BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 160

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to s 120 of the Act
BETWEEN	NEW ZEALAND ENERGY LIMITED
	(ENV-2014-WLG-000005)
	Appellant
AND	NGATI RANGI TRUST
	(ENV-2014-WLG-000006)
	Appellant
AND	MANAWATU-WANGANUI REGIONAL
	COUNCIL
	Respondent

Court: Environment Judge B P Dwyer sitting alone under s 279 of the Act

Date of Decision: 30 August 2018

Date of Issue: 30 August 2018

COSTS DECISION OF THE ENVIRONMENT COURT

A: No awards of costs made

REASONS

Introduction

[1] On 30 March 2016[1] the Court issued an interim decision in respect of appeals brought by New Zealand Energy Limited (NZEL) and Ngati Rangi Trust (Ngati Rangi) against a decision of the Manawatu-Wanganui Regional Council (the Regional Council) in respect of various consent conditions and consent condition variations applied for by NZEL in 2007 and 2011. Neither appeal sought decline of consents which had been granted. Rather, the matters at issue related to the form of conditions imposed on the consents.

[2] The interim decision was overturned by a decision of the High Court which issued on 7 December 2016[2] and this Court was directed to reconsider the interim decision.

[3] A final decision issued on 4 September 2017.[3] The final decision confirmed consents and determined the form of conditions in accordance with findings made in the High Court decision. The final form of conditions was approved on 24 August 2018[4].

[4] The Council and Ngati Rangi have both sought costs against NZEL which opposes the costs applications.

Background

[5] The appeals by NZEL and Ngati Rangi arose out of a series of resource consent applications made by NZEL to enable the ongoing operation of its Raetihi Hydro-Electric Power Scheme (the Scheme).

[6] The Scheme is located just north of Raetihi township and has been in place since 1918. It generates around 1.7 GWH per annum and is connected to the National electricity grid.

[7] The Scheme takes water from four water bodies:

- The Makotuku River (Makotuku);

---

1 [2016] NZEnvC 59.
2 [2016] NZHC 2948.
3 [2017] NZEnvC 141 (the final Decision).
4 [2018] NZEnvC 151.

- The Makara Stream (Makara);
- The Makaraiti Stream (Makaraiti); and
- An unnamed tributary of the Mangaone Stream (the tributary).

[8] The current resource consents for the Scheme were issued in 2003. The consents allowed the take of:

- Up to 300 litres per second from the Makotuku;
- Up to 300 litres per second from the Makara;
- 150 litres per second from the Makaraiti; and
- 5 litres per second from the tributary.

In addition to those limits, the consents were subject to a series of restrictions as to total take, residual flows and various other matters. The combined diversion from Makotuku and Makara is not to exceed 450 litres per second. Minimum residual flows are required downstream of the intakes of 50 litres per second for the Makotuku, 25 litres per second from the Makara and 5 litres per second from the Makaraiti and the tributary.

[9] The 2003 consents had been granted on a short-term basis (5 years) only following application by NZEL for consents to upgrade the scheme and increase the amount of water abstracted. The short-term consents were granted to allow sufficient time for NZEL to collect hydrological and ecological information enabling a proper evaluation of the proposal.

[10] Applications for new consents were lodged with the Regional Council in June 2007 and September 2011. The applications were granted by an independent Commissioner acting on behalf of the Regional Council on 13 January 2014, but (as I have noted) subject to conditions which were the subject of these appeals.

[11] The above description of the scheme and its application history somewhat foreshadows the observation contained in the Court's final decision that:

> **Costs**
>
> [52] This was a complex matter requiring the resolution of difficult and contestable questions of fact and law. Under the circumstances our tentative view is that costs should lie where they fall. If any party has a contrary view and wishes to make a costs application, any such application should be made and responded to

in accordance with the Environment Court Practice Note 2014.

The Regional Council Costs Application

[12] The Regional Council considered that there was justification for a costs award and sought alternative orders of:

- An award of $24,000 which it contended was a reasonable contribution to its costs being approximately 25 percent of costs from April 2015 to the conclusion of the hearing in December 2015; or
- Alternatively, an award of $16,132.10 in relation to what the Regional Council considered were procedural inadequacies by NZEL.

[13] As a preliminary point the Regional Council agreed with the Court's observation set out in para [11] (above) but contended that in a complex matter such as this NZEL had engaged in the proceedings from approximately March 2015 in a manner which caused the Regional Council to incur significant unnecessary expense addressing various permutations and changes of position on the part of NZEL.

[14] The Regional Council's costs memorandum set out a chronology and commentary as to progress of these proceedings from 5 March 2015.[5] The chronology highlights (inter alia) a requirement imposed by the Court on NZEL to provide a "definitive statement" as to its position on a number of issues and consideration of alternatives which were potentially being advanced.

[15] The Regional Council memorandum (understandably) refers to criticism on the part of Judge Thompson as to an unsatisfactory failure on the part of NZEL to clarify hydrological matters and the potential for this to "resound" when costs were being considered.[6]

[16] The submission referred to a further "final twist" in what the Regional Council pointed to as NZEL's changing position and failure to provide a clear statement of position. The Regional Council contended that its position was "largely consistent and transparently based upon its evidence"[7] and ultimately preferred by the Court.

---

5 Para 9(a)–(l).
6 Para 9(h) Regional Council submission.
7 Para 14 Regional Council submission.

[17] The Regional Council provided invoices justifying its costs application.

Ngati Rangi Costs Application

[18] Ngati Rangi sought a costs award of $19,250 representing 25 percent of the net costs incurred by it. It noted that this was in the "comfort zone" range.

[19] Ngati Rangi based its costs claim largely on the submissions of the Regional Council. It contended that it took a "proactive and considered approach to its engagement in the appeals".[8]

[20] Ngati Rangi contended that the ultimate outcome of the proceedings represented a "partial success"[9] to its appeal and that ultimately the Court confirmed the minimum flows and combined cap that Ngati Rangi sought.

[21] As had the Council, Ngati Rangi provided details in support of its costs application.

The NZEL Reply

[22] NZEL commenced its reply with reference to paragraph [52] of the Court's final decision noted in para [11] (above).

[23] NZEL contended:

> ... neither party addresses the fact that, due to complex issues and facts involved a significant portion of the costs would still have been incurred during caucusing even if new information arising out of caucusing hadn't led to the need to model further scenarios.[10]

[24] NZEL disputed the extent to which the way it engaged in proceedings caused the other parties to incur significant, unnecessary expenses. It referred to the increase in options put forward for consideration by the Court in these terms:

> ... that the increase in options that needed to be modelled arose from Horizon's advice during caucusing and for the first time that a different minimum flow should

---

8 Para 3, Ngati Rangi submission.
9 Para 4, Ngati Rangi submission.
10 Para 7, NZEL reply.

apply to the Makara (proposing doubling the minimum flow from the figure set out in the One Plan), provision of new and different information as to median flows, and differing advice as to what the MALF for that river actually was as well as issues over the correct interpretation of the One Plan's provisions which excluded lawful takes and minimum flows as at 2006 from the relevant schedule.

[25] NZEL submitted as follows:

> 21. In respect of factors generally relevant as to whether costs are appropriate Counsel respectfully submits:
>
> a. Although the Court has determined that the S4 scenario should be given effect, it is submitted that, within the context of the One Plan, the discretionary nature of the consents being sought and the evidence adduced, are such that it cannot be said that the applicant advanced arguments that should have been known to be unmeritorious.
> b. Notwithstanding the criticism of the Court in May 2015, for the reasons stated above arguments the applicant did not increase costs during the caucusing process through failure to meet procedural requirements or its conduct; rather faced with difficult technical and legal issues it went to significant lengths to insure full information was available to the Court and parties so as to allow those issues to be addressed properly;
> c. The applicant and (Ngati Rangi) fully explored options of settlement both within and outside mediation and caucusing;
> d The applicant did not seek to pursue technical points; and
> e. The applicant did not require any party to give evidence on disputed facts that should have been admitted; in fact all parties; and the applicant's scientific evidence was largely accepted by the court.

[26] NZEL accepted that Ngati Rangi was partially successful in the proceedings, but it was not successful in significant aspects. Minimum flows were not increased as sought by Ngati Rangi nor was the consent term decreased or significant extra monitoring imposed. Very high financial contributions Ngati Rangi (and the Regional Council) had sought were not imposed by the Court. NZEL was also successful in part.

Discussion

[27] It is pertinent at the outset to return to the observation made by the Court in para [52] of its final decision. The observations regarding the factual and legal complexity of the matter considered by the Court remain pertinent.

[28] Considerable weight in our considerations must of course be attached to the very clear warning given by Judge Thompson previously referred to in the light of directions earlier made by Commissioner Hodges. However, once the full complexity of the proceedings became apparent, including the additional scenario identified by the Court after its initial considerations and the changing of understanding and permutations as the case proceeded through hearing, the Applicant's difficulties became more apparent than may have been the case initially.

[29] In my view, to at least some extent, the Applicant's changes arose as a result of endeavouring to respond to evolving facts and evidence and address the issues in dispute before the Court.

[30] The comments contained in para 21 of NZEL's submission set out in para [25] (above) largely reflect the provisions of para 6.6(d)(i)-(v) of the Environment Court Practice Note 2014. By and large, I concur with the observations made by NZEL in that regard.

[31] This was a difficult and complex case where all parties had some measure of success, and, to the extent that there may have been some failures in process on the part of NZEL, I consider that it reflects to at least some extent the difficult nature of the case.

[32] I determine that no costs ought be awarded.

Outcome

[33] Costs applications are declined.

B P Dwyer
Environment Judge