

BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER OF the Resource Management Act 1991

AND

**IN THE MATTER OF Resource consent applications (42 applications
for water take and 13 associated land use and
discharge permits)**

APPLICANTS LOWER WAITAKI APPLICANTS

**LEGAL SUBMISSIONS ON BEHALF OF THE CENTRAL SOUTH
ISLAND FISH AND GAME COUNCIL**

September 2008

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May it please the Commissioners:

SUMMARY OF CONCERNS

1. These legal submissions are on behalf of the Central South Island Game Fish and Game Council ("Fish and Game") on all applications being heard by the Commissioners. Fish and Game oppose the granting of all consents unless otherwise specifically stated.
2. The applications can be summarised as being of concern to Fish and Game for a variety of reasons:
 - 2.1 Five of the applicants have sought a 100m³/s minimum flow when the Waitaki Catchment Water Allocation Regional Plan ("the Plan") specifies a minimum flow of 150m³/s. All but four of the Lower Waitaki applications will also breach the volumetric annual allocation in Rule 6. Thus the integrity of the Plan is brought into question, and the precedent effect for future applications, including the variation of existing consents, is raised.
 - 2.2 There is no need for a minimum flow of 100m³/s in order to address the reliability of supply of irrigation water during the 1st September – 30th April irrigation season. Whilst a lower minimum flow would slightly enhance reliability, a minimum flow of 150m³/s provides over 95% reliability. Enhancing reliability beyond this level comes at an increasing cost to the environment, and to instream values in particular.
 - 2.3 The abstraction from the Hakataramea River will further degrade a fully allocated river. The Hakataramea River is a popular fishing area for rainbow trout¹ and the applied for abstraction will further degrade the river as a valued fishing location. The significant lower Waitaki River trout fishery is totally dependant on tributary spawning, of which the Hakataramea River is a vital contributor.²
 - 2.4 Fish and Game is particularly concerned over water quality in the Hakataramea River. Despite the good intentions of the Applicants through the use of Farm Management Plans, no Farm Management Plan can stop an increased level of nutrient loss. Fish and Game

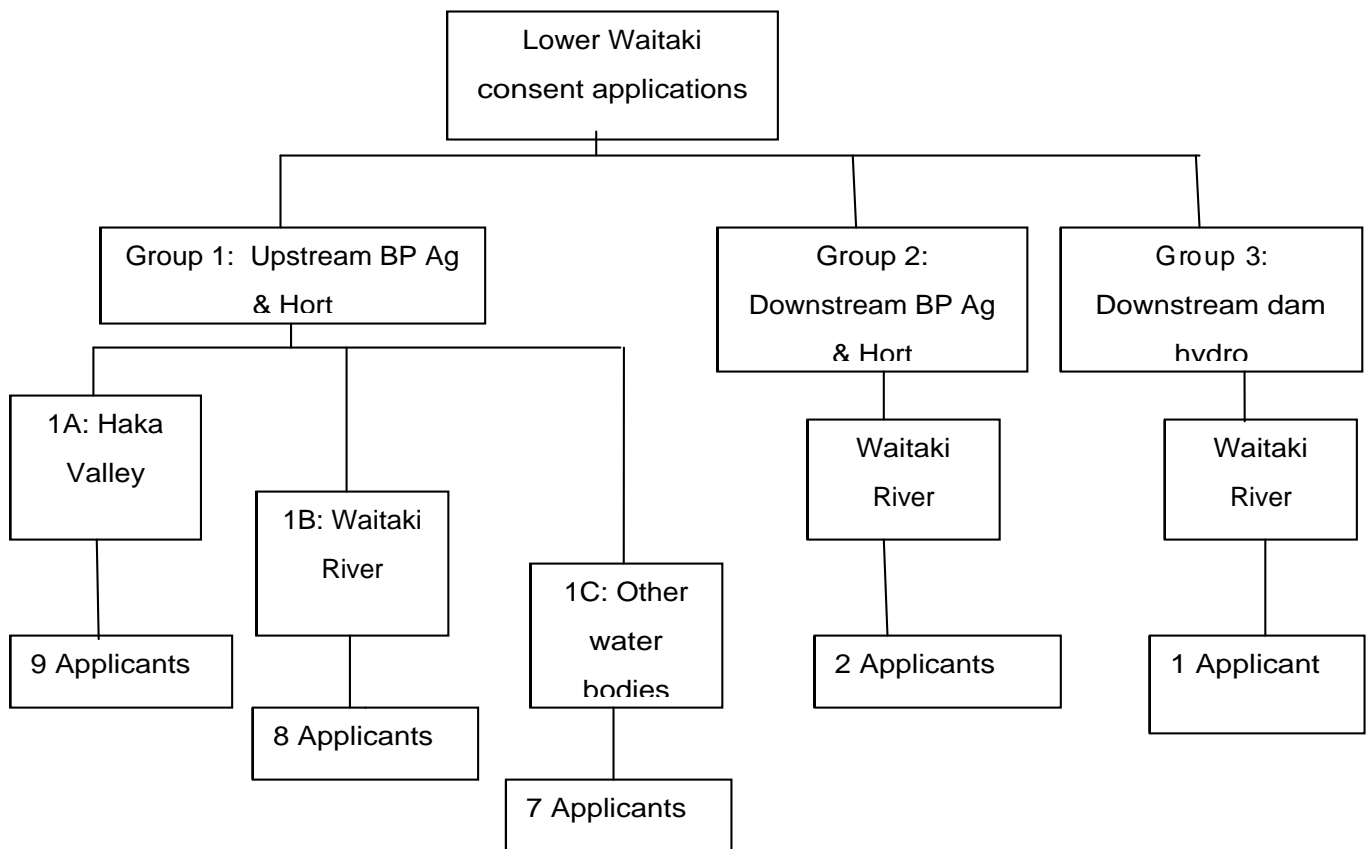
¹ Evidence of Mark Webb at paragraph 26 and paragraphs 33-38

² Evidence of Mark Webb at paragraph 32

submits the Commissioners are not in a position to be certain the proposed mitigation will be effective and can conversely be almost certain anticipated adverse effects will occur.

2.5 The cumulative effects of the proposal are significant and adverse in both the Lower Waitaki catchment and the Hakataramea catchment.

3. Fish and Game's evidence will address the potential effects of the proposed takes, both generally and where necessary on an application by application basis. The applications, for ease of analysis, have been separated into common groupings, as follows:



4. Fish and Game's overall position is that:

1. Upholding the whole lower Waitaki total limit of 1250M m³/year for agriculture and horticulture is of greater importance than upholding the 150/1100M m³/year split.

2. Group 1A – Hakataramea – raise cumulative effect issues, water quality and the management of abstractive users as a group.
 3. Group 1B – Waitaki upstream of Black Point – all seek a reduced minimum flow, which raises issues of adverse environmental effects, and precedent.
 4. Group 1C – Maerewhenua and other tributaries – applications involve over allocation and drying of streambeds, water quality and the application of environmental flow regimes.
 5. Group 2 – Waitaki downstream of Black Point – Waihao Downs Irrigation Ltd's application is opposed because it proposes a lower minimum flow than is set by the Plan; conversely the application by DD and VJ Chalmers, which does not, is not opposed, although potential conditions of consent will be addressed in evidence.
 6. Group 3 – the sole applicant for hydro on the Waitaki is opposed because it seeks a lower minimum flow than that set in the Plan and considers that as it is a 'diversion' it's take should not be included in the volumetric allocation.
5. In terms of allocation in summary:
1. Group 1A argue current allocation is 407 l/s with a further 93 l/s available as per the Plan. Should the environmental flow regime be applied in two parts – the main stem of the Hakataramea River; and its tributaries? If yes, there is 93 l/s available. If no, and a total catchment approach is applied, then allocation for 'A' consents is currently exceeded. Fish and Game take the view that allocation is currently exceeded. With most consents having a minimum flow of 500 l/s the river becomes dry due to abstraction most years.
 2. Minimum flows of 500/1500 l/s are understood to be sought so as to match existing consents. This is opposed, because the Hakataramea River is already over-allocated. A minimum flow of 750 l/s from April to August, in order to provide for adult fish passage during migration, should be applied as per the Plan, consents are granted.
 3. For the mid river applicants Fish and Game is unclear what mitigation would occur in the absence of exercising the Hunter Downs consents

(were they to be granted). The 100 m³/s minimum flow, regardless of whether HDI is operating or not, is opposed.

4. The three applicants – Torach Farms, Waitaki Orchards and Hakataramea Valley Irrigation – cannot alter their applications to now say they wish a minimum flow of 100 m³/s.
5. For the Maerewhenua River, which is the second largest tributary of the Lower Waitaki River, particular value is placed on its trout spawning habitat. However the river currently dries in its middle reaches due to abstractions complying with the minimum flow. It is considered to be over-allocated and any new consents must be subject to a suitably raised minimum flow that accounts for this.
6. Fish and Game does not oppose the Sunny Downs application on the Otekaike River, although it seeks a minimum flow condition.
7. The amended Westmere application to take from the Kurow River is not opposed, but Fish and Game seeks screening of the intake, plus a minimum flow trigger point upstream of the take.

STATUS OF THE ACTIVITY

6. As reported in Environment Canterbury's section 42A reports, a considerable number of the applications are non-complying. These applications do not comply with several rules in the WRP including Rule 6 (Volumetric Allocation) and Rule 2 (minimum flow). Of the ten applications for take and use from the Waitaki River according to ECan records only four comply with Rule 6. They comply because they have greater priority over other applicants. Five of the applicants do not comply with Rule 2 as they apply for a minimum flow of below 150 m³/s. These particular applications are:

- 6.1 Cameron WN
- 6.2 Maerewhenua District Water Resource Company
- 6.3 Rutherford ER
- 6.4 Station Peak Partnership & Wainui Farms Ltd
- 6.5 Clarkesfield Holdings Ltd

7. As discussed in the evidence of Bridget Pringle Fish and Game's concern over annual allocation does not relate solely to the reach above Black Point. The separation of an allocation limit at Black Point has no ecological reasoning. Fish and Game is however concerned if the total allocation for the whole river is breached. There is currently 1264 Mm³/yr consented and applied for within the whole river. That means if all the current applications are granted then the Plan's allocation will be breached by 14 Mm³/yr.
8. The s42A report of Claire Penman notes in Figure 2 there are consent applications for 38.8 m³/yr currently being considered by the Commissioners. The generally agreed view (excepting the evidence of Keri Johnston) is that current allocation is 146 Mm³/yr. Considering an annual allocation under Rule 6 of 150 Mm³/yr according to Environment Canterbury's records, a total of 34.8 Mm³/yr is non-complying. This represents the majority of the applications before the Commissioners.
9. As the Commissioners are aware these applicants must satisfy either of the two tests in s104D, as well as the Commissioners' concerns in respect of their overall discretion under s104. It is submitted that neither of the gateway tests in s104D is satisfied.
10. Fish and Game is particularly concerned about the Hakataramea applications and their effect on the environment. Fish and Game considers these effects to be more than minor. The effects will be outlined in detail in the evidence of Mark Webb, Bridget Pringle, Graeme Hughes and Wayne Grafton.
11. The Hakataramea catchment already has degraded water quality and a reduced fish population. These effects are a result of increased abstraction over the past twenty years and this is explicitly addressed in the evidence of Mark Webb. Absence of an allocation limit in the proposed consent applications means that consent holders could continue to abstract water when the river is above 500 l/s, with no cap. The only restriction would be when the river is below 1500 l/s, when the abstractors must reduce their takes by half. This is not the same as flow

sharing as envisaged by the Plan.³ Fish and Game submits the Commissioners can decline both new applications and renewal applications under s104(1) due to their cumulative effect on the environment. However with true renewals, meaning replacements of existing consents, Policy 28 does recognise the value of existing an consent holder's investment and maintains inclusion of the consent, if **granted**, in its priority band and in respect of its allocation. However the policy does not prevent the application of the Plan's minimum flow.

Is the annual allocation breached?

12. In respect of which applicants breach Rule 6, we note that Fish and Game and Environment Canterbury do not agree with the analysis undertaken by Keri Johnston in calculating the annual allocation. The evidence of Bridget Pringle has been prepared on the basis that consents to divert water are intended by the Plan to be included in the calculation of the allocated amount, except in very limited circumstances (i.e. Rule 6(2)).
13. Fish and Game is aware both the applicants and Meridian disagree with Fish and Game's analysis. However Fish and Game considers such an interpretation is the only proper interpretation given the language of the Plan.
14. As the Commissioners will be well aware applications shall be considered in accordance with the matters listed in s104 but subject to the matters listed in Part II of the Act. Justice Fogarty discussed the application of s104 in *Wilson v Selwyn District Council* [2005] NZRMA 76 when he said:

Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part II, to have regard to it, "shall have regard". The qualifier "subject to Part II", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose or one or more of the provisions in Part II, in the context of the application for this resource consent.

15. Fish and Game submits this is important when considering the interpretation of Rule 6 in respect of its application to tributaries. The evidence of Bridget Pringle and Frank Scarf outlines in detail why Fish and Game considered Rule 3

³ Evidence of Mark Webb at paragraph 92

should be interpreted to include tributaries. We submit Justice Fogarty's statement in *Wilson* indicates that such an interpretation is appropriate.

16. The relevant rule provides:

(1) *Except as provided in (2), no person shall take, use, dam or divert water when, by itself or in combination with any other take, use, dam, or diversions, the sum of the annual volumes authorised by resource consent, exceeds the annual allocation to that activity in Table 5.*

17. The rule refers to any one diversion or in combination with another diversion exceeding the annual allocation in Table 5. It could not be more clear: the Board explicitly included diversions in both the activity being applied for and in calculating the current volume already authorised.

18. Fish and Game submits the rule is clear and a literal interpretation of the rule must lead to a conclusion that diversions are taken into account. The Court in *Brownlee v Christchurch City Council* [2001] NZRMA 539 referred to the principles of Plan interpretation. The Court listed six principles, the first of which was the "text of the relevant provision". The text of the provision is plain and simple. Whilst the Applicants and Meridian suggest a more purposive approach that does not include diversions, Fish and Game submits it is neither necessary nor appropriate to apply a stretched interpretation.

19. Fish and Game further submits the above application of Rule 6(1) is endorsed by Rule 6(2), that provides:

(2) *Water taken or diverted and returned to the same water body in the vicinity of the take or diversion point, in the same condition and quality as taken, for micro hydro-electricity generation or fisheries and wildlife, does not need to be accounted for in the annual allocation to activities in Table 5.*

20. There the Board has given an explicit limited exemption for some diversions. It has qualified its above inclusion of diversions into the annual allocation to be covered by Table 5. It has expressly stated the exemption and made plain that certain criteria must apply. It must return to the same water body "in the vicinity" and in the same condition and is only for certain activities.

21. Both Rule 6(1) and Rule 6(2) are very clear: the critical rule (6(1)) defines that diversions are to be included and the qualification to that rule explicitly excludes diversion of a certain type. Fish and Game submits there is only one possible reading of the Rule in accordance with proper statutory

interpretation – that diversions be included within the allocation limits referred to in Table 5.

Other Issues

22. We now turn to consider three particular issues:
- 22.1 The integrity of the Plan would be undermined by grants of consent for the proposed non-complying activities;
 - 22.2 The precedent effect of granting the take application from the Lower Waitaki River;
 - 22.3 The cumulative effect of granting the Hakataramea applications will be so great as to create a synergistic effect that will not achieve the Act's purpose of sustainable management.

INTEGRITY OF THE PLAN

23. In our previous submissions on the North Bank Tunnel Concept ("NBTC") we made submissions⁴ on the importance of the Plan and the likelihood that the granting of non-complying consents would undermine in particular the integrity of the WCWARP. We do not intend to repeat in full those submissions, but ask that they be considered with regard to the present applications.
24. Tompkins J in *Hopper Nominees Ltd v Rodney DC* (1995) 2 ELRNZ73 stated the integrity of the plan is a relevant consideration when considering (now) s104(1)(b)(iv). As far as it applied to the (now) s104 (1)(b)(iv), Tompkins J cited with approval the full High Court in *Batchelor v Tauranga District Council (No. 2)* [1993] when it stated:

Section 104(4)(a) and (b) [now 104(1)(b)(iv)] require that regard also be had to the rules of a plan and to its relevant policies or objectives. In our view, those provisions envisage consideration of the integrity of the plan. The weight to be given to any effect on that integrity must be a matter of judgement for the consent authority or the Tribunal.

⁴ Paragraphs 58-67

25. The Board explicitly referred to the Plan's predicted effect when it stated in Appendix 1 to the Plan:

The environmental level and flow regimes, and the allocations to activities, are two key components of the allocation framework established by this Plan. They should be binding except in specific cases where it can be established that the adverse environmental effects of the proposal are minor, and where the activity is not contrary to the objectives and policies of this Plan.

26. As expressed previously in Fish and Game's submissions at the NBTC hearing, the WAP is not a "regular plan", in that its creation history is unique. It was produced after an unprecedented amount of public consultation, after hundreds of submissions were received and heard, and was created by a Board which had considerable experience and knowledge. The Board realised the process from which it had created the Plan had been significant and considered it should be complied with except in "specific cases".

PRECEDENT EFFECT

27. The Court of Appeal in *Dye v Auckland RC* [2002] 1 NZLR 337 noted that issues of precedent effect and cumulative effect are not properly considered under s104D but rather under (b)(iv) or para (c) of s 104(1). Therefore whilst Fish and Game consider these applications should be declined under s104D, if the Commissioners do consider they pass one of the gateways in 104D then Fish and Game requests the Commissioners decline consent under s104 due to the precedent that would be established should consents be granted.
28. Whilst the precedent effect of a large scale abstraction (NBTC) could be limited due to its uniqueness, that is not the case with these current applications. Fish and Game submits the five applications for a minimum flow below 150 m³/s, if granted, will encourage other applicants to apply for the same minimum flow. However this is a large group of applications for abstraction and there will inevitably be more applications and Fish and Game submit there is considerable room for a precedent effect to occur.
29. There are two issues as to precedent effect for the Waitaki applications; annual allocation and minimum flow. Fish and Game submitted at length at both the NBTC and HDI hearings on the integrity of the Plan in respect of a minimum flow in the Waitaki River below 150 m³/s. There is no need to repeat

those submissions except to note Fish and Game opposes any application for a minimum flow below 150 m³/s and to outline any specific effect from these applications.

30. The current hearing process shows the precedent effect of previous applicants filing for a minimum flow of less than 150 m³/s. Whilst some of these applications were filed a significant time ago some applicants have only recently sought a minimum flow of less than 150 m³/s. They have done so knowing that both Meridian through the NBTC and Meridian/South Canterbury Irrigation Trust through the HDI scheme, applied for a minimum flow of less than 150 m³/s. The applicants have made the amendments as it allows greater reliability of supply and puts them on par with the other applicants. Future applicants will be encouraged to apply for a minimum flow lower than 150m³/s for the greater reliability and with the knowledge that their applications may be granted.
31. Fish and Game submits the precedent effect is even greater in respect of Rule 6 for those applications on the Lower Waitaki River. Whilst all applications being heard by the Commissioners with the exception of four, breach Rule 6, as discussed above Fish and Game does not believe there to be a sufficient precedent effect for those applications in the Hakataramea River. However it does consider there will be a considerable precedent for any future applications in the lower Waitaki River. Applications continue to be made that breach Rule 6. This is after the Board set an annual allocation limit; this allocation limit was to satisfy the competing interests for the use of the river. Granting these applications runs the danger of sending a message that Rule 6 has no real effect, and thus encourage further abstraction that was clearly not intended by the Board.
32. Fish and Game notes that Meridian would appear to have the same concerns over the precedent effect of granting the lower Waitaki applications⁵.
33. Fish and Game also has concerns over how the applications have proceeded through the application process, the mitigation offered by the applicants and its precedent effect on future applicants. In respect of the monthly minimum cut offs it is not apparent what mitigation the Applicants have offered and at what cut off level. Fish and Game is in the unenviable position of being unaware of what exactly the Applicants are seeking and also being unaware

⁵Legal submissions of Jo Appleyard paragraphs 36-37

of what specific mitigation (if any) the Applicants are offering to mitigate the effects of the activity. Fish and Game note that Meridian in its legal submissions stated that it was not certain of the details of the application.

34. It maybe that MRNAG's applications are made in reliance on Meridian's specific mitigation. However as noted in Meridian's opening legal submissions, Meridian is not aware of this. Whilst Fish and Game still believes Meridian's mitigation will be insufficient it is at least able to be assessed and understood by Fish and Game officers. Even if the mitigation relied on is Meridian's, how will this work if Meridian's consents (presuming they are granted) are not exercised for a significant number of years? Under that scenario, it would appear there is very little mitigation offered by the Applicants unless or until Meridian commences the exercise of its consents.

Cumulative Effects

35. Fish and Game believes several aspects of these applications give rise to concerns over their cumulative effect. These in the main relate to concerns over the effect of breaching Rule 6 and the cumulative effect on the Hakataramea catchment of granting the Hakataramea applications.
36. The High Court in *Unison Networks Ltd v Hastings District Council* Potter J, HC, CIV-2007-485-896, approved the Environment Court's decision in the same case where it stated:

If a consent authority could never refuse consent on the basis that the current proposal is the straw that will break the camel's back, sustainable management is immediately imperiled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose.

Logically, it is an unavoidable conclusion that what must be considered is the impact of any adverse effects of the proposal on the environment.

37. We have presented submissions previously on the legal basis for cumulative effects as expressed in *Dye v Auckland City Council* [2001] NZRMA 513 and *Kuku Mara Partnership v Marlborough DC* (W037/2005).
38. We would however wish to add the following from the High Court in *Herzog Investments V Waitaki District Council* (HC), CIV-2006-485-1061 to summarise:

that if an existing activity has adverse effects, and a proposed activity also has an adverse effect even if only minor, which would add to the existing effects, then the definition requires a consideration of both. It would be an exception to the permitted baseline concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together with the new effect, they produce a synergistic impact on the environment.

...

The decision of the Court of Appeal in Hawthorn confirms the relevance of a broad definition of environment for the purposes of s 104(1)(a) as including the subject site and the surrounding environment, sometimes called the receiving environment. The permitted baseline jurisprudence has never confined adverse effects analysis to adverse effects generated solely on the subject site. Plainly, the concept of cumulative effects (which is part of the RMA statutory concept of effect, see s 3(3)(d)) allows taking into account effects generated by a proposal on the subject site in combination with other neighbourhood effects.

39. It is our understanding⁶ that there is no issue between Meridian in respect of NBTC and the present applications in terms of priority, as Meridian does not claim priority over MRNAG. However, there is still a potential priority issue both above and below Black Point in times of low flow. Irrespective of who has priority, there is the potential for cumulative effects of abstraction to occur, particularly in times of low flow. The major concern regarding cumulative effects is, however, in the Hakatamea River, where the irrigable area is expected to double. However, adverse effects on this waterway can be expected to pass downstream and adversely affect the mainstem of the Waitaki as well.
40. In summary:
- More abstraction results in reduced dilution, coupled with additional contaminants entering the waterway from intensification land use;
 - Reduced amenity and angling experience;

⁶ Decision of Commissioner Skelton on Waitaki Catchment Priority Issue, dated 8 April, at page 13

- Increased river temperatures, which adversely affect trout and salmon and their habitat;
- Increased periphyton and filamentous algae, which is a limiting factor for food production for trout and salmon.

Water Quality

41. Fish and Game does not believe there is sufficient certainty that the mitigation offered through Farm Management Plans ("FMPs") will deliver the required results. As Clare Mulcock referred to in her HDI evidence there have been no studies or analyses completed on the effectiveness of FMPs in general.
42. Whilst Fish and Game acknowledges the current applicants have attempted to mitigate the effects through the use of FMPs as much as possible, it is the very model of FMPs that Fish and Game does not consider to be an effective method of mitigation. Fish and Game note that Ned Norton has stated in evidence that a 50% reduction in lost nutrients would be the best case scenario.⁷

Conditions on cumulative effects

43. If the Commissioners were minded to grant the applications, then Fish and Game submits the Commissioners are within their jurisdiction to place conditions on the applications to help ameliorate current cumulative effects. This was first raised by the Supreme Court in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112 and was approved in a more recent case *Rotokawa Joint Venture Ltd v Waikato RC* EnvC A041/07. The Environment Court at paragraph 111 stated:

This raises a subsidiary but important issue, and that is whether this Court has the jurisdiction to impose conditions to address subsidence effects arising from past lawful extractions. It was accepted by Mr Robinson that cumulative effects arising from the grant of these consents upon the effects of past extractions can be addressed by conditions. We also agree with the submission of Mr Taylor for Environment Waikato that the position now settled by the Supreme Court in Waitakere City Council is that while the assessment of effects is an integral part of section 104,

⁷ Evidence of Ned Norton, paragraph 53 "...we shouldn't expect more than about 50% reduction in nutrient loads from all mitigation measures combined"

when it comes to imposing conditions, the nexus or link often thought necessary is not required because the language of section 108 itself is so open that such a restriction is not to be read into it. What is required is the application of the classic Newbury principles overlaid perhaps with the Supreme Court's view that conditions should be "logically connected". One of those principles of course is that any condition must be reasonable. The reasonableness of any condition was stressed by Mr Robinson on behalf of Contact.

44. Therefore the Commissioners can impose conditions on the applicants to address the well documented current cumulative effects. The water quality of the rivers of the lower Waitaki River catchment, including the Hakataramea River in particular, have been degraded in recent decades due to existing land practices. These current effects are addressed in the evidence of Bridget Pringle but include sediment deposition, reduced water clarity, increased water temperature, and bacterial contamination. These effects have been assessed by several Environment Canterbury commissioned reports.⁸
45. Fish and Game considers there are several areas where the Commissioners could impose conditions to address the cumulative effect on the environment, including:
 - 45.1 Payment of the costs for Fish and Game to address the increased bird population that will arise from increased irrigation and its associated change in land use and the creation of ponds;
 - 45.2 Baseline monitoring (as discussed below)
46. Fish and Game acknowledges that the applicants have, at significant cost, attempted to mould the FMPs to identify which farm user is accountable for any environmental effects. The Applicants have said the science is not there to enable them to be in a position to sufficiently identify which farmer is causing the increased effects. Fish and Game accept that this may well be the situation, as at today.

⁸ RW McDowell (2006) Estimation of phosphorus loads from dryland and irrigation areas in the Hakataramea catchment; Norton and Rouse (2007) Assessment of effects of increased nutrient concentrations due to catchment land use changes in the Hakataramea River; and the GNS report by Zemansky, White and Barrell (2006).

47. However Fish and Game proposes an alternative approach that applies to all current applicants. This approach would be of most benefit in the Hakataramea River catchment. There is a considerable amount of science produced by both past and present applicants' consultants and through Environment Canterbury's commissioned reports that identifies the current state of the Hakataramea River. This is both in terms of water quality and fish populations. The Commissioners may decide to grant these applications although they may be uncertain as to the true effect of the applications. The Commissioners may be certain that some effects will occur but believe with sufficient certainty that they will not be so significant as to require decline of the applications. In that case Fish and Game suggests baseline monitoring could be appropriate.
48. This baseline monitoring would identify the current state of the environment (or previous evidence could be relied upon) such that later effects are attributable to the current applications, or that irrespective of who caused the effects the matter must be addressed. If it was identified through baseline monitoring that the environment was further degrading this could be addressed via a s128 review. Such a review could result in the imposition of conditions requiring contribution to further mitigation, or requiring each consent holder to contribute to some further mitigation.
49. As these applications involve separate applicants the issue of funding for such baseline monitoring would arise. Fish and Game proposes that each Applicant be required to contribute towards the cost of the monitoring. The monitoring could be carried out by Environment Canterbury and funded by the Applicants. Legally, such a condition could be imposed as an increased monitoring charge.
50. Such monitoring does not identify which particular consent holder is to blame for any adverse effect on the environment. However it does recognise that each application in combination with the other applications, will lead to adverse cumulative effects to a greater or lesser extent. Whilst this paints every applicant with the same brush, it is the most practical way of ensuring adverse effects are mitigated based on the level of scientific information available.
51. Further it would ensure consent holders would be held accountable for any adverse effects on the environment. If as the applicants suggest there will be

no adverse effect on the environment then the applicants only cost will be the monitoring. However if the Applicants and their consultants' assertions are incorrect, the applicants will help ensure the effects are ameliorated.

Section 104 summary

52. Fish and Game submits the following:

52.1 Integrity of the Plan is a significant issue with these applications. The Plan identifies the limits for irrigation and these applications explicitly breach those limits.

52.2 Those applications for take from the Lower Waitaki River will add to the cumulative effect of the North Bank Tunnel Concept. There is little cumulative effect from the proposal for a minimum flow of 100 m³/s as this is already applied for by HDI. However Fish and Game is concerned over the cumulative effect that will occur from the breaches of Rule 6. These applications will further affect the Lower Waitaki to a level higher than anticipated by the Plan.

52.3 There will be considerable precedent effect from the granting of the Lower Waitaki applications. This is both in respect of applications for a minimum flow of 100 m³/s and for breaches of the annual allocation limit.

52.4 For those applications that relate to the Hakataramea Fish and Game submits the cumulative effect of these applications will be significant. The environment is already degraded and these applications will further degrade it. This case is the very type of case the Environment Court was referring to where there was a "synergistic effect" on the environment.

Why not 150 m³/s in the Lower Waitaki?

53. Fish and Game has previously put forward in evidence before the Commissioners its concerns over a minimum flow of 100 m³/s. Its concerns over a 100 m³/s flow include loss of the 'big river' experience, an approximate 15% reduction in salmon spawning habitat, an approximate 32% reduction in salmon angling habitat, loss of natural braiding pattern, increased silt

deposition and periphyton growth and loss of sub-adult rainbow habitat. These concerns are listed in the evidence of Mark Webb.

54. It has since the approval of the WRP advocated for a minimum flow of 150 m³/s as outlined in Rule 2. Fish and Game believes whilst it was not what it had requested from the Board it did however provide certainty going forward. Fish and Game acknowledges the Board considered a whole range of competing interests in setting the minimum flow, and it has accepted that flow.
55. The affidavit of Frank Scarf puts into context the competing interests for use of the Waitaki River. Meridian holds back water during certain periods to ensure its generation occurs at the most profitable time; those who rely on in-stream values (such as DOC, river users and Fish and Game) wish those applications that breach the Plan (i.e. Rules 2 and 6) are declined, and irrigators seek to abstract water at the highest reliability possible. It is not surprising that these interests often conflict. However Fish and Game believes the Commissioners are in a position (as the Board was) to satisfy, at least in part, the competing interests for use of the lower Waitaki River.
56. The Board explicitly intended to meet the competing interests in the river through various policies and rules in the WRP, for example Rule 2. In setting the flows in Rule 2 the Board considered all the matters (and others) in Policies 4, 45 - 46. This is explicit from the explanation section on page 45 that provides:
- These policies (45-46) describe the basis on which the environmental flow regime for the Lower Waitaki River has been set.*
57. The Board considered the actual requirements of current⁹ consents would be met, and this has been assessed by several experts at these and previous hearings to be 56 m³/s. The Board referred to the "actual requirements of exercising existing consents" and these consent holders currently enjoy near 100% reliability. If these consents were reviewed against a 150 m³/s minimum flow then this would fall to 97.5%. Then the Board states the environmental flow regime would accommodate up to 95% reliability for future applicants provided they were within the annual allocation.
58. The Board considered that 95% reliability was the appropriate standard for new applicants; however the current Applicants are applying for a minimum

⁹ Those consents authorised on the date the Plan become operative – Footnote 15, Page 45 WRP

flow that is below the environmental flow regime and also abstraction above the allocation limit, meanwhile also requesting reliability of 100%. Such a result is explicitly going outside the Board's intention. They could have applied for a minimum flow of 150 m³/s and achieve a reliability above 95% and the Board's intention, at least in part, would be achieved. Fish and Game and other instream submitters would achieve the desired consistency in the application of the Plan and the effects on the river as envisaged by the Board would be achieved.

59. The Applicants for the HDI scheme suggested it was impossible to obtain the required reliability to ensure investment with a minimum flow of 150 m³/s. This is disputed by Fish and Game as outlined in the evidence of Frank Scarf at that hearing. However the HDI application is a "new" consent as defined in the Plan as if it is granted it was not in effect on the date the Plan became operative. It therefore falls into Policy 46 (ii)(c) where the Board considered 95% reliability would be appropriate. Both the Applicants' evidence through Rob Potts and Fish and Game show that this 95% could be achieved. The HDI scheme is another example of the Applicants being able to achieve the Board's desired effect but for commercial reasons deciding not to.
60. Conversely Meridian is able to, although according to Meridian at some financial cost, achieve a minimum flow of 150 m³/s and provide for the required 90 m³/s for abstraction. Meridian has the means to control the flow of the Lower Waitaki. The only requirement currently is that the minimum flow at all times is 120 m³/s, although the Plan envisages a minimum flow of 150 m³/s on review. It can if it wishes, release the 80m³/s irrigation allocation as stated in Rule 7 (regardless of its start date) and provide for a minimum flow of 150 m³/s in the Lower Waitaki River. This is explored in the evidence of Mr Frank Scarf.
61. Therefore in summary:
 - The Board after assessing the environmental effects and considering the competing interests in the Waitaki River set an environmental flow regime that included flushing flows, minimum flow, instantaneous allocation limit and also the setting of volumetric allocations through Rule 6.
 - When setting the environmental flow regime the Board considered it was sufficient to allow for current abstractions to continue as allowed

by their consents and for future abstractors (as long as they were inside the annual allocation) to be given 95% reliability.

- Contrary to the intention of the Board, five of the eight applicants in this case have applied for a 100m³/s minimum flow to achieve 100% reliability.
- The HDI scheme can be run at a 95% reliability and therefore achieve the intent of the Board.
- Meridian has the authority and the ability to provide for a minimum flow of 150m³/s, construct NBTC, and commission HDI whilst ensuring the current applicants (including HDI) achieve reliability above 95%.
- This will arguably result in exactly what the Board apparently intended – a considerable hydro power project above Black Point, a minimum flow of 150 m³/s to protect instream values, 100% reliability for current abstractors at least until they are reviewed, and reliability greater than 95% for new applications (both below and above Black Point) for abstraction.

62. For the above to happen the Commissioners must decide that each stakeholder must consider other stakeholders. No one interest in the river has complete dominance over another. The Plan was written by the Board in such a manner and it should be interpreted in such a manner. The Board did provide the opportunity for a major hydro power project to occur on the Lower Waitaki River and it also intended there could be substantial irrigation from the river. However it made sure these intention were balanced with a need to ensure those activities do not adversely affect the environment.

63. The Affidavit of Frank Scarf at paragraphs 53-55 outlines the alternative option of equal reliability between all abstractors. Under a WRP review existing consent holders would enjoy a reliability of 97.5%. This is assuming a minimum flow of 150 m³/s. Given the HDI take and all the consents for this hearing the reliability for irrigation, regardless of priority, would fall to 95.1%.

64. Fish and Game is aware that the Commissioners are not able to force those current consent holders to equal reliability with these applicants, the HDI applicants and any future applicants. However this analysis does illustrate that even given equal reliability (although not preferred by the Board) all

abstraction consent holders (both present and future) within the 90 m³/s allocation can achieve over 95% reliability. Whether those abstractors are forced to accept slightly lower reliability will be a matter for Environment Canterbury to consider upon review of those consents.

65. We intend to call the following witnesses:

- 65.1 Evidence of Bridget Pringle;
- 65.2 Evidence of Graeme Hughes;
- 65.3 Evidence of Mark Webb;
- 65.4 Evidence of Wayne Grafton; and
- 65.5 Frank Scarf (via Affidavit Evidence).

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