

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

**SUMMARY OF SUBMISSIONS ON BEHALF OF
THE DIRECTOR-GENERAL OF CONSERVATION**

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SUMMARY OF SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION (THE DEPARTMENT)

1. INTRODUCTION

- 1.1 This hearing is about the proposed Central Plains Water Enhancement Scheme (CPW) to take and use water from the Waimakariri and Rakaia Rivers for irrigation purposes. I will not repeat details already given of the schemes history. I will however note that it involves:
- applications to take water by Central Plains Water Trust (CPWT) and Ashburton Community Water Trust (ACWT) - albeit for different purposes;
 - applications to use the water taken by CPWT for irrigation; and
 - a Notice of Requirement by Central Plains Water Limited (CPWL) for a designation over areas required for the infrastructure necessary to use the water taken by CPWT.
- 1.2 In respect of the ACWT proposal I understand that this hearing is currently considering only the hydrological effects on the Rakaia River. Other aspects of the ACWT scheme will be addressed following the presentation of ACWT's own case.
- 1.3 As noted in the submissions on behalf of the North Canterbury Fish and Game Council (F&G) the Director-General (the Department) is presenting a joint case and sharing witnesses with F&G given the similarity of many of their concerns. However each organisation has its own particular focus. Together they present a detailed analysis on actual and potential effects on the rivers and lakes involved and in particular the freshwater fish and wildlife that inhabit them.
- 1.4 This proposed scheme depends on its ability to store water to differentiate it from any other proposal to abstract the waters of rivers for irrigation of the Canterbury Plains. The water is to be stored in an area which provides support for what is likely to be the largest and most important population of a nationally endangered indigenous freshwater fish the Canterbury mudfish (*Neochanna burrowsius*). The construction of the dam will eliminate the natural stream – resident population and mudfish will not be able to live in the reservoir or connected streams. It is the effect of the loss of this habitat on the Mudfish

which is of particular concern to the Department. It is a section 6(c) matter which it is submitted has not been properly addressed by this application.

- 1.5 The water being abstracted will come from braided rivers that provide nationally and internationally significant habitat for indigenous bird species (in particular the wrybill plover and black-fronted tern). Again the actual and potential effects (including cumulative effects) of the reduction in river flow on the bird habitat are a matter of concern for the Department.
- 1.6 Reduction in river flows will also affect the native fish of the Rakaia and Waimakairiri. On the other hand increased flows of water into Te Waihora/Lake Ellesmere will also impact on the lake's wildlife.
- 1.7 Increased water flows in lowland and foothill streams may expand the range of mudfish predators.
- 1.8 Finally the Department manages on behalf of the public areas of land affected by the Notice of Requirement (NOR) and the consent of the Minister of Conservation will be required under the Public Works Act for its acquisition.
- 1.9 The Department's case is only part of the picture focusing as it does on native fish and birdlife. Other parts of the picture will be presented by other submitters.

2. WITNESSES

The Department will be calling the following witnesses:

- Sjaan Charteris-Bowie- Department of Conservation- Mudfish Recovery Plan;
- Professor. Ken Hughey (Lincoln University) - the wildlife of the braided rivers and Te Waihora/Lake Ellesmere;
- Associate Professor Angus McIntosh (University of Canterbury)- the Canterbury Mudfish;
- David Newey Department of Conservation – planning issues.

- Associate Professor Timothy Davies - jointly with Fish and Game- University of Canterbury the geomorphology of the Waimakariri and Rakaia rivers;
- Joseph Hay-jointly with Fish and Game-a freshwater biologist with the Cawthron Institute Nelson.
- Dr John Hayes-jointly with Fish and Game- benthic invertebrates, native fish and bird habitat in the Rakaia and Waimakariri Rivers
- Richard de Joux - jointly with Fish and Game- hydrology of the Rakaia and Waimakariri Rivers;
- Dr Scott Larned - jointly with Fish and Game – NIWA-ecological effects on lowland streams and Te Waihora/Lake Ellesmere;
- Dr Dean Olsen - jointly with Fish and Game – Cawthorn Institute invertebrate habitat.

3. SUMMARY OF DIRECTOR GENERAL'S CASE

3.1 This is a large scheme with wide ranging effects on the environment both actual and potential.

3.2 It will affect:

- the nationally and internationally significant braided river systems of the Waimakariri and Rakaia Rivers supporting as they do 'nationally endangered' and 'nationally vulnerable' bird species, (the black fronted tern and the wrybill).
- the nationally significant fisheries and habitat values of both rivers.
- the outstanding features of the Rakaia River that have been recognised by a National Water Conservation Order (ie the braided form, wildlife habitat, fisheries, recreational, angling and jet boating features).
- Waianiwaniwa Valley which provides the habitat for the largest and most important population of the nationally endangered Canterbury mudfish.
- Te Waihora/Lake Ellesmere (the Lake) which is of national and international importance for birdlife.

There will be numerous other effects (especially on the water quality and quantity of lowland streams) which collectively could be significant.

- 3.3 In the Department's view, based on expert advice, the proposed scheme will have more than minor effects on endangered native species and the habitat of significant species that cannot be adequately avoided, remedied or mitigated. It is contrary to a number of the policies of the relevant plans, does not constitute sustainable management and consent should therefore be declined.
- 3.4 In respect of the NOR the effect of the dam and reservoir on the endangered mudfish population and habitat of the Waianiwaniwa Valley will be significant and (again in the opinion of experts) cannot be mitigated. It is also suggested that CPWL has not given adequate consideration to alternative sites and methods for achieving the project and the Hearing Committee should recommend that the NOR be withdrawn.
- 3.5 As to be expected in such a large scale proposal there are a wide range of legal issues raised not all of which will be addressed in my submissions. Some of which have been covered in the F&G submissions and which I adopt.

4. THE NOR AND PUBLIC LANDS

- 4.1 The Notice of Requirement will also affect public lands as well as private property. Attached to my submission is a map giving as best we can a map of the various reserves and public lands affected by the NOR.
- 4.2 These lands include land held under the Conservation Act:
- the Selwyn Riverbed Stoneydale
 - the Tramway Reserve Sheffield
- and the Reserves Act
- the Coalgate Recreation Reserve

5. PART 2 OR PART 9 RMA- RESOURCE CONSENT V NATIONAL WATER CONSERVATION ORDER

- 5.1 This has already been addressed by Fish and Game (paras 7.6 – 7.17). These submissions are in addition to those comments. It is quite clear from the case law that minimum standards considered appropriate in respect of a NWCO under Part 9 are not necessarily determinative in respect to resource consent applications especially if there is latter information. In this case the Rakaia River

NWCO was made in 1988 and as a matter of law the Hearing Committee could set different standards on any resource consent to protect factors not taken into account in the NWCO or where there is further evidence on factors that were taken into account.

Rangitata South Irrigation Ltd & Ors v NZ & Central Fish and Game Council
EC C 109/2004 at para 260.

"[260] In making the following recommendations we are not expressing an opinion that the recommended flows are sustainable management under Part 2 of the Act. We are simply making recommendations as required by Part 9 of the Act as to the minimum waterline that should be set. Our findings as to the minimum standards are not necessarily the same as might be set in a Regional Water Plan, or on a resource consent application especially if there was further evidence." My emphasis.

- 5.2 The effects of the scheme should therefore be assessed against Part 2. In respect of the effects on the hydrology of the Rakaia the evidence of Mr de Joux was that they would be minor. In respect of the birdlife the conclusions of Professor Hughey (para 1.24) is that the effects will overall be less than minor. While he thought construction may have localised impacts these can be mitigated. However there may cumulative effects on other values which are of concern.

6. WAIMAKARIRI RIVER REGIONAL PLAN (WRRP)

- 6.1 Again the Fish and Game submission's have also addressed this matter (OS para 7.18 -19). These comments are additional to those.
- 6.2 While the WRRP was made operative in October 2004 it is clear from the evidence that the Plan which was developed in the 1990s does not manage the effects of abstraction on the scale proposed (see Meredith section 42A Report para 41 and Callander para 3.8) and that it didn't fully take into account habitat modelling for flow hungry elements (Hayes para 5.3). It certainly does not provide for flow sharing.

6.3 While the provisions of the WRRP must be had regard to, under section 104(1)(b)(ii), in my submission that does not mean that mere compliance with the WRRP will result in CPW complying with Part 2. The Unison case (*Unison Networks Ltd v Hasting D.C.* CIV-2007-485-896 11 December 2007) has an interesting discussion of the caselaw on this.

[73] Mr McClelland submitted that if the Environment Court was to be bound by the District Plan it would be prevented from doing justice to s 6 even if all the evidence adduced before it was that the relevant provisions of the Plan were wrong. He submitted that Fogarty J put the position "in a nutshell" at [79] of his judgment in *Wilson v Selwyn District Council* [2005] NZRMA 76: Where a provision in a plan or proposed plan is relevant, the consent authority is obliged, subject to Part II, to have regard to it, "shall have regard". The qualifier "subject to Part II", enables the consent authority to form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose or one or more of the provisions in Part II, in the context of the application for this resource consent. (The decision in *Wilson* on the essential issue in that case, namely the meaning of "the environment" under s 104, was reversed by the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA), but the observations at [79] in *Wilson* were not criticised). Fogarty J in reaching that conclusion, nonetheless recognised that plans have only been brought into being by a Part 2 analysis which will inevitably have examined the impact of activities on the environment.

[74] I agree that the analysis of Fogarty J helpfully and accurately states the manner in which a consent authority acting under s 104 should approach its consideration of a particular application.

[75] In this case the Court was considering a specific proposal, namely Unison's Stage 2 proposal. It was required to assess that proposal in terms of s 104 giving primacy to the purpose and relevant principles in Part 2.

[76] The purpose of the Act stated in s 5 is to promote the sustainable management of natural and physical resources. Section 6 requires all persons exercising functions and powers under the Act to recognise and provide for matters of national importance. They include in s 6(b) the protection of outstanding natural features and landscapes from inappropriate subdivision use and development (refer [22] and [23] above).

[77] The priority of the Part 2 considerations in the context of s 104 is made clear because the matters to which the Court must have regard are made

expressly subject to Part 2. This priority position for Part 2 was accorded by a 1993 amendment to the Act, as confirmed and applied in the decision in Reith v Ashburton District Council [1994] NZRMA 241 (PT)...

[81] The Court had appropriate regard to the provisions of the District Plan at [16] to [28] of the decision, but quite properly made its own judgment on the Part 2 matters in issue and did not in its reasoning subordinate these issues to the provisions of the District Plan. It would have been wrong to do so. The Court was entitled to, and properly did make its own judgment based on the evidence it heard, that the area subject to the Stage 2 proposal was an outstanding natural landscape.

6.4 In this case the evidence is that the Plan provisions did not contemplate abstraction on this scale and that science in respect to flow habitat modelling has moved on. The WRRP provisions constitute a minimum flow regime based on the knowledge available at the time and which has been described as “barely survivable” for some values. The focus now is on environmental flow regimes rather than just minimum flow regimes. Such an environmental flow regime includes both minimum flows and flow variability.

6.5 Because this is a resource consent hearing rather than a plan change/variation it is not about altering the WRRP itself. The evidence about the adequacy of the WRRP minimum flow regime indicates that, as with the Unison Network case, it will be necessary for this hearing to make its own judgement on the Part 2 matters and not subordinate them to the plan provisions. In other words it is necessary to consider the effects of the CPW against more than compliance with the minimum flows set in the WRRP. In my submission to manage effects and protect flow variability additional flow regime controls will need to be incorporated into any resource consent.

6.6 Mr Newey’s evidence, (para’s 5.23 – 39) after reviewing the relevant WRRP provisions and expert evidence is that the proposal is inconsistent with some objectives and policies of the plan.

7. ACTIVITY STATUS: NON-COMPLYING/DISCRETIONARY

7.1 Under the various planning instruments the activities involved some of the proposed activities are non-complying while others are discretionary. It seems

generally accepted that “bundling” of these activities is appropriate, the question is which activities to bundle together. F&G have made submissions to the effect that the bundling of all the various activities is appropriate and would result in them being non-complying. If that submission is accepted then the proposal as a whole will have to pass either of the gateway tests of s104D.

- 7.2 Even if the “bundling” is taken to be narrower than that there are still non-complying activities to be considered and the majority of the remaining activities are discretionary. Discretionary status means that the consent can be granted or declined and I adopt the submissions on behalf of F&G that there is no presumption that the activity is appropriate. In my submission the proposal will still not pass section 104(1).

8. Section 104B and 104D

8.1 Section 104B –Discretionary

It is clear from the legislation that consent for discretionary activities can be declined (section 77B(4)(b)) . To suggest as the Applicant’s opening submission does (OS para 161) that it equates to a conditional use under the Town and Country Planning Act is incorrect. On the contrary under the RMA the consent authority has the discretion to grant or decline consent and there is no presumption that it should be granted.

8.2 Section 104D Non-complying

As noted above regardless as to whether all the activities are ‘bundled’ as non-complying, there is no dispute that at least some of these activities are non-complying. These include such core activities as the discharges from the scheme (Newey 4.4). In my submission that makes the water consents non-complying.

- 8.3 All non-complying activities will therefore need to meet one or other of the two gateways. The adverse effects are clearly more than minor and these activities may not be consistent with relevant objectives and policies. However even if they do pass the S104D thresholds they are then assessed under S104(1).

9. S104(1)(a) "effects"

9.1 There has been discussion during this hearing in respect of potential/cumulative effects. In my submission in respect of this application it includes:

- the additional effect of the CPW takes on the existing takes (see Kuku Mara Partnership (Admiralty Bay) v Marlborough District Council (2005) 11 ELRNZ 466 at para 52 -3). You have, had for example the evidence of De Joux on cumulative effects on hydrology and Olsen on food production and;
- the potential effects arising over time e.g. from additional nitrate in the ground water (see Larned). But also the complex interactions on the birdlife of the braided rivers from flow reduction as discussed in particular Hughey evidence at para 2.104. This latter factor is of particular importance when considering the types of effects discussed below 10.5 - 10.

10. ADVERSE EFFECTS INCLUDE:

10.1 **Obstruction of fish passage** –The scheme affects fish passage in several ways. On the one hand there are effects from reduction of flows in the rivers from which water is being abstracted to be considered.

10.2 Then there are potential obstructions of fish passage at the approximately 50 stream/river crossings (see Hay 5.1-24). This is a relevant consideration under section 104 &105 of the RMA (Re Auckland Regional Council [2002] NZRMA 241) notwithstanding that it is also a matter that is covered by the Freshwater Fisheries Regulations of 1983 (FFR). The two provisions are not conflicting or inconsistent because the issue under the RMA is whether the activity constitutes sustainable management- a broader issue than under the FF Regulations.

[13] Given the scope of the Resource Management Act it is not surprising that there is frequent overlap with other pieces of legislation, including regulations such as the Freshwater Fisheries Regulations. Approvals will often be required under other legislation for activities that also require resource consents. Examples include:

- the Reserves Act 1977, where ministerial consent is required for activities and reserves;
- the Local Government Act 1974 or the Public Works Act 1981, where Council or ministerial approval is required for road stopping;
- the Building Act 1991, where a variety of consents are required in circumstances where a resource consent may also be needed; and
- the Sale of Liquor Act 1989, where licences are needed to sell alcohol.

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[46] The Resource Management Act provides for the sustainable management of natural and physical resources which clearly includes fish and their habitat. This is but one matter that has to be weighed and considered by a consent authority when considering an application for a resource consent. A wide range of other factors are often involved.

[48] A consent authority under the Resource Management Act is required to consider resource consent applications under ss 104 and 105 so as to give effect to the broad purpose of the Act. Section 5(2) sets out the extended definition of the Act's purpose. "Sustainable management" requires those exercising functions under the Act to provide for the social, economic and cultural wellbeing of people and communities, as well as for their health and safety. At the same time those exercising functions under the Act must ensure, that the potential of natural and physical resources to meet reasonably foreseeable needs of future generations are sustained; the life-supporting capacity of the environment is safeguarded; and adverse effects of activities on the environment are avoided, remedied or mitigated.² The provision of fish passage is but one of a broad spectrum of activities or matters that is weighed and considered by the consent authority in this context. A wide range of other factors are often involved in deciding whether or not to grant consent and if so what conditions are appropriate, if any.

[49] By contrast, the purpose of the Fisheries Regulations is much more narrow. They are deemed to be made under the Conservation Act which is an Act to promote the conservation of New Zealand's natural and historic resources. When the Freshwater Fisheries Regulations were brought under the Conservation Act, the Conservation Law Reform Act also added a new

function for the Department of Conservation in s 6(a)(b) of the Conservation Act:

To preserve so far as practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats.

[50] The purpose of the regulations are accordingly far narrower than the purpose of the Resource Management Act. The thrust of the regulations is conservation and preservation. The range of considerations available to the Director-General, when giving effect to his/her functions, is far narrower than the range of considerations to which the Council must turn its mind; when considering resource consent applications.

[51] The purpose of the regulations is the narrow and circumscribed process of the preservation and protection of freshwater fish and their habitats. By contrast the purpose of the Resource Management Act is the sustainable management of all natural and physical resources. The focus is quite different and far more wide ranging and all embracing.

[52] Consideration of the issue of fish passage under the Resource Management Act encompasses the considerations mandated by the Conservation Act and the Freshwater Fisheries Regulations (conservation, preservation) and extends beyond those considerations, to determine, in an integrated manner, whether the application for an activity in the bed of a stream, or lake, properly promotes the sustainable management of natural and physical resources, in its broad sense.

As the Environment Court noted in the above decision consideration of the effect of the scheme on fish passage is a relevant matter under the RMA notwithstanding the provisions of the FFR also apply to the structural interference with fish passage. Ironically of course not only will CPW impede fish passage in some areas it also has the potential promote fish passage in others. The potential introduction of fish predators to new areas and improved access for competitors to others is of major concern to the Department. In respect of the design of the intakes they should meet the NIWA criteria to prevent entrainment of fish.

- 10.3 **Potential introduction of fish species to catchments** where they do not occur at present (see Hay 1.15 & 6.46-52). This is of particular significance in regard to the current mudfish refuge that the Waianiwaniwa River provides. It is clear from the applicant's own experts that the creation of the reservoir will

inevitably lead to the introduction of mudfish predators to the valley putting at risk any replacement mudfish habitat

- 10.4 **Loss of Canterbury Mudfish habitat in the Waianiwaniwa River.** It is clear from the mudfish experts (Associate Professor McIntosh in particular – para 1.8) that this river valley supports the largest and most important population of this nationally endangered fish. The habitat is significant because it is a high quality natural stream habitat over an extended area (approximately 23 kms) free of large predatory fish. This will be lost under the reservoir.
- 10.5 **Loss of invertebrate habitat particularly January- April** (Olsen para 4:16)
- 10.6 **Effects on the braided river pattern of the Waimakariri River** (Davies section 6).
- 10.7 **Loss of braided river feeding bird habitat and protective features from riverbeds,** Hughey 2.101
- 10.8 **Effects of river training works** (Hay 6.62-3)
- 10.9 **Reduction in river flows and natural flow patterns on braided river bed bird species ;** see Hughey 2.101-102.
- 10.10 **The cumulative effects of the above 10.5-9.** Professor Hughey concludes that CPW will lead to a *“substantial (but unquantified) overall loss of habitat quantity and quality which could have significant adverse effects on braided river birdlife conservation and black-fronted tern endangered species (and probably wrybill plover) management in New Zealand.”* (para 2.122).
- 10.11 **Increased nutrient run-off from land use intensification;** See also evidence of Peter Callander for CCC section 5 and Larned.
- 10.12 **Te Waihora/Lake Ellesmere higher lake levels and increase in nitrate levels.** See evidence of Larned (para 4.22- 7), Hughey (para 1.267), and the Ecan Regional Engineer, Mr Vesey.

11. POSITIVE EFFECTS INCLUDING:

- 11.1 To be counted as a positive effect in my submission the benefits need to be real and achievable. In the case of CPW, as Larned notes (para 3.1-2), the rivers and lakes are such complex systems that changes which may be of benefit to some values may disadvantage others. The practicality of mitigation such as the mudfish recovery programme will be considered under mitigation below. As it is aimed at mitigating adverse effects of the scheme in my submission it is not a positive effect.
- 11.2 Provision of additional habitat in the reservoir, canals, races or bywash soakage wetlands the quality of which is dependant on water quality and water level fluctuations (see Hay 1.16 & 5.33, 5.42 5.53-62, 7.8). Potential gains in habitat quantity may be negated by reduction in quality caused by land use intensification; again I would regard this as a proposed mitigation of adverse effects rather than a positive effect.
- 11.3 **Potential increase in baseflow of the Selwyn and tributaries from bywash discharges** (See Hay 5.34-9, 7.6-7 and McIntosh section 5). As already noted previously and discussed by witnesses last week (particularly Larned and Olsen) increasing flows in themselves are not necessarily an unqualified benefit. Benefits to some values (i.e. visual natural character and trout/eel habitat) may be at the expense of other and rarer values in particular the mudfish.
- 11.4 **Potential increase in groundwater levels;** See Callander section 4 again another situation where the benefits may be outweighed by disadvantages.
- 11.5 **Economic development of farmland.** Further intensification of land use will have economic benefits for the community. But as noted in 10.11 above it can have accompanying adverse consequences. The practicality of the proposed farm managements plans will be further discussed below.

12. S104 (1) (b) Plans.

- 12.1 I have already made comments on the WRRP. With reference to the Proposed Selwyn District Plan (PSDP) the caselaw I refer to in para 6.3 and my conclusions in 6.5 also apply because, as the applicant acknowledges (O.S. para 183-4), a scheme of this type and scale was not contemplated by the Plan. In respect of the weighting between the TRP and NRRP I adopt the submissions by the F&G.(OS para 7.4) that greater weight be given to the NRRP.

13. S104 (1) (c) Other relevant matters.

- 13.1 In my submission the provisions of the Canterbury CMS, NZBS, and the Mudfish Recovery Plan as discussed by Mr Newey (para 6.5 -20) are also relevant.

- 13.2 The status of land held under other legislation is relevant (if not determinative) (DG Conservation v Marlborough DC EC W89/87) although in this case the land is not merely adjacent but actually part of the scheme. The status of the Selwyn Riverbed Stoneydale Conservation Area is certainly relevant to the section 6(a) assessment - Kuku Mara Partnership (Forsythe Bay) v Marlborough District Council EC W25/2002 at para 409.

"[409] We consider the proximity of Bird Island due to its status as a scenic reserve, and its ecological status as a nationally important birdlife habitat to be of significance, and indicative of the high natural character values of the bay. Whilst not physically impacted upon by the proposal, we accept that the natural character values placed on this area by the community will be greatly diminished by the proposal which is only 500 metres away and greatly utilitarian."

- 13.3 The question of mitigation/environmental compensation/biodiversity offsets is considered below.

14. Adaptive Management /Management Planning.

- 14.1 Again the issue of adaptive management (Applicants OS para 235) has been the subject of submissions by F &G (O.S. paras 9.1 – 10) and these comments are additional.
- 14.2 Adaptive management tools are not the 'fix it' solution for all uncertainties. It is unsuitable if the effects of the activity are irreversible or the effects cannot be monitored. In the case of the CPW while water takes may be stopped the structures and in particular the dam would not be so easy to dismantle. The loss of the existing mudfish stream habitat will be permanent and if predatory fish had accessed the Valley system in the interim any remaining mudfish populations will be at risk.
- 14.3 In respect to monitoring Mr Callander's evidence (para 5.8-9) raises issues about the practicality of that approach in respect of assessing effects on groundwater where effects can take years to become apparent.
- 14.4 Mr Callander also raises issues in respect to the implementation of the proposed farm management plans (paras 5.19). Dr Larned also raises questions about the scope of the farm management plans (para 3.18).
- 14.5 There also needs to be adequate baseline assessments against which change can be measured for adaptive management to work. As Professor Hughey notes in respect of birdlife on the rivers (para 2.73) such data is lacking. Dr Larned commented on the type of research and testing scheme necessary for monitoring the aquatic environment of the Lake and its tributaries.

15. Mitigation/environmental compensation/biodiversity offsets-scope/costs

- 15.1 All three terms seems to have been used in the relevant caselaw and the concept has been considered under section 104(1), section 6(c) and section 5. Whatever the terms used the fundamental questions to be considered are what is being lost and what is being gained?

- 15.2 In the case of the complex effects of the CPW scheme it has been said a number of times that changes which may benefit some values will be at the cost of others. We have already heard that increased flows in lowland streams and reduction of intermittent reaches in the Selwyn may look good to the lay person, increase habitat for some fish e.g. trout and eels. But it will also decrease the intermittent habitat which is increasingly being recognised as being of value in itself. Further an increase in trout/eel habitat will be to the detriment of the prey of those species in particular mudfish. Changes beneficial to one species may disadvantage another (see De Joux 11.8, Olsen and McIntosh 5).
- 15.3 Issues raised have also included the potential costs of the proposed weed control suggested in Dr Bishop's evidence (supplementary p36) see Hughey (para 2.107) In respect of mitigation for effects of increased groundwater levels see Callander (para 4.10 and 6.4).
- 15.4 Looking at the case law (in particular *Memon and Ors v Christchurch CC* EC C 116/03, *Stapylton-Smith v Banks Peninsula DC* EC C191/04 and *JF Investments Ltd v Queenstown Lakes DC* EC C48/2006) the relevant tests seem to be :
- is what is being offered of comparative value to that lost? Preferably it should be similar in both degree and kind.
 - will it be effective i.e. will be implemented and if implemented maintained?
- 15.5 Applying those tests it is clear that benefits to other native or introduced fish are not of the same kind as the loss to the endangered Canterbury mudfish and therefore not mitigation for effects on the mudfish. It is acknowledged that CPW does offer a specific Mudfish Mitigation Plan, i.e. mitigation of the same kind. In the view of experts, (see McIntosh paras 1.10 and 6.3), the proposed mitigation plan for the mudfish will not compensate for the loss of unique habitat in the Waianiwaniwa Valley. Replacing the characteristics of the mudfish population will require at least 23 kilometres of low gradient contiguous stream network, free of large predatory fish and with mostly perennial flow. The technology to establish the Waianiwaniwa mudfish population elsewhere is neither well developed nor reliable, (McIntosh 4.10).

- 15.6 The proposed captive management facility is of little benefit for a species which is limited more by lack of habitat than poor reproduction (McIntosh 4.11). Further the proposed mudfish replacement habitat in the Waianiwaniwa Valley relies on 3rd parties and therefore lacks certainty. This is further addressed below.
- 15.7 In my submission therefore there is no adequate mitigation/compensation for the effects on the Canterbury mudfish population. Further improving the habitat and extending the range of mudfish predators will place the species under increased pressure.
- 15.8 In respect of other mitigation/enhancement options (e.g. the weed control, farm management plans, wetland development and riparian protection) questions have been raised about their effectiveness and the adequacy of the Environmental Enhancement Fund to cover costs.

16. Section 108 Consent Conditions

- 16.1 Consent conditions need to be clear and enforceable and monitorable. It is not the task of a submitter to draft appropriate conditions or to lay the parameters for a consentable scheme. The Department raised issues from the outset about the information available and these concerns remain.

16.2 Duration

As F&G have noted the proposed 10 year lapse period will result in a 'locking up' of water for a considerable period and 'planning blight' for affected properties. In my submission such a term is unjustified and inappropriate.

16.3 Monitoring effectiveness.

Where monitoring of effects is required it must be effective. However there are questions about whether some effects can be effectively monitored (see Callander 4.10 & 6.4 re groundwater level impacts & 5.19 re groundwater quality impacts & farm management plans).

16.4 Enforceability

The F&G submission has already raised the potential issues around enforcement of consent conditions in circumstances where the holder of the water rights, (CPWT the community trust), does not actually use the consents. Rather it is CPWL (the commercial entity) who owns the infrastructure and has exclusive use of the water. It is CPWL who is supposed to enforce the sustainable farming protocol (Applicant's O.S para 60). However it is CPWT who proposes to monitor the environmental outcomes and compliance with the consents (OS para 50). In my submission little weight can be placed on such uncertain and confusing mechanisms.

16.5 Transferability of water permits.

The RMA allows for transfer of water permits (section 136). However if the permit is being transferred to a different site then the effects of the change need to be considered. This is entirely sensible. As De Joux has commented taking the water from one place and using it at another may have very different effects. For example extracting water from a river running it through an Hydro Electric Power scheme and returning to the river downstream is a very different proposal from one which seeks to take the same amount of water and use it for irrigation. Similarly the effects of irrigation water may differ from site to site. Each case would need to be considered on its merits, it cannot be assumed however that the effects are the same. If ACWT is granted consent for a take for hydro-purposes in my submission any change in use should require a new consent.

16.6 Working parties costs.

If the applicant is proposing a working party approach then the costs of attendance by NGO's/ private individuals is relevant. In my submission expecting such parties to fund their participation is inappropriate especially given the number of management plans being proposed.

16.7 3rd party

It is clear from the case law that conditions requiring 3rd party approvals may be ultra vires. In this case management of the increased water flows into the Lake to avoid flooding around the Lake margins requires Ecan to open the Lake. Even if Ecan was minded to accept that in theory, the evidence of the Ecan Regional Engineer para 142-6 makes it clear that it may not be that easy to achieve in practice. This is confirmed by Dr Larned's comments on the difficulties of maintaining the opening (para 4.26-7).

16.8 Another proposal which requires 3rd party co-operation is the creation of mudfish habitat in the Waianiwaniwa Valley. As noted in the CPW Mitigation Plan for Canterbury Mudfish page 15 this will rely on co-operation from those not part of CPW. There is no certainty that this could be implemented or if it was how predators who accessed the area via the dam would be controlled. The proposed mitigation plan in that respect is therefore too vague and uncertain to form the basis for any conditions of consent.

17. Matters that are not relevant:

17.1 Ownership Of Water Rights

The resource consent process is not designed to transfer ownership of water (section 122) or to determine which category of applicant or use is superior to any other. Instead the RMA provides for these issues in other ways. If the purpose is to obtain community ownership of water (see Applicants Opening Submissions [O.S] paras 49, 50-56, 62) then it either ignores s354(1) RMA or to the extent it seeks a different outcome it requires a legislative change

17.2 Identity of the applicant;

Although the Applicant lays emphasis on the fact that it is a Trust which will hold the water rights the RMA is effects based. Legally therefore this hearing is not about the relative merits of a community trust as opposed to a private owner (*Fleetwing Farms Ltd v Marlborough DC* (1977) 3 NZLR). In any case the only users of the water are the shareholders of CPWL (see OS para 60). The Proposed Selwyn DP provisions in respect of utilities reinforce the point that it is

the effect of the activity which is relevant rather than the identity of the provider. As the Court noted in *Fleetwing*:

There are two further statutory indications which support these conclusions. First, the provisions of s 8 of the Marine Farming Act 1971 for giving preference where more than one application is received in respect of the same area were not carried forward in any form into the Resource Management Act. Section 8(3) of the 1971 Act empowered the controlling authority to determine which applicant was to be preferred "by lot, or by having regard to the financial or other circumstances of the applicant, or to the likelihood of the applicant being able successfully to develop a marine farm". Second, the transitional provisions of s 399 of the Resource Management Act specify the sequence in which certain applications in the pipeline including marine farming applications are to be processed and determined. By contrast with a comparative process under the 1971 Act they are to be determined on a first come first served basis.

These statutory provisions and others indicate that the legislature when regulating competing applications for scarce resources might among other things:

- (1) provide for a comparative assessment of the competing applications;*
- (2) provide for purchase of the entitlement say by tender;*
- (3) provide for a proportional allocation, based, for instance, on the applicants' history in the activity;*
- (4) provide for allocation by lot;*
- (5) proceed on a first come first served basis.*

The legislature may also require a qualitative element (eg of personal and financial integrity). The Marine Farming Act provided for (1) or (4) at the option of the controlling authority. Certain permits under the Crown Minerals Act 1991 can be allocated by public tender. Proportional allocation is provided for in the quota management system in the Fisheries Acts 1983 and 1996. On our reading of the Resource Management Act Parliament has used the final approach of first come first served." My emphasis.

17.3 In my submission therefore the scheme must stand or fall on its own merits and it is irrelevant that the applicant for the water rights (although not the user of the water) is a community trust

18. Part 2 RMA

18.1 In respect of section 6 matters they must be accorded significant priority as matters of national importance and are not merely an equal part of the balancing of conflicting considerations. I accept that they are not ends in themselves and do not create a veto. They are subordinate to the overall purpose of sustainable management but must be given due weight.

18.2 **Section 6(a) "Natural character"**. In both the coastal marine area and river/lake margins natural character has both visual and ecological components (Director-General of Conservation v Marlborough District Council W89/97) and the ecological component includes natural biodiversity and intrinsic values (Trio Holdings v Marlborough District Council [1997] p 97). Intrinsic values should be retained for their own sake (Kuku Mara (Forsyth Bay) v MDC op cit) and the intrinsic value of ecosystems is a matter the Hearing Committee is required to have particular regard to under section 7(d). In this instance, the Director-General's concern focuses on the ecological component (i.e. the birdlife and native fish) of the rivers and the Lake. Ecan's evidence deals with the visual component.

18.3 'Natural character' does not equate to 'native' let alone 'pristine'- it encompasses pasture, exotic trees and wildlife rather than excludes them. The opposite of 'natural' in this context is not therefore 'exotic' but 'man-made' see Harrison v Tasman DC (1994) NZRMA 193. When considering the effects of the man-made structures of the intake and headrace in the rivers it is irrelevant if the existing vegetation is exotic. There will be significant impacts on the ecological and visual natural character of rivers, lakes and wetlands from this proposal.

18.4 **Section 6(b) Outstanding Natural Features**. The Unison Networks case (op cit) confirmed the earlier decision Chance Bay Marine Farms Ltd v Marlborough District Council [2000] NZRMA 3 that the EC can still identify a feature as

outstanding even if it is not so identified in the plan. The Rakaia River WCO recognises as outstanding natural characteristics its braided river form and the outstanding wildlife habitat, fisheries, recreational, angling and jet boating features (Clause 3). These are therefore relevant even if not identified as such in the planning documents (ie PSDP).

18.5 Section 6(c) Significant indigenous vegetation and significant habitats of indigenous fauna.

The evidence clearly identifies habitats of significant indigenous species and the effects on them of the scheme (i.e. of the mudfish and braided river birdlife). In the context of section 6(c) it is my submission that proposed offsets/mitigation/compensation in the form of captive breeding and replacement habitat for the mudfish do not amount to adequate compensation (i.e. make amends) for the loss of the unique Waianiwaniwa Valley stream habitat and its population. The value of what is being offered does not, in the opinion of experts, match what will be lost. Nor can translocation be regarded as being an effective option as there are questions about the success of translocation techniques.

18.6 In my submission offsets of a different kind (e.g. amenity values, flowing streams, eel or trout and salmon habitat) do not have anything like the value of the significant mudfish habitat that would be lost under the CPW scheme.

18.7 Changes to the flow regime and environmental characteristics of the Waimakariri River are likely to be detrimental to such species as the wrybill plover and black fronted tern (Hughey para 2.122).

18.8 Insufficient information is available in respect of the effects of the scheme on the Lake to enable an informed assessment to be made of likely effects (Hughey para 2.147).

18.9 An overall judgement under section 5 is required which takes into account all the considerations raised under sections 6 and 7.

18.10 Section 5(2)(b) safeguarding life-supporting capacity of water and ecosystems. As discussed above it is clear from the evidence that the life-

supporting capacity of some unique ecosystems (in particular the mudfish stream ecosystem) will not be safeguarded. What is being offered are changes that will benefit some but disadvantage others

18.11 **Section 5 (2)(c) avoiding, remedying or mitigating adverse effects on the environment.** I have already discussed mitigation and compensation previously. In my submission this is not a case where the loss of the most significant remaining stream habitat of an endangered species can be mitigated by providing captive breeding facilities or a different type of mudfish habitat. The mudfish population is limited not by poor reproduction but by habitat availability (McIntosh para 4.11). It follows that creation of a breeding facility does not compensate for the loss of unique habitat. Still less can the loss be mitigated by benefits to other species or amenity values. In addition to the effect on mudfish are the potential cumulative effects on the birdlife (in particular the nationally endangered black-fronted tern and the nationally vulnerable wrybill plovers) of the Waimakariri caused by further changes to the rivers natural flow regime.

18.12 In my submission the economic benefits of this scheme cannot outweigh the environmental costs both actual and potential. In the Department's submission when all the matters are weighed the CPW scheme does not promote sustainable management.

19. Designation

The designation is still subject to Part 2 so the points made above are relevant.

19.1 S171 alternatives

As the Requiring Authority (i.e. CPWL) does not own the land and the proposal will have significant adverse effects the alternatives are relevant. The applicant's consideration of alternatives does not seem to have included discussion with landowning authorities such as the Department. The Ecan Regional Engineer also has concerns in respect to the Lower intake.

19.2 **Outline plans.** The applicant intends to make extensive use of the outline plan process. This process is designed to be flexible and allow for finalisation of design details. It is not however intended to be a substitute for the detailed

scrutiny of the proposal that is required under section 171, particularly when there is significant overlap with effects that would arise from the regional and district consents sought. In addition section 176A does not allow for the outline plan to be rejected. (Applicants OS para 154). This is reinforced by the timeframe provided which is short (176A(4)). With reference to timeframes see the comments at para 73 in Whangamata Marina Society v Attorney –General [2007] NZLR 252. Also there is no process for public participation and no ability to refuse approval. Clearly the Outline Plan stage of the process is not the place for a detailed examination of the proposal. That can only occur at this point. As the Environment Court noted in its decision on the requiring authority declaration proceeding (*Malvern Hills Protection Soc Inc v Selwyn District Council* (C105/07) (Environment Court, 9 August 2007, Judge JA Smith):

“[31]Finally this Court considers that the method provided under the Act to address a concern about particular aspects of a proposal is through the public and participatory procedure envisaged in terms of section 171 of the Act...”

- 19.3 The Applicants OS para 127 discusses the powers of CPWL as a Requiring Authority. It focuses on the issues of private land and omits any reference to process required for public land. While the majority of the scheme does affect private land there seems to be at least two areas of public land affected administered by the Department -the Selwyn Riverbed conservation area and the Tramway Reserve Sheffield conservation area. The consent of the Minister of Conservation would be required for this land to be acquired by the Requiring Authority.

20. FRESHWATER FISHERIES REGULATIONS

- 20.1 As noted above additional approvals will be required under these regulation in respect of culverts / fords constructed in natural stream beds (Regulation 42) and dams and diversion structures (Regulation 43) if they obstruct fish passage. The conditions of consent may provide for such passage.

21. CONCLUSIONS

- 21.1 This is a large and complex scheme with affects on nationally and internationally significant natural resources. The combined, cumulative effects of the many adverse effects identified in the evidence must be considered in total. The scale and significance of potential effects on the environment identified in the evidence from the Department and others requires far more information than currently available for these affects to be assessed or managed (*AFFCO NZ Ltd v Far North DC (no 2)* [1994] NZRMA 224).
- 21.2 In my submission the evidence shows that the scheme does not promote the sustainable management of natural and physical resources. The consents should thus be declined and a recommendation to withdraw the NOR made.

P. N. Rutledge
Counsel for the Director General

Dated: 20 May 2008

RMA

354 Crown's existing rights to resources to continue

(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular—

- (a) Section 3 of the Geothermal Energy Act 1953; and
- (b) Section 21 of the Water and Soil Conservation Act 1967; and
- (c) Section 261 of the Coal Mines Act 1979,—

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

[(2) Any person may take, use, dam, divert, or discharge into, any water in which the Crown has an interest, without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by that person does not contravene this Act or regulations.]

Water and Soil Conservation Act

21 Rights in respect of natural water

(1) Except as expressly authorised by or under this Act[, or as expressly authorised under the Mining Act 1926 by a mining privilege in respect of water granted after the 9th day of September 1966, or as expressly authorised under any other Act by any right granted during the period commencing after the 9th day of September 1966 and ending not later than than the 31st day of December 1968, or as expressly authorised by any other Act (whether before or after the passing of this Act) in respect of any specified natural water], the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, [or to discharge natural water containing waste on to land or into the ground in circumstances which result in

that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water,] or to use natural water, is hereby vested in the Crown subject to the provisions of this Act:

Provided that nothing in this section shall restrict the right to divert, take, or use sea water:

Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes:

Freshwater Fisheries Regulations 1983

Part 6 Fish passage]

41 Scope

(1) This part of these regulations shall apply to every dam or diversion structure in any natural river, stream, or water.

(2) For the purposes of these regulations "dam or diversion structure" shall not include—

(a) Any net, trap, or structure erected and used solely for the purpose of taking or holding fish in accordance with the provisions of the Act, or of these regulations:

(b) Any dam constructed on dry or swampy land or ephemeral water courses for the express purpose of watering domestic stock or providing habitat for water birds:

(c) Any water diversion not being incorporated into or with a dam, that is solely and reasonably required for domestic needs or for the purposes of watering domestic stock and that empties, without dead ends, into any viable fish habitat:

(d) Any structure authorised by a Regional Water Board not requiring a water right that in no way impedes the passage of fish.

(3) For the purposes of this Part of these regulations, the term "occupier" includes the owner of any land when there is no apparent occupier; and also includes any person doing any work by contract for the occupier.

42 Culverts and fords

(1) Notwithstanding regulation 41(2)(d) of these regulations, no person shall construct any culvert or ford in any natural river, stream, or water in such a way that the passage of fish would be impeded, without the written approval of the Director-General incorporating such conditions as the Director-General thinks appropriate.

(2) The occupier of any land shall maintain any culvert or ford in any natural river, stream, or water (including the bed of any such natural river, stream, or water in the vicinity of the culvert or ford) in such a way as to allow the free passage of fish:

Provided that this requirement shall cease if the culvert or ford is completely removed or a written exemption has been given by the Director-General.

43 Dams and diversion structures

(1) The Director-General may require that any dam or diversion structure proposed to be built include a fish facility:

Provided that this requirement shall not apply to any dam or diversion structure subject to a water right issued under the provisions of the Water and Soil Conservation Act 1967 prior to the 1st day of January 1984.

(2) Any person proposing to build such a dam or diversion structure shall notify the Director-General and forward a submission seeking the Director-General's approval or dispensation from the requirements of these regulations, shall supply to the Director-General such information as is reasonably required by the Director-General to assist him in deciding his requirements (including plans and specifications of the proposed structure and any proposed fish facility).

(3) Should the Director-General consider that the information supplied is inadequate, he shall, within 28 days, advise the applicant as to what further information is required.

44 Requirement for a fish facility

(1) If, in the opinion of the Director-General, a fish facility is required or dispensation from such a requirement is acceptable, the Director-General shall as soon as practical but in no case longer than 6 months if a fish facility is required from the date of receiving all information required, or 3 months where a fish facility is not required from the date of receiving all information required, forward his written requirement or dispensation to whomsoever made the submission.

(2) Where in the opinion of the Director-General a fish facility is required he shall specify what is required to enable fish to pass or stop the passage of fish, and while not limiting this general requirement may specify—

(a) The type, general dimensions, and general design of any fish pass to be utilised:

(b) The type, general dimensions, general design, and placement of any fish screen utilised.

(3) Subject to the Water and Soil Conservation Act 1967 and any determination under that Act, the Director-General may specify—

(a) The type and placement of any water intake to be utilised where fish screens are not required:

(b) The flow of water through any fish pass and the periods of the day and year when the pass must be operational:

(c) The volume, velocity, and placement of additional water to attract migrating fish to any fish pass:

(d) *The type and scope of any remedial works in connection with any fish screen or fish pass to enable fish to approach the structure or to be returned to the normal course of the water channel:*

(e) *The volume or relative proportion of water that shall remain downstream of any dam or diversion structure and the period of day or year that such water flows shall be provided.*

(4) *Every approval given by the Director-General shall expire 3 years from the date of issue if the construction of the dam or diversion structure is not completed, or such longer time as he may allow.*

(5) *The manager of every dam or diversion structure in connection with which a fish facility is provided shall at all times keep such fish facility in good and satisfactory repair and order, so that fish may freely pass and return at all times or are prevented from passing as specified under these regulations.*

45 Adequate water

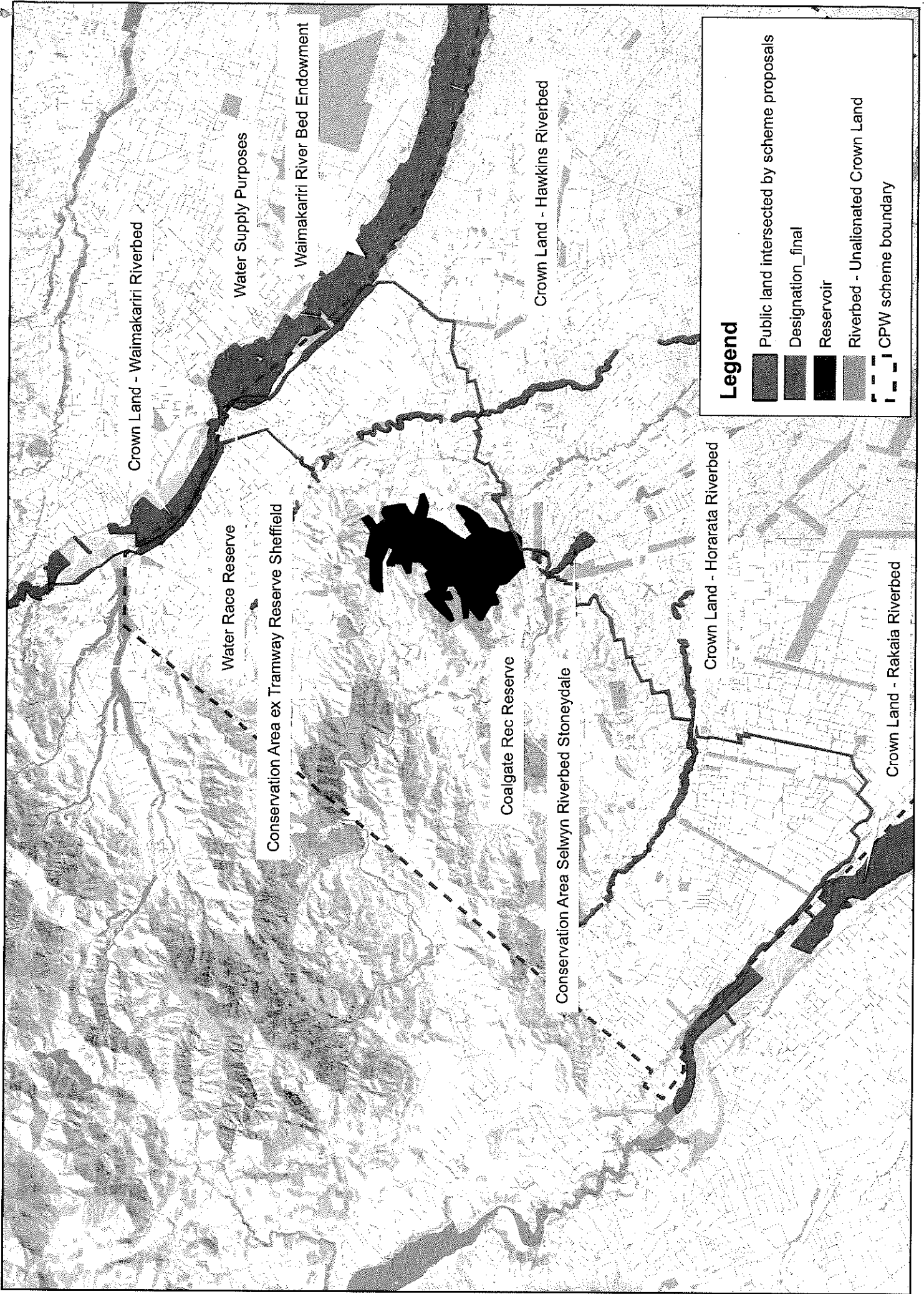
The manager of every dam or diversion structure in connection with which a fish facility is provided shall, subject to the Water and Soil Conservation Act 1967 and any relevant determination under that Act, maintain a flow of water through or past such fish facility sufficient in quantity to allow the facility to function as specified at all times or periods specified; but no person shall be liable for a breach of this regulation due to drought, flood, or other sources beyond his control if the default is made good as soon as reasonably possible.

{Editorial Note: The Water and Soil Conservation Act 1967 was repealed on 1 October 1991 by s361(1) of the Resource Management Act 1991 (1991 No 69).}






46 Required maintenance or repair

The Director-General may serve notice in writing to the manager of any fish facility notifying him of any defects or want of repair in such fish facility and requiring him within a reasonable time to be therein prescribed to remove any defect or make such repairs as may be required:

Provided that nothing in this regulation shall affect the liability of a manager under regulation 44 of these regulations.



Legend

-  Public land intersected by scheme proposals
-  Designation_final
-  Reservoir
-  Riverbed - Unalienated Crown Land
-  CPW scheme boundary