

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

LEGAL SUBMISSIONS ON BEHALF OF APPLICANT IN REPLY

Dated

September 2008

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Introduction - Overview

1. This genesis of this project was the far-sightedness of elected representatives of the Selwyn and Christchurch districts, and their vision of a broad-based, comprehensive and reliable irrigation scheme for the good of their districts and the region. Descriptions of the project as “a private scheme” or “for private benefit” are wrong. Access to, and financial support for, the scheme was open to all landowners. The Trust plays a critical role in ensuring that the scheme remains in public control, and that the commitments made will be carried through.
2. The involvement of the Trust might not be enforceable through consent conditions imposed under the RMA but this does not alter the reality that CPW is a community-driven scheme and will benefit the community as a whole. The RMA and its processes are not the only means by which sustainable management of natural and physical resources can occur. It is appropriate to recognise that there are other methods, with possibly better outcomes, than a rigid statutory regime.
3. There are some 370 shareholders who represent (as current owners and custodians) some 60,000ha of land with the potential to become considerably more productive from the water provided by this scheme. That land is an important resource, as is the water it needs to achieve its productive potential. The RMA’s purpose of sustainable management applies to the use and development of the land as much as the water and other resources.
4. It is accepted that there will be adverse effects across a range of environmental factors, including some that will be more than minor, despite efforts to avoid, remedy and mitigate. It is the applicant’s case that in the overall evaluation, the benefits of the scheme outweigh the negatives. The balancing of effects is not the only consideration, and overall granting the consents (and approving the designations) will be more likely to achieve the RMA’s purpose of sustainable management than to decline them.
5. CPW also acknowledges that there are aspects of the scheme and potential for effects which have not been exhaustively researched. Some of these are better left to a later time, in other cases it has been a matter of judgement as to what level of detail is appropriate. Its

approach, while falling short of the standard of perfection others have demanded, is reasonable.

What this project will achieve

6. This project will convert a water resource of limited value into one of high value and deliver it to a large section of the farming community and of the productive land in the central Canterbury plains. As noted in opening, farming is the backbone of commerce in this region, as well as of major importance to the national economy. The well-being of people and communities is dependant on the success of the farming sector.
7. This success is hard-won. The many expressions of opposition were characterised by a lack of recognition that they and their communities depend on it for the standard of living they wish to continue to enjoy. A great deal of effort has gone into advancing every reason, real or imagined, why the scheme should not be allowed to proceed, but there has been no serious evidence to challenge the benefits it will confer.
8. The benefits, both economic and otherwise, will be very considerable. notwithstanding the deconstruction attempts by economists and others, the proof is in the eating. Reliable irrigation has a stunning impact on farm land, as the vivid descriptions by Dr Garth Jansen, Mr Jonkers and Mr Macfarlane amply demonstrate. Irrigation schemes elsewhere, large or small, have delivered significant (and better than predicted) benefits.
9. These benefits are not just to the land or its owners, nor only monetary in nature. The opponents of the CPW scheme, their witnesses (and some Council report writers) have steered clear of the real-world proof that irrigation schemes dramatically improve social, economic, cultural and other environmental well-being¹. These are the very matters which the RMA promotes as sustainable management. In short, this scheme, as others before it, will achieve the purpose of the RMA, by a considerable margin and in a very real sense.
10. A particular advantage of the CPW scheme is that the financial cost will be met by those prepared to take the risk. Other major infrastructure projects are funded by the public, usually involuntarily (e.g. from taxes, rates, road user charges, electricity prices etc). In this case, the benefits which will flow to the wider communities (and to future generations) will

¹ See for example the July 2008 report on the Waimakariri Irrigation Ltd scheme

have been funded by those willing to take the risk, rather than by spending other peoples' money.

11. CPW recognises that there will be other costs – some immitigable environmental effects and personal cost to some of those affected. This is a feature of major infrastructure projects, and must be factored in to the overall evaluation, if not otherwise compensated for. At an individual level benefits may be asymmetric - some of those who pay a cost (financial and otherwise) will not see a proportionate benefit, and many of those who benefit will do so at little or no cost.
12. Over past decades, and well into the future, the harnessing and use of water from the Rakaia and Waimakariri Rivers hold the key to the efficient, productive and beneficial use of farmland in the central plains. Without a scheme such as this, the opportunities are considerably reduced. The combination of the resources required to deliver the available water to a standard of reliability so as to confer significant added benefits across such a large section of the central plains, could simply not occur otherwise than through such a scheme.
13. The critical elements which make the scheme stand out include:
 - (a) The conversion of an otherwise unreliable source of water, into a highly reliable one. The allocation regimes on both the Rakaia and the Waimakariri Rivers mean that the more reliable water is already committed and is not available.
 - (b) The availability and supply of this water across a large area of the plains and to properties which (on their own) could not realistically obtain access to it.
 - (c) The ability, through the scale of the scheme and the number of properties involved, to address adverse effects in a way that the proliferation of smaller or individual schemes could not. This includes the ability, though the Trust, company and supply agreement structures, to confer real benefits and not simply to mitigate adverse effects.
14. Without a scheme such as CPW, the available water in both rivers might still be taken, but it will happen in a piecemeal fashion, at less reliability, with less efficiency and accessible to fewer properties. There will not be the ability to address many of the issues that this scheme will.

15. While the scale is large and the scope is broad, you must keep in mind that in proportion to the numbers of properties and the area of benefit, the scheme has considerable efficiencies both in terms of cost and overall environmental effects.

Adequacy of consideration of effects and level of opposition

16. No other application involving the take and use of water from these rivers has had to respond to the range of issues and the level of opposition that have been faced in this case. I set to one side (for the moment) the opposition which results from the proposed Coalgate dam and reservoir, as they are particular to this proposal.
17. The eventual taking of the remaining available water from both rivers and its likely irrigation on the upper Canterbury plains, will have many of the predicted adverse effects. The flows in the rivers will reduce, there will be intake structures and distribution canals, storage of some type and recharge of the groundwater (with increased Nitrates). The consents that have been granted (even recently) have not (either individually or collectively) been subjected to the degree of scrutiny and challenge as in this case. I understand very few of the current submitters took an interest in the recent Synlait and Ngai Tahu applications on the Rakaia and Waimakariri Rivers respectively.
18. CPW has responsibly identified a range of potential adverse effects and has engaged in far more consultation and investigation than others before it. This has helped to raise awareness of the potential effects of what is already occurring and will continue to occur, regardless of the Central Plains scheme, yet CPW is told that they are its responsibility. Further, CPW is criticised for not doing enough investigation (and consultation), and for not addressing all potential effects.
19. The reality is that the environment is a complex and dynamic one, undergoing constant change (both natural and induced). Much of this cannot be predicted or measured (even if funds were unlimited). The RMA does allow for the environment changing in response to human activity, and experience has shown that the environment (and our relationship to it) is generally tolerant to change and adapts well.
20. The RMA does not set out to resist change, even change which adversely affects the environment. There would be few opportunities for

progress if that was the case. The Act seeks to strike a balance between our aspirations, and those aspects of the natural environment which might not adapt to the change, or where severe and irreversible consequences would flow.

21. Therefore the focus of the investigation to date has been to identify the areas where change is most likely to occur and the environmental impacts, so as to reasonably inform the consent process. Every major project under the RMA faces the accusation that not enough has been done to identify, evaluate and address potential adverse effects. Even when funding is unlimited, what is done at the preparatory stages has to be proportional, and ultimately it is a matter of judgement as to whether the resources committed and the assessments undertaken up to the consent stage were reasonable in relation to the project and its potential impacts.
22. CPW gratefully acknowledges the opportunities which have been provided to engage with affected parties and to present additional material to the hearing as it has progressed.

Probability, certainty, standard of proof and risk

23. Many of the submissions and much of the evidence has sought to persuade you that the absence of certainty about the future means you must refuse consent. Even those providing advice or recommendations on behalf of the consent authorities have used phrases such as “*there is no certainty that ...*” or “*you (the Panel) cannot be certain that ...*” and “*uncertainty cannot be eliminated...*” particularly in relation to potential effects and the success of steps to avoid, remedy or mitigate them.
24. The approach is that there is an onus on the applicant to identify and assess every issue, and to do so to the standard of proof of certainty. The RMA does not, and indeed cannot, impose such a standard.
25. The discussion of this and related issues by Judge Jackson’s decision in the *Clifford Bay* case² is worth reflecting on, even allowing for his rebuff of the Court of Appeal’s judgment in *Dye v Auckland City Council*.³

² *Clifford Bay Marine Farms Ltd & Ors v Marlborough District Council* C131/2003, 22 September 2003.

³ [2001] NZRMA 513

26. There is no formal onus of proof in resource consent applications. There might be an initial onus on the applicant to show that granting consent will achieve the purpose of the Act (ie sustainable management of natural and physical resources) but the evidential burden shifts as each party asserts matters in favour of or against the grant of consent (or the designation). The exercise is primarily one of evaluation, not proof.
27. This discussion applies particularly to the assessment of future effects on the environment and measures to avoid, remedy or mitigate them. Judge Jackson drew the distinction between past or present facts (as to which proof may be possible) and judgements about possible future events and their effects “which is the principal task of decision makers under the RMA”⁴. He adopted the reasoning of the Privy Council that imposing a standard of proof is inappropriate when prophesying what might happen in future⁵.
28. The RMA does not require certainty. It recognises that certainty is seldom, if ever, possible. That is particularly so when considering the dynamics of a complex environment. Assessments of probability and consequences are matters of judgement, informed as best as can reasonably be done in the circumstances. Those include limitations on current knowledge and understanding, and the reasonableness of the steps by the applicant to unlock further knowledge.
29. Judge Jackson also rejects the application of a separately accounted-for “precautionary principle” as an unnecessary complication in the already complex statutory and factual matrix of the RMA, and would result in double-counting⁶. The Judge then sets out an extensive discussion of what he describes as “a useful approach to risk assessment”. This involves a series of steps as follows:
- Identify the risks
 - Identify the consequences
 - Estimate the probability of harm
 - Evaluate the significance of the risk
 - Undertake a comparative risk assessment

⁴ *Clifford Bay* para [58]

⁵ *Clifford Bay* para [62]

⁶ *Clifford Bay* para [67], adopting *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66

30. While not strictly following the above stepped approach, the CPW scheme architects have gone to considerable lengths to identify, assess and evaluate the risks and the means of addressing the potential adverse effects identified. There are areas where there are simply no answers, and others where the answers will only be available with the better knowledge that detailed design work, and operational experience, will provide.
31. There will always be a question of the most appropriate timing to fully detail all effects and how best to address them, relative to the granting of consent / designation. In terms of the considerable financial expenditure involved, the reality is that the funding may not be available or warranted (it is also a “resource” to be sustainably managed) until there is greater certainty (through the grant of consent) both:
 - (a) That the project has overcome the considerable hurdle of the RMA consent (and designation) processes; and
 - (b) As to the shape of the project and the requirements placed on it as the outcome of the RMA process.
32. CPW does not claim that it has done everything that will be needed to address all of the potential adverse effects, but says that it has done at least as much as (and probably more than) could reasonably be expected at this stage.
33. The information before you is sufficient to paint a reasonable picture of the adverse effects (and benefits) to enable you to grant the necessary consents to allow the project to proceed to the next stages. CPW agrees that there is more work to be done, but says this is not a reason for refusing the consents, or recommending against the designations.
34. Issues have been raised about the ability to grant consent when not all of the myriad of potential effects have been exhaustively quantified and where the steps to address them are reliant on the development of detailed design (and further studies and investigations). This would require that the consent process should be at the end of the planning and implementation of a project, rather than at an earlier stage when that planning can be informed by the RMA process, rather than determine it.

35. The standard of information that is one of reasonableness. The consent authority need only be reasonably satisfied (not “certain”) that:
- (a) The principal effects have been identified and their parameters described, albeit without precision;
 - (b) Action is available which will reasonably address those effects, subject to (d) below;
 - (c) Conditions of consent can be drawn which will result in that action being taken, subject to (e) below;
 - (d) Where effects might not be addressed to the extent anticipated, there is a sufficient margin to allow or compensate for this;
 - (e) More specific conditions can be developed through the s.128 review process in the light of the experience and knowledge gained.

Reliance of management plans

36. There are many (and at times complex) interrelationships among the various elements that make up the scheme, and the environments within which it will be built and will operate. A scheme as large and extensive as this cannot be designed, built or operated according to an exact, predetermined plan. Many factors will contribute to the eventual outcome, not least of which is this current process. The advantage of not setting everything in stone beforehand has been amply demonstrated at this hearing, with the flexibility to adjust aspects to accommodate various (often competing) issues and interests. To have presented a particular design of the scheme as final and inflexible was neither realistic nor appropriate.
37. There is nothing in the RMA which precludes resort to and reliance upon management plans as a suitable method of implementing the Act’s purpose of sustainable management. Indeed, s.5 uses the term “*managing* the use, development and protection of ... resources”. The requirement to obtain resource consents and the imposition of restrictive conditions is not the exclusive tool by which this management can occur.

38. Reference to the principles of *ultra vires* such as in *Turner v Allison*⁷ is misplaced. The management plan process is not a delegation of the Councils' powers to grant or refuse consent, or to impose conditions. CPW say that you can grant the consents, knowing that there will (or may) be adverse effects and leaving for subsequent detailed design and implementation how they are best avoided, remedied or mitigated. It is not the role of a council, in the exercise of its consent authority functions under the RMA, to concern itself with the detailed design, supervision and operation of projects that come before it for consent: *Walker v Manukau City Council*⁸
39. Nor does it have to be satisfied that every effect can be avoided, remedied or mitigated as the result of conditions imposed. It is known that there are likely to be adverse effects and that there are different ways in which they might be addressed. There is no principled basis for an assertion that one particular way must be selected and precisely determined in advance of the consent being granted and then imposed through an inflexible condition.
40. Where an effect (or the control of it) is capable of quantification, then conditions can be imposed which set quantitative limits. In some cases it can be left to the consent holder to design and build the project so as to comply with those limits (ie envelope of effects). It may be desirable (but not always necessary) to require the consent-holder to furnish plans to demonstrate the method(s) by which that compliance will be achieved.
41. However, effects can be more qualitative in nature. They cannot always be predicted with such certainty as to enable the applicant to propound, and the consent authority to impose, a single means of addressing those effects to a level of detail that might be required for an "enforceable condition". If the absence of certainty and enforceability meant that consent should be declined, progress beyond what is completely within our present knowledge and understanding could never occur.
42. The ability to adapt to changing circumstances and take advantage of the increased knowledge obtained as the project progresses through the stages of design, construction and operation is of real advantage. In this case that advantage will apply not just to this project, but to a wider

⁷ [1971] NZLR 833

⁸ C 213/1999, Judge Skelton

understanding of the environment within which it will operate and which is already subject to other influences, and its responses to change.

43. There is no particular meaning to attach to the terms adaptive management or management plan. They are used to describe a variety of types of approach to the type of flexibility required in addressing the issues covered.
44. The term “adaptive management” used in a general sense describes a technique by which information and experience are accumulated and used to revise the management strategies and responses. This can apply where the full extent of potential effects is unknown. It is not limited to situations where the grant of consent can be revoked and the status quo restored if the results are not as predicted.
45. In *Rotokawa Joint Venture Ltd & Ors v Waikato Regional Council*⁹ the approach taken to conditions was described as one of “adaptive management” and was because of uncertainty as to future effects:

The conditions are drafted in a way that contemplates monitoring and information gathering so that informed decisions can be made. They enable flexibility to appropriately respond to a range of trends and effects.¹⁰

46. In *Clifford Bay* the approach was taken for precautionary reasons, and the Court adopted a definition of “adaptive management” as an experimental approach using systematic testing rather than random trial and error:

Adaptive management is most useful when large, complex ecological systems are being managed and management decisions cannot wait for final research results.¹¹

47. There is no statement in the authorities that management plans are not permitted (or that they are discouraged) in consent processes under the RMA. In the recent TrustPower’s Wairau River hydro scheme consents “management plan” conditions were used extensively¹². There are numerous examples; they are a common technique. There is no evidence that they are unreliable or do not work. Experience suggests the opposite. The point not to lose sight of is that no amount of legal enforceability will outweigh the professionalism and integrity of the consent holder and developer.

⁹ A 41/2007, 18 May 2007, Judge Whiting

¹⁰ Para [50]

¹¹ *Clifford Bay Marine Farms Ltd v Marlborough Regional Council* (C 131/2003, 22 September 2003, Judge Jackson), para [151]

¹² See attached, esp condition 41

48. There is direct precedent in the RMA for the use of management plans or their equivalent - "outline plans" - in designations. Section 171 in relation to designations requires consideration of "the effects on the environment", as does s.104, in relation to consents. Section 176A contemplates that, subsequent to the decision, there should be an "outline plan" submitted to the council. This is to include detail of "matters to avoid, remedy or mitigate any adverse effects on the environment". There is no further process of public or affected person participation in any approval of that plan.
49. The use of management plans in the case of resource consents is not materially different in concept to the use of outline plans to address the same issues in relation to designations. It cannot therefore be argued that all effects and the means to address them must be known and controlled by the time of the hearing, and through conditions imposed.
50. It is accepted that the use of management plan conditions as a tool can introduce some uncertainty, but certainty is not paramount, for the reasons already discussed. There is also validity in the point that a management plan condition should identify the objectives of the plan so as to result in the purpose of the condition being achieved. There are several considerations in that regard:
- (a) The process of management planning is, in itself, a valid methodology to impose through the resource consent/designation process. In other words, the consent should be exercised according to a structured planning process;
 - (b) Better solutions can be achieved through a management plan flexibility than through rigid conditions in areas of particular expertise;
 - (c) A statement of objectives can be identified, albeit that it may be at a level of generality which has limited value. The detailed objectives themselves may be better worked through as part of the management plan process itself.
 - (d) The management plan methodology is supported by the availability of a s.128 review. Uncertainty of the outcome of the management plan process (particularly if objectives are ill-defined) can be a

reason for deferring until later review the “final” resolution of effects more appropriately addressed at the conclusion of the process.

51. Conditions can be imposed requiring the consent holder to adopt the best practicable option (“BPO”) to prevent or minimise adverse effects. While this is expressly in relation to the discharge of contaminants - s 108(2)(e) – it is not limited to those consents. It indicates an acceptance by the RMA that prescriptive conditions are not always the right answer.
52. Section 128 also provides, as an important tool in the process, the ability to review conditions of consent for the express purpose of dealing with adverse effects which it is appropriate to deal with at a later stage. It explicitly contemplates that the consent authority may grant consent without the knowledge or certainty that would enable precise conditions to be imposed at the outset.

Conditions generally

53. In relation to the designations it is appropriate to note again s.176A which specifically contemplates that steps to avoid, remedy or mitigate adverse effects are to be the subject of detailed provision in the as yet undeveloped outline plan. It cannot therefore be asserted that the potential effects of the designation must be covered off by detailed conditions at this stage.
54. In relation to those conditions which involve management plans or their equivalent, the objectives of the plan can be stated with reference to the effects to be avoided, remedied or mitigated. As a general approach, the conditions can be expressed as requiring the (development and) implementation of the best practicable option for dealing with the particular issue or effect. The review condition under s.128 can expressly require a BPO review in the case of discharge consents¹³. It can be worded so as to allow such a review in relation to other consents, on the basis that (having regard to the reason for the management plan / BPO condition in the first place) it is “appropriate to deal with the adverse effects at a later stage”¹⁴.
55. Note that s.128(1)(iii) allows there to be a review “for any other purpose specified in the consent”. Such a purpose can be linked to the outcome

¹³ Section 128(1)(a)(ii)

¹⁴ Section 128(1)(a)(i)

of the management plan or BPO process, to ascertain whether any more detailed consent conditions are required.

56. Two particular issues warrant consideration of this approach and are not dealt with elsewhere in this outline. One of the concerns is the provision of fish screening at the intakes. It is appropriate to specify a condition that CPW adopt the BPO to develop and implement a design which, either on its own or in combination with other measures will avoid unreasonable fish losses through the intakes, with the back-up of a s.128 review after that process to assess the reasonableness of the measures proposed.
57. In the case of kayak safety at the intakes, the condition can likewise be expressed as requiring a BPO to be developed and implemented, with the objective of ensuring that the Waimakariri River does not reduce its safety rating as the result of the intake structure and associated works.
58. An issue has been raised about the legality of the dispute resolution proposals on relation to groundwater effects. This methodology was approved by the Environment Court in *Alexandra District Flood Action Society Inc v Otago Regional Council*¹⁵.

Waimakariri River Regional Plan

59. Despite what has been said in the hearing, it remains CPW's position that issues relating to the consent to take water from the Waimakariri River are limited to the restricted discretionary activity criteria in the WRRP. CPW rejects that the concept of "bundling" applies so as to render this activity fully discretionary or non-complying, and also rejects the submissions and evidence seeking to persuade you that the flow regime should be rejected and the Plan ignored.
60. The Plan became operative in 2004, following an extensive and detailed process including full public participation. All of the individuals and groups now seeking to undermine the Plan were involved or had the opportunity to participate. It must be assumed that the issues expounded on at length before this hearing were raised and considered. There is no claim of new and important information having come to light which would render the Plan obsolete, but even if there was it is not your task to rewrite it. This hearing is by the author and administrator of the

Plan (i.e. Environment Canterbury). This is your council and your community speaking through its Regional Plan, which is a living document. Section 84 RMA requires you to observe the Plan, and to apply it.

61. Clause 1.2 states that the Plan's purpose is to promote the sustainable management of the river and other related features in the catchment.

"... the Plan addresses the issues of ... (a) competition for the use of water in the Waimakariri River ..."

Whether it achieves its purpose or fails to address the issue are not matters that can be questioned in this hearing.

62. Issue 5.1 identifies that there are competing demands for the use of water in the River, and expressly recognises

"fishers and other recreational users; those who value the water for its natural character and life-supporting capacity, and Tangata Whenua ..."

63. Chapter 5 recognises that water lakes, diversions and uses need to be managed to enable people to appropriately use the resource while supporting the River's life supporting capacity and other instream values.

64. These statements lead into Objective 5.1 being to enable people to gain cultural, social, recreational, economic health and other benefits while *"... maintaining and enhancing amenity values"*.

65. The Objective recognises that people obtain these benefits from the rivers and other features in the catchment. This Objective is supported by Policy 5.1 being to:

"set and maintain water flow, water level and water allocation regimes and control the taking, use, diversion, discharge and damming of surface water ... so that ... (b)(i) the braided character of the Waimakariri River, aquatic ecosystems and habitats ... amenity based on the river ... are protected."

66. The explanation recognises the recreational fisheries and ecological values are outstanding features of the River, and states:

"setting minimum flows will protect instream values of rivers."

67. The principal reason is:

"To maintain minimum river flows to protect instream and other values and to efficiently and equitably allow abstractors to use water within these catchments."

¹⁵ C 34/2007, 30 March 2007, Judge Jackson

68. Rule 5.1(i) prescribes as a “restricted discretionary activity”, below Woodstock, the *taking of any surface water* of the Waimakariri River. For B-permit water, the activity status applies a minimum “*unmodified*” flow of 63 cumecs. The terminology used may require some clarification, but under the usual rules of statutory interpretation (and allowing the tolerance extended to Plan drafters) the intent of the flow description is not difficult to discern.
69. The matters to which the Council’s discretion is restricted, in the case of surface takes are:
- (a) The reasonable need for the quantities sought and the ability to abstract and apply those quantities;
 - (b) The availability and practicability of alternative supplies;
 - (d)(i) The effects the take has on river flows and consequential effects on those values identified in (a) to (h) of Objective 5.1, *near the point of take*;
 - (d)(ii) the effects on other authorised takes.
70. Rule 5.2 prescribes as a discretionary activity the diversion of water from, and the discharge of water into, the River (or its tributaries or wetlands). Other associated activities are also fully discretionary.
71. Every take of water from the river must also involve a diversion and/or some of the other activities described as discretionary. It cannot be that by prescribing these other activities as discretionary, the Plan intended that every “*taking*” would, on that account (by application of the principle of “bundling”), be rendered fully discretionary. Such an outcome is patently not in accordance with the intent of Rule 5.1 and the scheme of the Plan.
72. Rule 5.4 states that implementation of the water policies and methods is expected to have all of the following environmental results:
- “(2) Protection of the braided character of the River;
 - (3) Sufficient depth of water and sufficient flow to maintain the fisheries, wildlife, wetlands and recreation associated with rivers in the catchment; and
 - (6) Efficiency in use of water.”

73. Appendix 3 provides an overview of the main aquatic values. In relation to the Waimakariri River below the Kowai confluence it identifies aquatic birds and fish species, significant habitat and the range of recreational and sporting amenity values. All of the in-stream values which were the subject of submissions and evidence before you were taken into account in the preparation of the WRRP.
74. Some only of the submissions and evidence in opposition to the proposal (and in the s.42A assessments) was directed to the matters in (a) – (h) of Objective 5.1 at and “*near the point of take*”. The witnesses mainly referred to effects down-river of the reduction in flow. Those considerations are irrelevant.
75. The taking of water (i.e. abstraction per se) is a restricted discretionary activity and is to be assessed under s.104C RMA:

When considering an application for a resource consent for a restricted discretionary activity a consent authority

(a) must consider only those matters specified in the plan ...to which it has restricted the exercise of its discretion;

(b) may grant or refuse the application;

(c) if it grants the application may impose conditions under s 108 only for those matters ... over which it has restricted the exercise of its discretion

Activity status – so called “bundling”

76. The argument is advanced by many of the submitters that every aspect of the proposal for which consent is required should be treated as a “non complying” activity because (they say) some of the consents are for a non-complying activity. The advice to Selwyn District Council is that the principle (if it applies at all) applies only as among the consents required from the same consent authority. That is undoubtedly correct, and Asher J in *Tairua Marine* did not hold otherwise.
77. There is confusion about the principle sometimes referred to as “bundling”. The question is not whether various aspects of the proposal are interdependent, but whether their *effects* overlap to such a degree that it is artificial to separate them.
78. The argument put forward is that because no irrigation will occur unless water is first abstracted from the rivers, then those two aspects are

interdependent and all consents are to be bundled together. That is too simplistic and ignores the principled reason for the concept of bundling.

79. In this case there is no necessary relationship:
- (a) Irrigation could occur if water was taken from only one river or from groundwater.
 - (b) Irrigation could occur if there was no dam and reservoir.
 - (c) The taking of water from either or both of the rivers could be for purposes other than irrigation.
 - (d) The dam and reservoir could be for purposes other than irrigation
 - (e) There is nothing about any of the other aspects of the scheme that has an effect on the instream values of the River beyond the immediate vicinity of the take.
80. It is entirely appropriate to compartmentalise the various aspects of the overall proposal, especially as they may occur many kilometres apart, and have effects of entirely different characters in unrelated surroundings.
81. The case-law has been addressed in submissions by Fish & Game at paras 5.22 ff. Counsel there asserts that there is “*no scope for hybrid planning status for [this] proposal*”, but the case law to which she refers does not support her submission.
82. Counsel drew attention to *Southpark*¹⁶, as do I. This decision followed soon after the judgments in *Body Corporate 97010 v Auckland City Council*.¹⁷ In *Southpark* Judge Sheppard noted that while the pre-RMA approach in *Locke* remains generally applicable and a proposal can be considered in the round rather than being split “artificially” into pieces, that approach is not appropriate where one of the consents is for a controlled or discretionary activity.
83. Whatever the status of the other consents required to give effect to the CPW scheme, so far as the *taking* of water from the Waimakariri River is concerned, it is classified as a restricted discretionary activity, and the

¹⁶ *Southpark Corpn Ltd v Auckland City Council* [2001] NZRMA 350

¹⁷ [2000] NZRMA 202 (High Court); [2000] 3 NZLR 513 (Court of Appeal)

Regional Council has restricted the scope of its discretionary judgment so far as in-stream effects are concerned, to those “near the point of take”.

84. None of the other consents impact on in-stream values, except those required for intake structures and river works, where the effects are also localised, i.e. near the point of take.
85. Rules in a District (or Regional) Plan have the status of statutory regulation (s.76(2)) and are to be interpreted according to the usual principles of statutory interpretation. The WRRP specifically describes the abstraction of water from the Waimakariri River as a restricted discretionary activity. Other activities associated with (and usually necessary for) the abstraction of water are fully discretionary. The Plan cannot be interpreted in such a way that renders meaningless the deliberate intention that abstraction per se should be assessed against restricted criteria. The application of a bundling approach would result in abstraction always being full discretionary and would render nugatory the clear purpose and intent that abstraction per se is to be treated separately.
86. It is clearly a situation where the Plan intends that the abstraction or “take” consent is split from the other consents. There is no artificiality about this result. Reduction in water flows beyond the immediate area of the point of take are therefore not able to be taken into consideration.

Can the Plan be ignored or rewritten?

87. In *Discount Brands Ltd v Westfield (NZ) Ltd*¹⁸ Elias CJ in the Supreme Court said at [10]:

“The district plan is key to the Act’s purpose of enabling “people and communities to provide for their social, economic, and cultural wellbeing”. It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.”

88. This is equally applicable to a Regional Plan when the matter for consent is within the jurisdiction of the Regional Council as consent authority.

¹⁸ [2005] 2 NZLR 597 (Supreme Court)

89. In *Matukituki Trust v QLDC*¹⁹ the High Court said at [80]:

“When exercising s 104 powers in respect of discretionary activities governed by operative provisions of a plan, the plan itself can dictate what are adverse effects for the purposes of the RMA. ... It needs to be kept in mind that an operative plan is the product of Part 2 analysis and is beyond challenge.”

90. It has been suggested in submissions that these statements do not mean what they say or have somehow been watered down by the decision of the High Court in *Unison Networks Ltd v Hastings District Council*.²⁰ In that case Potter J found that there was no error of law by the Environment Court when it found an area to be an “outstanding landscape” when it was not specifically identified as such in the District Plan. The activity for which consent was sought (a wind farm) was non-complying, so had no recognition in the District Plan.

91. Potter J observed that in the evaluation required by s.104, the requirement to “have regard to” the matters listed in clauses (a) to (c) of s.104(1) is subordinate to Part 2. She agreed with Fogarty J’s view in *Wilson v Selwyn District Council*²¹ that this qualifier enables the consent authority:

To form a reasoned opinion that upon scrutiny the relevant provision does not pursue the purpose of one or more of the provisions in Part 2, in the context of this application for resource consent.

92. However neither Potter J in *Unison* nor Fogarty J in *Wilson* supported the notion that the District Plan could be disregarded or rewritten through the consent process. Indeed, as Fogarty J held, the issue which can arise is whether Part 2 is not satisfied “*in the context of this application*”. Similarly, Potter J in *Unison* referred to the context being the consideration of the “specific proposal”²². Neither case is authority for the principle that in the context of a specific proposal a whole premise of the Plan’s application generally can be overruled.

93. The argument put forward by submitters here is that the WRRP fails to satisfy Part 2 because of its allocation regime being based on a minimum flow regime held to be sufficient to accommodate instream values beyond the area near the take. This is not an issue specific to this application, but is an attack on the whole scheme of the Plan.

¹⁹ High Court, Christchurch CIV 2006-462-733, 19 December 2006, Fogarty J

²⁰ High Court, Wellington CIV 2007-485-896, 11 December 2007, Potter J

²¹ [2005] NZRMA 76

²² *Unison* para [92]

94. Submitters have sought to persuade you that you should renounce the WRRP in favour of a different regime altogether. You simply cannot do this, and nor should you. There can be no mandate for doing so, and the two cases above do not provide authority for it.
95. As the Supreme Court (and other Judges) have emphasised, the Plan (Regional or District) is arrived at after an inclusive, thorough and wide-ranging process in which all interested parties and sector groups participate. The hearing of a resource consent application is limited to the applicant and those with an interest in the outcome of the application. You do not have the range of considerations before you that have informed the Plan and which would be required for the Plan to be substantially modified, which is what has been called for here.
96. Other prospectively affected persons and the community at large have assumed that their rights and interests are governed by the Plan, and to order their lives accordingly. For the take consent to be refused or qualified so as to reflect a desire to re-write the Plan, will impact on those persons.
97. A relevant example in this case would be a shareholder of CPW. Believing that the WRRP has (as recently as 2004) established a regime for the allocation of water as between abstractors and in-stream amenity values, that person can be expected to have made an informed and reasonable choice about whether to join the scheme (at significant cost). His options were to go it alone (if he had known that by joining a large scheme he would be subjected to an altogether new and unexpected constraint which he would not have been subject to on his own – e.g. Ngai Tahu), or do nothing (because even after all the time and effort put into the Plan it has no status), and keep waiting because no investment in the future could be justified in the face of such uncertainty.
98. The effect of the regime now being suggested, to result in a consent which excludes a shareholder from access to water which (if he had gone alone) he could have obtained, is demonstrably unfair. Even more unfair is that a subsequent applicant can steal a march by obtaining consent to abstract water which the Plan says is available but which the consent requires CPW not to take.

99. The position is demonstrated by the grant of consent to Ngai Tahu Properties Ltd. There appears to have been no contention then (nor in any other case) that the WRRP breaches Part 2 and should be ignored or rewritten.
100. The High Court has confirmed in *Auckland City Council v John Woolley Trust*²³ that in the case of a restricted discretionary activity, the consent authority may have regard to Part 2 matters favouring the *grant* of consent, but may not take them into account as reasons for refusing consent if to do so involves overriding the limitation in s.104C. Equally, resort cannot be had to Part 2 to impose conditions which would override the restriction.

Summary in relation to take and quantities

101. CPW's position is that the flow regime in the WRRP should be implemented in accordance with the Plan, and the CPW scheme should be permitted to take the available A Permit water (provided priority over NTPL is retained) and the instream effects other than near the point of take can be treated as having been accounted for by the regime.
102. If the Panel takes a different view about activity status, you must still have regard to the Plan and the regime it implements. If you consider that Part 2 considerations allow you to override the Plan's regime, and that the effects of this consent require modification to that regime, CPW has proposed a method of flow sharing to address some of those effects. This is not put forward by way of variation to the application, but as a fall-back in the event that the above arguments are not accepted.

Rakaia River

103. There were few challenges to the take consent for the Rakaia River. The National Water Conservation (Rakaia River) Order 1998 is generally regarded as an acceptable take regime, and no-one presented a case which seriously challenged its application, either legally or factually.
104. Regulation 9(2)(a) requires that any discharge into the River is "to be substantially free from suspended solids, grease, and oil". CPW seeks consent to discharge back into the River water which has been diverted, but not taken (CRC061980), and which will include sediment sluicing

(and thereby contain suspended solids). The issue is whether this is a breach of the NWCO.

105. Pursuant to s 5 Interpretation Act 1999 the Order is to be interpreted according to the principle that “the meaning of an enactment must be ascertained from its text and in the light of its purpose”. That purpose may be gleaned from the Order itself, but also from s 199 RMA which states the purpose of water conservation orders generally. It is (*inter alia*) to “recognise and sustain ... outstanding amenity or intrinsic values which are afforded by waters in their natural state”. An Order may provide for the preservation of water in its natural state and for the protection of characteristics considered to be outstanding: s 191(2)(a).
106. What is proposed here is the return to the River of the naturally occurring sediment which is an unwanted by-catch of the water abstraction. The turbidity of the River is part of its natural state and is a particular characteristic of this and other comparable rivers.
107. As to the text, applying the *ejusdem generis* principle of interpretation, the rule is apparently directed at avoiding the introduction into the River of externally generated contaminants. Suspended solids, when read together with grease and oil, suggests that it is not intended to apply to sediment naturally occurring within the river, and being returned to it after a temporary diversion.
108. It is also relevant that the rule is qualified by the term “substantially” free of suspended solids. In the context of the return of the River’s natural sediment, this qualification should be applied in a purposive way. If the River itself is the source of the sediment then its return as proposed is “substantially”, in the sense of comparatively, free. This is clearly so if the River is in a turbid state at the time of the sediment sluicing, and applies even if the turbidity has receded at the time the sediment is returned.

²³ [2008] NZRMA 260

Reasonably necessary – s.171

109. Section 171 requires consideration of the effects on the environment of allowing the requirement, having particular regard to (summarised):
- (a) relevant provisions of national, regional and district planning instruments.
 - (b) whether adequate consideration was given to alternative sites, routes or methods of undertaking the work, if
 - (i) the requiring authority does not have a sufficient interest in the land or
 - (ii) adverse effects on the environment likely to be significant.
 - (c) whether the work and designation are “*reasonably necessary*” for achieving the objectives of the requiring authority for which designation is sought.
 - (d) any other matter considered reasonably necessary to make a recommendation.
110. As observed by Judge Sheppard in *Bungalo Holdings Ltd v North Shore City Council*²⁴ “necessary” falls between expedient and desirable on the one hand, and essential on the other. “Reasonably” qualifies necessary, so as to allow some tolerance.
111. There is similar wording in s 24 Public Works Act 1981 where the Environment Court (on an objection to a compulsory taking) must be satisfied that the taking is “fair sound and reasonably necessary” for achieving the objectives of the relevant public authority. An important difference is that the requirement in s 24 PWA is a necessary pre-requisite to the taking, whereas under s 171 RMA it is a matter to which particular regard must be had, but is not obligatory.
112. In *Kett v Minister for Land Information*²⁵ the High Court rejected an argument (in a challenge to a PWA taking) that the taking could not be “reasonably necessary” while Transit had yet to finalise the intended route and design for its proposed motorway extension.

²⁴ A 52/01, 7 June 2001

²⁵ High Court, Auckland AP404/151/00, 28 June 2001, Paterson J

113. At [44] there is a reference to the several prior changes of alignment leading to different land requirements, and to those changes having been contemplated by the designation (which had covered a wider corridor to allow flexibility).
114. Also under challenge was Transit's claim to take an area of land required only indirectly, to provide access to surplus land. The High Court upheld the finding that such a taking was also "fair sound and reasonably necessary": [77]. The test imposed is not a high one, even in the case of a compulsory taking.
115. As to the requirement being related to the objectives of the requiring authority, the issue has been raised that the stated objectives do not specify a particular reliability, against which the question of what is "reasonably necessary" can be assessed. This is to place too strong a meaning on the term and on s 171. The objectives of the requiring authority cannot be stated with such particularity that the outcome is thereby predetermined, either for the purpose of s 171 RMA or s 24 PWA.
116. The objective is therefore usually a high-level statement of general intent, not a detailed description. This is demonstrated in the Transit cases – Transit does not specify in its statement of objective the safety or performance standards proposed for the particular highway.

Whether the work and designation of both the upper and lower Waimakariri intakes are "*reasonably necessary*".

117. The argument has been raised that because the CPW scheme can operate with either (and not necessarily both) of the proposed Waimakariri intakes, then neither of them can be said to be "reasonably necessary", and/or CPW must make an election.
118. The substance of this argument is that a requiring authority must have finalised its choice of site, route or method before any designation can occur, and that it cannot protect and provide for, by way of designation, an alternative in case its first choice falls over. There is no authority for this hard-line approach and it does not accord with cases such as those involving Transit's highway designations. Nor is it consistent with the purposes of the designation process.

119. The logical conclusion to the argument is that where two (or more) routes or intakes are identified as suitable, neither of them can be said to be reasonably necessary because in each case, the other is available.
120. The “work” is the construction and operation of intake and related works. With Transit it is the building and operation of a road, in the case of Transpower a series of pylons and power lines. There is no dispute that such a work must occur, somewhere, and so is reasonably necessary. For present purposes it is assumed that there is no argument that a designation is also reasonably necessary, at least for one intake. There has been no argument to the contrary.
121. In *Kett* (above) the designated corridor was wider than would be required to accommodate a single alignment, for the reason that Transit had yet to decide on the preferred alignment and required flexibility. It is clear from this and other cases that the test of “reasonably necessary” is not a hard-line test, and there is no requirement for the requiring authority to have settled on a final route before designating to protect its options. How far that designation can extend and what degree of flexibility is “reasonably necessary” are to be informed by the Act’s purpose of sustainable management, in the circumstances of the particular case.
122. The consent authority cannot decide for the requiring authority which of two alternatives it must pursue. The requiring authority may have valid reasons to extend the area of its designation to accommodate the flexibility reasonably necessary, while further investigation and design are carried out before a final decision is made. It is apparent that Transit does this in relation to corridor width, and the only difference here is that the areas required for the flexibility are not contiguous.
123. What is “reasonable” also requires consideration of the purpose and effect of a designation. There are two direct purposes and some indirect purposes and consequences.

Directly:

- (a) To put in place provision which will permit the activity to occur within the designated area;

- (b) To restrict other activities occurring within the designated area which would be in conflict with the activity (except with the consent of the requiring authority);

Indirectly:

- (c) To be included in the District Plan and so provide notice to the community that the area is designated and not fully subject to other provisions of the Plan;
- (d) To confer certain entitlements on the owners/occupiers of the affected land.

124. There is nothing in these purposes (and consequences) which would suggest a restrictive approach is required to what is reasonably necessary when there are sound reasons for designating more than will ultimately be required, so as to retain flexibility. It is clear from the cases that this is a legitimate purpose, more so in the case of a designation than compulsory acquisition.

125. Section 185 RMA provides for the Environment Court to order the requiring authority to acquire the land. This applies where the owner (at the time of designation) has been unable to sell the land at market value but for the designation.

126. Section 71 PWA provides for the Environment Court to overrule a refusal by the requiring authority to the owner establishing a conflicting use on the land.

127. "Planning blight" is a misconceived concept in relation to privately owned designated land. There may be constraints on the use that can be made on some parts of the designated land but most of it is farmland and its continuing use is not restricted by the designation.

Acquisition and compensation under Public Works Act 1981

128. Aspects of the proposal will involve land which CPW does not currently own or have an interest in. It must either obtain the land (or interest) by agreement, or by compulsion under the PWA (via s.186 RMA).

129. The acquisition of the land does not constitute an adverse effect on the environment, and is not a matter constrained or controlled through the

designation or resource consent process. There is a separate regime under the PWA both as to the taking and as to compensation.

130. The project will not proceed unless the required land (or interest) has been acquired. The owners will be compensated, either by agreement or pursuant to the compensation provisions of the RMA. It is not the function of this hearing to assess the adequacy or otherwise of compensation. Nor is it a relevant consideration that the land (or interest) may be taken compulsorily.
131. The only matter of overlap is under s.171(1)(b)(i) RMA. This states that where the requiring authority does not have an interest in the land you must have particular regard to “whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work”. That requirement also applies where the work is likely to have a significant adverse effect on the environment. There is no restraint on granting resource consent over land currently owned by someone else, only a requirement that if the application is to be notified, the owner is entitled to be served²⁶.
132. Designation is not a pre-requisite to compulsory acquisition, either under s.186 RMA, or the PWA. A requiring authority (or Government agency) can exercise the power of acquisition at any time, and can rely on resource consent(s), rather than a designation.
133. The grounds for challenge to compulsory taking under the PWA include²⁷:
 - The adequacy of the consideration given to alternative sites, routes or other methods;
 - Whether it would be fair, sound, and reasonably necessary for the land to be taken.
134. A determination of the similarly worded issues under s.171 RMA, in the context of the designation process, is not determinative under the PWA. They are assessment criteria only under s.171, whereas under the PWA they are pre-requisites to the taking.

²⁶ Reg 10(2)(b) Resource Management (Forms, Fees and Procedures Regulations) 2003

²⁷ Section 24(7) PWA

135. Part 5 PWA provides a comprehensive code for compensation. It includes where land is taken for a public work or suffers injurious affection as the result of the taking of other land. The principle is that the person whose land is taken should be fully compensated.
136. The PWA provides for payment of the market value disregarding any influence of the work for which the land is acquired, and additional compensation including:
- Disturbance payment (i.e. costs associated with acquiring and relocating to alternative land).
 - Any loss on repayment of mortgage.
 - Business loss resulting from relocation.
 - A solatium where the land contains a dwelling.
 - Loan assistance if the compensation is insufficient to acquire a reasonably equivalent replacement.
137. There is no factual evidence that compensation under the PWA will be inadequate. The power to acquire land and the concomitant right to compensation are the result of the balancing of rights and interests in a complex society, which is addressed through the PWA and not through the RMA.
138. CPW acknowledges that the land itself, and the environmental features on it, may be adversely affected by the scheme. However, the impact on the owners of that land is not relevant. The simple point is that they will not own the land when the works are carried out.
139. CPW has not sought to designate the distribution network, but instead to apply for the necessary resource consents and to negotiate with land-owners for access. The question was raised during the hearing whether CPW would undertake not to use its powers to acquire land compulsorily for the distribution canals.
140. CPW's position is that it will not seek to have the Minister acquire land or any interest in land for an open canal on its distribution network. However it reserves its right to seek to do so for a piped system in the event that it can find no suitable alternative route for the distribution network.

Impacts on Coalgate township and residents

141. The effect of the proposal on those residents whose properties will be acquired for the scheme are not relevant, for the reasons stated above. CPW acknowledges that the other Coalgate residents will be affected to varying degrees, both during the construction period and subsequently. CPW identified at an early stage, the need to work with the community to identify the more serious potential affects and how these might be dealt with. Unfortunately, the process has been impeded by the entrenched opposition to the project from vocal opponents within the community, and you have heard from them.
142. One can understand and sympathise with those members of the Coalgate community (and especially those in the Wainiwaniwa Valley) who see the scheme as highly detrimental to their personal interests and as offering them no direct benefits. Their opposition, and its strident expression, are not of themselves an effect and the issue is what actual and potential effects are likely, and how can they be avoided, remedied or mitigated. The Panel will have an understanding of the difficulties faced by CPW obtaining relevant and meaningful information through its attempts to engage with some of the community.
143. The willingness of CPW to engage with the community and address its concerns in a co-operative manner remains undiminished, and it will work both with the opponents and the (apparently more numerous) residents who do not see the proposal so negatively. In terms of effects, the refusal by individuals or sections of the community to engage co-operatively, and thereby allow effects on them to be assessed and avoided, remedied or mitigated, is a relevant consideration under s.104(1)(c).
144. Experience shows that people and communities are adaptable and that once the dust settles, it can be expected that there will be greater acceptance of the scheme and recognition that benefits can occur.
145. The main effects of relevance will be the disturbance during construction activities and the continued presence of the dam behind Coalgate. As to construction, there are ways in which these effects can be avoided and mitigated. There are trade-offs between the duration and intensity of effects, such that there should be flexibility in how these are managed.

146. There is a concern that the noise standards are considered inadequate, especially in relation to night-time noise. The noise standards have been developed after extensive review and are used throughout New Zealand. There is no evidence that they are inadequate or that if those standards are observed adverse effects will occur.
147. As to the dam, the visual effects are acknowledged and the opportunities are limited, given the constraints on planting on the dam face itself. However the dam will be of natural materials and will be grassed. Planting in front of the dam will also reduce the impact.
148. Concerns about the safety of the dam are understandable, but require a consideration of actual, rather than perceived, risk. The evidence is that the risk to life is at the very lowest (falling between lightning strikes and major natural events), and is orders of magnitude below the risks accepted in human activities²⁸.
149. As in *Shirley Primary School v Christchurch City Council*²⁹ community concerns about a perceived risk are not an adverse effect unless there is an actual risk on which the concern can reasonably be based.

Tangata Whenua

150. Two issues identified as of concern and not dealt with elsewhere in this outline are the effects on the Te Waihora and the potential effects on sites of cultural significance. It is acknowledged that Tangata Whenua also have an interest in the fate of the Kowaro / Canterbury mudfish and instream values in the Waimakariri and Rakaia Rivers.
151. The effects on Te Waihora are a consequence of the increase in groundwater from the increased irrigation and recharge of groundwater in the CPW area. There is also some potential for increased Nitrate (quantity but not concentration) in the groundwater and thence into the Lake. In the next section I argue that Nitrate is an irrelevant effect of these consents, but for present purposes have assumed that it is an effect.
152. The reality is that Te Waihora is already a highly modified environment as the result of historical and current land use practices unrelated to

²⁸ Richard Davidson evidence

²⁹ [1999] NZRMA 66

CPW, and this situation does not seem likely to change in the foreseeable future. Assessment of adverse effects requires that the environment is taken as it exists, not as we (or Tangata Whenua) would like it to be.

153. The effects on Te Waihora from the CPW scheme will not be significant, either on their own, or cumulatively. The additional groundwater is addressed by opening the lake perhaps once more per year.
154. As to the cultural sites, CPW has identified the issue and has addressed it in evidence and in proposed conditions. It has not been practicable to undertake a full survey and the proposal is to manage effects through the design and construction phases.
155. No site can be destroyed or modified without consent under the Historic Places Act. This legislation is specific and overrides the general RMA. You cannot predetermine (or predict) the outcome of any application under that Act.

Remote effects not relevant

156. There is a limit on how proximate to the consented activity the potential adverse effects must be to rank for consideration in the consenting process. This issue was addressed directly in *Cayford & Hamilton v Waikato Regional Council*³⁰ involving the pipeline to supply water taken from the Waikato to augment water supplies in Auckland. The consents related to taking water from the river and construction of the pipeline.
157. Dr Cayford and Mr Hamilton sought conditions to deal with the quality of the water for its end-use, on the basis that the water contained contaminants and if not properly treated would have adverse effects on peoples' health and on horticulture. Dr Cayford also argued that the increased supply of water would add to the loading of the wastewater treatment plant, and to its discharges.
158. The Court held that these effects were possible, but not inevitable, and were "independent of the activity of taking water from the Waikato". It referred to the earlier *Aquamarine*³¹ case and others and, held that:

³⁰ A 127/98, 23 October 1998, Judge Sheppard

³¹ *Aquamarine v Southland Regional Council* (1996) 2 ELRNZ 361

regard is to be had to direct effects of exercising the consent which are inevitable or reasonably foreseeable, and also to effects of other activities that would inevitably flow from the granting of consent, but that regard is not to be had to effects which are independent of the activity authorised by the consent.

159. Following the principles so deduced, the Court then held:

the potential effects of the use of the water to be taken due to contaminants in the water are not adverse effects on the environment of *allowing the activity*.
(*emphasis original*)

160. The activities for which consents are sought in this case do not include the use of the land which will be irrigated. It is not inevitable that the land will be used in a particular way, and any such use is independent of the activity for which consents are sought.

161. The fact that the activities for which consents are sought will enable consequential activities is not the test. The enabling of people and communities to provide for their wellbeing is the fundamental purpose of sustainable management. The activities they undertake to achieve this wellbeing are independent of the activities for which consent may have been required to enable it.

162. In the *Cayford* case, the Waikato pipeline would enable all sorts of growth and other activities in Auckland, many of which could have adverse effects (not simply on the wastewater loading), and while a consequence of the water from the Waikato, these would be too remote from that activity to be taken into account as adverse effects from the grant of consent.

163. It could be argued in this case that the effects of the take, storage and distribution do not include the effects of the irrigation on the land to which the water will be delivered. CPW acknowledges that the use of the water for irrigation is the purpose for the take and is sufficiently proximate such that the effects of the additional loading of water and its transfer to groundwater are relevant effects.

164. What is outside the scope of the activities for which consent is sought, and consequently beyond the range of adverse effects to be considered, is the predicted intensification of farming (dairy or otherwise) as the result of the availability of the water. The potential effects of the use of the land which is irrigated are not effects of the activities for which consent is sought, and nor do they flow “inevitably” from the granting of the consents. They are consequences of the enabling that the take and

use of the water will confer. This hearing should therefore not take any account of the claimed effects of increased Nitrate levels which are predicted to result from more intensive farming.

Groundwater mounding and lowland effects

165. The applicant has identified and has sought to address the potential for irrigation from the scheme to recharge groundwater and increase the level of groundwater both within the scheme area and beyond, including in the lowland areas down-slope of the scheme.
166. Professional differences have resulted in criticisms of the method of modelling used and the claim that other models might have shown a different scenario. The mantra that uncertainty exists was frequently recited. What has been made clear is that no method or amount of modelling will provide certainty: “All models are wrong but some are useful” – David Scott.
167. It is noted that other irrigators / applicants, (eg Synlait) have simply not dealt with this issue. The lowland farmers were not identified as prospectively impacted, let alone consulted or notified by Synlait. The CPW scheme has identified the range of potential effects and has gone to considerable lengths to address them. It is to be commended, rather than criticised for this. This provides a good example of the advantages of a scheme of the size and scale of CPW – smaller schemes would never have been able to commit the resources and at an individual level could not be made accountable for the collective consequences.
168. The criticisms of the proposed conditions to address potential effects of raised groundwater levels and increased nitrogen (if relevant) in the lowland groundwater and drains are matters of judgement. CPW has responsibly acknowledged the potential and has demonstrated that there are ways in which they can be assessed and addressed on an adaptive basis. Importantly, there are remedial solutions and the issue becomes how and in what circumstances they should be brought into play.
169. There are questions of equity involved. There has already been significant modification to the lowland groundwater as the result of the activities within those areas and quite probably as the result of the groundwater takes in the upper plains. It would not be reasonable to

require CPW to take responsibility for all the effects of the past and future conduct of others.

170. Concern about the adequacy of what CPW has proposed by way of conditions is simply a reflection of the fact that there is not enough current knowledge or understanding of the existing and likely future state of the groundwater to enable anyone to predict with any precision what the effect of CPW will be, and therefore how changes in the lowland areas can be remedied or mitigated and what responsibility CPW should have for it.
171. The modelling and other information provided to you are the best that are currently available. It is unlikely that anyone will ever be able to provide the answers prospectively. The choice is therefore to refuse progress because some effects are not predictable, on the premise that unless effects can be predicted consent must be refused.
172. A better approach is to allow the effectiveness of the proposed conditions to be tried with the back-up of the s.128 review process. The knowledge and experience accumulated in the meantime will provide a sound basis for this, where such a basis may not now be available. In simple terms, if the matter needs to be litigated it is better to do so later (with actual information) than now (when everything is speculative). On the other hand, complex (and expensive) modelling might never provide a satisfactory answer and the proposed conditions allow flexibility to develop other solutions.

Ngai Tahu Property's proposal and consent

173. Counsel for NTPL referred you to *Fleetwing*³² and sought to argue that this judgment (and the RMA) does not preclude you from considering "alternatives". The particular case then relied on was *Lakes District Rural Landowners v QLDC*³³. This case involved consideration of "alternative" in an entirely different sense to that advocated by NTPL. The issue in that case was whether the District Council could include in its District Plan an assessment criterion requiring consideration of possible alternative locations (for a residential dwelling in an area of sensitive landscape). The Environment Court noted that there are

³² *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257

provisions in the RMA which refer to “possible alternative locations or methods for undertaking the activity”³⁴.

174. The Court held that the criterion (amended to bring it into line with the RMA provisions) was valid. In doing so it explicitly did not endorse any departure from or erosion of the statements of principle in *Fleetwing* that the RMA does not allow a comparative assessment of competing applications for the same resource, and that consent cannot be refused because another applicant might meet a higher standard under the RMA³⁵.
175. However the argument by NTPL is that as consent authority you can and should consider its alternative (and putatively better) use for the same resource. This is clearly not permissible, and is contrary to *Fleetwing*. A consent application does not involve a contest among prospective users of the resource, in which an applicant is required to show that its proposal represents the best outcome (in terms of the RMA). If the CPW scheme does not involve an efficient use of water it may fail to obtain consent. However it is not required to show that its use is the most efficient, nor that it is more efficient than NTPL.
176. The assertion that an effect of the CPW scheme will be to thwart the NTPL scheme and the loss of all its benefits is to say the same thing. There could be any number of other projects or uses which could argue that they and the potential benefits they offer will be “lost”.
177. NTPL also argues that its proposal should be given special recognition because it has had its consent granted. However that ignores two important considerations. The first is that the law (as stated in *Fleetwing* and recently applied by the Court of Appeal in *Ngai Tahu*) requires that priority is given to the CPW consent. Accordingly it should have been heard and determined in its correct order.
178. The second point is that the consent it was granted is expressly subject to NTPL enjoying priority. If it does not, then it has “lost” nothing.
179. There is no scope for the consent authority to re-order the priority rule to require CPW to forego water of higher reliability so as to allow Ngai Tahu to access that water. There is a significant additional cost to CPW

³³ C 162/01, 20 September 2001, Judge Jackson

³⁴ Clause 1(b) 4th Schedule, the former s.92(2) (both relevant to resource consents), s.171 (designations)

³⁵ *Fleetwing* at p.264

if Ngai Tahu attains priority. Bear in mind that the CPW scheme is a “run-of-river” scheme first, with storage (augmentation) to provide the additional reliability that run-of-river cannot. Reliability of the primary supply is of at least equal importance to CPW as to anyone else.

Other groups – Gravel Extractors; Christchurch Airport; Canterbury Coal

180. The gravel extractors and the Airport drew your attention to potential adverse effects from an increase in the levels of groundwater in some locations. These are indirect effects and the evidence indicated they were both of low probability and low potential impact. Under s.3 RMA the ability to take into account those potential effects is limited.
181. While the evidence is that the increased irrigation from the scheme is likely to result in an increase in the groundwater over present levels, the consequences to the gravel extractors are far from established. The groundwater levels may never reach their historical maximum, due to other factors. Equally there can be other factors which may outweigh any effect from the CPW scheme.
182. It is also clear that there are many other activities which constrain the ability to extract the gravel resource, such as urban development and the encroachment of sensitive activities. There can be some sympathy for the difficulties encountered by gravel extractors in accessing an otherwise abundant resource as the result of decisions made under the RMA (including their own resource consents), but it is not appropriate that CPW should be held to blame when no other development in the Region is held up on this account.
183. The claim is made that the grant of consent to CPW will “derogate from” the grants of consent to the gravel extractors as they limit the depth of extraction to 1 metre above the highest recorded groundwater levels. The claim is that if groundwater levels increase as the result of the CPW scheme, this will reduce the material available under their consents.
184. However the consents do not appear to operate in the way suggested. An example of the consent was attached to the evidence of Kim Seaton. Condition 2 states that the maximum depth should be no greater than 1m above “the highest recorded groundwater levels at the property. For the purpose of this consent, the highest recorded groundwater levels are

shown on Plan CRC072440B attached to this consent”. There is no provision for that Plan, and therefore the consented level, to change after the grant of the consent, as the result of subsequent changes to groundwater.

185. Furthermore, the evidence was that these consents will have been exhausted before any appreciable effect on groundwater from the CPW scheme. The terms under which future consents might be granted are matters of speculation. The basis for the 1 metre requirement is debatable and there is no certainty that a similar condition will be imposed in future.
186. The claim that the grant of consent to CPW derogates from the consents granted to the gravel extractors is not correct as a matter of law. The principle of derogation applies where the consent relates to the same resource, as in *Aoraki*³⁶. In that case the resource (water) had been fully allocated and the argument was that the allocation was permissive only and not equivalent to the grant of a right. In *Southern Alps Air Ltd v Queenstown Lakes District Council*³⁷ Panckhurst J held that the principle of non-derogation requires that there is frustration of the grant, or at least interference in a substantial way with the grant, and in a substantial way³⁸. In both cases the competition was for the same resource.
187. The gravel extractors do not have exclusive rights to the gravel resources in the Canterbury region, and the substance of their consents is not confined to the last metre or so of the resource. The CPW scheme does not involve access to the same resource and the principle of non-derogation is simply not applicable. Even if it was there is no good evidence that the extent of any interference will be substantial.
188. As observed in the *Alps Air Ltd* case, it is a feature of the grant of consents that the rights or expectations of others might be affected. Those consequences can be taken into account to the extent that they constitute relevant adverse effects, but not otherwise. The potential sterilisation of access to gravel as a resource is therefore of potential relevance, but not in the way portrayed by the extractors. Other decisions under the RMA (including the limitation on depth of extraction) have had the same consequences to limit access, but you do not have

³⁶ *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251

³⁷ (2007) 13 ELRNZ 221

the evidence of what (cumulative or other) effect will be attributable to the CPW scheme.

189. Canterbury Coal say that the flooding of the Wainiwaniwa Valley will deprive them of the opportunity to extract coal that is thought to be within and alongside the area which will be flooded. Again, this is a potential effect of the proposal to flood the Valley for the reservoir, rather than a matter of direct loss to the Company.
190. The extent of the claimed resource is unquantified and the ability to access it (and the probability of that happening in the foreseeable future) are matters of speculation, as to which the evidence from the Company was vague. The loss of the resource could be an effect of some significance if the resource was shown to be significant, accessible and economically viable. There appears to be an abundance of other coal resource in the area which, at current rates of extraction, will last for the foreseeable future. The evidence was of 25 million tonnes of recoverable resource, and a current rate of extraction of 25,000 tonnes per annum³⁹.
191. If the scheme results in the loss to Canterbury Coal of the value of its mining licence, then s.30 PWA provides for the payment of compensation for that loss. In respect of other costs, such as the relocation of the stockpile, there may be a right of compensation depending on the ownership or other interest in the land. The Company is likely to have a long enough lead-time to arrange its affairs so as to mitigate any loss.
192. On the principle that the onus of proof in this process is a shifting one, if these submitters (as with others) wish you to take into account in a significant way the claimed affect on the resources in which they have an interest, they had the evidential onus to satisfy you of the extent and importance of those resources and the effects of the scheme on them.
193. Each of these submitters refer to the importance to them of the region's growth and might be thought to have much to gain from the increase in activity and productivity from the CPW scheme. It is therefore somewhat ironic that they should seek to constrain the growth in economic activity

³⁸ At paras [50] ff

³⁹ Evidence, Bell & Shearer

they rely on, and presumably benefit from. There is no good reason why they should not experience some restriction in the interest of that growth.

Removal of indigenous vegetation

194. There is no application before you for consent in terms of the recently discovered Rule 9.21 of the (partially operative) Selwyn District Plan⁴⁰. If any non-designated part of the development (e.g. distribution canals) involves the removal of indigenous plants covered by the Rule, a resource consent may be required.
195. You have heard that this Rule is as a holding measure only. Either the Rule will have been modified by then, or there can be some confidence that consent should not be too difficult to obtain given the flexibility to provide replacement / mitigation planting.
196. The proposed conditions require a Significant Indigenous Vegetation Protection Plan⁴¹. This is to include identifying and mapping significant indigenous vegetation that might be destroyed or damaged, and to determine methods to protect the plants where possible. Any indigenous vegetation within the reservoir, and some in the areas designated for the terrace races and possibly the headrace, will be lost as part of the scheme. This effect cannot be avoided but is to be remedied and mitigated, by relocation and reseeded nearby areas. In the case of identified wetland vegetation in the Wainiwaniwa Valley it will be replaced with equivalent or better.
197. The loss of wetlands and a peat bog have been identified. A peat bog per se cannot be replicated, but the wetlands and indigenous vegetation they support can be. As Dr Bishop observes, the term “area of significant indigenous vegetation” can be applied to the “ecological district” rather than to a precise location. This is supported by the s.6(c) reference to “areas” of significant vegetation, rather than to the vegetation itself. Unlike DoC – see below – Mr Davis on behalf of Selwyn District Council does not regard the protection conferred by s.6 as limited to naturally occurring areas.

⁴⁰ Mark Davis

⁴¹ Selwyn District consents, proposed general condition 8

Section 6(c) – significant habitats of indigenous fauna

198. This has been addressed in separate submissions, and I remind you of the thrust of those:
- (a) Section 6(c) does not require “preservation” of habitat, and habitat is not locationally specific, so replacement habitat is not excluded from the requirement to protect;
 - (b) In *RFBS v Buller District Council*⁴² the requirements of the section were satisfied in relation to a significant habitat of *powelliphanta* snails by their relocation, with protection and management, as proposed here;
 - (c) The enhancement of existing mudfish habitat outside the area to be lost was relevant to the overall assessment of compliance with the section.
199. Counsel for DoC submits (Supplementary para 2.5) by reference to dictionary definitions, that the section can only refer to naturally occurring habitat. There is a range of definitions, and the literal meaning of “habitat” is the place where or environment within which [the subject] dwells.
200. DoC’s approach leads to the perverse (and unintended) result that s.6(c) (and s.7(h)) confer protection only on those habitats still in their natural state. This would exclude from protection under Part 2 RMA areas where indigenous fauna dwell in any modified habitat, where artificial habitats have been colonised or where colonisation has occurred non-naturally. It would exclude from protection a large section of the Canterbury mudfish habitat in the Wainiwaniwa Valley – most of which is in a modified state.
201. There is also a contradiction in DoC’s submissions (para 2.9) where it is claimed that the loss of habitat in the “snails” case (above) would not be permanent because the snails are to be returned after mining of their habitat is completed and it is “rehabilitated”. That will, by then, be a highly modified and non-natural habitat.

⁴² [2006] NZRMA 193

202. CPW accepts that the Wainiwaniwa Valley habitat is significant for Canterbury mudfish but rejects the claim by counsel for DoC that the *whole* (her emphasis) population is put at risk by this proposal, which it seems is based on her renaming of the species as “the Wainiwaniwa mudfish” – paras 2.9 and 2.10.
203. DoC’s submission discounts the added benefits to the other areas of Canterbury mudfish habitat which the scheme will deliver. As with other submitters (and Council report-writers) DoC’s opposition is premised on the requirement for certainty (“assurance” – para 2.14).

The role of the Trust

204. The Trust will hold the consents. It is a council controlled organisation with obligations under the LGA. The Councils, and through them the communities of Selwyn and Christchurch, will have control over the Trust. The Trust, in turn, has control over the schemes, as it will hold the consents and will direct the company as to how they are to exercised.
205. The terms of the Trust, and of the agreements between the Trust and other parties (ie the company, shareholders, farmers and water-users), have been provided to you. The issue raised is that there is limited ability, through the consent / designation process to require that these observed and enforced. This will be achieved by engaging in proactive administration of the trust rather than by simply relying on legal remedies.
206. Matters of importance to the Trust are:
- (a) Environmental standards – they will look to augment the minima imposed through the resource consent process, thereby delivering better outcomes.
 - (b) Enforcement of standards – Environment Canterbury is reactive – ie can only act in cases of breach or to review conditions. The processes in the agreement will allow the Trust to be proactive.
 - (c) Community engagement – the agreement requires several initiatives. The community has another pathway, not just reliance on consent / designation conditions. The Trust’s performance

(KPIs) will be audited. There will be annual sustainability reports to the community and the formation of a Community Liaison Group (which will also be a condition of the consent). The Trust will be accountable to the community.

207. Diligence of the trustees – they are appointed by (or represent) interested sections of the community. They are able to be replaced in the event that the Trust does not meet the expectations on it. It will operate with openness and transparency – the Trust will publish its reports.
208. If the taking of water was otherwise to occur in a piecemeal basis, and gradually over time, there will be no such controls. The CPW scheme is a genuine attempt by the trust to establish a scheme which takes account of the environment and values.
209. The trust and the company are incorrectly regarded as the same entity. Once the consent are granted their roles will again diverge. The trustees will be appointed for their independence.
210. Recreation and environmental enhancement – the trust can seek other funding for recreation access to the reservoir and lakeside recreation/camping. Other sources of funding are likely to be available (e.g. Lake Hood in Ashburton).

DATED this day of September 2008

Matthew Casey QC / Rachel Dunningham
Counsel for applicant