

# Exploring for oil at the coalface

## RW Plume

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## Abstract

There is no such thing as an outright win. The Newtonian concept of action and reaction applies as surely to social interaction as it does to physical objects impinging upon one another. In the commercial world that interaction regularly takes place in the context of debates surrounding commercial developments and that often involves the Resource Management Act (RMA)<sup>1</sup>. Frequently these debates are acrimonious and have a distinctly confrontational character. The participants usually see themselves as defending positions which are, for them at least, axiomatic. In this atmosphere the natural tendency is to seek the outright win even if we realise that an outright win this time is likely to produce stiffer opposition next time around. And – one way or another – there is always a ‘next time around’.

When we are directly involved in these situations it is easy to forget or overlook that simple truth. Pressed in by deadlines, operational requirements, commercial imperatives and the like; accumulated irritations may eventually override judgement, egos intrude and we often find ourselves seeking to stymie completely all opposition to our plans. And, too, in the social and political environment that we live in there are very good reasons for taking the fortress approach: if we admit of deficiencies in our position today we may well find ourselves on the receiving end of litigation or worse tomorrow.

Furthermore, anyone seeking support for their position has also learned that moderation doesn't cut it these days. There is a strong tendency to believe that for the public, commissioners, councilors, or officials to be convinced of the rightness of your case it must be presented powerfully, energetically, passionately. After all, if you aren't passionate about your position what reason is there to believe that your listeners will support you? So passion begets extremism which begets an extreme response and so on.

It is not surprising therefore that in some cases the process of obtaining resource consents under the Resource Management Act has become a difficult, time-consuming, and expensive affair. If we all were able to stop, step back and breathe through our nose for a moment we would begin to realise that what the opposition needs isn't so unreasonable after all.

## Introduction

In our modern culture the character of conflicts between interest groups has become increasingly confrontational in nature. Whether they be developers, environmental groups, or regulatory agencies the general trend has been towards a more intransigent approach to negotiations involving things such as resource consents under the Resource Management Act 1991 (RMA).

In its crudest form the lines can be drawn between polar opposites as, for example, environment NGOs vs mining interests or rate payers vs the local council, “watch” groups vs developers. Furthermore, people have become adept at lobbying for a particular point of view.

In terms of the RMA a practical result of this effect has been that it has become increasingly difficult to secure resource consents for activities which are controversial in nature. Furthermore, although the purpose of the RMA is to deal with environmental effects, it is quite clear that the Act is being used to achieve aims – political, commercial, cultural, economic, personal – which often have only the most tenuous connection to the purpose of the Act.

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<sup>1</sup> Although this paper uses the RMA to exemplify its underlying point, the effects referred to are certainly wider than that and are by no means restricted to New Zealand.

## An example

In early 1990s a farming family bought a medium to large stock farm with the intention of running sheep, perhaps a few cows, and possibly undertaking some cropping. Soon they discovered that in places the surface was littered with partially exposed boulders and they start investigating the possibility of using the rocks as a resource.

They discovered that the rocks were large, hard, and plentiful and set about the process of developing a quarry on the back blocks of their farm.

## Background

The regional council had been interested to find sources of riprap for use in various construction operations. Field work was carried out and in general terms the resource was known in the area as early as 1976. More detailed work was carried out and by 1992 the extent and nature of the resource was known well enough to support the opening of a quarry operation.

## The initial consent

The first consent application was submitted to the local authority in March 1993. Later that month the application was notified generally and 22 parties were notified individually. Submissions closed in late April and by that time 21 submissions had been received. Planning officers had produced a report by late May. A hearing was held and the consent was granted on 20 October 1993 and operations began<sup>2</sup>.

Thus, the early phases of the operation went smoothly. But because the activity was new in the area and because the local council had had little experience with the proposed activity, the consent period was limited to 5 years.

The operator lodged applications to renew the consent in April 1998 – six months before the expiration of the original consent. The second consent application comprised two main concerns: the activities relating to the quarry itself (which was the principal element of concern) and the issues relating to the access road. During the processing of the second consent application, factors surrounding the details of development of the road became a significant impediment to progress. The consent was significantly delayed for a variety of reasons including a number of further information requests from the council and confusion surrounding whether or not the application would be notified.

In the early stages of the consent application the council officer responsible for processing it had indicated informally that the application would probably be non-notified contingent, as usual, on the written consent of affected parties. A list of affected parties was produced, the required consents secured and in October 1998 the council had determined that

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<sup>2</sup> A competitor lodged an appeal but the matter was resolved.

the application would be non-notified and informed the applicant of their decision by letter. Six months later in April 1999, however, the council changed their thinking on this point and informed the applicant that – contrary to their earlier letter – the application was now to be notified regardless of the consents gained from parties that had been deemed to be affected.

In effect the council's decision to notify meant that the applicant had to regain consents from parties which consented to the application before October 1998. Moreover, the council's list of parties deemed affected had been considerably extended in the intervening months. The applicant attempted to gain the required approvals but for various reasons failed and in November 1999 the council decided that the consent would be notified. Also at about this time, council officers concluded that the matter was sufficiently serious to warrant hearing by commissioners rather than by local councilors (who are elected officials). It is not clear why the council considered that withdrawing their October 1998 position on notification was an acceptable action but it certainly was unorthodox.

## The road

While these various events played out in respect of the quarry consent, issues relating to the access road took on a life of their own and became a central element of the whole process.

A legal road had been mapped in the area which extended southwards to and then through the eastern portion of the applicant's property. Before 1968 the formed portion of the legal road comprised only the portion between points 1 and 2. At that time access to this portion of the formed road was via the farm track to the southeast. The northern extension of the road (which ultimately joins the main highway) was formed as part of the reconstruction work which followed the Wahine storm.<sup>3</sup> The road remained in this state until 1993.

Neighbour B purchased their property in 1967 and not long after applied to the council to erect a woolshed. Permission to build on the location that B had proposed was granted. Since this construction work occurred before April 1968 B's access to the construction site was via the southeast road and the farm track.

In 1992 neighbour F applied to the council to erect a structure near point 1 (which at that time was the southern end of the formed road). Permission was granted and a building was erected.

The surveying and actual construction of the southern extension of the formed road proceeded from south to north;

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<sup>3</sup> The Wahine Storm was a major weather event which occurred in April 1968. It caused widespread damage including the sinking of an inter-island ferry, the *Wahine*, by which name the storm has since been known. A number of power pylons had blown down in the immediate area and road access was required in order to re-erect them.

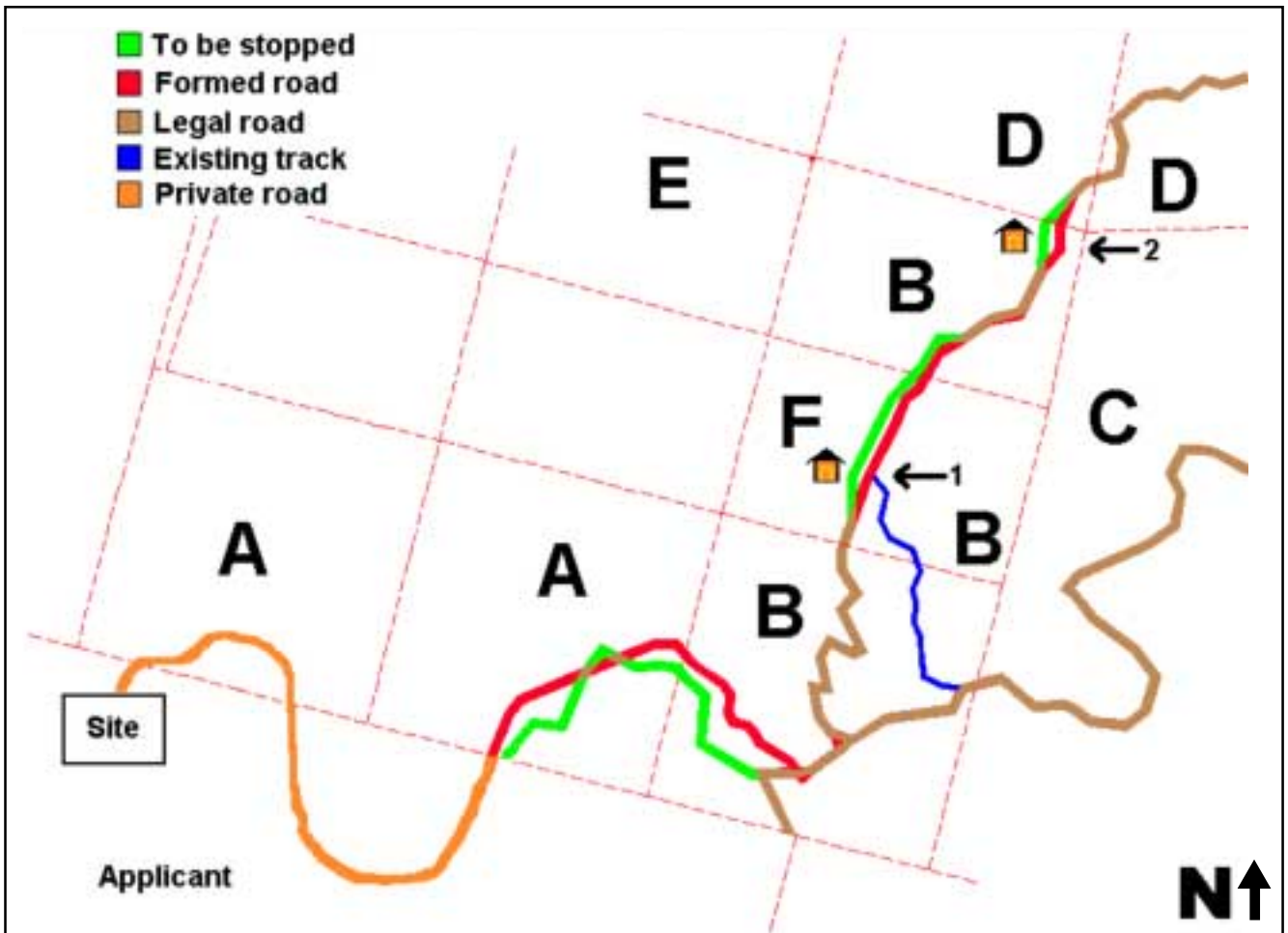


Figure 1: The access road.

i.e., from the applicant's property towards point 1. When the surveyor (followed closely by a bulldozer) reached the area of point 1 it was discovered that F's building had been erected in the middle of the legal road. Since the older part of the formed road was close by, the pragmatic solution (to avoid destruction of the building) was to bypass the building and simply to join with the existing road. Similarly, during the process of upgrading the existing road near point 2, it was discovered that B's woolshed straddled the legal alignment.<sup>4</sup>

It should also be noted that it was also discovered that the existing, southeast-trending road south of point 1, which had been assumed to be a portion of the legal road, was in fact nothing more than a farm track and had no legal status whatever. It is clear that there were significant misunderstanding as to the location of the legal road.

The southern section of the road was formed on private property (i.e. off the legal line) at the request – and with the contractual agreement – of A and B. The agreements are conventional legal arrangements in which the applicant agreed to fence the road in exchange for unimpeded access by way of the road.

<sup>4</sup> The presence of both buildings on the legal road is the result of an oversight by the council.

All of these developments suggested the need for a road rationalisation agreement. The agreement was intended to stipulate that the formed road would henceforth be treated as the legal road and the unformed portions of the legal road would be stopped. It is symptomatic of this situation that even though negotiations on the agreement began in 1994 it took until early 2000 to conclude the deal.

#### Recent events

On 24 December 1999 – some 21 months after initial application was received by the council – the applicant was notified by the council that a land-use consent (for a discretionary activity) was required for using the parts of the physical road which deviate from the legal line. The council took the view that this was an RMA requirement even though there were current access contracts extant at the time and the entire business was the subject of road rationalisation negotiations. Notwithstanding these agreements the applicant was required to re-solicit the permission of affected parties.

The affected neighbours were deemed to be A, B, C, and D. Council required C's permission even though neither the formed road nor the legal road crosses any part of C's property. Furthermore, since there are extant access contracts between the applicant and both A and B, one wonders what is the legal situation if one of the parties with whom there was a contract for access declined to sign the RMA consent. What would take precedence: permission granted through

contract or permission withdrawn through refusal to sign? Furthermore, what would be the powers of the council in that circumstance? This question is possibly not simply academic in that A – who has an access contract with the applicant and who has signed the road rationalisation agreement – has so far declined to sign the affected party consent and had indicated a strong reluctance to do so. Just how this behaviour makes any kind of sense is elusive but it gives something of the flavour of this basically unpleasant situation.

The insistence of the council to confirm permissions which exist in contract and are also the subject of the rationalisation agreement has produced a state of affairs that borders on the ridiculous. If A, B, C, and D all grant consent, the road-use consent could then be processed independently of the quarry consents and furthermore could be processed as a non-notified application. Non-notification is important for the applicant because it would make it impossible for neighbour E and a trade competitor (neither of whom are affected parties in respect of the land-use consent but both of whom have shown a certain eagerness to stymie the overall application) to make submissions on the issue of the road.

However, if one or more of A, B, C, and D do not grant permission the roading land-use consent would then be included in the proceedings of the hearing. Furthermore, since the application would then be notified both E and the trade competitor would be able to make submissions.

The applicant, however, has noted that under the district plan forming a road on the legal line is a controlled activity. Because it is a controlled activity an application for a consent to form a legal road cannot be refused although conditions can be attached. The advantages to the applicant are quite clear: a consent for a controlled activity does not require any kind of notification, and hence the roading issue would be removed completely from the consent process. The story takes on a bizarre twist when it is realised that the owners of the two buildings which are located on the legal road could be forced to remove them. Furthermore, the removal can be done without the owner's permission though notifying them would presumably be a condition of the consent.

## Discussion

What is the point of all this? Is this just another example of RMA process gone astray or is there something more instructive we can learn from this example? There is a message but it lies more deeply than simply enumerating failures along the way.

### The underlying problem

It was suggested by a person who reviewed this paper that I note that most consent applications go through without difficulty (it is certainly true that the example I have cited is exceptional). But this paper is not about the RMA consent process. It isn't even about the RMA. It is often stated that the Act itself is adequate to its purpose but that failures in

implementation have caused the difficulties. I submit that it is not a failure in implementation. It is a failure of *attitude*. That is what this paper is about.

Within the exploration industry the practical experience of the process of securing consents for development activities has been that it tends to take longer and cost more than it has in the past. I suggest that this is in large part because different groups are motivated by a desire to achieve quite different aims. For some people it is efficient, inexpensive consent processing. For others it is preservation of the only accessible legal mechanism they have to affect changes in proposals they find unacceptable. For still others it is the ability of bring about desirable environmental results. In the worst case it is forcing attention to an agenda which may have little or nothing to do with the intentions of the RMA.

Amendments proposed by the previous Government were designed to overcome some of the problems exemplified here. In a modified form those amendments are now being reviewed by the current Government. In changing the Act the underlying assumption is that the opportunities to misuse the process will be removed. However, I suggest that a more likely result is that misuse will continue but modified in whatever way is necessary to serve the a participant's original purpose and stay within the bounds of the law. In other words the game will still be played with the same result in mind but the rules of the game will be different.

The realisation that changing the legislation is unlikely to change views of why the legislation exists exposes the heart of the problem. There may be a common intellectual understanding of the stated goal (it is, after all, explicit in section 5). But there is little or no common thread of understanding of how those goals can be achieved. What does it mean that there is no common thread of understanding of the goals?

An example of a common thread of understanding is our culture's understanding of what it means to be environmentally sensitive or to behave in a responsible manner with respect to the environment. Clearly, what it means to behave environmentally responsibly means different things to different people but at some fundamental level there are common elements to the understanding of what it means. We might agree that there are subjectively that there are minimum standards of air or water quality essential to sustain life. Presumably everyone will agree that contaminating your water supply to the extent that it becomes lethal is not responsible environmental behaviour. In other words, we accept this is as a common thread of our collective understanding of what it means to behave in an environmentally sensitive manner. Furthermore, I submit that these common threads can be thought of as axiomatic. That is, they are built into the culture; they are innate in the culture. The conceptual background is neither given in law nor provided in regulation. It simply is a commonly understood and accepted boundary condition in any conception of what responsible environmental behaviour means.

I contend that over time, as a culture we have slowly lost our connections with these common threads that constrain us and guide us in our interactions with other people. Furthermore, I believe that as a consequence we have lost sight of the fundamental fact that there is a necessary and undeniable interdependence between us. If you will allow me some latitude to sketch this in crude extremes: no matter how fanatically green you may be, there is no escaping the fact that for today, at least, you still need that oil. And on the other side of the coin, no matter how fanatically you support exploration for and use of oil and gas, there is no escaping the fact that you still need those trees.

Among other things, a practical effect of this disconnection is the difficulties we now have in managing the consent process so that it works in a rational way. Allowed to persist along its current course, I suggest that the process will continue to become more difficult, more expensive and more time consuming. The worst-case result of this process will be a regulatory, legislative, or administrative paralysis; a kind of stasis in which it becomes too difficult to move forward in any kind of sensible manner.

But talk of paralysis should not be taken too literally. After all – setting aside anarchy or war – the life of the community does not proceed in extremes of collective behaviour. We won't wake up one morning and hear on Morning Report that regulatory paralysis has occurred during the night. But in the context of the exploration industry, what could be expected is that more and more licences will be dropped earlier in their history and acreage will remain open longer on average. The common measures of exploration activity will show a slow but steady decline, and of course discovery rates will decline and, finally, the wealth of the community will also gradually decline.

## Conclusions

There is no “magic bullet” that solves this problem. Nevertheless, there are some guidelines and here is a suggestion for a place to start:

## Author

RUSSELL PLUME has worked in the oil and gas exploration industry for 25 years. He originates from the US and first washed up on NZ shores in early 1971 whereupon he embarked on what might be generously termed ‘study’ at Victoria University of Wellington. His early years in the industry were spent in the Rocky Mountains travelling back and forth between Texas and Montana working on a seismic crew. After that thoroughly practical introduction to the industry he spent some years working in a seismic data processing house in Denver. Returning to NZ in the early 80s he worked briefly in the retail end of the industry before taking a position with Petrocorp when it was still the national oil company. Petrocorp eventually transformed itself into Fletcher Challenge Energy Taranaki and in 1991 Russell transformed himself into Roxburgh Plume Ltd an independent consultancy providing services in a wide range of areas including the Resource Management Act, the Crown Minerals Act, the Greenhouse Effect, oil and gas exploration, and environmental auditing. In 1996 he began in his current role of Executive Director of the Petroleum Exploration Association of NZ. He lives in Plimmerton with his partner and two children.

*“Do unto others as you would have them do unto you”*

This may strike you as pathetically naïve or absurdly out of touch with reality. If so I would ask you to consider where the modern, “enlightened” approach to “interested party relations” has brought us to.

It has brought us to a time when confrontation and conflict are common if not expected elements of many initiatives no matter how innocuous they might first appear. It has brought us to a time when litigation is an all too common if not yet the preferred method of conflict resolution. Indeed, it is now possible to buy insurance to cover the cost of “small scale” litigation such as might occur between a homeowner and a tradesperson. What should be disturbing about this development is that in today's culture, insurance of this nature makes sense. It has brought us to the sort of situation exemplified here in which what should have been a relatively normal case has become a grotesque parody of the consultative process.

In order for New Zealand to advance and to prosper in a manner which is just and at least reasonably harmonious we must learn to accept that other participants in any debate are entitled to respect and some understanding that they usually have valid aims and concerns even if those concerns are often layered over with rhetorical window dressing. But this must be accepted universally and learned at a cultural level. It must stand outside law and regulation. It must become part of the culture and until this – or something like it – becomes embedded in the culture we probably shouldn't hope for too much in the way of improvements in process no matter how we manipulate the legislation.

But when each of us strives to live by this concept in whatever form you choose to understand it, we will have made a small and but significant step towards recognising and changing our role in history. As individuals we may never see the effect of our action. But our children's children and *their* children will be the beneficiaries.