

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
NGĀI TAHU PROPERTY LIMITED**

Introduction

1. Ngāi Tahu Property Limited's concerns relate primarily to the proposed abstraction of water from the Waimakariri River.
2. These submissions are made on the basis that Ngāi Tahu Property does not retain its priority over Central Plains Water's (**CPW**) proposed abstraction from the Waimakariri River. If Ngāi Tahu Property retains its priority over CPW, then the consent held by Ngāi Tahu Property CRC052033 enables Ngāi Tahu Property to take A Permit water. If CPW has priority over Ngāi Tahu Property and CPW is granted consent to the A Permit water, then consent CRC052033 will effectively be inoperative and the Ngāi Tahu Property development will not proceed.
3. Much of CPW's case over these many months of hearing has been in an effort to convince you that its proposal without the A Permit water is efficient and promotes sustainable management. That is, CPW does not need the A Permit water.
4. In the event that Ngāi Tahu Property does not retain priority, you should not grant the A Permit water to CPW.

5. The efficiency and sustainability of the Ngāi Tahu Property scheme was recognised in the Preliminary Decision to grant resource consent to Ngāi Tahu Property for its scheme (the Preliminary Decision). The Preliminary Decision, at page 47, outlines that the amount of water Ngāi Tahu Property sought was based on optimum demand and that it is not a 'wasteful' use of the resource because of the modern infrastructure and flexible farming practices that Ngāi Tahu Property will be adopting to maximise output and respond to variations in water demand and availability.
6. Even when the CPW Scheme is considered as a proposal on its own, it is still not efficient and does not promote sustainable management, as addressed in the evidence of Mr Jansen.
7. The standard approach to consideration of a proposal is that there need not be a consideration of any other proposal or application that comes after it in priority. That approach does not apply and is not appropriate here because:
 - a. Issues of efficiency are very important in this case. It is appropriate and consistent with the RMA to consider the relative efficiency of the CPW and Ngāi Tahu Property schemes; and
 - b. When considering the overall purpose of sustainable management you are able to take into account under s104(1)(a) and (c) the fact that the Ngāi Tahu Property Scheme has been consented. Not allocating the A Permit to CPW, but instead making it available to Ngāi Tahu Property (which would be next in priority), best promotes the sustainable management of the water resources of Canterbury and best provides for the social, economic and cultural well being of the residents of Canterbury and beyond.
8. There is no legal impediment to you proceeding in this way. To do so, is effectively neutral in terms of issues of which scheme has "legal priority". It is consistent with both the traditional view of priority, and

the more “merits based’ approach which appears in the Court of Appeal decision. It would also result in an appropriate allocation as between competing uses, but in a manner consistent with the RMA, in a situation where there has been a policy failure in terms of providing for allocation of water from the Waimakariri and Rakaia Rivers and from groundwater.

Consideration of relative efficiency

9. CPW seeks a consent to take and use a quantity and class of water in excess of its reasonable needs. This also raises the issue of whether this calls into question the efficiency of the CPW Scheme. If the CPW consents are granted in that form, this will not ensure the achievement of sustainable management in the wider community.
10. It is only once the the alternative use of the CPW proposal or Ngāi Tahu Property's approved scheme have been compared that an answer can be given to the question of whether the CPW Scheme is efficient.
11. The traditional proposition is that consent authorities do not need to determine the relevant efficiency of the use of resources, compared with other possible uses. This arises from the Planning Tribunal decision in *Swindley v Waipa District Council A75/94*. The question of relative efficiency arose also in the case of *Cassidy v Queenstown Lakes District Council C39/07*, where the Court accepted the position that it does not have responsibility for determining the relative efficiency of the resources involved.
12. However, efficiency brings into question the effect of the change compared with the existing situation. It must therefore be open to consider, in appropriate cases, a comparison with other developments: *Nelson Intermediate School v Transit New Zealand* (2004) 10 ELRNZ 369.
13. Given that consent can be obtained which effectively ties the resource up for a considerable period of time, it is appropriate to consider

comparative efficiency and the combined efficiency achieved by enabling both proposals to proceed.

14. The sustainability of competing proposals (whether mutually exclusive or otherwise) can be compared in this context and used to determine the efficiency of each especially in the case of water takes. It was indicated in the Preliminary Decision that comparative efficiency is acceptable in the context of comparing uses and not users (page 47 paragraph 230).
15. The Preliminary Decision at page 47, paragraph 228 and 230 went further to state that:

The purpose of the Act is to achieve sustainability, not the efficient or equitable allocation of resources...and that applications for resource consent must be considered on their own merits, not considered against other alternatives.

The decision of the High Court in *Aoraki Water Trust* makes it clear that in granting a consent, we are allocating water and at least in the Court's view we are granting a (limited) right to the property in that water for the term of the consent. In that context section 7(b) when combined with section 5 must require us to have regard to whether this is an appropriate use of the resource in relation to other potential competing uses of it which **might** be considerably more efficient and which might therefore represent a better use of this public resource.

16. Therefore, it is appropriate for both scheme's to be compared in terms of section 7(b) and section 5.
17. Allocative efficiency enables you to distribute the scarce resource to the most appropriate use. It is therefore appropriate to look at the benefits from both schemes and compare them to determine whether they are mutually exclusive, or whether they can both be accommodated.
18. What is the most efficient use of the remaining 2.72 cumecs of A Permit water? This turns on the issue of alternative use of that water

and reliability requirements, which is addressed in Mr Jansen's evidence.

19. Ngāi Tahu Property's scheme has been determined to represent an efficient use of the A Permit water consistent with the intended purpose and uses provided for in the Waimakariri Regional River Plan. The actual demand and reasonable need for the quantities of water sought by Ngāi Tahu Property has been proven and consented.

Granting CPW the A Permit water does not promote sustainable management

20. It is implicit in the sustainable management purpose of the Act that the equitable allocation of resources is part of the matrix. In the case of water allocation, you are being asked to grant what is, in effect, a right to the property in that water for the term of consent. In that context, Part 2 of the Act enables you to have regard to whether this is an appropriate use of the resource. In doing so, you may have regard under section 104(1)(a) and (c) to other potential competing uses which might be considerably more efficient or which might otherwise represent a better use of this public resource because they better promote sustainable management.
21. Even if the CPW Scheme is viable in itself, but there are other viable uses that, in combination with the scheme, can achieve a greater distribution of benefits across the wider community, then this must be taken into account in reaching a decision whether or not to allocate some or all of the water resource to CPW.
22. Again, the normal approach is that alternative possible uses do not need to be taken into account. However, the reason for this approach in the cases is to avoid a situation where an applicant never gets to the end of people coming along and saying they can think up a better way of doing things or a better place in which to do them, and the applicant then has to carry out a comparative analysis of possible and perhaps fanciful alternatives. However, that is where the alternatives

put up are unspecific and put forward in a way that demands that the applicant carry out the assessment.

23. The legal authorities do not prevent a consideration of alternatives in appropriate situations. The Court held, at paragraph 118, in *Sanford (South Island) Ltd v Southland Regional Council* C106/02 that proposals may require an evaluation of not only individual but all sites as a whole, balancing issues and benefits under section 5. Therefore, sustainability of the competing proposals can be compared and used to assess the efficiency of each.
24. In this case, both the Ngāi Tahu Property and Synlait schemes are actual proposals which have been considered and consented. They are not fanciful or inchoate ideas. Here we know that there is continuing demand for water in Canterbury. If not CPW, there will be someone else looking to use the water (or some of it). Sustainable management is a relative concept. A particular proposal might not be worthy of consent (in terms of section 5) if there is a better way in which sustainable management could be promoted.
25. In this case, the Ngāi Tahu Property and CPW's schemes can be considered under section 104(1)(a) and (c) in determining whether or not the CPW scheme in its full glory represents sustainable management. That is really no different to considering whether leaving the water in the river better promotes sustainable management. It does not require CPW to assess and be compared with all other possible unspecified uses.
26. In addition to the specific Ngāi Tahu Property scheme representing a better use of the Waimakariri River, Mr Jansen's evidence indicates that, even in general terms, other uses of the water would be more efficient than what is proposed by CPW. Again, the legal authorities do not prevent you from taking this into account under section 104(1)(a) and (c). All those cases say is that an applicant need not think up all possible alternatives and assess them. But this is a situation of a scarce and sought after resource. Here, when those alternatives have been put in front of a hearings panel, as Mr Jansen

has done, then you should not grant consent to CPW unless and until additional evidence from CPW directly in response convinces you that it is to be preferred over Mr Jansen's evidence. You need to be satisfied that the CPW scheme is, contrary to Mr Jansen's evidence, really as efficient as they assert.

27. It is not necessary for Ngāi Tahu Property to show that its scheme is more efficient than CPW. Rather, the issue of relative efficiency goes to whether consenting one or other, or both, schemes best promote overall sustainable management.
28. The grant of the A Permit water to CPW would not best promote the sustainable management of the water resources of Canterbury. The direct benefits of the CPW scheme accrue to the some 250 landowners. The direct benefits of the Ngāi Tahu Property scheme accrue to some 42,000 registered Whanui of Ngāi Tahu. If you grant the A Permit water to CPW, only those relatively few farmers accrue the benefit. If you make the A permit water available for Ngāi Tahu Property, then both those CPW farmers and the Ngāi Tahu Whanui will benefit. That in itself, better provides for the economic and social wellbeing of the community, than just allocating the A permit water to CPW.
29. Having said that, however, the justification of the overall allocative efficiency of the water takes proposed by CPW is questionable and remains unproven. The rationale for replacing efficient consented groundwater takes with surface water takes and the requirement for high reliability lacks evidence and substance. The reasonable needs of irrigators within the CPW scheme has not been established. This is discussed in more detail in the evidence of Mr Jansen.
30. In considering the grant of B Permits to CPW, the granting of water take consents in excess of CPW's reasonable needs will not promote the efficient use of the water resource within the wider community, nor of the soil resource within the Canterbury region. The consent conditions should also preclude CPW selling surplus run of river water, whether stored or otherwise, outside of the command area.

Water in excess of the reasonable needs of CPW should be left in the river.

31. In summary, the best use of the Waimakariri A Permit water is to enable Ngāi Tahu Property to have access to that water. This will allow both schemes to proceed, with their respective attendant benefits. An either/or condition scenario depending on priority (as per the Ngāi Tahu Property consent) is not appropriate in this case. Regardless of the outcome of the declaration proceedings concerning priority, you are entitled to reach a view that the remaining A Permit water should not be granted to CPW, on the basis that the use of that water by Ngāi Tahu Property is more efficient, and on the basis that this better promotes sustainable management outcome as it will enable the two schemes to proceed.



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