties supplied in advance.
12. The sequence of hearing based on issues sought by New Zealand Energy Incorporated may be theoretically perfect, but it would be so impracticable it would be both unfair and inefficient. It would make the hearing very complex. It would result in some parties and their witnesses having to appear a number of times which would be unsatisfactory. Accordingly we refuse to make the direction sought.
  13. However, the Special Tribunal will take into account the sequence proposed by New Zealand Energy Limited when setting the order for hearing parties. Thus (without making any binding ruling to this effect) the Special Tribunal will generally hear the parties in the following order:
    - (a) The applicants;
    - (b) Submitters in support who have expressed preferences;
    - (c) Other submitters in support;
    - (d) Submitters in opposition to the application;
    - (e) Submitters in opposition to preferences;
    - (f) The applicants in reply.
  14. It is likely that the Special Tribunal will be unable to adhere exactly to this proposed order of hearing due to the unavailability of witnesses and other factors. However, it will endeavour at all times to ensure that the hearing is as fair as practical.
  15. The issue of fairness may also be addressed in part by the Special Tribunal putting on its website (refer to the Notice of Hearing) as soon as practical the evidence provided prior to the hearing. This will assist parties in the position of

New Zealand Energy Limited which are opposing preferences. However, the Special Tribunal's ability to do this is dependent on a number of factors which may be outside its control and it records that this decision would not be affected by evidence not being placed in its website.

16. The parties can also assist the process to their mutual benefit. Ms Martin, counsel for Forest and Bird, said in paragraph 13 of her submissions:

*“Forest and Bird would be willing to identify to the Special Tribunal the expert witnesses it will call and to identify which aspects of the Buller Water Conservation Order application for variation these witnesses would be speaking to. However, to ensure that the process is fair on all parties. Forest and Bird would ask that all parties provide similar information within a timeframe that preceded the provision of evidence. This would be consistent with section 39(1) to ensure a procedure that is appropriate and fair in the circumstances.”*

17. The Special Tribunal is not going to make a direction of the type suggested by Ms Martin, but it encourages the parties to liaise and agree to follow that process if they think it will be to their mutual advantage. If it would assist the parties to achieve a degree of formality then they could agree to file with the Special Tribunal and serve on the other parties to the arrangement a notice identifying the expert witnesses the party will call and the aspects of the Buller Water Conservation Order application for variation/preference each witness will be speaking to. If this procedure is adopted by the parties then the Special Tribunal will expect it to be adhered to.

## **Conclusion**

18. Although the directions sought by New Zealand Energy Limited will not be made, the matters raised by it are being taken into account in the management of the hearing process. If at any time during the hearing any party thinks it is being disadvantaged in a material way by the procedures being adopted by the Special Tribunal then the issue should be raised with the Special Tribunal which will address it at that time.

DATED 17<sup>th</sup> April 2007.

  
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J D Lynch  
Chairman  
Special Tribunal