

IN THE MATTER OF

the Resource Management Act 1991

IN THE MATTER OF

applications by Central Plains Water Trust to:

Canterbury Regional Council for resource consents to take and use water from the Waimakariri and Rakaia Rivers for the Central Plains Water Enhancement Scheme and for associated consents required for the construction and operation of the Central Plains Water Enhancement Scheme; and to

IN THE MATTER OF

applications by Central Plains Water Trust to:

Selwyn District Council for resource consents to construct and operate the Central Plains Water Enhancement Scheme

AND

IN THE MATTER OF

a Notice of Requirement by Central Plains Water Limited to:

Selwyn District Council for the designation of land for works associated with the construction and operation of the Central Plains Water Enhancement Scheme

**Minute 14 of Commissioners
Preliminary Comments on Conditions**

1 February 2010

1. CONTEXT

- 1.1 CPW provided a comprehensive draft set of conditions to the hearing attached as Appendix C to Mr Tipler's initial evidence. A revised draft was provided by Mr Tipler in September 2008 as Revision B. Some further modifications were proposed but in most cases not detailed in CPW's evidence at the resumed hearing in October 2009. At our request, the officers of both Councils did not address conditions in any detail in their original reports. That was because we indicated that it would be premature to deal with conditions in detail before we had decided whether the consents would be granted and whether we would be recommending in favour of the Notice of Requirement. Given that we have now indicated our position on those matters, we asked the officers of both councils late last year to work with CPW to so far as is possible, agree a set of revised draft conditions. Minute 13 sets out our directions as to how we will now proceed.
- 1.2 The purpose of this further Minute is to signal our preliminary thoughts on particular conditions and general issues associated with conditions, so that our views can be considered by the officers and CPW prior to redrafted conditions being lodged (due 15 February). Our comments are preliminary in the sense that our final position on conditions will not be decided until after we have considered any evidence or submissions relating to conditions. We will utilise the hearing days on 24 and if needs be 25 March to explore any points of difference between the officers and CPW and/or between relevant submitters and what is proposed by CPW or officers.
- 1.3 We also note that our comments at this stage are not particularly detailed nor exhaustive. There are a great many conditions and until now we have not focussed on the detail of those, but have concentrated on whether particular issues are capable of being adequately addressed by conditions. We are now satisfied that all potential adverse effects can be properly addressed by conditions. Once we have the amended draft conditions and the views of CPW and officers, we will focus on detailed drafting issues.
- 1.4 We emphasise that it is for the CPW and the officers to advance draft conditions. It is not for us to embark on drafting or redrafting conditions unless we identify difficulties with what is proposed. The purpose of this Minute is to identify some key issues which **may** need to be addressed or at least further considered by us. Our comments are intended as a checklist of potential issues rather than a direction as to how particular issues need to be dealt with. This Minute should be read in conjunction with other comments we have made in relation to conditions during the hearing or in earlier Minutes.

2. EXISTING DRAFT CONDITIONS

- 2.1 The applicant's suggested conditions were set out in a document dated 25 September 2008 as follows:
- *"Appendix C. - Revision B*
 - *Canterbury Regional Council Resource Consent Conditions*
 - *Schedule 1: General Conditions*
 - *Schedule 2; Administrative Conditions*
 - *Schedules of Locations*

- *Selwyn District Council Resource Consent Conditions*
- *Selwyn District Council Designation Conditions*
- *Schedule 3: Bonding*
- *Extracts from New Zealand Dam Safety Guidelines 2000"*

3. KEY ISSUES WHICH HAVE ARISEN IN RELATION TO CONDITIONS

3.1 In Minute 11 we identified the following potential issues in relation to conditions:

- *Sustainable Farming Protocol and Farm Management Plans:* Updated draft protocol and farm management plan template to be submitted to the panel when consent conditions are submitted. Both are to refer to all relevant Best Management Practices (BMPs) including those which minimise losses to water of nitrogen and phosphorus particularly, for example, through review of the BMPs cited in the Norton & Bidwell report, and those which maximise efficient use of irrigation water.
- *Environmental Management Fund:* CPW to identify draft priorities for this fund and submit to the panel when consent conditions are submitted. We expect one of these priorities would be riparian management for lowland stream water quality. We would also like CPW to consider increasing the intended levy to better reflect the objectives of the Trust and the benefits to the shareholders.
- *Technical Review Panels:* CPW to flesh out the Terms of Reference and indicative membership for the External Expert Review Panel (drainage panel), drinking water wells/gravel extractors etc dispute resolution as necessary, and other technical dispute resolution mechanisms proposed during the hearing.
- *Lower Waimakariri Intake:* Specific location of water intake and tunnel transect to be identified, and proposals drafted for consultation mechanisms for design and operation of the intake to ensure boater safety, fish screen design and any other issues.
- *Headrace and Distribution Channel Routing:* CPW now have an opportunity to negotiate on major routing and design issues for intakes, headrace, water distribution system and related issues such as crossings, access, cooperation with stockwater races, and bywash design which avoids mixing of surface waters.
- *Management Plans:* CPW have an opportunity to refine draft management plans including specifically consent conditions and draft plans addressing archaeological protocols, terrestrial ecology, earthworks etc. We note that Christchurch City Council has made some helpful suggestions regarding management plan conditions. We also note that there are some recent examples of ECan consents which have made extensive use of management plan conditions in the context of stormwater disposal, sediment control and the like.
- *Waimakariri and Rakaia take conditions.* Once we have issued Minute 12 which will set out our conclusions regarding the take regimes for these rivers, CPW, and ECan officers will need to finalise a set of

conditions which reflects that conclusion and which meets the practical management requirements of both the Council and ECan. In relation to the Rakaia take the conditions will need to harmonise with other relevant consents and with any agreements which have been reached with other consent holders. If there are still outstanding priority issues these will need to be addressed in conditions, as was the case in relation to the ACWT consents.

- Specific conditions: There are a various other matters which we have alluded to during the course of the hearing which will need to be addressed. By way of example the potential for vibration damage in relation to Homebush heritage buildings and any other structures which might be affected by major earthworks will need to be assessed. If necessary there will need to be a vibration management strategy as part of the construction management plan.

3.2 We now set out a more comprehensive list of issues which we or submitters or officers have raised during the course of the hearing. We have explored many of those issues in various exchanges with experts and legal counsel. In no particular order, the key issues which have arisen include (but are not limited to) the following:

- Whether a 10 year lapse period for the consents and designation is appropriate.
- Whether a 35 year term of consent is appropriate for the consents to take and use water.
- Whether there should be any restrictions on the extent of particular farming types which water is used for, so as to reduce pollution potential.
- The form of restrictions to ensure efficient irrigation practices.
- Whether the consents should be in a form allowing other parties to utilise the take and use consents prior to the full CPW scheme being commissioned.
- Uncertainty around predictions and the consequent need to take a precautionary approach in relation to conditions dealing with potentially significant adverse effects.
- The corresponding need to retain a degree of flexibility to adaptively manage adverse effects if and when they arise, rather than attempt to prescribe detailed mitigation in advance.
- The need for CPW to retain a degree of flexibility prior to final design.
- The degree of specificity required in conditions for the designation as compared to resource consents. What matters may be left to the Outline Plan stage.
- The form of adaptive management conditions and review conditions.
- Concern regarding the final location of the headrace and terrace canals within the corridor and lack of detail as to some parts of the design.

- Similar concerns in relation to the distribution network and in particular the proposed level of access by landowners to parts of their property.
- Concern regarding the lack of comprehensive ecological and heritage surveys of the route of canals.
- Concern at some key effects being left to be addressed by management plans or some other mechanism.
- Whether some matters can be left to side agreements rather than being addressed in conditions. (eg compensation for damage to council assets).
- The extent to which outstanding issues with landowners needs to be dealt with by conditions or can be addressed via other mechanisms.
- Lack of detail as to objectives and contents of some of the proposed management plans. Eg landscaping and terrestrial ecology.
- The desirability of backing up management plans with "bottom line" conditions and requirements to adhere to the management plans.
- Concern that the proposed mechanisms to deal with bore water contamination as a result of increase pollutant levels and to deal with potential effects on land drainage and gravel extraction as result of mounding, may lead to uncertainty and disputes and may delegate the resolution of important issues away from the consent authorities.
- Concern that the proposed mechanisms to deal with these issues may place an onus on those who are affected, to prove that the effects arise primarily as a result of use of water from the CPW system.
- Issues as to the lawfulness of that approach.
- Whether there should be water quality standards imposed via conditions.
- How to address the risk of didymo spread.
- The monitoring regime for nitrates and other contaminants and associated adaptive management issues.
- Scientifically robust design of monitoring networks for groundwater quality recognising spatial and seasonal variability.
- Monitoring of flows and enrichment of lowland streams and Te Waihora, linked to s128 review of conditions.
- The need for s128 reviews during the consent term to address matters such as climate change effects, adjustments to conditions resulting from monitoring and improvements in water use efficiency.
- The monitoring regime for mounding and associated adaptive management issues.

- The adequacy of using "protocols" to address nitrate and other on farm issues and whether that approach needs to be backed up with enforceable conditions.
- The adequacy of the proposed Environmental Fund as a means of providing an offset of adverse effects from the scheme. Whether that fund should be administered by CPWT or some other agency. How the fund should be reflected in conditions (if at all).
- Whether there is a need for biodiversity offsets to be required (or offered) to compensate for the loss of shelter belts etc.
- Whether there is a need for a bond in relation to completion of construction works and remediation of damage, or in relation to any other matter.
- Conditions to mitigate any effects on archaeological or heritage sites which may be discovered prior to or during construction.
- The form of the additional restriction on the take from the Waimakariri to protect recreational values.
- Conditions to minimise the landscape and natural character effects of the works alongside both rivers.
- The conditions relating to kayaker safety at river intakes.
- Whether fish screening specifications can be set by way of a subsequent decision process (eg based on the NIWA guidelines) or whether specifications should be set in conditions (eg condition 6 of the ACWT water permit CRC093683).
- Conditions regarding maintenance of angler access to the Rakaia in particular.
- Ensuring Rakaia take conditions are consistent with the Water Conservation Order and with the ACWT water permit conditions and that they will ensure no significant derogation from any other consent holders' rights.
- Ensuring that the relationship between consent holders on both rivers is clearly defined and consistent with the rights of existing consent holders (including protecting any priorities to the resource which may be found to apply).

3.3 We will have inevitably omitted some issues which have been raised and look to the applicant, officers and relevant submitters to remind us of those during the concluding part of the process. (Appendix 1 also summarises some notes we have made during the hearing.)

3.4 We now proceed to discuss some but not all of these issues further. Firstly we make some general comments on conditions, management plans, and adaptive management.

4. GENERAL PRINCIPLES

4.1 There are some general principles which apply to consent and designation conditions.

- Except with the agreement of CPW, we can only include conditions which are necessary to achieve a resource management purpose (in particular to avoid, remedy or mitigate an actual or potential adverse effect on the environment). However, CPW may volunteer or agree to additional conditions which might otherwise be beyond our powers.
- Conditions must be reasonable and not be capable of frustrating the consents which are issued. Conditions should not usually require third party approval of any matter. However in some cases separate statutory approvals may be required.
- Conditions must be clear, certain and enforceable. They must not reserve a discretion to the relevant consent authority or some other party to decide fundamental issues later (ie. issues which go to whether approval should be given).
- Conditions may leave matters of detail to management plans. However, where management plans are relied upon, we must be satisfied that the plans will ensure that the effects which they address will be adequately avoided remedied or mitigated.
- There is a tension between this latter requirement and the fact that until the current process is complete CPW has (understandably) not reached the point of final design. With a project of this magnitude it is unrealistic to expect that every last detail will have been settled, let alone to expect that management plans will be at a fully developed stage. We also note that so far as the Notice of Requirement is concerned, while conditions can and will be imposed, the Act envisages that the proposal will be further developed and that matters of non critical detail can be left to the *Outline Plan* stage. The District Council may at that stage request changes to the Outline Plan and if those changes are not accepted may appeal (however there is no opportunity for third party submissions or appeals).

Management Plans

4.2 In relation to management plan conditions we will need to resolve the tension between CPW's need for a degree of flexibility prior to final design and the requirement that we be satisfied that adverse effects can and will be adequately addressed. We also accept that in the case of some effects which can not be accurately predicted, a degree of adaptive management is appropriate.

4.3 There are many examples of management plan and certification conditions. Such conditions have become the norm for all but the smallest of projects. This is recognition of the reality that not all matters can be finalised before consent or requirement hearings, or even appeals. For many larger projects (particularly design and build) final design will not have been completed prior to at least the first instance hearing and often will await the outcome of any appeals. At one end of the spectrum some projects will have reached final design prior to hearing. At the other end, some projects may be advanced essentially on a "black box" basis.

4.4 For the latter, it is still incumbent on the applicant to demonstrate to the consent authority that the project will be designed so as to adequately avoid remedy and mitigate adverse effects. We must satisfy ourselves that there are adequate

“bottom line” conditions to address potentially significant adverse effects. However, it is now accepted practice to leave some less fundamental matters to be addressed by management plan conditions, either with or without a certification requirement.

4.5 It is important that management plans be linked to a requirement that they be adhered to, so that if they are not adhered to then the consent authority or an affected third party may take enforcement action.

4.6 We also note that it is often necessary for there to be a process whereby a management plan may be adapted as circumstances require, without the need for the consent holder to go through a formal process of applying for a change of conditions. Any such changes to management plans should also be subject to certification or approval by the consent authority. It is important however that any such process not be capable of overriding third party rights. (ie submitters and the public need to be assured that fundamental conditions will not be eroded by later changes to management plans).

4.7 The case law on management plan conditions is relatively limited and to some degree conflicting. However there are number of principles as follows:

- Where matters are left to management plans the objectives and subject matter of the plan should be clearly set out in the consent/designation conditions (either directly or by reference). There will usually be some form of certification whether under the consent holder’s control or the consent authority’s.
- Provided that the intended scope of a management plan is clear there is no necessary requirement that it be linked to achievement of “specified bottom line conditions”.
- A management plan condition should not put a third party into the role of an arbitrator.
- A suitably qualified expert may be given a certification role (often the word “approval” is used).
- The certifier may be engaged by or associated with the consent holder or may be an independent person or may be a council officer or appointee.
- Whilst the details of mitigation of adverse effects may be left to management plans, the consent authority must be still be satisfied that adverse effects can and will be adequately avoided remedied or mitigated.
- In some come cases that will require bottom line conditions.
- For other matters, it may be sufficient for the details of mitigation to be left to a management plan.
- Whilst there is no requirement that management plans need to be certified, such a process may allow the consent authority to have more confidence that the plans will be adequate. It is up to the consent authority to determine the appropriate level of independence and/or council involvement in terms of certification/approval.

- A management plan should generally not leave the consent authority with a formal approval role. It should be a certification role (ie. certification that the management plan meets requirements set out in conditions and follows best practice).
- An applicant/requiring authority may volunteer an approval condition which overcomes the “vires” issues. Under the *Augier* principle where an applicant agrees to a condition it can not subsequently argue that it is unenforceable/ultra vires. For example this overcomes the argument that a condition can not leave a third party in a position of potentially frustrating the consent.
- The Augier principle can not overcome the need for the consent authority not to delegate its decision making role to a third party or to a later date. In other words, we would need to be satisfied either that matters left to management plans do not relate to potentially significant adverse effects, or that the **combination** of bottom line conditions, management plans, certification/approval and review conditions will ensure that adverse effects are adequately avoided remedied or mitigated.
- That does not mean that every potential significant effect must be linked to a “bottom line” condition.

Certification versus arbitration

- 4.8** One issue which often arises in relation to Management Plan conditions relates to "certification".
- 4.9** Generally speaking neither a condition or a management plan should put a third party in a role of arbitrator. In the present instance this is particularly relevant in relation to the mounding and bore drinking water quality issues where CPW has put forward a process which would require decisions about cause, effect and response to be made by a third party. Accordingly, we set out our understanding of the case law on this topic.
- 4.10** As a general rule, the consent authority should not be left with the role of approving a management plan. Rather, the consent authority or an independent expert should *certify* the plan as meeting the requirements of the conditions and good practice. (That of course requires the objectives of the management plan to be specified in conditions).
- 4.11** There are two reasons for this approach. The first is that the consent holder should not be left in a position whereby the exercise of a discretion by a council officer may frustrate the implementation of the consent. That difficulty can be overcome if the consent holder agrees to the consent authority being left with an approval role. The second concern is that the decision makers (us) should not leave fundamental matters to be decided at a later date by way of a non public process. That issue can be addressed if the conditions requiring the management plan clearly set out the objectives of the plan and what it must cover. The role of the officers' certification or approval is then to ensure that the final plan achieved that purpose.
- 4.12** The Court of Appeal decision in *Turner v Allison* [1971] NZLR 833 is authority for the proposition that there is a distinction between the function of a "*certifier*" and an "*arbitrator*". In particular, a Court may confer upon some other person the function of settling some detail involved in a condition, including where that

matter is to be settled according to an independent person's own standards based on that person's own skill and experience.

4.13 The Court noted that certifier conditions were:

"analogous to that which arises in building contracts and in commercial contracts containing provisions whereby something has to be done to the satisfaction or approval of an architect, engineer or other person having special technical skill and qualifications. The distinction between such persons (often referred to as a "certifier") and an arbitrator was discussed at length in Nelson Construction Co Limited (in Liquidation) v A C Hatrick (NZ) Limited [1964] NZLR 144 (CA)....."

In my view the effect of conditions 2, 5 and 7 is to impose conditions whereby the external appearance of the supermarket and landscaping and planting are required to be carried out to standards set by Miss Northcroft by reference to her own skill and experience. They do not purport to confer upon her an arbitral status. In my opinion therefore those three conditions cannot be attacked upon the basis that they purport to confer on Miss Northcroft a judicial function. ...

... There is nothing in section 35 or elsewhere in the Act which requires the Board to settle every last detail of the conditions which it seeks to impose and in my view, in the case of conditions 2, 5 and 7, the Board neither abrogated its own functions nor delegated to Miss Northcroft a judicial function.

Condition 18, however, stands on a different footing. It contains the words "any dispute to be settled by Miss Northcroft whose decision shall be final and binding on the parties." These words clearly purport to confer upon Miss Northcroft the powers of an arbitrator."

4.14 In *Wood v West Coast Regional Council* EnvC C127/99 the court accepted a submission that the purpose of a management plan is to provide a consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent.

4.15 The Court said at page 6:

*"In the end counsel were agreed on a submission... **that a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent.** So, for example, in case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However, because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent.*

We accept this as an appropriate alternative to requiring management plans to form part of the conditions of consent and in

the consents to be granted in this case it will be seen we have followed this approach. For example, in the conditions relating to the consents for which the first respondent is the consent holder condition 16 requires the preparation of a contingency and response plan and a series of management plans but the terms of those management plans are not included as part of the relevant consents."

4.16 In *Wood* the Court acknowledged difficulties in specifying a management plan as a condition of consent, where it might benefit from future amendments to keep pace with developments in technology. The Court said that it is not appropriate to provide for a management plan on the basis that it is to be approved by a consent authority or some delegated official at a later time, except to the extent that they may be regarded as certifiers.

4.17 In commenting on management plans the Court at page 6 said:

"In New Zealand Rail Ltd v Marlborough District Council (1993) 2 NZRMA 449 this Court took the view that if an applicant was relying on a management plan as a method of avoiding, remedying or mitigating adverse effects, that plan should be formulated so it could be scrutinised by the Court and if accepted, included as part of the conditions of consent. That may still be an appropriate way to proceed in some circumstances. However, in this case it was pointed out... that practical difficulties can arise, particularly where a management plan might benefit from future amendments to keep pace with developments in technology.

It was generally accepted that it is not appropriate to provide for a management plan on the basis that it is to be approved by a consent authority or some delegated official at a later time, except to the extent that they may be regarded as certifiers in terms of the leading case on this subject, Turner and Others v Allison and Others [1971] NZLR 833; 4 NZTPA 104 (CA). However, what is or is not a valid certifier condition can itself create considerable difficulties, particularly in regard to a management plan."

Adaptive Management

4.18 The traditional approach of having all potential adverse effects addressed by specific "bottom line" conditions has been modified in recent years by the concept of "adaptive management". This approach has developed after the *Wood* decision. Under this approach the form of mitigation of effects can be adapted to the circumstances. The Courts have accepted that a degree of "adaptive management" can be acceptable in a consent provided that the consent authority does not delegate fundamental issues to be sorted out via a later non public process. We discuss this approach in a little more detail given that CPW proposes a relatively high degree of adaptive management.

4.19 The High Court in *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 considered the validity of a proposed condition that results of a survey "satisfy a consent authority that it is very probable that the site of the marine farm would not be of special significance for Hector's Dolphin."

4.20 At page 136, MacKenzie J stated:

"While the question of whether the condition requires the decision-maker to act as certifier or arbitrator will provide a useful test, it does not necessarily provide the only test. **The issue is whether there has been an unauthorised delegation of the judicial function. Where the judicial function has been delegated in terms which require an adjudication to be made by the delegate, then it will normally be readily apparent that it is a judicial function which has been delegated.** But that is not necessarily the only basis upon which a judicial function may have been improperly delegated. It is of the essence of a judicial function that the adjudicator will be required to make findings of fact. **If the function of making a finding on facts which are essential to the decision is delegated, then there is a delegation of the judicial function. That may occur in circumstances where the delegate is not explicitly deciding a dispute between the parties. The role of the delegate as certifier may conceal the fact that what is being delegated is the power to certify a matter which is an essential element of the decision which should be made by the tribunal. It is necessary to examine the real nature of the decision which the delegate is required to make, rather than the form in which the power to make that decision is conferred.**" (emphasis added)

- 4.21** Ultimately, the High Court found that the conditions in relation to the marine farm were substantially different to those as expressed to be acceptable in *Turner v Allison*. The Court considered that the conditions in *Turner v Allison* related to matters of appearance of the buildings, landscaping and planting. It stated that those were matters which necessarily **followed** the making of the decision to allow the development rather than being essential to whether approval was granted.
- 4.22** Conferring a certifying role on a third party, as was done in *Turner v Allison*, did not involve a delegation of the judicial function of deciding whether the development should be allowed, but rather a delegation of the administrative function of ensuring that appropriate standards were met in relation to the development after it had been allowed.
- 4.23** In contrast, in *Director-General of Conservation* the decision of whether the site would be of special significance for Hector's Dolphin was found to relate to the issue of whether or not the consent should be granted. If the decision of the appointed person/panel is sufficiently important to have a bearing on whether a consent should be granted or not, then it should be decided by the consent authority itself and is not a question which can be properly delegated.
- 4.24** In *Director-General of Conservation* the matter was referred back the Environment Court to resolve the conditions. The conditions as approved by the Court required the consent holder to engage an independent scientist (approved by the Department of Conservation (**DOC**) and the Council) to carry out a three year baseline survey of the dolphin population, then report to the Council. After completion of each stage of the marine farm, the consent holder was required to engage an independent scientist (approved by the Council and DOC) to monitor the effects of the marine farm on the dolphins. The consent holder was required to submit the monitoring programme to the Council and DOC for approval prior to commencement of the monitoring.
- 4.25** Whilst we are supportive of adaptive management in relation to some issues such as mounding, there will be some issues which will also require clear

'bottom line' conditions. We will need to be satisfied by the CPW that any matters left to management plans or adaptive management are either backed up with 'bottom line' conditions or are not fundamental to the approval of the project.

- 4.26** We note in passing that Mr Prebble in his submissions on behalf of Christchurch City Council made some useful suggestions as to how some proposed management plan or similar conditions could be modified. We also draw CPW's attention to the form of conditions approved by the Regional Council in relation to the Christchurch Southern Motorway consents.

5. NOTICE OF REQUIREMENT AND SDC LAND USE CONSENT CONDITIONS

- 5.1** With the abandonment of the dam, reservoir and Upper Waimakariri intake there will be conditions which can now be deleted or amended.
- 5.2** Proposed conditions relating to the Selwyn District Council designation [the NOR] are contained on pages 94 -114 of the draft conditions. Many of these are similar or identical to those proposed for the land use consent application to the Selwyn District Council.
- 5.3** The proposed conditions relating to the land use consent application are contained on pages 73 - 93 of this document. As this aspect of the application has not been changed by the reduction in the scale of the scheme, the suggested conditions would still appear relevant.
- 5.4** Specific points which we have identified as potentially requiring further consideration are as follows:

Management Plan Conditions

- 5.5** See our discussion above.

Lapsing date for the consents and designation

- 5.6** Under Clause 1.1.1 for both the designation and the land use consent, a lapse date of 10 years is proposed to give effect to the consent. This would only require substantial progress, not completion, to be achieved during this time. The timing of works associated with the land use and designation will need to be considered in conjunction with the lapse period under section 125 of the Act for the consents to take, use and divert water. A key issue here is the period under which the applicant could potentially deny the use of water to other parties. We are of the preliminary view, that with the removal of the dam and reservoir from the scheme, there should be no reason why CPW would not be able to make "substantial progress" towards implementing the scheme within 7-8 years of commencement.

Dust monitoring

- 5.7** Clause 9.4 under both the draft designation and land use consent conditions sets out a proposed condition relating to dust monitoring. The current draft conditions are primarily centred on effects on Coalgate. The withdrawal of the designation for the dam significantly reduces potential effects on the town, but there are still substantial canal works proposed [some elevated] in the vicinity of Coalgate and other residences. Monitoring may still be required but needs to be based on dust from headrace works. We assume that current proposed conditions and management plans relating to dust and noise control will remain

in place to the extent that these are relevant to the headrace works. There may be a need to specify, perhaps on an attached map, the sensitive areas where dust monitoring is needed; alternatively, an all-encompassing Dust Management Plan may cover this.

- 5.8** Similar issues arise in relation to construction traffic management and noise and vibration management.

Risk of flooding from canal breach

- 5.9** Any risks to public safety from canal collapse or breach will need to be addressed in a management plan.

Effects on Regional Council and District Council infrastructure

- 5.10** The potential for damage to district roads in the event of a canal breach is a matter which could be covered in such a plan or in a side agreement with the Council.

- 5.11** Effects of the intake and terrace canal works on flood protection works is a matter which can be largely, if not wholly dealt with by side agreement with the Regional Council. There is in any event a separate statutory approval process.

- 5.12** Similarly, potential effects of the scheme on Selwyn District Council roads and state highways can, to a large degree be managed by side agreement. . Any conditions relating to these matters should be discussed with SDC and NZTA staff.

- 5.13** Potential effects on SDC drainage systems, waste water treatment facilities, and water supplies can also largely be addressed by side agreement. Given that SDC is a settlor of the Trust and has a significant financial stake in the proposal, there would appear to be mechanisms available to address the issues which have been raised by officers regarding effects on infrastructure. The bottom line, is that rate payers should not bear any costs associated with the scheme, however this is not necessarily an issue for conditions.

Restoration of indigenous vegetation/wetland sites

- 5.14** Several sites of specific ecological relevance were identified during the course of the hearing, examples being the "Westwood" site, and at least one other on the Rakaia escarpment in the vicinity of the "Curiosity Shop". Both of these sites are potentially affected to some degree by proposed canal works. Neither the draft ECMP or the landscape and rehabilitation management plans referred to in the applicant's draft conditions specifically identify these or other sites, but simply call for rehabilitation of land along the designated corridor in very general terms. During the course of the hearing the potential for 'compensatory' improvements to sites such as Westwood were raised - for example removal of exotic weeds etc. Some of these sites may be fully or partly on privately owned land outside the designation corridor.

- 5.15** It seems that an additional more detailed condition whereby the affected parties identify particular sites of significance, and collaborate in relation to the preparation of a management plan would be appropriate. We refer to the mitigation adopted for the ACWT decision as an appropriate approach.

Escarpment planting

- 5.16** Partly following on from the point set out above, we were given extensive evidence as to the cost and difficulty of rehabilitating exposed earthworks along the escarpments. We are of the view that this requires something more specific than a general rehabilitation condition. The approach which we adopted in relation to ACWT is of relevance. We envisage a management plan specific to the Rakaia and Waimakariri escarpments in terms of the nature of the work required, the specification of suitable hardy species, and a maintenance regime. We are not suggesting that this needs to be completed prior to our decision being released but the contents and objectives of the plan and a proposal for consulting with relevant parties, completing it and having it "certified", need to be advanced.

Maintenance of river access

- 5.17** The applicant's proposed condition 3.1 specifies the maintenance of continued public access to rivers during construction works. In our view, this condition is currently too general. It needs to refer to both the construction period and longer-term access post construction. It should also specifically identify important access points as part of the conditions - for example the Steeles Road access to the Rakaia River. We also note that it would not be satisfactory to have "public access" to the river which might be legally available but which could not be crossed by vehicles where appropriate or elsewhere by foot.

Effects on particular landowners subject to the land use consent

- 5.18** There were submissions in opposition to parts of the distribution race network (e.g. Garland/Pilbrow, Ascot Park, and Kimberley residents). We do not consider that any of these concerns are sufficient to justify us requiring CPW to alter its proposed route or requiring it to pipe the network. There is no barrier to the grant of a resource consent to CPW in the face of opposition by a land owner. However, we must be satisfied that the effect of granting consent, including potential disruption to farming, will be adequately avoided, remedied or mitigated. Ultimately if CPW can not agree access (usually by way of easement) with a landowner will have to re route that part of the network or seek to have the Minister utilise the Public Works Act as provided for under section 186 of the RMA.
- 5.19** For present purposes there will need to be a condition which requires CPW to provide an adequate or agreed level of access to all parts of properties affected by the distribution network and which requires it to avoid significant disruption to farming or other operations. There may also need to be some means of dispute resolution. Any condition addressing this matter should be subject to any private arrangements which may be entered into with property owners.

Effects on the existing SDC irrigation race system and other infrastructure

- 5.20** The Selwyn District Council expressed concern about the effect of the designation and the distribution race network where it displaces or passes over or under the Councils own irrigation races, and its roading network. This raises issues such as legal ownership and responsibility for maintenance. It also raises the need for a process to continue operation or replace stockwater/irrigation races during and after construction, and any conditions necessary to facilitate that. We assume that given the Council is to some degree a supporter and stakeholder of the scheme, these are matters which can be addressed by way of a side agreement rather than conditions. That will need to be confirmed by SDC officers.

- 5.21** The applicant has proposed an ECMP under clause 1.5 of its suggested conditions, a construction programme under clause 1.6, and as built plans under clause 1.9. All of these appear to address processes matters and management of adverse effects rather than the production of agreed plans, prior to any works beginning. Clause 1.9 addresses works once they are completed. It may be these matters are simply for negotiation and a side agreement but this is not entirely clear.

Effects on terrestrial ecology of closing stock water races

- 5.22** We also note that Forest and Bird raised concerns regarding the potential closure of some of the stock water canals and consequent loss of valuable habitat. Given that such closure is a permitted activity and given that piping of that network is also permitted, we do not think that this is a matter for us. Furthermore it appears to us that the distribution network and the discharge wetlands will provide some compensatory offsets if stockwater races are lost.

Identification of heritage values and mitigation of effects on historic heritage

- 5.23** We have discussed this issue to some extent in Minute 11. We do not consider that it necessary for CPW to carry out a comprehensive survey of the whole of the headrace and distribution network. However there will need to be conditions ensuring that known heritage values are protected and for dealing with the potential discovery of new sites.

Use of water

Effects of change of land use on terrestrial ecology

- 5.24** Farming and irrigation are permitted activities. We accept that there will be some indirect adverse effects on terrestrial ecology and avi fauna as a result of loss of shelter belts, possible loss of stock water canals and further intensification of farming. We would like CPW to give further thought as to a mechanism by which there would be some environmental offsets provided beyond the environmental fund.
- 5.25** In particular there would appear to be scope for requiring shareholders who remove shelter belts, to plant and protect small pockets of bush or wetland in corners of their irrigation areas and/or alongside canals or streams, so as to achieve corridors for birds and other bio diversity offsets. Again, we are not suggesting that the details of any such proposal would need to be provided prior to our decision. What we would like to see is the sort of collaborative and more detailed approach which was adopted by ACWT (albeit to deal with much more direct and non permitted destruction of indigenous vegetation). This and riparian management can perhaps be left to the on farm protocol, however CPW's intentions in this regard should be made clear now.

The Environmental Management Fund

- 5.26** The proposed environmental fund is to be administered by the Trust and is intended to provide a degree of offset for any adverse effects which may occur and which are not fully mitigated or avoided by other means. It is debatable whether the fund is our concern since it is more in the nature of an offset than mitigation. We have not been advised that CPW intends to reduce the amount of levy as a result of the modifications to the scheme and assume therefore that its original proposal still holds.

- 5.27** Given the environmental objectives of CPWT and the significant benefits to shareholders from the use of water, we regard the proposed level of contribution as rather meagre, even with the removal of the most controversial and potentially damaging aspects of the scheme. Ultimately however, that is a matter for CPW to assess since we are concerned with mitigation rather than offsets. We can not require a fund by way of condition but we do note that the fund could be reflected in a condition with CPW's agreement. We would also prefer to see the fund administered by an entity other than CPW which in its current form is not well placed or well equipped to make decisions about the allocation of such funding. There are conflicts between its role in relation to the scheme and the best use of the fund for environmental benefits.
- 5.28** We indicated at para 22.5 of Minute 11 that a priority for the Environmental Management Fund should be riparian planting and fencing along lowland streams (outside the CPW area) for mitigating local effects on water quality. We would like to hear CPW's response and proposals for this.

The on farm protocol

- 5.29** We accept the evidence that the proposed on farm protocol is a useful way of encouraging better environmental management by farmer shareholders. We also accept that this approach may have spin off benefits in term of encouraging more sustainable practices elsewhere within Canterbury. The objectives of the protocol and its scope will need to be clearly set out. We think it should include riparian management and planting offsets as well as water demand and contaminant management practices.
- 5.30** The protocol should be updated to refer to all relevant Best Management Practices (BMPs) including those which minimise losses to water of nitrogen and phosphorus particularly, for example, through review of the BMPs cited in the Norton & Bidwell report, and those which maximise efficient use of irrigation water.

Nitrate Monitoring

- 5.31** Mr Hanson for ECan had suggested farm scale modelling. At this stage, we favour scheme based monitoring rather than farm based monitoring. If what is meant by 'farm based monitoring' is to monitor groundwater quality locally and relate that to potentially contaminating activities on upstream farms, then the heterogeneity in the aquifers and the variability in existing groundwater quality data indicate it would likely be very difficult to show any link between cause and effect. The variability in the groundwater quality data over time, and space and with depth of bore suggest that a broad scale monitoring design would be more useful. Nevertheless if ECan officers consider farm based monitoring to be practical and desirable we will consider any further evidence on that point.
- 5.32** It may be that there would be some merit in a few farms being monitored more intensively so that the results of that can be calibrated against results from monitoring bores up and down gradient. However this is a matter which we hope can be agreed between CPW and officers.

Nitrate levels in domestic well supplies

- 5.33** Our understanding is that the applicant has offered to volunteer a condition which would require it to replace any domestic well supply where it 'could be shown' that levels have risen above the MAV as a consequence of CPW. We are not convinced that it will be practical to demonstrate the cause of any rise.

One approach may be to require CPW to provide a potable alternative drinking water supply to any bore user if the bore is say 10% below MAV at the commencement of the CPW irrigation and at some time in the future exceeds MAV for whatever reason. This would need to be limited to particular parts of the command area. It may be that such a requirement only needs to apply to properties where there are or will be bottle fed infants and perhaps only for a temporary period.

Effect of mounding on quarries

- 5.34** Section 25 of our Minute 11 set out our preliminary views on this matter. We accept that there is a potential effect on gravel extractors and that the costs of dealing with such an effect if it arises and would not have occurred but for CPW, should not be borne by the gravel extractors. We concluded that this issue did not warrant declining consent. We look forward to CPW's proposals in relation to monitoring and adaptive management of any such effects.

Effects of mounding on land drainage

- 5.35** We are not convinced that the current proposal to address this issue is appropriate and least without some further "backup" conditions. The concept of an independent panel to adjudicate on the relative causes of any drainage issues and to decide upon the level of mitigation to be provided by CPW would appear to be an unlawful delegation of the Regional Council's responsibilities. There is potential for protracted disputes and we do not think that it is reasonable that affected landowners and/or SDC be left to prove that CPW is the primary cause of any problems. Equally however, we do not think that it would be reasonable to require CPW to mitigate problems which arise as a result of climatic or other factors if those would have occurred in any event. We do not have a ready solution to this dilemma. We accept that some degree of adaptive management is going to be necessary, but that will at least need to be backed up with a specific review condition which will allow the Regional Council to intervene if the mediation or adjudication approach fails.

- 5.36** Careful thought will also need to be given to the design of before and after monitoring of this issue, so that any future debate is properly informed.

Effects of mounding on Airport operations (birds and fog)

- 5.37** We are not convinced that this is an issue which requires any conditions beyond a general review condition and or a specific condition dealing with the effects of mounding generally.

6. RAKAIA TAKE CONDITIONS

- 6.1** We had considered issuing a separate Minute dealing with the Rakaia take, however, given that we have dealt with this in some detail in our decision in relation to the co applicant (ACWT) we have concluded that a separate Minute is not required. Our reasoning in relation to the Rakaia will be summarised in our final decision.

- 6.2** We note that under its consent which has not been appealed, ACWT can take the whole 40 cumecs (when available) if CPW isn't taking its share, accordingly the only additional effects of CPW's take are the non-return to the Rakaia downstream of Barrhill. We note that there will need to be a robust real-time flow and take monitoring system capable of managing the cumulative takes. (We mentioned this in our decision on ACWT).

- 6.3** In terms of conditions, so far as is practicable, we would like the CPW conditions to follow the approach which we have utilised for its co applicant. In particular, we and officers and ACWT experts spent some time trying to ensure that the ACWT consent was consistent with the WCO and existing consents. We accept that some modification may be necessary. CPW and/or officers will need to explain to us the reason for any such proposed changes. CPW will need to look not only at the take conditions but also what we concluded regarding sediment releases, fish bypasses and fish screens.
- 6.4** From our perspective it would be preferable if CPW was to come back to us with a resolution of the fish screen issues, ideally along the lines of ACWT rather than prolonged debate about mesh sizes that we end up having to decide upon.
- 6.5** For the CPW take consent, the ACWT conditions will need to be modified so that the consent operates in conjunction with the consented ACWT take consent and also the higher priority takes. In particular, ACWT conditions 1 and 2 which provide for a maximum rate of take of 40 cubic metres per second, will need to be modified so that the CPW maximum take continues to comply with clause 7 and other relevant provisions of the WCO when ACWT is taking, and discharging at Barrhill. We suggest CPW draft replacements for ACWT conditions 1 and 2 for our consideration.
- 6.6** The maximum of 40 cubic metres is subject to ACWT conditions 2, 3, 4 and 5. Together these will define the extent of the "allocation" or water available to CPW. ACWT condition 2 will need to be modified to refer to the ACWT allocation, not the CPW potential allocation.
- 6.7** We are unsure as to the state of play with the Synlait priority issue and whether a "flip flop" condition will still be required as was included in the ACWT consent.
- 6.8** We will need to revisit CPW's intentions in relation to unallocated band 2 and 3 water and allocated but unused water. Again, so far as is possible the approach we adopted in relation to ACWT should be applied to the equivalent CPW conditions unless there is good reason for any change of approach.
- 6.9** If water is unallocated then there is no barrier to CPW being allowed to take it up to the limits in the WCO. The conditions simply need to ensure that the WCO is met.
- 6.10** From recollection CPW was happy to have the condition specify that it would only take allocated but unused water with the consent holders permission.

7. WAIMAKARIRI TAKE CONDITIONS

- 7.1** We have discussed the Waimakariri take regime in some detail in this Minute since those have been addressed in Minute 12 and the 23 November addendum. The panel will need to be provided with detailed drafting of conditions to implement our interim decision as discussed in Minute 12. In particular, CPW and ECan officers will need to respond to the following matters raised in Minute 12:
- Para 5.4 (trigger flows for B takes)
 - Para 7.7 (14 vs 21 day interval for leaving river freshes)

- Paras 8.11-8.13; 8.17-8.18 and 9.3 (restrictions on water take for kayak, jet boat and salmon angling amenity)
 - Paras 8.41 (effects of CPW take on existing water users)
 - Para 10.14 (taking of winter water)
 - Para 10.16 (lapse period)
 - Para 11.9 (access to unallocated or unutilised water)
- 7.2** CPW will need to come back to us with a proposal in relation to recreational flows as discussed in Minute 12. There is also some flexibility around how the flow sharing condition would be drafted.
- 7.3** In Minute 12 we confirmed that we envisaged 1:1 flow sharing as indicated by ECan's graph. Our conclusion was based on modelling which used a sliding scale, whereas the earlier proposal from CPW described as "5:5" involved blocked takes of 5 cumecs then 5 cumecs left in the river for higher upstream flows. The panel's terminology "1:1" was not intended to necessarily mean 1 cumec taken, then 1 cumec left. Rather, we envisaged is a sliding scale.
- 7.4** From a practical point of view, CPW may wish to implement the take in small blocks rather than continuously adjusting intake gates. In that case the conditions on the Waimakariri water take consent will need to reflect that, or at least clearly specify the envelope for the maximum rate of take and the time interval upon which compliance would be checked.
- 7.5** Para 5.6 of Minute 12 observed that compliance is based on mean daily flows, so setting a take rate each day based on the upstream trigger flow will require a time step that works for both CPW and ECan.
- 7.6** If we proceed with conditions prescribing a fully sliding scale, then any takes as blocks of flow would need to fit below the dashed line on the ECan graph at all times; the dashed line is then the 'envelope' mentioned above.
- 7.7** On the basis of effects on the river, the difference between a fully sliding 1:1 sharing regime and one based on setting daily block allocations also based on 1:1 sharing is unlikely to be noticeable (while noting that in any case, the conditions will need to accommodate the time delay for flow from Otarama to OHB).

1 February 2010



Philip Milne (chair)



Bob Nixon



Andrew Fenemor



Ray O'Callaghan

APPENDIX 1

ECan Consents which appear no longer to be necessary

061769 Waianiwaniwa
061817 Waianiwaniwa
061842 Upper Waimak
061953 Waianiwaniwa
072761 Tunnel
072765 Tunnel
061845 Waianiwaniwa
061866 Upper Waimak
061939 Reservoir
061767 Dam Reservoir
061941 Upper Waimak
061927 Dewatering for dam & reservoir
061930 Dam
072762 Tunnel
061870 Waianiwaniwa
061875 Upper Waimak
061975 Reservoir to headrace
061976 Tunnel & reservoir
061981 Upper Waimak
072766 Tunnel portals (what about Lower Waimak tunnel portals/construction?)
073313 Waianiwaniwa
Schedule A1, A2, A6, B1, B2, C2 (part)

APPENDIX 2

Miscellaneous comments on matters to address in consent conditions for Central Plains Water, which are not already covered by Mr Tipler's Appendix C Revision B

The following is based upon our notes of particular issues which arose during the course of the hearing or which we have subsequently identified.

Comments on conditions

061814/820/822/843/954 Excavate and deposit material

- A Terrestrial Ecology Management Plan will be required under the SDC land use consent, and will limit activities under these consents too

073034/035 Selwyn & Hawkins constructed wetlands

- Authorises works in bed of river and beside it, but does any part of the wetland need to be in the riverbed? There could be a condition preventing or controlling works in flowing water

061846/847 Maintenance & construction works in water bodies

- Similar precautionary condition should avoid discharges into flowing water

061863 Rakaia intake construction and maintenance

- Any works within the bed of the river should require consultation with CRC Rivers Engineer
- A River Works Mgt Plan as proposed for upper Waimak (866) should also be considered, addressing fish, boaters, access, visual impacts etc

061868 Lower Waimak intake

- Conditions should be consistent with those for Rakaia, as above

061768 Headrace and distribution water dam and diversions

- Similar precautionary condition to 034 should avoid discharges into flowing water

061940/943 Divert Rakaia & Lower Waimak water and headrace/ distribution races

- Like ACWT, consider limiting area within Rakaia riverbed where works for diversion of channels is permitted, to avoid effects on jet boat passage and angler access
- Consider whether a similar condition is needed for Lower Waimak diversions
- No diversion works in Waimak to be carried out during Coast to Coast event or prior training weeks

061972 Waimak water take

- Devise conditions consistent with Minute 12 directions
- Review draft conditions for appropriateness and retain (eg fish screening, kayak safety etc)
- We suggest this Take & Use water permit be split into separate Take and Use permits. The Rakaia take and Use are separate already as ACWT shares the Take permit which the ACWT commissioners split into an ACWT and a CPW component.

So the Rakaia Use consent 973 could be granted as applying to Waimak water as well.

- Draft conditions 18ff (Water Supply Agreements with farmers; Groundwater Technical Panel) would then become part of the Water Use consent 973

021091 Rakaia water take

- This consent was originally with ACWT but ACWT has been split off and granted separately, so this will now be the CPW Rakaia take only
- Conditions need to largely mirror and be consistent with ACWT ones, except any relating to the different location of the CPW intake below ACWT's

061873/920 Rakaia & Waimak intake sediment discharges

- For operational discharges, we need to consider whether if these consents include sluicing or sediment deposition on the riverbed, that should be limited to land-based disposal and sluicing or whether dredging is allowed

061922 Stormwater discharges

- Purpose is stormwater discharges from construction yet a 35 year consent is sought, so if this includes operational stormwater discharges, that should be clearly stated in the purpose of the consent (perhaps the other stormwater consents cover this, hence is 35 year expiry needed?)

061950/071916/071917 Bywash discharges

- Needs a condition about not discharging into surface waters (the mixing of waters issue). We do not accept Mr Lewthwaite's proposition to provide for a discharge to surface water bypassing the wetlands during emergency disasters.
- Same applies to 061977 (discharges for maintenance purposes)

061974 Headrace discharge to Waianiwaniwa River

- Conditions 1 and 2 need tightening: the aim is to augment flows for ecological purposes

061980/061982 Sluicing discharges to Rakaia & Waimak Rivers

- Needs to mirror similar ACWT consent

Environmental Management Fund

- Needs to as a priority focus on riparian fencing and filter planting along banks of lowland streams and springs below the CPW scheme

Community Fund

- Without the dam, we presume this is no longer offered?