

From Sunny Downs Limited decision on application CRC073249 (paragraphs 65 – 89).

65. The first matter we must address is the issue relating to non-compliance with Rule 6 Table 5, in the Allocation Plan. It is important at the outset to bear in mind that this Plan seeks to control, or rather to manage the water resources of the whole of the Waitaki Catchment, basically in two ways. First, apart from the objectives and policies in the Plan, it contains Rules that set environmental flow and level regimes for all the water bodies in the Catchment. In this case, as we have already said, the relevant water body is the Otekaieke River, which is provided for in Rule 2 Table 3, row xxii. The Lower Waitaki River is provided for in the same Table at row xvii, where a minimum flow is stipulated, as well as provisions for flushing flows, and a 90 cumec allocation limit. These matters were dealt with at length by us in our decision on the North Bank Tunnel Concept. Then the same Table provides, relevantly, for an environmental flow regime for the Hakataramea River, details of which will be dealt with in another set of decisions, and the Maerewhenua River which has already been referred to in one decision that we have issued in that Catchment and will be referred to again in another decision.
66. The environmental flow regime is, of course, materially different from the other control mechanism, which limits the allocation of water for various activities, again throughout the whole Catchment. It cannot be over emphasised that one of the key purposes of this Plan was, as its name implies, to make such allocations for the various activities stated in the objectives and policies, ultimately, of course, to achieve the purpose of the RMA.
67. The important point for present purposes is to recognise that the environmental flow regime applies to specific water bodies, whereas the allocation regime applies to catchments or parts of catchments. So, for example, the allocation limit for agriculture and horticulture in that part of the Lower Waitaki River Catchment, identified as being downstream of the Waitaki Dam, but upstream of Black Point, is an allocation in respect of all water resources in that part of the Lower Catchment, irrespective of which water body is involved. That is why in this series of cases we have a number of applications where water is being sought from different water bodies, but all of them exceed, for reasons that will be stated shortly, the allocation limit in that part of the Lower Catchment. The same, of course, applies to that part of Table 5 that refers to the catchment downstream of the Waitaki Dam, and also downstream of Black Point.
68. Incidentally, we record here that during our hearing into the Hunter Downs Irrigation Scheme, the precise location of Black Point, which is not identified in the Allocation Plan, was fixed for us by evidence given by Mr Potts. We do not propose to refer to it in detail here. We are satisfied that it is common ground that all those concerned with these proceedings now know the location of Black Point, and there was no evidence to the contrary.

69. Now, as we said earlier in this decision, the Allocation Board fixed the annual volumetric limit for agriculture and horticulture in the relevant part of the Lower Catchment, that is downstream of Waitaki Dam, but upstream of Black Point, at 150 million cubic metres. It also provided limits for town and community water supply at 3 million cubic metres, industrial and commercial activities outside of municipal town supply areas at 1 million cubic metres, tourism and recreational facilities at 2 million cubic metres, any other activities at 16 million cubic metres, and in respect of hydroelectricity generation, it provided “*all other flows except the flows that must remain in the rivers pursuant to the environmental flow regimes*”. We do not know, and it is not stated anywhere in the Plan what “*any other activities*” means, but we assume it is activities other than those specifically provided for.

70. In its decision on this part of the Plan, the Allocation Board referred to evidence that had been given to it at the hearing of submissions on the draft plan, and in particular, evidence about possible future expansion of irrigation in the Lower Waitaki Catchment. It then said this at paragraph 208;

“It was asserted that there is potential for development of a further 70,380 hectares of spray irrigation, including a large area on the coastal plains to the north of Waimate extending as far as Timaru, coupled with further areas to the south of the river. On reviewing all this material in the context of the policy framework of this Plan, it is the Board’s judgement that there is realistic potential for further development of some 53,000 hectares of spray irrigation in the foreseeable future, with an associated annual volumetric requirement of 350 million cubic metres, based on a peak take of 0.45 litres per second per hectare over 158 days. The total annual provision in the Plan for agricultural and horticultural activities in the lower catchment is therefore 1,250 million cubic metres”.

71. There is a footnote at page 37 of the Board’s reasons for decision that is relevant. It records that the period of 158 days is not to be confused with the length of the irrigation season.

72. The geographical split above and below Black Point, which is referred to in Policy 12, which is the policy that specifically addresses allocation of water to activities, is discussed by the Board in the context of that part of its decision that actually dealt with putting in place the environmental flow regime. At paragraph 162 and following, the Board said this;

“The Board found that the use of two environmental flow regimes would enhance opportunities for providing for competing demand for water of the Lower Waitaki River.

The Board amended Policy 45 (formerly Policy 44) by splitting the environmental flow regime into reaches upstream and downstream of Black Point to better provide for competing demands for different activities. Two different environmental flow regimes have been set in the Lower Waitaki River, both of which provide minimum flows. For the reach

downstream of Black Point, flow variability above the minimum flow is provided for by an allocation limit of 90 cubic metres per second. In the reach between the Waitaki Dam and Black Point, variability above the minimum flow is provided for by flushing flows, and by the addition of Policy 45(2). Policy 45(2) requires consideration of these effects on flow variability if more than 90 cubic metres per second is to be abstracted upstream of Black Point.”

73. Nowhere in the Board’s decision, nor anywhere else in the Plan, is reference made to the division that has been made in Table 5 for the purposes of the annual volumetric allocation. At the various hearings before us when this matter was raised a number of the applicants, particularly the members of MRNAG asserted that the 150 million cubic metre volumetric limit was a mistake by the Board. They made this assertion on the basis that Mr Potts, as we said earlier, had sought a limit of 250 million cubic metres. But submitters in opposition, and particularly the Fish and Game Council and the Director General of Conservation and the Lower Waitaki River Management Society, did not accept that this was the case although, again as we have recorded earlier, the Fish and Game Council were not particularly anxious about departing from the 150 million cubic metre limit provided the overall limit of 1,250 million cubic metres was retained and respected.
74. Ms Claire Penman, an Environmental Consultant with MWH Limited, was one of the lead section 42A reporters for this group of applications and, at our request, she gave additional evidence on a number of matters towards the end of the hearings in October 2008. She specifically addressed the matter we are now considering. She advised us against combining the allocations so that the total of 1250 cubic metres per annum effectively became the limit. In answer to questions by us Mr Boyes had suggested this as a way forward. Her principal reason for this was that without a plan change abstractors below Black Point could continue to claim access to 1100 million cubic metres per annum even though the 1250 million cubic metres had been exceeded. Ms Jo Appleyard counsel for MEL and her planning witness Ms Sarah Dawson also raised a similar point but they went on to say that really the only allocation that would be affected if we did decide to exceed the allocation above Black Point would be the allocation for hydro-electricity because it has the “residual flows.”
75. As we said earlier in this decision this matter has caused us considerable difficulty mainly because we have been very conscious of the fact that the Allocation Plan is still quite new and the intention is that its rules should be adhered to unless consent to a non-complying activity can be granted in terms of sections 104D, 104B and Part 2 of the RMA.
76. For this reason we decided to consult the parties further on this matter and as we said earlier we did so in the form of a Minute to Parties issued on 18 May 2009 a copy of which is annexed to this decision as Appendix 1.
77. In this Minute we stated that in round figures existing consents above Black Point take up approximately 145 million cubic metres and if all applications

currently before us were to be granted this would reach approximately 182 million cubic metres. This would leave a shortfall of approximately 37 million cubic metres. If all the applications currently before us below Black Point were granted then out of the allocation of 1100 million cubic metres approximately 21 million cubic metres would still be available. Consequently, the shortfall above Black Point could not be made up from below Black Point. We went on to say in our Minute that we had several choices. We could refuse all the applications on the ground of non compliance with Table 5; we could grant the applications on the ground that the non compliance is not significant but if we placed the upper limit at 1250 million cubic metres some applications would still have to be refused on that approach. We then raised with the parties the possibility of the Canterbury Regional Council promoting a change to the Allocation Plan to increase the allocation for agriculture and horticulture above Black Point. We also said that we did not accept that the 150 million cubic metres was simply an error by the Board and we adhere to that conclusion now.

78. Later we received advice that the Canterbury Regional Council is contemplating a plan change at some time in the future but not within the timeframes contemplated by us. In the course of receiving that advice we were struck by some advice given by Ms Gillian Ensor to the Canterbury Regional Council in respect of a then potential response to our Minute. Ms Ensor is Consents Project Leader for the Waitaki applications. She began by referring to the Allocation Board's decision, and in particular a passage that we have already quoted, where the Board decided to provide for future irrigation by a volumetric allocation of 350 million cubic metres. In her advice Ms Ensor pointed out that the amount of water currently available for resource consent applicants is 281,626,317 cubic metres per year which is less than the 350 million cubic metres anticipated by the Board. This is an overall figure for both upstream and downstream of Black Point. She went on to say that the reduction in the amount of water available, is in her view, a reflection of a difference in the calculation of the existing allocations between the Board and the Canterbury Regional Council today and not a finding by the Board that it did not allocate enough water for future users. She said it is not clear what the Board's exact calculations were but it is likely that there are two potential points of difference. The first is the way the Council deals with diversions, and the second is the way the Council has dealt with mining privileges.
79. In our decision on the North Bank Tunnel Concept we ruled that the proper interpretation of Rule 6 in the Allocation Plan required that all diversions for agriculture and horticulture should be included in the annual allocation. Several parties including MEL and MRNAG had submitted they should be excluded. So far as we are aware, that ruling has never been challenged. Including diversions this results in as much as 25.6 million cubic metres upstream of Black Point, being excluded from water available for allocation compared with earlier calculations. Then in addition there are a number of mining privileges upstream of Black Point that equate to a further 36.8 million cubic metres on a 365 day per year calculation. It is necessary to do

this because these privileges, which are now consent permits, are not limited to an irrigation season.

80. Ms Ensor went on to say it is not clear how the Board dealt with these mining privileges. At the time of the Board hearings there were six privileges that the Canterbury Regional Council thought had expired and the Board may not have been aware of these in its final drafting. These equate to 6.75 million cubic metres a year. She then said that if the Board included a seasonal allocation for the remaining mining privileges this may have equated to 16.9 million cubic metres a year over a 206 day border dyke irrigation season.
81. The result of all of this is that the Board's calculation of 350 cubic metres may not have been adequate in the light of the way in which the allocation regime has been subsequently applied in terms of the Allocation Plan and in the light of possible discrepancies in the way mining privileges have been dealt with.
82. On the basis of Ms Ensor's figures the difference between what the Board thought it was providing namely 350 million cubic metres per annum, and what is now available namely 282 million cubic metres per annum, is approximately 68 million cubic metres per annum. The shortfall above Black Point, is as we said earlier, approximately 37 million cubic metres per annum. If we add this number to the existing allocation of 150 million cubic metres per annum, that makes a total of 187 million cubic metres per annum above Black Point, leaving the total allocation of 1100 million cubic metres below Black Point intact. An additional volume of 37 million cubic metres in that part of the Catchment above Black Point equates to approximately 1.8 cumecs during the whole irrigation season of 242 days.. Spread across that part of the Catchment this is a small amount of water and allowing for it would in our judgment be minor in terms of any effects on the environment. Consequently, for the purposes of section 104D of the RMA, the first gateway test can be met. We add here that we agree with counsel for MEL that in effect it is the only allocated user affected by this conclusion. The other allocations cannot be affected because we are not changing the Plan. Indeed we cannot do that as a matter of law. Then as Ms Borthwick pointed out MEL can hardly complain (and we did not understand it to be doing so anyway) because for the purposes of the North Bank Tunnel Concept it has agreed to make additional water available to the main stem applicants anyway if that scheme proceeds.
83. However that is not the end of this particular matter. It does not follow that all the applications in this series should be granted. We are still required to have regard to the relevant provisions of the statutory instruments, and for the present purpose, in particular, the relevant objectives and policies of the Allocation Plan. Then in the exercise of our discretionary judgment we are also required to have regard to any relevant matters in Part 2 of the RMA. It is not the purpose of this part of this decision to complete this exercise here.
84. However, for the purposes of this case, and for the other non complying applications, we now go on to consider whether granting consent because of

the failure to comply with Table 5 will be contrary to the objectives and policies of the Plan.

85. As we said earlier, one of the key requirements of the Plan, is to make an allocation for various activities, including agriculture and horticulture, in terms of Objective 2 and Policy 12. Policy 11 also provides that when allocating to activities Tangata Whenua values, national effects and local effects need to be considered. We remind ourselves from our consideration of some of these matters in the North Bank Tunnel Concept decision that Objective 1 is intended to carry more weight than Objective 2 in the exercise of any balanced judgment.
86. For a proposal to be contrary to the objectives and policies of the Plan for the purposes of section 104D it must be repugnant to, or in opposition to, those objectives and policies. In this case we are proposing to notionally extend one of the allocation volumes in Table 5 by 37 million cubic metres per annum across that part of the Lower Waitaki Catchment above Black Point, which as we have said earlier, equates to approximately 1.8 cumecs during the whole irrigation season of 242 days. We are proposing to do this because of the uncertainties surrounding the allocation that is contained within the Plan. We recognise that some of these uncertainties have arisen after the Plan became operative. These are the matters referred to by Ms Ensor in her advice to the Canterbury Regional Council.
87. We still have to consider any effects on values recognised and provided for in Objective 1 and in the policies that we have earlier referred to in respect of individual cases, and to some extent, also in a cumulative way. But for the reasons now set out above it is our judgment that to grant the current series of applications that are before us as non complying activities will not be contrary to the objectives and policies of the Plan simply because they are outside the allocation limit in Table 5. We say nothing in this ruling about any other effects on the relevant objectives and policies of the Plan.
88. We also say, and this is important, that for the future this ruling should not be regarded as a precedent by anybody including pending or future applicants who are not before us. We think the circumstances set out earlier constitute a special set of circumstances that attach to those applications in a large measure anyway, that were pending when the process surrounding the Allocation Plan took place. Of course, it is not for us to make any pronouncements about future action, either by the Canterbury Regional Council, or by any other decision makers, in respect of this particular Plan. But for ourselves we see the proposal to grant, in effect, an additional 37 million cubic metres per annum of water as a special case.
89. We will now proceed to consider further this particular application, and as we said earlier in this decision, this part of it will be annexed to other relevant decisions as an appendix so that it is not necessary for us to repeat our reasoning.