

Decision No. W 1/2003

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of an appeal under section 174 of the Act

BETWEEN

**PAREMATA RESIDENTS
ASSOCIATION INCORPORATED**

(RMA 768/97)

Appellant

AND

TRANSIT NEW ZEALAND

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine sitting alone pursuant to section 279 of the Act

IN CHAMBERS

RECORD OF DETERMINATION OF APPEAL

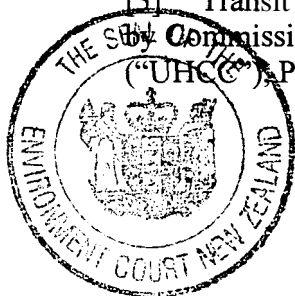
Introduction

[1] This is an appeal by Paremata Residents Association Incorporated (“PRA”), under s. 174 of the Resource Management Act 1991 (“RMA”) relating to decisions by the Respondent (“Transit”) on four Designation Requirements for the Transmission Gully Inland Motorway Project (“TGM Project”):

- Wellington City Council Designation Requirement;
- Upper Hutt City Council Designation Requirement;
- Porirua City Council Designation Requirement; and
- Kapiti Coast City Council Designation Requirement.

[2] Transit’s decision on a fifth and related Designation Requirement, for what is known as “Kenepuru Link Road ‘State Highway Purposes - Limited Access Road’ Designation”, was not appealed.

[3] Transit’s decisions were in relation to recommendations made under s.171 of the RMA by Commissioners appointed by Wellington City Council (“WCC”), Upper Hutt City Council (“UHCC”), Porirua City Council (“PCC”), and Kapiti Coast District Council (“KCDC”),



[4] By way of background:

- The TGM project traverses four districts in the Wellington region - namely Wellington City, Porirua City, Upper Hutt City and Kapiti Coast District.
- On 17 July 1996, the Councils notified Transit's five Notices of Requirement for the TGM project. Four of these were for the relevant district segments of the corridor for the Transmission Gully Motorway, and the fifth was for a State highway link road in Porirua known as "Kenepuru Link Road".
- On 30 July 1997, the Commissioners for the WCC, PCC, UHCC and the KCDC, recommended that each of the Notices of Requirement be confirmed subject to certain terms and conditions.
- On 12 September 1997, Transit notified its decision, accepting the recommendations with minor modifications.
- On 16 October 1997, the Paremata Residents Association Incorporated ("PRA") lodged a notice of appeal against aspects of Transit's decision (as detailed below).
- On 28 June 1999, the Minister of Conservation gave notice under s.274 to participate in this appeal.
- On 30 March 2000, the WRC, a submitter on the Notices of Requirement, gave notice under s.271A of the RMA to join as a party to the appeal.
- On 27 July 2001, the PCC gave notice under s.274 to participate in the appeal.
- Following discussions, the parties and participants have agreed a basis upon which the appeal can be allowed in part. This is recorded in the Joint Memorandum of Counsel Recording Agreed Settlement.

[5] The PRA sought as relief in its submissions on the Kapiti Coast and Porirua City District sections that the designation be approved, but for a period of 5 years, not 15. The PRA considered the additional highway should be constructed as soon as possible.

[6] The PRA appeal sought the following relief in its notice of appeal:

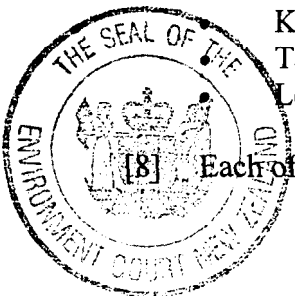
- (1) *In respect of the duration of each designation - a reduction of the period of designation from 15 years to 8 years.*
- (2) *In respect of Advance Ecological and Landscape Mitigation in part of the designated area - removal of an 8 year lead time for pre-construction retirement of land and planting by Transit NZ, and its replacement by a period of 2 years.*
- (3) *Deletion of any other condition which may have the effect of preventing preparatory work or the commencement of construction.*

Other Appeals on TGM

[7] A number of other appeals were lodged in respect of aspects of Transit's Designation Requirement decisions for the TGM Project, namely:

- Wellington Regional Council v Transit New Zealand (RMA 771/97);
K Wyatt v Transit New Zealand (RMA 764/97);
Tawa Community Board v Transit New Zealand (RMA 779/97); and
Lewis and others v Transit New Zealand (RMA 772/97 & 855/97).

[8] Each of those appeals has by now been withdrawn or settled by consent.



Settlement of the PRA Appeal

[9] Following settlement discussions the PRA, Transit and the other parties and participants lodged a Joint Memorandum seeking that the PRA appeal be allowed in part:

- In the case of the PCC and KCDC Designation Requirements, by confirmation of each Designation Requirement in accordance with Transit’s decisions but subject to modification of conditions relating to Advance Ecological Mitigation and Advance Landscape Mitigation (the amended conditions being set out in Annexure A to the Joint Memorandum); and
- In the case of the UHCC and WCC Designation Requirements, by confirmation of the Designation Requirements in accordance with Transit’s Decisions.

Jurisdiction

[10] Under s. 174 of the Act, in determining an appeal against a requiring authority’s decision on a designation requirement, the Environment Court may:

- (a) *Confirm or cancel a requirement; or*
- (b) *Modify a requirement in such manner, or impose such conditions, as the Environment Court thinks fit.*

[11] The Environment Court must be satisfied in this case, that the amended changes to the conditions are within the meaning of “modification”.

[12] The parties agreed that the Court has jurisdiction to modify the Designation Requirements in the manner proposed by reason that the modifications:

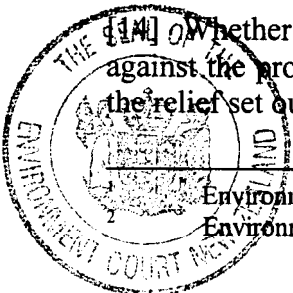
- Do not alter the essential nature or character of the Designation Requirements as notified;
- Are within the scope of the PRA appeal; and
- Are not such that, had they been originally included in the Designation Requirement by Transit’s decision, they would have prompted others to lodge an appeal or otherwise join the PRA appeal as a s.271A party or s.274 participant.

*Quay Property Management Ltd v Transit NZ*¹ noted that a modification to a designation is “an act of making changes to something without altering its essential nature or character”. This formulation was subsequently adopted in *Norwest Community Action Group Inc v Transpower New Zealand Ltd*² where the Environment Court considered whether anyone who did not make a submission would have done so given the modification proposed to the designation. Transit says, in this case, the modifications are to conditions only, which relate to Advance Ecological Mitigation and Advance Landscape Mitigation, and have been devised in response to the removal of the eight year lead time (as sought in the appeal). It is submitted that the modifications sought are within the definition of “modification” as expressed in *Quay Properties* and *Norwest*.

[14] Whether or not the parties to an appeal are in agreement as to the outcome of the appeal against the provisions of the plan, the Court is still constrained by the notice/s of appeal and the relief set out in them.

Environment Court Decision W 28/00.

Environment Court Decision A 113/01.



[15] In this regard, Transit submits that case law establishes that it is appropriate to grant the agreed relief where it can be safely assumed that, had the agreed relief been advertised originally, it would not have prompted others to become involved in the appeal: see *Green & McCahill Properties Ltd v North Shore City Council*³, and *Proudlock v Mt Maunganui Borough*⁴. *Norwest* also noted that, although the designation was modified, the substance remained unaltered. Therefore, the Court held that no additional person would have lodged a submission had the modification been notified at the outset. Transit submits, in this case, the changes to the present conditions are within the scope of the appeal and do not alter the substance of the designation.

[16] I agree with this analysis, and find that there is no jurisdictional bar to determining by consent the PRA appeal in accordance with the Joint Memorandum and the draft Record of Determination of Appeal.

Consent Order

[17] **HAVING CONSIDERED** the notice of appeal and the parties' memoranda, **THIS COURT HEREBY ORDERS BY CONSENT** that designations are modified as follows:

The PCC Designation Requirement

The PCC Designation Requirement is modified as follows:

Condition 10

Condition 10 of the PCC Designation Requirement, as included by Transit's decision is hereby deleted and replaced with the following:

Advance ecological mitigation

10 In this designation:

10.1 "Advance ecological mitigation" in relation to each Retirement Area means each of the following actions as may be specified and provided for in the relevant Approved Management Plan:

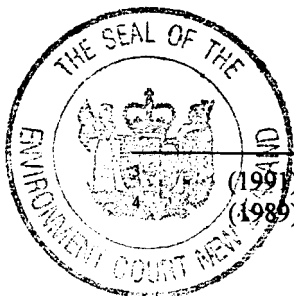
10.1.1 Fencing off;

10.1.2 Retiring from pastoral farming and the appropriate control and management of other productive uses or activities, including retirement where appropriate;

10.1.3 Controlling pests in accordance with any relevant Regional Pest Management Strategy;

10.1.4 Planting (but excluding replanting for production purposes);

10.1.5 Methods and principles specified in Schedule 2 hereto so far as practicable in the absence of regional consents.



10.2 “Approved Management Plan” means a management plan certified as approved in accordance with Condition 14.2 and includes any amendments in accordance with Conditions 14A.

10.3 “Council Manager” means the Council officer or consultant nominated by the Chief Executive of the Council as having the requisite skills and experience.

10.4 “Maintenance Period” means the period of time in which the plants within a Retirement Area are to be actively maintained as specified in an Approved Management Plan.

10.5 “Retirement Area” means each area numbered 2 to 11 on attached **Plans A, B, C** and land within the designation shown in attached **Plan D**.

Condition 11

Condition 11 of the PCC Designation Requirement as included by Transit’s decision is hereby deleted and replaced with the following:

11 *Prior to commencement of construction of the Proposed Work Transit shall ensure that Advance Ecological Mitigation is undertaken for each of the Retirement Areas, in accordance with the relevant Approved Management Plan and to the reasonable satisfaction of the Council Manager.*

Condition 12

Condition 12 of the PCC Designation Requirement as included by Transit’s decision is hereby deleted and replaced with the following:

12 *Transit shall ensure that any Advance Ecological Mitigation required to be established and maintained and continued before, during or after the construction of the Proposed Work is so established and maintained and continued in accordance with the relevant Approved Management Plan.*

Condition 13

Condition 13 of the PCC Designation Requirement as included by Transit’s decision is hereby deleted and replaced with the following:

13 *The objectives of the Advance Ecological Mitigation shall be to:*

13.1 *Assist in filtering sediment runoff;*

13.2 *Assist, in conjunction with any works required under any regional resource consent secured, to avoid, remedy or mitigate erosion by intercepting precipitation and delaying overland runoff;*

13.3 *Mitigate for the loss of some native vegetation and areas of the stream bed;*



13.4 *Whenever practicable provide shelter to waterways to encourage the recovery of freshwater habitat;*

13.5 *Whenever practicable provide flora and fauna corridors; and*

13.6 *Assist (so far as practicable in the absence of regional consents) in implementation of the Regional Policy Statement for the Wellington Region and compliance with any relevant Wellington Regional Plan -*

in order to avoid, remedy or mitigate adverse ecological effects (particularly on the Pauatahanui Inlet and freshwater ecosystems which drain to the Pauatahanui Inlet).

Condition 14

Condition 14 of the PCC Designation Requirement as included by Transit's decision is hereby deleted and replaced with the following new conditions:

14 *In respect of each of the Retirement Areas, Transit shall.*

14.1 *Prepare a management plan in consultation with the Department of Conservation and the Wellington Regional Council within 6 months of Transit, (or the Crown) acquiring the land or a leasehold or other interest for each site which shall specify:*

14.1.1 *The Advance Ecological Mitigation for the Retirement Area in order to meet the objectives in Condition 13; and*

14.1.2 *The timetable for the Advance Ecological Mitigation to be undertaken;*

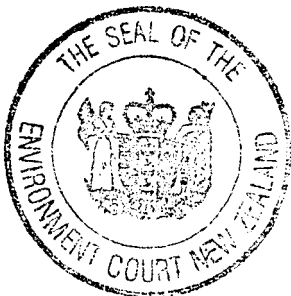
14.1.3 *The duration of any establishment period required prior to construction to ensure that any plantings made as part of the Advance Ecological Mitigation are largely self-sustaining (subject to maintenance);*

14.1.4 *The duration of any proposed Maintenance Period for any plants to be planted in the Retirement Area, and maintenance criteria; and*

14.1.5 *The nature of any measures in relation to the management of construction activities so as to avoid, remedy, or mitigate any adverse effect of those activities on the Advance Ecological Mitigation in the Retirement Area.*

14.2 *Submit each such management plan to the Council Manager, for certification that the management plan complies with the conditions of this designation including satisfying the objectives in Condition 13; and*

14.3 *Make such amendments as reasonably required by the Council Manager for the purpose of ensuring compliance with the conditions*



of this designation and satisfying the objectives in Condition 13, and re-submit that amended management plan for certification accordingly.

14A After an Approved Management Plan is in place in respect to any Retirement Area:

14A.1 Transit shall, if so requested by the Council Manager, following that Manager's consultation with the Wellington Regional Council, make such amendments to the Approved Management Plan as reasonably required to satisfy objective 13.6 of Condition 13;

14A.2 Transit may, from time to time, in consultation with the Department of Conservation and the Wellington Regional Council prepare any amendments to that Approved Management Plan for that Retirement Area;

and conditions 14.1 to 14.3 shall apply to any such amendments, accordingly, as if the Approved Management Plan together with those amendments were together re-submitted for certification by the Council Manager.

14B Transit shall not commence construction of the Proposed Work in any area where Wellington Regional Council resource consents are required until all such necessary consents have been obtained.

Condition 17

Condition 17 of the PCC Designation Requirement as included by Transit's decision is hereby deleted and replaced with the following:

Advance landscape mitigation

*17 Transit shall not commence construction of the Proposed Work until the area shown on attached **Plan F** (part of property numbered 18, on figure 4.2 of the AEE) has been fenced off and planted prior to the commencement of construction works. Such fencing off and planting shall be to the reasonable satisfaction of the Council Manager.*

The KCDC Designation Requirement

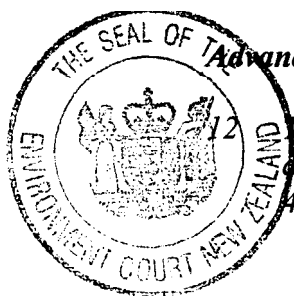
The KCDC Designation Requirement is modified as follows:

Condition 12

Condition 12 of the KCDC Designation Requirement as included by Transit's decision is hereby deleted and replaced with the following:

Advance landscape mitigation

*Transit shall not commence construction of the Proposed Work until the two areas shown on attached **Plan B** (parts of properties numbered 42B and 42C on figure 4.2 of the AEE) have been fenced of land planted prior to the*



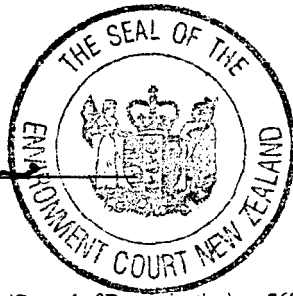
commencement of construction of the works. Such fencing off and planting shall be to the reasonable satisfaction of a Council Officer or consultant nominated by the Chief Executive of the Council as having the requisite skills and experience.

[18] The appeal is otherwise dismissed.

[19] There is no order as to costs.

DATED at WELLINGTON this 6th day of January 2003

S. E. Kenderdine
S Kenderdine
Environment Judge

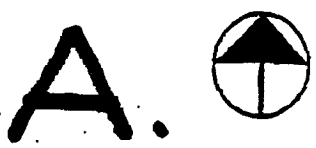
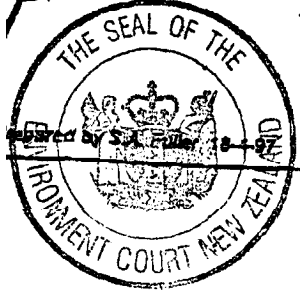
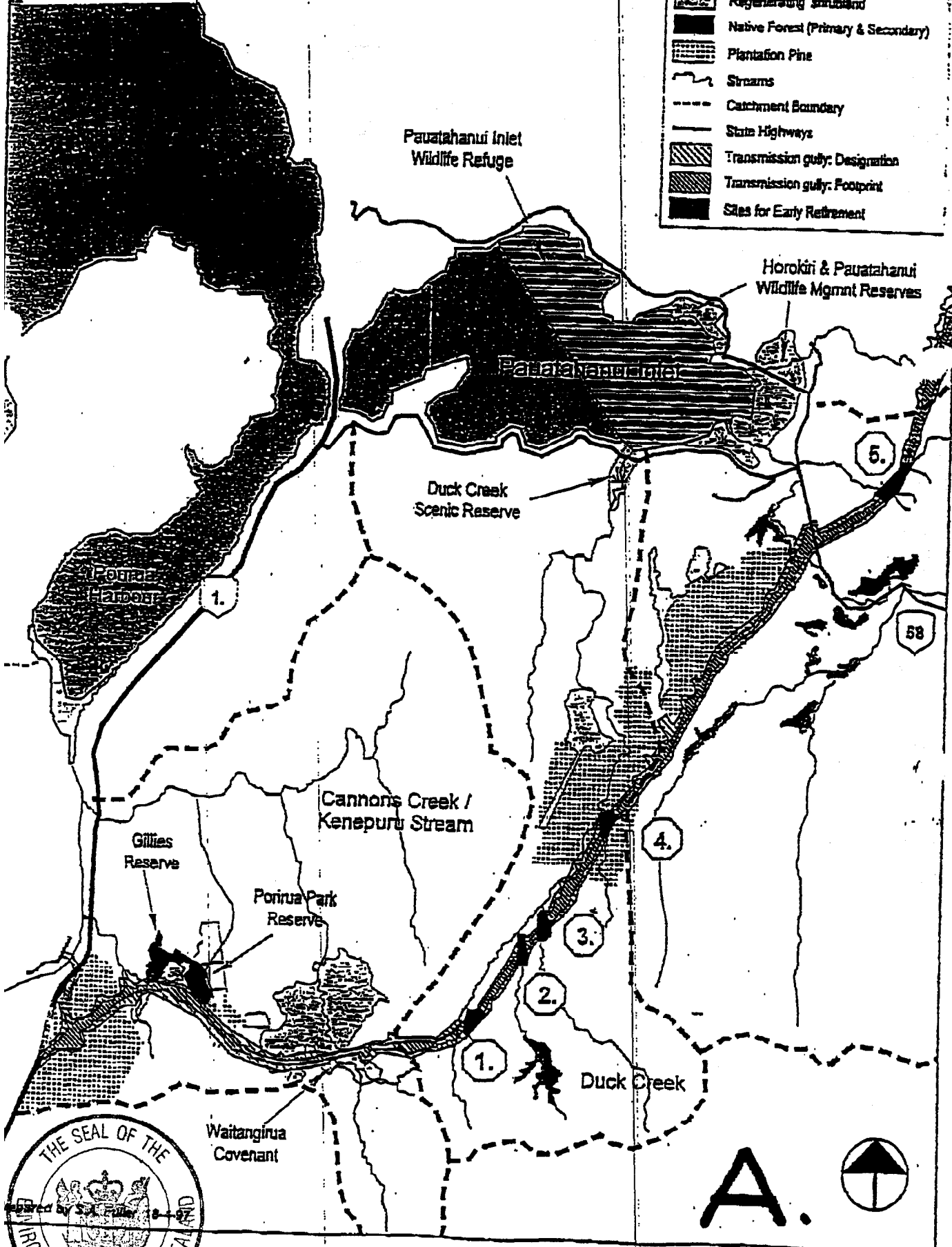


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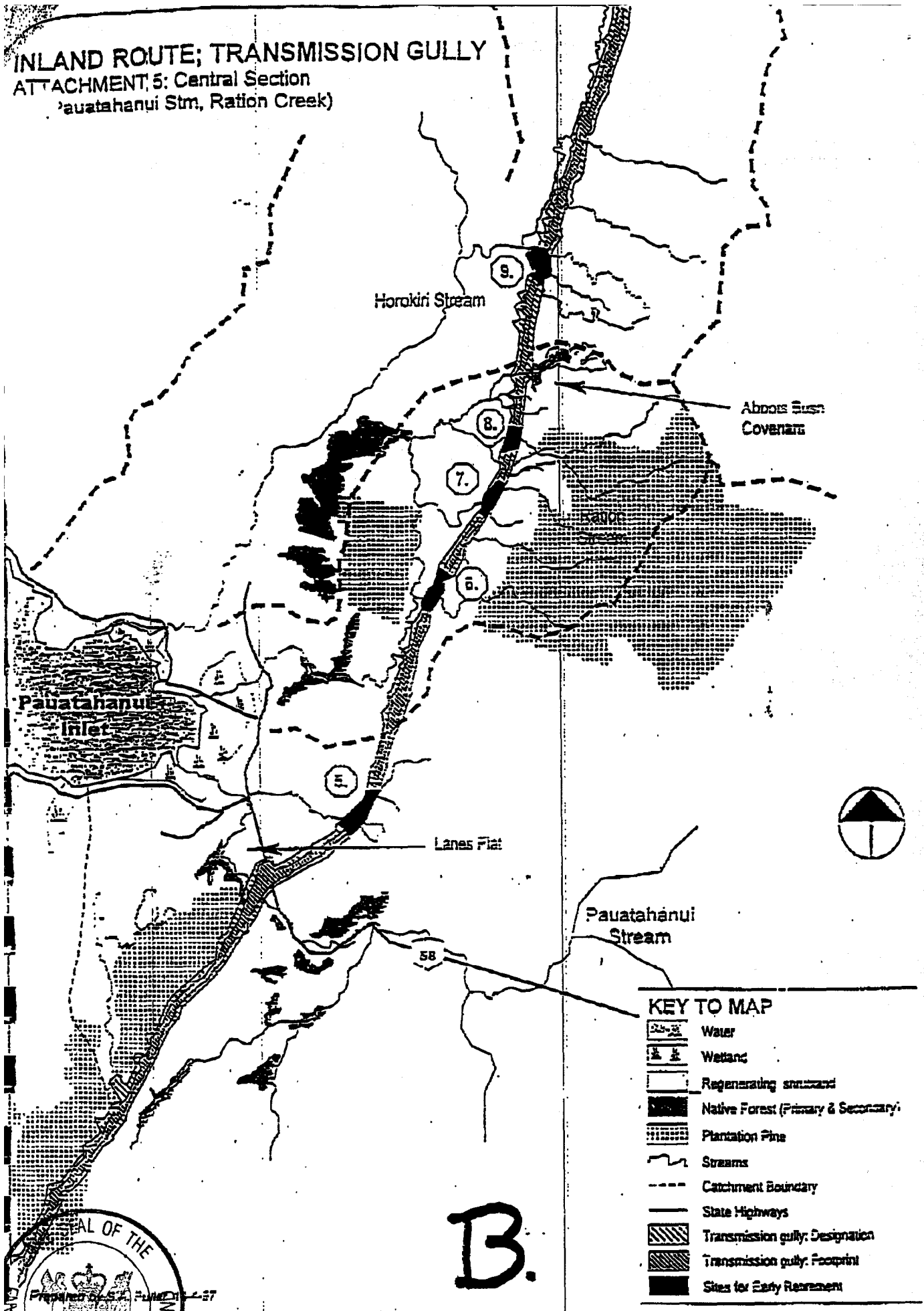
INLAND ROUTE; TRANSMISSION GULLY
ATTACHMENT 4: Southern Section
 (Cannons Creek, Duck Creek, Pauatahanui Inlet)

KEY TO MAP

	Water
	Wetland
	Regenerating scrubland
	Native Forest (Primary & Secondary)
	Plantation Pine
	Streams
	Catchment Boundary
	State Highways
	Transmission gully: Designation
	Transmission gully: Footprint
	Sites for Early Retirement



INLAND ROUTE; TRANSMISSION GULLY
ATTACHMENT 5: Central Section
 (Pauatahanui Strm, Ration Creek)



Abbots Bush
 COVENANT



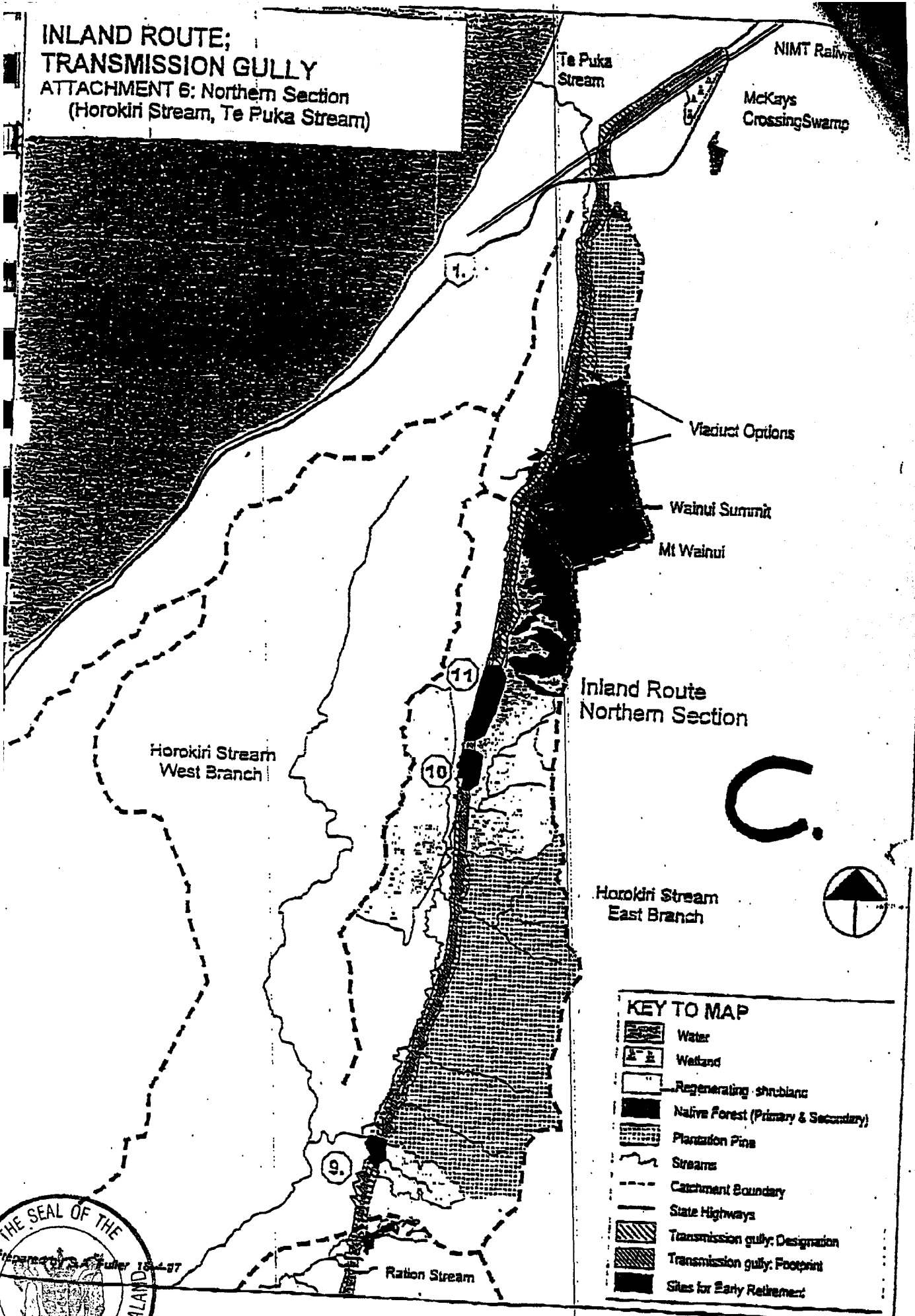
KEY TO MAP

	Water
	Wetland
	Regenerating scrubland
	Native Forest (Primary & Secondary)
	Plantation Pine
	Streams
	Catchment Boundary
	State Highways
	Transmission gully: Designation
	Transmission gully: Footprint
	Sites for Early Reassessment

B.



**INLAND ROUTE;
TRANSMISSION GULLY**
ATTACHMENT 6: Northern Section
(Horokiri Stream, Te Puka Stream)












KEY TO MAP

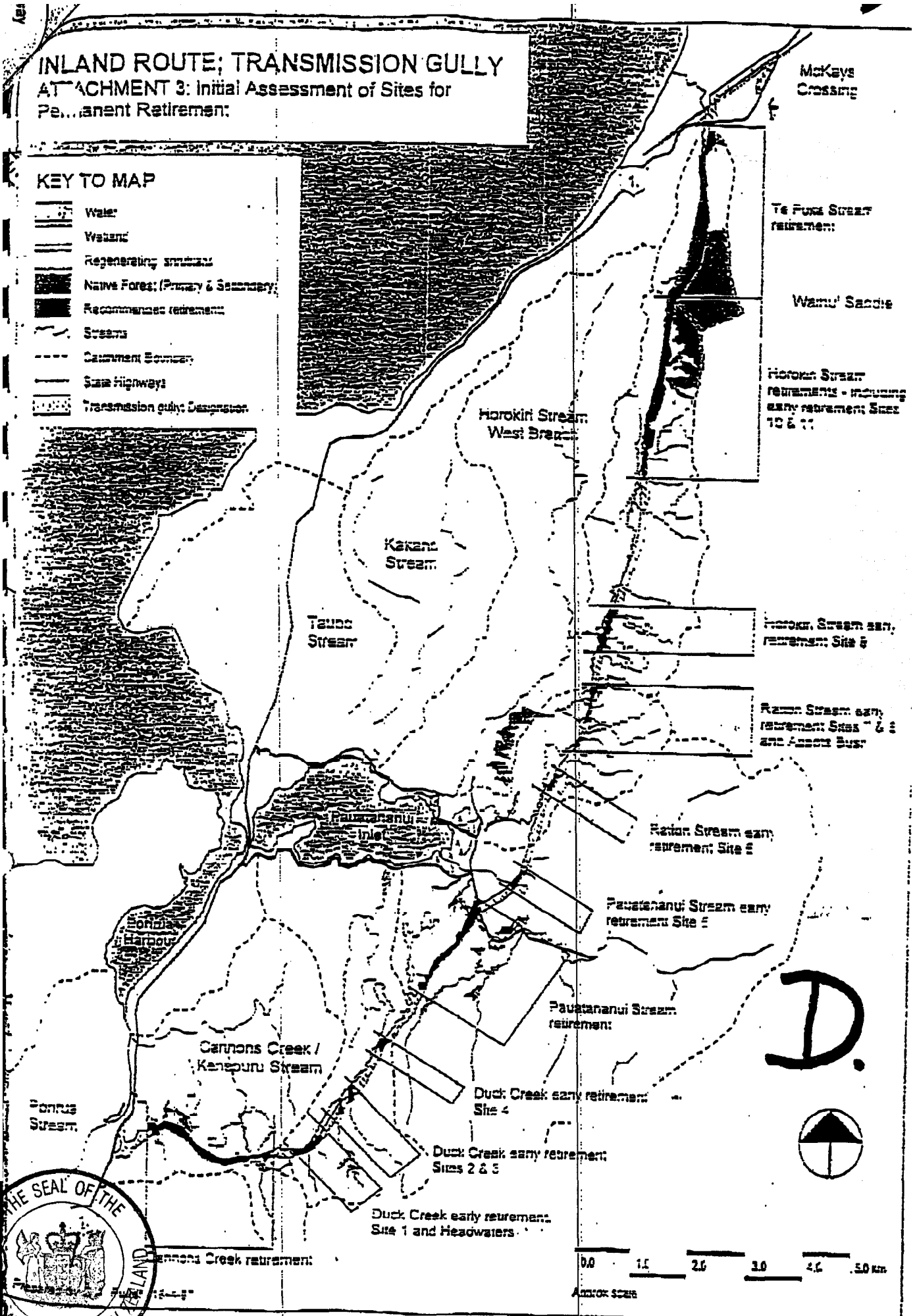
- Water
- Wetland
- Regenerating shrubland
- Native Forest (Primary & Secondary)
- Plantation Pine
- Streams
- Catchment Boundary
- State Highways
- Transmission gully: Designation
- Transmission gully: Footprint
- Sites for Early Retirement



INLAND ROUTE; TRANSMISSION GULLY
ATTACHMENT 3: Initial Assessment of Sites for
Permanent Retirement:

KEY TO MAP

-  Water
-  Wetland
-  Regenerating scrubland
-  Native Forest (Primary & Secondary)
-  Recommended retirement
-  Streams
-  Catchment Boundary
-  State Highways
-  Transmission gully Description



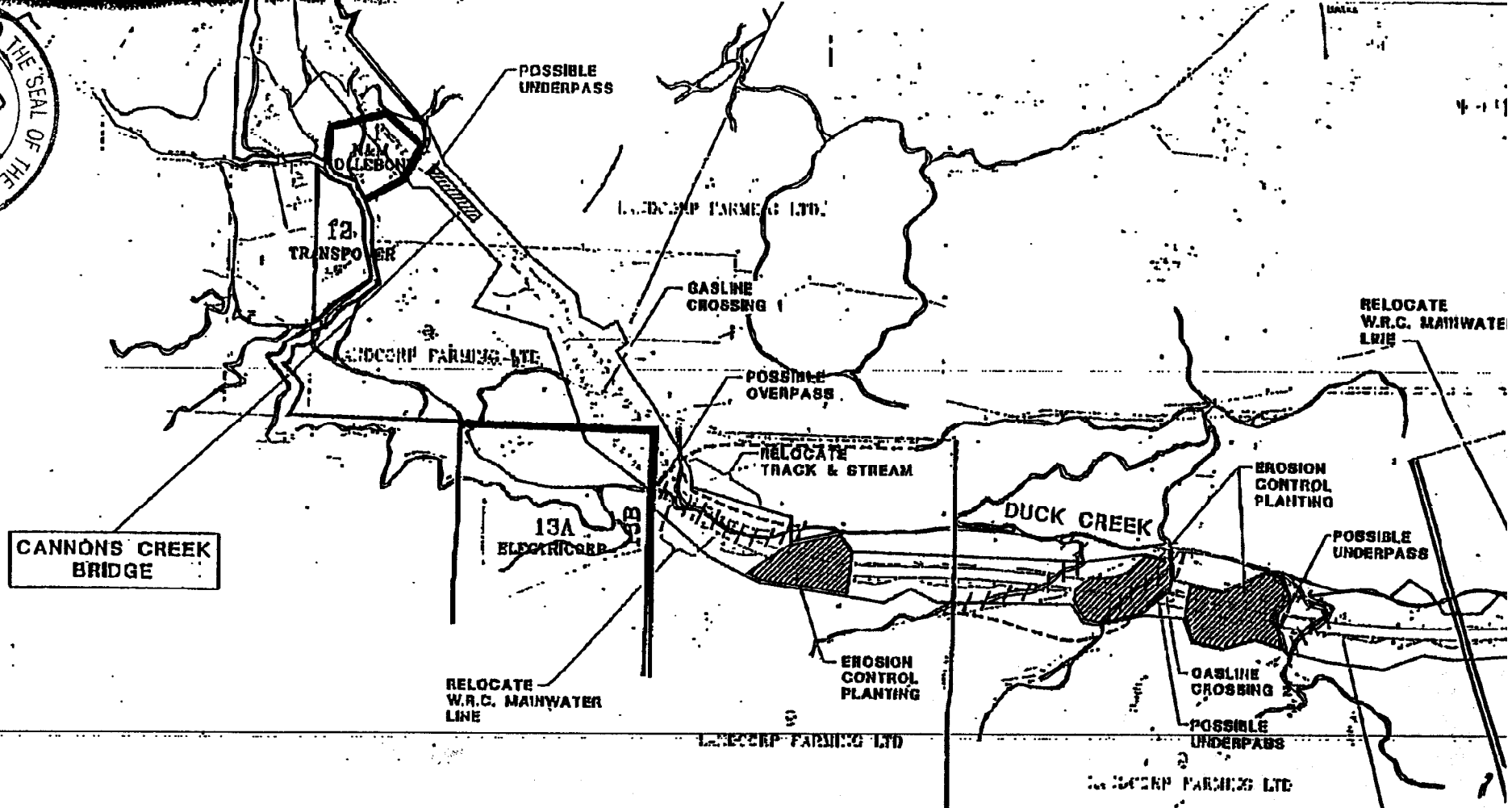
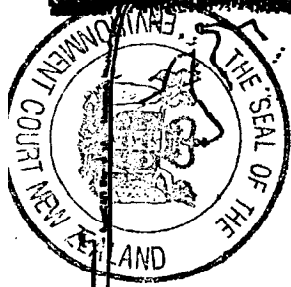
D.






0.0 1.0 2.0 3.0 4.0 5.0 km

Approx scale





KEY



-  EXISTING TRACKS
-  APPROXIMATE LOCATION OR REALIGNED TRACK
-  ABANDONED TRACKS

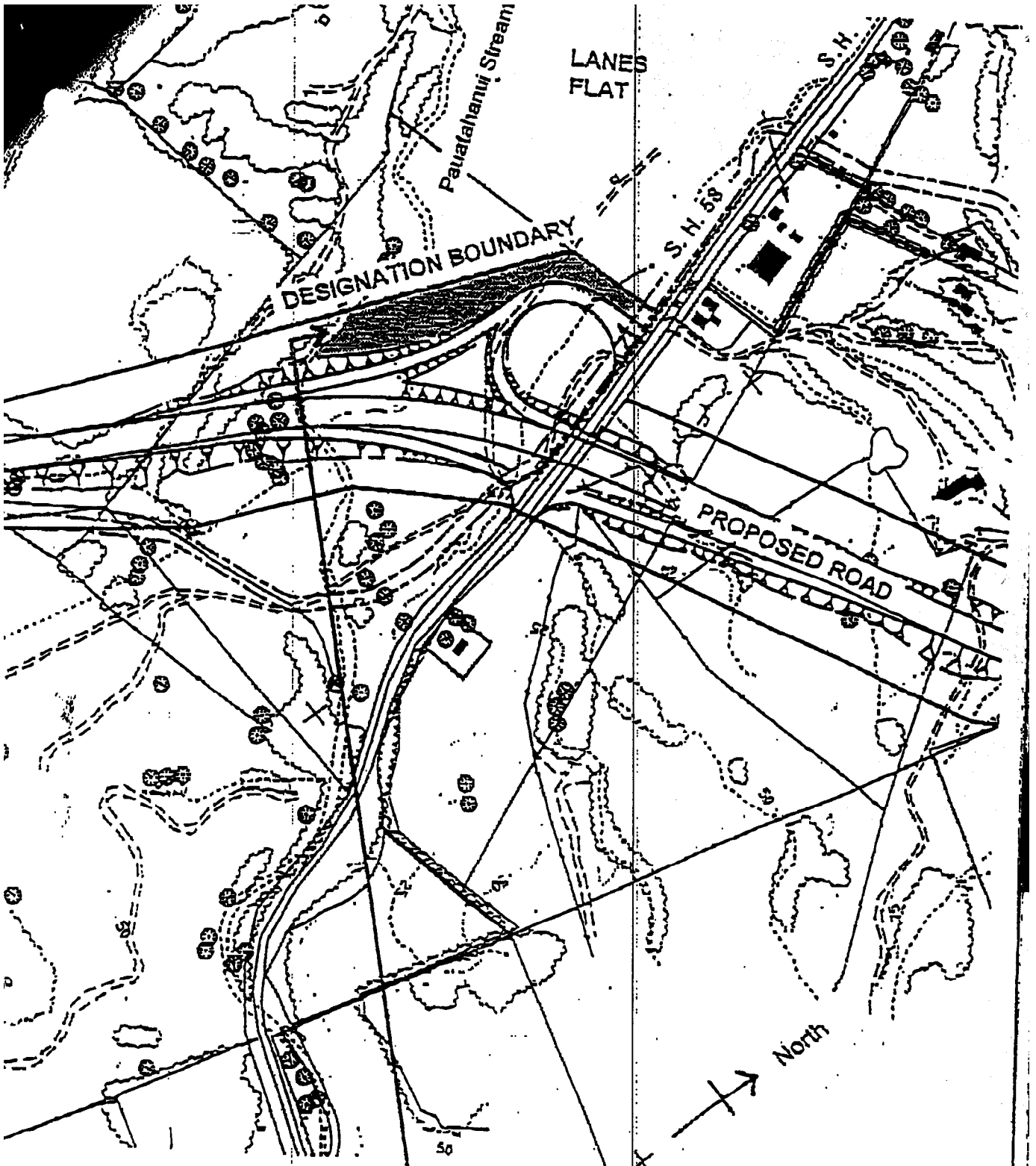


BELMONT REGIONAL PARK

SOUTHERN TOLLING

PRELIMINARY

 Decca Carter Hollings & Ferner Ltd. Civil Engineering 100-102, Victoria Street, Auckland, New Zealand		 NZTA TRANSPORTATION 100, Victoria Street, Auckland, New Zealand		ISLAND CORRIDOR TRANSPORTATION DUTY		PLAN - PROPOSED ROUTE EXISTING TRACKS BELMONT REGIONAL PARK	
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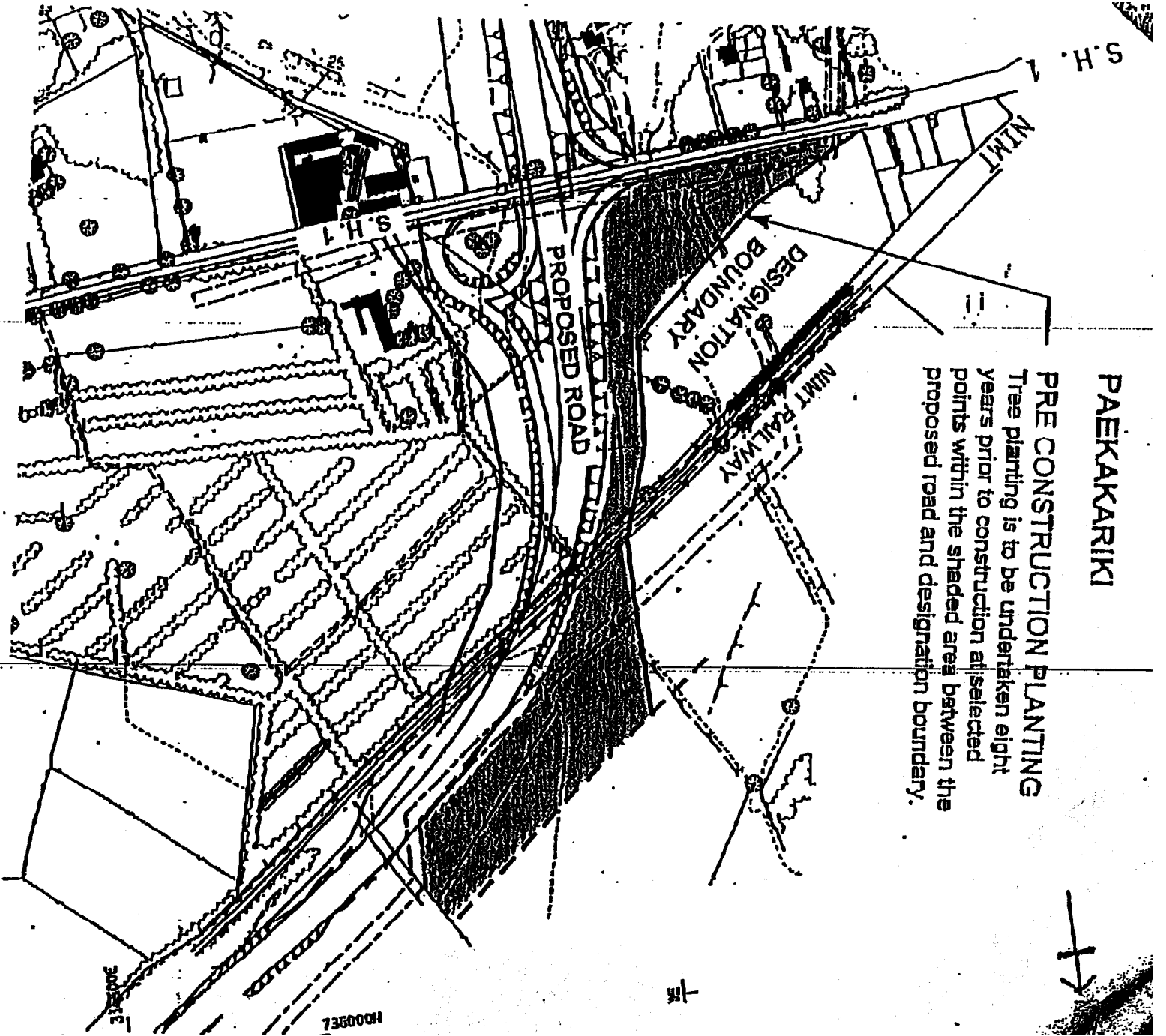
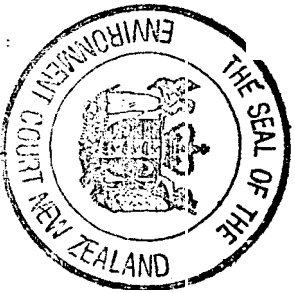
PAUATAHANUI

PRE CONSTRUCTION PLANTING

Tree planting is to be undertaken eight years prior to construction at selected points within the shaded area between the proposed road and designation boundary.

F.





PAEKAKARIKI

PRE CONSTRUCTION PLANTING

Tree planting is to be undertaken eight years prior to construction at selected points within the shaded area between the proposed road and designation boundary.

B.

7350001