

CASES

[Motiti Rohe Moana Trust v Bay of Plenty Regional Council](#) [Westlaw NZ](#) | [Checkpoint NZ](#) | [Alert24](#)

NZ 12/6/2018 11/5/2018 [2018] NZEnvC 67

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This was an interim decision of the Environment Court on appeals concerning the proposed Bay of Plenty Regional Council Environment Plan (“the PRCEP”). At issue was whether, given the outstanding and high values recognised within the coastal marine area surrounding Motiti Island, the Motiti Natural Environment Management Area (“the MMA”), further controls to avoid effects on such values in the MMA should be included in the PRCEP.

The Court stated that the issues raised were of considerable complexity and involved the interaction of the RMA and the Fisheries Act 1996 (“the FA”) and consideration of the overlays in the New Zealand Coastal Policy Statement 2010 (“the NZCPS”). Furthermore, the **related issues of cultural concerns and impact on fisheries had been the subject of consideration within the Bay of Plenty for a considerable period**, and the subject of several significant previous decisions. There had been a number of interrelated appeals relating to the PRCEP: those relating to natural heritage issues, including *Royal Forest & Bird Protection Soc of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080; appeals relating to the Otaiti reef on which the *Rena* was grounded; and appeals relating to the extent of the Environment Court’s jurisdiction to control fishing activities. Regarding the latter, the High Court decision in *Attorney-General v Trustee of the Motiti Rohe Moana Trust* [2017] NZHC 1429, [2017] NZRMA 370 was currently being appealed to the Court of Appeal.

The Court now addressed the present proceeding. All parties agreed that there had been a consistent approach in the application of the RMA, through the NZCPS, the regional policy statement (“the RPS”) and the PRCEP in identifying significant indigenous biodiversity, outstanding natural features, outstanding landscapes, NZCPS areas and areas of significant cultural value. Tangata whenua values were also consistently recognised. The PRCEP sought to avoid adverse effects on the identified values and attributes of significant biodiversity areas identified under NZCPS Policies 11(a) and 15(a). The question now was whether the PRCEP similarly avoided such adverse effects in such areas on such values and attributes through its methods and rules. Further, there was a question as to whether the PRCEP provisions implemented the objectives and policies of the RPS, thus giving effect to the NZCPS.

The Court considered the relevant statutory instruments, including the Motiti Island District Plan (“the MIP”), before undertaking a detailed analysis of the MMA. The entire area around Motiti Island was identified as having high natural character and had a range of outstanding values, in addition to acknowledged significant cultural values. **The Court concluded that there was sufficient evidence, objectives, policies and descriptions of attributes and values to warrant protection of**

indigenous flora and fauna on and around Otaiti, Motunau and Motohaku (“the three areas”) based on the recognition of biodiversity and natural character values in the RPS and the PRCEP. The Court concluded there was insufficient evidence to reach the same conclusion as to Taumaihi or other parts of the MMA.

Regarding the broader controls sought by the appellants relating to fishing activities in the MMA, the Court considered proposed controls on and around reef structures in the MMA. Noting that the Court’s obligation was to ensure that there were provisions to maintain biological diversity that give effect to the higher order planning instruments, **the Court was satisfied that the areas suggested around the three areas in the MMA required protection from adverse effects, which included effects relating to fishing.** The Court concluded that the PRCEP had a lacuna in relation to the **protection and enhancement of areas of significant indigenous biodiversity, outstanding natural character and outstanding features and landscapes within the MMA.** The Court noted that Bay of Plenty Regional Council (“the council”) and the Ministry of Primary Industries (“MPI”) submitted that such lacuna was filled by the FA. Notwithstanding this, the Court stated that the MPI had refused to intervene and take steps to protect the areas. The Court stated that the mere overlapping of functions between statutes did not give primacy to one over the other. However, this was a matter to be considered in the Court of Appeal proceedings.

After undertaking a s 32 analysis, **the Court found that the adverse effects of protecting the three areas were minimal, as were the effects of the displacement of commercial and recreational fishing from the three areas.** There would be positive effects, particularly for recreational diving and tourism. The Court was concerned that evidence showed that the by-catch of protected and endangered animals in the three areas was increasing and there was a risk of not acting. The Court concluded that the protection of the areas identified within the MMA would give the potential to maintain, protect and possibly enhance those significant areas. Having **concluded that there should be more protection in the PRCEP of such areas** by the provisions of rules, the decision was interim and had to await decisions of principle from higher courts.

The Court made directions that changes to the PRCEP were to be made including that **damage, destruction, removal of flora and fauna within the three areas, marked in Annexure A to the decision, of the MMA in the PRCEP was prohibited.** The council was directed to draft appropriate provisions and circulate these to the parties according to the timetable set. Costs were reserved.

Legal Representatives:

- RB Enright and RG Hazen for Motiti Rohe Moana Trust (MRMT) and Royal New Zealand Forest & Bird Protection Society Inc (Forest & Bird) (s 274 party);
- JM Pou for Ngāti Māhino Heritage Trust (Ngāti Māhino), Ngāti Ranginui Iwi Incorporated Society (Ngāti Ranginui);
- MH Hill for Bay of Plenty Regional Council (the Regional Council);
- JM Prebble and NC Anderson for Attorney-General for Ministry of Primary Industries (MPI);
- ME Casey QC and SJ Ryan for Lowndes (s 274 party);
- VJ Hamm and KJ Jordan for Motiti Avocadoes, s 274 party Port of Tauranga, Ford Landholdings, Te Tumu Kaituna 14 Trust, and Te Tumu Landowners Group) abide the decision of the Court;
- No appearance for Federated Farmers NZ Inc or Department of Conservation

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