Northland REGIONAL COUNCIL
Te Kaunihera ā rohe o Te Taitokerau

Fast-Track Approvals Bill

Implications for Iwi/Hapū

April 2024

Fast-Track Approvals Bill (Govt Bill 31-1): Implications for iwi / hapū

Introduction

The stated purpose of the Fast-track Approvals (FTA) Bill is "to provide a streamlined decision-making process to facilitate the delivery of infrastructure and development projects with significant regional or national benefits".

This document provides an overview of key aspects of the FTA Bill and highlights matters that may be relevant to iwi/hapū, and their potential implications — many of which are very significant. Iwi/hapū in Te Taitokerau Northland are encouraged to take a detailed look at the Bill and consider whether they wish to make a submission on it.

The Bill went through its first reading in Parliament on 7 March under urgency and was referred to the Environment Select Committee. Submissions on the Bill will be accepted **until 19 April 2024**.

Click here for a link to the submissions page.

Click here for a link to the text of the FTA Bill itself.

Northland Regional Council are also holding an online hui to support understanding the FTA Bill, its potential implications for iwi/hapū and how to make a submission.

Online hui is on the **11th April at 6:30pm**.

Click here to register for the online event.

Attached separately is also an example of a submission format. Anyone is welcome to use to make a submission on the FTA Bill. It provides a simple way to add the thoughts of an individual or organisation, however it will still need to be submitted through the submissions portal.

Click here for a link to the submission portal for the FTA Bill.

Summary of implications of the FTA Bill for iwi / hapū

- No requirement to take into account or give effect to Treaty principles, or to uphold Te Tiriti itself.
- Narrow focus on upholding Treaty settlements, Marine and Coastal Area (MACA) customary rights, Mana Whakahono ā Rohe and Joint Management Agreements.
- Treaty settlements can be modified by agreement, but an iwi authority / Treaty settlement entity cannot "unreasonably withhold" agreement (schedule 3, clause 5(3)).
- Decision-making emphasis on delivering infrastructure / development quickly and efficiently rather than on sustainable management. Risk of increasing environmental degradation and reduced protection of Māori environmental interests in taonga.
- Opportunities to access a quicker process for progressing Māori developmental interests either directly or in partnership with other developers. Many iwi have developmental aspirations that could benefit from a fast-track process. However, some iwi (particularly non-settled iwi) may not have the upfront resources to lead projects through the process. The ineligible projects provisions of the FTA are also relevant which include Māori land.
- Projects can be listed or referred by Ministers without engaging affected iwi/hapū.
- Given the broad scope of projects that will be eligible for the FTA process, and the high level of Ministerial discretion to refer projects to the Expert Panel, combined with that panel's limited power to recommend the decline projects, projects could be approved without proper public consultation, especially with non-settled iwi/hapū.
- Prohibited activities may be eligible — this fails to protect iwi/hapū. For example, in Northland, Proposed Regional Plan Rule C.1.1.14 prohibits new aquaculture in significant areas (including Sites of Significance to Tāngata whenua, Significant ecological areas, etc. There is also a regional plan rule prohibiting release of genetically modified organisms (GMO) in the coastal marine area.

  Conflicts may also arise between a prohibited activity and a Treaty settlement (particularly those that provide for a specific function in plan making). Resolving any conflict would be at the discretion of the relevant Minister making the referral decision. It would be more difficult to honour the Treaty and uphold Treaty settlements and other arrangements.
- Protections of existing laws are bypassed or subordinated to the purpose of the FTA Bill — this diminishes iwi/hapū ability (especially unsettled entities) to ensure proper assessment of environmental and cultural effects.

  All iwi and hapū rely on the broader architecture of existing legislation (such as sections 6(e), 7(a) and 8 of the resource management act (RMA), section 4 of the Conservation Act, section 12 of the Exclusive Economic Zone (EEZ) Act and Te Mana o Te Wai in the National Policy Statement for Freshwater Management, including the weighting afforded those matters when making decisions) to protect Māori interests. As these will be diluted or bypassed by the FTA Bill, a key avenue relied upon by iwi and hapū to ensure proper assessment of the environmental and cultural effects of a large-scale project in their rohe will be affected. This is of particular concern for iwi and hapū who are yet to settle their historical Treaty claims with the Crown and thus cannot rely on Treaty settlement protections.

As approval processes under existing statutes will be fundamentally changed by the FTA bill, the relationship with Treaty settlements may also be so affected as to not even be triggered in the fast-track process or decision-making criteria.[1]

- Applicants have the discretion to decide from whom to invite comment. May miss out iwi – and especially hapū – with legitimate interests.
- Hapū will not necessarily be adequately consulted on fast-track consent applications, as it is up to the discretion of iwi authorities whether they consult with hapū and include their comments when making submissions on applications.
- When Ministers consider the report on Treaty settlements and other obligations (section 2), it is unclear what level of expertise the "responsible agency" will have on issues relating to Māori. There is thus the likelihood that relevant Māori stakeholders will be overlooked or omitted.
- No public or limited notification, so if an iwi/hapū is not invited to comment, there is no guarantee that they will receive information about applications.
- No opportunity for uninvited iwi or hapū to assert their interests, or to assert the right to be consulted; hearings not required.
- Very short timeframe for iwi/hapū comment on applications (10 working days), which will limit the opportunities to provide meaningful input.
- There is no cost-recovery provision for iwi/hapū to prepare comments on applications. Unsettled iwi/hapū especially may lack resources to comment, while settled iwi/hapū may have to divert resources to do so.
- Expert Panel Māori expertise limited (e.g. one out of four members).
- The fact that the Minister for the Environment is not included among the joint Ministers (the Minister for Infrastructure, Minister of Transport, and Minister for Regional Development, acting jointly) approving applications, or among the Ministers that must or may be consulted by the Expert Panel under clause 20, is likely to diminish the opportunity for the taiao interests of iwi and hapū to be taken into account.
- Without spatial plans being in place beforehand, there is the risk that decisions on projects could be made without adequate consideration of, for example, risks such as coastal inundation, erosion, managed retreat areas, geological instability; and issues/places of importance to Māori such as sites and areas of significance to Māori, wāhi tapu, taonga species, wai māori (freshwater), mahinga kai, etc. New Zealand Planning Institure (NZPI) recommends[2] that a national spatial plan, or a national database of information for fast-track projects, should be established to support the fast-track process. This would allow key constraints for infrastructure (such as cultural sites or significant wetlands) and opportunities for infrastructure (such as areas usable for solar and wind farms) to be identified on a national scale, and augmented by regional and local data. Such a database, or national spatial plan, would bring significant efficiency, effectiveness, and transparency to the process.
- The fast-track system is a top-down decision-making process which does not always sit comfortably with the bottom-up decision-making processes that are commonplace within Te ao Māori.

[1] Memo by Whaia Legal to National Iwi Chairs Forum Leaders, 13 February 2024.
[2] "Feedback on proposed Fast-Track Consenting Bill", New Zealand Planning Institute, 12 February 2024.

Detailed description and analysis

Approvals covered by the FTA Bill

The Bill provides a separate process ("one-stop-shop") for the following approvals:

- resource consents, notices of requirement, and certificates of compliance under the Resource Management Act 1991
- concessions under the Conservation Act 1987
- authority to do anything otherwise prohibited under the Wildlife Act 1953
- approvals under the Freshwater Fisheries Regulations 1983
- concessions and other permissions under the Reserves Act 1977
- an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014
- marine consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
- Crown Minerals Act 1991 (section 61 or 61B land access provisions)
- aquaculture activity approvals under the Fisheries Act 1996.

Criteria for "significant regional or national benefits"

A range of criteria are provided to assess whether a project would have significant regional or national benefits (clauses 17(3) and (4)). The joint Ministers may consider whether the project:

- has been identified as a priority project in a central government, local government, or sector plan or strategy (for example, in a general policy statement or spatial strategy) or central government infrastructure priority list
- will deliver regionally or nationally significant infrastructure
- will increase the supply of housing, address housing needs, or contribute to a well-functioning urban environment (within the meaning of policy 1 of the National Policy Statement on Urban Development 2020)
- will deliver significant economic benefits
- will support primary industries, including aquaculture
- will support development of natural resources, including minerals and petroleum
- will support climate change mitigation, including the reduction or removal of greenhouse gas emissions
- will support adaptation, resilience, and recovery from natural hazards
- will address significant environmental issues
- is consistent with local or regional planning documents, including spatial strategies.

Additionally, a project will be considered to have significant regional or national benefits if it involves a resource consent application for an aquaculture activity within:

- an aquaculture settlement area declared under section 12 of the Maori Commercial Aquaculture Claims Settlement Act 2004, where the applicant holds the relevant authorisation; or
- an area identified within an individual iwi settlement as being reserved for aquaculture activities.

Ineligible activities

Ineligible project activities are described in Clause 18. Among these, **with regard to Māori, a project must not include any of the following activities:**

(a) an activity that:

- would occur on land returned under a Treaty settlement or on identified Māori land; **and**
- has not been agreed to in writing by the relevant landowner.

(b) an activity that would occur on any of the following classes of Māori land:

- Māori customary land
- land set apart as Māori reservation under Part 17 of Te Ture Whenua Maori Act 1993.

(c) an activity that:

- would occur in a customary marine title area under the Marine and Coastal Area (Takutai Moana) Act 2011; **and**
- has not been agreed to in writing by the holder of the relevant customary marine title order issued under that Act.

(d) an activity that:

- would occur in a protected customary rights area under the Marine and Coastal Area (Takutai Moana) Act 2011 and have a more than minor adverse effect on the exercise of the protected customary right; **and**
- has not been agreed to in writing by the holder of a relevant protected customary rights order issued under that Act.

(e) an aquaculture activity or other incompatible activity that would occur within an aquaculture settlement area declared under section 12 of the Maori Commercial Aquaculture Claims Settlement Act 2004 or identified within an individual iwi settlement, unless the applicant holds the relevant authorisation under that Act or the relevant Treaty settlement Act.

Note: A project is not ineligible just because the project includes an activity that is a prohibited activity under the RMA (clause 17(5)). This means that potentially, projects could be considered under the FTA Act that:

- have previously been declined, or would have been likely to be declined, under existing RMA processes; or
- have significant environmental effects meriting public consultation.

How projects will gain access to fast-track approvals process

- To access the fast-track approvals process (FTA process) project owners must apply to joint Ministers (the Minister for Infrastructure, Minister of Transport, and Minister for Regional Development, acting jointly).
- Joint Ministers will then refer the project to an Expert Panel to assess the details of the project.
- The expert panel will then make a recommendation back to joint Ministers who will determine if the approvals should be granted or declined.
- Regionally and nationally significant projects will have access to the FTA process.

- Ministers will have to assess the project against the set of criteria and determine if the project can be "fast-tracked" by referring it to an expert panel.
- Projects that occur on certain types of land (without approval from the landowner) or in certain areas will be ineligible for the process.
- The joint Ministers must seek and consider comments from other Ministers, local government, and relevant Māori groups when making this decision.
- The joint Ministers have broad discretion to decline the access of a project to the process.
- Any person can apply to the joint Ministers for a project to be referred to an expert panel.

Projects for direct referral, and projects for referral consideration

- The Bill will include in Part A of Schedule 2 a list of projects for direct referral to an expert panel.
- For a Part A listed project, the authorised person must lodge the application with the Environmental Protection Authority (rather than apply to the Ministers) for assessment by an expert panel, and the EPA must refer the project to a panel that will be assigned by the panel convenor.
- Part B listed projects (for joint Ministers to consider referring to an expert panel) that are considered to have significant regional or national benefits may be referred by joint Ministers to a panel, either in full or in part. **Joint Ministers may also refer any other eligible project or part of a project to an expert panel.**
- **Note: Part A and B lists were <u>not included</u> in the Bill referred to Select Committee. It is intended to add the lists at a later Parliamentary stage of the Bill. It appears that these lists will not be available during Select Committee consideration, so they will not be able to be scrutinised by the Select Committee based on detailed submissions by experts, stakeholders and the public.**

Fast-track approval process

- The Expert Panel will assess the projects and make a recommendation (back to the joint Ministers) on whether the project approvals should be granted or declined, and what conditions should be required. **The expert panel is not responsible for approving or declining projects — that is the responsibility of the joint Ministers.**
- The joint Ministers are the Minister for Infrastructure, Minister of Transport, and Minister for Regional Development, acting jointly.
    - In relation to an approval to do anything otherwise prohibited by the Wildlife Act 1953, this includes the Minister of Conservation acting jointly with the Ministers.
    - In relation to an approval under the Crown Minerals Act 1991, includes the Minister responsible for that Act or the appropriate Minister within the meaning of that Act, acting jointly with those Ministers.

  Note: the Minister for the Environment is not included among the joint Ministers.

- Under Schedule 4, clause 20:
    - **The expert panel is unable to seek public submissions and is not required to conduct a hearing. No person has a right to be heard by a panel.**
    - The expert panel will be required to seek and consider comments from other Ministers, local government, a range of relevant Māori groups, landowners and

occupiers (or those **adjacent**) to the land on which the project is to take place, and other listed groups. Requirements differ according to whether the project is listed or referred.

Note: effects of a project may extend much further than adjacent properties, so this provision is very restrictive.

- An iwi authority invited to provide comments under the above clause may:
  - share the consent application or notice of requirement with hapū whose rohe is in the project area proposed in the application or notice; and
  - choose to include comments from that hapū with the comments provided to the panel by the iwi authority.

  Note: this is at the discretion of the iwi authority.

- When making recommendations, the expert panel is required to consider the purpose of the FTA Act **above the purposes and provisions of the Acts that approvals are required under.** This prioritises "the delivery of infrastructure and development projects with significant regional or national benefits" above other considerations.
- **The joint Ministers must consider the expert panel's recommendations and decide whether to grant or decline the approvals. They may also direct an expert panel to reconsider conditions** if new information is made available, or direct the applicant to reapply.
- Local Government will be responsible for processing changes to consent decisions and for compliance monitoring.
- Provisions exist for cost-recovery mechanisms for local government, the EPA, and other agencies. **However, no cost-recovery mechanism is mentioned for iwi and hapū entities that may be invited to comment on applications.**

Appeal rights and judicial review

- The Bill does not limit or affect any right of judicial review.
- **Appeals are available to the High Court on points of law only.**
- No appeal can be made to the Court of Appeal from a High Court determination, but there is recourse to the Supreme Court, which may also allow appeals to the Court of Appeal.
- **Only specific groups may appeal,** including applicants, people from whom the expert panel sought comments, and any person with an interest greater than that of the general public.

Expert panel

- An Expert Panel consists of up to four persons, but the panel convenor has some discretion to appoint additional persons if warranted. The panel must include one person nominated by the relevant local authorities, and **one person nominated by the relevant iwi authorities.**
- The members of a panel must, collectively, have an understanding of te Tiriti o Waitangi/the Treaty of Waitangi and its principles; and an understanding of tikanga Māori and mātauranga Māori.

  Note: no criteria are specified in the FTA Bill for assessing a panel's collective level of understanding of these matters.

Treaty settlements, consultation with māori, consideration of māori interests

- **There is no requirement to "take into account" or to "give effect to" the principles of the Treaty of Waitangi** in the Bill, or to **protect and uphold iwi and hapū rights and interests set out in Te Tiriti o Waitangi.** In the context of the Treaty itself, the Bill only provides iwi and hapū some protection for those rights and interests arising from treaty settlements and specified customary rights that have been granted under the relevant Act.
- All persons exercising functions under the FTA Act must act in a manner that is consistent with the obligations arising under:
    - existing Treaty of Waitangi settlements
    - customary rights recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019
    - the NHNP Act (clause 6).
- **The Expert Panel or its convenor appears to be empowered to adopt a modified Treaty arrangement**, with the agreement of the relevant Treaty settlement entity or iwi authority, that is consistent with achieving the purpose of the FTA Act, the Treaty settlement Act, iwi participation legislation, Mana Whakahono ā Rohe agreements, and joint management agreements (schedule 3, clause 2(b)). In such a case, the "**relevant Treaty settlement entity or iwi authority may not unreasonably withhold their agreement to a modified arrangement**" (schedule 3, clause 5(3)).

  Note: This contradicts direction to comply with existing settlements / arrangements in Clause 6.

- **Under Schedule 4 (clauses 12 & 13), every consent application must assess the activity against:**
    - sections 5, 6 and 7 of the Resource Management Act 1991
    - the purpose of the Fast-Track Approvals Act
    - whether the project helps to achieve the purpose of the Act
    - any planning document recognised by a relevant iwi authority and lodged with a local authority
    - any resource management matters set out in a planning document prepared by a customary marine title group
    - relevant provisions in any Treaty settlements that apply in the project area, including redress provisions that affect natural and physical resources.

  Note: there is no reference to taking into account Treaty principles (such as section 8 of the RMA) nor to giving effect to Treaty principles (e.g. Section 4 of the Conservation Act).

- **A consent application must include an assessment of the activity's effects on the environment that includes the following information:**
    - identification of persons who may be affected by the activity and any response to the views of any persons consulted, including the views of iwi or hapū that have been consulted in relation to the proposal
    - if iwi or hapū elect not to respond when consulted on the proposal, any reasons that they have specified for that decision
    - an assessment of any effects of the activity on the exercise of a protected customary right (clause 13).

- Under Clause 13(1), before deciding to refer a project to an expert panel, the joint Ministers must obtain and consider a report from the responsible agency on the application for referral. The report must include:

  (a) who are the relevant iwi authorities and relevant Treaty settlement entities

  (b) what Treaty settlements relate to the project area

  (c) the relevant principles and provisions in those Treaty settlements, including those that relate to the composition of a decision-making body for the purposes of the Resource Management Act 1991

  (d) any recognised negotiation mandates for, or current negotiations for, Treaty settlements that relate to the project area

  (e) any court orders that recognise, in relation to the project area, protected customary rights or customary marine title, whether the court orders or agreements are granted under the Marine and Coastal Area (Takutai Moana) Act 2011 or another Act

  (f) any applicant groups under sections of the Marine and Coastal Area (Takutai Moana) Act 2011

  (g) any part of the proposed area of the activity that is within Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (and if so, the relevant provisions of the NHNP Act, including those that relate to decisions about resource consents)

  (h) the relevant iwi or hapū that are parties to any Mana Whakahono ā Rohe or joint management agreement under the RMA in the proposed area of the activity

  (i) the relevant principles and provisions in those Mana Whakahono ā Rohe and joint management agreements

  (j) any relevant other Māori groups with interests

  (k) a summary of comments received by the Ministers following inviting comments from Māori groups, a summary of any further information received by the Ministers from those groups, and the responsible agency's advice on whether the referral application should be accepted.

  In preparing the report required by this section, **the responsible agency must consult the Minister of Māori Development and the Minister for Māori Crown Relations - Te Arawhiti** at the same time as other relevant Ministers are consulted under section 19, and these Ministers must respond to the responsible agency **within 5 working days of receiving the draft report.**

  Note: identification of persons who may be affected by the activity is left to the discretion of the applicant to decide.

- Before lodging a referral application, the applicant must consult with:
  - relevant iwi, hapū, and Treaty settlement entities
  - any relevant groups with applications for customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011
  - if relevant, ngā hapū o Ngāti Porou

- relevant local authorities.

An applicant must include in their referral application a record of the engagement and a statement explaining how it has informed the project (clause 16).

Note: the Bill does not specify any criteria for determining who are relevant entities.

- **The joint Ministers must invite written comments on an application from a range of Māori stakeholders** (e.g. iwi authorities, Treaty settlement entities, etc), **however, they have only 10 working days to do so (clause 19).**
- The joint Ministers must consider the consultation undertaken with Māori groups before deciding to accept an application for referral (clause 22).
- The expert panel assessing an application or notice of requirement for a listed or referred project, and any written comments received on it, must give weight to a number of matters, including:
  - Sections 6 and 7 of the RMA
  - Iwi management plans
  - Mana Whakahono ā Rohe
  - Joint management agreements (schedule 4, clause 32).

The panel must also consider the extent to which any relevant Treaty settlement and the Crown's commitments under the Marine and Coastal Area (Takutai Moana) Act 2011, the NHNP Act, and any relevant Mana Whakahono ā Rohe and joint management agreements would be met if the application were approved.

- If a consent application for a listed or referred project relates to an activity in an area where a planning document applies that is prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, **a panel must have regard to any resource management matters in that document** until all obligations under section 93 of that Act have been met by the relevant local authority (schedule 4, clause 33).

Note: there is no such requirement relating to other planning documents recognised by an iwi authority and lodged with a local authority, e.g. iwi/hapū environmental management plans.

- The responsible agency must give notice of a decision made by the joint Ministers on a referral decision, and the reasons for it. **This includes a range of Māori entities, including those invited to comment on the application (clause 24).**
- To support a final decision by joint Ministers on whether to approve a project, the expert panel must prepare a report with recommendations on the referred application, and provide the report to the joint Ministers. **The expert panel must consult the Minister for Maori Development and the Minister for Māori Crown Relations - Te Arawhiti** as part of this process. However, these two Ministers **have only 5 working days** to comment on the draft report, its assessment of the project in relation to the relevant Treaty settlement, and any conditions relevant to that assessment (clause 25).

Northland Regional Council
Te Kaunihera ā rohe o Te Taitokerau

Fast-Track Approvals Bill
TTMAC Briefing 28 March 2024

Fast-Track Approvals Bill

What is it?

- Bill designed to speed up consenting for major projects and create a one-stop-shop for approvals (RMA, Wildlife, Crown Minerals, Fisheries Acts etc)

Where has it come from?

- Adapted from NBEA / Covid fast-track Act

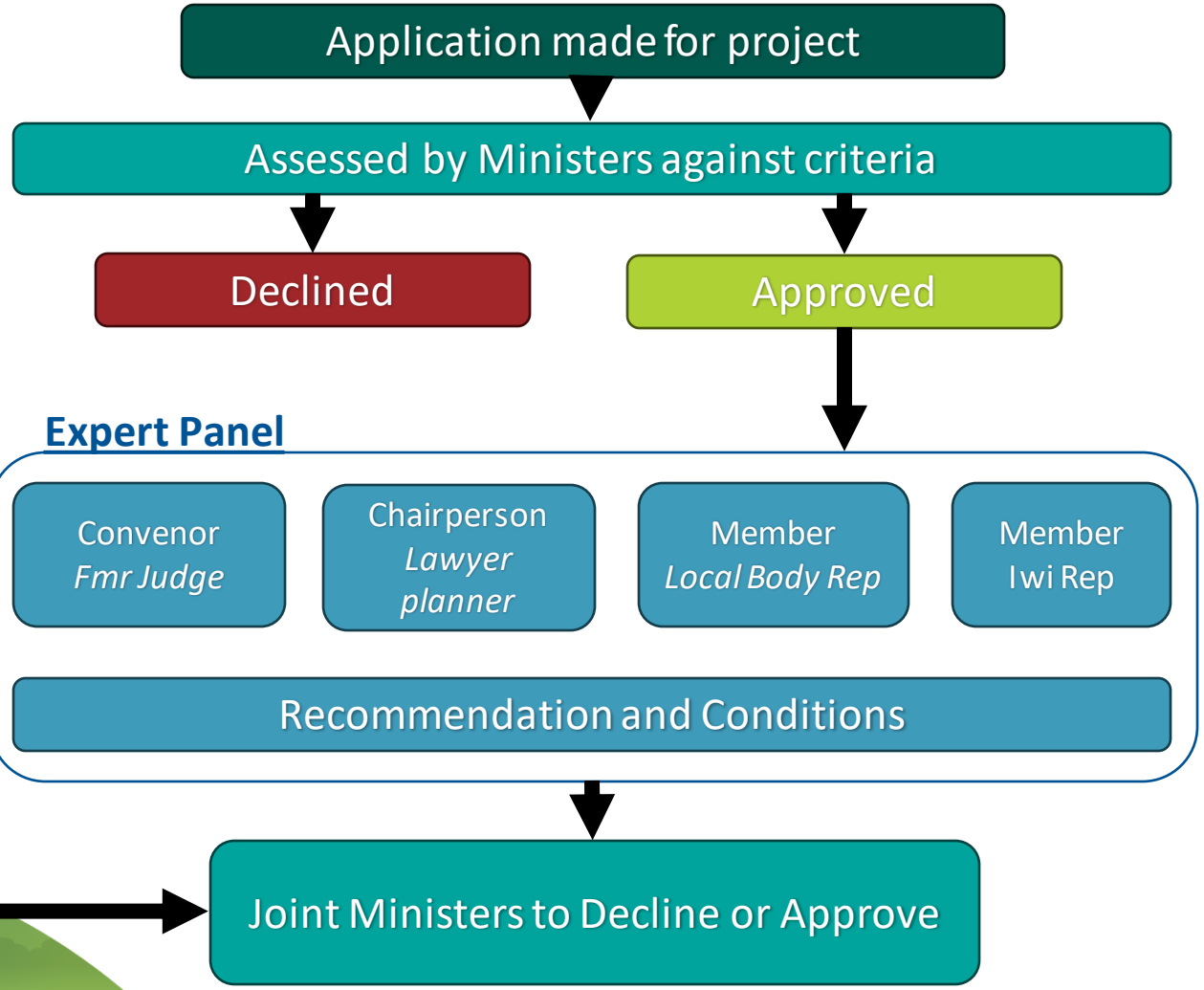
What is the purpose?

- Facilitate delivery of infrastructure / development projects with significant regional or national benefits

Fast-Track Processes

Listed Projects (Schedule 2A)

Referred Projects (Schedule 2B)



Council's Submission Points - Highlights

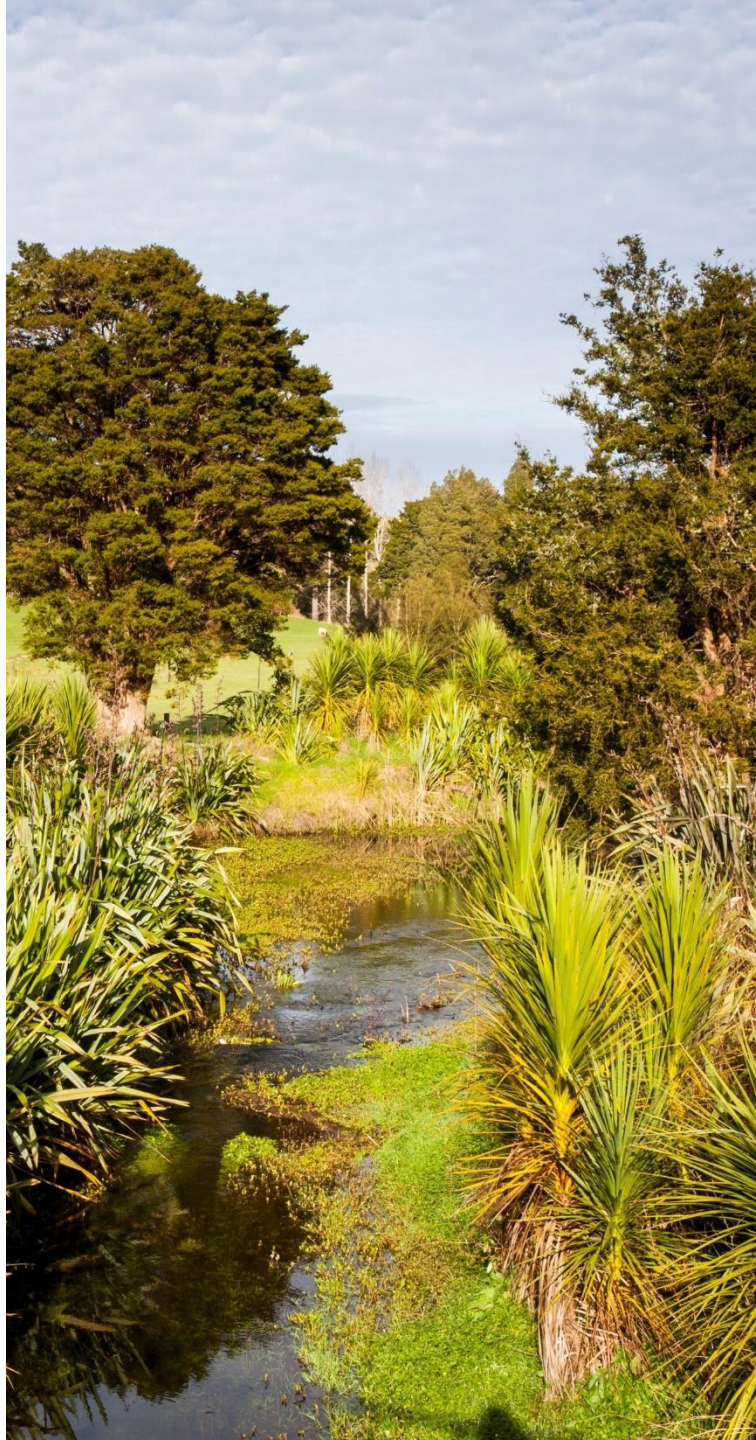
- Oppose statutory weighting of RMA below purpose of FTAB, and deletion of reference to section 8 of the RMA (Treaty of Waitangi)
- Oppose prohibited activities being eligible for approval
- Oppose Ministers being able to depart from expert panel recommendations (expert panel should be decision maker with 'sign-off' by Ministers)
- Request that 'Listed Projects' are released prior to the Bill being debated in Parliament

Council's Submission Points - Highlights

- Seek amendments to require comment from tangata whenua and individuals and groups that could be potentially affected (not just adjoining landowners)
- Expand representation on expert panels (currently 1 each for Local Government and Tangata whenua)
- Support cost recovery for Council but expand to cover tangata whenua costs as well
- Oppose the extremely limited ability for iwi & Hapū to be involved

Key Challenges for Iwi & Hapū

- Limited opportunities for participation in the process as part of:
  - Listing or referral of projects
  - Representation on expert panels making recommendations
  - Providing tangata whenua input into determining application
  - Appeals (can only be on points of law)
- Lack of emphasis on cultural values in decision-making
- Decision-making emphasis on delivering infrastructure / development quickly and efficiently rather than on sustainable management
- No cost recovery for iwi/hapū input
- Very short timeframe for iwi/hapū comment (10 wd)
- Treaty settlements can be modified by agreement, but iwi authority / Treaty settlement entity cannot "unreasonably withhold" agreement



Ways to support iwi/hapū to provide feedback on Bill

- Provide summary of staff analysis/key submission points to iwi/hapū
- Share submissions lodged by the sector
- Inform iwi/hapū about other information sources, including template submissions if available
- Hold online webinar with iwi/hapū to provide analysis of Bill

P 0800 002 004
E info@nrc.govt.nz
W www.nrc.govt.nz

Northland
REGIONAL COUNCIL
Te Kaunihera ā rohe o Te Taitokerau