

BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 15

IN THE MATTER of an application pursuant to section 311 of  
the Resource Management Act 1991

BETWEEN PETER WILLIAM MAWHINNEY (AS  
TRUSTEE OF WAITAKERE FOREST LAND  
TRUST AND OF THE FOREST TRUST)

(ENV-2017-AKL-000090)

Applicants

AND AUCKLAND COUNCIL

Respondent

Court: Environment Judge J R Jackson  
(Sitting alone under section 279 of the Act)

Hearing: at Auckland on 19 October 2017  
(Final submissions received 9 February 2018)

Appearances: P W Mawhinney for the applicants  
F Quinn and B Ford for the Auckland Council  
N Mawhinney for himself (as a section 274 party)

Date of Decision: 14 February 2018

Date of Issue: 14 February 2018

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INTERIM DECISION

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A: Under section 311 Resource Management Act 1991 the Environment Court  
declares that:

- (1) Subject to (2) and to Declaration C the owners, occupiers, lessees and forestry right holders in the land listed in Schedule 1 below have an existing use giving them the privilege of planting, maintaining, growing and harvesting of tree crops on the parts outlined in red on the maps annexed in Schedule 2 with effects that are the same or similar in character, intensity and scale to



the silviculture and harvesting carried out on those parts of the subject land since 20 December 1984 without first obtaining resource consent to contravene a district rule (but not a regional rule).

### SCHEDULE 1

Parcel	Address	Hectares (ha)	Year first planted	Maps <sup>1</sup>
Lot 1 DP 320387	131-149 Anzac Valley Road	51.5860	1955-1980	Ae,C,D E,H,K,L M,N,O P,Q,R,S T,U
Part Lot 24 DP 166619 subject to Forestry Right C904357.11	68 Bethells Road	0.1223	1960	
Lot 309 DP 210991	193-197 Anzac Valley Road	4.2841	1960	G
Lot 323 DP 210991	199-201 Anzac Valley Road	6.7419	1960	I,J
Lot 324 DP 210991	102-104 Anzac Valley Road	6.0057	1960	F
Lot 933 DP 320387	95-115 Anzac Valley Road	7.2309	1953 approx.	Ae,Aw, B
Lot 3 DP 196590	60 Bethells Road	5.2112	1953	V
Part Lot 4 DP 162886 subject to Forestry Right C923891.3	62 Bethells Road	3.8000	1953 approx.	X

(2) In declaration A (1), the expression "harvesting" includes harvest activities with effects that are the same or similar in character, intensity, and scale to those harvest activities carried out in the subject land since 20 December 1984 including:

- repair and maintenance of existing forestry roads, tracks and vehicle loading and turning areas; and/or
- formation of new forestry roads, tracks and vehicle loading and turning areas with the exotic planting or over the areas marked pink on the maps identified in the last column of Schedule 1; and/or
- gravelling or similar surfacing; and/or
- subject to any applicable regional plan rules, repair and maintenance of existing



<sup>1</sup> See Maps in Attachment "D".

rainwater run-off management including culverts, dams, wetland and settlement ponds; and/or

- subject to regional plan rules, installation of new rainwater run-off management systems, including attenuation, treatment and disposal; and/or
- maintenance of existing skids and/or landing sites; and/or
- installation of new skids and/or landing sites; and/or
- tree felling, including onto undergrowth vegetation; and/or
- removal or destruction of or damage to understorey vegetation;
- destruction of or damage to accessory vegetation (subject to regional plan rules) within one pine-tree length of the perimeter of the stand being harvested;
- debranching; and/or
- hauling logs by ground based hauling, including the destruction of undergrowth vegetation; and/or
- making logs; and/or
- marking logs; and/or
- loading logs out; and/or
- docketing; and/or
- transporting logs; and/or
- raking, and/or disposal of slash.

B. The Environment Court declares:

- (1) the land listed in Schedule 2 is subject to an existing use so that any lessees and/or forestry right holders may access, construct and use tracks, culverts, bridges, buildings and other works and facilities ancillary to and necessary for the purposes of establishing, maintaining and harvesting tree crops on the land listed in Schedule 1 without first obtaining resource consent to contravene a district rule (but not a regional rule);
- (2) that declaration B (1) is subject to any persons exercising the forestry access use (by themselves or by their agents and/or contractors) having a property right, whether under the Forestry Rights Registration Act 1983 or otherwise, to pass over the land and to carry out any track and road construction and/or maintenance.





## SCHEDULE 2

Parcel	Address	Hectares (ha)	Year first planted
Lot 9 DP 166619	Access	0.3681	N/A
Part Lot 10 DP 168437 subject to Forestry Right C904358.8	189-191 Anzac Valley Road	0.0492	1979
Part Lot 11 DP 168437 subject to Forestry Right C904358.8	183-187 Anzac Valley Road	0.0052	1979
Part Lot 12 DP 168437 subject to Forestry Right C904358.8	179-181 Anzac Valley Rd	0.0925	1979
Part Lot 13 DP 168437 subject to Forestry Right C904358.8	173-174 Anzac Valley Road	0.1263	1979
Part Lot 15 DP 168374 subject to Forestry Right C904357.9	157-163 Anzac Valley Road	0.1793	1979
Part Lot 17 DP 168374 subject to Forestry Right C904357.9	151-155 Anzac Valley Road	0.1364	1979
Part Lot 19 DP 168374	87-93 Anzac Valley Road	1.9836	1979-1980
Part Lot 20 DP 168374 subject to Forestry Right C904357.10	77-85 Anzac Valley Road	0.2130	1980
Part Lot 21 DP (168374) 320387 identified as area P in Forestry Right D025640.3	67-75 Anzac Valley Road	0.0844	N/A
Lot 23 DP 168374	Access	0.4738	N/A
Lot 200 DP 210991	Access	0.3919	N/A

- C. The Environment Court declares that nothing in declarations A and B relieves the obligation on any person intending to log in any part of the land referred to in Schedule 1 above from their duty to apply for any necessary resource consent under the regional Rules in Chapter E11 of the Auckland Unitary Plan.
- D. Leave is reserved to any party to apply to amend or correct any of the declarations if there is any mistake in its wording when tested against the findings in, or omission from the matters resolved in, the reasons below provided that application is made on notice within 15 working days of issue of this decision.
- E. Costs should lie where they fall.





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## REASONS

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### 1. Introduction

#### 1.1 The application

[1] Mr Peter William Mawhinney as sole trustee of both the Waitakere Forest Land Trust and of the Forest Trust has applied<sup>2</sup> under section 311 Resource Management Act 1991 ("the RMA" or "the Act") for, initially, the following declaration:

The owners, occupiers, lessees and forestry right holders in the land listed in Schedule 1 annexed hereto have a right to carry out the planting, maintaining, growing and harvesting of *Pinus radiata* tree crops without first obtaining resource consent to contravene a district rule.

[2] Mr Mawhinney amended his application prior to the hearing so that the declaration he sought was:

The owners, occupiers, lessees and forestry right holders in the land listed in Schedule 1 annexed hereto have a right to carry out the planting, maintaining, growing and harvesting of tree crops with effects that are the same or similar in character, intensity and scale to the silviculture and harvesting carried out in the subject land since 20 December 1984 without first obtaining resource consent to contravene a district rule (but not a regional rule).

In this declaration, the expression "harvesting" can include harvest activities with effects that are the same or similar in character, intensity, and scale to those harvest activities carried out in the subject land since 20 December 1984 including, but without limitation:

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<sup>2</sup> Application dated 26 June 2017.



- repair and maintenance of existing forestry roads, tracks and vehicle turning, and/or
- formation of new forestry roads, tracks and vehicle turning, and/or
- gravelling or similar surfacing, and/or
- works to comply with the provisions of the Health and Safety at Work Act 2015 or similar legislation that is in force at the time, including establishing vehicle parking for harvest operators and first aid stations, and/or
- repair and maintenance of existing rainwater run-off management including culverts, dams, wetland and settlement ponds, and/or
- installation of new rainwater run-off management systems, including attenuation, treatment and disposal, and/or
- maintenance of existing skids and/or landing sites, and/or
- installation of new skids and/or landing sites, and/or
- tree felling, including onto undergrowth vegetation, and/or
- debranching, and/or
- hauling logs by ground based hauling, including the destruction of undergrowth vegetation, and/or
- making logs, and/or
- marking logs, and/or
- loading logs out, and/or
- docketing, and/or
- transporting logs, and/or
- raking, and/or disposal of slash, and/or
- any other harvest activity.

[3] The application was served on the Auckland Council and on the owners of the land. It replaces Application 43 in ENV-2015-AKL-000088 which Mr Mawhinney withdrew after lodging this application.

[4] Mr Nicholaus Mawhinney, owner of a property at 60 Bethells Road (part of the land subject to the application) was given leave<sup>3</sup> to lodge a late section 274 Notice. He supported the application at the hearing and the Council generously allowed him to give brief oral evidence at the hearing (subject to the Council being able to call further evidence in reply which was subsequently lodged).

[5] The Council opposes any declaration being made. Its general grounds of opposition are<sup>4</sup>:

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<sup>3</sup> Under section 281 RMA.

<sup>4</sup> Notice of reply dated 19 July 2017 at [2], [Environment Court (2017/2) document 5].



- (a) The applicants do not have any property rights in respect of Lot 1 DP 320387 and the related rights of access. Accordingly, they do not have any existing use rights in respect of forestry on that land.
- (b) The applicants have discontinued the use of the land set out in schedule 1 for the planting, maintaining, growing and harvesting of *Pinus radiata* on the land for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified.
- (c) The Auckland Regional Council Proposed Regional Plan for Erosion & Sediment Control requires 'discretionary activity' regional resource consents for earthworks ("disturbance of land surfaces") over 1 hectare, and also for roading/tracking over 100 metres length. Accordingly, even if the applicants have some existing use rights they do not extend to regional consents which have always been required.
- (d) Any existing use rights the applicants may have only extend to *Pinus radiata* and not removal of native vegetation which is now growing on the land set out in schedule 1.

[6] The evidence for the applicant is:

- the Tenth Affidavit of Mr P W Mawhinney from a 2015 proceedings (ENV-2015-AKL-88);
- the affidavits<sup>5</sup> of Mr P W Mawhinney dated 4 August, 2 November and 3 November 2017; and
- the viva voce evidence of Mr Nicholaus Mawhinney.

All references to pages in Exhibit "A" are to the Exhibit "A" — actually a series of exhibits — in Mr Mawhinney's 10<sup>th</sup> affidavit in the 2015 proceeding.

[7] The Council relied on the affidavit<sup>6</sup> of Mr G W Pope dated 2 February 2017 also lodged in the 2015 proceeding and on the affidavits of Mr C D McKinney, a principal specialist planner for the Auckland Council, dated 21 August 2015<sup>7</sup> and 8 December 2017 respectively (this later affidavit recording his inspection of 60 Bethells Road on 2 November 2017).

[8] Some landowners (other than Mr N Mawhinney referred to above) initially joined as section 274 parties opposing the application but subsequently withdrew before the hearing.



<sup>5</sup> Environment Court documents 7, 16 and 19 respectively.

<sup>6</sup> G W Pope affidavit [Environment Court (2015) document 45].

<sup>7</sup> C D McKinney affidavit [Environment Court (2015) document 7].



[9] While the essence of Mr Mawhinney's claim is that forestry is an existing use on the land subject to the application, he accepts<sup>8</sup> that resource consents from the Auckland Council as Regional Council will be necessary for some logging to be carried out.

## 1.2 The land, trees and the landowners

[10] The land known as "the Waitakere Forest", is now 89 hectares approximately<sup>9</sup>. The land is not owned by the trustee, although Mr Mawhinney (as a trustee) does have Forestry Rights over some of the total area<sup>10</sup> of pine plantings (50 hectares). I will list the land in two schedules because after the Council raised questions about the land in the second schedule it transpired, when this was suggested by the court that Mr Mawhinney is not seeking a right to harvest on the land but a right to traverse it for the purposes of harvesting.

[11] Schedule 1 below details the land in respect of which a full forestry existing use is claimed, the owners of the fee simple estates, the area of each lot and the year the current crop was planted.

### SCHEDULE 1

Parcel <sup>11</sup>	Address	Hectares (ha)	Year first planted	Maps <sup>12</sup>
Lot 1 DP 320387	131-149 Anzac Valley Road	51.5860	1955 <sup>13</sup> – 1980	Ae,C,D E,H,K,L M,N,O P,Q,R,S T,U
Part Lot 24 DP 166619 subject to Forestry Right C904357.11	68 Bethells Road	0.1223	1960	
Lot 309 DP 210991	193-197 Anzac Valley Road	4.2841	1960	G
Lot 323 DP 210991	199-201 Anzac Valley Road	6.7419	1960	I,J
Lot 324 DP 210991	102-104 Anzac Valley Road	6.0057	1960	F
Lot 933 DP 320387	95-115 Anzac Valley Road	7.2309	1953 approx.	Ae,Aw, B
Lot 3 DP 196590	60 Bethells Road	5.2112	1953	V
Part Lot 4 DP 162886 subject to Forestry Right C923891.3	62 Bethells Road	3.8000	1953 approx.	X

<sup>8</sup> P W Mawhinney submissions [Environment Court document 5].

<sup>9</sup> P W Mawhinney 10<sup>th</sup> affidavit, para 94 [Environment Court 2015 document 61] says 94.3 hectares but that is incorrect because he double-counted Lot 3 DP 196590 (60 Bethells Road).

<sup>10</sup> P W Mawhinney 10<sup>th</sup> affidavit, para 100 [Environment Court 2015 document 61].

<sup>11</sup> P W Mawhinney 10<sup>th</sup> affidavit at [12] [Environment Court (2015) document 61].

<sup>12</sup> P W Mawhinney submissions 25 January 2018 [Environment Court document 27].

<sup>13</sup> P W Mawhinney 10<sup>th</sup> affidavit p 89 [Environment Court (2015) document 61].



[12] Schedule 2 below is the land over which Mr Mawhinney conceded in his submissions<sup>14</sup> of 28 January 2018 that the existing use of this land relates to a forestry access only.

## SCHEDULE 2

Parcel	Address	Hectares (ha)	Year first planted
Lot 9 DP 166619	Access	0.3681	N/A
Part Lot 10 DP 168437 subject to Forestry Right C904358.8	189-191 Anzac Valley Road	0.0492	1979
Part Lot 11 DP 168437 subject to Forestry Right C904358.8	183-187 Anzac Valley Road	0.0052	1979
Part Lot 12 DP 168437 subject to Forestry Right C904358.8	179-181 Anzac Valley Rd	0.0925	1979
Part Lot 13 DP 168437 subject to Forestry Right C904358.8	173-174 Anzac Valley Road	0.1263	1979
Part Lot 15 DP 168374 subject to Forestry Right C904357.9	157-163 Anzac Valley Road	0.1793	1979
Part Lot 17 DP 168374 subject to Forestry Right C904357.9	151-155 Anzac Valley Road	0.1364	1979
Part Lot 19 DP 168374	87-93 Anzac Valley Road	1.9836	1979-1980
Part Lot 20 DP 168374 subject to Forestry Right C904357.10	77-85 Anzac Valley Road	0.2130	1980
Part Lot 21 DP (168374) 320387 identified as area P in Forestry Right D025640.3 <sup>15</sup>	67-75 Anzac Valley Road <sup>16</sup>	0.0844	N/A
Lot 23 DP 168374	Access	0.4738	N/A
Lot 200 DP 210991	Access	0.3919	N/A

[13] As often in historical cases, matching the current legal descriptions to earlier legal descriptions and to activities on the ground has proved difficult. To assist with understanding I attach – marked “A” – a copy of a near-current cadastral plan produced<sup>17</sup> by Mr Mawhinney. On this I have outlined in different colours the land in Schedule 1 which

<sup>14</sup> Environment Court document 34.

<sup>15</sup> P W Mawhinney 1<sup>st</sup> affidavit Volume 7 Tab 138 p 1196.

<sup>16</sup> The legal description is correct in the Auckland Council's memorandum of 26 January 2018 [Environment Court document 26].

<sup>17</sup> P W Mawhinney 10<sup>th</sup> affidavit, Exhibit A, p 86 [Environment Court 2015 document 61].





is subject to this application other than the allotments over which there is a forestry right purely or principally for access (as listed in Schedule 2).

[14] On plan "A" I have also outlined in red the original extent of the Waitakere Forest (approximately 159 hectares). Mr Mawhinney's Exhibit "A" page 75 is attached as "B". The full extent of the Waitakere Forest as planted in 1988 is shown in a copy attached as "B". There appears to be no planting in the area adjacent to Bethells Road (at 60 and 62 Bethells Road) but I am satisfied that area had been planted a few years earlier. Indeed, the young pines can be seen on a blowup<sup>18</sup> of photograph "B". If the area inside the red lines on "A" is compared with the earlier (flown in 1988) aerial photograph<sup>19</sup> – "B" – produced by Mr Mawhinney it will be seen they approximately coincide.

[15] I attach as "C" a copy of a planting plan<sup>20</sup> prepared by Carter Holt Harvey Limited in the second half of the 1980s. It shows the Waitakere Forest as being in 5 blocks<sup>21</sup>, in addition to some useful dates as to when the various blocks were planted.

[16] Finally, attached as "D" is a sequence of maps identifying the current areas of forest on the land listed in Schedule 1 to this decision.

#### *60 Bethells Road*

[17] This is the property owned by Mr N Mawhinney. More than half of 60 Bethells Road is covered in pine trees. Under the pines native vegetation is regenerating. Most has not yet reached through to the canopy. In some areas the understorey has been cleared.

[18] A contiguous area of indigenous vegetation — which has grown sufficiently to form a canopy —exists along a number of connected stream corridors (approximately 5 metres to 20 metres wide) flowing though the central part of the property. In his post-hearing report on his inspection of the property the Council's officer Mr McKinney describes<sup>22</sup> a few areas of native bush as having been taped off with yellow plastic tape. He said "these are roughly

<sup>18</sup> P W Mawhinney 10<sup>th</sup> affidavit, Exhibit A, p 76 [Environment Court 2015 document 61].

<sup>19</sup> P W Mawhinney 10<sup>th</sup> affidavit, Exhibit A, p 75 [Environment Court 2015 document 61].

<sup>20</sup> P W Mawhinney 10<sup>th</sup> affidavit, Exhibit A, p 89 [Environment Court 2015 document 61].

<sup>21</sup> An area of 33 hectares had been planted to the east of the straight-line north-south boundary to Lot 5: this land was in CT 423/246 then sold and was on-sold contemporaneously by Mr Mawhinney's interests when he purchased it from Carter Holt: P W Mawhinney memorandum 13 January 2018 [Environment Court document 23]. This area is shown with a dashed red line on map A. It is not relevant to this proceeding.

<sup>22</sup> C D McKinney affidavit 8 December 2017 Exhibit CDM1 [Environment Court document 21].





consistent with the red continuous native vegetation lines on the aerial photo presented in the submissions of Nicholaus Mawhinney dated 3 November 2017". In Mr McKinney's observation "the taped off area roughly follows a line of remaining bush that has not been cleared, rather than 20 metres setback from the streams or areas of contiguous native vegetation". The 20 metres setback reference is to a requirement of the (partly) operative Auckland Unitary Plan.

[19] There are several cleared areas, mainly to the south, around an abandoned bus, a building, a toilet and firebreak along the eastern boundary. These areas are mostly in grass with no tree canopy. There are no council records of any resource consent for this vegetation clearance or for a second dwelling.

*62 Bethells Road*

[20] The forestry right registered in favour of associates of the applicant over the property at 62 Bethells Road expired on 9 October 2017. However, Mr Mawhinney sees some utility in having declarations in respect of this property because it is the subject of an abatement notice issued by the Auckland Council<sup>23</sup>: a declaration that the forestry was an existing use protected by section 10 RMA as at the date when the abatement notice was issued may assist in having the abatement notice cancelled.

*68 Bethells Road*

[21] The land at 68 Bethells Road is subject to a forestry right<sup>24</sup> that does not expire until 22 September 2989 (a term of 990 years).

[22] Mr Mawhinney advised that only some of the tree crop at 68 Bethells Road has been harvested. The harvest area is less than 2 hectares and can be restocked as a permitted activity under the Auckland Unitary Plan. The unharvested trees would be a subject of the proposed declaration.



<sup>23</sup> A copy is annexed to the affidavit of Mr Pope sworn 2 February 2017 at "GP4" in proceeding ENV-2015-AKL-000088.

<sup>24</sup> Memorial C.904357 CT NA101D/684.

*Roads and tracks*

[23] Further copies of the maps attached to Mr P W Mawhinney's affidavit of 2 November 2017 have subsequently, at the request of the Environment Court, been marked up by Mr Mawhinney<sup>25</sup> except for:

- (a) existing roads and tracks outside of the forest areas marked red or pink for each property to show the access from roads and tracks to the stands of pines; and
- (b) roads and tracks within the tree crops.

[24] Mr Mawhinney also explained that<sup>26</sup>:

There is no native vegetation between the existing roads and tracks and the tree crops. There is a small amount of native vegetation within the drip line of the tree crops including where the crops are adjacent to the roads and tracks, but the removal of such vegetation is a permitted activity under the Auckland Unitary Plan (on the grounds set out at paragraphs 17 to 21 of the applicants' submissions dated 3 November 2017).

[25] Finally, Mr Mawhinney added<sup>27</sup>:

One of the existing forestry tracks runs through a significant ecological area, shown on Map L. That track is fully formed, and the adjacent native vegetation will not be disturbed. The maintenance of the track is a permitted activity in activity tables E.11.4.3 at (A25), E15.4.1 at (A5), and E15.4.2 at (A35) of the Auckland Unitary Plan.

[26] A full set of the maps showing:

- (i) the stands of pines on each of the properties in Schedule 1; and
- (ii) marked in pink, the access from roads and tracks to the stands — is annexed marked "D".

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<sup>25</sup> P W Mawhinney memorandum 25 January 2018 para 7.2 [Environment Court document 27].  
<sup>26</sup> P W Mawhinney memorandum 25 January 2018 para 7.3 [Environment Court document 27].  
<sup>27</sup> P W Mawhinney memorandum 25 January 2018 para 7.4 [Environment Court document 27].



## 2. The changing plans

### 2.1 Introduction

[27] There are six potentially relevant territorial authority plans (including deemed plans under the RMA). The dates they become operative are:

- 20 December 1984: the Waitemata City District Scheme came into force;
- 2 June 1988 First Review came into force;
- 14 June 1988: Scheme Change 129 became operative;
- 26 February 1992: Scheme Change 3 to the Waitemata Scheme became operative;
- 27 March 2003: the Waitakere City District Plan became operative;  
and
- 15 November 2016: the Auckland Unitary Plan became operative.

[28] I add that there may be another relevant date because the AUP makes existing “forestry” a permitted activity if it existed on:

- 30 September 2013: Table E15.4.1 (A5) Auckland Unitary Plan.

### 2.2 The 1984 District Scheme of the Waitemata City Council

[29] It is common ground that all the land in dispute was in the Rural 2 Zone in the 1984 District Scheme of the Waitemata City Council under the Town and Country Planning Act 1977. This district scheme came into force on 20 December 1984.

[30] The 1984 Scheme makes a distinction between the defined term “farm forestry” and the undefined term “forestry”. The full definition of farm forestry states<sup>28</sup>:

***Farm Forestry** means the planting, maintenance and harvesting of exotic and native trees, provided that no more than 50% of a site may be used, and provided that this shall not include small areas of trees grown for wind breaks and other general farming purposes*

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<sup>28</sup> Ordinance 2.





[31] Ordinance 12 of the 1984 Scheme treats Farm forestry and Forestry differently (in the Rural 2 Zone). “Farm forestry” is a predominant use in that Zone<sup>29</sup>, in contrast “Forestry” is a conditional use<sup>30</sup>, and therefore approval was required to establish a forestry use after 20 December 1984.

### 2.3 The Waitemata First Review

[32] The Waitemata City Council First Review District Scheme (“the First Review Scheme”) became operative on 1 June 1988<sup>31</sup>. Some of the ordinances changed. Under ordinance 12.2.1 “Forestry” became a predominant use<sup>32</sup>.

### 2.4 The Waitemata Scheme Change 129

[33] Very shortly after the First Review Scheme became operative Scheme Change 129 followed — on 14 June 1988. Under this the Waitakere Forest was zoned Rural 3 and Forestry became a conditional activity for which planning approval was required.

[34] In summary to this point, “Forestry” was only a permitted activity for a window of 14 days from 1 to 14 June 1998.

### 2.5 Waitakere Scheme Change 3

[35] By 1992 the Waitakere City Council was the relevant territorial authority. Its Scheme Change 3 to the former Waitemata District Scheme became operative on 26 February 1992. It introduced controls for clearing of native trees.

### 2.6 The Waitakere City District Plan

[36] The Waitakere City District Plan (“the WCDP”) came into force (in large part) on 27 March 2003. Its complexities have been described in decisions of the Environment Court such as *Robinson v Waitakere City Council*<sup>33</sup>. The WCDP contains a definition of “Forestry”

<sup>29</sup> Ordinance 12.2.1.

<sup>30</sup> Ordinance 12.2.2.

<sup>31</sup> P W Mawhinney affidavit 3 November 2017 [Environment Court document 19].

<sup>32</sup> Ordinance 12.2.1 [the First Review Scheme p 319].

<sup>33</sup> *Robinson v Waitakere City Council* (EnvC) A2/2009 at [54] et ff.



as follows:

#### FORESTRY

Means the ongoing management of trees or stands of trees for commercial or other production purposes, and includes planting, pruning, felling and removal from the site of trees but does not involve the processing of timber.

[37] The Waitakere Forest (or most of it) was “zoned” as “General Natural Area” in which forestry of more than (1) hectare was a discretionary activity<sup>34</sup>.

## 2.7 The Auckland Unitary Plan

### *Introduction*

[38] The Auckland Unitary Plan (“AUP”) became operative (in part) on 18 November 2016. It is a very complex document comprising a regional policy statement (Part B), two regional plans and a district plan. The AUP contains both regional rules and district rules. This part of the decision sets out the applicable district rules which would apply if there is no existing use (or if there is a restricted existing use).

[39] The Waitakere Forest is zoned “H20” — Rural (Waitakere Foothills) zone — in Chapter H (Zones) of the AUP. The forest also includes areas subject to the following overlays<sup>35</sup>:

- Natural Resources overlays —
  - (iii) D1 High-Use Aquifer Management Areas Overlay over all the land [regional plan].
  - (iv) D9.1.1 Significant Ecological Areas – Terrestrial (two areas within Lot 1 DP 32087) [regional plan/district plan].
- Natural Heritage overlays —
  - (i) D12 Waitakere Ranges Heritage Area Overlay over all the land.
  - (ii) D10 Outstanding Natural Landscapes Overlay (one area on the western edge of Lot 1 DP 32087) [regional coastal plan/district plan].

<sup>34</sup> (Rule (General Natural Area) 5.3) WCDP.

<sup>35</sup> An “overlay” is a sort of additional zoning.



- An Infrastructure overlay —
  - (iii) E28 Quarry Buffer Area Overlay (south-western edge of Lot 1 DP 32087).

[40] There are relevant parts in two chapters of the AUP in addition to the regional policy statement's objectives and policies which are entirely contained within Chapter B. Those parts are:

- E11 (Land Disturbance) Regional which contains regional objectives, policies and rules;
- E12 (Land Disturbance) District which contains the district provisions;
- E15 (Vegetation management and biodiversity) which contains regional plan and district objectives and policies and rules which are not (as far as I can see) stated to be either regional or district rules although I infer they are the latter; and
- H20 (The Waitakere Foothills Zone) which contains district rules.

[41] Forestry with an exotic species like *Pinus radiata* has two sets of adverse effects recognised by the AUP. First, its harvest, planting and initial growth may directly and indirectly replace, damage or destroy indigenous plants and trees. Second of great concern is the adverse effects of forestry in terms of land disturbance and consequent sedimentation in waterways, streams, rivers and estuaries. The AUP records<sup>36</sup>:

The major contaminant of Auckland's urban coastal marine area is sediment generated from rural areas and during land development. This sediment affects both the quality of coastal water and the amenity and recreational values of popular beaches. Sediment also reduces the biological diversity of urban and rural streams.

[42] In passing I note that forestry for harvesting has a beneficial medium-term (1.5 human generations) effect on climate change in that trees absorb CO<sub>2</sub> from the atmosphere. Many of those benefits are lost after 24-35 years when trees are harvested, but not all: the timber contains carbon some of which is not released back into the atmosphere if used for sawlogs, fibreboard or paper.




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<sup>36</sup> Chapter E11 p 1 AUP.



[43] Returning to the land disturbance effects of activities the AUP takes this issue so seriously that Chapter E contains both a regional section and a district (land use) section. That has implications for Mr Mawhinney's application in that if he can establish forestry as an existing use then that only over-rides any land use rules. An existing use under section 10 RMA has no effect on regional rules: they still apply in full force<sup>37</sup>.

[44] I outline the land use rules first.

*E12 Land disturbance — District provisions*

[45] Forestry activities in themselves are managed by zone rules in Chapter H20. However some aspects of forestry are managed as land use activities.

[46] "Ancillary forestry activities" are defined as follows<sup>38</sup>:

Disturbance of soil, earth or substrate land surfaces ancillary to forestry. Includes:

- land preparation for the establishment, planting and growing operations, and harvesting of forestry including establishment of erosion and sediment control measures; and
- construction and maintenance of infrastructure and facilities typically associated with forestry including but not limited to tracks, roads and landings, and related erosion and sediment control measures.

[47] Rule A14 in Table E12.4.1 shows that ancillary forestry earthworks are permitted activity provided they meet the standards in rule E12.6.4. The standards do not appear unduly onerous but I accept that any ancillary earthworks beyond those covered by any existing use would need to comply with the standards.

*Vegetation Management and Biodiversity*

[48] Chapter E15 (vegetation management and biodiversity) sits within the "Auckland-wide" section of the AUP and therefore applies across all underlying zones. The following district rules are potentially relevant to the removal of indigenous vegetation from the land:



<sup>37</sup> There is a (temporary) exception under section 20A RMA but that is not relevant to this proceeding.  
<sup>38</sup> Auckland Unitary Plan J1 Definitions pp 13–14.

(A5)	Forestry ... as existing at 30 September 2013.	P
(A9)	Vegetation alteration or removal for routine operation, maintenance and repair of existing tracks, lawns, gardens, fences, shelterbelts and other lawfully established activities.	P
(A23)	Permitted and controlled activities in Table E15.4.1 that do not comply with one of more of the standards in E15.6.	RD
(A10)	Vegetation alteration or removal, including cumulative removal on a site over a 10-year period, of greater than 250m <sup>2</sup> of indigenous vegetation that: (a) Is <b>contiguous vegetation</b> on a site or sites existing on 30 September 2013; and (b) Is outside the rural urban boundary.	RD
(A16)	Vegetation alteration or removal within 20 metres of <b>rural streams</b> , other than those in Rural — Rural Production Zone and Rural — Mixed Rural Zone.	RD

[49] "Forestry" is defined in the AUP<sup>39</sup> as follows:

Growing trees to produce timber, or where the land cover is principally timber tree species. Forest has a corresponding meaning.

Includes:

- clearing understorey;
- harvesting trees;
- portable sawmills
- planting trees;
- tree alteration;
- replanting trees;
- thinning trees; and
- accessory vegetation removal.

Excludes: ... planting or growing fruit, citrus, nut or other food producing trees (refer to farming).

This definition is nested within the Rural nesting table.

[50] Vegetation removal for maintenance and repair of existing tracks is permitted under A9 in the table above if it complies with standard 15.6.4. That states:



<sup>39</sup> AUP chapter J1 (Definitions) p 43.

**E15.6.4. Vegetation alteration or removal for routine operation, maintenance and repair of existing tracks, lawns, gardens, fences, shelterbelts and other lawfully established activities**

- (1) Vegetation alteration or removal must be undertaken within 1m either side of existing tracks or fences.
- (2) Vegetation alteration or removal must not include trees over 6m in height, or 600mm in girth.
- (3) Vegetation alteration or removal must not result in greater than 25m<sup>2</sup> of vegetation removal from within a Significant Ecological Areas Overlay, Outstanding Natural Features Overlay, Outstanding Natural Character Overlay, High Natural Character Overlay or the Outstanding Natural Landscapes Overlay per site.
- (4) Vegetation alteration or removal must not result in greater than 50m<sup>2</sup> of vegetation removal from areas not identified as significant ecological areas per calendar year.
- (5) Vegetation alteration or removal undertaken within the 100-year ARI floodplain must ensure that erosion control measures associated with vegetation removal and replanting, such as mulch or bark, are not able to be swept off-site in a flood event.

(Underlining added)

If all the standards are not met then restricted discretionary consent is required under district rule A23.

[51] The Council points to some evidence of Ms Absolum<sup>40</sup> in another proceeding which describes native trees in excess of 6 metres over in height. Thus rule E15.6.4(2) is likely to give rise to the need for restricted discretionary consent under rule A23. In addition, small areas within Lot 1 DP320387 are subject to Significant Ecological Areas and Outstanding Natural Landscapes overlays. Standards E15.6.4(3) and (4) may also give rise the need for consent under rule A23.

[52] For the purpose of rule A10 “contiguous vegetation” is defined<sup>41</sup> as follows:

Vegetation with continuous or near continuous canopy, or sub canopy or ground cover and any adjacent individual plants or groups of plants that connect to the continuous area in terms of species, structure or ecological gradient. It does not include vegetation planted as a crop, garden or pasture or understorey in forests.

(Underling added).

<sup>40</sup> Referred in P W Mawhinney 10<sup>th</sup> affidavit [Environment Court (2015) document 61].

<sup>41</sup> AUP chapter J1 (Definitions) p 32.





The underlining shows that the understorey of forest is specifically excluded from the definition of "contiguous vegetation". "Understorey" is not defined in the AUP or in the Act. A dictionary definition of understorey is:

An underlying layer of vegetation specifically the vegetative layer and especially the trees and shrubs between the forest canopy and the ground cover.

[53] Removal or alteration of indigenous vegetation within 20 metres of the stream at 60 Bethells Road, and on any other part of the and would require restricted discretionary consent (again subject to any existing use).

*Plan Change 4 as it effects Chapter E15*

[54] There is one proposed plan change to the AUP. Plan Change 4 ("PC4") was notified on 28 September 2017. Parts of PC4 have immediate legal effect upon notification under section 86B(3) of the Act.

[55] In particular PC4 included a new rule A44 into Chapter E15 with immediate effect:

(A 44)	Vegetation alteration or removal not otherwise provided for, and not subject to any standard listed in E15.6.	P
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[56] The Council's position is that if Mr Mawhinney could show that the removal of indigenous vegetation was purely of understorey, outside significant ecological areas, and not for the purposes of track maintenance or within 20 metres of any stream, then the activity may come within rule A44. However, it said that information had not been provided by Mr Mawhinney to confirm that all of those criteria have been considered or could be met when harvesting *Pinus radiata*. The Council did concede that the court is able to make a finding that rule A44 permits indigenous vegetation clearance that would occur as part of harvest. It may not have realised the strength of that concession because it really contradicts the previous argument. The point is that if the court finds that the existing use includes removal of vegetation (not simply understorey) which is inside significant ecological areas or is for the purpose of track maintenance, or is within 20 metres of any stream then it does not matter what the district rules say: the use may be continued (but subject to any regional rules to be discussed soon) as an existing use.



*Chapter H (Zone)*

[57] Chapter H20 makes forestry a permitted activity in the Waitakere Foothills zone of the standards are met.

[58] The standards applying to forestry activities in the Rural — Waitakere Foothills zones are:

**Rule H20.6.7 Forestry**

The following standards apply to forestry:

- (1) forestry activity on a site must not exceed 2 hectares;
- (2) forestry must be carried out at least 10m from any adjoining site boundary unless the landowner of the forest also owns or controls the adjoining site, or the adjoining site is an area identified in the Significant Ecological Areas Overlay or the adjoining site is already forested;
- (3) forestry must be carried out at least 5m from the bank of a permanent stream, river, lake, wetland or coastal edge;
- (4) forestry must be carried out at least 5m from an area identified in the Significant Ecological Areas Overlay; and
- (5) portable sawmills must be located on a site for no more than six months in any 12 month period. Where a portable sawmill has been located on a site for longer than six months in any 12 month period, the use of a portable sawmill on the site will be considered as a rural industry being a non-complying activity in the Rural — Waitakere Foothills Zone.

[59] If forestry does not meet those standards, it is a discretionary activity under Table H20.4.1 Activity (A20).

*The Overlays*

[60] In relation to the small area within the Outstanding Natural Landscapes overlay, on Lot 1 DP 32087 ancillary forestry earthworks are permitted under rule (A26) and are subject to the same standards.

[61] District Rule E12.6.4 sets out 13 standards for ancillary forestry earthworks to be considered permitted. Any ancillary forestry earthworks above and beyond those covered by that right would need to comply with all of these standards in order to be treated as permitted.



*Part E11 (Regional Rules)*

[62] Before the district rules in Chapter E12 there are regional rules in Chapter E11. Earthworks related to forestry activities may also require discretionary consent under the regional plan if a long list of standards<sup>42</sup> is not met. Those provisions may well apply to any proposed logging operators on the land even if I hold there is an existing use of forestry.

### 3. The relevant law, the activity of “forestry” and the issues

#### 3.1 Existing uses and changing plans

[63] Section 10 RMA states:

#### **10 Certain existing uses in relation to land protected**

- (1) land may be used in a manner that contravenes a rule in a district plan or proposed district plan if —
  - (a) either —
    - (i) the use was lawfully established before the rule became operative or the proposed plan was notified; and
    - (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:
  - (b) or —
    - (i) the use was lawfully established by way of a designation; and
    - (ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.
- (2) subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless —
  - (a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and
  - (b) the territorial authority has granted an extension upon being satisfied that —
    - (i) The effect of the extension will not be contrary to the objectives and policies of the district plan; and
    - (ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.



<sup>42</sup> E11.6.4 Standards for ancillary forestry earthworks.



- (3) this section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.
- (4) For the avoidance of doubt, this section does not apply to any use of land that is —
  - (a) Controlled under section 30(1)(c) (regional control of certain land uses); or
  - (b) Restricted under section 12 (coastal marine area); or
  - (c) Restricted under section 13 (certain river and lake bed controls).
- (5) Nothing in this section limits section 20A (certain existing lawful activities allowed).

[64] There are a number of issues as to the application of section 10 RMA. The first is how is it applied when there have been a number of relevant plans

[65] The leading authority on the relevance of changing plans to existing uses is *Rodney District Council v Eyres Eco-Park Limited*<sup>43</sup> ("*Eyres Eco-Park*"). In that case there were three rules relevant to the claimed existing use: a 1988 rule, a 1995 rule, and a 2000 rule as described by O'Regan J giving the judgment of the Court of Appeal. The applicant at first instance, Eyres, claimed that<sup>44</sup>:

... its existing use right is defined by reference to the use of the land and the effects of that use prior to the introduction of the 1988 rule. The council says that the existing use right is defined by reference to the lower scale of use and reduced effects of that use at the time of the introduction of the 2000 rule by the notification of the proposed plan.

[66] The Court of Appeal over-ruled both the Environment Court and the High Court<sup>45</sup>, concluding:

... that the existing use right must be assessed by reference to the activity on the land, and the effect of that activity, at the time the current rule (here the 2000 rule) came into force, not at the time the initial rule (the 1988 rule) came into force.

[67] Usefully, O'Regan J giving the decision of the Court added<sup>46</sup>:

That does not mean, however, that the extent of the use, and the effect of that use, as at the date of the coming into force of the initial rule will necessarily be irrelevant to the analysis in all cases. We say that because s 10(1)(a)(i) refers to a use which is "lawfully established". In the context of the present case, the use would have been "lawfully established" as at the coming



<sup>43</sup> *Rodney District Council v Eyres Eco-Park Limited* [2007] NZRMA 320 (CA); (2007) 13 ELRNZ 157.  
<sup>44</sup> *Eyres Eco-Park* above n43 at [4].  
<sup>45</sup> *Eyres Eco-Park* above n43 at [14].  
<sup>46</sup> *Eyres Eco-Park* above n43 at [16].

into force of the 2000 rule only if it was in accordance with the existing use right applying as at the coming into force of the 1995 rule, which in turn would have been lawfully established only if it complied with the existing use right arising on the coming into force of the 1988 rule. There is no doubt that the extent of the use in 2000 in this case was in accordance with the existing use right applying at the coming into force of both the 1988 rule and the 1995 rule.

[68] The effect of the Court of Appeal's decision is that I need to assess the factual situation at each of the relevant dates identified in Part 2.1 of this decision.

*Cyclical and long-term activities*

[69] An existing use needs to take into account that all aspects of an activity may occur frequently or even annually. For example some activities are seasonal or cyclical over periods of years.

[70] In *Rodney District Court v Eyres Eco-Park Limited* the Court of Appeal identified an approach<sup>47</sup>:

... that suggests that a "snapshot" view will be taken of the effects of the relevant activity on the day that the new rule comes into force.

It continued:

That is not the correct approach, however, Some enterprises are subject to variations within the scope of their normal operation. For example, some farming enterprises are subject to significant seasonal variations in stock numbers, with consequent variations in effects. In this context an existing use is to be assessed on the basis of the normal year round operation, not the point in the operational cycle existing on the day the new rule takes effect.

[71] In other words, the principle is that each and every separate activity that makes up a cyclical use need not be carried out in each 12 month period.

[72] An example of an activity with a long cycle is the building and use of a house. Once built, the house may be used for many years before it is replaced. However, the privilege of building a house is part of the use, so that if the existing house burns down, a new one may be erected on the same spot even though a period much greater than one year has elapsed since the original house was built.

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<sup>47</sup> *Eyres Eco-Park* above n43 at [18].





[73] Similarly the growing of trees for timber is cyclical and runs with the land. The common law<sup>48</sup> is that in the absence of any agreement between a landowner and a tenant to the contrary: "...the landlord has an implied right to enter on the land at all reasonable times to saw, and to cut and carry away the trees" citing *Lifard's Case*<sup>49</sup> from the C17<sup>th</sup>, and *Hewitt v Isham*<sup>50</sup> from the C19<sup>th</sup>. Further "the destruction of germens, or young plants destined to become trees, is waste"<sup>51</sup>. In other words, if the trees are on the land whether planted or by natural regeneration, the landowner has the right to harvest them, which may be many years later.

[74] The same approach has been applied in New Zealand under our resource management laws. Under the Town and Country Planning Act 1977 the Planning Tribunal accepted that "... permission to plant exotic forest implies permission to harvest"<sup>52</sup>, and that principle has been applied under the RMA — *Aubade NZ Ltd v Marlborough District Council*<sup>53</sup>.

#### *Lesser effects*

[75] Section 10 requires that to be an existing use an activity has to have effects that are the same or similar as the previously lawful activity. What happens if the adverse effects are less intense or smaller in scale? Does that disqualify the current activity from being an existing use? No authority was quoted to me, but in my view that would be an absurd result. Section 10(1) must be read as if underlined words were added as follows:

... the effects are the same or similar or, if adverse, less in character, intensity and scale ...

### 3.2 The meaning and practice of forestry

[76] Preparation of the land for forestry in the 1950s through to the 1970s used at least two different techniques (or a combination of both). One was to clear the land by burning, or with bulldozers; the other was to cut parallel lines through the existing scrub or bush. Either way, some preparation was needed to avoid young pines being overgrown by other

<sup>48</sup> *Halsbury's Laws of England* Vol 52 (Forestry) at [56].

<sup>49</sup> *Lifard's Case* (1614) 11 Co Rep 466 at 52a.

<sup>50</sup> *Hewitt v Isham* (1851) 7 Exch 77.

<sup>51</sup> *Halsbury's Laws of England* above n48 (citing *Phillips v Smith* (1845) 14 M&W 589 at 594).

<sup>52</sup> *Marlborough Forest Owners Association Inc v Marlborough County Council* (1980) NZTPA 167 at 183.

<sup>53</sup> *Aubade NZ Ltd v Marlborough District Council* [2015] NZEnvC 154 at [22].





plants. Radiata pine are notoriously intolerant of shade and die if not able to obtain sun.

[77] The seedling pines were then planted in lines at densities varying between 400 to 1,600 stems per hectare. The wide variation was because the optimum densities for different conditions had not yet been established.

[78] Almost all pine plantations needed initial weed control and/or "release" cutting, because until the young trees grew higher than the surrounding vegetation they were vulnerable to shading and competition for water and nutrients. Subsequent silvicultural management varied particularly as to the amount of trimming and pruning that was undertaken. The trees were allowed to grow for about 25 to 35 years. Twenty-three years was about the minimum for *Pinus radiata* to provide saw logs with millable timber (ie not just fence posts).

[79] When the trees were mature, usually the whole stand was clearfelled: all the pines were felled in a short period, the crown and branches were lopped off as slash, and the logs were hauled over the ground<sup>54</sup> to "landings" or marshalling areas where they could be loaded onto logging trucks. Tracks for skidders and roads for logging trucks had to be built into the forest. Until trucks gained more power considerable care was needed with the grade of the roads in the 1960s and 1970s because the loads were so heavy that trucks could not get up steeper slopes.

[80] I conclude that an existing use of forestry includes the whole cycle from preparation, planting, through growing and maintenance to harvesting and removal. Ancillary activities, which are part of the use include construction of tracks, landings and roads (subject to regional plan requirements in relation to crossings of waterways and sediment control) and destruction/removal of understorey and adjacent vegetation. For a crop of Radiata pines the whole process may, as described above, take place over a period 25 to 35 years before the cycle can begin again.

[81] The fact that there is a gap of (say) 30 years between the first planting and the second does not mean that the existing use has been discontinued under section 10(2) RMA. On the other hand, a gap of more than 12 months between termination of felling and new planting might trigger section 10(2) RMA.

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<sup>54</sup> Steeper sites used aerial wires.



### 3.3 The issues

[82] To establish whether or not forestry, as described in this case, is an existing use of the land the questions are:

- (1) what are the facts — what is the history of use of the land for forestry?
- (2) was the claimed existing use of forestry lawfully established as at the dates each of the relevant plans came into force and, if so, at what character, intensity and scale?

[83] The land has gone through nearly two cycles of exotic forestry of radiata pines involving preparation and planting, growing and management and harvesting. I now consider the more detailed history to establish the answers to those questions.

## 4. **The history of the use of the land**

### 4.1 The direct evidence in relation to Cycle 1 (1953 to 1994)

#### *Preparation and planting*

[84] In 1953 the Waitakere Forest was owned by a forestry company call Henderson and Pollard Limited. There is no direct evidence about the original preparation of the land for planting, but clearly lines had been cut (at a minimum) because the pines survived.

The Waitakere Forest was planted in various smaller areas from sometime after 1952 through to 1960. The plantings are identified on a map<sup>55</sup>, prepared by Carter Holt Harvey Forests Ltd (“Carter Holt”) when it subsequently took over<sup>56</sup> the Waitakere Forest in 1986. The Carter Holt map – Attachment “C” – does not give the original planting dates for the first cycle on Blocks 1, 3 and 4, only the replanting dates. However, I infer that land had been through a first cycle because Mr Mawhinney recalls<sup>57</sup> riding through the forest in his youth. Further, the Planning Tribunal in a previous proceeding between, effectively, the same parties found in 1994/5 that some of the forest had been harvested in “about 1978”

<sup>55</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 89 [Environment Court (2015) document 61].

<sup>56</sup> P W Mawhinney 10<sup>th</sup> affidavit para 16 [Environment Court (2015) document 61].

<sup>57</sup> See P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 89 [Environment Court (2015) document 61].





(see *Waitakere Forestry Park Ltd v The Waitakere City Council*<sup>58</sup>). Assessing a minimum 25 year growing period, that suggests planting of Blocks 1, 3 and 4 in about 1953.

[85] Two parallel water courses were left unplanted. These run from the borders of Blocks 2 and 5 northeast to the boundary of the Waitakere Forest, as shown in the Carter Holt map<sup>59</sup>. The map shows various other small areas as not being planted in pines. Other areas of regenerating bush in Blocks 2 and 5 were also left unplanted as shown on Attachment "C" (the white areas)

#### *Growing and management*

[86] There is no evidence as to release cutting, pruning or thinning before the 1980s<sup>60</sup>. Indeed Mr Mawhinney's evidence was that Carter Holt did not prune their forests.

#### *Harvesting*

[87] As described above, Blocks 1, 3 and 4 were harvested in 1986, 1980 and 1979<sup>61</sup> respectively.

[88] Harvesting of Blocks 2 and 5 by Carter Holt took place<sup>62</sup> during the summers of 1992/93 and 1993/94. The aerial photograph<sup>63</sup> taken for the Council in May 1993 shows that these blocks were clearfelled. Most of the land in these blocks appears either white, denoting bare ground, or brown which means it is covered in dead vegetation or slash. There are green patches along the northern watercourse and on the borders of Blocks 2 and 5.

#### 4.2 The direct evidence on Cycle 2 (1979 to present)

##### *Preparation*

[89] Mr Mawhinney did not describe any additional ground preparation. I infer that he

<sup>58</sup> *Waitakere Forestry Park Ltd v The Waitakere City Council* (Planning Tribunal Decision A77/94 p 2).

<sup>59</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 89 [Environment Court 2015 document 61].

<sup>60</sup> P W Mawhinney 10<sup>th</sup> affidavit para 31 [Environment Court (2015) document 61].

<sup>61</sup> Carter Holt map, Attachment "C".

<sup>62</sup> P W Mawhinney 10<sup>th</sup> affidavit para 32 [Environment Court (2015) document 61].

<sup>63</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 77 [Environment Court (2015) document 61].





simply planted on to the bare blocks.

### *Planting*

[90] Block 4 was replanted in 1979 and Block 3 in 1980 as shown on the Carter Holt map. The land in Block 1 at (now) 60 and 62 Bethells Road was replanted in 1986.

[91] An aerial photograph<sup>64</sup> from 1988 shows darker mature forest on Blocks 2 and 5, lighter (younger) forest on Blocks 3 and 4 and very youthful plantings (only two years old) on the 60/62 Bethells Road Block 1. It also shows areas of lighter vegetation in the valleys and to the west of the property, together with logging roads and landings.

[92] A company controlled by Mr Mawhinney (or some of his trusts) purchased<sup>65</sup> most of the Waitakere Forest from Henderson and Pollard Limited on 5 June 1992 with the vendor reserving the right to harvest the mature forest, being the areas outlined in bold on the Carter Holt Plan (ie Blocks 2 and 5 on plan "C"). The cutting rights to the younger forests came with the land to Mr Mawhinney's interests when the purchase was settled on 4 June 1993.

[93] Carter Holt harvested<sup>66</sup> the mature forest on Blocks 2 and 5 on the western side of the Waitakere Forest during the summers of 1992/93 and 1993/94.

[94] In May 1993, the Waitakere City Council commissioned aerial photography for the purposes of preparing its proposed district plan under the RMA. A photograph of the Waitakere Forest was produced<sup>67</sup> by Mr Mawhinney showing the areas of forest and clearance at that time.

[95] After the mature blocks were harvested they were replanted in the following winters (ie 1993 and 1994) by the applicant<sup>68</sup> with *Pinus radiata* seedlings from Cambridge Nurseries<sup>69</sup>.

<sup>64</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 75 [Environment Court 2015 document 61].

<sup>65</sup> P W Mawhinney 10<sup>th</sup> affidavit paras 24 and 28 and pp 114 et ff, Exhibit A [Environment Court (2015) document 61].

<sup>66</sup> P W Mawhinney 10<sup>th</sup> affidavit para 32 [Environment Court (2015) document 61].

<sup>67</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 77 [Environment Court (2015) document 61].

<sup>68</sup> P W Mawhinney 10<sup>th</sup> affidavit para 33 [Environment Court (2015) document 61].

<sup>69</sup> P W Mawhinney 10<sup>th</sup> affidavit para 34 [Environment Court (2015) document 61].



[96] On 18 July 1994, the Waitakere City Council issued<sup>70</sup> a certificate of compliance under section 139 RMA for the forestry use to be carried out without resource consent “due to an existing use right”. The certificate identifies the land to which it applies as Lot 5 DP 158029 and describes the activity simply as “FORESTRY”. The certificate is expressed to be subject “... compliance with any rules/restrictions imposed by the District Plan ...”. Most of the land in Schedules 1 and 2 was included in Lot 5 DP 158029.

### *Growing*

[97] Part of Block 1 is now 62 Bethells Road (Lot 4 DP 162886). In respect of that Mr Mawhinney described how he organised<sup>71</sup> the pruning and thinning of the 1986 crop.

[98] On 16 February 1994, for insurance purposes<sup>72</sup> a forestry consultant, Mr Barton, certified the stand of trees planted in 1986 (partly located in what was to become Lot 4 DP 162886) at 62 Bethells Road as follows:

Eight year old stand well stocked with ca. 340 stems/ha, and pruned to 5.7m ht. Tree form generally very good.

[99] Mr Barton wrote<sup>73</sup>:

Newly planted stand is in cutover. Stocking averages 930 per ha but is variable because of slash heaps and some natural regeneration.

Mr Mawhinney said<sup>74</sup> this clearfelled area shown in the aerial photograph (his Exhibit A, page 76) on Blocks 2 and 3 had an average stocking rate of 930 stems per hectare. I believe Mr Mawhinney was actually referring to his Exhibit A, page 75 because page 76 shows only Block 1.

[100] In 1995, noxious weeds competing with the young radiata pines were sprayed to eradicate them. Mr Mawhinney produced<sup>75</sup> some of the invoices for the spraying.

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<sup>70</sup> P W Mawhinney 10<sup>th</sup> affidavit para 48 [Environment Court (2015) document 61].  
<sup>71</sup> P W Mawhinney 10<sup>th</sup> affidavit para 49 [Environment Court (2015) document 61].  
<sup>72</sup> P W Mawhinney 10<sup>th</sup> affidavit para 50 [Environment Court (2015) document 61].  
<sup>73</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 150 [Environment Court (2015) document 61].  
<sup>74</sup> P W Mawhinney 10<sup>th</sup> affidavit para 51 [Environment Court (2015) document 61].  
<sup>75</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, pp 172 to 174 [Environment Court (2015) document 61].





[101] In 1997, another aerial photograph<sup>76</sup> was flown in which releasing lines can be seen. Release cutting involved<sup>77</sup> the clearance of gorse and pampas along the planting lines. The rows of *Pinus radiata* in the tree crop that includes what is now Lot 4 DP 162886 at 62 Bethells Road can also be seen. They had been grown on continuously since planting in 1986.

[102] As part of its district plan preparation the Council inspected the subject land on 14 August 1997. Its records observed it had been replanted in pine. Decision Notice<sup>78</sup> 39 dated June 1998 in respect of the proposed district plan recorded<sup>79</sup> at item 3.18:

The property was visited on 14/8/97 and it was confirmed that the majority of the area identified as Managed Natural Area is vegetation that has grown back after the removal of pine. There was a very high gorse component, and most of the cutover area had been replanted in pine and other timber species.

#### 4.3 Other evidence

##### *The Planning Tribunal Decision of 1994*

[103] As it happens, the question of existing use of this land has already been the subject of a decision of the Planning Tribunal (predecessor of the Environment Court). In *Waitakere Forestry Park Limited v The Waitakere City Council*<sup>80</sup> (“*Waitakere Forestry Park*”) issued on 28 September 1994. The Planning Tribunal was considering an application for declarations in respect of a 128-hectare block of land at “Bethells Road Waitakere”. Part of the block considered in that proceeding is the 89 hectares subject to the current proceeding.

[104] The issue before the Planning Tribunal was slightly different in those proceedings. Sheppard PPJ summarised it as follows:

<sup>76</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 78 [Environment Court (2015) document 61].

<sup>77</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 78 [Environment Court (2015) document 61].

<sup>78</sup> Under clause 11 Schedule 1 RMA.

<sup>79</sup> Item 3.18 – P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, pp 189 et ff [Environment Court (2015) document 61].

<sup>80</sup> *Waitakere Forestry Park Limited* above n58.





The Waitakere City Council, being the territorial authority, maintains that the activity is subject to controls in its district plan on clearing of native trees and bush. The applicant maintains that those controls are not applicable to its forestry activities because those activities are authorised as an existing use. That is not accepted by the Council. The applicant has therefore applied to the Tribunal for certain declarations to resolve the issue.

[105] The findings of fact by the Planning Tribunal in 1994 included<sup>81</sup>:

At no time since the district scheme became operative has the forestry use been discontinued for a continuous period of more than 12 months. It is the applicant's intention that the forestry use will continue on the same or similar character, scale and intensity as previously, and that will require destruction of some competing native vegetation.

[106] The Planning Tribunal attempted to identify the issue more precisely<sup>82</sup>:

The heart of the issue is whether the clearing of native trees and bush in the course of forestry activities on the land was lawfully established to the extent that is now controlled before the relevant rules became operative being 26 February 1992 when the rule introduced by Scheme Change 3 became operative by which clearing of native trees and bush is controlled.

That sentence, with its two references to "controlled", is rather obscure.

[107] The Tribunal's findings were<sup>83</sup>:

Although there may once have been native trees or bush on the land, the evidence did not establish whether before that date native trees or bush had been cleared to the extent that is now controlled in the course of forestry activities. On the Council's behalf Mr Brownhill fairly accepted that clearance of native trees and bush had been occurring on the land prior to 26 February 1992. However, he did not go so far as to concede that such clearance passed the threshold where the control that became operative in 1992 would \* apply, and in the absence of some evidence of that he could not be expected to have conceded that on the Council's behalf.

In the absence of such evidence we are not able to make a finding that such clearance now would represent effects of the use of the land for forestry which are the same or similar character, intensity and scale to those which existed before the relevant rules became operative. [Asterisk added]

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<sup>81</sup> *Waitakere Forestry Park Limited* above n58.

<sup>82</sup> *Waitakere Forestry Park Limited* above n58 p 4.

<sup>83</sup> *Waitakere Forestry Park Limited* above n58 p 4.



In my view the last sentence in the first paragraph is confusing with its negatives and in fact needs a further “not” to give the meaning the Tribunal intended.

[108] The application was declined and the Tribunal made no declaration.

[109] While the Planning Tribunal refused to make a declaration that the clearing of native bush was an existing use, it did make two findings of fact in its decision which Mr Mawhinney relies on. The first is its finding that the land had been “clearfelled”. Mr Mawhinney advised me (in submission<sup>84</sup> rather than an affidavit — but I accept his statement on this) that the Tribunal had before it the 1993 aerial when making that finding, the second is its statement (quoted above) that<sup>85</sup> since the district scheme became operative the forestry use had not been discontinued.

[110] Mr Mawhinney produced<sup>86</sup> a photograph taken in 1988 by New Zealand Aerial Mapping Services Limited. It shows quite extensive parts of the subject land being used to grow *Pinus radiata* at that time. This evidence of Mr P W Mawhinney in this proceeding is consistent with and fleshes out the finding of the Planning Tribunal.

*The certificate of compliance*

[111] On 18 July 1994, the Waitakere City Council issued<sup>87</sup> a certificate of compliance under section 139 RMA for the forestry use to be carried out without resource consent “due to an existing use right”. The description of the activity for which the certificate was issued is stated simply “Forestry” which is not a defined term in the Waitemata District Scheme taken over by the Waitakere City Council.

**5. Findings as to character, scale and intensity of forestry use**

**5.1 The Council’s arguments**

[112] The Council argues that the existing forestry use extinguished when various unspecified silvicultural activities were not undertaken. That is set out, for instance, in the

<sup>84</sup> P W Mawhinney, submissions 9 June 2017 at 53 [Environment Court document 11].

<sup>85</sup> *Waitakere Forestry Park Limited* above n58 p 4.

<sup>86</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 33.

<sup>87</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 148.





## Synopsis of Submissions dated 3 February 2017:

...  
 Council does not believe that the logging can be carried out without a resource consent which Mr Mawhinney has not applied for. Mr Mawhinney argues that the forestry rights are an existing use and that resource consent is not required. Council's position is that something more is required than just growing trees and there needs to be silvicultural activities. As there has been no active management of the forest (which is supported by the affidavit of Andrew Dick provided by Mr Mawhinney) any existing use rights have now expired.

[113] In effect the Council's argument is that active management is necessary and that merely allowing trees to grow after being planted is insufficient to establish a use. I find that is incorrect for several reasons. First, historically silviculture involved a range of management from *laissez fleurir* to strict regimes of clearing and releasing, pruning, thinning, coppicing and pollarding and sustainable harvesting. But even the most passive "watching the trees grow" management did not invalidate an owner's privilege<sup>88</sup> to harvest timber. An owner did not even need to occupy the land (it could be tenanted) while the trees were growing. Second, the Environment Court held in *Mackenzie Branch of Federated Farmers of New Zealand Inc*<sup>89</sup> that "... the growing of self-sown [ie wilding] trees comes within section 9(3) of the RMA as a way of using land...", so, logically does the growing of planted trees. Third, given the importance of having particular regard to "the effects of climate change"<sup>90</sup> and the capacity<sup>91</sup> of trees, including radiata pine, to take up CO<sub>2</sub>, it would be in breach of the purpose of the Act to discount passive management of carbon sequestering trees as a use of land.

[114] Another of the Council's general arguments is that Mr Mawhinney (as trustee) has no property in the largest (51.5860) central block and therefore can have no existing use. This argument can be shortly dealt with: a person (owner or occupier) does not hold an existing use. An existing use privilege or liberty right<sup>92</sup> exists (or not) as a matter of fact regardless of ownership and runs with the land, subject to the section 10(2) RMA cut-off for non-exercise after one year.

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<sup>88</sup> In the Hohfeldian sense, (otherwise a "liberty right"), as discussed in *Halsbury's Laws of England* above n48.

<sup>89</sup> *Mackenzie Branch of Federated Farmers of New Zealand Inc* [2015] NZRMA 171 at [32].  
<sup>90</sup> Section 7(i) RMA.

<sup>91</sup> At 800 tonnes/hectare over 30 years on average for *Pinus radiata*.

<sup>92</sup> *Dunedin City Council v Saddle Views Estate Limited* [2016] NZEnvC 107 at [87] and [92].





[115] The Council's third general argument is that consents are required from the regional council for:

- earthworks — disturbance of land surfaces — over one (1) hectare; and
- roading/tracking over 100 metres in length.

Mr Mawhinney accepts that some regional council consents may be necessary, but submits quite correctly that is irrelevant to the existing land use issue.

[116] Finally the Council argues that the existing use only extends to the *Pinus radiata* and not to removal of native vegetation. That is a question of fact and degree in relation to each block of land which I now consider.

#### 5.2 Was exotic forestry lawfully established as at 20 December 1984?

[117] As at 20 December 1984 the situation on the Waitakere Forest land was (see Attachment "C"):

- Blocks 1, 2 and 5 were extensively planted in large stands of maturing radiata pines (with some areas of regenerating bush particularly along watercourses. In other words, these blocks were near the end of their first cycle; and
- Blocks 3 and 4 had completed their first cycle and been replanted in 1980 and 1979 respectively so at 20 December 1984 they contained small young pine trees.

[118] On the balance of probabilities I hold that the planted areas of Blocks 1 to 5 are likely to have been cleared of native trees (ie woody vegetation more than 6 metres high) before planting at the commencement of the first cycle in the years 1953 to 1960. Certainly that was the technique adopted on Block 1 a few years later (in 1986) as shown on photograph 75. My view is supported by the Planning Tribunal's finding in 1994 that Block 2 and 5 had been clearfelled.

[119] The maturing pines are visible on Exhibit A, page 75 as providing a uniform canopy in 1988 — and I find that would have been likely to have been present on 20 December 1984.



[120] The character of the activity can be inferred from the photographic record. The earliest photograph<sup>93</sup> in the evidence dates from 1988. While it shows the Waitakere Forest with four years more growth than existed at 20 December 1984, the picture on the earlier date would have been similar. The logging roads and landing sites are particularly noticeable at the western side of Blocks 3 and 4. That is consistent with those blocks having been clearfelled in part and replanted within the previous 8 or 9 years. Darker exotic forest is visible as the 1952, 1960 and 1959 stands on Block 2 and an extensive area of mature forest on Block 5.

[121] As for the scale of the use as at 20 December 1984, the areas planted are given as:

Block 1		10.8 ha
Block 2	21.0	
	7.4	
	4.2	
	<u>33.5</u>	33.5 ha
Block 3		24.4 ha
Block 4		26.4 ha
Block 5		36.2 ha
<u>Total</u> <sup>94</sup>		<u>131.3 ha</u>

That is a lesser area than the full Waitakere Forest planted since 1953 which was 160 hectares<sup>95</sup>. However, I have described an area to the east<sup>96</sup> was on sold elsewhere at the same time in 1993 as the Mawhinney interests settled the purchase of the remainder. Generally an existing use applies to each of the lots or titles that exist or which may be subdivided off.

[122] Again, on the balance of probabilities I infer that the intensity of clearance inside the planted areas was nearly complete in that few or no native (or introduced) trees are likely to have been left before those areas were planted. The areas left uncleared were the "white" areas on the Carter Holt plan (Attachment "C"). They are likely to have contained

<sup>93</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 75 [Environment Court (2015) document 61].

<sup>94</sup> P W Mawhinney 10<sup>th</sup> affidavit para 100 [Environment Court (2015) document 61].

<sup>95</sup> P W Mawhinney 10<sup>th</sup> affidavit para 99 [Environment Court (2015) document 61].

<sup>96</sup> The land in CT 423/246 (Auckland Registry): P W Mawhinney memorandum 13 January 2018 [Environment Court document 23].



native trees, shrubs and lower ground cover or gorse and other weedy species before planting.

[123] The planting density of pines was about 1,200 radiata trees per hectare<sup>97</sup>.

[124] I conclude that an existing use of forestry with a full cycle of clearance, planting, growing and felling had been established for the planted areas on Blocks 1 to 5 shown on the Carter Holt plan well before 20 December 1984.

### 5.3 As at 2 June 1988 (First Review)

[125] Mr Mawhinney argued (if I understand him correctly) that even if, for any reason, I do not find forestry was an existing use as at 20 December 2014, the difficulty is remedied by the coming into force, on 2 June 1978 of the First Review to the Waitemata District Scheme. He submitted that under the Review, forestry became (for 12 days from 2 to 14 June 1988) a predominant use. While "forestry" was a predominant use, it is not a defined term. I hold it involves the activities identified above in Part 3.2 of this decision.

[126] The Council disputed that forestry ever became a predominant use. I do not have to decide this in view of my findings as at 20 December 1984 when the first relevant plan came into force. I find that the existing use continued on 2 June 1988.

### 5.4 As at 14 June 1988 (Scheme Change 129)

[127] The same facts apply as for 2 June 1988 but the relevant law had changed: the Waitakere Forest was rezoned to Rural and "forestry" changed to require a conditional use activity. That is irrelevant because the existing use was established over the whole Waitakere Forest as from 20 October 1984.

### 5.5 As at 26 February 1992 (Scheme Change 3)

[128] The same situation as at 2 June 1988 applied in respect of the planted areas on Blocks 2 to 5.




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<sup>97</sup> P W Mawhinney 10<sup>th</sup> affidavit para 96 [Environment Court (2015) document 61].



[129] As for Block 1 I find it had been clearfelled and replanted in 1986. In the absence of an existing use that would have required a resource consent under Scheme Change 3 to the Waitemata District Scheme. However, I hold the clearfelling and planting was just part of the existing use established prior to 20 December 1984.

[130] On the basis of Mr Mawhinney's photograph 76 (taken in 1988) I conclude that no mature native trees were left on Block 1 (except possibly along the Bethells Road margin).

#### 5.6 As at 27 March 2003 (Waitakere District Plan)

[131] The Planning Tribunal found in *Waitakere Forestry Park Ltd*<sup>98</sup> that the planted areas on Blocks 2 and 5 were "clearfelled" by November 1993. That is an important finding because it means that at least in the planted areas any remaining native vegetation would have been (at most) ferns, grasses and shrubs, not trees. While the Planning Tribunal found that the "land" was clearfelled, I find from the aerial photographs produced to me that it was the areas planted in pines which were clearfelled, not the entire block.

[132] In 1993/94 the footprints of the first cycle's planted areas were largely replanted by Mr Mawhinney. Again, the existing use runs on for the planted areas shown on the Carter Holt plan.

[133] Strong confirmation of the existing use was the issue by the Council of a certificate of compliance for "forestry" on 18 July 1994. The district plan at the date of the issue of the certificate of compliance was the transitional district plan, being the Waitemata District Scheme deemed to constitute a district plan by section 373 RMA (there was no district plan prepared under the RMA until a proposed plan was notified in August 1995). I have described how the expression "forestry" was not defined in the transitional district plan, but "farm forestry" was. It included in part "... *the planting, maintenance and harvesting of exotic and native trees ...*". There is no reference in the definition to other silviculture practices such as releasing, pruning, thinning and transporting of logs — but the general cycle of forestry activity is recognised. The principal difference between "farm forestry" and forestry is that only 50% of a title could be used for the former.

[134] Mr Mawhinney says that the existing forestry use was the use carried out by Henderson and Pollard/Carter Holt, not the use defined in the district scheme.

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<sup>98</sup> *Waitakere Forestry Park Ltd* above n58 p 2.



[135] At the date of issue of the certificate of compliance, forestry was not a permitted activity under the Rural 3 zoning in the transitional district plan. The certificate of compliance expressly states it was issued “*due to an existing use right*”. That is curious wording for a certificate of compliance but, as Mr Mawhinney pointed out, at the date of issue of the certificate of compliance, existing uses were certified under section 139 RMA as activities that did not require resource consent. While section 139A RMA now provides for existing use certificates, that section was not enacted until ten years later on 10 August 2005. For the Council Mr McKinney suggested<sup>99</sup> that the existing use right ceased when Carter Holt left the land. However Mr Mawhinney says that does not square with the facts that:

- (a) the Carter Holt harvest had been completed more than 12 months prior to the issue of the certificate of compliance, as photographed in May 1993<sup>100</sup> (Exhibit A, page 77); and
- (b) the purchase from Carter Holt was settled<sup>101</sup> more than 12 months prior to the issue of the certificate of compliance.

[136] If the 12 month discontinuance period in section 10(2) RMA was to be applied the consent authority could not have issued the certificate of compliance because the existing use would have been extinguished. Mr Mawhinney says that the certificate of compliance was issued because the functionaries that did so believed the existing use right for forestry had not ceased when Carter Holt left the land. Indeed, the land was subsequently inspected by the consent authority as described above and its decision records that pine were growing on the land.

[137] I find that issue of the certificate of compliance for forestry is independent confirmation that the use had been lawfully established prior to the notification of any rule that the use might contravene, including in Waitemata District Scheme.

[138] As for the scale of the activity: the certificate of compliance was issued in respect of Lot 5 DP 158029, as recorded on the certificate<sup>102</sup>. The area of that allotment comprised 127.7150 hectares, and included the land in what is now Lot 4 DP 162886 at 62 Bethells

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<sup>99</sup> C D McKinney affidavit sworn 21 August 2015 para 30 [Environment Court (2015) document 7].  
<sup>100</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 148 [Environment Court (2015) document 61].  
<sup>101</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 145 [Environment Court (2015) document 61].  
<sup>102</sup> P W Mawhinney 10<sup>th</sup> affidavit at Exhibit A, p 148 [Environment Court (2015) document 61].





Road. That is demonstrated by a comparison of the deposited plan with the cadastral plan which is now Attachment "A". It was from Lot 4 DP 162886 at 62 Bethells Road that logs were harvested and sold to raise the money for the security for costs. That is, the certificate of compliance confirms that the forestry use in Lot 4 DP 162886 at 62 Bethells Road was lawfully established when the certificate was issued. The Carter Holt forest plan shows the tree crop was planted in 1986. The planting rows can be seen in the 1988 and 1993 aerial photographs. The trees had grown on continuously since planting. Most of Block 1, all of Blocks 2, 3 and 4, and part of Block 5 were included in Lot 5.

15 November 2016

[139] Little changed between 2003 and 2016 except that the pines grew larger. I find that as at the date the AUP became operative (at least in the relevant parts) there was existing use of exotic forestry over an area corresponding to the planted areas shown on the Carter Holt plan. The scale was reduced from that plan but the character of the planted areas on the land subject to the application was essentially the same.

[140] As for the intensity of use there had been no pruning or thinning except in Block 1. However the Mawhinney planting was at a lower intensity on Blocks 2 and 5 — 930 stems per hectare<sup>103</sup>.

Date of Hearing

[141] The final issue is whether forestry has been discontinued on any of the land as at the date of the hearing.

[142] At the hearing Mr Mawhinney was given leave to produce maps showing the extent of current forestry on the land. In his affidavit<sup>104</sup> of 2 November 2017 Mr Mawhinney produced some maps showing forestry on the larger titles covering the land as described in Schedule 1 above.

[143] Mr Mawhinney's maps did not cover the land in Schedule 2. Indeed the only evidence I have concerning that land is the Council's submissions referring to aerial photographs and observing that there are no extensive areas of pines planted on that land.

<sup>103</sup> P W Mawhinney 10<sup>th</sup> affidavit para 96 [Environment Court (2015) document 61].

<sup>104</sup> P W Mawhinney affidavit 2 November 2017 [Environment Court document 16].





Accordingly, the land in Schedule 2 is not considered further, and any declarations should be confined to forestry access.

## 6. Result

### 6.1 Forestry as an existing use on the land in Schedule 1

[144] I find that forestry as I have defined it above<sup>105</sup> is an existing use on those planted parts of the land shown in Attachment "D". I respectfully differ from the findings of the Planning Tribunal in 1994 in *Waitakere Forestry Park* for several reasons. First, the Planning Tribunal had been asked to make a declaration that "in the clearing of native trees and bush in the course of forestry activities" was an existing use on a "128 hectare block"<sup>106</sup>. In this case Mr Mawhinney has, belatedly, sought to restrict the declaration to the areas of the (reduced) Waitakere Forest which are actually planted (or used for roads/landings). Second I have considerably more evidence in this case than the Planning Tribunal had, in particular the Carter Holt plan and the photographs showing the forestry cycle on the land. Third I have, as stated earlier, found the reasoning of the Tribunal hard to understand in that despite its findings on clearance of native vegetation that (exotic) forestry was an existing use, it did not consider at all the inevitable effects of forestry operations on native vegetation at any stages of the forestry cycle. Fourth despite hearing the matter in September 1994 the Tribunal does not appear to have had the "Forestry" certificate of compliance dated 18 July 1994 referred to it. Fifth it found that the land subject to its application had been clearfelled and the evidence before me shows that parts were indeed clearfelled. Exhibit "A" p 75 shows no green vegetation whatsoever over extensive areas of Blocks 2 and 5. I simply do not understand what the Planning Tribunal thought had happened to any indigenous vegetation understorey within a tree-length of the exotic pines or on the hauler tracks and roadways. I find from the photographs (reinforced by memories of observations from my days as an aspiring bushman in 1960s and 1970s vacations) that the native vegetation was effectively destroyed by logging.

[145] Where I have more difficulty with the application is in knowing where the logging roads are on the land, and even more difficult is the ascertaining where those roads were contiguous to areas A to V as shown on the attached maps prepared by the Auckland Council and produced by Mr Mawhinney. I asked Mr Mawhinney to elaborate on this, which

<sup>105</sup> In Part 3.2 of this decision.

<sup>106</sup> *Waitakere Forestry Park Limited* above n58.



he did in his memorandum<sup>107</sup> of 25 January 2018. The Council did not challenge these.

[146] On the maps (comprising Attachment “D” to this decision) Mr Mawhinney has marked in purple highlighter<sup>108</sup> the loading areas, tracks and roads which he says are covered by the forestry existing use. The Council has confirmed<sup>109</sup> that if the court is minded to grant a declaration it would prefer that wording.

[147] On the basis of my findings that there is an existing forestry use on some of the remnants of the Waitakere Forest, I consider that declarations should be made. However, I do not accept the wording proposed by the applicant.

[148] There are a number of aspects of wording of the proposed declaration in respect of the land in Schedule 1 which I consider are either wrong or at least inappropriate. I will exercise my discretion under section 313 RMA to make the following changes:

- the reference to “right” to carry out forestry is incorrect and should be deleted. It is a common ambiguity to refer to “existing use rights”. In fact the word “right” does not occur in section 10 RMA, and legally an existing use is a privilege or liberty right not a claim right (which imposes a duty on someone else);
- the principal declaration should only relate to the parts of land within Blocks 1 to 5 which contained stands of pines. These are shown on the plans attached as “D”;
- to delete any reference to occupational safety requirements. While works may be necessary to comply with the Health and Safety at Work Act 2015, they are clearly not within the scope of the existing use since when the use was initially established (20 December 1984); the relevant statute did not exist;
- the references to roads and culverts should be expressed “subject to regional plan requirements”;
- the references to establishment repair and maintenance of “vehicle turning” should be extended to read “vehicle loading and turning areas” but should be confined to the stands being logged, not the whole title;

<sup>107</sup> P W Mawhinney memorandum 25 January 2018 [Environment Court document 27].

<sup>108</sup> P W Mawhinney submissions 25 January 2018 [Environment Court document 27].

<sup>109</sup> Memorandum 9 February 2018.





- removal or destruction of accessory vegetation should be confined to within one pine tree length of the perimeter of the stand of pines being harvested.

[149] Subject to those and other minor changes I am satisfied that the existing use of forestry was lawfully established as at 18 November 2016 on the parts of the land on Schedule 1 marked as A to V plus 60, 62 and 68 Bethells Road on the maps in Attachment D to this decision.

## 6.2 Forestry access over the land in Schedule 2

[150] The land in Schedule 2 no longer contains growing pines so to that extent the forestry use in relation to that land has lapsed. However, Mr Mawhinney claims — after the court raised this — that access rights are or will still be exercised. The Council agrees/disagrees. When the court raised this in its Minute of 26 January 2018. Mr Mawhinney suggested<sup>110</sup> that the second declaration should read:

The lessees and forestry right holders in the land listed in Schedule 2 herein have a (liberty) right to access, construct and use tracks, culverts, bridges, buildings and other works and facilities ancillary to and necessary for the purposes of establishing, maintaining and harvesting tree crops on the land listed in Schedule 1 without first obtaining resource consent to contravene a district rule (but not a regional rule).

[151] He explained that:

The drafting of the amended declaration now sought follows s2A(2) of the Forestry Rights Registration Act 1983 as regards the access. It is noted that s6 of that Act provides that the creation is a forestry right shall be deemed not to be a subdivision of land for the purposes of the RMA, and any right of access created as ancillary to a forestry right shall be deemed not to be the creation of a right of way under section 348 of the Local Government Act 1974.

[152] Mr Mawhinney's suggested wording goes a little too far in its suggestion there is an existing use "to reserve or grant rights" but otherwise the proposed declaration is largely appropriate.




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<sup>110</sup> Submissions 28 January 2018 Appendix A.



### 6.3 Costs

[153] As for costs, given the indulgences given to Mr Mawhinney to call further evidence — especially his affidavit of 2 November 2017 lodged after the hearing, with its vital maps, I do not consider, despite his success, that he should be entitled to apply for costs.

### 6.4 Other matters

[154] I also note that the declaration may be a pyrrhic victory for Mr Mawhinney because it is not at all clear to me how much of the land can be logged lawfully without first obtaining water and/or discharge permits from Auckland Council as regional Council. To reinforce that I will add a declaration C to that effect.

  
\_\_\_\_\_  
**J R Jackson**  
**Environment Judge**



#### **Attachments:**

- Attachment A: Cadastral plan.
- Attachment B: Aerial photograph of Waitakere Forest in 1988.
- Attachment C: Carter Holt planting map late 1980s.
- Attachment D: Maps A to V plus maps of 60, 62 and 68 Bethells Road, Waitakere (from P A Mawhinney submissions 25 January 2018) [Environment Court document 27].

"A"

Part Allot 16 PSH OF Waipā

Lot 2 DP 171964

Lot 2 DP 211869

Lot 3 DP 196590

Lot 4 DP 162886

Lot 24 DP 166519

Lot 5 DP 158544

Lot 20 DP 168374

Lot 6 DP 11093

Lot 7 DP 11093

Lot 1 DP 211869

Lot 8 DP 11093

Lot 18 DP 168374

Lot 933 DP 320387

(Lot 323)

Lot 309

Lot 1 DP 320387

Lot 323 DP 210991  
Lot 324 DP 210991

Lot 3 DP 204200

Lot 2 DP 204200

Lot 225 DP 210991

Lot 1 DP 49126

Lot 4 DP 60226

Lot 8 DP 58785

Lot 30 DP 133908

Lot 1 DP 204200

Lot 6 DP 58785

Lot 2 DP 60226

Lot 1 DP 58785

Lot 5 DP 58785

Lot 29 DP 133908

Lot 2 DP 58785

Lot 7 DP 58785

Part 1 of 2 DP 10692

Spatial Map Print

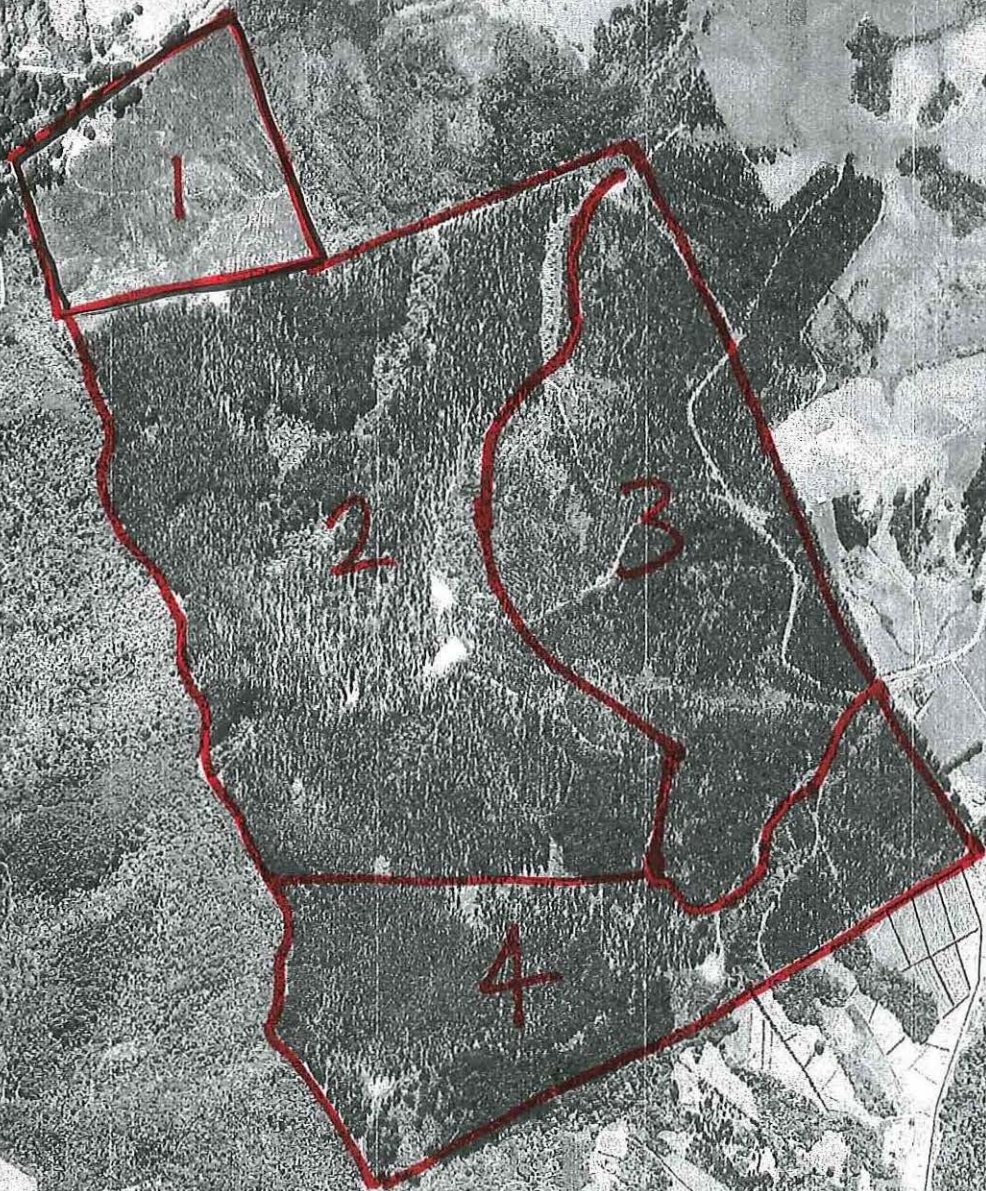
Scale 1:6000



86



"B"



Flown 1988

75



"C"

1:47000mE

BETHELLS RD.

ROW

ROW

ANZAC VALLEY RD.

SHALE RD.

VALLEY RD.

1.1 1986  
10.8 ha

2.1 1955

3.1 1980  
26.4 ha

21.9 ha

4.1 1979  
26.4 ha

5.1 1960  
36.2 ha



Carter Holt Harvey Forests Limited



WAITAKERE FOREST

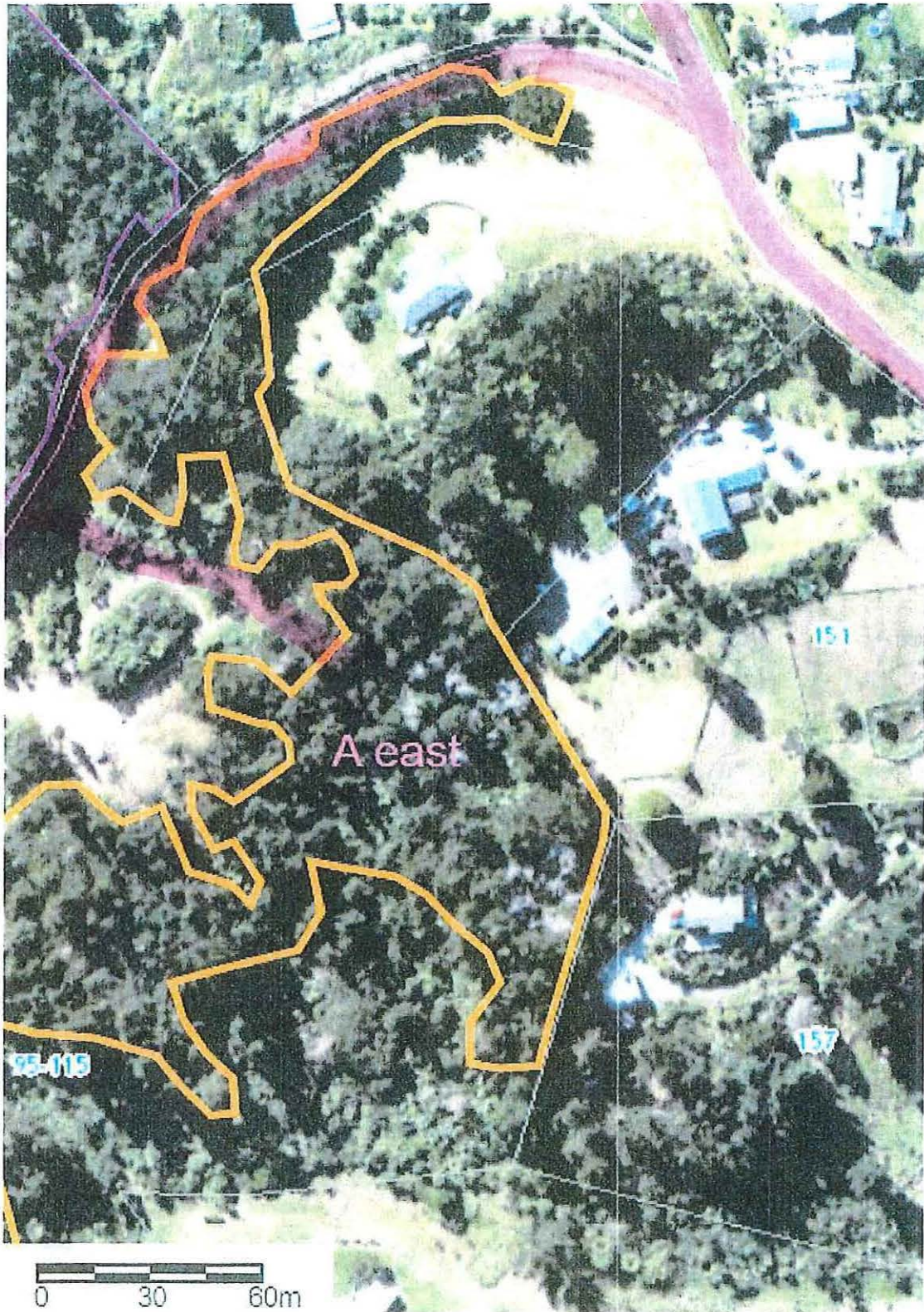
Scale 1:10 000

1266

89



“D”



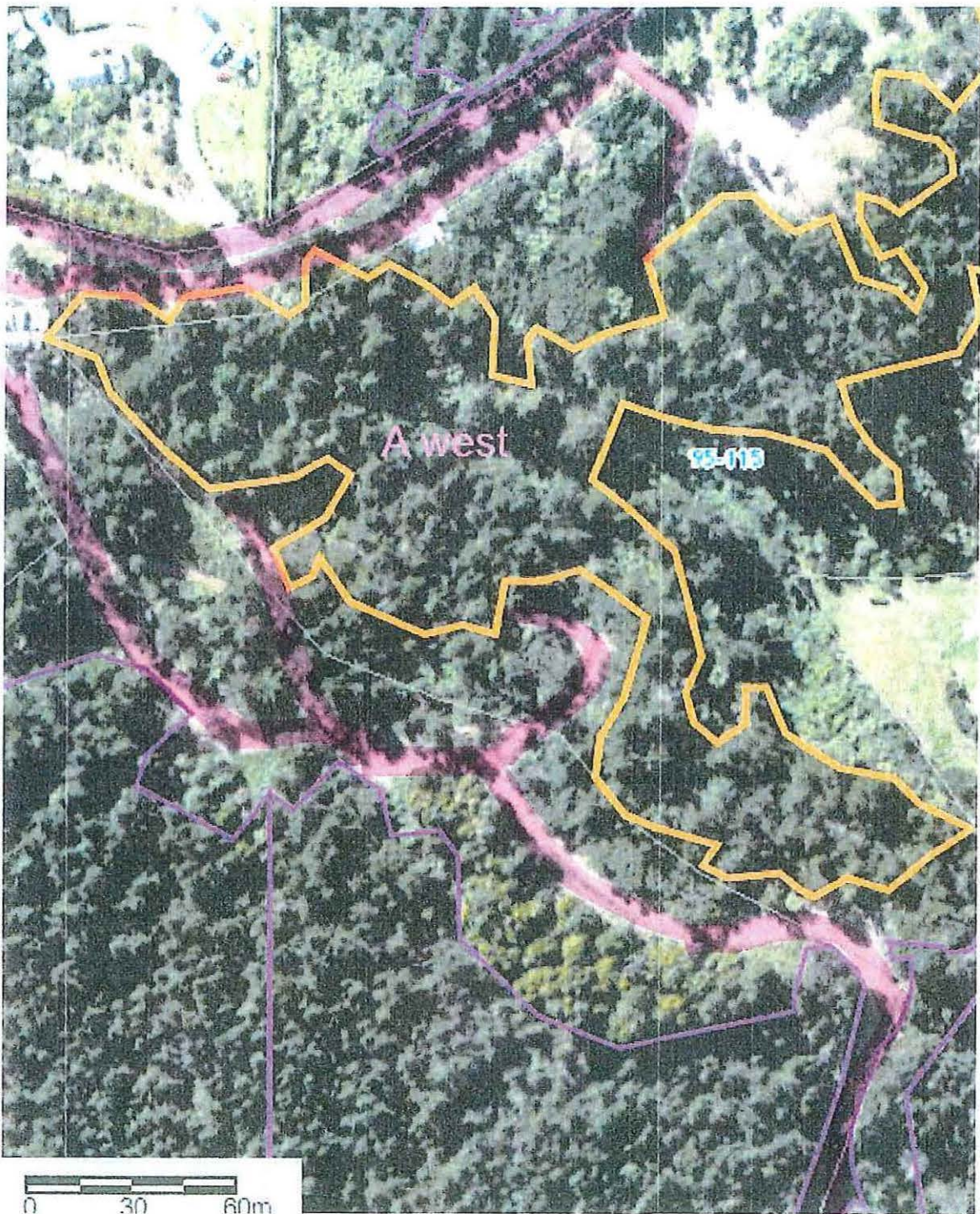
Map A East

Location: 95-115 Anzac Valley Road, north eastern part of Lot 933 DP 320387, and part of Lot 1 DP 320387

Area of predominantly pinus radiata in Map A east and west combined: 3.1 hectares







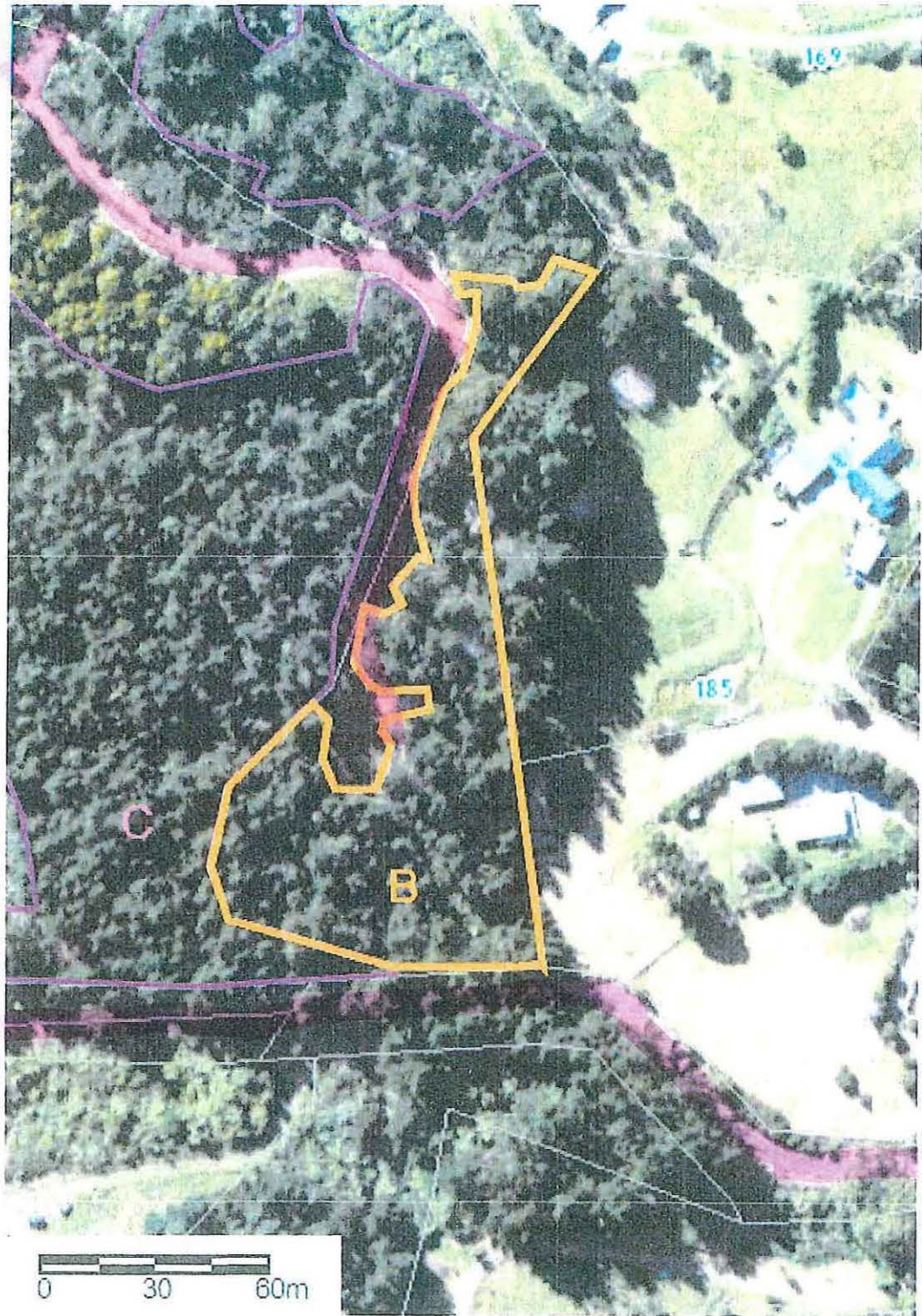
Map A West

Location: 95-115 Anzac Valley Road, north western part of Lot 933 DP 320387

Area of predominantly pinus radiata in Map A east and west combined: 3.1 hectares







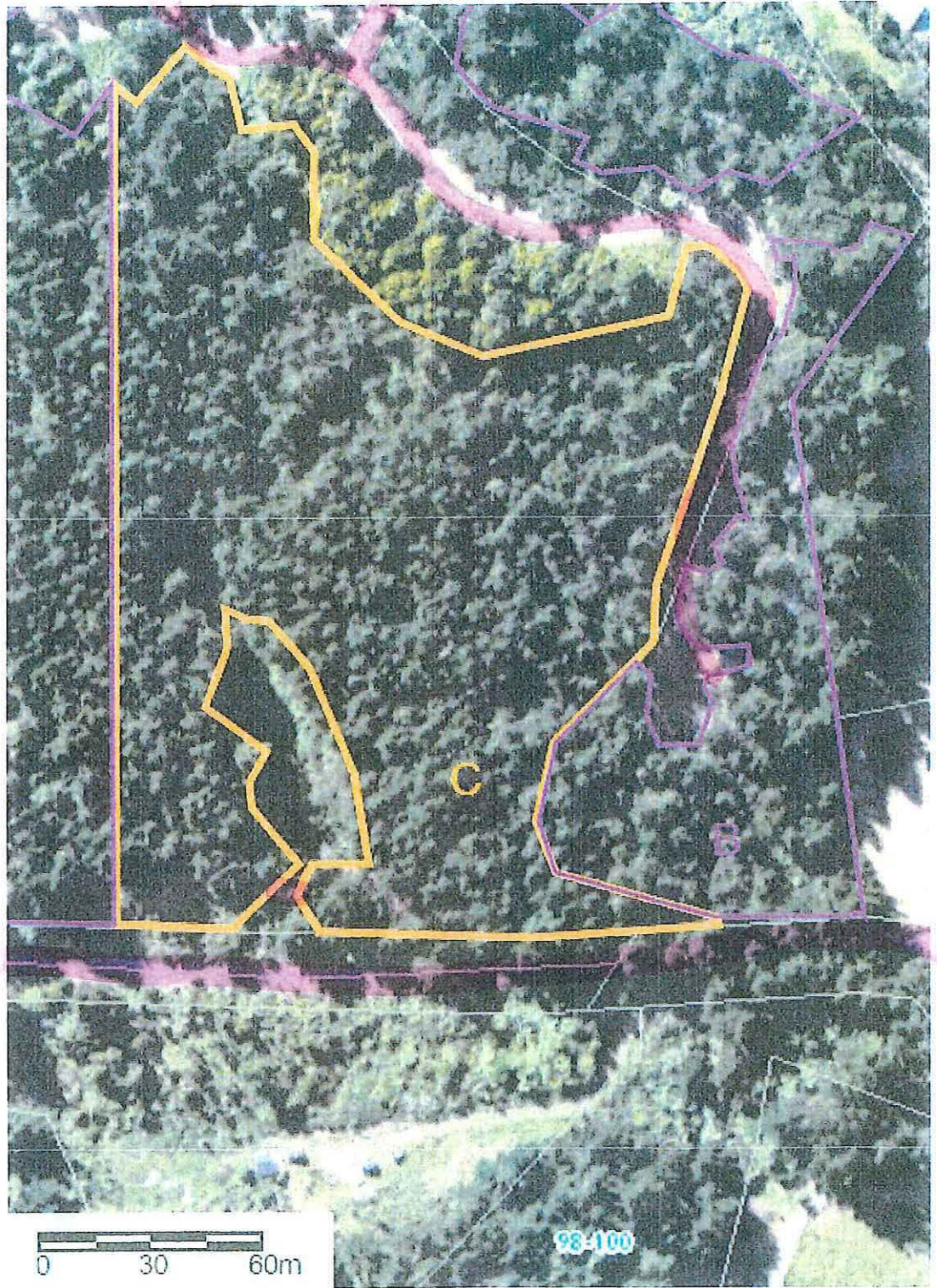
Map B

Location: 95-115 Anzac Valley Road, southern part of Lot 933 DP 320387

Area of predominantly *pinus radiata* in Map B: 0.7 hectares







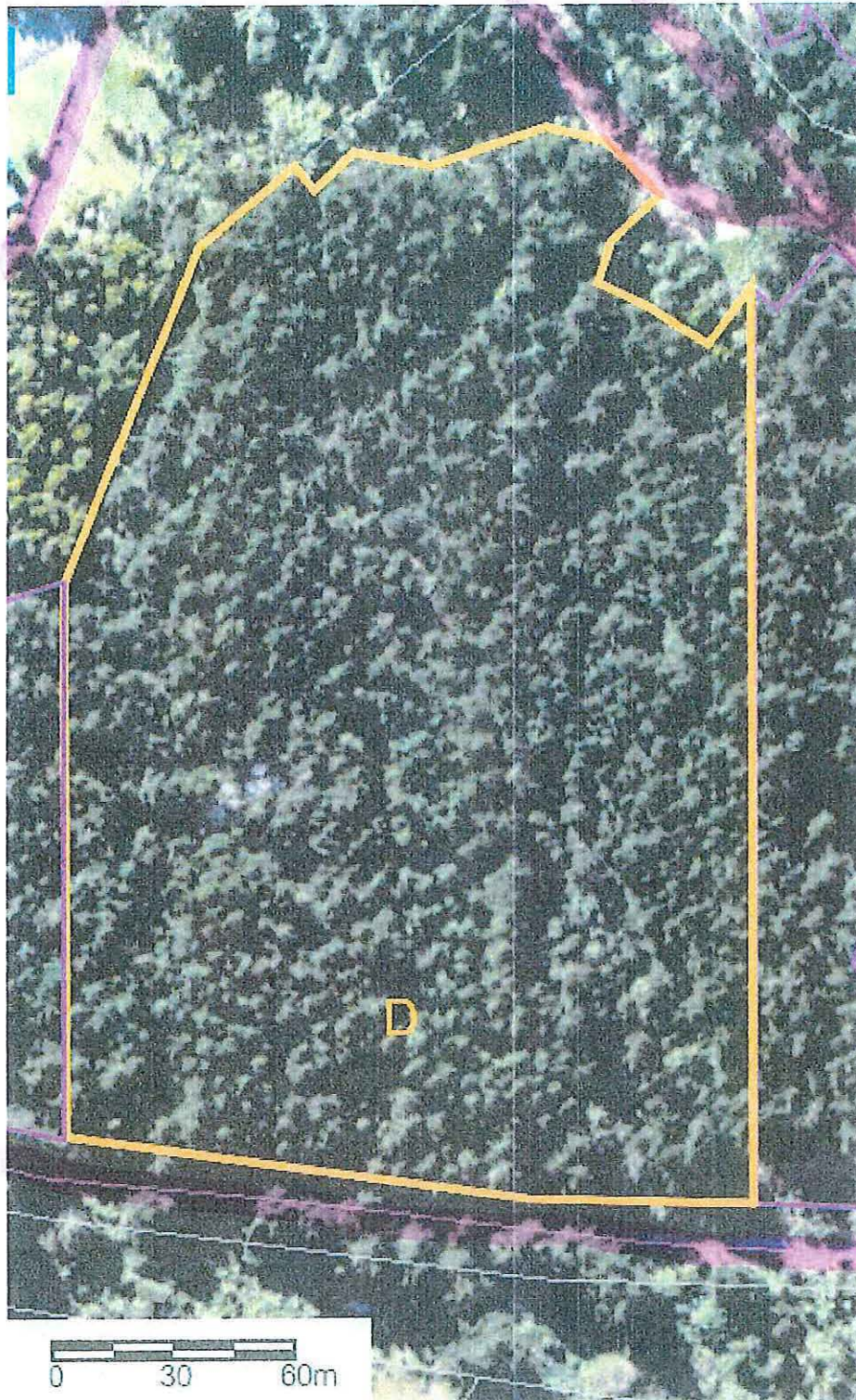
Map C

Location: 131-149 Anzac Valley Road, south eastern part of Lot 1 DP 320387

Area of predominantly *pinus radiata* in Map C: 2.4 hectares







Map D

Location: 131-149 Anzac Valley Road, central south part of Lot 1 DP 320387

Area of predominantly *pinus radiata* in Map D: 3.9 hectares







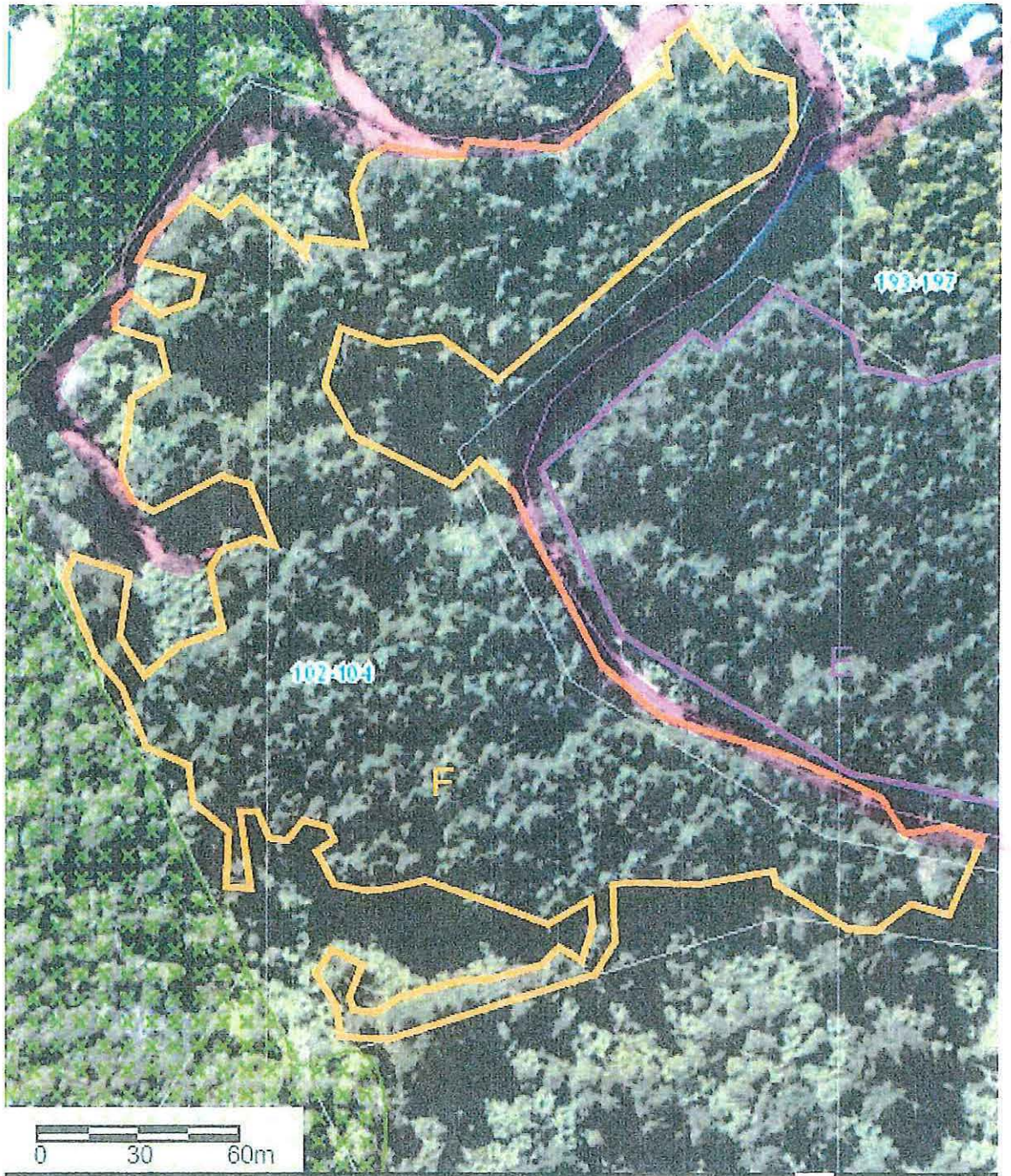
Map E

Location: 131-149 Anzac Valley Road, south western part of Lot 1 DP 320387

Area of predominantly *pinus radiata* in Map E: 1.5 hectares







Map F

Location: 102-104 Anzac Valley Road, Lot 324 DP 210991

Area of predominantly *pinus radiata* in Map F: 3.0 hectares







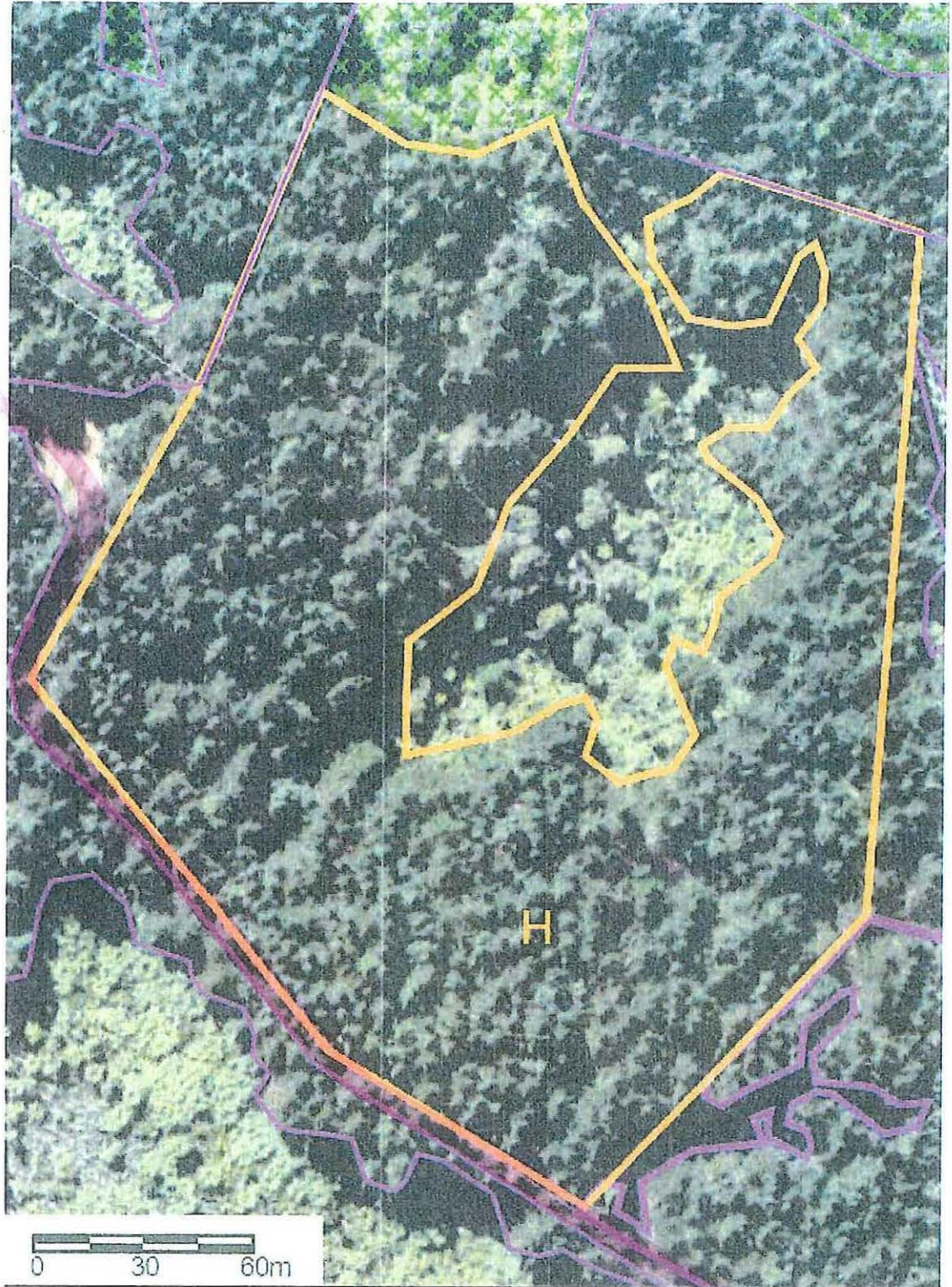
Map G

Location: 193-197 Anzac Valley Road, Lot 309 DP 210991

Area of predominantly *pinus radiata* in Map G: 1.5 hectares







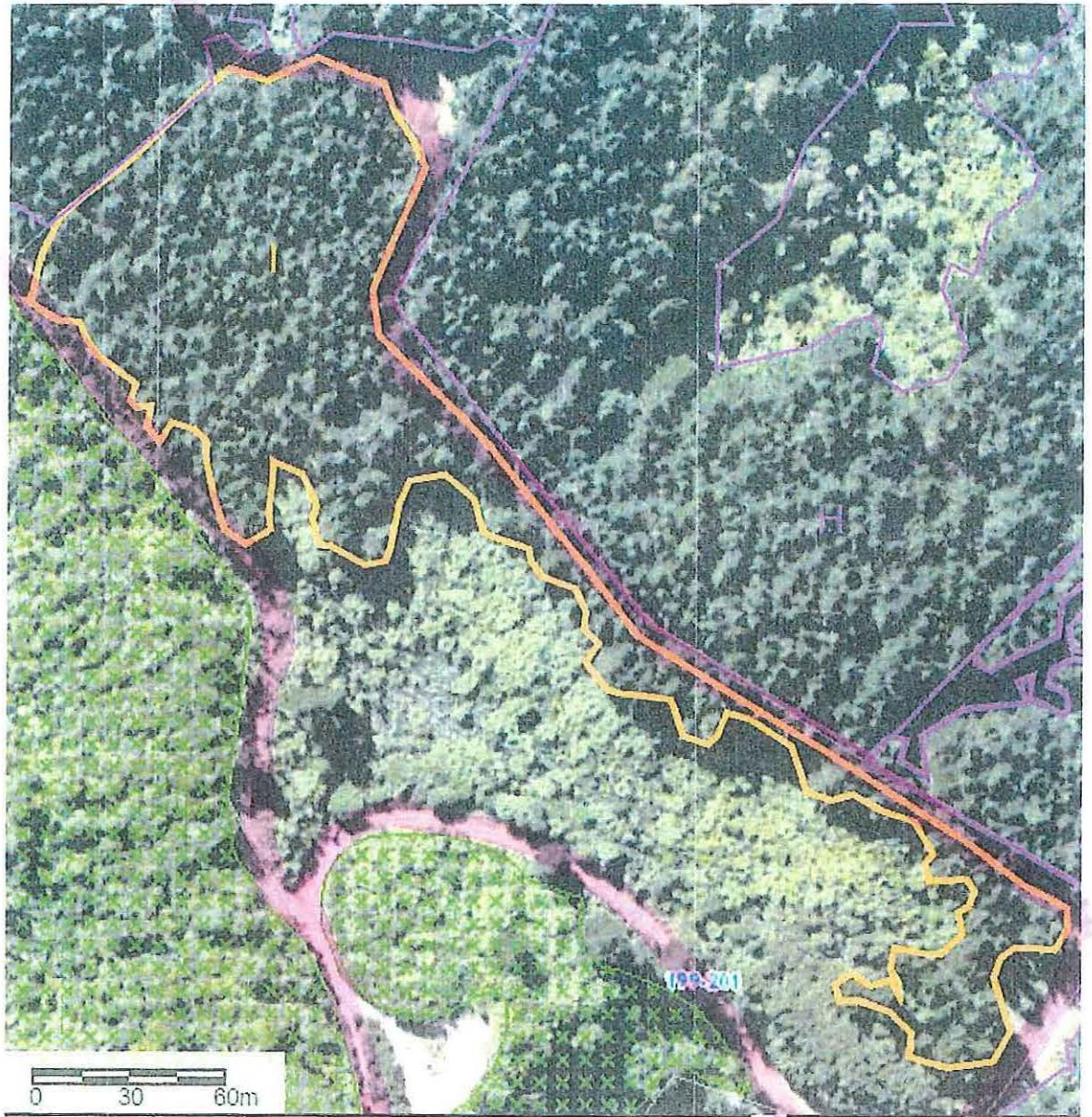
Map H

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 that lies east of Lot 323 DP 210991

Area of predominantly *pinus radiata* in Map H: 4.0 hectares







Map I

Location: 199-201 Anzac Valley Road, Lot 323 DP 210991

Area of predominantly *pinus radiata* in Map I: 1.7 hectares







Map J

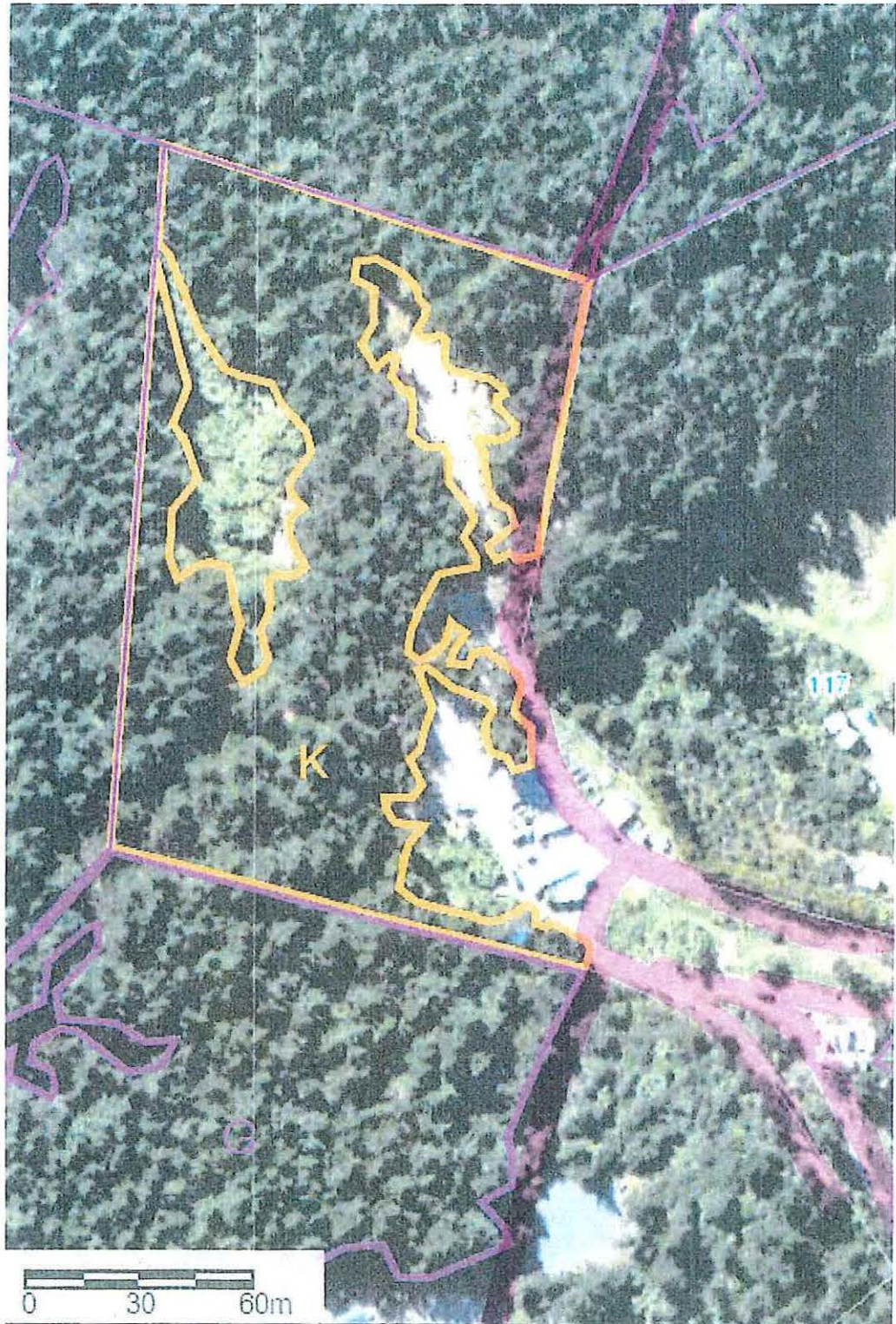
Location: 131-149 Anzac Valley Road, eastern most part of Lot 1 DP 320387

199-201 Anzac Valley Road, northern part of Lot 323 DP 210991

Area of predominantly *pinus radiata* in Map J: 2.8 hectares







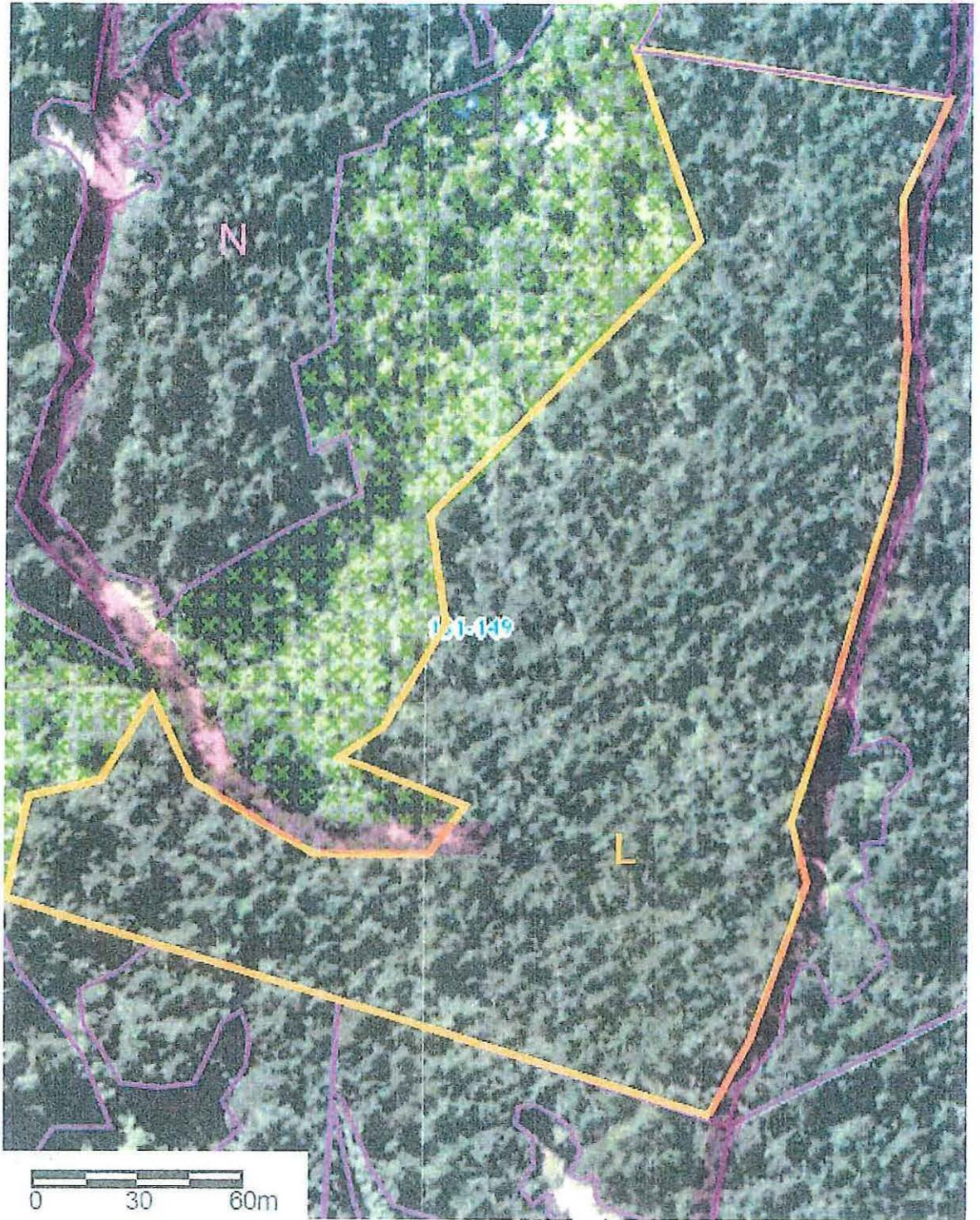
Map K

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 west of Lot 18 DP 168374 (at 117 Anzac Valley Road)

Area of predominantly *pinus radiata* in Map K: 1.4 hectares







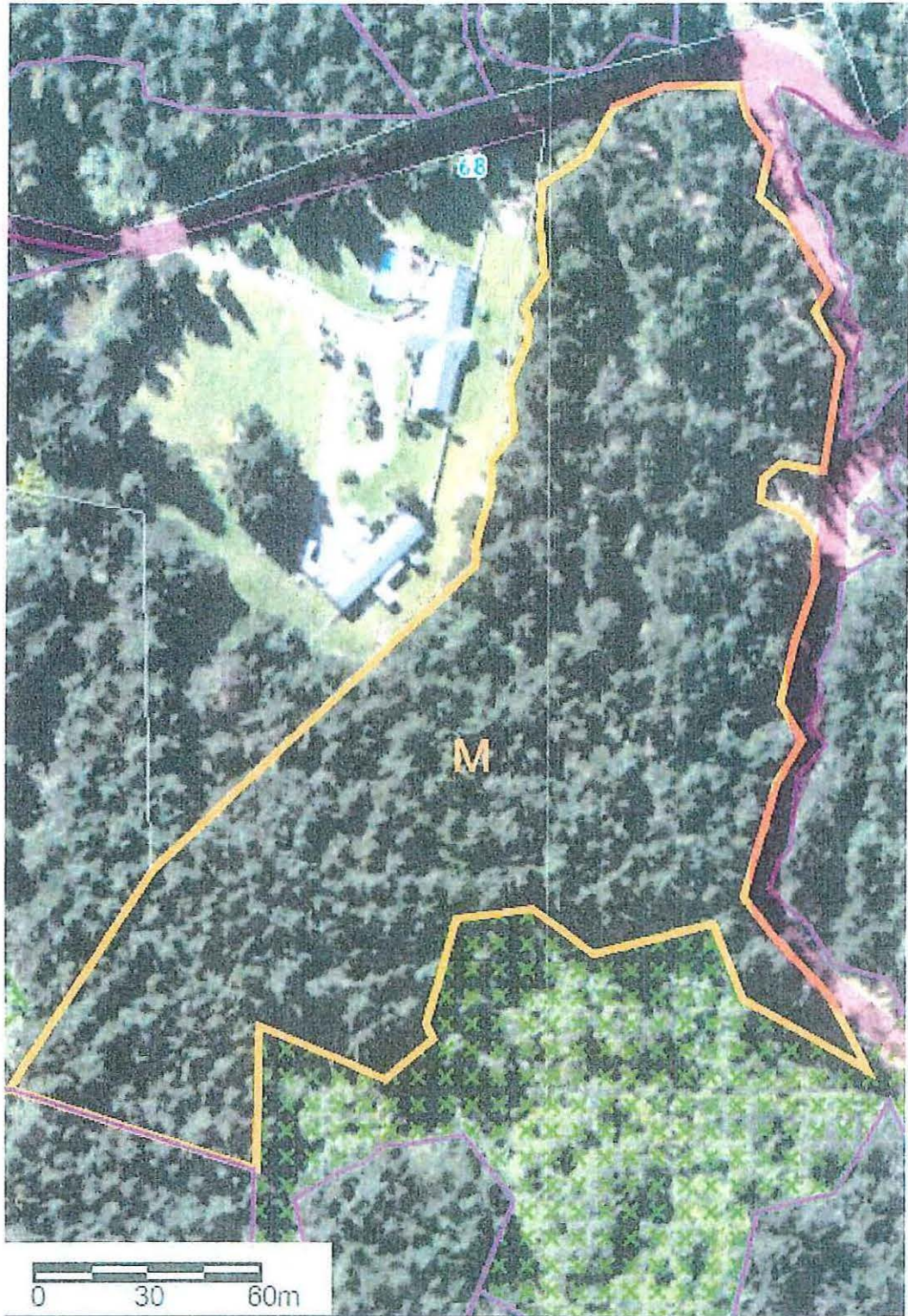
Map L

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 on south western side of central track

Area of predominantly *pinus radiata* in Map L: 3.4 hectares







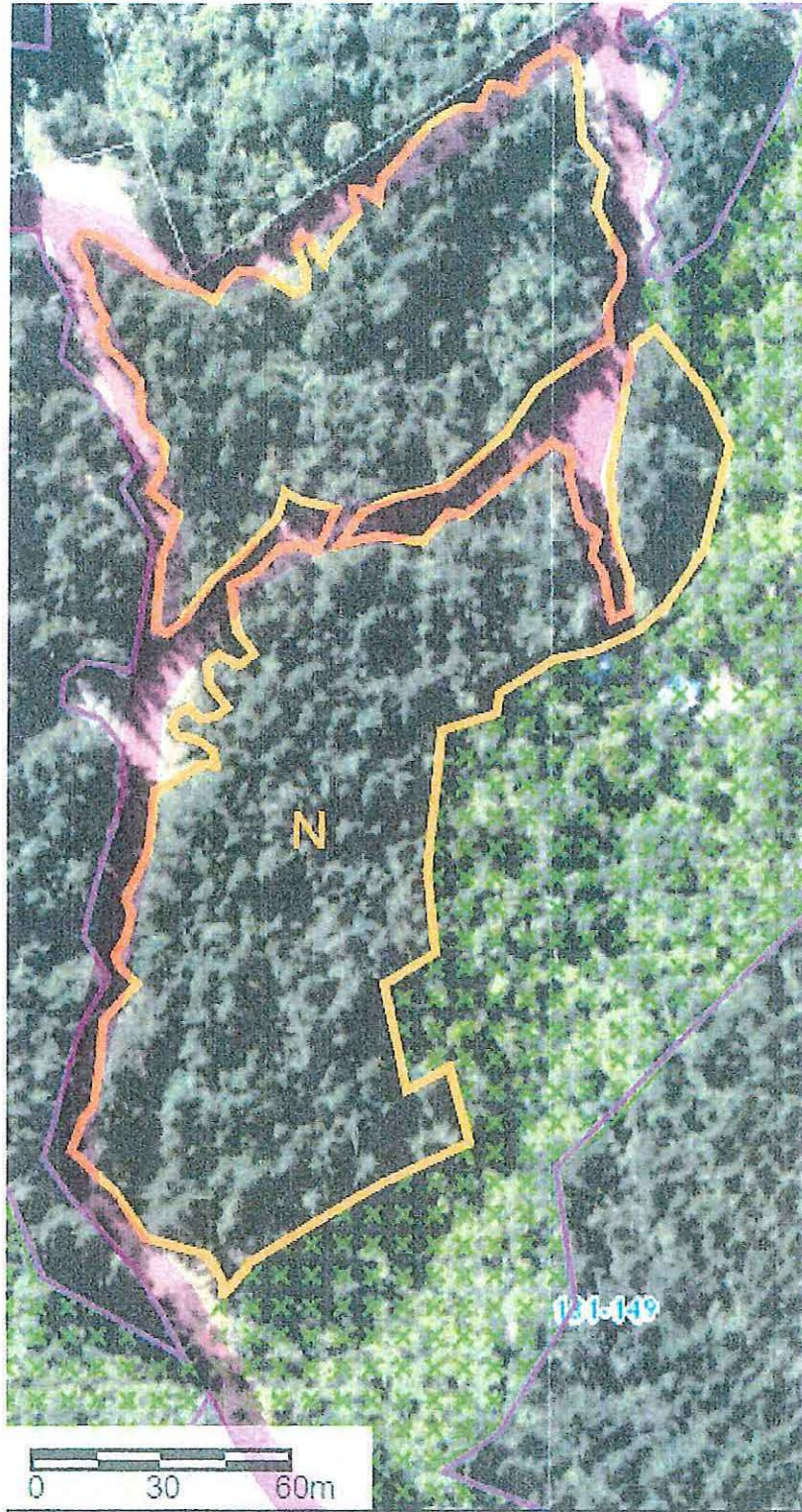
Map M

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 east of Lot 21 DP 166619 (at 68 Bethells Road)

Area of predominantly *pinus radiata* in Map M: 2.7 hectares







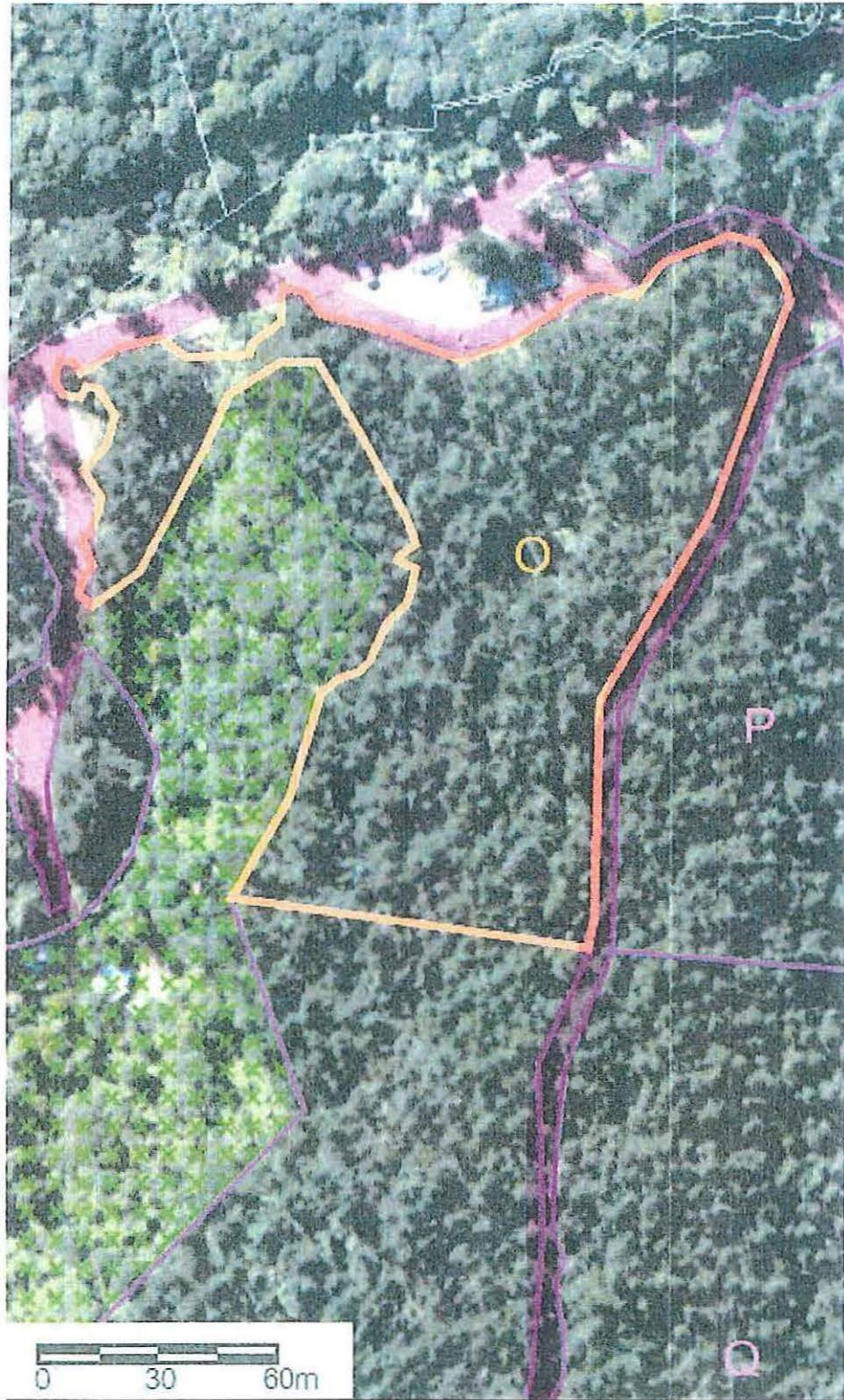
Map N

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 south of 52A Bethells Road

Area of predominantly *pinus radiata* in Map N: 2.2 hectares







Map O

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 on north western side of central track

Area of predominantly *pinus radiata* in Map O: 1.4 hectares







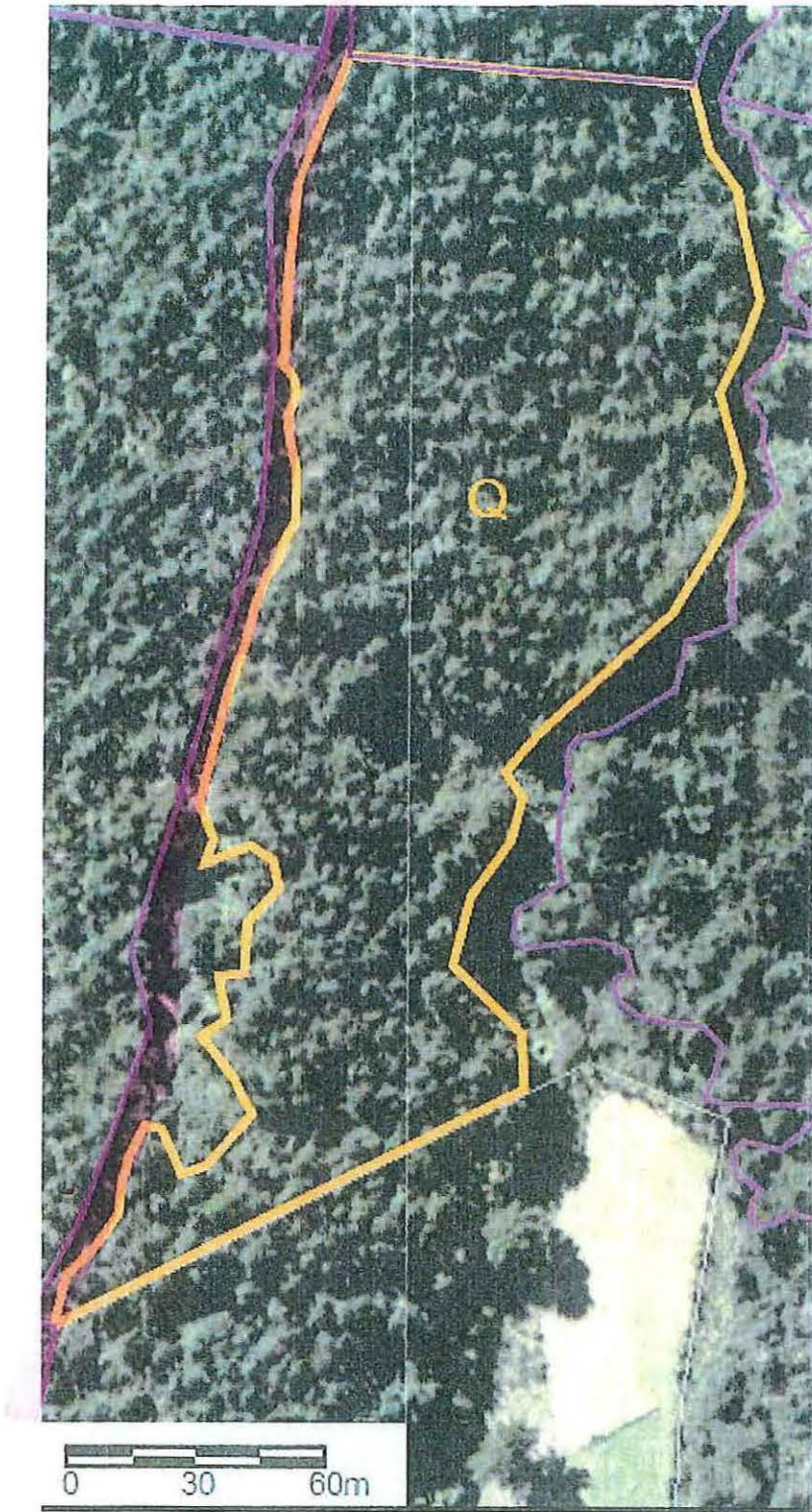
Map P

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 on north eastern side of conral track

Area of predominantly pinus radiata in Map P: 1.0 hectares







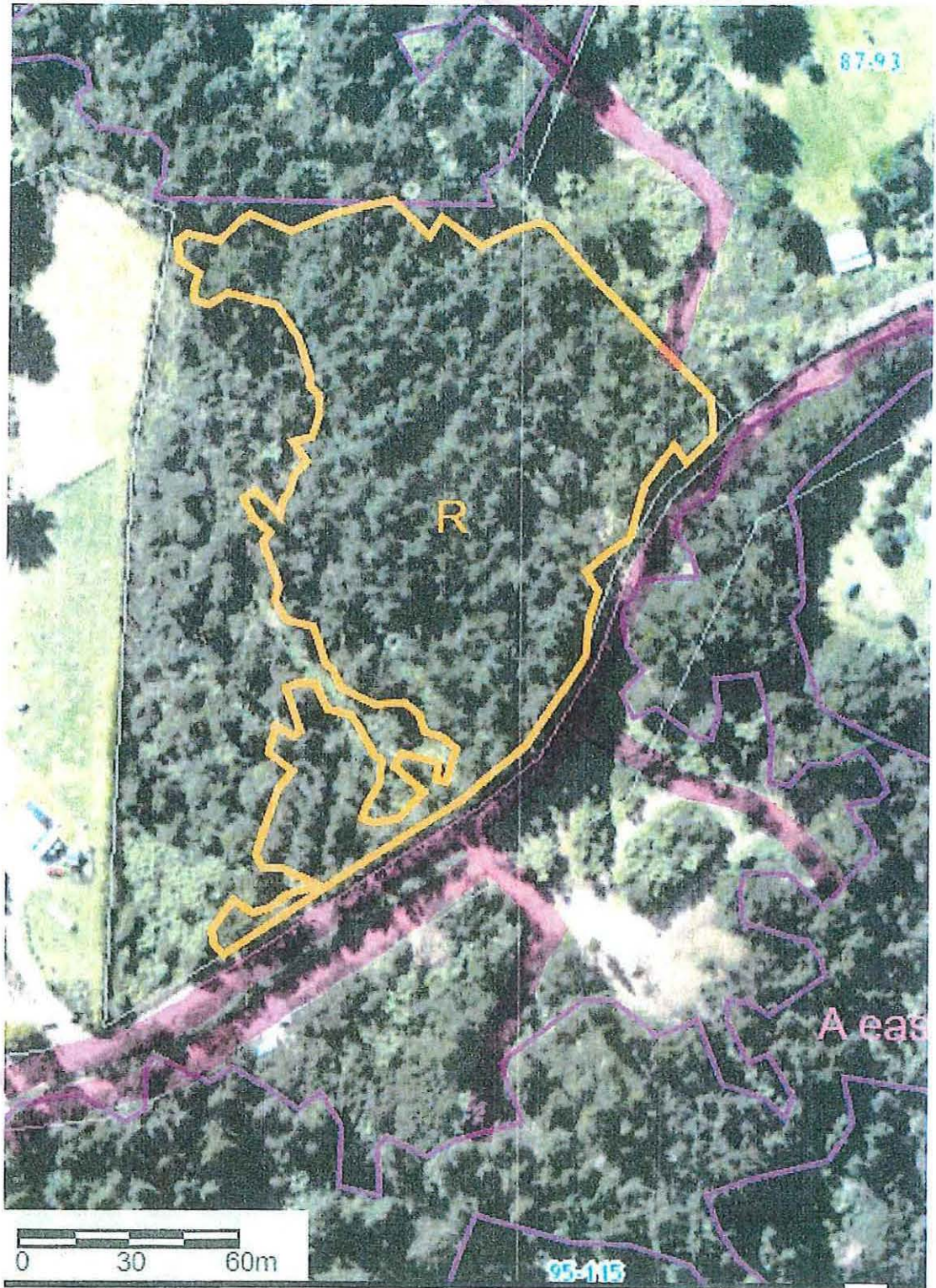
Map Q

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 on south eastern side of central track and north of 117 Anzac Valley Road

Area of predominantly pinus radiata in Map Q: 2.2 hectares







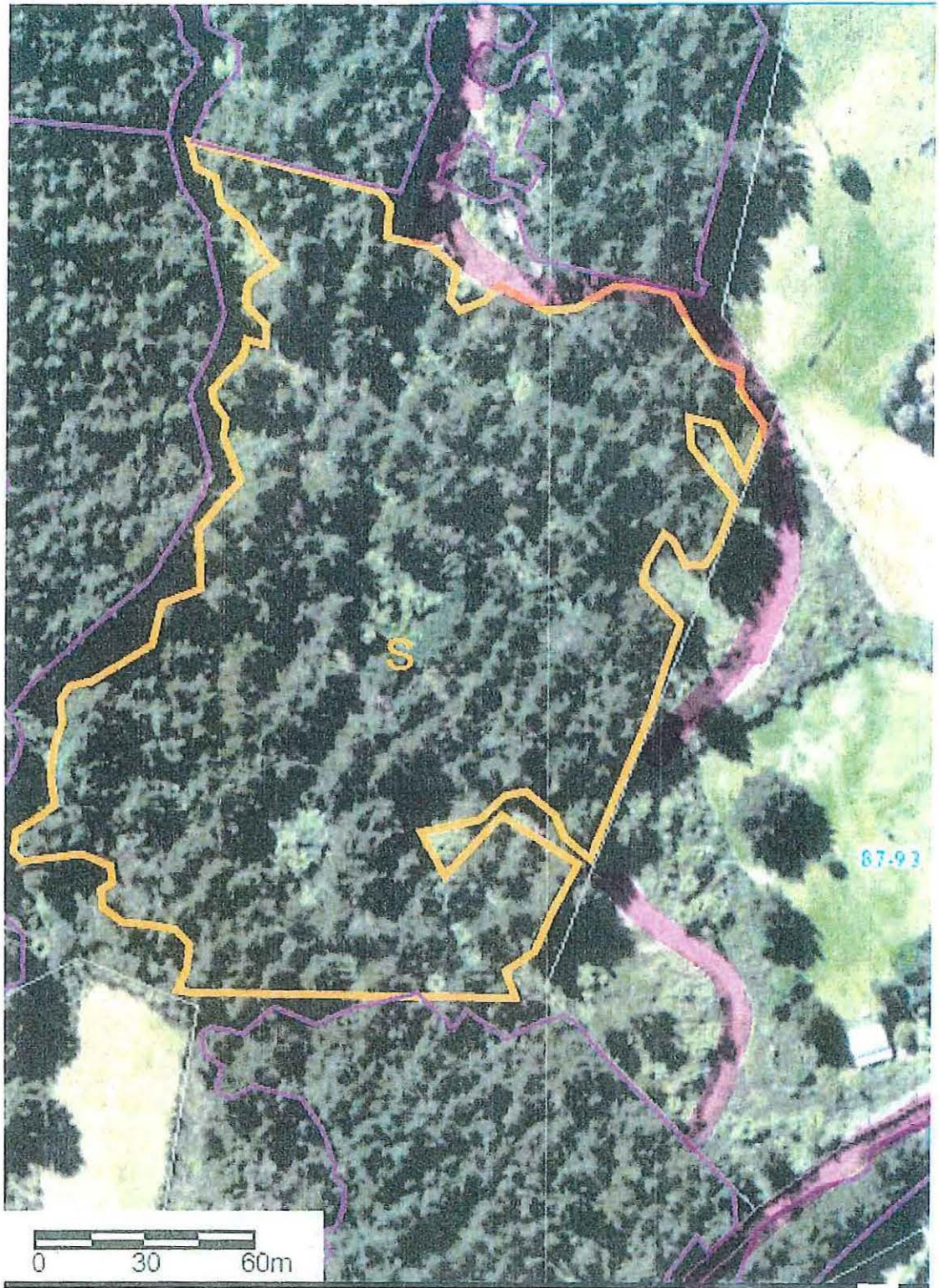
Map R

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 south west of Lot 19 DP 168374 (87-93 Anzac Valley Road)

Area of predominantly *pinus radiata* in Map R: 1.4 hectares







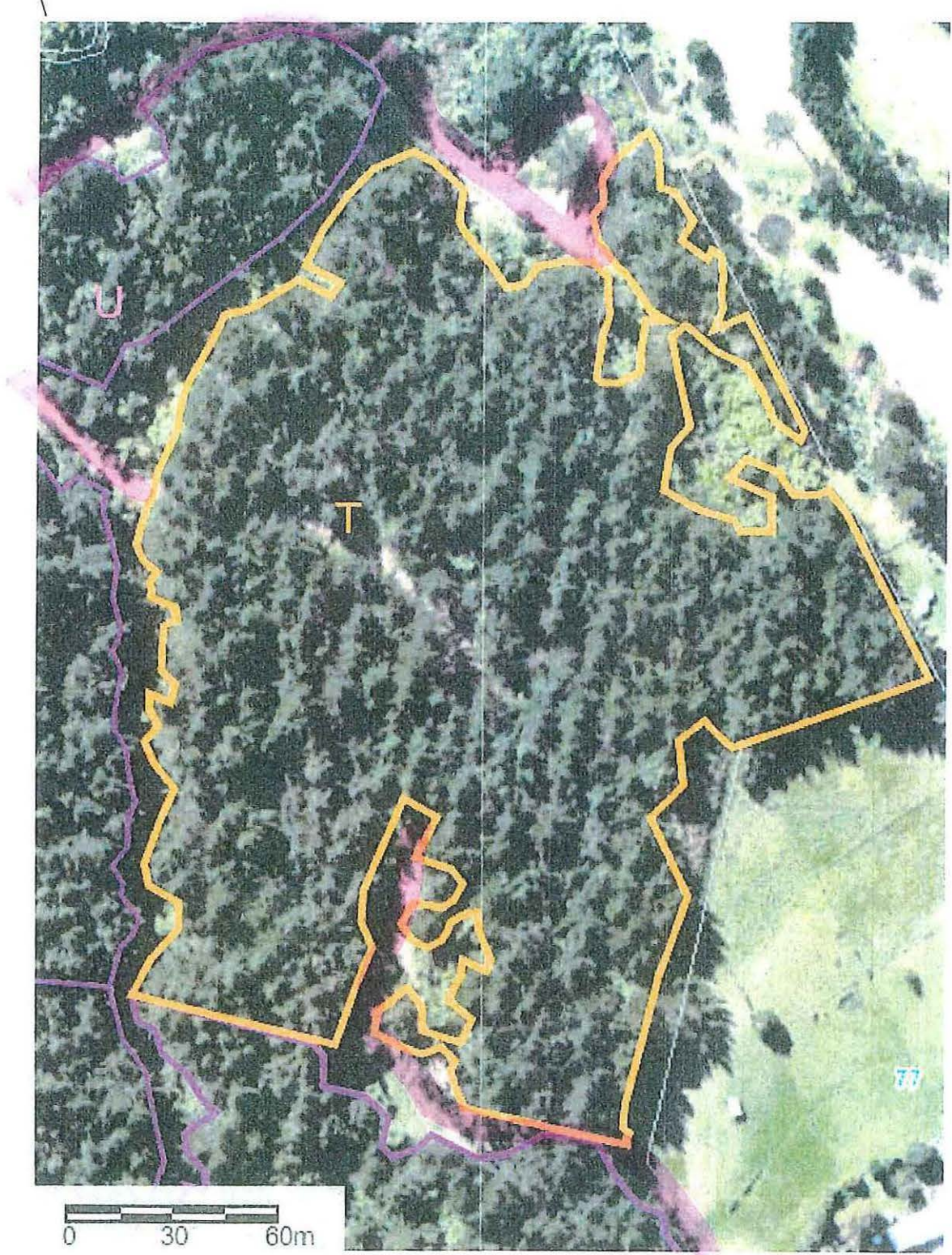
Map S

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 North west of Lot 19 DP 168374 (87-93 Anzac Valley Road)

Area of predominantly *pinus radiata* in Map S: 2.7 hectares







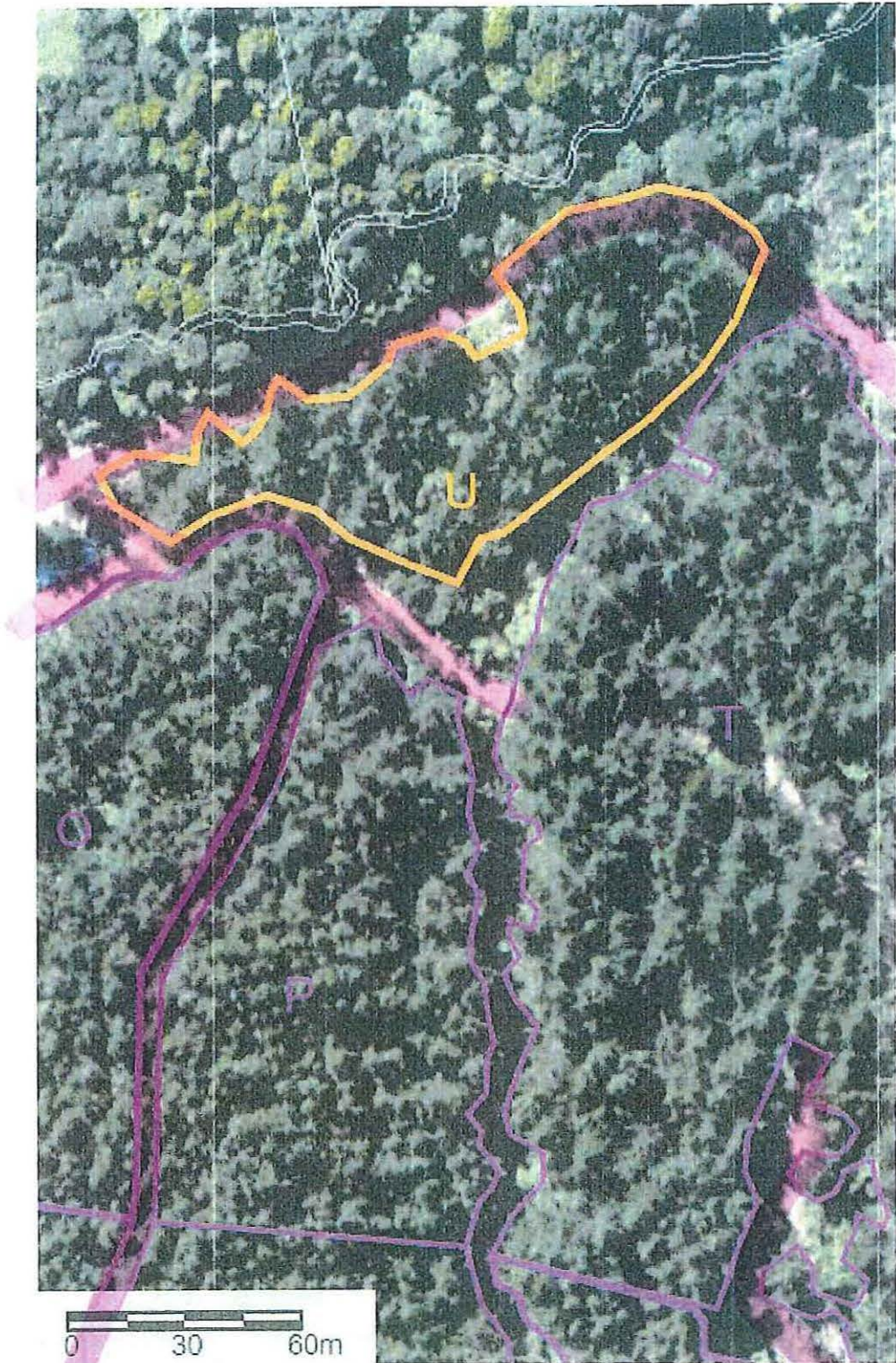
Map T

Location: 131-149 Anzac Valley Road, part of Lot 1 DP 320387 north of Lot 20 DP 168374 (77 Anzac Valley Road)

Area of predominantly pinus radiata in Map T: 3.6 hectares, part harvested







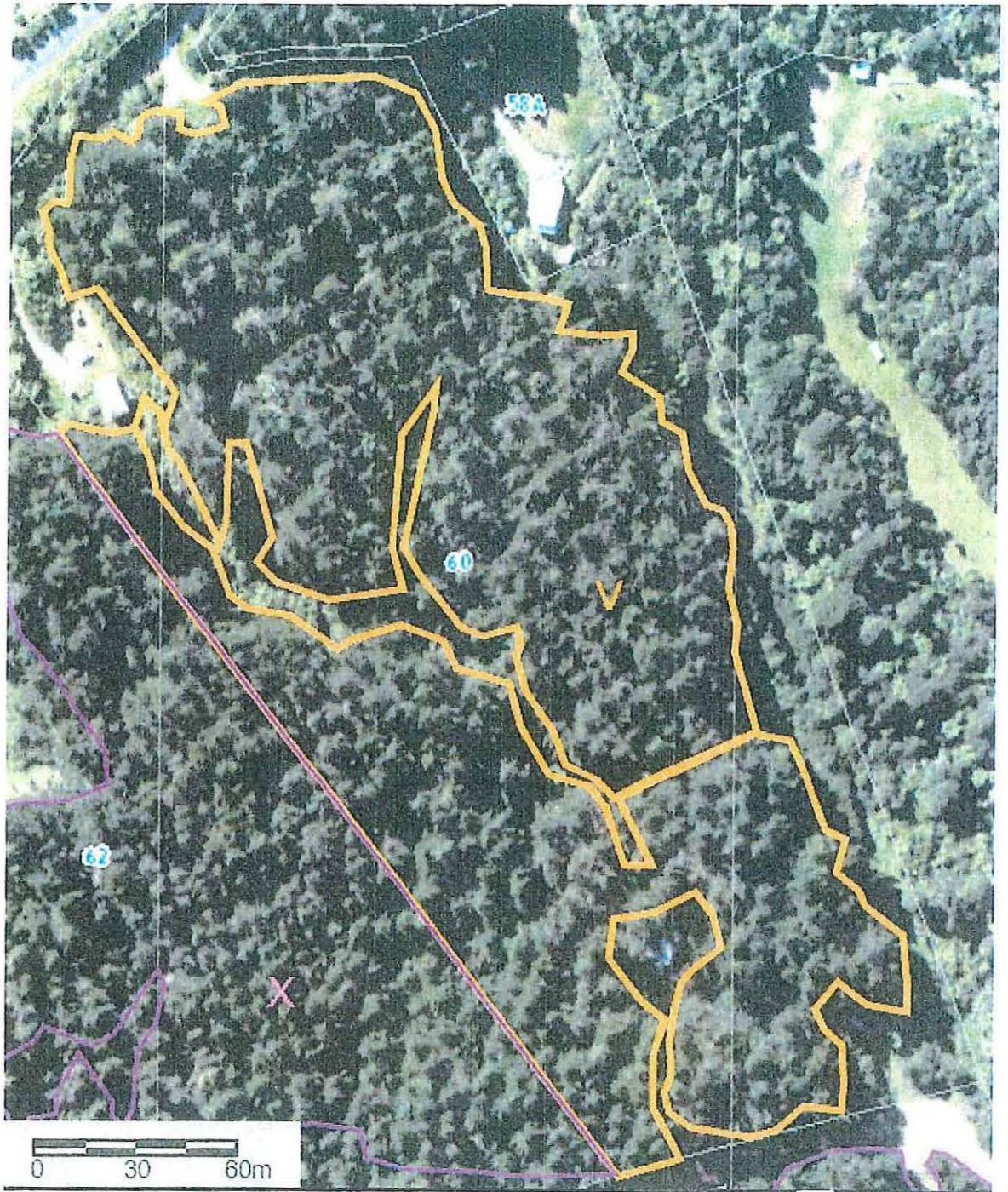
Map U

Location: 131-149 Anzac Valley Road, northermost part of Lot 1 DP 320387

Area of predominantly pinus radiata in Map U: 0.7 hectares







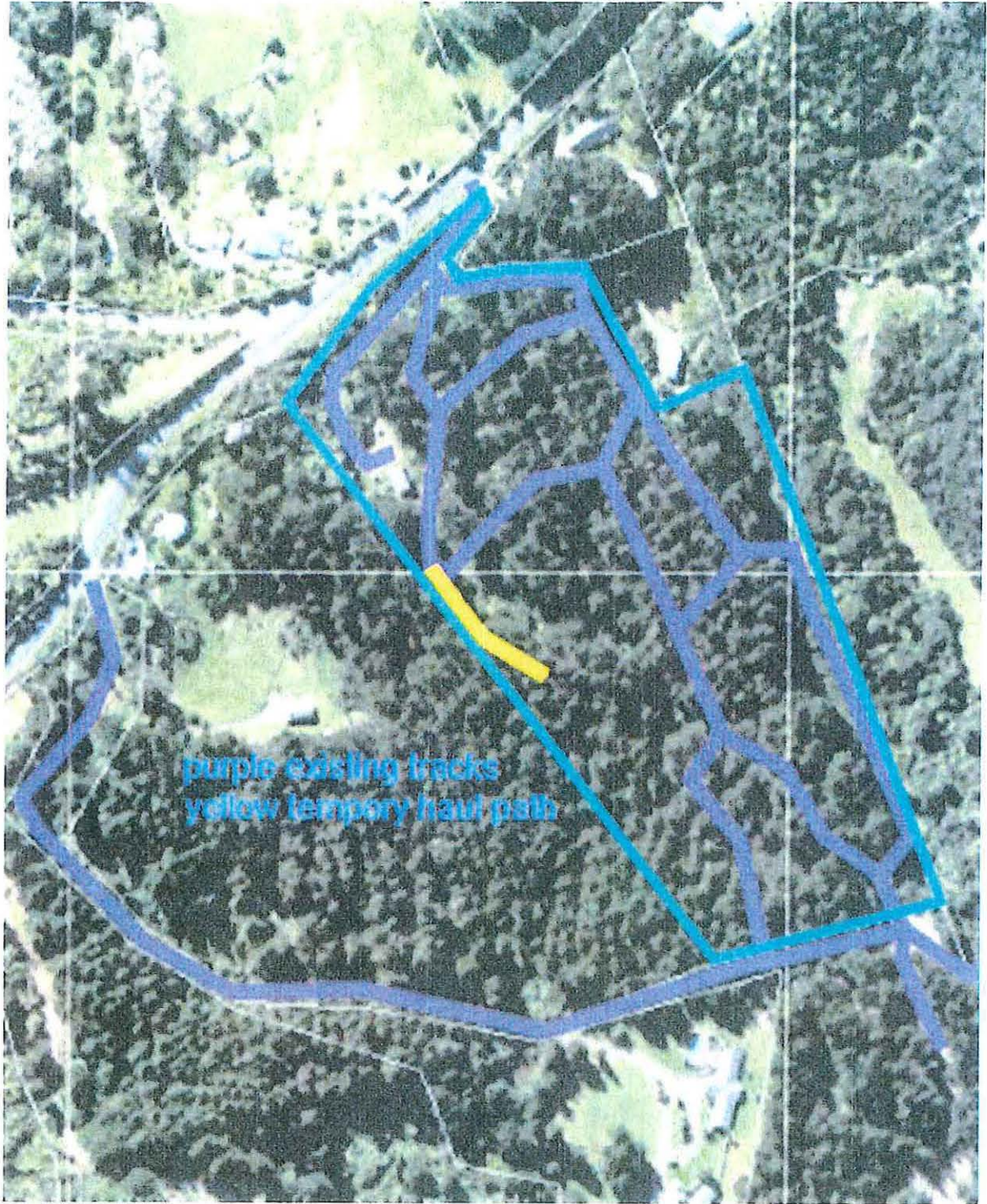
Map V

Location: 60 Bethells Road (Mr N J Mawhinney)

Area of predominantly *pinus radiata* in Map V: 3.8 hectares







60 Bethells Road and forestry right access over Lot 1 DP 320387 (131-149 Anzac Valley Road)

Map prepared by Mr N Mawhinney.





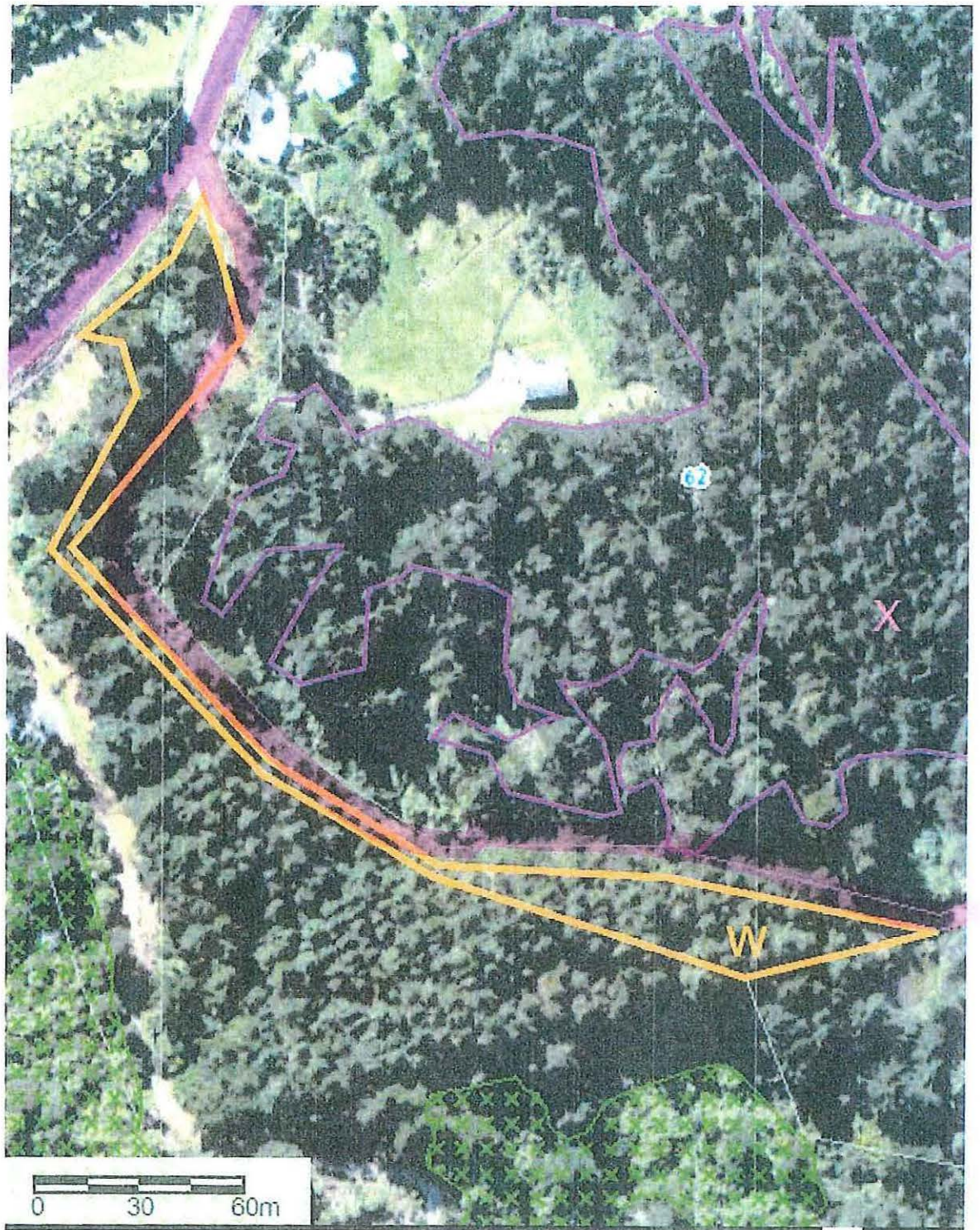


60 Bethells Road and forestry right access over Lot 1 DP 320387 (131-149 Anzac Valley Road)

Map prepared by Mr N Mawhinney.







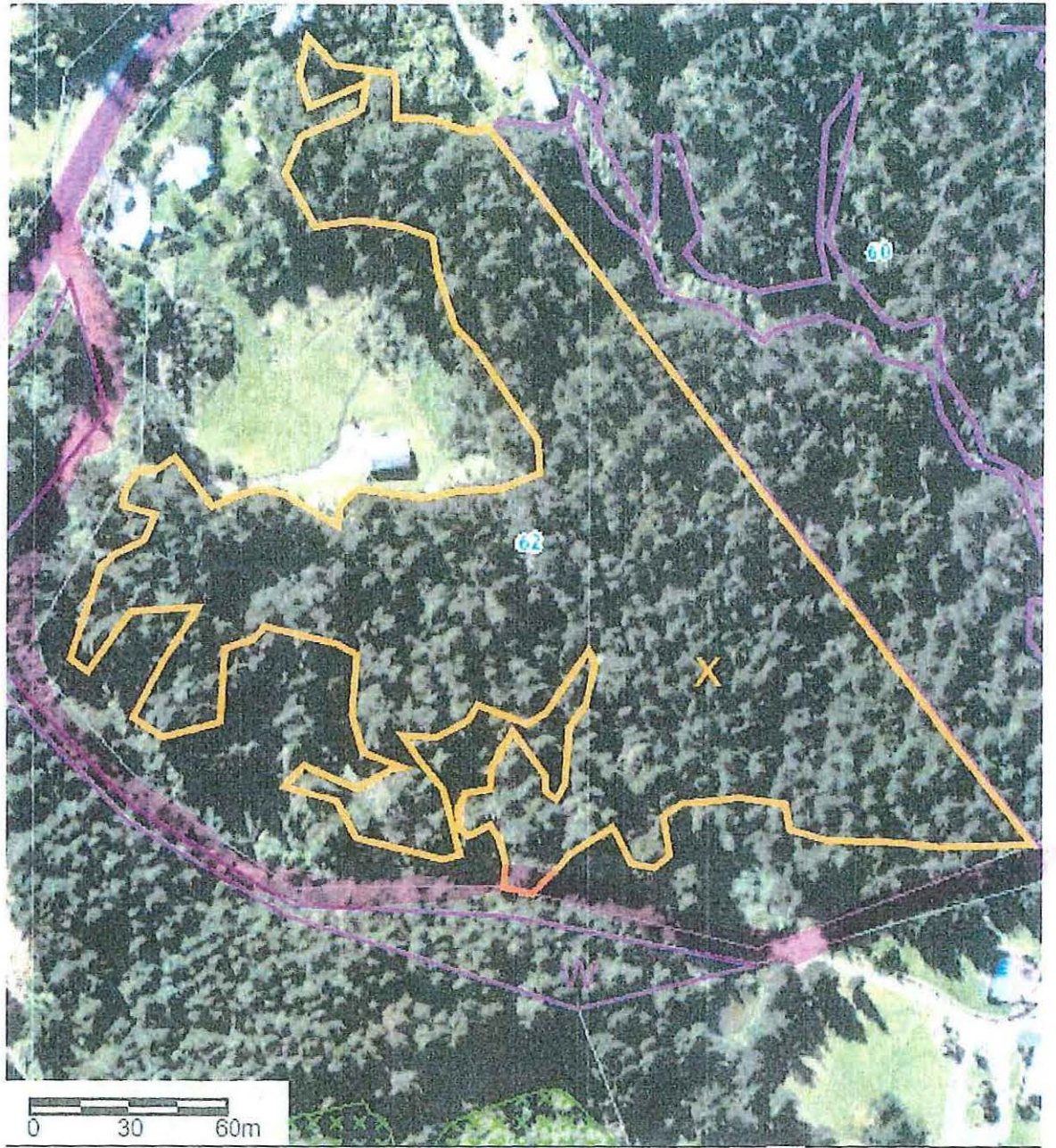
Map W

Location: 68 Bethells Road (part only)

Area of predominantly *pinus radiata* in Map W: 0.4 hectares







Map X

Location: 62 Bethells Road

Forestry Area: 2.7 hectares, now harvested

