

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
NORTH CANTERBURY FISH AND GAME COUNCIL**

**ANDERSON LLOYD
LAWYERS
CHRISTCHURCH**

Counsel: J M Crawford/S J Eveleigh

Level 10 Clarendon Tower
Cnr Oxford Tce & Worcester St
PO Box 13831
CHRISTCHURCH 8141
Tel 03 379 0037
Fax 03 379 0039

1. INTRODUCTION

- 1.1 This hearing concerns a proposal by Central Plains Water Limited/ Central Plains Water Trust (**the Applicant**) to establish and operate a private irrigation scheme on the central Canterbury plains between the Waimakariri and Rakaia rivers (**the CPW Scheme**).
- 1.2 The history leading up to this hearing has been canvassed in detail in opening submissions for the Applicant, together with a broad overview of the CPW Scheme. It is not proposed to repeat those matters in detail.
- 1.3 The initial application to take water was lodged in December 2001, jointly with Ashburton Community Water Trust (**ACWT**). To the extent that the ACWT proposal is relevant, we propose at this juncture to confine the case to the hydrological implications as they relate to the various priority scenarios affecting the single application to take water that was made jointly by ACWT/CPW. Brief comment is made in evidence as to the conceptual fish screen design, however this and other issues relating to the other aspects of the Rakaia terrace hydro scheme, including water discharge and use, will be addressed when ACWT presents its substantive case at a later date.
- 1.4 North Canterbury Fish and Game Council (**Fish and Game**) is presenting a joint case with the Director General of Conservation (**DoC**). As indicated in the evidence, there is a degree of overlap between the various technical witnesses and a commonality of position on most, but not all, matters. Ms Rutledge will be presenting separate legal submissions on behalf of DoC.
- 1.5 Fish and Game has submitted in opposition to the applications for resource consent made to the Canterbury Regional Council (**the Regional Council**) and in relation to the applications for land use consent made to the Selwyn District Council (**the District Council**), together with the notice of requirement for the designation of land associated with the CPW Scheme.

2. SUMMARY OF CASE

- 2.1 Fish and Game's primary concerns are with the impact of the CPW Scheme on key elements of the fishing and hunting experience.
- 2.2 The potential impact on instream values, including in particular the viability of the salmon and trout fishery, is of particular concern to Fish and Game. Many aspects of the CPW Scheme will affect instream habitat parameters that influence the quality and quantity of fishing or hunting. The aesthetic and recreational amenity values associated with these activities are also important factors. The ability to access sportsfish and gamebird habitat within and along valued freshwater environments is considered to be a critical part of the hunting and fishing experience.
- 2.3 Fish and Game's position is that:
- a. The abstraction regimes contained in the Waimakariri River Regional Plan (**WRRP**) and the Rakaia Water Conservation Order (**Rakaia WCO**) set a low tide mark. Compliance with minimum flows does not mean that instream values are automatically protected.
 - b. The CPW Scheme should be assessed overall as a non-complying activity, and ought not to be compartmentalised for the purposes of determining activity classification.
 - c. The actual and potential adverse environmental effects of the CPW Scheme on sportsfish and gamebird habitat, and angler and hunting amenity, are more than minor and, in some instances, potentially significant. Such effects cannot be adequately addressed by mitigation measures, by an over-reliance on adaptive management, or by the promise of benefits elsewhere.
 - d. The proposal is contrary to key objectives and policies of the relevant planning instruments, including in particular those provisions that are directed towards demonstrating actual and reasonable need for the quantities of water sought for

abstraction, together with provisions that seek to maintain and enhance public access and amenity values. In other instances, insufficient information has been provided by the Applicant to determine whether the proposal is consistent with certain provisions, such as those relating to water quantity and quality.

- e. The Applicant has failed to demonstrate that the all aspects of the designation are reasonably necessary, or that alternatives have been adequately considered.
- f. The CPW Scheme proposal is otherwise inconsistent with the sustainable management purpose and related principles contained in Part 2 of the Resource Management Act 1991 (**the Act**).

3. **FISH AND GAME**

- 3.1 Fish and Game is the statutory manager of sports fish and game birds in the district under the Conservation Act 1987, the Wildlife Act 1953 and associated regulations and notices. As such, Fish and Game has an obligation to manage, maintain and enhance the recreational interests of anglers and hunters, by maintaining and improving the sportsfish and game resource.
- 3.2 Key elements of the angling and hunting experience considered to be at risk from the CPW Scheme include the quality and quantity of fishing and hunting available, together with associated ecological and recreational amenity values that are related to these activities.
- 3.3 The primary focus of Fish and Game's submission concerns the two braided rivers, the Rakaia and the Waimakariri, both of which are revered as open space recreation areas. These significant braided rivers, together with related land and water resources, will be affected should the CPW Scheme proceed. Key instream issues relate to the extended duration of low flows, factors influencing fishability and fishing amenity, related impact on instream habitat in braided river birds, public access, fish screen design and a range of other issues.

The Waimakariri River

- 3.4 The Waimakariri River is the most heavily fished river in New Zealand and extremely popular with a range of recreationalists, due in part to its accessibility and proximity to Christchurch. The river has nationally significant values for:
- a. fisheries, particularly salmon but also trout and a wide range of indigenous species;
 - b. wildlife habitat for species which occupy the riverbed; and
 - c. recreation, including fishing, hunting, jetboating, kayaking and a range of other activities.
- 3.5 You will hear from a number of expert anglers as part of Fish and Game's case, as well as from various interest groups during the course of this hearing, as to the significance of this river in recreational terms. Expert evidence will also be presented by Fish and Game/DoC regarding key instream ecological issues.

The Rakaia River

- 3.6 The Rakaia River may experience less quantity of usage in some respects, but the relative quality of the recreational experience is considered by some users to be higher. The Rakaia River supports an internationally significant sports fishery for Chinook salmon, as well as a regionally significant trout fishery. It is recognised as constituting the best recreational salmon fishery in New Zealand, as well as being an important river for jetboaters and kayakers. It also contains outstanding habitat for certain braided river birds.
- 3.7 You will hear from a number of witnesses, including experienced anglers and avifauna experts, in relation to the amenity of this important braided river.

Other resources

- 3.8 Affected lands (such as reserves) and waters (including foothill rivers and lowland streams) within the CPW Scheme area constitute valued recreational resources at a district and local community level.
- 3.9 There are also areas downstream of the command area that offer a range of recreational uses relevant to Fish and Game's interests, from the nationally significant activities such as gamebird hunting at and around Lake Ellesmere, other freshwater environments and estuarine areas between the Rakaia and Waimakariri Rivers, the long-established whitebaiting area of the lower Waimakariri, through to more locally significant uses.
- 3.10 The submission lodged by Fish and Game with the Regional Council in August 2006 emphasised the potential adverse impact of the CPW Scheme on recreational amenity, and expressed the concern that the recreational benefits of the proposal had been overstated. This issue was re-stated in the submission lodged with the District Council in January 2007. A number of other submissions lodged by a range of individuals and groups speak to the loss of recreation opportunity on land, as well as water. Yet, the extent to which particular recreational uses in this area are affected by the CPW Scheme has not, to date, been comprehensively addressed by the Applicant.

4. LAW

- 4.1 A large number of resource consents are sought, as well as a notice of requirement, to enable the CPW Scheme to proceed. The key legal tests are summarised below.

Consent applications

- 4.2 When considering the applications for resource consent you have a discretion to grant or refuse consent under section 104B of the Act. For non-complying activities, additional restrictions apply under

section 104D. The reasoning behind the determination of the overall activity status as non-complying is discussed shortly.

- 4.3 Section 104 requires that, subject to Part 2 of the Act, a number of matters be considered. These include any actual or potential effects on the environment of allowing the activity; any relevant provisions contained in the applicable planning framework; and any other matter considered relevant or reasonably necessary to determine the application.

Notice of requirement

- 4.4 Section 171 provides that, subject to Part 2, consideration must be given the effects on the environment of allowing the requirement having particular regard to:

- a. Any relevant provisions of applicable policy statements, plans or proposed plans;
- b. Whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work if:
 - i. The requiring authority does not have an interest in the land sufficient for undertaking the work; or
 - ii. It is likely that the work will have a significant adverse effect on the environment;
- c. Whether the work and the designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and
- d. Any other matter.

- 4.5 I understand that you will hear further from Ms Rutledge for DoC in relation to the notice of requirement, as well as from a range of directly affected individual landowners and groups as this hearing proceeds. I wish to make the following general observations on behalf of Fish and Game.

- 4.6 Careful consideration should be given as to whether CPW has discharged its duty as requiring authority. In my submission, the

Applicant has failed to meet the fundamental tests of reasonable necessity and adequate consideration of alternatives.

- 4.7 It is questionable, for example, whether it is reasonably necessary for the notice of requirement for the headrace canal to extend hundreds of metres either side of the actual canal width that is required to service the scheme. An analogy would be Transit NZ seeking to designate an additional 1-200 metres either side of a two lane highway. That would not be appropriate, as it is not reasonably necessary for achieving the objectives of the roading authority. The same rationale applies to CPW and, in my submission, raises the very real question of planning blight.
- 4.8 The obligation to consider alternatives does not mean putting forward a range of possible options as part of a proposal, in the expectation that one option will ultimately turn out to be feasible and affordable. It is also inappropriate in the circumstances of this case to leave the design of key components for a later point in time, with a heavy reliance on the outline plan process. To that extent, CPW has acted arbitrarily and without careful consideration of the most appropriate sites, routes or methods to enable the CPW Scheme to proceed.
- 4.9 The Applicant needs to decide now what form the proposal will take – is it to be the upper or lower Waimakariri intake, will there be a piped or open headrace, and at what width and location, what is the size of the reservoir, and so on. Such alternatives should have been properly canvassed at the outset, with extensive consultation, so that an informed decision could have been made to pursue a scheme with sufficient certainty and detail regarding the critical components of the proposal. The failure to do so calls into question the necessity of various critical components of the CPW Scheme, and, more fundamentally, whether it meets the purpose of the Act under Part 2.

5. **ACTIVITY STATUS**

- 5.1 There are a number of issues affecting the status of the various applications for resource consent. These are:

- a. The relationship between restricted discretionary activities and Part 2.
- b. Whether a presumption applies in favour of unrestricted discretionary activities.
- c. The non-complying status of certain aspects of the proposal.
- d. Bundling of activities in order to determine the appropriate classification.

Restricted discretionary activities and Part 2

- 5.2 This issue arises particularly in terms of Rule 5.1 of the WRRP, which provides that the take and use of water from the Waimakariri River is a restricted discretionary activity subject to compliance with a range of standards. The following analysis is something of a moot point, given that the assessment matters are relatively broad and also on the basis of the 'bundling rule', which I will come to shortly. Nonetheless, for completeness, I address this issue for the benefit of the panel as it has been the subject of discussion during the course of this hearing.
- 5.3 Consent authorities are frequently required to consider applications for restricted discretionary activities. When making this assessment, the consent authorities have in the past approached the matter on the basis that they can take into account only relevant matters that arise from the plan itself. The traditional view concerning restricted discretionary activities, was that resource consents could be refused or conditions imposed, based only on the matters which the District Plan describes as relevant: *Auckland City Council v Auckland Regional Council* [1999] NZRMA 167.
- 5.4 Recently, there has been a line of cases, which suggests that the various consent authorities should, in addition, assess the application against the matters that arise from Part 2 of the RMA: see *Tuscany Limited v Christchurch City Council* C099/05 and *Stephenson v Auckland City Council* A169/05.

5.5 The most recent decision is that of the High Court in *Auckland City Council v The John Woolley Trust* CIV 2004-404-3787, 31 January 2008. The High Court determined that the matters contained in Part 2 RMA 1991 are relevant to considering an application for a resource consent for a restricted discretionary activity. However, the Court then went on to state that (at paragraph [43]):

...any application for consent to a restricted discretionary activity is subject to Part 2 but with the important proviso, evident from section 77B(3)(c), that matters under Part 2 may not be relied upon to decline consent for a restricted discretionary activity. Similarly, Part 2 matters may not be relied upon to impose conditions on a grant beyond those relevant to the matters upon which the Consent Authority has restricted its discretion in the plan.

5.6 I note that a similar approach is reflected in the definition of "restricted discretionary activity" contained in the WRRP. Therefore, on the face of it, this would suggest that a decision maker may not be entitled to rely on Part 2 to decline consent to the abstraction of water from the Waimakariri River.

5.7 However, applying this reasoning in practical terms has the inexplicable result that an Applicant for resource consent for a restricted discretionary activity can argue that there are relevant matters in Part 2, which justify consent being granted, even though those matters were not listed as being relevant in the District Plan. Yet opponents of the application cannot point to matters under Part 2 to justify the consent being refused or conditions imposed.

5.8 If an Applicant is able to call evidence on Part 2 matters, then opponents must surely be equally entitled to call evidence to the contrary. In my submission, a consent authority should then be entitled in such circumstances to assess the competing evidence as part of the ultimate balancing exercise in order to determine whether a proposal represents sustainable management. If that is so, then it should follow that the consent authority to exercise its discretion to grant consent, refuse consent, or impose conditions. To hold otherwise may lead to the situation where a restricted discretionary activity, even though clearly contrary to Part 2, cannot be declined on

the basis of a narrow application of the matters to which the council has restricted its discretion in the plan. That is tantamount to classifying such activities as quasi-controlled and fails to recognise the ultimate statutory purpose of promoting sustainable management.

- 5.9 Based on the law as it currently stands a consent authority is free to assess restricted discretionary consents under section 104 and Part 2 RMA. Yet the reasoning in *Woolley* suggests that this may only enable the consent authority to rely on Part 2 when granting consent and not denying consent. If this is the case, then there is no jurisdiction to enable rejection of a proposal for an restricted discretionary activity that is plainly contrary to Part 2. With respect, I am not certain that this was what was intended. In my submission, if evidence is presented with respect to Part 2 matters then it is open to you to conclude that Part 2 is relevant to the exercise of your discretion to grant or decline consent, or impose conditions, for a restricted discretionary activity.

No presumption in favour of unrestricted discretionary activities

- 5.10 Counsel for CPW has suggested that, where an activity is wholly discretionary, the presumption is that the activity is appropriate in the zone, and, by definition, cannot be contrary to the objectives and policies of the relevant plan.
- 5.11 The traditional view was that a discretionary activity was seen as being generally appropriate in the zone: *Doherty v Dunedin CC* C006/04.
- 5.12 However, this presumption no longer applies: *Campbell v Napier City Council* W067/05. In that case the Court acknowledged the need to have due regard to any relevant provisions of a plan or proposed plan pursuant to s 104(1)(b)(iv), and made the following observation at paragraph [63]:

...it was probably not now good law that discretionary activity was presumed to be appropriate in a zone subject to being approved for

a particular site. Instead, it was about what the objectives, policies and other relevant provisions of the district plan provided.

- 5.13 Put simply, this means that the wind is no longer behind unrestricted discretionary activities.
- 5.14 The exercise of the discretionary judgment to grant or refuse consent under section 104B is to serve the purpose of sustainable management of natural and physical resources. The evidence will demonstrate that the various unrestricted discretionary activity applications that comprise the majority of this proposal ought not to be given consent on their merits.

Non-complying activities

- 5.15 There are also aspects of this proposal that fall to be considered as non-complying. This includes a number of activities for which consent is required under the NRRP. Mr Murray in his planning evidence for CPW concedes that discharges to water not covered by the WRRP should be considered non-complying. It would also appear that non-compliance with Rule 5.1 of the WRRP (water take) would render that aspect of the proposal non-complying. Such activities are integral to the operation of the CPW Scheme, which is relevant to the bundling of activities and the overall classification of the proposal.
- 5.16 The assumption to date is that the water race distribution network falls to be considered as a 'utility' for the purposes of the Selwyn Proposed District Plan (**the District Plan**). The literal interpretation of that term, as defined in the District Plan, would suggest that to be the case. However, as acknowledged by counsel for the Applicant in opening, the District Plan does not envisage an irrigation scheme of the type proposed by CPW. Indeed, the Applicant accepts that the scale of the proposal is larger than that contemplated by the District Plan.
- 5.17 The utility provisions, objectives and policies, are clearly directed towards necessary public infrastructure such as telecommunications or community water supplies. For obvious reasons, the District Plan

is somewhat broad and enabling in terms of its treatment of public utilities. It is questionable however whether it was intended that a private irrigation scheme, such as that being promoted by CPW, form part of the necessary public infrastructure of the district. It is an uneasy fit.

5.18 In any event, this is again something of a moot point given the bundling issue which is considered below.

Bundling

5.19 Having determined the status of the various consents, the question then is how to treat the large number of consent applications associated with the construction and operation of the CPW Scheme.

5.20 Three issues arise with respect to the bundling of uses:

- a. Whether the various Regional Council consent applications should be bundled together when determining the status of the instream/water related activities.
- b. Whether the District Council applications should be bundled with the Regional Council applications to give the proposal an overall status.
- c. Whether ACWT, as joint applicant to take water from the Rakaia, should also be 'tainted by association' with CPW in order to determine the activity status of the Rakaia terrace hydro proposal.

5.21 The general proposition is that there is no scope for hybrid planning status for a proposal, and that the more stringent classification of activity applies to the whole application: *Locke v Avon Motor Lodge Ltd* (1973) 4 NZTPA 17.

5.22 The *Locke* principle remains generally applicable today. However, there are some qualifications on the bundling of activities, as recognised by the Court of Appeal in *Bayley v Manukau City Council*

(1999) 1 NZLR 568 (CA). For completeness, the often quoted phrase from *Bayley* (at page 580) is set out in full below:

The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round considering at the one time all the matters which it ought to consider and instead to split it artificially into pieces.

- 5.23 Accordingly, where there is a direct connection between the activities and consents overlap to such an extent that they could not be realistically or properly separated, then bundling is appropriate: *King v Auckland City Council* [2000] NZRMA 145 HC, Randerson J. (at paragraph [50]).
- 5.24 On the other hand, if an activity is distinct, in that there are no consequential or flow-on effects, then there may be no case for overlap and no need for a holistic approach: *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 (HC) (upheld by the Court of Appeal).
- 5.25 This approach to hybrid proposals was discussed by the Environment Court in *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350. After reviewing the case law the Court stated (at paragraph [15]):

From those authorities it is our understand that while the *Locke* approach remains generally applicable so a consent authority can consider a proposal in the round not split artificially into pieces, that approach is not appropriate where:

- (a) One of the consents sought is classified as a controlled activity or a restricted discretionary activity; and

- (b) The scope of the consent authority's discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and
- (c) The effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application but are distinct.

5.26 This test has been applied in a number of cases including *Methodist Church of New Zealand v Auckland City Council* A050/03 and *Lake Edge Holdings Limited v Taupo District Council* A053/05.

5.27 In my submission, there is no scope for hybrid planning status for the CPW proposal and the more stringent classification of activity applies to the whole, for the following reasons:

Regional Council consents

5.28 Applying the principles to the CPW Scheme, the following observations can be made. Even if it is determined that the take and use of water from the Waimakariri River is a restricted discretionary activity, it is apparent that the assessment matters for Rule 5.1 of the WRRP covers a broad range of issues. Furthermore, the take of water will have a number of consequential and flow-on effects that are closely associated with the construction and operation of the irrigation scheme. The discharge consents are, for example, closely related to the take and use of water.

5.29 It would therefore be artificial to attempt to compartmentalise the various water-related aspects of the proposal. The proposal should be considered in the round, at least in terms of the regional council consents, which in my submission renders that aspect of the proposal non-complying.

5.30 The next question is whether the land use consents ought be to thrown into the mix.

Bundling of Uses between District and Regional Councils

5.31 This issue arose before the Environment Court in *Tairua Marine Limited v Waikato Regional Council A108/05*, concerning a proposal for a marina development which involved dredging and reclamation works. Under the regional plan, the proposed dredging was non-complying activity and the proposed reclamation discretionary. Under the district plan, the proposed parking and recreation activities on the reclamation were discretionary activities. The Court determined that, due to the non-complying status of the dredging, the proposal as a whole was a non-complying activity.

5.32 The High Court (CIV-2005-485-1490) agreed with the Environment Court's approach, stating (at paragraph [30]):

It is a long-standing principle that where there is an overlap between two consents so that the consideration of one may affect the outcome of the other it will generally be appropriate to treat the applications as one requiring overall assessment on the basis of the most restrictive activity: *Bayley v Manukau City Council, King & Ors v Auckland City Council*. However, Mr Kirkpatrick argued that the effects of disposing of the dredge material did not overlap with matters such as the natural character of the visual and recreational amenity. The issue of overlap was not directly addressed by the Environment Court. However, there is overlap between the dredging and the other proposed activities. The dredging lies at the heart of the project. There will be no marina until a very substantial dredging exercise is carried out. The proposed all tide marina will be situated on an area which is totally exposed to the tide at the present. Presumably the dredging will be extensive and will have to exceed 2 metres in depth for large parts. The dredged material is estimated to amount to 142,000m³. The disposal of those dredging pailings creates an immediate environmental issue.

...

As I have stated the environmental effects on dredging and disposal of the dredged material are key issues in the application. There is therefore a need for as referred to in *Body Corporate 97010* as "a holistic approach".

5.33 In *Living Earth Ltd v Auckland Regional Council* A126/06 the Environment Court considered several different planning documents relevant to the consenting of a composting operation. Under the district plan the composting aspect of the proposal was a non-complying activity, although accessory buildings were a discretionary activity and the earthworks were restricted discretionary. Under the regional plan, the diversion and discharge of stormwater was a non-complying activity, and discharge of contaminants to land were discretionary activities.

5.34 In determining the status of the proposal the Environment Court held (at paragraph [87]) that:

As the subject matters of the various requirements for resource consent for the proposal overlap so that consideration of one may affect the outcome of another we find that the proposal requires overall assessment on the basis of the most restrictive status of consent applicable, namely, as a non-complying activity.

5.35 Applying the relevant case law to the CPW Scheme, some clear analogies can be drawn. There will be no irrigation scheme without the necessary distribution network. Similarly, the water distribution network relies on the necessary regional council consents to take, use and discharge water, as well as consent for a range of activities in the beds of the relevant tributaries. The water take and its end use lies at the heart of the project. One cannot exist without the other. Consideration of one therefore affects the outcome of the other.

5.36 In such circumstances, the proposal therefore requires an overall assessment for the purposes of determining activity classification that combines both the District and Regional Council consent applications.

Relationship between joint applicants

5.37 It is perhaps unfortunate for ACWT that they have been tainted by association with CPW, and have been faced with what Ms Appleyard called a 'tsunami' of submissions opposing the ACWT take. To some

extent, it is the author of its own misfortune. That being said, I am inclined to agree with Ms Appleyard (for ACWT) that the fact that there was a joint application with CPW for the take of water may not of itself necessarily render the entire ACWT proposal non-complying. To that extent, the proposals are arguably distinct.

Activity status – conclusions

- 5.38 Case law requires that inter-related consents be bundled. The issue is whether you can unbundle certain key components of the CPW proposal from those matters that are truly ancillary and which do not flow from, overlap or connect with with the primary consents.
- 5.39 In my submission, to separate the take of water from its ultimate end use would introduce an element of artificiality to the proposal, which, when viewed in the round, is for an irrigation scheme. As such all consents associated with that activity ought to be bundled as one.
- 5.40 In the present case, a single joint classification would represent the reality of the situation. It is clearly artificial to attempt to split the water take from its end use. It lies at the heart of the project. There will be no irrigation scheme until the take and use of the water is confirmed. The environmental effects of abstraction of water are key issues in this application, and they relate to downstream impacts and the consequential land use activities that are the inevitable result of this proposal. The subject matters of the various requirements for resource consent for the proposal overlap, such that consideration of one may affect the outcome of another.
- 5.41 There is therefore, in my submission, a need for a 'holistic approach' to determining the activity status of the CPW proposal. Accordingly, the proposal requires overall assessment on the basis of the most restrictive status of consent applicable, namely, as a non-complying activity.

5.42 If the activities are not unbundled, and cannot be as a matter of law, it is then questionable whether you can reach a conclusion that the overall effects of the CPW Scheme are no more than minor.

6. ACTUAL AND POTENTIAL EFFECTS

6.1 There are a range of actual and potential effects arising from the construction and operation of the CPW Scheme that may impact on the interests represented by Fish and Game, including:

- a. Effects on the flow regime of the Rakaia and Waimakariri Rivers
- b. Effects on fish passage, movement and screening
- c. Water quality and effects of the discharges
- d. Effects on instream and riparian ecology habitat
- e. Impact on public access, safety, amenity values, natural character and associated recreational values

6.2 These effects are assessed in detail in the evidence of the various technical witnesses for Fish and Game.

6.3 Fish and Game's case is that the cumulative effects of the CPW Scheme warrant careful consideration. For completeness, I note that cumulative effect is something that will occur, rather than something that may occur, representing as it does a gradual build up of consequence over time: *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

6.4 On the evidence before you, it will be necessary to determine whether a sustainable limit has been reached, beyond which further effects are unacceptable. Is this proposal the straw that breaks the camel's back? It is often easier to see the problem after limits have been reached, which is perhaps the reason why permissive minimum flow regimes are typically fraught with problems. The evidence will demonstrate that the cumulative effects of the CPW Scheme are potentially significant and warrant the decline of consent on that basis alone, particularly in terms of the Waimakariri River.

- 6.5 The impact of the CPW Scheme on the flow regime of the Rakaia and Waimakariri Rivers is discussed in the evidence of Mr de Joux. While the minimum flows and allocation limits set out by the Rakaia WCO are likely to limit the hydrological effects of the proposed takes in the Rakaia, this does not necessarily translate into automatic protection of related instream values and habitat. In terms of the Waimakariri River, it is Mr de Joux's evidence that the proposal will result in significant periods of "flat lining" at or about the minimum flow. The mitigation measures recently put forward by the Applicant may not necessarily resolve the issues, particularly if the abstraction is still likely to reduce the duration of short term freshes. The effect of the CPW Scheme on the morphology of the braided river system is also discussed in the evidence of Dr Tim Davies.
- 6.6 Insufficient information has been provided by the Applicant to reliably determine the effects of the CPW Scheme on instream habitat for fish, birds and their benthic invertebrate food supply. The flow-clarity relationship and the optimal conditions for salmon angling will be discussed by Dr John Hayes and a number of expert anglers being called for Fish and Game. Dr Hayes considers that there are potential cumulative effects that may impact on the sports fishery in both the Waimakariri and Rakaia Rivers, in terms of the reduction in the area of salmon habitat (fewer angling lies).
- 6.7 As outlined by Dr Dean Olsen, the scheme proposed by CPW is likely to significantly affect the productivity and composition of macroinvertebrate communities, particularly in the Waimakariri River and foothill streams draining the Central Plains area. There is inadequate information on the mitigation options proposed by CPW to allow for an informed assessment of their likely effectiveness and adequacy to mitigate effects of the CPW Scheme on invertebrate populations and the values they support.
- 6.8 Mr Joe Hay addresses the proposed design of fish screens, at the three intake sites, with respect to native fish found in the Waimakariri and Rakaia rivers. Mr Davor Bejakovich will address the fish screen

design with respect to salmonids. As outlined by these witnesses, insufficient information has been provided by the Applicants to adequately assess the adequacy or feasibility of fish screening at the proposed intakes on the ecology of the Waimakariri and Rakaia rivers. This is largely because the design is still at a conceptual level, making it difficult to assess effects until the design is confirmed. Such matters ought not to be relegated to a post-consent management plan structure or a working group/consensus approach.

- 6.9 Without the baseline data concerning flow requirements for a range of recreation users, combined with comprehensive primary research, the overall recreation amenity impacts of the CPW Scheme could not have been properly assessed by the Applicant, in order to reach the conclusion that effects will be either localised or minor. Based on the evidence of a range of experienced recreationalists, together with the expert recreation planning evidence of Mr Geoff Canham, it is apparent that the implementation of the CPW Scheme has the potential to adversely affect recreational amenity, both within and beyond the command area.
- 6.10 In my submission, it is inappropriate for such a significant issue to be relegated to a management plan. No specific concepts or designs for any proposed recreation assets have been made available. Nor is there any evidence of the management or ongoing cost implications for proposed new assets. There is insufficient evidence to confirm whether the evolving mitigation measures or potential recreational benefits of the proposal will be realised.
- 6.11 A number of potential benefits have been emphasised by the Applicant – including increased recharge of groundwater, flows to lowland streams, creation of wetlands, a range of potential recreational opportunities, and what is said to be significant economic advantages should the scheme proceed. There is however little evidence to suggest that these benefits will be translated into reality, and in some instances may be offset by negative impacts elsewhere.

- 6.12 The Applicant stated at the commencement of this hearing that the CPW Scheme will supplant the need for use of groundwater and further enhance groundwater availability. However, there is no certainty that existing groundwater abstractors will be willing to relinquish their permits in order to connect to a scheme that is already recognised by the Applicants to be at the cusp of farmer affordability. Furthermore, it has emerged during the course of the hearing that trading of groundwater rights may well occur, which would appear to undermine the possibility of an increased water table.
- 6.13 Much has been made by the Applicant of the public interest aspect of the proposal. This is not a centralised community-owned scheme. It is for private irrigation purposes, nothing more. The public interest aspect relied on the Applicant is, in my submission, irrelevant and ought to be given no weight in your deliberations. I expect that other submitters will address you later in this hearing in relation to broader socio-economic and economic considerations.
- 6.14 You will also hear from a number of witnesses by Fish and Game/DoC, and other submitters, regarding the package of environmental compensation or biodiversity offsets that has been put forward by the Applicant. Environmental compensation was considered by the Court in *JF Investments Ltd v Queenstown Lakes District Council* C048/06. Ultimately, you need to decide whether any proposed mitigation is relevant under s104(1)(c) in terms of producing a better outcome. In my submission, the use of biodiversity offsets is only appropriate where short term adverse effects are overcome by the long term positive effect of a proposal on the environment. Any offers to offset must also be tangible and measurable. Such tools or techniques have their limits. There is no evidence that the CPW Scheme will result in a better outcome overall.
- 6.15 In summary, it is Fish and Game's case that the actual and potential effects of the CPW Scheme are clearly more than minor, and are not able to be mitigated by conditions or by an over-reliance on management plans or outline plans. Furthermore, the stated benefits of the CPW Scheme have not been quantified adequately and ought

to be given little weight when considering the relevant matters under section 104(1)(a) of the Act.

7. **PLAN PROVISIONS**

- 7.1 The applications must also be assessed against the relevant provisions contained in a number of planning instruments including the Canterbury Regional Policy Statement (**RPS**), Rakaia WCO, Transitional Regional Plan, Waimakariri River Regional Plan (**WRRP**), proposed Natural Resources Regional Plan (**NRRP**) and the Selwyn Proposed District Plan. These planning instruments are discussed in detail in the evidence of Mr Jason Holland for Fish and Game, and Mr Dave Newey for DoC.
- 7.2 It is accepted that there are no national policy statements relevant to the present applications, nor do the provisions of the New Zealand Coastal Policy Statement apply.

Plan weighting

- 7.3 It is generally the case that the weight to be given to proposed plans instruments depends on the stage they have reached in the plan review process, the weight generally being greater the further a plan proceeds through that process. Importantly, however, are other relevant considerations such as whether the proposed plan was prepared under the RMA and represents a shift in Council policy: *Lee v Auckland City Council* [1995] NZRMA 241; *Hanton v Auckland City Council* [1994] NZRMA 289.
- 7.4 In my submission, the NRRP should be afforded greater weight than suggested by the Applicant. Submissions on Variation 1 to the NRRP (water quality and quantity) have been received and hearings have now commenced. The fact that a large number of submissions have been received does not lead to the conclusion that the general thrust of the NRRP will be rejected. The NRRP reflects a change in policy and signals the direction the Regional Council is seeking to take in ensuring the integrated management of resources in Canterbury. By

comparison, the Transitional Regional Plan has its genesis in previous legislation and comprises various general authorisations, bylaws and regulations that were not subject to the same rigour of sustainability that is present in the new generation plans.

Canterbury Regional Policy Statement

7.5 The RPS provides some general guidance, particularly in terms of water quality, quantity and broader considerations of efficiency. This is considered in detail in the evidence of Mr Holland.

Rakaia Water Conservation Order

7.6 Mr Holland also provides a detailed explanation in his evidence of the mechanics of the Rakaia WCO. Set out below is an analysis of the relationship of the Rakaia WCO with Part 2 of the Act.

7.7 The Rakaia WCO was made under the provisions of previous legislation. In *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Incorporated* [1988] 1 NZLR 78 (Rakaia WCO proceedings), the Court held that the primary object of a water conservation order is the conservation of waters in their natural state. The matters to be taken into account when considering an application for a water conservation order under the WSCA 1967 were set out in section 20B(6).

7.8 There was a great deal of evidence before the Tribunal in 1984, which was ultimately accepted by the High Court and Court of Appeal, relating to fishability and recreational instream values. The minimum flows and abstraction regime set at the time were intended to protect the values specified in the Rakaia WCO. The issue is whether this in fact creates a rebuttable presumption that protection will occur as a result of compliance with the allocation regime.

7.9 There has been a great deal of water under the bridge since the making of the Rakaia WCO. The main substantive difference is that the purpose of a water conservation order is now affected by Part 2 of

the RMA; there was no equivalent in the WSCA. There is also further scientific understanding of the conditions required to protect outstanding values, and the concept of cumulative effects has come more sharply into focus under the RMA.

- 7.10 Essentially, it comes down to an evidential issue. If you decide that the minimum flows are not sufficient to protect a characteristic recognised in the Rakaia WCO, then there is jurisdiction to ensure that the purpose of the order is met through the resource consent process. The Rakaia WCO does not permit the take. It is discretionary, therefore all effects can be considered in deciding whether or not consent should be granted.
- 7.11 Substantively, a water conservation order establishes the water levels which must not be lowered if the purpose of an order is to be achieved. In essence, it provides a low tide or watermark (of quantity and quality) below which the river should not be drawn on, or to put it another way, a "plug in the bath": *Rangitata South Irrigation Limited v New Zealand and Central South Island Fish & Game Council C109/04* (Rangitata WCO proceedings) (at paragraphs [51] –[53]).
- 7.12 Furthermore, the purpose of a WCO is not to enhance or improve characteristics. To that extent, Part 9 has a different approach to resource management than Part 2 of the Act. In determining whether or not to grant an order protecting the Rakaia river, the Tribunal in 1985 was not expressing an opinion whether the recommended flows represented sustainable management under Part 2 of the Act. Nor did it consider enhancement of amenity values, or the fish population. The findings will not necessarily be the same on a consent application, particularly if new evidence comes to hand that suggests a more restrictive regime is warranted in the context of a particular proposal.
- 7.13 As the Court stated in the Rangitata WCO proceedings (at paragraph [51]):

A regional water plan is prepared subject to Part 2 of the Act without modification, so different, and more familiar tests apply under sections 5-8 of the Act. They authorise remedying of adverse effects and enhancement of resources (where appropriate). Both of those approaches to resource management appear to be largely precluded by the water conservation order regime in part 9 of the Act.

7.14 In *Central Plains Water Trust v Synlait Investments Limited* C045/07 the Environment Court considered the extent to which a water conservation order should influence a decision on an application for resource consent to take water. His Honour Judge Smith observed that:

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

[82] Having looked at the provisions of sections 199 through to 217 of the Act, we are not able to conclude from those sections that the imposition of a Water Conservation Order substitutes for the requirement on a resource consent to consider the provisions of Part 2 of the Act or the various other criteria set out in section 104 and relevant portions of section 105. Importantly, it appears that the Regional Council's power to impose an allocation regime under section 32(fa), or the power to grant consents on more restricted terms than the Water Conservation Order, or refuse consents is not affected by the operation of the Water Conservation Order.

7.15 In the context of the application by CPW, it is therefore appropriate to consider all the effects (not just those which are addressed in the Rakaia WCO) and make a decision in accordance with Part 2. In

doing the Rakaia WCO provisions can be taken into account under section 104. However, it is open to you to impose more (but not less) restrictions than the Rakaia WCO, to address an effect on a value which is recognised as nationally outstanding by the WCO. Consent can also be declined notwithstanding compliance with the allocation regime, if the evidence supports such a course of action.

- 7.16 When considering a resource consent application to extract water, compliance with the Water Conservation Order itself is therefore not sufficient. The application must also be considered under the full provisions of Part 2, and the various requirements of Section 104, including consideration of "any actual and potential effects on the environment of allowing the activity". This could include consideration of the extent to which conditions could adequately remedy and mitigate effects, or even enhance certain qualities of the river. The Applicant carries the burden of proof to persuade you that consents ought to be granted, having regard to the relevant statutory criteria.
- 7.17 Therefore, in conclusion, is it not enough to assert that all concerns in relation to the Rakaia River are addressed by strict compliance with the allocation regime in the Rakaia WCO. The listed values and characteristics are not protected by default. The take is discretionary, therefore sections 5, 6 and 7 apply. It is not a rebuttal presumption that effects are taken care of. The only presumption is that an application can be made, which is then assessed against the relevant criteria.

Waimakariri River Regional Plan

- 7.18 As with the Rakaia WCO, compliance with the minimum flow regime does not of itself ensure that all effects are protected. There is no presumption that consent will be granted. The proposal must be assessed against the relevant criteria, and, arguably, Part 2 of the Act in deciding whether or not to grant consent, or impose conditions.
- 7.19 Mr Jason Holland considers the assessment criteria in Rule 5.1 in some detail, together with the relevant objectives and policies. He

concludes that there are some compliance issues, and that the proposed abstractions, diversions and discharges associated with the CPW Scheme may not be consistent with the provisions of the WRRP.

Proposed Natural Resources Regional Plan

7.20 Mr Holland assesses the provisions of the NRRP in detail and, in light of the expert technical evidence, concludes that there are number of key objectives and policies that will not be achieved or implemented should the CPW Scheme proceed.

Sections 105/107

7.21 The sensitivity of the receiving environment and impact on aquatic life are relevant factors to be considered in relation to the discharge permits. This is dealt with in evidence.

8. PART 2

Section 5

8.1 In considering the proposal by CPW, a broad overall judgment is required as to whether it promotes the sustainable management of natural and physical resources.

8.2 It is questionable whether the proposed activities will enable local communities to provide for their own needs. You will hear from a number of local individuals and groups in relation to this issue as the hearing proceeds. Again, it is important to remember that this is not a community scheme. It is a conglomerate of private farmer shareholders seeking to promote their own interests. To that extent, any suggestion as to community welfare or public interest favouring the approval of the CPW Scheme should in my submission be given little weight.

8.3 The enabling aspect of section 5 is also tempered by the environmental bottom-lines. The evidence of Fish and Game is that the CPW Scheme will not sustain the potential of natural and physical resources to meet the needs of future generations, will impact on the life-supporting capacity of key waterbodies, and has a range of actual and potential effects on the environment that cannot be adequately avoided, remedied or mitigated.

Section 6

8.4 There are a number of matters of national importance that must be recognised and provided for. The natural character and habitat of the rivers, lakes, wetlands and their riparian margins, together with public access, are key matters of concern to Fish and Game. This is covered in detail in evidence.

8.5 It is acknowledged that section 6 factors are not absolute requirements, and that preservation of natural character is not necessarily to be achieved at all costs: *NZ Rail v Marlborough District Council* [1994] NZRMA 70 (HC). However, questions of national importance do play a key part in the overall consideration as to whether sustainable management is promoted by a particular proposal.

Section 7

8.6 Section 7 matters are similarly addressed in evidence. Of particular concern to Fish and Game is to ensure the efficient use of the water resource, protection of the habitat of trout and salmon, intrinsic values of ecosystems along with the maintenance and enhancement of amenity values and the quality of the environment.

9. PROPOSED MANAGEMENT STRUCTURE/CONDITIONS

An over-reliance on adaptive management

- 9.1 The concept of adaptive management is a recognised method of managing potential uncertainty. However, adaptive management is not appropriate in all circumstances. The 'ambulance at the bottom of the cliff' approach is not appropriate in this case.
- 9.2 The proposed conditions make extensive reference to the development of management plans. Yet, detailed plans have not to date been prepared. CPW accepts that any consent conditions must put in place specific controls, but is asking to be left with the flexibility to provide the necessary information through management plans following the grant of consent.
- 9.3 The purpose of management plans should be to implement consent conditions. They should not be used as the replacement for an assessment of environmental effects. There is an over reliance on adaptive management in the context of this proposal. This reflects the fact that, in my submission, the Applicant has not done its homework. It has nothing to do with a potential change in technology or level of scientific uncertainty that could not have been addressed at the outset.
- 9.4 There is insufficient evidence that adaptive management response proposed by the Applicant will adequately avoid, remedy or mitigate potential adverse effects. The management structure also contemplates agreements with third parties and to that extent, lacks certainty. It is not supported by a comprehensive monitoring regime. Fish and Game's position is that conditions must be clear, transparent and enforceable.
- 9.5 In *Kuku Mara v Marlborough District Council* W025/02 the Environment Court was required to assess whether a proposed system of adaptive management was capable of giving effect to the

need for a strong application of the precautionary approach. The Court said (at paragraph [479]):

It is for the Court to decide whether an applicant's adaptive management regime supported by an extensive monitoring regime and conditions, is appropriately precautionary. This is determined on matters of fact.

- 9.6 Adaptive management, in itself, implies a cautious approach. The High Court in *Minister of Conservation v Tasman District Council, HC Nelson CIV-2003-485-1072* (9 December 2003) Young J, accepted (at paragraph [11]) that:

Adaptive management is a precautionary approach for managing risks. It is a policy response to potential adverse effects which are unable to be assessed by considering the primary or adjudicative facts.

- 9.7 The Environment Court in *Clifford Bay Marine Farms Limited v Marlborough District Council C131/03* made the following comments about what conditions must achieve in order to apply adaptive management (at paragraph [118]):

The applicant has proposed conditions of consent which involve staged development and monitoring. To this extent they have acknowledged at least the possibility that effects might follow which require avoidance, remedying or mitigation. The case must therefore turn on whether the conditions proposed, in particular the monitoring regime and adaptive management strategy, can first detect and secondly remedy any effects that might arise before they become irreversible.

- 9.8 The concept of adaptive management has emerged as an alternative way of managing uncertainty. Put simply, it is an experimental approach to management – learning by doing. It is not to be used as an excuse to avoid a full and complete assessment of the effects of a proposal.

- 9.9 CPW applied to take water for this irrigation scheme in 2001. In my submission, it has had ample opportunity over the past 7 years to conduct the baseline survey work to enable it to commit to a comprehensive set of conditions, or identify those factors that are so uncertain as to be appropriately dealt with post consent. The 'suck it and see' approach does not mean that an Applicant can do the bare minimum to get to the consent hearing stage, then seek the necessary funding to do the work to determine how implementation of the proposal might affect certain values. That is putting the cart before the horse.
- 9.10 Adaptive management should only be implemented if there is a high level of confidence that:
- a. Quantifiable triggers of adverse effects can be set.
 - b. Such adverse effects are reversible.
 - c. Mitigation of adverse effects can be implemented quickly.
 - d. Mitigation is guaranteed to be effective.
 - e. If necessary, the extent of the development can be cut back.
- 9.11 The general concept of “sustainable farm management” is prominent in the AEE and is recommended as a mitigation measure to address effects of the CPW Scheme. However, this is presented only in the form of draft management plans, the details of which have not been finalised. Any assessments of sufficiency of farm management plans will require more detailed information than is currently included. Until this is done, the likely effectiveness of careful management cannot be predicted.
- 9.12 There is also insufficient evidence concerning the effectiveness or reliability of the various mitigation measures proposed by the Applicant.
- 9.13 For example, as outlined in the evidence of Dr Dean Olsen, there is inadequate information on the mitigation options proposed by CPW to allow for an informed assessment of their likely effectiveness and adequacy to mitigate effects of the CPW Scheme that are likely to

negatively affect invertebrate populations and the values they support.

- 9.14 The Applicant also fails to provide sufficient information, for example, about the design and ongoing monitoring/maintenance of proposed wetland areas. As outlined in the evidence of Mr Scott Larned, it is not clear whether the wetlands would be constructed or simply incidental to activities such as bywash discharge. Details about design, construction, performance, monitoring, and maintenance are needed before the effectiveness of these wetlands can be predicted. The same issue arises in relation to fish screen design, where the Applicant is proposing a Working Group/consensus approach notwithstanding the preferred criteria already put forward by Fish and Game and others.
- 9.15 In the case of instream recreation users, it is inappropriate to rely on management plans to attempt to resolve matters after consents may be granted. As Mr Geoff Canham states in his evidence, this is relegating current users to 'fit in' with the operation of controlled rivers and use conditions as determined by the proposed CPW Scheme's needs after consents are granted. The inequity of placing recreation users in this position infers a greater decision has been made on the role of a river or recreation resource to people; and that they are secondary to it.
- 9.16 A further outcome of management plans occurring after consents are granted will be to impose a further 'resource race' on to current users for only the balance of a resource available, the conditions of which may be decided before the management plan process even commences. Post consent management plans also do not deal with the future requirements of the recreation resource and, in effect, set limits for future generations.
- 9.17 In summary, there is an over-reliance on management plans as a means of controlling the effects of this proposal. There is not appropriate baseline assessment put forward by the Applicant from which to consider the proposal. In some instances investigations are

not complete, but it is not clear what will be done and when results and analyses might be expected. The scale and complexity of the project has not been matched by the amount of effort to understand the natural resources, nor is there sufficient detailed design material to allow effects to be fully identified and understood.

Sustainability protocol

- 9.18 In my submission, the appropriateness and enforceability in terms of consent conditions relating to the sustainable farming protocol is also questionable. The protocol is intended to require farmers to adhere to and uphold best practice environmental standards. However, it is understood that the consent is held by CPWT on licence to CPWL.
- 9.19 Mitigation measures that are not under the direct control of the CPW Scheme will require compliance and cooperation by other parties, including water users. Such external mitigation measures include weed monitoring and control, stock exclusion and fencing, alterations in the Lake Ellesmere opening regime, enhancement and creation of wetland habitat, and riparian restoration along lowland streams.
- 9.20 There is limited information about whether and how compliance and cooperation will be achieved with third parties, only that some compliance will be a matter for consideration through the development of farm management plans. If compliance and cooperation cannot be assured, the likelihood of the mitigation measure succeeding is questionable. For mitigation measures that fall outside of the farm plans, no mechanisms have been identified for ensuring that the measures are implemented.
- 9.21 The practical issue is how consent authorities then enforce compliance. CPW seem to be putting themselves forward a quasi-planning authority. The obligations are too detached from that of the consent holder. Little reliance can be placed, in my submission, on the use of farm plans and other indirect mechanisms by which to ensure compliance with the conditions of consent. It is nothing more than an information and education exercise, and must be viewed as

additional to the need to have clear and enforceable conditions of consent.

Conditions relating to the takes – trading water

- 9.22 In relation to ACWT, it is not intended to traverse issues relating to scope, except in so far as to note that the use specified in that application has now changed. This does potentially raise questions of scope having regard to the *Haslam* test, and no doubt you will hear from other submitters on this point. I note that counsel for ACWT accepted Commissioner Milne's proposal that the take be expressly limited to the purpose to which it is now being sought – ie. hydroelectricity, and only for the amount that is actually needed for that purpose, as demonstrated by the evidence. It is submitted that a similar approach is warranted in respect of the CPW proposal, if consent is granted.
- 9.23 The Applicant is seeking to take water that others are not currently using, even though it has already been allocated. If consent is granted in the terms sought, CPW will be seeking to negotiate with other users to take their un-used allocations. The tradeability concept has been emphasised by the Applicant. There are, in my submission, some potential issues concerning the workability of such an arrangement. This is particularly so where the consents held by existing users are for a different purpose, in which case they would have to be formally varied.
- 9.24 The concept of transferable water rights has some obvious attraction to water users, as a market-based instrument for water allocation where there is spare capacity in the water system (from un-used allocations). However, in my submission, such matters are better dealt with at the regional plan level through improved strategic planning and/or the setting of allocation criteria that properly account for instream values, rather than in an ad hoc fashion through the granting of individual resource consents.

- 9.25 Leaving aside the issue of whether potential control of the allocated water resource by speculators is in fact appropriate (given that it is essentially privatising ownership of freshwater), there is the risk that enhanced transferability leads to a higher level of abstraction that occurred in the past. The devil is in the detail – conditions will require careful wording to ensure that the resource is not inadvertently over-allocated, with necessary variations to existing permits held for a different purpose, along with consideration of the environmental effects of the transfer, and instantaneous monitoring between water users. Such factors point to the fact that what CPW is proposing ought to take the form of a plan change to facilitate transfers of water allocations among water users.
- 9.26 Fish and Game's technical witnesses have modelled a number of alternative flow regimes, that may reduce the potential impacts on residual river flows particularly in the Waimakariri. These include 1:1 flow sharing or the raising of the minimum flow for the CPW take. Ultimately, this raises the question of whether such an arrangement is more appropriately addressed via a plan change rather than in the context of a resource consent application.

Term/lapse

- 9.27 The Applicant has sought a term of 35 years. The Court has in the past criticised such an approach for large scale water takes, at least in a groundwater context, on the basis that it commits the resource for a much longer period than is desirable and limits the responses that can be made as understanding of the resource increases over time: *Lynton Dairies v Canterbury Regional Council C108/05*.
- 9.28 The proposed term can be assessed having regard Clause 1.3.5 of the NRRP. Investment certainty is of course a relevant factor, but in my submission it is subservient to environmental measures. There is no certainty that adaptive management conditions will address the cumulative effects of this proposal. Nor should it be necessary for the Regional Council to have to resort to review conditions. Furthermore, an adaptive management approach can only be justified in the

context of relatively short term consents that are supported by an extensive suite of conditions. These factors, in my submission, support a substantially shorter term.

- 9.29 In my submission, a 10 year lapse period is also inappropriate. In the case of the water takes, the Applicants should not be entitled to obtain priority to a scarce, and in some instances vulnerable, resource and then sit on the consent for an extended period. This would deny access to other users and would not be efficient. The only reason that seems to be put forward by the Applicant for an extended lapse period is that the works to be undertaken are very extensive and funds need to be raised to undertake them. It is considered that a 5 year lapse period would be more appropriate.

10. **CONCLUSION**

- 10.1 The CPW Scheme is a very large scale project that interacts with complex physical and ecological systems, including dynamic gravel river beds, vulnerable lowland streams and lakes, and sensitive riparian environments. The scale and significance of the project has not been matched by a comprehensive assessment of effects or by sufficient design detail to ensure that any mitigation is both workable and affordable. The wide-ranging implications of the CPW Scheme have not been fully assessed by the Applicant. In my submission, the groundwork has simply not been done by the Applicant to justify the implementation of such a large scale project scheme with its attendant effects.
- 10.2 The applications for consent and notice of requirement fail to pass the relevant statutory tests in the Act. The CPW Scheme does not promote the sustainable management of the key natural and physical resources that will be affected should this proposal proceed.
- 10.3 In these circumstances, I submit that the only appropriate course of action is to decline consent and recommend that the notice of requirement be withdrawn.

11. **WITNESSES**

11.1 The following witnesses will be called on behalf of Fish and Game:

- a. Mr Trevor Isitt, Mr Tony Matravers, Mr Neil Goldie, Mr Ian McCrory, Mr Dirk Barr and Mr Rick van der Zwet (anglers);
- b. Mr Geoff Canham (Senior Project Manager: Parks and Recreation, Opus - recreation values);
- c. Mr Richard de Joux (EDS Services - hydrology);
- d. Dr John Hayes (Senior Fisheries Scientist, Cawthron Institute - trout and salmon fishery);
- e. Dr Dean Olsen (Freshwater ecologist, Cawthron Institute - invertebrate habitat);
- f. Mr Joe Hay (Freshwater biologist, Cawthron Institute - native fishery, habitat and fish screening);
- g. Mr Davor Bejakovich (Senior Fish and Game officer - sports fishery, habitat and screening);
- h. Dr Scott Larned (Freshwater ecologist, NIWA - ecological effects on lowland streams and Te Waihora-Lake Ellesmere);
- i. Dr Tim Davies (Associate Professor in Engineering Geology, University of Canterbury - braided river morphology);
- j. Mr Jason Holland (Fish and Game environment officer - planning).

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JM Crawford/SJ Eveleigh

Counsel for North Canterbury Fish and Game Council

13 May 2008