

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

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND**

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INTRODUCTION

1. This hearing concerns the following applications:
 - A joint application (CRC 021091) by the Central Plains Water Trust (CPWT) and the Ashburton community Water Trust (ACWT) to take water from the Rakaia and Waimakariri rivers. (ACWT will use water for power generation, and will take only from the Rakaia. CPWT will take water from both rivers, for irrigation.)
 - Applications by CPWT to take and use the water for irrigation; these include consents for construction of the water distribution network, (These works are not included in the current Notice of Requirement, which seeks to designate the main infrastructure areas.)
 - A Notice of Requirement by Central Plains Water Limited (CPWL) to Selwyn District Council, seeking that various areas be designated for the purpose of building and operating the diversion channels, bypasses, canals, dam and reservoir for the scheme.
2. Forest & Bird submitted on the take and use applications notified in June 2006 by the Canterbury Regional Council; on the notification by the Selwyn District Council of the notice of requirement lodged in June 2006; on the resource consent applications notified by the Selwyn District Council in June 2006; and on the additional applications and amended notice of requirement notified by the Selwyn District Council in May 2007.
3. We will concentrate on the effects of the scheme on indigenous vegetation and habitat, and Dr Colin Meurk of Landcare will provide expert evidence. Although our concerns are wider than indigenous vegetation, in this hearing we have relied on the shared evidence provided by Department of Conservation and Fish & Game witnesses, and we will not be addressing those effects on birdlife and native fish which have already been covered by those witnesses, in particular:

- Dr Ken Hughey, birdlife of the braided rivers and Te Waihora/Lake Ellesmere
- Dr Angus McIntosh, the Canterbury mudfish

SUMMARY OF FOREST & BIRD'S CASE

Overall

4. Forest & Bird is of the view that the Central Plains irrigation scheme, as currently presented, is basically an engineering proposal. We acknowledge the hard work done in pulling together an application of this complexity, but we believe that environmental considerations have been accorded a very low priority in that process.
5. We believe the adverse environmental effects of the scheme are serious, and that these alone outweigh the stated economic benefits. When all other adverse effects are included, such as the impact on social and amenity values, and in the absence of mitigation for key environmental concerns, we submit that the irrigation proposal in its current form is not sustainable.
6. Unless the adverse effects of the scheme can be explicitly dealt with by conditions—I will speak about the inadequacies of management plans later—the resource consent applications should be declined and the Notice of Requirement withdrawn.
7. Forest & Bird is mindful of the approach taken in Director General of Conservation v Wairoa District Council W081/07 but we distinguish it on the facts. Clearance of kanuka in a district where it is relatively abundant may have only a minor effect on biodiversity values within a district, but that is not the case on the Central Plains. Here it is very clear that we have reached the limit of significant indigenous vegetation and habitat resources. You will hear from Dr Meurk on this.
8. We will argue that the residual effects of the proposed activity (**after** mitigation by conditions) **will** cause an unacceptable increase in cumulative adverse effects. It is conceivable that effects could be 'offset' —for example, historic removal of indigenous vegetation and habitats could conceivably be offset by re-planting the entire swathe of the proposed designation as a wildlife corridor, or by linking progressive biodiversity thresholds to conditions

for water users. This would require a shift in attitude from the applicant, and significant financial commitment.

9. Another obvious difficulty is that the very people who are most likely to make such a project work, that is, the locals, have already been alienated by a lack of consultation.
10. Minister for the Environment, David Benson-Pope, granted Central Plains Water Ltd the status of requiring authority on 24 November 05. Forest & Bird believes that the Minister's decision was flawed, and that he was unaware of the narrow interests which CPWL currently represents. Consultation so far and lack of required environmental representation on the Trust board does not reassure us the Trust will act responsibly.
11. One possible course of action is to persuade the Minister for the Environment to revoke the approval, pursuant to s167(5b). The effect of this would be to transfer the requiring authority from CPWL to the Minister for the Environment. The Minister could then decide how, or not, to proceed.
12. More than 120 network utility operators have been granted requiring authority status since 1991 including four irrigation companies – Barrhill Chertsey Irrigation Limited, South Canterbury Waterways Limited, Doubtless Bay Water Supply Company Limited and North Otago Water Harvesting and Irrigation Company Limited. However the approval of private bodies as requiring authorities is a new development. We believe the approval process is of great public importance and should not be left to the Minister's sole discretion.
13. The Trust's (CPWT) relationship with the Company (CPWL), and the status of those two entities has created some confusion, as has the relationship between the two councils (Christchurch City, and Selwyn District) and the Trust. I believe you will hear further submissions on this from Mr Parker for Malvern Hills.
14. We submit that this is a matter you will need to consider under s104 (1c), as it is relevant to the effectiveness of conditions of consent. Under the current regime, any conditions would be virtually unenforceable, as the fox is guarding the hen house. We would like to deal with this first.

Relationship between CPWT , CPWL , CCC and SDC

15. We refer you to Mr O'Rourke's evidence, which contains the Memorandum of Agreement between CPWT and CPWL.
16. The Central Plains Water Trust is a Council Controlled Organisation for the purposes of the Local Government Act 2002, and is, in theory, controlled by the Christchurch City and Selwyn District councils, either through the appointment of directors or by majority voting rights (s6, Local Government Act 2002).
17. It is our submission that by allowing the Trust to enter into an agreement to grant exclusive use of resource consents for water to a tiny subset of their wider community of ratepayers (CPWL), the council(s) acted in breach of their statutory responsibilities. All subsequent dealings resulting from that breach may therefore be invalid. That is outside the scope of present enquiries, but is relevant to this hearing as follows.
18. Unless there is greater involvement from the Councils, as instigators of the original community trust for water, the perception among submitters will continue to be that the Trust as an entity has been hijacked by a private company (CPWL).
19. Both councils have seemingly retreated from what has become a hot potato. Mr Prebble in his legal submissions for the Christchurch City Council, admits to misgivings about the Council having to underwrite the Trust's environmental responsibilities, but other than this, there is no indication the Council has any oversight of the Trust's activities: *Concerns about becoming an environmental underwriter remain but are reflected in the Council's primary submission that the Panel should take a conservative approach to assessing adverse effects (particularly on groundwater quality) and its request for more stringent conditions than those proposed, if consent is granted.*
20. We submit that the scheme has become a hot potato because people believe that CPWL is acting on its own, and in its own best interest. Forest and Bird shares those concerns, and wonders what the environmental outcomes are likely to be if there is no oversight while a group of farmers and engineers go about building a large dam.
21. The objects of the Trust (page 1 of Deed of Agreement attached to Mr O'Rourke's evidence) are sufficiently wide and bland to be almost

meaningless, making it even more crucial that there is balanced representation on the Trust. See paragraph 33 below.

22. We question what oversight and council involvement took place before CPWT (the Trust) entered into an agreement to make any consented water exclusively available to CPWL. (Memorandum of Agreement, dated 5 November 2004, which is attached to Mr O'Rourke's evidence).
23. Confusion has dogged these applications from the start, worsening since the original joint (Selwyn District Council/Christchurch City) council initiative metamorphosed into a private group of (374) shareholders who now stand to hold exclusive rights to community water.
24. We believe it would benefit all parties if clarification was sought from the two councils as to their interest and intentions regarding their oversight of the Trust. Separately, it would also be helpful to know how the Canterbury Strategic Water Study fits.
25. Commissioner Milne remarked during Mr O'Rourke's evidence that using a Trust as consentor was a 'novel' approach. It is accepted that the Trust (a body of trustees) is a 'person' under s88 of the RMA. The word 'person' is defined in section 2(1) as "*the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporated.*"
26. While we accept that the applicant Trust (CPWT) is a person, for consenting purposes, we do not accept that it is currently representing the interests of the wider community. It is intuitively undemocratic that a private body (CPWL) can acquire authority to take the land of other members of the community, in the name of a community Trust, when in fact they (CPWL) are the only beneficiaries of that Trust. This perception of the Trust adversely affects community consultation and goes to the very heart of 'other matters'.
27. This confusion affects not only the Councils, and all of the ratepayers they represent, but with respect, the confusion has continued to the Court of Appeal. The following excerpt from the recent decision *Central Plains v Ngai Tahu* CA6907.
28. At paragraph 83-85 below, in the Schedule referred to at Baragwanath's paragraph 2, there is a description of the Central Plains Water Trust. Here the Court states (and presumably believes) that the charitable trust has been appointed a Requiring Authority.

29. Perhaps the Court assumed that CPWL is still the community-backed initiative it once was, in which case the Court's Utopian view of Central Plains is easier to fathom. Note the mix-up at paragraph 30, and again at paragraph 32:

Central Plains Water Trust

30. [83] **The Trust** is a public body and a charitable trust. It was settled by the Christchurch City Council and the Selwyn District Council, both public bodies responsible for long term planning to achieve the purposes of Part 2 of the RMA. **It has been appointed a requiring authority** under s167 which may give notice under s168 requiring that land or water be designated for a public work. The Trust supports non-commercial as well as commercial interests. Its objects are:

- To encourage support and facilitate sustainable development of the water resources of lands within the Christchurch City Council and Selwyn district Council boundaries for the benefit of the inhabitants;
- To provide and facilitate opportunities for agricultural and horticultural diversity in the regions;
- To provide and facilitate education of the inhabitants of the regions in relation to water issues affecting the regions;
- To appropriately balance enhancement of economic benefits for the regions with enhancement of ecological, social and recreation values for the regions.

31. [84] Among the seven trustees are two **appointed by Ngai Tahu**. The rules governing the appointment of trustees record that the settlors will be mindful of the need to provide balanced representation in the trust, including appropriate representation for :

- *tangata whenua*;
- **environment and protection agencies**
- *farmer interest groups*

32. [85] A joint Environment Canterbury /Selwyn District Council tribunal is currently hearing applications for **resource consent** by a company called **Central Plains Water Limited**.

33. The panel can draw their own conclusions, but we are un-nerved to find that the Court of the Appeal has difficulty telling the two entities apart. We submit that this is because, despite what we are told, the two entities are one and the same. The Trust (CPWT) is— for all practical purposes— the Company (CPWL).
34. This reinforces our discomfort: we intuitively **know** that CPWT is now merely CPWL by another name, but we are expected to believe in the legal fiction that CPWT is still the well-intentioned council-backed group acting on our behalf to make the very best decisions about the use of a scarce resource.
35. Nonetheless, that the Central Plains scheme is a ‘community’ water scheme was a core foundation in the Court’s decision, and we are concerned that wider community interests—including environmental—are cemented in to the Trust, going forward.
36. We raise these questions of public policy as relevant ‘other matters’ in the context of consultation, and community representation. Because of the unusual duality of the consent holder, we suggest that if the applications were granted, there would need to be conditions of consent specifically creating environmental liaison and monitoring groups, to ensure that CPWT actually knows what CPWL is doing. This condition would not be necessary if the Trust was not a double entity, that is, if the Trust was in fact what it purports to be, rather than CPWL by another name.
37. We refer to paragraph 31 above and note that in its legal submissions, Ngai Tahu advised that Ngai Tahu trustees on CPWT do not have the authority to represent Ngai Tahu’s interests.
38. We believe there are currently no environmental and protection agencies represented on the CPWT, and that there have not been any for some time.
39. We wonder about the validity of important decisions made by the Trust, while it was without appropriate representation. These would include the decision to enter into the Memorandum of Agreement with CPWT for exclusive use of the resource consents.
40. I will now turn to the s104 and Part 2 matters. Many legal submissions have already been made, and I do not intend to repeat them, except where Forest & Bird’s position differs.

S104 ASSESSMENT

Effects

41. We remind the panel that Forest & Bird is presenting evidence specifically on indigenous vegetation and habitats, which is only one piece of all of the evidence you will hear on adverse effects. We have adopted the evidence of others re effects on mudfish, and on birdlife in the braided rivers, as mentioned above.
42. The effects on indigenous vegetation and habitat are set out in Dr Meurk's evidence at paragraph 50. In summary, the Canterbury Plains and foothills are the most degraded, and therefore among the most threatened, environments in the country, in terms of representative and sustainable natural ecosystems.
43. In degraded areas, 'significance' must be perceived in a different light. In Canterbury and other areas with almost no remaining native vegetation and habitat, essentially everything that remains is nationally significant.
44. We are therefore concerned about the following :
- known indigenous vegetation and habitats lost in construction phase
 - unknown indigenous vegetation and habitats lost in construction phase
 - accelerated post-irrigation loss of indigenous vegetation and biodiversity as a direct result of currently permitted farm practices
45. The effects are two-fold: both immediate and cumulative. The Act also allows for past effects to be recognised.
46. Mr Grove's ecology report (part of the Canterbury Regional Council 42A report) assesses the impact of the scheme on areas the subject of the resource consent application, chiefly the distribution network and associated utilities and bywash areas. He expresses concern about how effects will be mitigated (para 25), and (at paras 47-50) says the farm management plan approach will not protect indigenous vegetation and habitat from intensification of land use as a consequence of the scheme.

47. A summary of the effects on terrestrial ecology from the Notice of Requirement application appears at para 149-151 of the Boyes 42A report for the Selwyn District Council. This summarises the findings of Mr Mark Davis, the independent ecology expert engaged by the council. Davis found that in the absence of a proper biodiversity survey, there was insufficient information to assess effects.
48. Adverse effects of the proposal on indigenous vegetation and habitats will be described in detail by Dr Meurk. The aerial photograph of smouldering shelter belts in a vast tree-less landscape (Rosalie Snoylink's evidence for Malvern Hills Protection Society) was a striking reminder that loss of biodiversity on the Plains is happening as we speak. To this extent, we disagree with Mr Boyes, (in particular where marked in bold) when he says at para 9 of his 42A report for the Selwyn DC.
- 49. 9. In the context of the NoR, it is acknowledged that the construction of the scheme would facilitate land use change within the central plains beyond that physically possible at present, given the availability (or otherwise) of water for irrigation. The scale of such change would not have been anticipated at the time the Proposed District Plan was drafted. *Should there be concerns regarding the effects arising from the extent of land use change that could arise following the scheme, such concerns are more appropriately addressed through the District Plan process.***
50. With respect, we disagree. District Plan changes are too slow in this situation. It would be closing the stable door after the horse had bolted to leave it to a plan change. There is unacceptable biodiversity loss on the Central Plains now, and we strongly suggest that the panel has more than enough evidence before it to say 'enough is enough'.
51. Dairy farming is a permitted activity under the Selwyn District Plan, (Rural Volume, Part 3, rule IX, pages 312-313) so long as cows are 10m from a waterway: as is the clearance of indigenous vegetation, (Rural Volume, Part 3, rule IX, pages 324-325) provided it is not a wetland, or a 'listed' plant, or exceeding clearance land area criteria. Needless to say, these rules are unable to protect indigenous vegetation and habitats.
52. The panel must consider two types of effects: the first is the 'additive' effect of all of the adverse environmental effects, as separately presented by various

witnesses. The second is the cumulative effect of these effects, added to the existing environment.

53. From Salmon at 1-634 under permitted baseline (*italics mine*): The definition of “effect” in S 3 of the RMA means that if an existing activity (*such as dairy farming*) has adverse effects, and a proposed activity (*such as the irrigation scheme*) also has an adverse effect which would add to the existing effects, then consideration of both is required. This is 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. See para 52, *Kuku Mara Partnership v Marlborough DC* W037/05.
54. [52] *But the definition of effect in s3 of the Act includes ... any cumulative effect which arises over time or in combination with other effects ... regardless of the scale, intensity, duration or frequency of the effect ... So if the existing activity has adverse effects, and the 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. That is because the new effect will have an impact in combination with other effects even if its scale, intensity duration or frequency is not, of itself, more than minor. ...*
55. [53] *To hold otherwise would be contrary to the plain meaning of effects in s3 and contrary to the purpose of the Act, as set out in s5 - the sustainable management of natural and physical resources. 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 would be immediately imperilled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose.*
56.*So there are two sets of cumulative effects to be considered here. **One is the combined impact on the environment of the adverse effects of the proposals, or either of them:** - ie habitat displacement, impact on navigation and public access and impact on natural character landscape and visual amenity. **The other is what we have just been discussing – the effects of these proposals, or one of them, being added to the effects of the existing perimeter farms.***
57. Cumulative effects of new dairy conversions will need to be factored in to the already degraded environment, as well as the effects on biodiversity loss from the proposed earthworks (*Queenstown Lakes District council v Hawthorn Estates Limited* 2006 NZRMA 424 CA;)

58. The Boyes report at page 46-47 contains a useful summary of the various effects which the panel will consider. In assessing matters under sections 104 and 171, the panel needs to look at each environmental effect in turn, and then weigh up the combined (additive) effects at the end. (See *Clifford Bay Marine C131/03* at par 68 and par 72)

Visual evidence

59. For a hearing of this size and complexity— a 55m dam and 65 km of canal—the visual evidence has, in our view, been very poor.. Simulations would have provided an accurate benchmark for discussion, not only for landscape matters, but for social and amenity values as well. We believe that many people do not understand the scope of the works proposed.

Relevant provisions of planning documents

60. The proposed removal of indigenous vegetation and habitat is contrary to the (Canterbury Regional Council) Natural Resources Regional Plan, the proposed Selwyn District Plan. Forest & Bird adopts the evidence of Dave Newey for DOC and Jason Holland for Fish & Game, and we note that the panel has asked planners for submitters, and those for the applicant, to supply a list of where objectives and policies are contradicted and supported respectively.

61. Mr Meurk will also refer to the National Biodiversity Strategy, and the recent Canterbury Biodiversity Strategy, which are directly relevant, and are more up to date as an indication of current thinking. The Canterbury Strategic Water Study is proceeding, although we are unclear what its contribution will be in this debate.

62. There is also the joint Minister(s) of Environment and Conservation document, *Protecting our Places* (2007). Its stated expectation is that the priorities in the statement will be used to support and inform council's biodiversity responsibilities under the Resource Management Act, and for this reason we include reference to it here. (<http://www.biodiversity.govt.nz> > pdfs >protecting our places).

Activity status

63. We concur with the planning evidence of the Department of Conservation and Fish & Game. According to the bundling principle, the resource consent parts of the proposal must be assessed as for a non-complying activity, since some important 'use' activities (bywash discharges) are non-complying.
64. However the panel will consider the Notice of Requirement application under s171, which is slightly different from s104D. There is no 'threshold' test in s171, so that non-complying activities which offend both on plans and 'effects', (stripping of vegetation, terrace cuts etc) do not disqualify it from consideration by the commissioners.
65. So that even if the consent applications were assessed and failed at 104D, the panel is still obliged to assess the Notice of Requirement under s171. We assume therefore that the panel intends to assess both NoR and resource consent applications 'in the round', using their much wider overall discretion under Part 2.

PART 2 ASSESSMENT

Section 6

66. From Forest and Bird's perspective, the panel is unable to provide for the matters of national importance set out in s6(a) and (c). This is not immediately terminal to the applicant's case but we submit that it becomes so when the proposal is assessed 'in the round'. Other submitters have raised other s6 and s7 matters, and collectively, these become relevant at section 5 (2c).
67. See para 89 at *Mighty River Power v Waikato RC* A146/01, which refers in turn to *Minister of Conservation v Western Bay of Plenty DC* A071/01, at para 30 following:

[89] As in this case, so in *Western Bay of Plenty*, section 6(c) attained considerable prominence in submissions and evidence. However, the context in which section 6(c) must be placed is important, and we can do no better than quote the words employed by that division of the Court (at paragraph 30), with approval:

In weighing the evidence of the witnesses on all sides, we have borne constantly in mind the Act's single purpose of promoting the sustainable management of natural and physical resources. Section 6 matters, nationally important by prescription as they are, plainly need to be recognised and provided for in conjunction with the many other considerations contemplated by the legislation in the district planning process. It thus becomes a question of weighing all relevant matters and incorporating them within the plan's framework in order to produce a carefully analysed and well-balanced document for achieving the Act's purpose. That is not to say that individual aspects of sections in Part II of the Act that follow upon section 5 are bound to become submerged and lost sight of in the mix of the plan's ingredients. The sections subsequent to section 5 are designed more fully to inform and assist a body such as the Council in following through and applying Parliament's intent in achieving the Act's purpose for its district. Expressed in the



68.

reverse context, those sections are not intended to be applied as a series of competing considerations liable to undermine the achievement of the purpose laid down in section 5.

Section 7

69. The proposal comes up short from Forest and Bird's perspective, when particular regard is had to the following:

- s7 (d): Intrinsic values of ecosystems
- s7 (f): Maintenance and enhancement of quality of the environment
- s7 (g): Any finite characteristics of natural and physical resource (available water, indigenous vegetation)
- s7 (h): the effects of climate change. The *Genesis Power v Greenpeace* decision seems to have settled that climate change has been reserved as a matter for Central Government. This does not preclude the panel taking it into account, as the inclusion of this 2004 amendment to the RMA makes clear. We support the view of Dr Hazeldine that the cost of agricultural emissions must be factored in to the economics of the scheme.

70. Section 7 can usefully be regarded as a checklist for the panel. Section 6 has already flagged nationally important considerations, and s7 raises some of these again from a different perspective. In the end, you must weigh them up in order to see whether the proposal achieves the purpose of the Act. (*Wakatipu Environmental Soc Inc v Queenstown Lakes DC C180/99*, at page 46.)

Section 5

71. We submit that the proposal as it is, is unsustainable, as serious adverse environmental effects cannot be avoided, and current proposals to remedy or mitigate are inadequate. No proposals have been made to 'offset' adverse effects.

72. There is a useful discussion of mitigation in *Forest and Bird v Buller District Council*, (the 'Snails' case, CIV-2005-485-001240) a decision of Justice Panckhurst in the High Court. In that case it was accepted that there were matters of fundamental importance to the New Zealand economy, which is not accepted here.

73. In our view, this case raises matters of importance to a private company's economic well-being on one side of the ledger, and issues of national importance to the natural environment and biodiversity loss on the other

74. It may be that the current dairy boom is itself unsustainable: when fuel prices, the price of water, greenhouse gas liabilities and competing producers elsewhere are taken into account, the figures of Mr Donnelly are unrealistic. And the true cost of restoration is unlikely to have been factored in. Dr Meurk will speak to this, provide estimates, and suggest what needs to be done to further quantify the cost.

75. The snails case is informative as it involved shifting (with a view to eventually re-planting) a 12ha red tussock wetland, as well as the habitats of great spotted kiwi and the snails. One issue was whether there was sufficient evidence that transplanting the tussock wetland would actually work. Another issue re kiwis and snails was whether this would be 'mitigating' or merely 'compensating'. The Court found that effects on the kiwi and snails would be mitigated, albeit that this was achieved by compensation. At paragraph 79:

[79] Mr Reid submitted that this error compounded the previous one in relation to the standard of proof, that is, not only did the Court approach the issue of proof incorrectly, but it also failed to distinguish between measures which provided only compensation, as opposed to mitigation of the potential effects. The gist of the argument was that Solid Energy's proposals did not mitigate the loss of habitat, in the sense that it was minimised. Instead, the mitigation plans were in essence an "off-site" environmental benefit by way of a trade-off to compensate for the loss and, therefore, not within the terms of s 5(2)(c) of the Act. At best, the Court was entitled to view the plans as compensation to be weighed in the mix when making the final assessment pursuant to s 104 as to whether the purposes of the Act would be served by granting consent to the mining activity.

76. One difference in the snails case was that at an early stage, Solid Energy seemed to recognise that approval of its activities would necessarily require the imposition of comprehensive conditions designed to protect values recognised in s6 of the Act. (You will hear from Dr Meurk that remaining biodiversity in the scheme footprint is regionally and nationally significant.)
77. We have seen no such acceptance on the part of the applicant. Other submitters and report writers have already raised the inadequacy of the management plans as a method of dealing with adverse effects. Forest and Bird's position is that adverse environmental effects can only be managed by conditions firmly attached to the consents and the NoR. Conditions that say, "if there is a problem, consult the management plan" should be rejected as ineffective.
78. The bigger question is whether adverse environmental effects can be mitigated at all. The short answer is no, if mitigation means minimising effects, rather than compensating.
79. Mr Bishop for the applicant seems to suggest that the Waianiwaniwa wetland can easily be replace. Mr Meurk believes that nothing like this has been successfully done before. He will also say that it is very costly to re-create a full indigenous wetland, and that avoidance is by far the best option. In this case, a separate resource consent would have to be applied for to allow construction of the new wetland, and this in turn would need a reduction of plantation trees currently in the Selwyn forest.

80. We are not confident that mitigation will address the scale and quality of indigenous vegetation in the Waianiwaniwa Valley, especially when the mudfish are taken into account. Dr Meurk will say that replacing ecosystems in all their complexity is not possible, and if it were, it would be extremely expensive.
81. We do not believe the proposal can achieve the protection of significant vegetation throughout the region, in terms of s6. At the start of my submissions I referred to the *Wairoa District Council (W081/07)* case and distinguished it on the facts, because the vegetation in that case was regionally, relatively common. Here it is regionally rare, and removing large tracts of it cannot be mitigated by 'protecting' other pieces elsewhere. There simply isn't any more to protect.
82. Forest & Bird has thought carefully about whether it would be a useful outcome to support the Notice of Requirement, in the hope that this would, through conditions, bring some strategic planning and control to an area where the removal of biodiversity is otherwise virtually uncontrolled by the district plan.
83. We have decided that that course of action would be risky because due to the 'firewall' between Trust (consent holder) and Company (CPWL) there is no guarantee that conditions imposed would be implemented by the Company. Nor that the Trust would be made aware of any breaches of conditions by water users.

Conclusion

84. It is for the panel to consider the additive environmental effects, (of which Forest & Bird's evidence on biodiversity loss is just one) and weigh these against the benefits of the scheme.
85. It is our belief that immediate and long term adverse effects from biodiversity loss on the Central Plains will far outweigh any short term economic benefit to the shareholders of this scheme.
86. We asked ourselves the question: Will the residual effects of the proposed activity (both construction of the scheme and post-irrigation effects), after mitigation of conditions, cause an unacceptable increase in cumulative adverse effects? (Milne paper, February 08: When is enough, enough?)

Dealing with cumulative effects under the Resource Management Act; MfE website).

87. In our view, the answer is yes, to the question above, for the following reasons:

- The applicant has not suggested how it which will achieve protection of significant indigenous vegetation and habitats in the footprint of the scheme, and in the wider irrigated area. The cost of restoration has not been factored in as a part of the scheme.
- Adaptive management is not a suitable tool in this case. The science is not un-clear (compared to hydrology, for example), and the effects are irreversible. The limits of biodiversity loss in Canterbury have clearly been reached.
- What legal safeguards will be put in place to achieve new and enhanced habitat?
- It is not clear how post-irrigation effects will be controlled outside of the footprint area. That is, residual effects will be uncontrollable. This is a critical question which, if addressed, could provide some possibility for offsetting. See paragraph 8 above.
- There is a lack of responsibility and accountability at local and regional council level. Without buy-in from Christchurch City, Selwyn District and Environment Canterbury, there will be no confidence in the scheme.
- The Trust does not properly represent wider community interests, particularly environmental. Conditions are therefore unable to be monitored. See paragraphs 18 and 20 above.

Fiona Mackenzie

Lawyer for Forest & Bird

9 June, 2008

