

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

**SUPPLEMENTARY SUBMISSIONS ON BEHALF OF
NGAI TAHU PROPERTY LIMITED**

1. On 24 June 2008 the Commissioners requested supplementary submissions on the reasons why you are able to take into account Ngai Tahu Property's irrigation project and the resource consents granted to it for that scheme. The issue arises because the Court of Appeal has held that Central Plains has priority over Ngai Tahu Property, even though Ngai Tahu Property's consent was granted first. The Supreme Court has granted leave to Ngai Tahu Property to appeal the priority issue. If successful, then no issue arises and Ngai Tahu Property's consent is simply given effect. However, if not successful, it is necessary to consider how in approaching determination of this application, the consent authority should treat the consent that has already been granted to Ngai Tahu Property.

2. The relevant extract from the Court of Appeal's decision in *Fleetwing Farms v Marlborough District Council* [1997] NZRMA 385 (CA) is:

"... Clearly the statute requires each applicant's application or applications to be determined on their own merits. It does not allow for a comparative assessment of competing claims to the same resource.

The conclusion that the statute requires the Council to judge each case on its merits also accords with the primacy attached to s5. If the relevant statutory criteria infused with the underlying objective of sustainable management are met in a particular case there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard that the Act specifies."

(page 8)

3. *Fleetwing* does not imply the first right to the resource, merely that an application be assessed on its own merits. It is very important that the test enunciated in *Fleetwing*

is properly interpreted and applied. It is my submission, there has often been a superficial analysis of the specific test which has led to an interpretation beyond that set out by the Court of Appeal.

4. *Fleetwing* (and subsequent cases) are to the effect that the Act does not allow one application to be compared with a later application so that the Council or the Court "chooses" which one it considers to be the better. However, the authorities do not say (as has often been the interpretation) that a subsequent consent has to be completely ignored for the purposes of the consideration of the first in time (see *Hawthorne; Unison Networks*). Consent has actually been granted to Ngai Tahu Property, so it is not speculative or fanciful to that extent. If less water is granted to Central Plains, the balance will go to Ngai Tahu Property and that scheme will be implemented. There are concrete consequences if you decide to grant consent to Central Plains and it would be artificial to ignore the Ngai Tahu Property consent.

5. The fundamental question is whether the Central Plains application meets the overall sustainable management purpose of the Act. Meeting a sustainable management purpose is not a matter of mechanically considering the elements of the application and its effects and then totalling up in some sort of mathematical way so that a score over a certain level means the threshold of sustainable management is met and that therefore the application is worthy of consent. Rather, the assessment of an application is a matter of balance and degree and discretion, whereby the consent authority or the Court must consider and balance a range of competing considerations, the only limits are those set out in the Act. The range of considerations is wide and includes social, economic, and cultural factors. Importantly, section 104(1)(c) provides that the council may take into account:

"any other matter which the consent authority considers relevant and reasonably necessary to determine the application."

6. So, in considering whether the Central Plains proposal meets the test of sustainable management, you are able to take into account a wide range of matters, and anything that you considered to be relevant and necessary for you to decide that question. There is nothing in *Fleetwing* or any other decision which would prevent you taking into account Ngai Tahu Property's project and granted consents. What you cannot do, under the current law, is to compare the two proposals, decide that you prefer the Ngai Tahu Property proposal and not grant A permit water to Central

Plains, if the Central Plains proposed use of the "A" permit water promotes the sustainable management and purpose of the Act. To that extent, Ngai Tahu Property's use of the "A" permit water and the efficiency and effectiveness of that proposal informs your deliberations about the sustainability of the Central Plains proposal. It is not appropriate that you pretend that the Ngai Tahu Property scheme and consent do not exist.

7. There is considerable judicial comment about the ability of a consent authority to take into account alternatives to a proposal. Again, the current law is that an applicant is not required to demonstrate that its proposed activity is the best possible of all alternatives. However, the existence of alternatives is clearly a matter which is relevant to the consideration of effects and the overall assessment of whether a proposal meets the Part 2 tests. There is no absolute prohibition on considering alternatives. That is a matter for the discretion of the consent authority (*Lakes District Rural Landowners v Queenstown Lakes District Council C162/01*).
8. Often, alternatives are not considered because they are put up by objectives to a proposal in an inchoate form. In that form, they may not be a matter which the consent authority considers necessary and relevant for deciding the application. However, where there is a clearly articulated alternative which is available, then that can indicate that the particular proposal in front of the consent authority does not otherwise meet the test of sustainable management.
9. Mr Jansen's evidence has demonstrated that Central Plains Water does not reasonably require the use of the last remaining "A" permit water to develop its scheme.
10. Without the "A" permit water, the Ngai Tahu Property scheme will not proceed and all the associated benefits will be lost. That is an effect of the Central Plains proposal to which you can have regard under section 104(1)(c).
11. All in all, while you cannot undertake a direct comparative analysis of the two proposals and decide which is "better", you are entitled to consider, and in my submission you should consider, whether the Central Plains scheme truly represents sustainable management. In this case because the Central Plains scheme relates to a limited resource and is such a huge use of that limited resource, you should require a very high standard in order to consider it meeting the sustainable management

test, rather than having it scrape over the line as the applicant continues to redesign the scheme as it goes along in an effort to address the many concerns raised.

Evidence on Reliability

12. Central Plains Water is advocating that consent should be granted to enable the achievement of 98% reliability.
13. Mr Tipler's original evidence stated that "typically, farming groups now expect irrigation supplies to have reliabilities in excess of 90% and closer to 95-97.5% if possible".
14. Mr MacFarlane states in his evidence that in his view, it would be "uneconomic, to propose a storage irrigation scheme with less than 97% reliability".
15. Mr Tipler, on page 4 of his second brief of evidence dated 14 April 2008, noted that the reliability of the CPW Scheme would reduce from 98.7% to 98.0% if CPW did not secure the "A" permit water granted to Ngäi Tahu Property under consent CRC052033.
16. The new evidence on reliability presented by CPW has not addressed the principle issues:
 - a. What is the additional reliability that Central Plains Water will achieve by the strategic utilisation of the 30,000 hectares of groundwater consents held by the applicant?
 - b. Should surface water resources be allocated to an applicant who holds a groundwater consent without any quantitative and reliable evidence provided in relation to the use made of the groundwater consents and the need for the additional water sought?
 - c. What is the marginal return or efficiency of increasing reliability from 98% to 98.7%?

- d. Does this marginal return of increasing reliability by 0.7% (if any) warrant the granting of "A" permit water such that other people are prevented from providing from their reasonable social, economic and cultural well being.
 - e. Is this proposal of exclusion and over allocation in keeping with the achievement of sustainable management?
17. Rule 5.1 of the WRRP provides the Commissioners with an ability to withhold the granting the "A" permit water to Central Plains Water. The rule states that the taking of water from the Waimakariri River as a discretionary activity, with discretion limited to ...
- a) the reasonable need for the quantities of water sought, and the ability of the applicant to abstract and apply those quantities...and
 - b) the availability and practicality of using alternative supplies of water including alternative public or community reticulated supplies.
18. Central Plains Water has not demonstrated the reasonable need for the granting a "A" permit water. In addition, there are alternative supplies of water available to enable its proposal to proceed.



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Mark Christensen

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26 August 2008