IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA681/2023
[2024] NZCA 360

BETWEEN	FEDERATED MOUNTAIN CLUBS OF NEW ZEALAND INCORPORATED Appellant
AND	GRIFFIN CREEK HYDRO LIMITED First Respondent
	MINISTER OF CONSERVATION Second Respondent
	DEPARTMENT OF CONSERVATION Third Respondent

Hearing:	15 May 2024
Court:	Thomas, Fitzgerald and Osborne JJ
Counsel:	M C Smith for Appellant S R Gepp KC and M C Wright for First Respondent K F M Wevers and R M Fistonich for Second and Third Respondents
Judgment:	1 August 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay one set of costs to the first respondent and another to the second and third respondents jointly, each for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] Griffin Creek Hydro Ltd (GCHL), the first respondent, holds a concession granted under the Conservation Act 1987 (the Act) permitting the construction, operation, maintenance and repair of a run-of-river hydroelectric power scheme (the Scheme) at Griffin Creek (the Concession).[1] The second respondent, the Minister of Conservation, by her delegate, granted the Concession in 2011 under pt 3B of the Act in the form of an easement in gross. The Department of Conservation | Te Papa Atawhai (the Department), the third respondent, is the land holder and the administrator of the Concession.[2]

[2] The Federated Mountain Clubs of New Zealand Inc (FMC) advocates for outdoor recreation and the associated environment on behalf of approximately 22,000 members and 100 clubs. FMC says it has a particular interest in Griffin Creek as its members include the canyoning community who, some two years after the Concession was granted, discovered and now use Griffin Creek as a canyoning site. FMC was

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1 A run-of-river scheme has no dam.

2 Griffin Creek is part of a stewardship area called the Wanganui/Otira Catchment: see Conservation Act 1987, s 2(1) definitions of "conversation area" and "stewardship area". It is approximately 40 km east of Hokitika.

unsuccessful in its application to the High Court for a declaration that the Concession limits the volume of water GCHL may extract from Griffin Creek.[3] FMC appeals.

[3] The issue concerns the interpretation of the Concession and, in particular, whether the approach to interpretation of a resource consent granted under the Resource Management Act 1991 (the RMA) applies to interpretation of the Concession.

[4] FMC does not challenge the decision-making in relation to the Concession. In other words, there is no challenge to: the public notification or consultation regarding GCHL's application under the Act (the Application); the Department's assessment of the Application under the Act; or the approval of the Construction and Operational Plan required by the Concession and discussed below.

Background

[5] The background to the proceeding was set out comprehensively in the judgment under appeal which we replicate in large part, supplemented with further relevant detail.[4]

The Application

[6] On 8 January 2009, Richard Morgan, the sole director and shareholder of GCHL, applied on behalf of GCHL to the Department for a concession in the form of an easement to construct and operate the Scheme.[5] GCHL had made two prior applications in 2006 and 2007, both of which were the subject of discussion between the Department and GCHL and had been commented on by relevant iwi groups, the West Coast Tai Poutini Conservation Board and others.

[7] The Application included a general description of the proposed activity under the heading "E. Description of Service/Activity" as "[t]he construction and operation

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3 *The Federated Mountain Clubs of New Zealand Inc v Griffin Creek Hydro Ltd* [2023] NZHC 2917 [judgment under appeal]. The declaration was sought under the Declaratory Judgments Act 1908.

4 At [8]–[38].

5 The Application was made under ss 17R and 17S of the Conservation Act as at 1 November 2008. There is no material difference between ss 17R and 17S in that version and the Act as at 7 July 2010, under which the Concession was granted. We refer to the Act as it stood on 7 July 2010.

of a hydroelectric power scheme based on Griffin Creek which is a tributary of the Taramakau River."

[8] The section headed "G. Details of Proposed Activity" provided further detail:

> The proposed scheme will generate a maximum output of 1.3MW. It will take water from the Griffin Creek Catchment via an approximately 1.5 kilometre penstock to a Power Station situated on Crown Land 300 metres upstream from the Griffin Creek Bridge on Highway 73 at Wainihinihi. The water would then be discharged back into Griffin Creek.

[9] Under the sub-heading "Headwork's" details were provided relating to the intake, settling tank, monitoring equipment, penstock, track/boardwalk and the river gauge to be installed in the creek bed just below the intake to monitor water flow. This section also referred to the power station which is to be on adjoining Crown land rather than conservation land and was therefore not part of the Application.

[10] Section G included the following:

> **Residual Flow of Griffin Creek**
>
> The average Annual Flow is calculated 2.5 cubic metres per second (cumecs). The Annual Mean Low Flow is calculated at .8 cumecs. These flow rates have been calculated by transposing flow rates from the Taipo River. There is a NIWA river gauge at the Taipo River Bridge 2 kilometres northeast of Griffin Creek. Once the scheme has been fully developed there would be a 'take' of 1.2 cumecs.
>
> When in times of low rainfall the flow at the river gauge (below the intake) falls below .6 cumecs (600 litres per second) the automatic control equipment at the power station will be set to shut the turbine down.

[11] FMC relies on the last sentence of the first paragraph in the extract above as part of its argument that the Concession limits the volume of water GCHL may extract from Griffin Creek to 1.2 cubic metres per second (cumecs).

The First Determination Report

[12] Department officials considered the Application and prepared a First Determination Report to the Community Relations Manager, West Coast Tai Poutini Conservancy,[6] dated 26 August 2010 (the Report).

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6 The Minister's delegate, pursuant to s 57(1) of the Conservation Act.

[13] The Report analysed the Application against the statutory requirements of the Conservation Act, noting the provisions dealing with concessions, including: contents of the application;[7] process for a complete application;[8] matters to be considered by the Minister, including but not limited to consideration of the effects of the proposal, measures that can be taken to avoid, remedy or mitigate any adverse effects of the activity and the purpose for which the land is held;[9] and the relationship between concessions and conservation management strategies and plans.[10]

[14] In the section on natural, cultural, recreational and historic values, the Report relevantly considered the flora and fauna in the area and then, in respect of freshwater, said the following:

> **Freshwater**
>
> The applicant estimates that the mean annual flow and the median annual flow for Griffin Creek is 3.5 [cumecs] (3,500 litres per second) and 2.3 [cumecs], respectively, and the mean annual low flow is 0.8 [cumecs] (800 litres per second). …
>
> …
>
> Due the steepness of the terrain, elevation, distance inland and high rainfall, the fish biodiversity and biomass is likely to be very low. There are also a number of waterfalls in Griffin Creek, some being 40m high, which may prevent upstream travel by fish.
>
> Although some fish are recorded in the higher sections of mountainous catchments elsewhere and considerable distances from the sea, it is not likely that there is a high diversity and abundance of fish in the section of Griffin Creek where the intake is proposed to be located. This is due to the steep nature of the creek and the presence of waterfalls that may prevent the passage of fish. However, fish may be present in the lower reaches near to the power house.

[15] This section also addressed recreation, noting that very few trampers, hunters or other recreational users use the section of Griffin Creek where the Scheme was proposed to be installed.

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7 Conservation Act, s 17S.
8 Section 17T.
9 Section 17U.
10 Section 17W.

[16] In considering the nature of the activity,[11] the section on water take read as follows:

> **Water take**
>
> Once the scheme has been fully developed, the applicant proposes to divert 1.2 [cumecs] from the stream to the hydropower scheme (48% of the mean annual flow). The 300kW turbine would require a flow of at least 0.3 [cumecs] and the 1000kW turbine would require 0.9 [cumecs]. The two turbines can be shut down independently as the flow in the creek falls.
>
> To determine the actual flow rates on Griffin Creek, a NIWA approved flow gauge would be installed just below the intake site (but above the settling take outlet/weir outlet) once the hydropower scheme is operational. However, until the actual flow rates are known for Griffin Creek, the applicant proposes to turn off the larger turbine when the residual flow drops below 0.9 [cumecs] and the flow below the intake would increase to just under 1.8 [cumecs]. The smaller turbine would continue to operate. If the flow continued to decrease, the smaller turbine would shut down when the residual flow would be 0.6 [cumecs].

[17] Under the consideration of the effects of the activity,[12] in respect of freshwater, the Report referred to the Application which noted that blue ducks and fish species are not found in high abundance in the immediate area of the intake or downstream to the outlet site, and the intake screen would prevent fish from being drawn into the system. The Report said that the amount of water to be taken would therefore not affect the freshwater values significantly and for those reasons the effects of the proposed hydropower scheme on the freshwater values were considered to be minor.

[18] The Report then assessed the effects of the proposal and proposed a number of mitigation measures, saying in respect of freshwater:

> **Freshwater**
>
> The amount of water proposed to be taken from the creek at the intake point when both turbines would be operating (1.2 [cumecs]) represents 52% of the median annual flow and when the smaller turbine would be operating (0.3 [cumecs]) represents 13% of the median annual flow. The water take of 0.3 [cumecs] to operate the smaller turbine would occur most of the time (as the cut off point is around the mean annual low flow). The water take for both turbines of 1.2 [cumecs] would occur at least 50% of the time, as the cut off point for the take above the intake is 2.1 [cumecs] (the median annual flow being 2.3 [cumecs]).

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11 Section 17U(1)(a).
12 Section 17U(1)(b).

> To summarise, approximately 50% of the water is proposed to be removed from Griffin Creek during more than 50% of the time.
>
> The reduced water flow would not cause significant changes in oxygen levels, or represent a significantly smaller area of freshwater habitat for wildlife, in terms of foraging and passage. The catchment and the specific intake site were selected due to its steep slopes and waterfalls, which means that the creek section is not particularly suitable for whio/blue duck and fish.
>
> The intake structures would not be dug into the streambed and instead located in deeper water sections or on top of the rocks on the edge of the creek. Being on the creek edge, they would not block or impinge the upstream or downstream movement of fish, waterfowl or other wildlife.
>
> The applicant proposed a cut off in taking water when the residual flow is 0.6 [cumecs], which is lower than the mean annual low flow rate (0.8 [cumecs]). It is the view of the Department that to protect the environmental values of Griffin Creek, the minimum residual flow should be above the mean annual low flow rate and thus the cut off point for the removal of water should be at least 0.8 [cumecs] of water below the point of the intake.
>
> The applicant proposed a cut off in taking water for the larger turbine when the water flow above the intake is 2.1 [cumecs] and residual flow below is 0.9 [cumecs]. To be consistent, it is recommended that [the] Department should allow the cut off point for the larger turbine to also be a residual flow of 0.8 [cumecs].
>
> As there is no storage of water in the proposed system and there is a reasonable number of freshes and floods as indicated by the significant difference between the mean and median annual flows, the creek would retain an acceptable level of flow variability. Although the intake structures would be located within the streambed, and there would be a number of structures to return water to the watercourse, the natural flow of the watercourse would not be significantly diverted or altered and there would not be any increased abrasion or erosion occurring at the site.

[19] The Report assessed the Application as against the West Coast Tai Poutini Conservation Management Strategy (CMS) considering, relevantly, threats to freshwater biodiversity values, noting recognition in the CMS that the maintenance of the natural character and quality of waterways and wetlands is crucial for the survival of freshwater invertebrates, fish and bird species, as well as the continuation of freshwater ecosystem services. Further, many human activities or human induced factors had the potential to adversely affect freshwater species and ecosystems, including life supporting capacity, natural character, water quality and water quantity. It referred to the objective of the CMS in respect of freshwater ecosystem management "to prevent further extinctions of indigenous freshwater fish species and declines in species abundance and range". The Report considered the Application was not

inconsistent with the provisions of the CMS in respect of freshwater biodiversity, ecosystem management and authorised uses of public conservation lands. The impacts of the structures and activities associated with a small hydroelectric power scheme were not considered significant and, with appropriate design and special conditions, adverse effects could be avoided, remedied or mitigated.

[20] The Report concluded that the Scheme was consistent with the purpose for which the land was held and there was no reason why the easement could not be granted subject to the applicant's acceptance of the proposed special conditions and the outcome of the public notification process. On 15 September 2010 the Minister's delegate approved the Report.

[21] The intention to grant the Concession was publicly notified.[13] Three submissions were received in response, none of which raised any concerns relating to limits on water take or the recreational use of the river. The submissions were summarised in a final report which also addressed outstanding issues such as the appropriate amounts of activity fees and the bond.

[22] The Minister's delegate, Michael Slater, then Conservator, West Coast Tai Poutini Conservancy, approved the granting of the Concession on 7 February 2011. On the same day Mr Slater and Mr Morgan signed a "Concession Document (Easement)".

The Concession

[23] The Concession grants GCHL "an EASEMENT to carry out the Concession Activity on the Easement Land subject to the terms and conditions contained in this Concession and its Schedules".

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13 As required by s 17T(4) of the Conservation Act.

[24] The "Concession Activity" is defined as follows:

> **Concession Activity**
>
> This easement covers the construction phase and the ongoing operation, maintenance and repair of the hydro-electric power scheme at Griffin Creek, and authorises the activities listed below:
>
> (i) Taking of water from Griffin Creek.
>
> (ii) Construction, use and maintenance of an intake structure, settling tank, surveillance equipment, solar panels and shed.
>
> (iii) Construction, use and maintenance of an access track, pipeline structure to convey water and data cable.
>
> (iv) Vegetation clearance associated with the construction of the intake structure, pipeline and access track, and subsequent vegetation trimming required to maintain access to them.

[25] Notably, item (i) above does not place a limit on the water take. The absence of a limit in the description of the Concession Activity was relied on by the respondents in opposition to the declaration.

[26] Schedule 2 contains standard conditions. The standard conditions specify that GCHL is only allowed to use the land subject to the easement for the Concession Activity. It then contains provisions concerning the Concession term, fee and its review, prohibits assignment without the prior written consent of the Minister, prohibits cutting down or damaging vegetation, any natural feature or historic resource without the Minister's consent, limits what can be erected, addresses liability insurance, health and safety, termination and disputes.

[27] The Concession provides that GCHL must comply with relevant legislative provisions, including those under the Act, the Reserves Act 1977, the National Parks Act 1980, Wildlife Act 1953 and any other legislation affecting the land or the Concession Activity.

[28] Schedule 3 contains special conditions, the following of which are relevant:[14]

> 1. The Concessionaire must not undertake the Concession Activity unless or until the final Construction and Operational Plan is approved

[14] Special condition 1 was varied in 2021. Refer to [31]–[33] below.

in writing by the Hokitika Area Manager. In considering the Construction and Operation Plan, the Grantor would check that it does not differ substantially in regard to location, scale or level of effect to the application lodged by the Concessionaire and to the Concession Activity as described in the Department's First Determination Report. The Concessionaire must ensure that the Construction and Operational Plan is prepared by a suitably qualified person. The Grantor may require the plan to be audited by a suitably qualified person.

2. Once audited and approved by the Grantor, the Construction and Operational Plan including a timeline must form part of the Concession, and the Concessionaire must not deviate from this plan without the prior written approval of the Hokitika Area Manager.

…

4. The Concessionaire must ensure that appropriate resource consents are obtained prior to the commencement of the Concession Activity on the Easement Land and that they comply with any conditions of those consents throughout the term of this Concession. If any conditions attached to any resource consent obtained by the Concessionaire in relation to the Concession Activity are, in the opinion of the Minister, incompatible with this Concession, the Granter may review the provisions of this Concession; and, at the discretion of the Minister of Conservation, this Concession may be varied accordingly.

5. The Grantor reserves the right to apply restrictions to the Concession Activity if, in the opinion of the Grantor, the Concession Activity granted is having or may have an adverse effect on the physical environment and the effect can not be avoided, remedied or mitigated to an extent satisfactory to the Grantor. The Concessionaire shall not be entitled to any compensation in the event of such action being taken.

…

8. The Concessionaire must install a continuous flow monitoring device above the outlet site (which is located below the powerhouse). Flow must be recorded to an accuracy of ± 10%, and at no less than 15 minute time intervals. An electronic copy of these records must be provided to the Grantor annually.

9. Extraction of water must cease whenever the flow recorded at the flow-monitoring site specified in Condition 8 falls below the mean annual low flow, which is agreed to be 0.8 [cumecs]. Once two years of data under Condition 8 has been obtained, a new minimum residual flow based on a revised mean annual low flow may be used following agreement by the Grantor and the Concessionaire.

[29] Conditions 8 and 9 are relied on by the respondents to support their submission that there is no limit on water take and that water flow is addressed and controlled by

these conditions regarding residual flow. They also rely on special condition 4 which requires GCHL to ensure that appropriate resource consents are obtained prior to the commencement of the Concession Activity and to comply with the conditions of those consents throughout the term of the Concession. Further, if any conditions attached to any resource consent are, in the opinion of the Minister, incompatible with the Concession, the Minister may review the provisions of the Concession and, at the Minister's discretion, the Concession may be varied accordingly.

[30] In August 2012, GCHL submitted a Construction and Operational Plan (COP), as required by special condition 1 of the Concession, which was approved on 27 September 2012. The COP then became part of the Concession pursuant to special condition 2. The COP did not address water take or minimum flow.

[31] In February 2018, GCHL applied to the Department to vary the Concession. This application followed a variation to resource consents granted by the West Coast Regional Council in October 2017 (discussed below). The proposed changes included the following:

> 2. Residual flow lowered from 800L/s to 456L/s to be in line with [West Coast Regional Council] resource consent (Existing [Department] Concession, special condition 9). Maximum water abstraction rate to change from 1200L/s to 2500L/s.

[32] GCHL withdrew the application to vary the conditions on 13 March 2019, prior to it being determined by the Department, on the basis the Concession did not limit water take.

[33] A further application for variation was made in February 2020, resulting in the Concession being varied on 26 May 2021. The variation required consequential changes to the COP because it introduced new measures to manage potential adverse effects of the Concession Activity. None of the measures related to the imposition of a specified limit on water take or minimum flow. GCHL has not yet submitted an updated COP for approval, as it awaits the outcome of these proceedings.

[34] Just like special condition 1, the variation provides that the COP must "not differ substantially in regard to location, scale or level of effect to the Application (and

subsequent approved variation application/s) lodged by the Concessionaire and to the Concession Activity as described in the Department's First Determination Report (and subsequent approved reports to the Decision-Maker)".

Resource consents

[35] GCHL holds various resource consents from West Coast Regional Council, described as follows:

Resource consent no.	**Type of resource consent**	**Purpose**
RC10269/1	Land Use Consent	To disturb the bed of Griffin Creek for the construction of structures associated with hydro electricity generation, Wainihinihi.
RC10269/2	Water Permit	To take and use surface water from Griffin Creek for hydro electricity generation, Wainihinihi.
RC10269/3	Water Permit	To divert water from Griffin Creek for hydro electricity generation, Wainihinihi.

[36] GHCL had originally obtained a water permit authorising the take of a maximum of 1,200 litres per second (1.2 cumecs) from Griffin Creek. In 2017, GCHL applied for and was granted a variation increasing the maximum rate of water take to 2,500 litres per second (2.5 cumecs).

[37] As an affected person, the then Operations Manager of the Hokitika District Office of the Department had approved GCHL's application to vary the resource consents. The approval noted that the Department's approval was specific to the application for change of resource consent conditions and was for the purposes of notification under the RMA only.[15] The approval was not indicative of any associated

[15] Section 95 of the Resource Management Act 1991 addresses notification of applications for resource consents.

concession (i.e. under the Act) or other statutory approval which might be required from the Department.

The statutory framework

[38] Before embarking on a discussion of the judgment under appeal and interpretation of the Concession, we provide the necessary context by outlining the statutory framework for the grant of concessions under the Act.

[39] The long title of the Act provides it is:

> An Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation

[40] Relevant definitions are set out in s 2 of the Act. "Conservation" is defined as:

> … the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations

[41] "Preservation" is defined as meaning, in relation to a resource, the maintenance of its intrinsic values so far as is practicable. "Protection" is defined as meaning, in relation to a resource, its maintenance so far as is practicable in its current state, but includes its restoration to some former state and its augmentation, enhancement or expansion.

[42] The Report and the judgment under appeal refer to "conservation values". We understand conservation values to be generally those values which it is the purpose of the Act to preserve and protect.

[43] "Natural resources" are defined:

> **natural resources** means—
>
> (a) plants and animals of all kinds; and
>
> (b) the air, water, and soil in or on which any plant or animal lives or may live; and
>
> (c) landscape and landform; and

(d) geological features; and

(e) systems of interacting living organisms, and their environment;—

and includes any interest in a natural resource

[44] Notably, water is linked to plant or animal habitats.

[45] "Recreational enjoyment" is not defined.

[46] "Conservation area" includes any land or an interest in land held under the Act for conservation purposes. "Stewardship area" includes a conservation area that does not fall within specified categories, as is the case here. Section 25 of the Act provides that every stewardship area shall be managed so that its natural and historic resources are protected.

[47] The Department is established by s 5 of the Act. Its functions include:[16]

> (a) to manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:

Part 3B of the Act – concessions

[48] Part 3B of the Act governs the granting of concessions. It applies to every conservation area, which includes the land subject to the Concession.[17] As already noted, that land is within a "stewardship area".

[49] Any activity in a conservation area must be authorised by way of a concession unless certain exceptions are met.[18]

[50] "Concession" and "concession document" are defined in the same terms to mean a lease, licence, permit or an easement granted under pt 3B of the Act and include "any activity authorised by the concession document".[19] "Concessionaire" includes a

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16 Conservation Act, s 6(a).
17 Section 17O(1).
18 Section 17O(2). We note that a concession is not required to undertake any recreational activity (if not for specific gain or reward): s 17O(4).
19 Section 2 definition of "concession or concession document".

person who is the grantee of an easement under pt 3B of the Act.[20] The Minister has the power to grant concessions in the form of a lease, licence, permit or easement in respect of any activity (this power is, in most cases, exercised by a Department official under delegation from the Minister,[21] as was the case here).[22]

[51] Part 3B of the Act "does not relieve any person from any obligation to obtain a resource consent under the Resource Management Act 1991".[23]

[52] The required contents of an application for a concession are specified.[24] At the relevant time required information included a description of the proposed activity, its potential effects and any action that the applicant proposed to take to avoid, remedy or mitigate any adverse effects of the proposed activity.[25]

[53] The circumstances in which the Minister's intention to grant a concession is to be publicly notified are specified.[26]

[54] The matters to which the Minister is required to have regard in considering any application for a concession are set out and, at the relevant time, included:[27]

> (a) the nature of the activity and the type of structure or facility (if any) proposed to be constructed:
>
> (b) the effects of the activity, structure or facility:
>
> (c) any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity:
>
> …
>
> (f) any relevant oral or written submissions received as a result of any relevant public notice issued under section 49 of this Act:
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> …

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20 Section 2 definition of "concessionaire".
21 Pursuant to s 57(1).
22 Section 17Q(1).
23 Section 17P(1). This provision is subject to limited exceptions that are not relevant in this case.
24 Section 17S.
25 Section 17S(1).
26 Section 17T(5).
27 Section 17U(1).

[55] "Effect" is defined in s 2(1) of the Act as having the same meaning as it has in the RMA.[28]

[56] When granting a concession, the Minister is given wide-ranging powers to impose such conditions as the Minister considers appropriate for the activity,[29] including conditions relating to or providing for the activity itself, the carrying out of the activity, and the places where it may be carried out.[30]

[57] The Minister has a broad discretion, on request or on their own motion, to vary any conditions in a concession where:[31]

> (a) the variation is the result of a review provided for in the concession document; or
>
> (b) the variation is necessary to deal with significant adverse effects of the activity that were not reasonably foreseeable at the time the concession was granted; or
>
> (c) the variation is necessary because the information made available to the Minister by the concessionaire for the purposes of the concessionaire's application contained inaccuracies that materially influenced the decision to grant a concession and the effects of the activity permitted by the concession require more appropriate conditions;

A concessionaire is bound by every such variation.[32]

[58] Where a variation is of a minor and technical nature, and does not materially increase the adverse effects or will result in a reduction of the adverse effects or the duration of the activity, then by agreement the Minister and the concessionaire may vary any conditions in the concession document without public notification.[33] Alternatively, the concessionaire may at any time apply to the Minister for a variation

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28 Section 3 of the Resource Management Act defines effect as including: any positive or adverse effect; any temporary or permanent effect; any past, present, or future effect; and any cumulative effect which arises over time or in combination with other effects — regardless of the scale, intensity, duration, or frequency of the effect, and also includes any potential effect of high probability and any potential effect of low probability which has a high potential impact.

29 Conservation Act, s 17X.

30 Section 17X(a).

31 Section 17ZC(3).

32 Section 17ZC(3).

33 Section 17ZC(1).

or extension to the concession. Such an application is to be treated as if it were an application for a concession.[34]

[59] We note at this point that we agree with the High Court Judge's observation that, as is apparent from the above provisions, the Act provides a broader scope to vary concession conditions than is available under the RMA for variation of resource consent conditions.[35]

[60] Concessions that are in the form of easements may be registered under the Land Transfer Act 2017.[36] In the present case the Concession provided that the easement would not be registered.

[61] If a concession document includes a right to transfer, sublease, assign, mortgage or otherwise dispose of the concessionaire's interest, the Minister's consent is required.[37]

The judgment under appeal

[62] Gordon J, in the High Court, refused FMC's application for a declaration, holding that the Concession does not limit the volume of water that GCHL may extract from Griffin Creek to 1.2 cumecs.[38]

[63] In deciding how the Concession should be interpreted, the Judge noted the primary difference between a concession and a resource consent was that the latter is neither real nor personal property.[39] By contrast, a concession may be granted not only in the form of an easement but also in the form of other instruments that create an interest in land, for example leases and licences.[40] It was apparent on its face that the Concession was an easement, something which was reinforced by the contractual nature of some of its terms.[41]

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34 Section 17ZC(2).
35 Resource Management Act, ss 127 and 128; judgment under appeal, above n 3, at [102].
36 Conservation Act, s 17ZA(2). For the purpose of granting any easement over any conservation area, the Minister is deemed to be the registered owner of the conservation area: s 17ZA(1).
37 Conservation Act, s 17ZE(1).
38 Judgment under appeal, above n 3, at [166].
39 At [108], citing Resource Management Act, s 122.
40 At [108].
41 At [109].

[64] The Judge noted that the interpretation of easements is undertaken with the same objective purposive approach used for other commercial contracts.[42] She concluded that, on its plain wording, the Concession provides for a hydroelectric power scheme, including the taking of water without any limit on the amount of water that may be taken. The hydrological effects of taking water were controlled by the requirement to cease taking at a specified minimum flow with an associated condition requiring the installation of a continuous flow monitoring device.[43]

[65] The Judge then turned to consider whether the Application and Report changed the plain meaning. She noted the Application referred to the Scheme having a water take of 1.2 cumecs when complete and addressed the issue of whether that indicated an objective intention for the Concession to be subject to such a condition.[44] Referring to the wide powers of the Minister (or their delegate) to impose conditions, she observed that, had there been an intention to impose a limit on the amount of water that could be taken, then the Minister's delegate could have been expected to have done so explicitly.[45] She considered the affidavit sworn by Mr Slater, who made the decision on the Application.[46] The Judge also considered the Report and noted the proposed mitigation measures did not include a limit on take and nor did the proposed special conditions attached to the Report.[47] The Judge interpreted the Report as concluding that the relevant conservation values would be protected by the maintenance of a minimum flow rather than the imposition of an upper limit on the volume of water that might be taken.[48]

[66] The Judge concluded it was apparent that the objective intention was that the Concession would be subject to a cease-take clause (special condition 9 which required water extraction to cease when the recorded flow fell below a specified level) with its associated monitoring requirement, and not to a limit on the amount of water that could be taken.[49] She considered whether a term limiting the water take might

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42 At [110].
43 At [124].
44 At [130].
45 At [134], referring to *Attorney-General v Holland* (2007) 5 NZ ConvC 194,480 (HC) at [61].
46 At [135]–[136].
47 At [137].
48 At [138].
49 At [143].

nevertheless be implied but concluded the high hurdle for the implication of a term was not met.[50]

[67] The Judge concluded the differences between the statutory schemes under the Act and the RMA supported her view that the principle in RMA law that a consent could not grant more than what was applied for does not apply to concessions under the Act.[51] She noted that a concession authorises an activity which in this case includes the taking of water but she emphasised that the activity itself was a hydroelectric scheme.[52]

[68] The Judge contrasted the activity described in the Concession with the two water permits granted by the West Coast Regional Council which did not authorise an overall activity but rather the taking, using and diverting of water.[53]

[69] The Judge returned to the evidence of the decision-maker and was satisfied he had viewed the Application through the lens of conservation values. She quoted from his affidavit:[54]

> In considering whether to grant approval to a concession application, my focus would have been on protecting conservation values so as to be consistent with conservation purposes, as required by the Conservation Act. Level of take would only have been relevant to the extent that it impacted on these purposes and values.

[70] The Judge noted that the Act did not require an applicant to specify the volume of water it proposed to take but simply required a description of the activity and its effects on conservation values. In contrast, an application under the RMA to take water must specify the volume of water because the taking and other use of water is allowed only where it is expressly authorised by a resource consent or rule in a plan.[55]

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50 At [144]–[154].
51 At [155].
52 At [156].
53 At [159].
54 At [162].
55 At [163], citing Resource Management Act, s 14.

[71] The Judge concluded that, simply because an application under the Act refers to the volume of water proposed to be extracted, that did not operate as a constraint on the scope of the consent as it would do under the RMA.[56]

Case for the parties

[72] FMC appeals on the grounds that the High Court erred in holding that the Concession does not limit the volume of water GCHL may extract from Griffin Creek to 1.2 cumecs.

[73] Mr Smith, for FMC, submitted that the plain meaning of the Concession is that GCHL is permitted to take only up to 1.2 cumecs as this was the volume specified in the Application, and this was recorded in the Report. Alternatively, the Concession is ambiguous unless interpreted in the factual matrix of the Application and Report.

[74] In Mr Smith's submission, the High Court erred in distinguishing the established approach to the interpretation of resource consents, which is that the scope of an activity is confined by the terms of the application. He said that condition 1 to the Concession does limit the water take if properly interpreted and the High Court erred in concluding that the lack of an express condition limiting water indicated that there was no such limit under the Concession.

[75] Mr Smith contended that the High Court also erred in considering the implication of a term when that was not part of the case advanced by FMC and further in determining that parts of the evidence of its witness were inadmissible when it was led for the purpose of providing context only, but giving weight to the evidence of GCHL's expert.[57]

[76] For GCHL, Ms Gepp KC submitted that the Judge had approached the task of interpreting the Concession correctly in accordance with the law on easements. She submitted that the RMA approach does not apply to concessions as the statutory schemes of the RMA and the Act differ, and the RMA approach cannot be reconciled with the law of easements.

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56 Judgment under appeal, above n 3, at [164].

57 We do not need to address this argument as it is not material to the appeal.

[77] In Ms Gepp's submission, the plain meaning of the Concession was that there was no take limit. The objective intention of the Concession was to authorise a hydroelectric power scheme while managing effects on conservation values. It was a deliberate decision to manage the effects by flow monitoring and cease-take clauses and the contextual reference in the Application to volume-take was not intended to constrain the authorised activity.

[78] Finally, Ms Gepp noted GCHL's intention to support the High Court decision on the ground that, even if the RMA approach applies, the contextual statement in the Application did not constrain the Concession.

[79] Submissions on behalf of the Minister and the Department were made by Ms Wevers. In her submission, the Concession is in the form of an easement and the High Court's approach to interpretation was correct. The High Court was right to reject FMC's argument that the interpretative approach to resource consents under the RMA should apply to the interpretation of concessions under the Act. She submitted that there are a number of indications Parliament intended that a concession, once granted, would be inherently contractual in nature and thus interpreted in accordance with the usual rules of contract. Furthermore, FMC's argument cannot be reconciled with the express terms of the Concession which contemplates that the Scheme as constructed may differ from the activity described in the Application as long as the "location, scale or level of effect" does not "differ substantially" from the Application and the activity as described in the Report.

The issues

[80] There are two issues for us to determine:

(a) What is the correct approach to interpretation of a concession?

(b) Is the Concession subject to a water take limit?

What is the correct approach to interpretation of a concession?

[81] Mr Smith began his oral submissions by referring to the approach to interpretation of resource consents under the RMA. He observed that it is well established that the scope of an activity is confined by the terms of the application and a consent cannot grant more than what was applied for.[58] In his submission, that context is analogous and the same approach should apply to concessions.

[82] Mr Smith explained that the authorities on this point can be traced back to the case of *Sutton v Moule* where this Court said, in relation to the approach of a Planning Tribunal Judge:[59]

> He correctly pointed out that a council has no jurisdiction to grant a consent which extends beyond the ambit of an application.

[83] In Mr Smith's submission, the *Sutton* approach applies equally to an application under the Act which he says starts with the context of the jurisdiction granted by the Act.

[84] Mr Smith gave the example of the case of *Aotearoa Water Action Inc v Canterbury Regional Council*, where three parties were granted consents to take water, their applications and supporting documents specifying that the water was to be used for specified industrial activities. One consent simply referred to the permit as "to take and use ground water", the other two authorising the taking of ground water "for industrial use".[60] The applicants sought to use their consents for a commercial water bottling enterprise but the High Court found this was not within the scope of the consent,[61] even when the consent did not refer back to the application or supporting documentation.[62]

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58 Relying on *Sutton v Moule* (1992) 2 NZRMA 41 (CA) at 46; *Clevedon Protection Society Inc v Warren Fowler Ltd* (1997) 3 ELRNZ 169 (EnvC) at 185–189; *Millar v Ashburton District Council* [2016] NZHC 3015 at [69]–[71]; and *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 at [127] and [128].

59 *Sutton v Moule*, above n 58, at 46.

60 *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 58, at [9]–[23].

61 At [148].

62 At [145]–[147].

[85] In Mr Smith's submission, the strong similarities between the Conservation Act concession process and the RMA resource consent process logically lead to the application of the same approach to interpretation.

[86] While a resource consent and a concession both involve the grant of a right, it is the legislation governing the respective grants which provides the context for their interpretation. The starting point is that RMA and the Act have different purposes. The purpose of the RMA is stated to be:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[87] We repeat for convenience the Act's long title: "[a]n Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation". As outlined above at [40], conservation involves the preservation and protection of natural and historical resources for the purposes stated in the definition.

[88] There are similarities between concessions and resource consents, particularly in the way in which concessions and resource consents are obtained. That includes public notification of the application or intended grant,[63] and an obligation for the

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[63] Conservation Act, ss 17T(4) and 17T(5); and Resource Management Act, in particular ss 95A and 95B.

decision-maker to consider the effects of the proposed activity.[64] The Act defines "effect" as having the same meaning as it has in the RMA.[65]

[89] Notably, pt 3B of the Act, which deals with concessions, specifically addresses that part's relationship with the RMA, providing that, except for certain matters, it does not relieve any person from any obligation to obtain a resource consent under the RMA.[66] This serves to emphasise the different purposes and functions of the RMA and the Act.

[90] The RMA imposes restrictions on the use of land,[67] the coastal marine area,[68] river and lake beds,[69] water,[70] discharges,[71] and noise.[72] It imposes a duty to avoid, remedy or mitigate adverse effects.[73] No person may take water except as expressly provided, for example where it is allowed by a resource consent.[74]

[91] Under the RMA, separate consents are required for each of the restricted uses.[75] The detail provided in an application for each proposed use defines the consent authority's jurisdiction in granting any consent.[76] In the case of water, a resource consent application would be incomplete if it did not specify the volume of water to be taken.[77] In contrast, a concession under the Act is for an "activity" (defined as including a trade, business or occupation),[78] rather than its component parts.[79] The Minister must then consider the nature of the activity and the type of structure or facility (if any) to be constructed, the effects of the activity, structure or facility,

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64 Conservation Act, s 17U(1)(b); and Resource Management Act s 104(1)(a).
65 Conservation Act, s 2(1) definition of "effect".
66 Conservation act, s 17P.
67 Resource Management Act, ss 9–11.
68 Section 12.
69 Section 13.
70 Section 14.
71 Sections 15–15C.
72 Section 16.
73 Section 17.
74 Section 14.
75 The types of resource consent are specified in s 87. A consent is not required if the activity is otherwise allowed under the RMA.
76 Peter Salmon (ed) *Salmon Environmental Law* (online ed, Thomson Reuters) at [RM88.03]; and *Darroch v Whangarei District Council* PT Auckland A18/93, 1 March 1993 at 27.
77 Section 88(2)(b) and sch 4.
78 Conservation Act , s 2(1) definition of "activity".
79 Section 17O(2).

mitigation matters and other specified factors.[80] Similarly to the RMA, the assessment of an application for a concession includes consideration of the effects of the activity and mitigation measures, in the context of the Act and the specified requisite considerations.[81] That assessment leads to the form of the concession document and the conditions incorporated therein.

[92] The Department has the ability to impose conditions it considers necessary in the context of the Act to address or mitigate the adverse effects of the concession activity.[82] In the present case, for example, had it considered those effects warranted it, the Department could have imposed a condition limiting water take but, unlike an application for a consent for water take under the RMA, it did not have to do so.

[93] The legal conceptualisations of concessions and resource consents are different. A concession may be granted in the form of an instrument which creates an interest in land, such as an easement, lease or licence.[83] It is a condition of the grant of a concession that the concessionaire pays any specified rent, fee or royalty, which may be set as a condition of the concession, be fixed at market value having regard to "any contractual conditions …" and be periodically reviewed.[84] A concession must be signed or executed by the parties.[85] There is no right of appeal from a decision by a Minister, although it is amenable to judicial review. The Concession contains a dispute resolution clause, something that is not provided for in resource consents. These provisions emphasise the contractual nature of a concession and, in any event, easements are contractual in nature.[86]

[94] The interpretation of a concession which is an easement therefore involves the rules on contract interpretation. Contract interpretation requires an objective approach with the aim being to ascertain the meaning which the document would convey to a

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80 Section 17U(1).
81 Section 17U(1)(c) and 17U(3); and Resource Management Act, ss 104(1)(a) and 104(1)(ab).
82 Section 17X.
83 Section 17Q.
84 Sections 17X(c), and 17Y.
85 Sections 17ZC(4) and 17ZD.
86 *Body Corporate 341188 v District Court at Auckland* [2015] NZCA 393, (2015) 16 NZCPR 667 at [18], citing *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZConvC 193,938 (CA) and *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402, leave to appeal to the Supreme Court refused: *Big River Paradise Ltd v Congreve* [2008] NZSC 51, [2008] 2 NZLR 589.

reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[87]

[95] The background facts a reasonable person will take into account may vary depending upon the nature of the contract. The majority in the Supreme Court decision in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* acknowledged that the scope for resort to background is itself contextual. It may be more restrictive where the parties are aware their contract may be relied upon by third parties.[88]

[96] In *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust*, the Supreme Court observed this was particularly so with instruments which create interests in land.[89] That case involved rectification of registered restrictive covenants. There was an issue as to whether recourse could be had to extrinsic evidence in the interpretation of a registered document. The majority considered that registered documents should generally be construed without regard to extrinsic evidence which is particular to the original parties and not apparent on the face of the register. However, reference can be made to facts of which a reasonable future reader of the document could be expected to be aware, would recognise as relevant and to which they have access, such as any material referred to in the document.[90]

[97] The later Supreme Court decision of *Schmuck v Opua Coastal Preservation Inc*, concerned concessions (easements) granted under the Reserves Act 1977 allowing Mr Schmuck to carry out certain activities on reserve land.[91] "Concession" has the same meaning under the Reserves Act as under the Act, and in particular includes an

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87 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] per McGrath, Glazebrook and Arnold JJ, quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffman; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43] per Winkelmann CJ and Ellen France J.

88 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 87, at [62] per McGrath, Glazebrook and Arnold JJ; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd,* above n 87, at [47] per Winkelmann CJ and Ellen France J.

89 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161.

90 At [60] and [73]–[74] per William Young and O'Regan JJ, and [151] per Glazebrook J (concurring).

91 *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118, [2019] 1 NZLR 750.

easement and any activity authorised by the concession document.[92] In both Acts, authorisation is sought for an overarching activity and the same general decision-making process applies.[93] The Supreme Court was satisfied that, while generally registered documents should be interpreted without regard to extrinsic evidence not apparent on the face of the Register, the question did not arise in that case where the extrinsic material relied upon was the resource consents and the management plan required by them. The Court considered that the reasonable future reader of the easement was expected to be aware of them and would recognise them as relevant.[94] The resource consent, which referred to the management plan, was expressly referred to in the easement.

[98] Although a concession is not necessarily registered (and will not be in the present case) those observations are obviously pertinent guidance on the approach to be taken to their interpretation. Most concessions will be in a form which creates an interest in land, and, no matter what the form, will be relevant to parties other than the original contracting parties.

[99] We consider that the tension between the parties as to the correct approach to interpretation is somewhat misplaced. Concessions are granted under the Act and must be interpreted in that context. Similarly, resource consents are granted under the RMA and are interpreted in that context. It is therefore incorrect to suggest that the approach to interpretation of resource consents under the RMA should be applied to interpretation of concessions granted under the Act. The approach pressed upon us by Mr Smith is derived from the jurisprudence on the interpretation of resource consents under the RMA. To suggest the same approach for concessions granted under the Act ignores the different nature of concessions and the different legislative context. That is not to say, however, that interpretation of the Concession does not involve consideration of matters relevant to its grant. The reasonable future reader of a concession could be expected to be aware of the relevant application, and any reports prepared for the decision-maker and associated documents, such as a construction and operational plan, and recognise them as relevant.

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92 Reserves Act 1977, s 2(1) definition of "concession or concession document".
93 Section 59A(1); and Conservation Act, pt 3B.
94 *Schmuck v Opua Coastal Preservation Inc*, above n 91, at [59].

[100] On that basis, we now turn to consider the correct interpretation of the Concession.

Is the Concession subject to a water-take limit?

[101] In Mr Smith's submission, the approach he advocated is in any event not inconsistent with that taken to interpreting easements as we have discussed. Mr Smith said that the volume of the water take was a clear element of the Concession Activity and had to be included in the Application and considered in the Minister's decision-making.[95] Special condition 1 means that the activity authorised does not differ in substance from the activity described in the Report, which Mr Smith contended is the taking of 1.2 cumecs of water.

[102] The Concession authorises the construction and ongoing operation, maintenance and repair of the Scheme, including taking water from Griffin Creek, subject to the conditions.[96] Special condition 1 specifically refers to the Application and the Concession Activity as described in the Report. This condition was amended by the 2021 variation, which again referred to the Application and Report. The Application and Report are therefore relevant background to interpretation of the Concession.

[103] The Application asked the applicant to describe the proposed activity in detail and to provide a detailed site plan and drawings of the proposal. This emphasises the physical nature of the purpose of the Concession. The description in the Application recorded that the Scheme would take water from the Griffin catchment and then discharge it from the power station back into Griffin Creek upstream from the Griffin Creek Bridge. It did not include the amount of the water take.

[104] The description of the Concession Activity in the Report likewise did not include any reference to the volume or rate of water take.

[105] As discussed above, the Report set out the Department's assessments of the effects of the activity and proposed mitigation measures, recommending that, to

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95 Sections 17S and 17U.
96 See above at [24].

protect the environmental values of Griffin Creek, the minimum residual flow should be above the mean annual low flow rate and the cut-off point for the removal of water should be at least 0.8 cumecs of water below the point of intake. It is clear from the Report that the Department considered the relevant conservation values would be protected by minimum flow rather than by imposing an upper limit on the volume of water that might be taken.

[106] Special condition 1 expressly contemplates that the Scheme might differ from what was in the Application but it cannot do so "substantially in regard to location, scale or level of effect" from that described in the Application and the Concession Activity as described in the Report. That cannot be read as to limit the water take to 1.2 cumecs, as FMC would have it.

[107] The Department imposed special conditions 8 and 9 which require a continual flow monitoring device to be installed. The records from that device are to be provided to the Department and the extraction of water must cease whenever the flow recorded at the flow monitoring site falls below the mean annual low flow agreed to be 0.8 cumecs. There was no condition requiring the keeping and supply of records in relation to the amount of water take.

[108] Notably, special condition 4 requires GCHL to obtain appropriate resource consents prior to the commencement of the Concession activity. We accept Ms Wevers' submission that this suggests an objective intention for the volume of water take to be addressed through the mechanism of resource consents.

[109] The Concession is consistent with the two statutory schemes at play in connection with the Scheme. The Concession and the Report which led to it are in accordance with the requirements of the Act and its purpose of promoting the conservation of, relevantly, natural resources. Natural resources are defined as including water as it supports plant and animal life. The Concession requires a minimum water flow to remain in the Creek but otherwise leaves it to the Regional Council to control the volume of water taken because water take is properly a matter for the RMA.[97]

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[97] Resource Management Act, ss 14, 13(1)(e) and 87(d).

[110] Mr Smith did not ask us to imply a term into the Concession. We consider he is correct in that it is not tenable to contend that the correct construction of the Concession requires the implication of a term. The requirements of *BP Refinery* are clearly not met, most obviously the restriction for which Mr Smith argued is not so obvious that "it goes without saying".[98]

[111] In our view, FMC has seized on the reference to 1.2 cumecs in the application and interpreted the Concession through that lens. However, when interpreted using the objective purposive approach, which includes the context of the Act and having regard to the extrinsic evidence of the Application and Report, we are satisfied that the clear meaning the Concession would convey to a reasonable person is that it does not impose a limit on water take.

[112] For these reasons, the appeal is dismissed.

Costs

[113] The respondents seek costs on the basis of a standard appeal band A. FMC submits that, if unsuccessful, no costs should be awarded against it as a public interest litigant. Mr Smith agreed that his submissions on this topic as recorded in the High Court costs decision could be taken into account.[99]

[114] FMC's position in the High Court was that no costs award ought to have been made against it as the proceeding concerned a matter of public interest and FMC had acted reasonably in the conduct of the proceedings. Alternatively, any costs award should have been substantially reduced.[100] The respondents did not accept that position in the High Court or before us.

[115] The High Court Judge considered Mr Smith's submissions to the effect that the case concerned an infrastructure development in a previously pristine mountain valley and that protection of the environment is axiomatically in the public interest.

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98 *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

99 *The Federated Mountain Clubs of New Zealand Inc v Griffin Creek Hydro Ltd* [2023] NZHC 3746 [costs judgment].

100 At [9], citing High Court Rules 2016, r 14.7(e).

However, the Judge considered the issue in the case was narrow and the application for the declaration did not challenge the authorisation of the Scheme but simply the correct approach for interpreting the Concession.[101] On that basis, she concluded that the proceeding could not achieve the outcome to which Mr Smith referred. Mr Smith then contended that it was an important question of law as to whether the scope of a concession activity was confined by the terms of the application, as is the case in respect of an application for a resource consent. The Judge distinguished the proceedings from the cases relied on by FMC and did not consider the subject matter of general importance or significance going far beyond the present case.[102] She considered the interests were those of a select group of canyoners, saying the fact the Court had determined how a concession is to be interpreted does not elevate the interests of a niche group to a matter of public interest.[103] We can put it no better. We agree with the Judge's reasoning, which also applies to the issue of costs in this Court.

[116] For those reasons, we see no reason to depart from the usual course that costs follow the event.

Result

[117] The appeal is dismissed.

[118] The appellant is to pay one set of costs to the first respondent and another to the second and third respondents jointly, each for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Gilbert Walker, Auckland for Appellant
Rout Milner Fitchett, Nelson for First Respondent
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Second and Third Respondents

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101 At [16].

102 At [28]. FMC sought to rely on: *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 3314; *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 167; *West Coast ENT Inc v Buller Coal Ltd West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 133; and *Lawyers for Climate Action NZ Inc v The Climate Change Commission* [2023] NZHC 527.

103 Costs judgment, above n 99, at [28].