

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
FOR THE RESUMED HEARING**

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1. INTRODUCTION

- 1.1 These legal submissions address matters raised in the Applicant's submissions and technical evidence in response to Minute 9.
- 1.2 Fish and Game has, to date, identified a range of concerns with the CPW scheme and the amount of information provided. In addition, Fish and Game identified that in order to properly assess the effects of amended scheme you would need to receive completely new evidence on the effects of the post-CPW flows on invertebrates, the fishery, and angler opportunity and amenity. Fish and Game's concerns about the adequacy of information remain, particularly in relation to the amended scheme, but are not re-iterated in these submissions.
- 1.3 Fish and Game's position is that, should the Commissioner's be minded to grant consent, abstractions from the Waimakariri River should be subject to a B block minimum flow restriction of 100 cumecs¹ (**the de Joux proposal**). Fish and Game's view is that consideration should be given to Plan Change 1 (**PC1**) to the Waimakariri River Regional Plan (**WRRP**) in the circumstances of this case.

2. WEIGHT TO BE GIVEN TO PLAN CHANGE 1 TO THE WRRP

- 2.1 The panel has already been referred to the *Keystone*² decision, which established the following principles regarding the weight to be attributed to a proposed plan change (at paragraph 45):

In considering the weight that we give to it we take into account the following principles which arise from the various cases:

- *The Act does not accord proposed plan changes equal importance with operative plans, rather the importance of the*

¹ Measured at Old Highway Bridge

² *Keystone Watch Group v Auckland City Council* (Environment Court, A007/01, Judge Whiting, 11 January 2001), principles upheld on appeal, *Keystone Ridge Limited v Auckland City Council* (High Court, AP24/01, O'Regan J, 3 April 2001)

proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

- *The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:
 - (i) *the extent (if any) to which the proposed measure might have been exposed to testing and independent decision making;*
 - (ii) *circumstances of injustice;*
 - (iii) *the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.**

- *In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.*

2.2 This decision was applied in *Mapara Valley Preservation Society Inc v Taupo District Council*³, where the Court considered two variations introduced to manage urban growth. At the time of the Environment Court hearing submissions on the variations had not been heard. The Court found that the variations were aimed at implementing a coherent strategy of objectives and policies where none previously existed, represented a significant shift in council policy, and, in contrast to the provisions they were replacing, were in accordance with Part 2 of the Act. The Court also found that the variations were based on and informed by a comprehensive growth strategy which in turn was based on a number of professional reports. The Court acknowledged that the position might change as the variations progressed, but held that that did not outweigh the other factors requiring the variations be given substantial weight. With regard to

the "circumstances of injustice" factor, the Court found that an apparent injustice to an applicant needs to be weighed against the manner in which the new provisions show a significant shift in Council policy towards establishing provisions that are more in accord with Part 2 of the Act.

- 2.3 PC1 to the WRRP has been introduced in direct response to applications for large-scale abstractions from the B block. The evidence of Mr McCallum-Clark for Environment Canterbury is that the existing provisions were based on an assumption that there would be limited demand for water from the B block, which has proven false. It is Mr McCallum-Clark's opinion, and my submission, that in the face of this increased demand for abstraction the existing provisions do not accord with Part 2, nor do they achieve Objective 5.1. The plan change has been introduced to remedy these defects and to give guidance for the consideration of applications to abstract from the B block.
- 2.4 The plan change has been informed by a number of technical reports which have considered the most appropriate flow regime. In addition, I understand that evidence prepared for this hearing has been considered in preparation of the plan change. I submit that the degree of technical analysis that has informed this plan change is much greater than usual. Environment Canterbury has also undertaken consultation with key stakeholders prior to finalising the provisions for notification.
- 2.5 While the plan change itself has not been tested, the flow regime provisions it contains have been subject to significant testing through this consent hearing process. They have been the subject of extensive evidence on behalf of the Applicant and submitters and have been further investigated and considered by Environment Canterbury in developing the plan change. In my submission, the provisions proposed in PC1 reflect the best planning outcome, such

³ Environment Court, A083/07, Judge Whiting, Commissioners Oliver and Stewart, 1 October 2007.

that you can be comfortable applying the flow regime proposed to this application.

- 2.6 Matters relevant to the consideration of this application and to consideration of the plan change overlap significantly and, given the volume of water still sought by the Applicant, the decision on this application is likely to largely determine effects on the river resulting from B block allocations. It is therefore important that you consider the direction taken by Environment Canterbury to allocation within the B block.
- 2.7 With regard to potential injustice, the question of what flow regime is appropriate for the Waimakariri has been at issue throughout this hearing, it is not a new consideration brought about by the notification of PC1. A number of alternative flow regimes have been proposed and considered during this hearing and those alternatives have also been considered during preparation of the plan change. In my submission, the potential for injustice to the Applicant should not outweigh the requirement to impose a flow regime which accords with Part 2 and the objectives of the WRRP.
- 2.8 Fish and Game considers that the flow regime proposed by Mr de Joux at this hearing is the most appropriate, as both a condition of consent for this application and as a flow regime for the WRRP. Fish and Game's submission on PC1 to the WRRP seeks a B block minimum flow consistent with the de Joux proposal or, alternatively, the B block minimum flow as notified by Environment Canterbury where this can be shown to provide a similar level of protection to the river system.

3. **FLOW REGIME**

- 3.1 Evidence previously presented by Fish and Game identified and evaluated the effects of abstraction on a range of instream values. In considering an appropriate flow regime for the purpose of these applications, Fish and Game's attention has focussed on salmon angling habitat and preferred salmon angling days, as these values

have been identified as the most sensitive to modification of flows⁴. Dr Hayes has analysed the alternative flow regimes and concluded that the de Joux proposal provides the best mitigation of effects of abstraction on these values⁵. 1:1 flow sharing affords approximately half the mitigation benefit to the salmon angling variables considered by Dr Hayes⁶.

- 3.2 Mr Tipler's evidence on the amended scheme is that 1:1 flow sharing provides sufficient mitigation primarily because it increases the percentage of time that flows are within the preferred range for river dwelling birds and salmon angling, and as such it provides for "betterment" of the river when compared to the status quo. It is Mr de Joux's opinion that whether any potential flow regime is "better" or "worse" than another cannot be determined from a simple tabulation of flow statistics.
- 3.3 Preferred conditions for salmon angling, although often expressed as within a particular flow band, are dependant on the complex dynamic between a number of variables, particularly flow and clarity, as explained in the evidence of Dr Hayes and the expert anglers. As Dr Hayes identifies, drawing high flows (greater than 100 cumecs) down into the preferred flow band will not benefit salmon angling, as these flows are too dirty for angling. Mr Tipler has further addressed the flow-clarity relationship in his supplementary evidence and it is clear that there remains a difference of opinion between Mr Tipler and Dr Hayes. Dr Hayes has presented extensive evidence on the relationship between flow and clarity over a range of flows, informed by studies of the Waimakariri⁷. I refer you back to this evidence and submit that it is to be preferred.
- 3.4 It is Dr Hayes' evidence that abstraction cannot increase the number of preferred salmon angling days. Fish and Game seeks protection of

⁴ Evidence of Dr John Hayes, May 2008, paragraph 6.49

⁵ Evidence of Dr John Hayes, May 2008, paragraph 9

⁶ Evidence of Dr John Hayes, May 2008, paragraphs 11.17 – 11.20; Second Supplementary Evidence of Dr John Hayes, August 2008, paragraph 2.22

⁷ Evidence of Dr John Hayes, May 2008, paragraphs 8.40 – 8.45

existing salmon angling days through restrictions on abstraction from the B block until flows reach 100 cumecs.

- 3.5 Mr de Joux discusses use of "predicted" takes when modelling effects of the scheme and the likelihood of actual takes being greater than predicted. We have already addressed the Commissioners on the potential for water trading⁸. In the absence of conditions restricting the Applicant's take to reflect predicted takes, the potential exists for the abstraction of greater volumes than predicted, by the Applicant or by other parties seeking to take advantage of the unused allocation.

4. CONCLUSION

- 4.1 In conclusion, there is nothing in the further evidence for the Applicant which alters Fish and Game's view that a B block minimum flow of 100 cumecs provides the best mitigation against further abstraction. Fish and Game has provided extensive evidence as to alternative flow regimes and its preference for a gap is now supported by PC1 to the WRRP. In my submission, if the Commissioners are minded to grant consent, Fish and Game's evidence ought to be preferred and a B block minimum flow restriction imposed.



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J M Crawford/S J Eveleigh

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14 October 2009

⁸ Opening Legal Submissions, May 2008, paragraphs 9.23 - 9.25

