

IN THE MATTER OF the Resource Management Act
1991

AND

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 and for all
associated consents required for
the construction and operation of
the Central Plains Water
Enhancement Scheme

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

**MEMORANDUM BY COUNSEL FOR THE APPLICANT IN RESPONSE TO THE
COMMISSIONERS MINUTE DATED 1 APRIL 2009**

Dated 1 May 2009

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1. This memorandum responds to the Minute/directions of Commissioners and Request for Further Information dated 1 April 2009 (*"the Minute"*). The first part of the memorandum responds (in summary) to the questions and issues in paragraph 28 of the Minute. The second part addresses several of the issues in more detail, including responses on a number of legal issues raised.
2. The purpose of the memorandum is to inform the Commissioners and legally represented parties in advance of the hearing scheduled for 11 May 2009. I refer to the applicant and scheme proponent as Central Plains or CPW. I use the terms *"consent"* and the grant or refusal of consent to apply equally to the notice of requirement and a recommendation for or against their confirmation.
3. I do not repeat (except where necessary) the points set out in the memo dated 26 March 2009, a copy of which has been circulated to all submitters with the Minute.
4. It is anticipated that these matters will be expanded on at the hearing, and that further matters raised by the Commissioners and any opposing submitters will be responded to.
5. At paragraph 28 of the Minute, the Commissioners list a number of issues which they have asked the applicants (CPW) to respond to in order to assist them in deciding whether to:
 - Close the Central Plains part of the hearing and proceed to issue a final decision (presumably to decline all consents and applications);
or
 - Leave the hearing open so as to receive further evidence from Central Plains later in the year.

Summary points

6. The responses by CPW to the issues listed in paragraph 28 are as follows (using the paragraph numbering from the Minute):
 - (a) The two alternatives set out above are really the ultimate issue to be determined at the 11 May hearing. If the Commissioners choose the first alternative then the indication is that CPW will be

declined all consents. CPW seek that the Commissioners adopt the second alternative.

- (b) Whether, if the Commissioners decline the dam, upper intake and tunnel, they could still potentially grant the consents for take and use for the structures involved, and for the distribution network and headrace canal. CPW's position is that the Commissioners can grant some consents even if they decide not to grant others.

As the following points indicate, this is a staged issue.

The first stage is the legal power to do so, i.e. a jurisdictional question. CPW says that there is jurisdiction to do so because the consents to be granted are within the scope of what was applied for. This is essentially a jurisdictional question and is addressed in more detail below.

The second stage is to assess the consent applications against the required criteria, mainly those set out in s.104 RMA. You already have a substantial body of evidence and other material with which to make that assessment.

Some of that evidence/material was predicated on the scheme involving storage. A scheme without storage would have different effects and may involve some different considerations. The third stage therefore is to address what those differences might be so that the Commissioners can be satisfied that the information they have is enough to undertake the s.104 assessment.

This is likely to involve some additional evidence. However the issue is not whether the removal of the reservoir etc from the project also removes the ability to grant consent. It is whether the remaining applications on their own (or in combination) should be granted. Therefore the scope of the further evidence/information required ought to be quite limited.

Associated issues

- (c) Whether granting some of the consents and declining others would be contrary to case law. Neither the Act nor case law imposes an absolute rule that all aspects of a proposal should be bundled together and viewed holistically. It was the take and use aspects

of the application which the Regional Council has to date considered to be the most inextricably linked.¹ All other consents can be considered as discrete matters, the effects of which can be considered independently.

- (d) The implications for the take and use of a scheme without large scale storage is a question on which further evidence may be required. The reality is that the same irrigable area can be irrigated, but with significantly decreased reliability unless supplemented with an alternate water supply such as ground water.
- (e) Consents can be granted based on a maximum irrigable area. Any reduction in that clearly reduces the environmental effects of the application. The "area" to be irrigated cannot be a critical determinant of the grant of consent, other than as a maximum.
- (f) The Commissioners can grant consents to take water without the full extent of the consents to use water having been settled, or the final extent of the scheme and therefore its water demands not having been finally defined. Consents can be granted on the basis of the maximum area anticipated for a scheme based on the take and use consents that are granted. The area should remain at 60,000 hectares as such an area can benefit from water taken at the maximum rate proposed. Concerns about "*locking up*" of the resource are addressed below. CPW can and will only take water if there is a demand for it and the scheme should be based on the maximum area potentially able to be irrigated.
- (g) This issue is concerned with the potential lock-up of the resource. Without storage CPW simply cannot take more water than is required for farmers' actual use at the time. This risk can also be controlled by restrictions on how water is used at the end by the individual farmer, although without storage, these controls may need to be somewhat relaxed, as farmers may need to irrigate more when water is available to provide insurance against anticipated water shortages.

¹ See s.91 decision of 16 June 2005.

- (h) Without a dam there would be amendments (resulting in an overall reduction) to what CPW would take because it would not be taking significant quantities outside the irrigation season (unless and until other storage options were developed, such as permitted storage dams on individual farms, or larger options for which future consents might be sought). CPW may also reduce the total rate of take but only if it can reasonably use the water on farms which already have an alternative source of supply.
- (i) Issue (i) is related to issues (g) and (h) about avoiding lock-up of the resource. There is of course, no obligation to implement a consent to its maximum potential in any event, so lock up can not be prevented entirely with any consent granted for a limited resource.
- (j) The term "*use consents*" is used in a broad sense in issue (j), and presumably contemplates some future consents, such as for a dam. What is suggested is the grant of consents in the alternative e.g.

- x amount of water if dam granted;
- y amount of water if not.

Consent conditions are often crafted to deal with alternative scenarios e.g. Ngai Tahu water take consent conditions cater for two scenarios – with CPW having priority and without CPW having priority. Another (and possibly better) solution is to apply s.128, so that conditions controlling the rate, times and overall volumes can be adjusted according to future circumstances, not necessarily limited to future use consents.

- (k) The question of what additional information might be required is, to a large degree, linked to the answers to the questions concerning need, lock-up and viability. CPW makes the following points:
- While the reliability of the scheme will be considerably reduced, so will its cost. (About 35% of the cost of the full scheme).
 - A large area within the 60,000 ha (approx half) is irrigated to some degree at least by groundwater. Absent the reservoir, it

is likely that these will continue to supplement water from the CPW Scheme.

- Peak flow requirement without the reservoir will still be 40 m³/s, and there will be less flexibility than the storage option provided.
- This would also impact the timing of takes from the rivers, and the total volume taken (less because no reservoir to replenish).
- Increased pressure to pipe the irrigation so as to avoid water loss – but the current consents allow for this.
- Reduced groundwater mounding effects because less overall water from the rivers and continuation of ground water extraction.
- Possible changes in nitrate levels as less intensive farming possible but also less dilution.

CPW would expect to call evidence on the following:

- Some (but limited) evidence of the economics of the scheme. This is of dubious relevance for the reasons discussed below.
- Possible changes to scheme area – again of doubtful relevance.
- Effects on amounts and times of take from the two rivers.
- Effects on groundwater mounding.
- Effects of possible changes in nitrate levels.

As to timing, the main constraint is the time required to run a transient groundwater model. This is estimated to take 3 months for the technical work plus a further 1 – 2 months for analysis and evidence to be prepared. However, it is probably sufficiently self-evident that there will be an overall reduction in mounding, so a detailed re-analysis should not be needed.

- (I) The economics and viability of a truncated scheme are of limited, if any relevance. This is discussed in more detail below.

- (m) The hearing adjourned to a date 4 – 6 months away when CPW would present evidence on how water could be used if dam/upper intake rejected. Will require up to 6 months if a full mounding analysis is required.
- (n) The delays would not be unfair to submitters. The alternative is for the Commissioners to issue a decision now and for CPW to appeal. The timeframe to date has been years, not months, so a further delay of a few months is not large in the scheme of things. Submitters could facilitate the further process by indicating acceptance if the groundwater mounding will be better without the reservoir.
- (o) CPW considers that the suggested interpretation of s.103 is too literal and does not consider a common-sense purposive application of the section. However the Commissioner's proposal to indicate by some means other than a "*decision*" their reasons for declining the dam, reservoir and upper intake consents avoids any technical difficulty. It may be of assistance to CPW and the submitters to have those reasons in advance of the resumed hearing (if one is to be held).

Jurisdiction and scope

- 7. The Commissioners' minute asks if consent is declined to the dam, upper intake and tunnel can they grant the balance of the consents for the taking and use of water and the distribution network? The minute further asks whether such an approach (i.e. granting part of the proposal) would be contrary to case law which "*seems to suggest that generally all aspects of a proposal should be bundled together and viewed holistically?*"
- 8. There are a number of possible responses to this question. The first is to consider the scope of the Commissioners' jurisdiction and the permissible scope of amendments to an application. The second is to consider the holistic approach and case law on unbundling related applications. Finally, the option of a reduced scheme, absent the storage component, could be classed as an alternative.

Scope of jurisdiction

9. The scope of the Commissioners' jurisdiction is defined by the original application: *Darroch v Whangarei DC* (A018/93). Amendments can be made to an application until the close of a hearing if they are within the scope defined by the original application. The granting of the take and use consents for the other matters unrelated to the dam and reservoir is not an "amendment" in the sense that it is not put forward by CPW. However, the Commissioners' jurisdiction is tested against the same criteria.
10. In *Coull v Christchurch City Council* (C077/06) the Court concluded that there were 3 tests that should be applied to any change to an application to assess whether the change was within jurisdiction:
 - (a) Does it increase the scale or intensity of the activity?
 - (b) Does it exacerbate or mitigate the impacts of the activity, in terms of adverse effects and the plan?
 - (c) Would parties who have not made submissions have done so if they were aware of the change?
11. In this case the intensity or scale of the activity will decrease rather than increase. The adverse effects of the proposal will also be less. The Commissioners do not need to enquire into the implications for the positive effects (or scheme benefits) for the purposes of determining jurisdiction. No one would be affected to a greater degree by a reduced scheme so issues of notification do not arise.
12. Some of the Commissioners' questions are directed to whether the scheme would need to change as a result of the decision declining the reservoir consents. In para 6 the reasons for the preliminary view that they might not have jurisdiction include "*because it would be a very different scheme without large scale storage and because without the dam the volumes of water required by the scheme for take and for use are likely to be different*".
13. The first comment seems to relate to the issue of whether the scheme without the reservoir would take more water than would the scheme as proposed with the reservoir. If the quantity of water required by the scheme is greater than was applied for, there will be clear scope issues.

CPW accepts that it cannot be granted consent for any greater volume or rate of take than was originally sought. Later questions suggest that the Commissioners' concern might be that the volume of water required would reduce.²

14. Absent an increase in the quantity of the take from what was applied for, changes to the scheme would only go to jurisdiction if there was a change in the character or intensity of the adverse effects. For example, in *Brooklands Properties 2000 Ltd v Road Metals Co Ltd* (C164/07) the Court considered an amended application to excavate gravel at a different location on the bed of the Waimakariri River from the original application. The Court noted the test as to whether an amendment is within scope is a question of intensity, scale, possibly duration, and location. The Court found it implausible that notification of the original application would have alerted potential submitters who may be interested in extraction further up the river.
15. An analogy can also be made with the consent authority's powers under s.128. The courts have held that the power to change conditions under s.128 is wide and flexible, and that there is no obvious limit on how far a consent could be subtracted from or qualified by new conditions: *Feltex Carpets Ltd v Canterbury Regional Council* (2000) 6 ELRNZ 275. If there is jurisdiction to reduce the scale of an activity through s.128 (as was done in the case of *Kuku Mara Partnership v Marlborough District Council* (W025/02)) then, by analogy, the Commissioners have the jurisdiction to reduce the scale of a proposal in the original grant.

Holistic approach

16. A related issue is the holistic treatment of applications and what limitations this may impose on jurisdiction. The reasons the Commissioners consider they might not have jurisdiction include "*because the scheme has been presented to us as an integrated package*". This leads the Commissioners to ask whether to grant part of the application "*would ... be contrary to case law which seems to suggest that generally all aspects of a proposal should be bundled together and viewed holistically?*"
17. This question implicitly extends the case law which established the holistic approach. An analysis of this case law shows that the holistic approach is directed at notification (whether a person is potentially adversely affected)

² While a scheme without the reservoir will make different demands at different times than would a scheme

and the assessment of effects on the environment. *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) confirmed the continued application of a holistic approach and concluded that where there is an overlap between activities that require consent, the consent authority should decline to dispense with notification of one application unless it is appropriate to do so with all of them.

18. Sustainable management is at the heart of the holistic approach. In *Graham v Dunedin City Council* (C043/01) the Court declined to hear an appeal relating to district council consents for a poultry operation when additional consents were required from the regional council. It concluded a holistic treatment of the application required it to be satisfied that the development as a whole was sustainable. The link to sustainability is also evident in the High Court decision *Sheppard v North Shore City Council* (High Court, Auckland M1791/SW00, 1 May 2001, Priestley J). The Court expressed the view that the difference between a holistic approach and a mechanical item-by-item approach was not of much significance. He concluded that when considering whether an effect on the environment is minor, or whether a person is potentially adversely affected, the decision-maker should consider both the individual components of an application, and also the overall effect of those components in combination.
19. The scheme of the Act is that related applications should be considered together, unless the consents are distinct and would not overlap or have consequential or flow on effects: *Body Corporate 970101 v Auckland City Council* [2000] NZRMA 202 (HC) (confirmed in [2000] NZRMA 529 (CA)). The Commissioners have stated, in relation to s.103, that they do not consider that the "*applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together.*" However a determination that the applications must be decided together does not mean that the decision on the applications must be the same (i.e. grant all aspects or decline all aspects).
20. The holistic assessment of all of the effects of the proposal may lead to a decision to decline part only (and not necessarily the whole) of an application. *Motorimu Wind Farm Ltd v Palmerston North City Council* (W067/08) is an example of a decision to decline an application in part. In that case the applicant sought consent to establish a wind farm containing 127 turbines. The commissioners granted consent to 75 turbines; on appeal the Court granted consent to 5 additional turbines. This was

with the reservoir, that fact does not take it outside the scope of the application.

notwithstanding the applicant's submission that what it applied for was a unified wind farm development of 113 turbines and that if consent was refused to the additional turbines it was unlikely that the wind farm project would proceed. The issue of viability was considered as a preliminary matter and the Court's approach is discussed further below. The decision acknowledged the positive effects of the proposal and identified adverse effects in relation to landscape, visual and amenity values. The Court had no difficulty confirming the decision to decline consent to 33 of the turbines on the basis of the adverse effects.

21. Another example is *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (A095/08) in which the Court granted a consent to take and use water at considerably reduced volumes and for a significantly shorter term than was sought.
22. The circumstances leading to the dam and take applications being heard together are also relevant. CPW initially only applied for consents to take water. The applications to dam and use the water followed from the regional council's exercise of s.91. Section 91 entitles the Council to require that other consents which may eventually be required for the proposal be applied for at the same time:

"it is appropriate, for the purpose of better understanding the nature of the proposal".
23. The Act does not require all such consents to be applied for, let alone suggest that they must all be granted, before consenting one or more component parts of a proposal. Indeed, in the present case, the Regional Council wrote to CPW on 16 June 2005 seeking provision of just the take and use consents before proceeding to notification and hearing. It did not require all the other consent applications for an understanding of the key effects of the proposal. It was CPW's decision to provide all consents.
24. Having applied for a "bundle" of consents, it is appropriate that those applications be heard and decided jointly under s.103. However, it is not strictly correct that the scheme has been presented as an "integrated package" in every respect. The dam (and associated) consents have been presented as an adjunct to the consents to take and use the water. The ability to dam and store water increases the reliability of the scheme. But the take and use consents could be considered on their

own merits, with the dam-related consents assisting to provide a “better” understanding of the proposal.

25. There are conflicting authorities on whether all applications for a proposal should be made together. The decision in *AFFCO NZ Ltd v Far North District Council* [1994] NZRMA 224 that all applications for a project should generally be made together can be contrasted with *Kett v Auckland Regional Council* (A086/00) where the Court accepted that it is not always practical to apply for resource consents at the same time, especially for major projects on a large scale. This is echoed in the Court of Appeal judgment in the *Central Plains v Ngai Tahu* case.³
26. *Kapiti Environmental Action Inc v Kapiti Coast District Council* [2002] NZRMA 289, noted the importance of filing related applications together to avoid having a judgment skewed by not having some of the effects of the proposal before the consent authority. In that case, involving a subdivision consent application, the lack of evidence about the effects of the earthworks needed to implement the subdivision meant the evaluation of the effects of allowing the subdivision was not complete. By contrast, in this case all the relevant applications are before the consent authority but the dam consent is not needed to implement the take and use consents. Where some of the related applications (e.g. the consents to form the distribution network) are not before the consent authority, the Commissioners can nonetheless have regard to the effects of those consents: *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* (HC, 17/12/03, CIV-2002-485-22, Wild J). This point is important in relation to the Commissioners’ question, considered below, which is whether they can grant consent if the extent of the consents to use the water have not been settled.
27. If it is accepted that sustainability is at the heart of the holistic approach, the Commissioners should first consider if the dam consents together with the take and use consents are sustainable. If not, the Commissioners have jurisdiction to consider whether a reduced scheme, absent the dam consents, is sustainable. The two sub-groups of the application are sufficiently distinct that the take and use consents can be considered separately from the dam consents. This is not to suggest that the Commissioners need to “unbundle” the consents.⁴ Rather that the greater

³ *Central Plains Water Trust v Ngai Tahu Property Limited* [2008] NZRMA 200.

⁴ Unbundling is an exception to the rule that there is no hybrid planning status for a proposal and the more stringent activity classification applies to the whole of the proposal where there are multiple consents involved. CPWT is not supporting some form of hybrid classification with this submission.

incorporates the lesser and the lesser can be considered in the exercise of the overall broad discretion under s.5(2).

Consideration of alternatives

28. A different approach could be that the reduced scheme, minus the storage component, is an "alternative". As with the analysis above relating to amendments, this would be an alternative resulting from the Commissioners indicated declination of the dam reservoir, rather than proposed by the applicant.
29. Clause 1(b) of Schedule 4 requires an AEE to include a description of possible "alternative locations or methods" for undertaking the activity where the activity would result in a significant adverse effect on the environment. This is coupled with s.92(2) which empowers a consent authority which is of the opinion that a significant adverse effect may occur as a result of the proposed activity to require an explanation of possible alternative locations or methods. There are limitations to the application of clause 1(b):
 - (a) The clause only applies where it is likely that an activity will result in a significant adverse effect on the environment. If clause 1(b) does not apply, every proposal must be assessed on its own merits without regard to whether there might or might not be a better alternative or site: *All Seasons Properties Ltd v Waitakere City Council* (W021/07).
 - (b) The clause only applies to the applicant, not to the consent authorities and their consideration of the application: *Land Air Water Association v Waikato Regional Council* (A110/01).
30. It is unclear whether the Commissioners' powers under s.41C(3) to request further information at the hearing would extend to possible alternative locations or methods. That power is only expressly given under s.92 up until the hearing. Even if the Commissioners did have that power, little or no weight could be given to the "alternative" in the substantive decision unless the Commissioners make a finding that the application would result in a significant adverse effect on the environment.
31. The High Court in *TV3 Network Services v Waikato District Council* [1998] 1 NZLR 360 held that where a proposal would conflict with a matter of national importance in s.6, the availability or unavailability of an alternative site (or method) may be a relevant consideration. The similar conclusion was reached in *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional*

Council (A095/08). In that case the availability of a feasible alternative groundwater supply, and the significant adverse cultural effects on Maori, lead the Court to reduce the term of an abstraction consent from 25 years to 10 years to provide sufficient time to investigate, and implement, the alternative supply option.

32. The *TV3* decision was distinguished in *Dome Valley District Residents Society Inc v Rodney District Council (A99/07)*. The Court accepted the *TV3* ratio and continued: *"in other cases, where conflict with matters of national interest does not arise, the cases for more than a decade are all consistent: in holding that the availability of alternative sites is not a consideration."*
33. As no matters of national importance arise in this case, the Commissioners must assess the proposal on its own merits. Although this does not assist with the question of jurisdiction, the cases cited above assist in addressing the directions foreshadowed in paragraph 15 of the Commissioners' minute. The request for further information described in this paragraph cannot be of such breadth as to elevate the reduced scheme to an "alternative".

Economic viability

34. Economic viability has been raised under the heading of "additional information" required to assess a reduced scheme. The Commissioners question is, *"to what extent would we need to revisit the economics and efficiency of a truncated scheme?"* In paragraph 15 the Commissioners state that *"we would need to understand whether it was still possible to have a viable scheme without such storage"*.
35. The starting point in responding to this question is the High Court decision in *NZ Rail Ltd v Marlborough District Council [1994] NZRMA 70* that the financial viability of a proposed activity is not an economic effect. This is distinct from other economic effects, either beneficial or adverse, which may be relevant under s.5 ("economic wellbeing") or s.104(1)(c).
36. The viability of a reduced proposal (windfarm project) was considered in the *Motorimu Wind Farm* case. The Court considered the evidence relating to viability and concluded (paras 83-84):

"We accept that unless consent is given to the 38 additional turbines it is unlikely that [the appellant] would proceed with the Motorimu wind farm project at all as it would not be viable for it. We also accept that the economics of the project will alter if

consent is not granted to the additional turbines. Establishment of the additional turbines allows further return on the infrastructure expenditure, much of which must be established for either a 75 or 113 turbine wind farm and substantially increases productivity of the wind farm itself.

We do not however find that if consent is declined to the additional turbines then the establishment of the consented turbines would not be viable for any other operator."

37. In that case the benefits of the wind farm were submitted (and accepted by the Court) as a matter to weigh in the overall exercise of discretion. The Court accepted that there was "no guarantee" that the benefits would accrue unless another wind farm operator took over the consent.
38. CPW accepts that viability, in a broad sense, can be a relevant consideration, but not as a reason for refusing consent. The issue of viability has been considered under s.128. In *Minister of Conservation v Tasman District Council* (HC, 9/12/03, CIV-2003-485-1072) Young J held that in changing consent conditions, a council needed to consider whether, as a result of the change, the consent would still remain viable. The threshold for establishing viability would be low and the Commissioners should not require detailed evidence. CPWT's willingness to proceed with a reduced scheme and evidence already presented as to the benefits of irrigation (and the related demand) should be sufficient.
39. A related issue is that of "need". The Commissioners ask "*what would be the consequence of CPW not proceeding with a large scale storage dam, in terms of our consideration of the need for what has been sought?*" This question is a sub-set of the questions relating to "locking up" the resource and priority.
40. In *Gulf District Plan Association Inc v Auckland City Council* (A101/03) the Court held that its task was to consider the potential effects on the environment from granting consent and not the need (or lack thereof) for the facility. The Court followed the approach of the Court of Appeal in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and held that every case should be determined on its own merits. It is not the role of the consent authority to identify the "best" proposal to achieve a given end. I return to this theme under the next heading.

41. It is not usually a ground of refusing consent that the proposal is not financially viable. Consent authorities and the Environment Court are not given the task of deciding whether a project is affordable. Its only relevance usually is where an applicant may run short of funds before completion, and this is addressed by the requirement for a bond.
42. The cases also show that the Courts have had some (but only limited) sympathy for the position of an applicant seeking to resist the imposition of constraints imposed through the consenting process (such as the refusal of consent to some aspects – as here – or conditions to avoid, remedy or mitigate adverse effects) on the basis that implementation of the consent so constrained would be rendered uneconomic (i.e. unviable).
43. The short point is that if a project, once consented, is financially viable it will proceed. If not, there are several alternatives:
 - The project is redesigned to fit within the constraints;
 - The project is redesigned in such a way that some additional (or varied) consents are able to be obtained;
 - Alternative methods of funding are sourced;
 - (In the last resort) the project is scrapped.
44. It is untenable to require proof at this stage that a particular reduced scheme will be financially viable, let alone the many possible permutations which the consents, as granted, might allow.
45. The Commissioners may also be referring to the criteria for the take consent, which include the abstraction rate and its reasonableness given its intended use. The term “*reasonable need*” relates to the use of the water in the quantities sought. As with viability, the demand for the irrigation scheme, and the reasonableness of the proposed abstraction rates, have been covered in evidence. A decline of the reservoir consent will reduce the reliability of the scheme but will not change the essential nature of the scheme, or the demand for the water it will deliver.

“Locking up” the resource

46. The Commissioners questions include: “*How would we (or should we) avoid “lock up” of the resource? (i.e. providing one party with more than it needs*

and thereby allocating a public resource to private gain not necessarily associated with the productive needs of that person).” This question is extrinsically linked with the case law on non-derogation and priority.

The origins of the question

47. Counsel is aware of the views of the chairman critical of the *Aoraki* decision⁵ and the current “first come, first serve” regime for allocating water resources, including those expressed recently in a paper presented to the NZCEL Conference. The thesis is that the current law does not deal adequately with the allocation of water resources between competing applicants: *“In my view giving away public resources on a first in first served basis, subject only to the environmental safeguards in Part 2, is not sustainable resource management, it is more akin to encouraging a gold rush.”* Nonetheless this is the law for present purposes, and has been affirmed by the Court of Appeal. On the law as it stands, it is not the Commissioners’ role to make provision for future possible users through this consent process so as to avoid the potential “lock up” or inefficient use of the resource.
48. The *“problem of resource lockup”* is explained in the Paper as follows (pages 28-30):
- (a) A consent holder may be granted more of the resource than is necessary or efficient. This may shut out other more efficient or even more essential potential users of the resource.
 - (b) The non-derogation principle, in combination with the first come first served approach, has the potential to preclude later, more efficient, uses of the resource.
 - (c) It is not sustainable to allocate large quantities of public resources, for substantial periods without ensuring that no more of the resource is allocated than is reasonably required (efficient) and without making proper provision for the future needs of others.
49. The suggestion is advanced that consent authorities can make *“provision for future needs within consents”* by basing the extent of an allocation on a demonstrated need for the quantity of resource sought and requiring applicants to show that the proposed use is efficient. This runs counter to the point noted in the paper that *“the Courts have not*

⁵ *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268.

interpreted section 7(b) ... as requiring (or even allowing) consent authorities to consider whether a proposal represents the best or most efficient use of the resource or indeed to consider whether the proposed allocation is reasonably necessary for the applicant's purpose".

50. CPW's position is that there would be a fundamental unfairness if its present application was to be used as a testing ground for the concepts discussed in the Paper. At this stage the question of "lock-up" is raised in a general way, but it signals an intention to require CPW to establish the contrary proposition. While that might involve an inquiry of fact before any decision is actually made, there are also matters of principle involved.
51. Neither CPW nor the Commissioners can turn back the clock and apply the principle now under discussion to:
 - (a) The grants of prior consents – i.e. they were granted without any regard to the loss of opportunity for a later (and possibly better and more efficient) scheme such as CPW;
 - (b) The scheme and particular provisions in the Rakaia River National Water Conservation Order and the Waimakariri River Regional Plan, which provide for water to be left for recreational and in-stream qualities, but not for competing takes and uses;
 - (c) The history of how CPW got to this point and the legal framework within which it has progressed the application.
52. There are also practical issues, ie. a reality check. The remaining water is, in reality, the "scraps", after the priority holders have taken the best. Of the water that is available, the competition (if any) is for the "best" of that. As the availability (and reliability) decreases, there is, in reality, no significant issue about "lock-up".
53. The second reality check is that through the mechanism of the CPW scheme, water is able to be accessed by up to 370 parties. Their cooperative alliance means that its allocation within the group will be far more efficient than any regulated scheme of allocation could be.
54. By this mechanism, if there is an efficient and "sustainable" use of the water it is most likely to be achieved through a cooperative arrangement among a large number of prospective users. Among

themselves they will establish the best and most efficient mix of land uses, crop types, seasonal demand, and effective combinations of ground water, on-farm and localised storage options.

Priority and the assessment of effects

55. The suggestion that the Commissioners should make some provision for future consent applicants (or consent holders such as Ngai Tahu who rank second in priority) runs counter to case law.
56. *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 is the leading authority on the test to be applied when establishing priorities for the determination of competing applications. In determining that issue the Court of Appeal observed:

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

The conclusion that the statute requires the council to judge each case on its merits also accords with the primacy attached to s.5. If the relevant statutory criteria infused with the underlying objective of sustainable management are met in a particular case there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard than the Act specifies.

... It is, we think, implicit that if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other.”

57. The Court of Appeal in the *Central Plains v Ngai Tahu* litigation agreed that *Fleetwing* was the binding authority, despite noting some reservations. Baragwanath J stated that it was “*arguable that Fleetwing does not deal with the situation where the applicants are not similar commercial competitors*” (para 37) but reserved the question of whether *Fleetwing* was distinguishable on that basis for another day. Hammond J stated “*the problem [of how to allocate scarce resources between competing users] is one which may require rethinking, in a more fundamental way*” but that case was “*not the place to undertake that task*” (para 91).
58. Similarly, this resource consent application is not the place to undertake the task of rationalising *Fleetwing* and *Aoraki*. The Commissioners should not disadvantage or hamstring the CPW scheme with an overly restrictive, or

ultimately unviable, grant simply because they do not agree with the current state of the law.

59. Even the minority decision of Robertson J acknowledges that each application needs to be assessed on its own merits: *“Who has priority in a given case is a matter of fundamental importance as consent authorities do not become involved in a comparison of competing merits when there is more than one application”* (para 126).
60. Baragwanath J was not troubled by the fact that the Central Plains application, if granted, would allocate all of the remaining resource in Band A. His Honour noted (under a heading *Ensuring sustainable management*), para 58, *“the high policy of ensuring sustainable management is expressed in Part 2 of the RMA and must weigh heavily in assessing what priority regime accords with Parliament’s policy”*. Having regard to that policy, the further statement was made (para 59):
- “There is an obvious public interest that the law should not frustrate a proposed development in the course of undergoing the statutory process. At least where the whole resource being sought is the subject of an application, there should be no risk of a major development being trumped or significantly interfered with by smaller, simpler inconsistent proposals that are able to be made comprehensively without needing to proceed in stages.”*
61. The conclusion that the Act does not allow for comparative assessment of competing applications has even more force when an attempt is made to extend this assessment to future applications for the same resource. This exercise is too speculative and runs counter to the decision in *Queenstown Lakes District v Hawthorn Estates Ltd* [2006] NZRMA 424. The Court of Appeal held that the “environment” embraces the future state of the environment *“as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those resource consents will be implemented”* (para 84). The environment does not include the effects of resource consents that might be made in the future. Cooper J concluded: *“It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future environment as if those resource consents had already been implemented”* (para 74).
62. The application of *Hawthorn* to applications with priority was considered in *Unison Networks Ltd v Hawkes Bay Wind Farm Ltd* [2007] NZRMA 340 (HC). In that case, the wind farm structures of Unison’s application were

accorded priority by the Court and therefore regarded as part of the receiving environment for the purposes of assessing the application of Hawkes Bay Wind Farm Ltd to use the same wind resource.

63. The decision in *Unison* is a necessary consequence of combining *Fleetwing* and *Hawthorn*. Applying these authorities it is clear that CPWT's application can only be assessed against the existing environment, which will include take consents granted in respect of the same resource unless the CPW application has priority. The Commissioners cannot, and should not, attempt to pose the question *Does this proposal better meet the test of sustainable management than would another, as yet unknown, proposal to take and use water from the same source?* The Commissioners must take the environment as they find it.
64. The suggestion that Part 2 considerations can override *Fleetwing* and *Hawthorn* to incorporate an assessment of the needs of future users is strongly resisted. The Part 2 assessment cannot be a speculative exercise as to whether some "better" or more efficient application will be made in the future. The assessment is broader i.e. will it sustain the resource (i.e. the rivers) for future generations? This is necessarily a wide enquiry into ecological, resource and productive uses and is conducted within the framework of the Regional Plan.
65. This is not to suggest "first come first served" approach should be applied at the cost of sustaining the resource for future generations. Sustainability should not be compromised if, as in the present case, the Conservation Order and Regional Plan have allocated the resource. Although the CPW application takes up the remaining capacity under the Rakaia WCO and in Band A on the Waimakariri River, that capacity is predicated on sustaining the resource in terms of ecological and recreational values.
66. A water permit is an allocation for private, commercial use (with associated economic benefits in terms of Part 2) for a defined period. CPW will have to apply, as do other consent holders, for a renewal at the end of the term of the water permit. Water management is dynamic and the rules and regulations will change over time to meet the needs of future generations and users. The Commissioners do not need to try to anticipate the future state of the rules or regulations in 20 years time.

67. I also raise, once again, the restricted discretionary status of the take application. The High Court in *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 accepted that s.77(3)(c) places specific restrictions on the consent authority's power to decline consent for a restricted discretionary activity and on the power to impose conditions if consent was granted. Part 2 matters may not be relied upon to impose conditions on a grant beyond those relevant to the matters to which the consent authority has restricted its discretion in the plan.

Conclusion

68. Absent the reservoir and its related consents, the remaining matters for consent are:

- The water takes from both rivers.
- The take structures on the Rakaia and Lower Waimakariri;
- The terrace races.
- The head race.
- The reticulation network

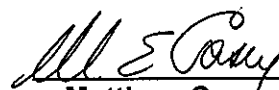

69. The effects of all these activities have been canvassed in the evidence before you. A scheme that does not include the reservoir will still involve all of the other essential elements in the original proposal. The removal of the reservoir will mean that the scheme must principally rely on run-of-river, as do many other schemes.

70. The removal of the reservoir will reduce some elements of flexibility as to the timing and volumes of the river takes, but equally will remove the adverse effects which that flexibility was able to offset (to a degree). It will reduce the overall quantities, and will increase the variability of flow at times when the water was otherwise to be taken to replenish the reservoir.

71. The reduced quantities of water will reduce the incentive for farmers currently pumping groundwater to cease doing so, but this is not an effect of the consents. On the other hand the reduction in surface water and the continuing reliance on groundwater will result in less mounding that was predicted for the scheme with reservoir. There will be changes

to predicted nitrate levels with less concentrated farming but also less dilution.

72. In all other respects the adverse environmental affects will be no greater (and in some cases less) than the case presented to you.
73. The concept of "lock up" of the resource is a complex issue, if allowed to intrude into this process. Having regard to the low-grade water involved, it is not such a substantive matter as to constitute an adverse environmental effect. Water within CPW's allocation, but which is not needed at any given time, will remain in the rivers, thereby contributing to in-stream values. It is unlikely to be of any value to any other contender at those times.

 
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