ORIGINAL

Decision No. C 45 /2007

IN THE MATTER of the Resource Management Act 1991 **(the Act)**

AND

IN THE MATTER of an application for declaration pursuant to section 311 of the Act

BETWEEN CENTRAL PLAINS WATER TRUST

(ENV-2006-CHC-420)

Applicant (an incorporated charitable trust under the Charitable Trusts Act 1957)

AND SYNLAIT INVESTMENTS LIMITED

First Respondent

AND ROBINDALE DAIRIES LIMITED

Second Respondent

AND CANTERBURY REGIONAL COUNCIL

Third Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)
Environment Commissioner D H Menzies
Environment Commissioner W R Howie

Hearing at Christchurch 13, 14 and 16 February 2007

Appearances

Mr E D Wylie QC and Ms R M Dunningham for Central Plains Water Trust **(Central Plains)**
Ms M C Dysart for the Canterbury Regional Council **(the Council)**

Mr B G Williams for Dairy Holdings interests as annexed hereto and marked **"A"** **(Dairy Holdings)**

Mr E J Chapman and Ms P L Leeming for Synlait Investments Limited and Robindale Dairies Limited **(Synlait)**

DECISION ON APPLICATION FOR DECLARATION

Introduction

[1] Central Plains seeks two declarations from the Court in relation to:

(a) an application by Synlait (CRC052033); and

(b) an application by Robindale Dairies (CRC62685), subsequently acquired by Synlait directly.

The two companies are associated and shall be jointly referred to as **Synlait**. CRC052033 shall be referred to as **the Synlait application** and CRC62685 as **the Robindale application** for the purposes of clarity.

[2] Central Plains applied to the Regional Council to take up to 40 cumecs of water from the Rakaia River and 40 cumecs of water from the Waimakariri River under certain conditions. It is common ground that Central Plains wish to abstract up to that volume from either or both rivers and direct the water by either pipe or canal to a central irrigation distribution point, with any excess being stored in a lake to be constructed.

[3] The scheme involves a harvesting component (lake storage) but is still heavily dependent on run of river where available. It could therefore be described as a hybrid scheme, with the lake storage being used to make up any shortfall when there is insufficient abstract available. Lake storage also enables the harvesting of water when water supply exceeds irrigation demand. Depending on the construction and placement of infrastructure, it is intended that the scheme could irrigate up to 84,000 hectares between the Rakaia and Waimakariri Rivers

[4] The take application for the Rakaia River was a joint application with the Ashburton Community Water Trust and any take on the south side of the river could

eventually be used for a further scheme between the Rakaia and the Rangitata Rivers for up to 64,000 hectares. The Ashburton Community Water Trust proposed irrigation project is currently conceptual only, with no other consents having been applied for.

The declaration sought

[5] In December 2001 Central Plains and the Ashburton Community Water Trust filed a joint application for takes from the Rakaia and Waimakariri Rivers. The progress of that application and relevant priority in relation to the Ngai Tahu application for a take on the Waimakariri River is the subject of a decision in the Environment Court[1], an appeal decision in the High Court[2] and, more recently, the grant of leave to appeal on two points of law to the Court of Appeal[3].

[6] Central Plains seeks declarations from this Court:

(a) in relation to the Synlait application for six cumecs of water from the Rakaia River to service around 6,000 hectares in the Te Pirita area; and

(b) in relation to the Robindale application for a similar quantity of water from the Rakaia River (six cumecs) for a different 6,000 hectares, to be taken from bands 2 and 3[4] of the allocation from the river.

[7] The declarations sought are:

(a) *That the Central Plains Water Trust joint application with Ashburton Community Water Trust, CRC021091, to take water from the Rakaia River*

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1 *Ngai Tahu Property Limited* (C104/2006).

2 *Central Plains Water Trust v Ngai Tahu Property Limited* CIV-2006-409-2116, Randerson J, HC Christchurch, 1 December 2006.

3 *Central Plains Water Trust v Ngai Tahu Property Limited* CIV-2006-409-2116, Randerson J, HC Christchurch, 8 February 2007.

4 Bands will be discussed later in this decision. They are a loose administrative grouping of consents with similar minimum flow restrictions. This essentially gives holders of consents with higher minimum flows less reliability of water because their takes are restricted first.

has priority over the application CRC052033 by Synlait Investments Limited for water allocation from the same resource.

(b) *That Central Plains Water Trust's joint application with Ashburton Community Water Trust, CRC021091, to take water from the Rakaia River has priority over the application CRC62685 by Robindale Dairies Limited (previously Synlait Investments Limited) for water allocation from the same resource.*

[8] Extensive affidavits were filed by interested parties in this issue, and the Court heard some three days of submissions.

Relationship to the Ngai Tahu decision

[9] All parties before this Court accepted that this application was not a relitigation of the issues decided in ***Central Plains Water Trust v Ngai Tahu*** **(the Ngai Tahu case)** and that for the purposes of this hearing the Court should regard the issues decided in the ***Ngai Tahu*** case as settled, notwithstanding the appeal to the Court of Appeal. Mr Wylie QC acknowledged that this was without prejudice to any arguments before the Court of Appeal. Mr Chapman for his part acknowledged that any delay by Central Plains between December 2001 and November 2005 was not being raised before us on the basis that this was an issue which may be argued if the ***Ngai Tahu*** decision was reversed on appeal.

[10] For reasons which the Court will go into in some detail, this application for declaration raises two new issues which were not considered in the ***Ngai Tahu*** declaration application. All parties agreed there was some efficacy in seeking declarations from the Court on these issues on the basis that the law as set out in the Environment Court and High Court decisions in ***Ngai Tahu*** is applicable.

Priority to what?

[11] Although the application for declarations sought priority in respect of the Central Plains application, there was ambivalence in the submissions as to what the priority was actually for. It was accepted by all parties that it could not be a priority to the resource.

The Resource Management Act applies and the application would have to be processed in accordance with the various sections of the Act and there could be no guarantee that any or all parties would necessarily obtain a resource consent.

[12] In this particular case there are significant differences between the applications. Although they are for water from the same resource, they relate to different places of take, times of take, extent of take, utilisation and the like. It was also agreed that the application which had priority was not necessarily the one heard first in time. As was clear from the ***Geotherm Group Ltd v Waikato Regional Council*** decision[5], there is no necessity that matters be heard in a particular order provided potential impact on the other application and its priority is taken into account. In this case the Robindale application has already been heard, although the Commissioners' decision has not been issued. In the ***Ngai Tahu*** case the Commissioners' decision was issued but was explicitly made to be subject to any decision in respect of this declaration.

[13] We have concluded that the priority referred to by Central Plains relates to procedural priority and having the prior application considered without reference to the later application. Thus we understand the environment as discussed in ***Queenstown Lakes District Council v Hawthorn Estate Ltd***[6] to be the existing environment as it may be affected by permitted activities or unimplemented consents already granted. It may include another application only if that application results in a consent being issued (even if unimplemented). It cannot be assumed that any discretionary consent will necessarily be granted. Thus the reasoning in ***Arrigato Investments Limited v Auckland Regional Council***[7] would not exclude consideration of a prior application if it was heard and a consent was already granted. Whether it is taken into account by the Court is in its discretion but in cases of applications for the same resource the new application would be subject to the prior consent in practical terms.

[14] However, where that application has not been determined then it cannot constitute part of the environment as described in ***Hawthorn***. The outcome is then critically affected if the initial application is determined first. If no consent is granted

5 High Court, 2004 NZRMA 1.
6 Court of Appeal, 2006 NZRMA 424, para 84.
7 Court of Appeal, 2001 NZRMA 481.

then the resource is unaffected by an unimplemented consent. Where granted, that consent can be taken into account. The Court of Appeal decision in ***Fleetwing Farms Limited v Marlborough District Council*** clearly establishes priority to hearing[8]. The Court of Appeal discussed this issue briefly in the ***Hawthorn*** decision when they noted that cases such as ***Fleetwing*** and ***Geotherm*** would be undermined if resource consent applications not yet made but which conceivably might be made could be taken into account. That was not the Court of Appeal's view – see para 80 of the ***Hawthorn*** decision[9]. It must follow that where applications have been made and priority is given to one then that application must be considered without taking into account the impact of the other application.

[15] Such priority is complicated by issues of appeals that the grant or refusal is not final until all appeals are exhausted. So for multiple applications for the same resource priority becomes critical as later applications cannot be properly determined until the application having priority has been finally determined. To do so runs the risk that a later application, if granted, may have effects on the application having priority not fully contemplated when that later application was granted.

[16] The priority the parties are seeking in this case is that their application be considered without taking into account the potential impact of the application which is determined to have lower priority.

The issues before this Court

[17] The Environment Court and High Court conclude in ***Ngai Tahu*** that the Council did have a discretion under section 91 to place an application on hold. This discretion was exercised in December 2001.

[18] The first issue before this Court was whether the requirements of section 91 were satisfied. In this case there are additional facts which were not relevant to the earlier decision, given the timing of the ***Ngai Tahu*** application on 28 January 2005 which was determined notifiable on 17 August 2005.

8 [1997] 3 NZLR 257.
9 [2006] NZRMA 424 para 80

[19] At para [39] of the Environment Court decision in ***Ngai Tahu*** the Court noted:

> *The further applications for resource consent that the Regional Council had been awaiting in order better to understand the nature of the irrigation proposal, were lodged on 24 November 2005. As at 30 March 2006, the Regional Council was satisfied that sufficient information was to hand for all applications to be notified. According to advice tendered from the Bar, notification occurred on 24 June 2006, with the lodgement time for submissions due to close on 18 August. Hence notification occurred some nine months after notification* [sic], *and four months after the hearing, of Ngai Tahu's application.*

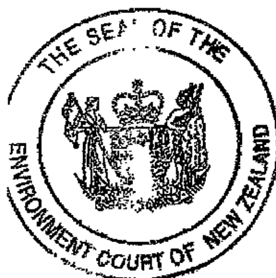
[20] That was expressed as part of the background of that case and we accept from counsel, who were present at that hearing and who appeared before our Court, that the matter was not the subject of any debate or argument as the particular dates did not affect the outcome of the hearing. In the High Court decision the Court said (at para [76]):

> *... When a consent authority decides under s 91 RMA not to proceed with notification, the application is not ready for notification until the additional resource consent applications are made....*

And at para [77]:

> *... Thirdly, there may be an issue as to whether, when s 91 applies, the original application is ready for notification immediately after the additional consent applications are made or only when, as happened here, the consent authority decides all relevant applications are ready for notification. As this question is not material to priority in the present case, I do not express a view on it ...*

The notifiable date issues



[21] The argument of Central Plains before this Court is that the Council issued a further decision on 16 June 2005, placing the application again on hold under section 91

but on different terms. They say that the terms of that letter or, in the alternative, the notice of hold of 12 December 2001, was satisfied at 10 am on 24 November 2005 when the other applications were made. Accordingly they argue that their application takes priority over both the Synlait and Robindale applications, the first of which – the Synlait application – satisfied its section 91 requirements but arguably not the request under section 92 (on the wording of Justice Randerson) at 3.55 pm on 24 November 2005 and in respect of Robindale on 23 or 31 March 2006.

[22] Synlait, for its part, argued that the Synlait application was notifiable at 3.55 pm on 24 November and the Robindale application was notifiable on 23 March 2006, and that the Central Plains application did not meet the terms of the section 91 hold until the Council determined it was notifiable on 30 March 2006. As a result, Synlait argue both its applications would have priority, simply on the basis of notifiability.

[23] We point out at this stage that evidence as to what occurred on 23 March, being the date when Synlait says it satisfied requirements and the Robindale application was notifiable, was only sought to be introduced at the commencement of the hearing after the expiry of all directions for exchange of evidence. Prior to that it had been asserted by Synlait witnesses that the Robindale application was notifiable on 31 March 2006. All other parties expressed some surprise at such a late change in position and either objected to the affidavit being filed or sought leave to introduce further evidence themselves.

[24] In the end the Court determined that it would receive but not read the further affidavit evidence at this stage. If it becomes relevant to the determination of priority the Court will make directions in this decision as to the further exchange of evidence and either re-convene the hearing or, with the agreement of the parties, deal with the matter on the papers.

[25] We have concluded that the actual date on which the further information for Robindale was filed would only be relevant if the Central Plains hold requirements under section 91 were not satisfied on 24 November 2005. The primary argument for Central Plains was that the hold was satisfied on 24 November 2005.

The resource argument

[26] The priority argument is subject to a (major and) novel argument raised by Synlait in respect of the Robindale application. In essence their resistance to the declaration in respect of Robindale was twofold:

(1) that the Robindale application was for a different resource to that applied for by Central Plains and therefore did not meet the terms of Central Plain's application for declaration;

(2) that in May 2006 Central Plains sought to amend its application to include the band 2 and 3 water, that this was a fundamental change to the application and therefore meant that they lost any priority as to notifiable date they had up to that time. Thus if their application was notifiable on 24 November 2005, by amending their application in May 2006 the application was no longer notifiable until after May 2006.

[27] For reasons which we will explain in some detail, the claim of separate water resources under the banding system raises a matter of major importance. It flies in the face of the conventional wisdom which is applied to water takes, particularly in the South Island, that those later in time have access to the water subject to all other consents granted prior in time.

[28] To understand the issues and the following arguments, we have paraphrased, as best we can, our understanding of the arguments in respect of the Robindale application:

(1) that resource consents set up an allocation regime for instantaneous volumes at the maximum rates set out in the consent;

(2) that other applicants (without the approval of or consultation with the consent holder) can utilise any unused instantaneous volume even beyond other limits of the consent (i.e. maximum volumes or times of take) on the same terms and conditions as the original consent. In other words, if the original consent is subject to times of take or total volume limitations, these can be taken up by another applicant on the basis that that applicant obtains the same priority as the original consent holder;

(3) that the Rakaia consents are in allocation bands 1 to 5 and that Robindale applied for band 2/3 water, which is a different resource to band 5 water;

(4) that the application is therefore for a different resource than that applied for by Central Plains because it is from a different allocation group or band;

(5) that by Central Plains extending their consent to seek band 2 and 3 water they fundamentally changed their application and any priority earlier obtained was lost.

[29] These claims need to be considered in the context of The National Water Conservation (Rakaia River) Order and the various consents which have been granted in respect of the Rakaia River. Central Plains argued that their amendment in May 2006 was made merely to clarify that they sought the highest priority water available. Further, they say that any application to extend the conditions of consent could not fundamentally affect their substantive application for water if there is in fact a different resource of bands 2 and 3 water.

[30] We also note that this argument was made by Synlait in the context of a claim of intellectual property in the concept of such banding and uptake of 'unused' consented water allocation. They allege that Central Plains breached such intellectual property rights by making the application in May 2006.

[31] For reasons which we will go into in due course, we have concluded there are a number of similarities between this claim and those discussed by the High Court in ***Aoraki Water Trust & Ors v Meridian Energy Limited & Ors***[10]. The High Court commented in that case at para [30]:

> *If taken to its logical conclusion, Mr Milne's argument would negate both the purpose and effect of this statutory resource licensing system. A consent authority could lawfully grant an unlimited number of permits for the same water even though that resource had already been exclusively or fully allocated in the physical sense. Existing and new permit holders would then have to compete among themselves to satisfy their demands There would be no*

10 [2005] 2 NZLR 268.

enforceable order of preference or priority, given Mr Milne's rejection of a first-come, first-served system. Also, a consent authority would be powerless to harmonise the first grant with later grants; upon granting a permit an authority becomes functus officio and is unable to revisit its terms unless expressly allowed by statute. In our view this chaotic situation would be the antithesis of the management regime contemplated by the Act and of the consent authority's express obligation to control the taking, use, damming and diversion of water. Also, we agree with Mr Kos that over-allocation of a water resource would be equally foreign to Part 2 of the statutory regime.

The Rakaia Water Management Regime

[32] We now need to very briefly identify the genesis and rationale of the current management regime on the Rakaia. It is one which commenced under the Water and Soil Conservation Act (or perhaps even earlier). The Water Conservation Order was incorporated into the overall management regime, while dealing with existing consents and renewals considered about that time. Subsequently the Council, on being the appointed controlling authority, has developed an ad hoc administrative system to group 'like' consents described as **banding**.

[33] Over a long period of time consents granted to take water from the Rakaia River have accumulated to the point where shortages occur during summer low flows. The Rakaia River Water Conservation Order requires specified flows to be maintained in the river over specified months. Only the excess over these flows is available for abstraction. As river flows naturally decrease over the summer months consents to abstract water are restricted in order to maintain the specified low flows.

[34] Consents to take water have been granted at different times. To give effect to the priority created by being first in time, and so having first right to the water, the Council implements a staged programme of restrictions. Consents granted more recently are restricted at higher flows than those of longer standing. Moreover, rather than restrict each consent strictly in accordance with the date the consent was granted the Council has grouped the consents into so-called bands. The bands are numbered, with 1 being lowest. Lower bands contain consents of longer standing. Many are renewal of

consents pre-existing the Conservation Order. Consents in the higher bands experience restrictions at higher flows, even to the extent of ceasing abstraction while the consents in the lower bands can continue to be exercised to their fullest extent.

[35] The holders of consents in the lower bands (1-3) have a more reliable supply of water authorised in their consents. Consent holders of more recent origin in the higher bands have a less reliable supply because they experience the first restrictions when natural river flows fall.

[36] This management regime is implemented by the Council invoking the restriction provisions included in the conditions of each consent. River flows rise and fall naturally and consents to abstract are not always fully utilised all of the time. Therefore, relative to low flows in the river, the sum of volumes or rates of abstraction authorised by consents often exceed both the actual quantity taken and the available water in the river. The water resource is then said to be over-allocated. This, it seems, is a common situation.

[37] The consent is to take water from the river. In our view it is not a guarantee that the water will be available. Once a consent to take is granted, the reliability of the supply will depend on the restriction conditions attached to the consent and on the natural flow of the river.

[38] Management of the Rakaia River water resource is achieved by way of the graduated restriction provisions in the conditions of consents if granted, or by not granting the applications or by provisions in an operative plan. We note that in some extreme situations, where the whole of the available water resource has been appropriated, no further applications can be contemplated, but that is not yet the case on the Rakaia.

[39] A key to the Robindale proposition to take water not actually taken by authorised abstractors with less restrictions is a detailed technique of monitoring the actual abstraction of the other consent holders using real time telemetry and exercising their take conditional upon the other takes not operating for the period of Robindale's

abstraction. Thus it is suggested unused allocation of waters of bands 2 and 3 consents can be utilised by Synlait. However, more fundamental issues arise as to:

(a) whether an unused portion of an allocation can be the subject of a further resource consent, (we will refer to the transfer provisions of the Act);

(b) whether such an allocation is in respect of instantaneous volume and not subject to the other limitations of the resource consent; and finally

(c) whether any such application would gain the same priority that might be accorded to the original application (i.e. the same minimum flow restraint).

Priority and notifiability

[40] We now come to deal with the issue of priority and the timing of the various documents. We repeat that delay was not argued for the purpose of this hearing (without prejudice to the position if the High Court decision in ***Ngai Tahu*** is reversed as to the application being notifiable in December 2001).

[41] In this case both the Synlait and Central Plains applications were placed on hold under section 91. In the case of Synlait, there was also a section 92 request. We do not intend to quote the entire contents of the Council letter of 21 December 2001 discussed in the ***Ngai Tahu*** decision but it notes (relevantly):

> *... The application was not accompanied by an application for the use of the water, or by discharge, divert and land-use consent applications, all of which will be necessary before the proposal can be undertaken.*
>
> *The application has been received by the Council as it meets all the necessary criteria of section 88 of the Resource Management Act 1991 (RMA). Furthermore, it is considered that sufficient information has been provided such that those who might wish to make a submission on it would be able to assess the effects on the environment and on their own interests. Therefore the application is sufficient to be publicly notified without the need for further information.*

However, before the application is notified, the council must consider whether it is appropriate to do so, in the absence of the associated applications.
[Section 91 then quoted.]

Notifying all applications together may ensure that there can be a better understanding of the nature of the proposal by both Environment Canterbury staff and potential submitters.

Before any decision is made on the application of Section 91, I invite you to provide comment on this matter. Until such time as any comments are received and a decision is made with regards to notification, the application will remain on hold under Section 91.

[42] The effect of that letter has been discussed in the ***Ngai Tahu*** Environment Court and High Court decisions. Reference in the penultimate paragraph to *all applications* in our view is a reference to the first paragraph which discusses **use of water, discharge, diversion** and **land-use consent** applications.

[43] There is no doubt that the Council had power to exercise its discretion by requiring such a wide-ranging group of consents. Further, it was accepted for this hearing that the letter of 21 December did require all such applications.

The June 2005 Decision

[44] A formal decision under section 91 was issued by the Council on 16 June 2005 (**the June 2005 letter**) after representations from the solicitors for the Trust that the matter be taken off hold and proceed to notification. A full copy of that letter is annexed to this decision and marked **"B"**. After confirming the discretion of the Council to place an application on hold under section 91 (which position has now been confirmed in the Environment Court and High Court), the decision discusses in the third paragraph the exercise of that discretion. The key words in this case are:

> *... I will exercise my discretion to defer notification of the above application under s91 until an application to 'use' water is submitted. Although the application to 'take' water is considered notifiable, I am exercising my discretion on the basis that the submission of further applications would provide more clarity and certainty for Environment Canterbury in auditing the proposal and for submitters, in gaining a better understanding of the nature and scope of the irrigation proposal.*

[45] The next sentence is of particular importance because it identifies the types of effects that should be considered with any application to *use* water, including ***efficiency of the use of the water, intensification of land use, groundwater quality, groundwater levels and economic consequences.***

[46] Importantly, this decision contains a reference to the right to seek a review and is clearly a decision under section 91.

[47] We have concluded that, for the following reasons, the 16 June 2005 letter is a new decision in respect of the same subject matter as the decision of 21 December 2001:

(1) it explicitly contained appeal rights;
(2) it is clearly made under section 91 and refers to the discretion explicitly;
(3) it is made in respect of the same application to take water the subject of the decision of 21 December 2001.

[48] On this basis we have concluded that the letter of 16 June 2005 replaced the earlier decision letter of 21 December 2001. The issue, from our perspective, is whether the 16 June letter requires a narrower range of consent applications to be filed before the take application became notifiable. Was it still necessary for all discharge, diversion and land use consent applications to be filed before the take application became notifiable?

What further applications were required?

[49] It is not unusual with large projects that the general consents required are to be considered separately to the numerous detailed consents. The principal consents required for a major project with many facets would be those where, if they were not granted, the project could not proceed. It would also include those consents that cannot be subject to conditions and design requirements that would adequately avoid, remedy or mitigate the effects. The categorisation of consents into what might be termed fundamental and those that are matters of detail will be a matter of judgment in each case. Entering that exercise of judgment will be the need for an adequate description of the project for those interested to make informed decisions on whether or not to take part in the process.

[50] In this case, in addition to the application for take, some 83 further applications were made on 24 November 2005, covering a plethora of issues from intake design to earthworks and land use for piping and canal structures. An explanation of this approach given to us was where Commissioner Peter Skelton recently determined that certain applications for the Waitaki River should be dealt with in a staged process by dealing with the use and take consents prior to all the other consents that would be necessary.

[51] The issue for this Court is whether the words *use* and *take* in the June 2005 letter were used in the technical sense on this occasion or as a generic reference by applying the word *use* to all the other consents that were necessary before the project could operate. Mr Chapman argued that there was a generic meaning and he referred to the earlier Council section 91 decision. He pointed to the fact that a full understanding of the application would best be gained by having all the consents, including the land use, damming and diversion consents. He argued that the Council did not proceed to notify until *all* consents had been applied for, although he acknowledged that the Synlait application itself was not notified until later, even though no ongoing requirements after the end of November were raised by the Council.

[52] Mr Wylie QC argued that the words *"use"* and *"take"*, and the emphasis with speech marks, intended that they be taken in their technical and specific sense, not in a generic sense.

The applications filed on 24 November 2006

[53] To understand the scope of the issue we turn to the consents which were actually filed at 10 am on 24 November 2006. At that time some 83 applications were filed. These included all the water use consents (at least for the Central Plains portion). There were a number of other consents, including land use, damming, diversion, and earthworks consents. Most of this range of consents was considered notifiable but some 13 which related to:

(a) intake structures, work in the bed of the river and/or earthworks; and
(b) damming (earthworks)

were considered to be subject to further information requirements. This Court must decide whether these consents were necessary to fulfil the requirements of section 91 in respect of the **take** consent, and were required to be submitted prior to notification of the **take** consent.

[54] We consider nothing turns on the question of when the consents were actually notified because the Synlait consents were also not notified until well after March 2006. We were told from the Bar by Ms Dysart that the Council is so overloaded with applications that it is having significant difficulty in processing them within the statutory time lines.

[55] The Council did not respond to the applications in any detail until 27 January 2006. Having considered the 27 January 2006 letter, we conclude that the wording of that document is not as felicitous as it might be, and it is difficult to understand from the document whether the Council considered the hold request to have been satisfied. That would not necessarily be determinative of the issue but may assist us in understanding the process adopted.

[56] Annexed hereto and marked **"C"** is a copy of the letter of 27 January 2006. The letter notes at the beginning (para 2) that the Council has considered whether the applications are now considered to be in a publicly notifiable state. A sentence follows:

> *At present, it is our view that the applications are publicly notifiable, with the exception of those listed below.*

[57] Thirteen consents were identified, all of which relate to intake structures or damming, which are not matters of the *use* of water but matters of relevant land use consents or structures in the bed of a river. Further requests for information under section 92 are included and the paragraph towards the bottom of the page ends:

> *... Until this information is provided we do not consider the applications are in a notifiable state.*

[58] The next sentence then commences:

> *In relation to all applications, the following information is also requested. This information is separate to that required to make the applications 'notifiable'.*

[59] It is unclear from this sentence whether the applications they are referring to are the 13 applications identified, the 83 applications filed on 24 November or include the take application. At the bottom of page 4 towards the conclusion the letter reads:

> *Your applications will be placed on hold until we receive this information. Please respond to this request by* ***Monday 20 February 2006****. Your options are ...*

Conclusion as to the November applications

[60] We have concluded that the 27 January 2006 letter did not place the ***take*** application back on hold and is not a reference to whether or not the requirements in

respect of the take application have or have not been met. Our reason for this conclusion is based primarily on the following:

(a) the Council already considered that the take application was notifiable and there would be no reason for the Council to specifically revisit that decision;

(b) there is no reference in the letter to the take application and it seems instead a consideration of the applications filed *associated with the Central Plains water enhancement scheme*;

(c) it is unclear whether the letter intended that all 83 applications be placed on hold. If that was the intention there is still nothing indicative from this document that this would mean that the application for **take** was necessarily placed on hold.

[61] Because of the consequences of a decision to place the application for take on hold, there would need to be a specific decision of the Council to continue to do so if the applications were made so as to satisfy the June 2005 section 91 decision. We remind ourselves that section 91(1)(b) relevantly provides:

> *It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents **be made before proceeding further.***

When were the other applications identified made?

[62] The issue is whether relevant applications were made at 10 am on 24 November or at some later point in time when complete information was available. If all applications were made on the same day, including those subject to further hold or information requests, then the hold notice of the Council dated either 21 December 2001 or 16 June 2005 would be satisfied. Thus a further decision under section 91 would then be required to place the ***take*** application on hold again.

[63] Mr Wylie's submission in this regard was quite simply that an application is made when it is filed with the relevant authority. Mr Chapman's position was that an

application could not be said to be made until it had been assessed and found to have been complete. This issue was expressly left open in the ***Ngai Tahu*** High Court decision as noted earlier at paragraph 20.

[64] We have concluded that the structure of the Act is compelling. The application is made when it is filed with the appropriate authority. As at November 2005, when the further application was filed, section 88(3) then provided that a local authority may, within five working days after the lodgement, determine that it is incomplete and return the application. Importantly, section 88(3) itself still acknowledges that an inadequate application is still ***made*** and gives power for a local authority to reject it, which decision is subject to appeal.

[65] Reference to sections 124 and 125 would also reinforce the importance of having a fixed date for the ***making*** of an application. Section 124(1), for example, refers in (c) and (d) to an application being ***made*** to an appropriate consent authority (c) at least six months before the expiry of the existing consent (d). If they do so, they may continue to operate under the existing consent in certain circumstances (section 124(3)). Section 125 provides that if an application is ***made*** prior to the expiry of five years after the granting of consent then the extension may be granted. Quite clearly, the date for filing in both these cases is critical. If the application is not ***made*** until such time as it is assessed or other intermediate steps have been taken, this may have a critical impact on the operation of major consents.

[66] Mr Chapman pointed to the distinction between ***receiving*** information referred to in section 92 as current in 2001 and ***making*** an application. However we conclude that this is merely a logical consequence of the difference between an application and information. In this situation an applicant **makes** an application or **provides** information. A council can only **receive** the application or information. We conclude this is the reason for the distinction in those terms used in the legislation.

[67] Finally, we agree with Ms Dysart that the difficulty with setting another date is in determining any firm date on which such an application would be ***made***. Given the significant contingencies which occur after the actual filing with the Council, there could be no certainty as to when an application might be assessed. On occasions

relevant officers are on leave or sick for protracted periods, files may be lost, and applications may be circulated to various departments for additional comment.

[68] In practical terms it would not be possible to know when an application had been assessed. If it was the date upon which further communication took place with the applicant, this would give rise to a whole range of delays beyond the control of an applicant in circumstances where they would have no certainty as to whether or not particular rights applying under the Act would accrue to them (i.e. section 124).

[69] We agree that if the application was rejected under section 88(5), and subject only to any appeals succeeding on that, the application would be invalid. In this case that did not occur and accordingly we have concluded that the section 91 hold decision (21 December 2001 and/or 16 June 2005) was satisfied for both Central Plains and Synlait on the same date (24 November 2006). In that case Central Plains satisfied the requirements of the hold decision earlier in the day and is therefore first in time.

Consequences of our conclusion

[70] Overall we have concluded that there are also pragmatic reasons for such a conclusion. We observe that the Central Plains application was the first to be made in 2001, compared with that made by Synlait in 2005, and the Central Plains application was also the first to be advertised on the 24th day of June 2006, compared with Synlait which was advertised, according to Council documentation, on 9 September 2006. In this case neither the Synlait application nor the Central Plains application has yet been heard. However the Robindale application has been to hearing.

[71] Central Plains holds priority over Synlait to be heard first on their application for the resource and also over the Robindale application, if that application is for the same resource. We must also consider, however, whether Central Plains varied their application so that they lost the priority obtained on 24 November 2005.

[72] Mr Chapman conceded that the alterations of May 2006 could not affect the original application as it related to the highest priority water available in the river, and the amended application in May 2006 did not abandon that claim. Furthermore, the low

flow restrictions are simply potential conditions on any consent to take water from the Rakaia River. Whatever the outcome of the subsequent consideration, the Central Plains application would have priority to be heard first and determined as it relates to the water resource of the Rakaia River over the Synlait application.

The Water Conservation Order

[73] In this context the Court must have particular regard to the regime established by The National Water Conservation (Rakaia River) Order 1988 and its inter-relationship with the Resource Management Act. Annexed hereto and marked **"D"** is a copy of The National Water Conservation (Rakaia River) Order 1988. In simplistic terms the order sets up a regime which intends to protect the quantity and rate of flow of the natural waters of the river because of its braided form, outstanding wildlife habitat above and below the Rakaia Gorge, outstanding fisheries and outstanding recreational, angling and jetboating features. Its purpose, therefore, is not to set up an allocation regime *per se* for the river but rather to protect certain features of the river. It does this by, in this case, specifying minimum gorge flows for each month of the year, then limiting the amount of water that can be taken downstream of the gorge site.

[74] In broad terms the Order provides a minimum flow in the river in each month. Higher flows are protected in the period from November to January:

November	129 cumecs
December	139 cumecs
January	124 cumecs

than those from February to October:

February	108 cumecs
March	105 cumecs
April	97 cumecs
May	95 cumecs
June	96 cumecs

July	91 cumecs
August	92 cumecs
September	90 cumecs
October	106 cumecs.

[75] However, in addition to providing minimum flows, the Order goes on to prescribe that at flows over 140 cumecs above the minimum in any month the maximum abstraction from authorised takes may be 70 cumecs. Between the minimum flow and 140 cumecs over that minimum flow, a regime of 1:1 is established. In other words, consented water users cannot take more than half the flow recorded at the gorge site over the monthly minimum specified.

[76] This is subject to two major reservations:

(a) section 9(4) provides for certain particular water rights which may be granted. Importantly these include a consent for the diversion, taking and discharging of water from and to the Rakaia River to enable the Ellesmere County Council to provide for its rural water supply (this is an existing consent);

(b) nothing in the Order affects the taking of water for domestic use, the needs of animals or in connection with fire fighting.

[77] Further, the Order itself needs to be read subject to the provisions of the then Water and Soil Conservation Act 1967, particularly section 20(d)(7). This provides that nothing in an order will affect any existing consents previously authorised.

[78] Section 217(1) of the Resource Management Act carries forward the former Water and Soil Conservation Act provision:

> *(1) No water conservation order shall affect or restrict any resource consent granted or any lawful use established in respect of the water body before the order is made.*

[79] A further provision is also carried down in section 14 of the Resource Management Act which provides:

> *(3)(b) In the case of fresh water, ..., is required to be taken or used for –*
>
> *(i) An individual's reasonable domestic needs; or*
>
> *(ii) The reasonable needs of an individual's animals for drinking water, –*
>
> *and the taking or use does not, or is not likely to, have an adverse effect on the environment . . .*

[80] The first question, which is not clearly addressed by the Water Conservation Order, is whether the consents existing at the time of that Order were intended to be included as part of the one for one sharing regime above minimum flows. Any existing consents could not have a minimum flow condition imposed upon them but might be used for the purposes of calculating minimum flow for other consents granted later.

[81] In a sense the Water Conservation Order has set out the maximum amount of water which might be allocated in certain given circumstances, but it is difficult for us to see this as an allocation regime in itself. By the operation of section 199 it is not possible to grant resource consents that detract from the Water Conservation Order. Renewals of existing consents (grandfather rights) appear to be exempted in terms of the Act, although that is not explicit. There is no requirement in terms of the Water Conservation Order that consents must be granted to the maximum rate specified in the Order.

The regime of the Act

[82] Having looked at the provisions of sections 199 through to 217 of the Act, we are not able to conclude from those sections that the imposition of a Water Conservation Order substitutes for the requirement on a resource consent to consider the provisions of Part 2 of the Act or the various other criteria set out in section 104 and relevant portions of section 105. Importantly, it appears that the Regional Council's power to impose an allocation regime under section 30(fa), or the power to grant consents on more

restrictive terms than the Water Conservation Order, or refuse consents is not affected by the operation of the Water Conservation Order.

[83] Although section 200(c) specifies that a Water Conservation Order takes effect in relation to the maximum allocation for abstraction, it does not appear to follow that an allocation plan in a regional document or a decision-making authority must necessarily grant resource consents for water to that maximum. In short, there is nothing that we can see under the Water Conservation Order that prevents higher levels of protection than those specified in the Water Conservation Order, depending on the merits of the individual application or the terms of a particular plan. Section 43C of the Act makes it clear that National Environmental Standards can be more stringent than Water Conservation Orders. Where they are less stringent then the Water Conservation Order prevails.

[84] We turn to section 30(e) of the Act which gives a council the power to control the taking, use, damming and diversion of water, and control the quantity, level and flow of water in a body, including the setting of maximum and minimum levels or flows of water, the control of the range or rate and control of the taking or use of geothermal energy. We conclude that in considering an application for a resource consent these types of controls and others may be imposed upon an individual consent when they have a resource management purpose, such as outlined in section 30 and Part 2 of the Act.

[85] Section 30(fa) of the Act provides that a council may have the function:

> *if appropriate, the establishment of rules in a regional plan to allocate any of the following:*
>
> *(i) the taking or use of water (other than open coastal water)....*

From this we must conclude that the basis for allocation plans for water is in an operative plan. Although we accept that a Water Conservation Order may take effect as an allocation by specifying levels of take by way of a regime, it does not necessarily follow that individual consents or a regional plan must have the same provisions for allocation as the Water Conservation Order. They cannot be less stringent but can be

more restrictive. In this case it is common ground that the Regional Council has no operative or even proposed regional plan purporting to allocate the taking or use of the water in the Rakaia River. This is to be compared with the ***Ngai Tahu*** decision and the allocation regime set up for the Waimakariri River with Class A and B waters.

[86] Section 30(4) of the Act deals with allocation issues and some of these provisions are relevant to the argument before this Court. Section 30(4)(a) provides that an allocation plan rule may not, during the term of an existing resource consent allocate the amount of a resource that has already been allocated to the consent. Section 30(4) also makes it clear that individual consents may have allocated to them an amount of a resource. This must be subject to any limitations that may be contained within such a resource consent. We can see no basis to read such provisions as relating only to the instantaneous take volumes. In this case the Water Conservation Order does not limit potential takes only in terms of instantaneous volumes but also in terms of minimum flows on a monthly basis, a one to one sharing regime and thus a maximum volume which might be taken.

The transfer of consents

[87] A key issue is whether the resource consents which have been granted have allocated the resource just by instantaneous volume. Consents can be limited by time, place of take, place of use, volumes, instantaneous rates and a whole range of other conditions and limitations relating to efficiency, drainage, leeching, artesian effects, waste etc. It is also clear that a consent in itself is permissive and it is not essential to take all of the resource granted.

[88] Section 136(2) of the Act provides that a holder of a consent can transfer all or some of their water take consent and, under (b)(ii) where there is no plan, this must be approved by the council. Such a transfer can be limited in a number of ways by conditions, including time. If the transfer is granted, the existing consent (or part thereof) is deemed cancelled.

[89] Three outcomes can be taken from this:

(a) if a council allocated an unutilised portion of any instantaneous volume granted to an applicant it would be a direct derogation of the powers of the owner to transfer that under section 136;

(b) the council's powers to impose conditions on any such transfer (section 136(5)(b)) makes it clear that there is no necessary conclusion that the same limits would apply to a new application for the transfer as applied to the original grant; and

(c) there is no necessary inference that the priority accorded to the original holder of the water right would necessarily fall to a person receiving that transfer under section 136.

[90] Even if such priority were the case, we are unable to see any basis upon which such a conclusion could be reached in respect of an applicant who did not have the permission of the owner. We can find no provision authorising a consent authority to allocate the whole or part of an existing consent without the request of the land owner. In this case there is no evidence of such a landowner request. Section 30(4)(a) seems to indicate that even an allocation plan cannot do so. It is even more likely that this is not possible in terms of a resource consent application without a landowner request.

Are the resource consents for the Rakaia River simply for instantaneous rates?

[91] We have not been able to follow an argument mounted by Mr Chapman that the Rakaia consents were simply for instantaneous take rates. All the consents we have seen (and we have only seen a limited sample) indicate a parcel of controls. In respect of those takes where the consent holder is not fully utilising the consent, we are unable to see any basis, as we have already discussed, on which that consent could be utilised by another party without the resource consent holder's permission. Where the consent is limited, for example by volume, we are unable to see any basis upon which the holder of the consent or any other person can suggest that the instantaneous rate should be applied for a greater volume or longer period. At best this argument appears to be an argument that the instantaneous take rate of the consent may not be utilised in every single month and thus there may be more volume available in a particular month than was previously thought because the consent does not cover all that period.

[92] However, as we understand the Robindale argument, they are seeking further volume in the same months as the taking and at the same instantaneous rate already consented. For example, one consent was in the order of 450 l/s but limited to 30,000 m^3 per month. That amounts to only some five days' continuous take per month. Robindale therefore argued that there are 25 days of time which they can utilise. Even if that argument was permissible, the condition of consent is not a minimum flow. It is a restriction affected by river flow conditions.

[93] We cannot see any basis on which a new application can argue that they should have the same restriction as a consent much earlier in time. To do so would, in our view, derogate from the principle on which this waterway has operated from inception, that the earliest applications in time are the last to be restricted. If there is a case for review of the restriction conditions because of changes in use by other parties, then that is a matter which should be subject to either review by the Council or applications for review by other parties. In our view it cannot form the basis for a later applicant to obtain a much higher reliability of water supply than would otherwise exist.

[94] We have concluded that the Robindale application is no more than a further application for allocation from the Rakaia River. Any arguments as to availability of water and low flow conditions on consent are matters of merit for the hearing but they cannot elevate the application to higher priority to access the resource than those of other parties prior in time and/or already holding consents.

[95] In the example of a high priority consent holder wishing to transfer an unused part of their consent to another, under section 136 the Council must consent as there is no allocation plan. Thus the Council may impose restrictions under section 136(4) including river flow restrictions based on priority issues.

Conclusion

[96] In light of the specific conclusions we have reached, overall we conclude that the declarations sought by Central Plains should be granted. Accordingly, under section 313 we must consider whether the form of the Order should be modified or whether other orders should be made. In the current circumstances we consider that the proposed

declarations easily follow from our conclusions and are clear in their meaning. We now restate and make those declarations:

> *(a) That the Central Plains Water Trust joint application with Ashburton Community Water Trust, CRC021091, to take water from the Rakaia River has priority over the application CRC052033 by Synlait Investments Limited for water allocation from the same resource.*
>
> *(b) That Central Plains Water Trust's joint application with Ashburton Community Water Trust, CRC021091, to take water from the Rakaia River has priority over the application CRC62685 by Robindale Dairies Limited (previously Synlait Investments Limited) for water allocation from the same resource.*

[97] The Court has power to make further or other declarations if it sees fit. There may be some advantage to parties in obtaining a declaration in relation to the Robindale consent that it is an application for water from the Rakaia River rather than a particular band. However, such a consequence follows from the two declarations we are minded to make.

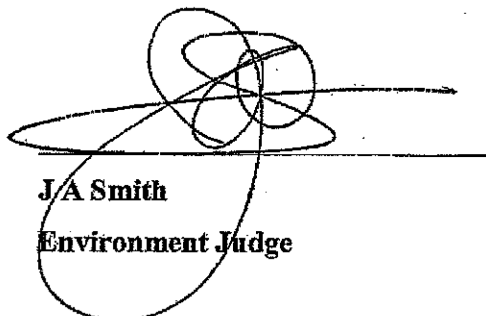
[98] We <u>direct</u> that any further declarations which are a necessary consequence of our decision be filed within 20 working days, replies ten working days thereafter and final reply five working days thereafter.

Costs

[99] The matter is one of importance and has been fully but succinctly argued by all parties. We would have thought that, given the wide-ranging public interest in the matter, costs should lie where they fall. If not, it appears that some provision should be made that costs will be suspended in the event that appeals are filed (which we were told by all counsel was likely). To that end we have determined that an application for costs (if any) is to be filed within 20 working days of the expiry of the appeal period or, if any appeal is commenced, within 20 working days of the determination or resolution of that

appeal(s). Replies should be filed within ten working days thereafter, with final reply five working days later.

DATED at CHRISTCHURCH this 27th day of **April** 2007



J A Smith
Environment Judge

Issued[11]: **27 APR 2007**

---

11 Smithje/Jud_Rule/D/2006-CHC-420 doc.

"A"

SCHEDULE

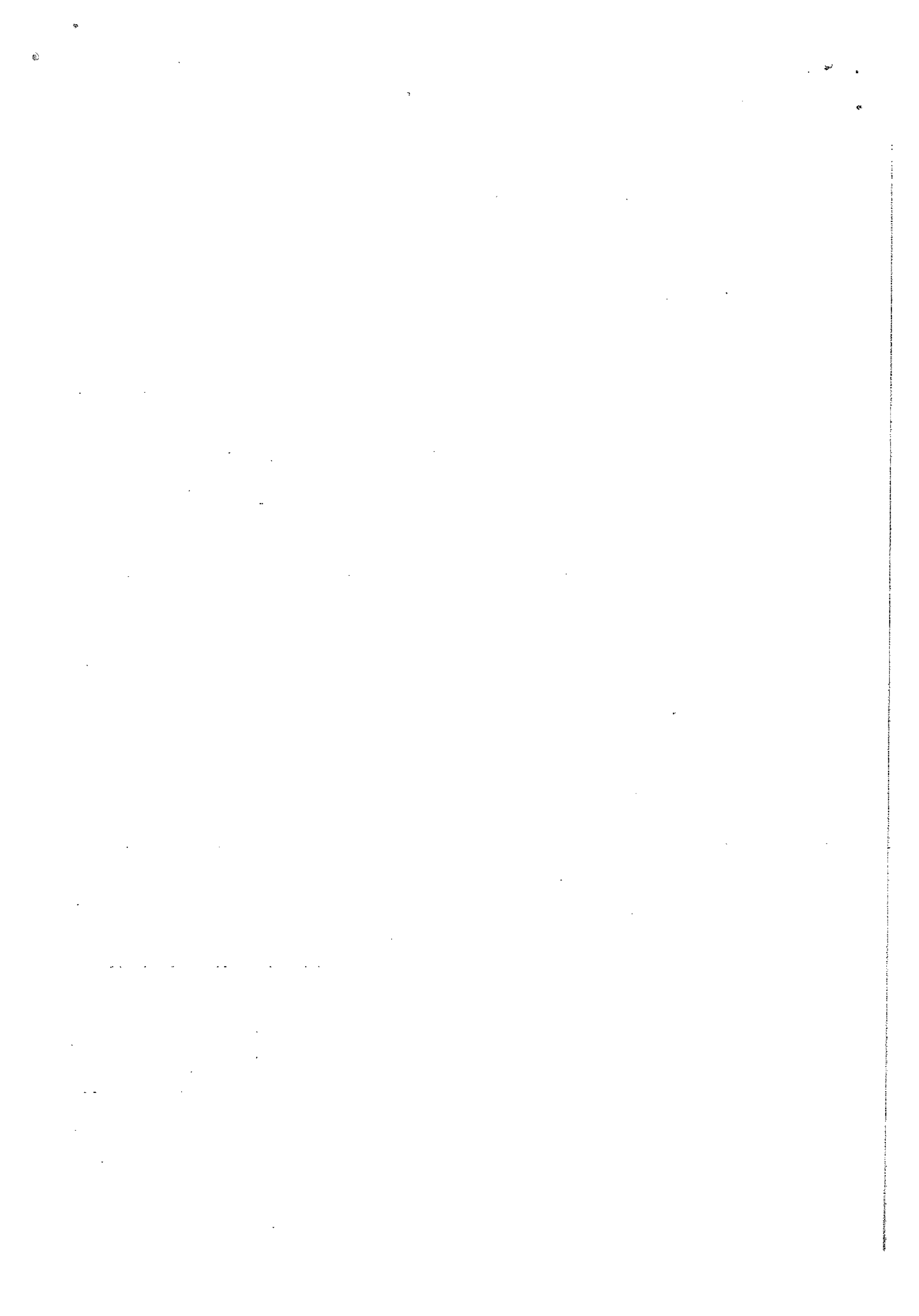
Parties represented by Dairy Holdings:

Dairy Holdings Limited
Lynton Dairy Limited (as shareholder of Glenroy Community Irrigation Limited)
Oakdale Dairy Limited (as member of Fereday Irrigation Group)
Northbank Irrigation Partnership
Glenroy Community Irrigation Company Limited
South River Dairy Limited (as member of Northbank Irrigation Partnership)
North River Dairy Limited (as member of Northbank Irrigation Partnership)
One Arrow Limited (as member of Northbank Irrigation Partnership)

Other parties outside the ambit of the section 274 notice subsequently acquired include operations with an interest in Ford Irrigation:

Glenroy Community Irrigation Company Limited (CRC 051803) also uses water not used under a consent held by Barrhill Chertsey Limited (CRC 990088) by agreement with Barrhill Chertsey

Smithje/Jud_Rule/D/2006-CHC-420 Schedule.doc.



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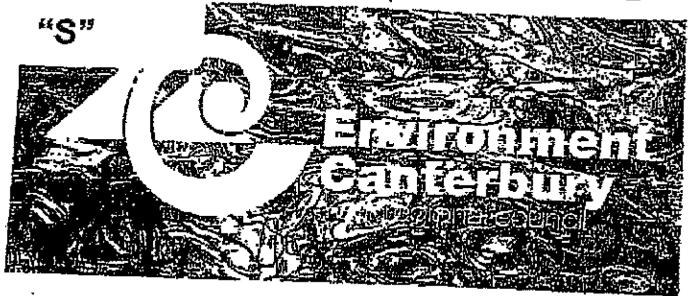


16 June 2005

58 Kilmore Street, PO Box 345, Christchurch
General enquiries: 03 365 3828
Fax: 03 365 3194
Email: ecinfo@ecan.govt.nz
Customer services: 03 353 9007
or 0800 EC INFO (0800 324 63
Website: www.ecan.govt.nz

FAXED

Rachel Dunningham
Buddle Findlay
PO Box 322
DX WP20307
CHRISTCHURCH

Dear Ms Dunningham

APPLICATION FOR RESOURCE CONSENT CRC021091 – CENTRAL PLAINS WATER TRUST

Thank you for your letter dated 25 May 2005 and your legal advice received 7 June to support your request for the above application to proceed to notification.

We have considered the advice you have presented, together with our own legal advice on this matter. Section 91 of the Resource Management Act 1991 (the Act) states that a consent authority may delay the notification of an application for a resource consent if other consents under the Act will also be required in respect of the proposal to which the application relates.

It is my decision that in this instance, that I will exercise my discretion to defer notification of the above application under s91 until an application to 'use' water is submitted. Although the application to 'take' water is considered notifiable, I am exercising my discretion on the basis that the submission of further applications would provide more clarity and certainty for Environment Canterbury in auditing the proposal and for submitters, in gaining a better understanding of the nature and scope of the irrigation proposal.

In particular, the effects that should be considered with any application to 'use' water include, but not be limited to those related to: efficiency of the use of the water taken; intensification of land use; groundwater quality; groundwater levels; and economic consequences.

You have the right to apply to the Environment Court for an order directing that Environment Canterbury's decision to place your application on hold under s91 of the Act be revoked.

If you have any queries regarding these matters please contact Sri Hall, Team Leader, Consents Investigations.

EXHIBIT NOTE

This is the annexure marked "S" referred to in the affidavit of **Michael Conrad Freeman** and affirmed at Christchurch this 21st day of November 2006 before me

Signature ....
A Solicitor of the High court of New Zealand
(Solicitor to sign in part on Exhibit)

COPY FOR YOUR INFORMATION

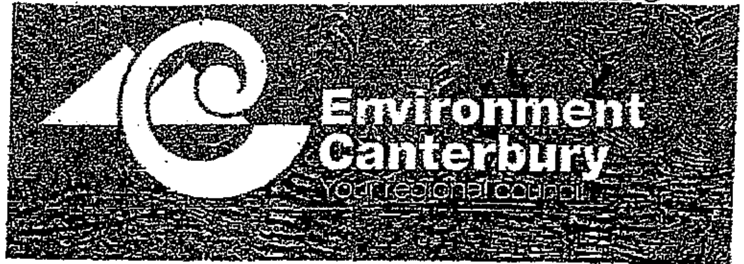
Yours sincerely

Mike Freeman
DIRECTOR REGULATION

MCF:CAL

CC: Don Rule
Sri Hall

Our Ref: CO6C/17309
Contact: Sri Hall



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27 January 2006

Central Plains Water Trust
C/- Buddle Findlay
PO Box 332
CHRISTCHURCH

Attention: Rachel Dunningham

Dear Ms Dunningham

RE: RESOURCE CONSENT APPLICATIONS FOR THE CENTRAL PLAINS WATER ENHANCEMENT SCHEME: CRC061755 – CRC061983

Thank you for the resource consent applications associated with the Central Plains Water Enhancement Scheme.

We have had the opportunity to read the document *Assessment of Environmental Effects for Resource Consent Applications to the Canterbury Regional Council* and make an assessment of the status of the applications as applied for (i.e. determine whether the applications are considered to be in a publicly notifiable state).

At present, it is our view that the applications are publicly notifiable, with the exception of those listed below.

For the applications below, we do not consider that sufficient detail of the proposed activities and assessment of effects has been provided such that parties who may wish to submit on the applications can understand the nature of the activity and the effects of these activities on their interests.

Applications relating to activities to disturb the bed and banks and place intake structures in the bed and banks of the Rakaia and Waimakariri Rivers:

Rakaia River
- CRC061863
- CRC061865
- CRC061961
- CRC061962

Waimakariri River Upper Intake
- CRC061863
- CRC061867
- CRC061963
- CRC061964

Our Ref: C06C/18965
Your Ref:
Contact: Lucy Bowker

Waimakariri River Lower Intake
CRC061868
CRC061869
CRC061969
CRC061970

Application to dam water for the purposes of creating a storage reservoir:
CRC061939

Under section 92 of the Resource Management Act 1991, the Canterbury Regional Council requests further information on the above applications as detailed below:

1. Preliminary specifications and schematic of the proposed Rakaia River and Waimakariri River intake structures.

Whilst the application provides an illustration of the proposed general layout of the intake system, and general points relating to this, it is unclear from the application as to the scale of the intakes and the nature of them. For example, page 3-7 refers to a '*low* diversion bund across *part* of the river' a '*short* sluicing race' and an '*excavated channel*'. These are all very vague descriptions with no clarity of scale or nature of the intake system. No sketches or plans have been provided.

Given the volume of water being taken, and the likely scale of the intakes and works involved, consideration of the effects of the structures and works cannot be made without further details being provided. If no final design plans have been decided upon, you will need to provide details of the options available, and an assessment of effects of each option. Plans or sketches that illustrate the scale and nature of what is proposed should also be provided.

Please provide an indication of the likely length of time that works will be required in the bed to construct the intakes.

2. Dam breach assessment.

The application states *"the risk of dam failure from flooding and overtopping will be negligible."* Under NZSOLD Guidelines, the dam is considered to be a high potential impact structure. Given this, please provide an assessment of dam failure, indicating the areas that could be inundated and the impact of such a failure on those affected.

This information is considered necessary to provide sufficient information for potential submitters to understand the nature of and potential effects of the proposed activities on their interests. Until this information is provided we do not consider the applications are in a notifiable state.

In relation to all applications, the following information is also requested. This information is separate to that required to make the applications 'notifiable'.

3. Rules

No information has been provided as to the relevant rules under which the applications have been lodged. This is an important part of any application given it forms part of the framework to be used in processing and deciding the applications. Please provide details of relevant rules in the Transitional Regional Plan, Waimakariri River Regional Plan and Proposed Natural Resources Regional Plan.

4. **Proposed conditions for each resource consent application.**

In relation to proposing consent conditions, the application states *"the RMA does not require the applicant to do this"*. However, the fourth schedule of the RMA does require the applicant to show how they will mitigate against any potential adverse environmental effects. Although there is reference to proposed mitigation throughout the application document, it is often unclear and not specific, making it difficult to know precisely what mitigation can be relied on when determining residual effects.

The application refers to the use of management plans to define mitigation, as well as to detail construction and operational guidelines for how the work will be carried out. It is proposed in the AEE that these plans will be compiled only if the applications are granted. Significant reliance has been placed on these management plans for mitigating effects and defining details of the activities throughout the AEE.

It is now well established practice, following on from case law (e.g. NZ Rail vs Marlborough District Council 1994 NZRMA70 p192) and observed at major hearings such as those held for Kate Valley and the CCC Bromley discharges, that decisions on appropriate mitigation to achieve certain environmental outcomes should be part of the decision-making process and management plans are simply documents that set out how resources (people and equipment) will be managed to achieve those outcomes. They should not be used to define those outcomes, which is what is proposed here.

We consider that in order to fully assess the nature of the activities, and the scale and significance of residual effects, either the management plan documents must be provided, or alternatively specific mitigation for each application. We recognise that this mitigation may change through the course of the application process as a result of submissions and consultation, and this change can be accommodated through that process.

It is recommended that this mitigation be provided in the form of proposed consent conditions, given the certainty such wording provides, enabling all parties to have complete clarity about precisely what is proposed as part of the application. It also results in greater transparency and efficiencies if decision-makers decide to grant consent with conditions that reflect the mitigation proposed with the application.

5. **Capacity of the sediment settling ponds.**

An estimate of the surface area of sediment settling ponds associated with the intakes has been provided along with approximate inflows, however there is no reference to the volumetric capacity of ponds and the methods or information used to determine this. Please provide information to show how the settling ponds will be managed in a high flow event.

6. **Further details on the Wainiwaniwa Dam, spillway and outlet channel.**

The application states that *"given the Potential Impact Category of the dam, it is likely that the dam will need to be constructed to a standard to safely pass inflows from a 1 in 10,000 year flood event, and be able to withstand a 1 in 10,000 year earthquake event without the uncontrolled release of water."* Please provide

details of what methods and information will be used to determine the size of these events and how these will be incorporated into the designs?

7. **Effects on groundwater quality.**

   Please provide the technical information that supports the conclusions regarding predicted increases in nitrate nitrogen levels in groundwater as a result of land intensification.

8. **Effects on groundwater quantity.**

   Please provide a copy of the report *'Central Plains Water Irrigation Scheme – preliminary assessment of effects on the groundwater environment'* prepared by Aqualinc, that is referred to in the assessment of effects on groundwater quantity.

9. **Additional Resource Consents may be required**

   Following our preliminary assessment of whether all necessary applications have been lodged, it has come to our attention that in relation to the Waininwaniwa Portal, the application refers to waste water associated with the toilets, showers, washroom and lunchroom, and states that a wastewater treatment system will be constructed at the Portal to service the construction facilities. Please clarify whether this will be separate from the storm water treatment system, and whether any resource consents are needed to discharge treated human effluent to land or water.

   Water in the sedimentation ponds associated with the intakes on the Rakaia and Waimakariri Rivers may constitute damming of water. Please confirm whether this has been considered and whether consent is required under the TRP or PNRRP.

Your applications will be placed on hold until we receive this information[1]. Please respond to this request by **Monday 20 February 2006**[2]. Your options are:

(a) Supply the requested information;
(b) Agree in a written notice to supply the requested information[3]; or
(c) Refuse in a written notice to supply the information requested.

Please note that you have the right to object to the above request for further information[4].

Yours sincerely

Leo Fietje
PRINCIPAL CONSENTS ADVISOR

[1] In accordance with Section 88B(a) of the Resource Management Act 1991
[2] In accordance with Section 92A(1) of the Resource Management Act 1991
[3] In accordance with Section 94A(2) of the Resource Management Act 1991
[4] In accordance with Section 357(A) of the Resource Management Act 1991

National Water Conservation (Rakaia River) Order 1988

SR 1988/241
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RONALD DAVISON
Administrator of the Government
ORDER IN COUNCIL
At Wellington this 10th day of October 1988
Present:
HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL

PURSUANT to section 20D of the Water and Soil Conservation Act 1967, His Excellency the Administrator of the Government, acting by and with the advice and consent of the Executive Council, hereby makes the following order.

Contents

1 Title and commencement
2 Interpretation
3 Outstanding characteristics and features
4 Retention of natural waters in a natural state
5 Partial retention of natural waters
6 Further partial retention of natural waters
7 Further partial retention of natural waters
8 Right to dam not to be granted
9 Water rights and general authorisations
10 Scope

Order

1 Title and commencement

(1) This order may be cited as the National Water Conservation (Rakaia River) Order 1988.

(2) This order shall come into force on the 28th day after the date of its notification in the Gazette.

2 Interpretation

In this order, unless the context otherwise requires,—

Act means the Water and Soil Conservation Act 1967:

gorge flow means the mean daily flow of the Rakaia River as estimated by the North Canterbury Catchment Board from measurements at—

(a) The recorder site maintained by that Board at the Rakaia Gorge Bridge (map reference NZMS 1 S82:139584); or

(b) The recorder site maintained by the Department of Scientific and Industrial Research at Fighting Hill (map reference NZMS 1 S82:120598).

3 Outstanding characteristics and features

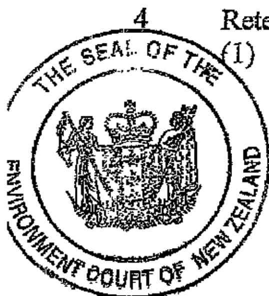
It is hereby declared that the Rakaia River and its tributaries include and provide for—

(a) An outstanding natural characteristic in the form of a braided river:

(b) Outstanding wildlife habitat above and below the Rakaia River Gorge, outstanding fisheries, and outstanding recreational, angling, and jet boating features.

4 Retention of natural waters in a natural state

(1) Because of the outstanding characteristics and features specified in clause 3 of this order—



(a) Subject to subclauses (2) and (3) of this clause, the quantity and rate of flow of natural water in the Rakaia River upstream of its confluence with the Wilberforce River and all tributaries of the Rakaia River upstream of that confluence shall be retained in their natural state:

(b) The quantity and level of natural water in Lake Heron, and the quantity and rate of flow of natural water in its tributary streams, shall be retained in their natural state.

(2) A water right may be granted or renewed in respect of the natural waters referred to in subclause (1)(a) of this clause if—

(a) In the case of a grant, the purpose is to replace a water right in force on the commencement of this order; or

(b) In the case of a renewal, the purpose is to renew a water right in force on the commencement of this order—

and the new water right or renewed water right is made subject to similar terms and conditions to which the former right was subject.

(3) A general authorisation pursuant to section 22 of the Act may be issued in respect of the natural waters referred to in subclause (1)(a) of this clause if—

(a) It is authorised for the purpose of renewing a general authorisation in force on the commencement of this order; and

(b) It is subject to similar terms and conditions to which the former general authorisation was subject.

5 Partial retention of natural waters

(1) Subject to subclauses (2) and (3) of this clause, because of the outstanding characteristics and features specified in clause 3 of this order and for their protection downstream of the confluence of the Rakaia River with the Wilberforce River—

(a) The quantity and rate of flow of the natural waters in the Wilberforce River and all tributaries of the Wilberforce River, including the Harper River, shall be retained in their natural state:

(b) The quantity and level of natural water in Lake Coleridge and the quantity and rate of flow of natural water in its tributary streams shall be retained in their existing state.

(2) A water right may be granted or renewed in respect of the natural waters referred to in subclause (1) of this clause if—

(a) In the case of a grant, the purpose is to replace a water right in force on the commencement of this order; or

(b) In the case of a renewal, the purpose is to renew a water right in force on the commencement of this order—

and the new water right or renewed water right is made subject to similar terms and conditions to which the former right was subject.

(3) A general authorisation pursuant to section 22 of the Act may be issued in respect of the natural waters referred to in subclause (1) of this clause if—

(a) It is authorised for the purpose of renewing a general authorisation in force on the commencement of this order; and

(b) It is authorised subject to similar terms and conditions to which the former general authorisation was subject.

6 Further partial retention of natural waters

(1) Subject to subclauses (2) and (3) of this clause, because of the outstanding characteristics and features specified in clause 3 of this order and for their protection downstream of the confluence of the Rakaia River with the Wilberforce River, the quantity and a rate of flow of the natural waters in the Rakaia River downstream of its confluence with the Wilberforce River and

upstream of the North Canterbury Catchment Board's recorder site referred to in clause 2 of this order shall be retained in their natural state.

(2) A water right may be granted or renewed in respect of the natural waters referred to in subclause (1) of this clause if—

(a) In the case of a grant, the purpose is to replace a water right in force on the commencement of this order; or

(b) In the case of a renewal, the purpose is to renew a water right in force on the commencement of this order—

and the new water right or renewed water right is made subject to similar terms and conditions to which the former right was subject.

(3) A general authorisation pursuant to section 22 of the Act may be issued in respect of the natural waters referred to in subclause (1) of this clause if—

(a) It is authorised for the purpose of renewing a general authorisation in force on the commencement of this order; and

(b) It is authorised subject to similar terms and conditions to which the former general authorisation was subject.

7 Further partial retention of natural waters

(1) For the purposes of this clause, the term minimum gorge flow for each month shall be as follows:

(a) January—124 cubic metres per second:
(b) February—108 cubic metres per second:
(c) March—105 cubic metres per second:
(d) April—97 cubic metres per second:
(e) May—95 cubic metres per second:
(f) June—96 cubic metres per second:
(g) July—91 cubic metres per second:
(h) August—92 cubic metres per second:
(i) September—90 cubic metres per second:
(j) October—106 cubic metres per second:
(k) November—129 cubic metres per second:
(l) December—139 cubic metres per second.

(2) Subject to subclauses (3) and (4) of this clause, because of the outstanding characteristics and features specified in clause 3 of this order in that part of the Rakaia River between the North Canterbury Catchment Board's recorder site referred to in clause 2 of this order and the sea, and for their protection, the minimum gorge flow shall be retained in the river and, while the gorge flow does not exceed the minimum gorge flow, the flow in the river shall not be reduced by abstraction or diversion.

(3) While the gorge flow exceeds the minimum gorge flow by less than 140 cubic metres per second, the flow in the river shall not be reduced by abstraction or diversion by more than half of the excess of the gorge flow over the minimum gorge flow.

(4) While the gorge flow exceeds the minimum gorge flow by 140 cubic metres per second or more, the flow in the river shall not be reduced by abstraction or diversion by more than 70 cubic metres per second.

8 Right to dam not to be granted

(1) A right to dam any of the bodies of water specified in clause 4 of this order shall not be granted under section 21 of the Act.

(2) A right to dam any of the bodies of water referred to in clause 5 of this order shall not be granted under section 21 of the Act if the effect of such a grant would be that the provisions of this order cannot remain without change or variation.

9 Water rights and general authorisations

(1) Water rights under section 21 of the Act shall not be granted, and general authorisations under section 22 of the Act shall not be made, in respect of any part of the Rakaia River or its tributary streams for the purposes of constructing or maintaining stock barriers or facilitating agricultural encroachment into those bodies of water.

(2) Water rights shall not be so granted and general authorisations shall not be so made for any discharge into the Rakaia River downstream of its confluence with the Wilberforce River or any part of the bodies of water specified in clause 4 of this order, if the effect of the discharge would be to breach the following provisions and standards:

- (a) Any discharge is to be substantially free from suspended solids, grease, and oil:
- (b) After allowing for reasonable mixing of the discharge with the receiving water—
  - (i) The natural water temperature shall not be changed by more than 3 degrees Celsius:
  - (ii) The acidity or alkalinity of the water as measured by the pH shall be within the ranges 6.5 to 8.3, except where due to natural causes:
  - (iii) The waters shall not be tainted so as to make them unpalatable, nor contain toxic substances to the extent that they areunsafe for consumption by humans or by farm animals, nor shall they emit objectionable odours:
  - (iv) There shall be no destruction of natural aquatic life by reason of a concentration of toxic substances:
  - (v) The natural colour and clarity of the water shall not be changed to a conspicuous extent:
  - (vi) The oxygen content in solution in the water shall not be reduced below 6 milligrams per litre:
  - (vii) Based on not fewer than 5 samples taken over not more than a 30-day period, the median value of the faecal coliform bacteria content of the waters shall not exceed 200 per 100 millilitres.

(3) Subject to subclause (4) of this clause, water rights under section 21 of the Act shall not be granted, and general authorisations under section 22 of the Act shall not be made, in respect of any part of the Rakaia River or its tributary streams, or of Lake Heron or Lake Coleridge or their tributary streams, where the effect of such rights or authorisations would be that the provisions of this order cannot remain without change or variation.

(4) Water rights may be so granted and general authorisations may be so made in respect of any part of the waters specified in this clause for all or any of the following purposes:

- (a) Research into, and enhancement of, fisheries and wildlife habitats:
- (b) The maintenance or protection of roads, bridges, pylons, and other necessary public utilities:
- (c) Soil conservation and related matters undertaken pursuant to the Soil Conservation and Rivers Control Act 1941:
- (d) The diversion, taking, and discharging of water from and to the Rakaia River to enable the Ellesmere County Council to continue to provide for its rural water supply in accordance with, and on the same terms and conditions as, the water rights granted to it and in force on the date of commencement of this order.

10 Scope

Nothing in this order shall be construed as limiting the effect of the second proviso to section 21(1) of the Act relating to the use of water for domestic needs, for the needs of animals, and for or in connection with fire-fighting purposes.

MARIE SHROFF,
Clerk of the Executive Council.

Explanatory Note

This note is not part of the order, but is intended to indicate its general effect.

This order declares that the Rakaia River and its tributaries include and provide for—

(a) An outstanding natural characteristic in the form of a braided river:

(b) Outstanding wildlife habitat above and below the Rakaia River Gorge, outstanding fisheries, and outstanding recreational, angling, and jet boating features.

The order also includes various provisions to preserve and protect the Rakaia River and its tributaries.

Date of notification in Gazette: 13 October 1988.

Issued under the authority of the Regulations Act 1936.
The National Water Conservation (Rakaia River) Order 1988 is administered in the Ministry for the Environment.