

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

**AND**

**IN THE MATTER** of applications for resource  
consent by the Central Plains  
Water Trust and a notice of  
requirement for the designation  
of land by Central Plains Water  
Limited associated with the  
construction and operation of the  
Central Plains Water Scheme

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**LEGAL SUBMISSIONS ON BEHALF OF  
NORTH CANTERBURY FISH AND GAME COUNCIL  
IN RESPONSE TO COMMISSIONERS MINUTE DATED 1 APRIL AND  
MEMORANDUM OF COUNSEL FOR APPLICANT DATED 2 MAY**

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## 1. INTRODUCTION

- 1.1 These legal submissions address matters raised in the Commissioners' Minute of 1 April 2009 and responds to the Memorandum of Counsel for the Applicant dated 1 May 2009.
- 1.2 To that extent that other submitters raise legal points of relevance to Fish & Game's concerns, those submissions are supported and adopted.
- 1.3 In my submission, the hearing ought to be closed and a final decision issued based on the proposal, the evidence and submissions heard to date. It is not appropriate to grant some, but not all, consents given that the application was presented as an integrated package.

## 2. JURISDICTION – SCOPE

- 2.1 There are clear limits signalled in case law regarding the means by which a proposal can be modified after a hearing has commenced.
- 2.2 The dicta of the Court of Appeal in *Sutton v Moule* (1992) 2 NRMA 41 (at 46) provides the appropriate starting point for consideration of this issue. There, the Court observed that:

A council has no jurisdiction to grant a consent which extends beyond the ambit of the application.

- 2.3 There are two main lines of cases which consider the question of permissible amendments under the RMA.
- 2.4 The first, based on *Darroch v Whangarei District Council* A18/1993, is directed towards whether amendments increase the scale and intensity of an activity and its effects such that it cannot be permitted as an amendment to the original application. One such issue relates to groundwater, which I will come to shortly. You will hear from other submitters in relation to additional issues.

- 2.5 The second, and in my submission, ultimate, test on scope derives from *Haslam v Selwyn District Council* [1993] 2 NZRMA 628. That test is whether the amendment is such that any person who did not lodge a submission would have done if the application information available for examination had incorporated the amendments.
- 2.6 In other words, without the upper intake, tunnel, storage and other key components of the CPW Scheme, is it plausible that any person would have submitted had they known of the amendments?
- 2.7 The answer in this case must be Yes.
- 2.8 Counsel for the Applicant has cited the decision of the Environment Court in *Coull v Banks Peninsula District Council* C077/06. In that case, His Honour reviewed the existing case law (*Darroch, Haslam*) and identified that that three effective tests which should be applied, in order to assess whether amendments to a proposal are within jurisdiction:
- a. Does it increase the scale or intensity of the activity?  
Answer, Yes (this issue potentially arises in terms of river hydrology, instream values and related groundwater effects).
  - b. Does it exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the plan and other superior documents?  
Answer, Yes it may exacerbate impacts for the same reasons.
  - c. Would parties who have not made submissions have done so if they were aware of the change? (ie. the *Haslam* test)  
Answer, Yes that is indeed plausible, in fact it is highly probable.
- 2.9 Higher Courts have also considered the issue of scope in a number of circumstances.

2.10 The issue arose before the Court of Appeal in *Shell New Zealand Limited v Porirua City Council* CA57/05. There, the Court stated (at para [7]):

We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Where the details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

2.11 In *Waitakere CC v Estate Homes Limited* [2007] 2 NZLR 149 (SC), the Supreme Court considered the scope of the Environment Court's jurisdiction in relation to varied conditions of a subdivision consent. Counsel for the Applicant will no doubt be familiar with that decision, having appeared for the Council in those proceedings. The Supreme Court cited with approval the decision of the Court of Appeal in *Shell* and clarified the position at law as follows (emphasis added):

[29] We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application....

...

[35] When, on appeal to the Environment Court, an applicant seeks to have an application granted on a materially different basis from that put forward to the Council, considerable care is required before the Environment Court permits the matter to proceed on that different basis. Not every alteration in approach would require an applicant to make a fresh application to the Council, rather than to proceed by way of appeal. It is a question of degree. Furthermore, as the majority of the Court of Appeal recognised, the question of any prejudice to other parties, and the general public, is always relevant. Where, as in the present case, the Environment Court came to be considering the matter on a materially different basis

from that to which the Council exposed itself, the matter could proceed on the wider basis only with the Council's consent and then only if the Court was satisfied that other persons and the public were not prejudiced. In the present case, the Council had good reason to oppose the wider basis for the appeal and the matter should not have proceeded in those terms at all. In consequence, the decision of the Environment Court was on a materially different basis which prejudiced the Council and cannot stand.

2.12 In *Blueskin Projects Limited v Dunedin City Council CIV-2007-412-669*, the High Court considered an application for a 3 lot subdivision consent which had been declined by the Council. Before the Environment Court, the applicant abandoned its application for subdivision and instead sought land use consent for two dwellings on the remaining land (having already obtained a certificate of compliance for one house). The Environment Court reached the view that it did not have jurisdiction to consider this amendment. The High Court, in acknowledging the previous authorities on the issue of scope, made the following comments (emphasis added):

[24] ... the thrust of what the Supreme Court says has the effect of maintaining a proper process. If the new proposal is significantly different, then it should go through the proper process. The Council should be entitled to assess it on its merits and the public should be given the opportunities that the statutory process accords it for involvement...

2.13 The High Court concluded that the application for land use was fundamentally and conceptually different in nature from the original subdivision and should not have been considered by the Environment Court. In doing so, the High Court stated (at para [31]) that the guidance from *Waitakere City* makes it plain that substantially different applications are not appropriately considered by the Environment Court in its appellate function. In my submission, the same principle applies to a decision-maker at first instance, when determining whether there is jurisdiction to entertain amendments.

- 2.14 In the present case, there is now likely to be a fundamental conceptual change to the original proposal as described in CRC021091.
- 2.15 The original proposal sought to reduce the groundwater take by including a large water storage facility as a key component of the CPW Scheme. Much of the Applicant's case has, until now, been directed towards touting the merits of water harvesting. The panel has signalled that this aspect of the scheme is unlikely to be approved. It is questionable whether a purely run-of-river scheme and its associated effects falls within the scope of an irrigation scheme which incorporates a single large storage facility as a key component.
- 2.16 The Applicant also stated at the commencement of the hearing that the CPW Scheme will supplant the need for use of groundwater and further enhance groundwater availability. The new proposal will now result in an increased reliance on groundwater takes and the conveying of water to other locations for irrigation. This, in my submission, may materially change the nature of the proposal and its effects.
- 2.17 A number of new questions emerge, such as:
- a. Will there be on-farm storage and/or is Lake Coleridge now back on the table as an option?
  - b. What additional consents will be required for on-farm storage, if that is now part of the new proposal?
  - c. What changes are required to existing groundwater consents?
  - d. How will existing groundwater consent holders (in the command area and not part of CPW) be affected?
  - e. Are these newly affected persons part of the current submission/hearing process?

- 2.18 CPW will say that some of these questions can be answered by providing further evidence. However, what this means is that existing submitters will have to re-litigate their positions based on a new proposal. It also does not address the problem of other would-be submitters who will not have an opportunity to comment if such a process is followed.
- 2.19 Counsel for CPW also maintains (at para [11]) that, without storage, the intensity or scale of the activity will decrease. It is stated that a scheme without a storage component can be seen as a refinement or reduction to the original application. In my submission, it is an oversimplification to suggest that this new scheme will automatically reduce the scale and intensity of the proposed activity. There are simply too many variables to reach that conclusion, given the nature of the amendments and the potential associated and consequential effects.
- 2.20 It is not matter of simply identifying and splitting out discrete components of this scheme. That introduces an artificiality to the assessment. The enquiry is, in my submission, more properly directed toward the character and nature of effects in determining whether the new proposal will be within the scope of the original application: *Blueskin*.
- 2.21 Fish & Game has consulted with its technical experts in relation to the new proposal.
- 2.22 As the panel will recall, extensive hydrological evidence was provided by Fish & Game on the modelled post-CPW flows in the Waimakariri and Rakaia Rivers. This was then supplemented by further evidence at the request of the panel. Scenarios modelled include alternative priorities (between CPW and Ngai Tahu Property (on the Waimakariri) and CPW and Synlait (on the Rakaia)), different abstraction volumes, different levels of reliability and different storage volumes. This hydrological information formed the basis upon which assessments of effects on all aspects of the river were carried out.

- 2.23 In order to consider a new scheme without storage and address all the new effects that flow from that, you will need to receive entirely new hydrological evidence on predicted post-CPW flows. The level of detail considered necessary when originally considering a scheme with storage will also be necessary to be provided afresh when considering a purely run-of-river scheme. Receiving further information from the applicant, as suggested by CPW (para 12, Memo, 26 March 2009), will not be sufficient.
- 2.24 Mr de Joux has advised that in order to properly assess effects on the hydrology of the rivers, substantial information about the new scheme will need to be provided. These details include matters such as the proposed command area, the irrigation demand, how CPW propose to meet daily irrigation demand and whether storage, on farm or elsewhere, is proposed. Without this information, the effects on the hydrology of the rivers cannot be properly assessed. I should also note that the preliminary view of Fish & Game's experts is that it would be unlikely that the effects on the river will decrease under the new proposal unless the command area was greatly reduced. It is not as simple as the Applicant suggests.
- 2.25 In order to properly assess the effects of the amended scheme, the proposed abstraction regime would essentially need to be redesigned. The assertion that the quantity of water to be taken would not increase is overly simplistic and completely inadequate to allow consideration of the effects of the water takes.
- 2.26 In addition to hydrological evidence, Fish & Game consider that to properly assess the amended application you will need to receive completely new evidence on the effects of the post-CPW flows on invertebrates, the fishery, and angler opportunity and amenity.
- 2.27 The proposed CPW scheme has already been subject to substantial and continuing modification over the last 8 years. In my submission, it is now reached the point that it is materially different than what was originally sought. If the panel were to entertain the request by the Applicant, it would, in a practical sense, mean that we are starting

afresh with a new proposal. All parties would need to re-evaluate that new proposal, produce new evidence and effectively re-litigate their positions at a subsequent hearing.

2.28 Although decision-makers are given a reasonable degree of latitude to regulate consenting procedures, this is not an unlimited discretion. It is guided by the statutory framework and, in particular, the section 21 duty to avoid unreasonable delay.

2.29 It is also important to recognise that Central Plains has two immediate remedies available to it. It can either withdraw and resubmit a fresh application; or the decision of this Panel can be appealed to the Environment Court to be determined on its merits. The fact that it might lose priority or jeopardise financial arrangements is a risk the Applicant should bear. That burden should not be placed on submitters.

2.30 As the proposal has now "mutated" into something quite different from that which was original sought by the Applicant, there is no jurisdiction to entertain the new proposal.

### 3. INTEGRATED MANAGEMENT

#### **Bundling – the holistic approach**

3.1 As stated on behalf of Fish & Game previously at this hearing, a bundling approach is the appropriate way forward in determining activity status (refer legal submissions for Fish & Game, paras [5.19] - [5.41]).

3.2 Where activities are inter-related, bundling is the correct approach at law: *Bayley etc.* It is only appropriate to exclude activities that are distinct from the overall proposal. In my submission, this should not apply to activities that are integral to the CPW Scheme which has, until now, been promoted as a water harvesting proposal. This is also

relevant to the substantive consideration of an application, consistent with the integrated management ethos of the Act.

- 3.3 To that extent, it is unclear why the passing reference to the *Woolley* case is made in the memorandum of counsel for CPW (para 67). The proposal should, at a minimum, be assessed as a fully discretionary activity (and possibly non-complying, as set out in the planning evidence of Jason Holland for Fish & Game). This is because it is only one aspect (the take) that is restricted discretionary under the WRRP. The related applications to divert and use water from the Waimakariri River is fully discretionary, as is the take and use from the Rakaia River. Accordingly, the reference to *Woolley* has no relevance in this case.
- 3.4 In any event, Rule 5.1 of the WRRP includes a wide range of matters relevant to the exercise of your discretion. Importantly, this includes the reasonable need for the quantities of water sought. Similar terminology is found in the NRRP. That, in my submission, is determinative of whether it is possible to proceed to grant some, but not all, of the consents for this project. It is necessary for you to be satisfied that the water to be taken is no more than required. To do this, you need to consider the CPW Scheme as an integrated package, having regard to the suite of applications before you. This cannot be easily remedied by crafting consent conditions on the water takes to provide for future contingencies. Nor is it appropriate or fair to remedy this by receiving further evidence on an incremental basis relating to a new proposal.
- 3.5 If you cannot properly determine whether there is a reasonable need for the quantities of water sought by CPW, then that suggests quite strongly that it is not possible to grant some consents, but not others, in circumstances where those other consents inform the water takes. This undermines the integrated management philosophy and public participatory nature of the RMA.
- 3.6 Counsel for CPW states (at para [66]) that sustainability should not be compromised on the basis that the Rakaia WCO and the WRRP have

allocated the resource. That cannot be assumed. The abstraction regimes in both planning documents simply set a low tide mark against which individual applications are to be assessed. There is no presumption that this proposal is sustainable simply because it complies with minimum flows. You have a discretion to grant or decline consents, having regard to the effects on the environment, objectives and policies of the relevant planning instruments and the purpose and principles of the RMA.

- 3.7 This is particularly the case in respect of the Waimakariri River, which has been recognised as vulnerable due to the inadequacies of the existing plan. Fish & Game put to the Panel an alternative flow regime for the Waimakariri River. It maintains the position that this also cannot be addressed by simply imposing a condition of consent on CPW's abstraction. A plan change will be necessary, as the provisions of the WRRP do not currently cater for this.
- 3.8 And in the case of the Rakaia, it is important to note that the WCO was issued in terms of Part 9 of the RMA. In doing so, the Tribunal was not expressing an opinion whether the recommended flows represented sustainable management under Part 2 (refer legal submissions for Fish & Game at paras [7.6] – [7.19]).
- 3.9 The Applicant has also emphasised the majority judgment of the Court of Appeal in the *Central Plains v Ngai Tahu* litigation as providing support for its argument. That case concerns the procedural issue of priority. It is not authority for the proposition that you can make the substantive decision to grant consent to take water in isolation from other consents required for the CPW Scheme. Regardless of whether the Court of Appeal's judgment ultimately stands, you still need to decide on the entire package of applications required in relation to this scheme. It would be an artificial exercise, and inconsistent with integrated management, to do otherwise.

### **Section 103**

- 3.10 Section 103 requires you to hear the applications together unless you are of the opinion that the applications are "sufficiently unrelated". This provision links back into section 91, and reflects the underlying principle (established in *AFFCO*) that good resource management practice requires that in general, all resource consents required should be carefully identified from the outset and applications made so they may be considered together or, at least, in circumstances where one application informs the others.
- 3.11 The provisions of the RMA provide for public participation in the resource consent process as an integral aspect of the statutory scheme, and section 91 together with section 103 ensure that this participation is effective and meaningful.
- 3.12 The underlying rationale is that related applications must be heard together. It must logically follow in terms of section 103 that you cannot then issue a decision separately on some aspects of an application ahead of others. This reflects the core principle of integrated management.

#### 4. PREJUDICE

- 4.1 Submitters have had the onerous burden of producing evidence to assist the Panel in absence of sufficient detail from the Applicant, and then continually responding to extensive supplementary evidence. It is procedurally unfair to submitters to allow the Applicant to now redesign the scheme after all evidence on the original scheme has been received.
- 4.2 In my submission, interest groups such as Fish & Game who do not have unlimited resources ought not to be put to the expense of filling the evidential gaps for the Applicant, then continually respond to amendments put forward by the Applicant, and now produce an entirely fresh set of expert evidence to address the effects of a new proposal. It will take considerable effort to model the new proposal and analyse the results. Additional time would be required to prepare

fresh statements of evidence. Presumably new officer reports will also be required.

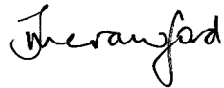
- 4.3 The Panel has commented on the possible wastefulness of declining all CPW applications, when there may potentially exist a salvageable scheme. Allowing consideration of a new and different scheme will not salvage the time, effort and expense already spent by submitters on assessing the original proposal, it will merely add to the expense already incurred by those groups.
- 4.4 Fish & Game are currently spending a disproportionate amount on challenging individual resource consents. That burden is not assisted by allowing applicants to perfect, or significantly amend, their applications throughout the hearing process.
- 4.5 The fact that CPW may face risks as to priority, or has financial implications in terms of loan agreements with the private interests propping up the scheme, is not a valid reason to allow this process to continue indefinitely at the expense of submitters.
- 4.6 Counsel for CPW has noted that it is not the Commissioners' role to make provision for future possible users through this consent process so as to avoid the potential "lock up" or inefficient use of the resource. That is precisely what CPW appears to be doing.
- 4.7 A concern has been expressed by the Panel that we may 'throw the baby and the water out with the bath tub'. Yet what CPW is proposing to do is to take the water out of the bath and let it run cold, while the baby makes up its mind how to use the water.

## 5. CONCLUSION

- 5.1 The CPW Scheme was put to you as an integrated package. Without the central storage facility, you are now faced with a conceptually different proposal. There are procedural and substantive difficulties

with allowing an applicant to continue with its proposal in these circumstances.

- 5.2 Fish & Game therefore submits that the only proper course of action is for panel to close the hearing and issue a decision on all applications based on the evidence received to date.



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**J M Crawford/S J Eveleigh**

Counsel for North Canterbury Fish and Game Council

8 May 2009