

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF a joint application by Central Plains Water Trust and Ashburton Community Water Trust to:

Canterbury Regional Council for resource consents to take water from the Rakaia River for use by the Central Plains Water Enhancement Scheme and the Rakaia Terrace Hydro Scheme

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 River and to use water from the Rakaia River for the Central Plains Water Enhancement Scheme and for associated consents required for the construction and operation of the Central Plains Water Enhancement Scheme; and to

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

IN THE MATTER OF applications by Ashburton Community Water Trust to:

Canterbury Regional Council for resource consents to use and divert water from the Rakaia river for the purposes of hydro electricity generation and associated consents required for the construction and operation of the Rakaia Terrace Hydro Scheme.

Minute/directions of Commissioners and Request for Further Information

1 April 2009

1. We are hearing a joint application by Central Plains Water Trust (CPWT) and Ashburton Community Water Trust (ACWT) to take water from the Rakaia River and various associated applications from both applicants along with Notices of Requirement (NoR) by Central Plains Water Limited. (CPWL)
2. We left both the hearings open in case we required further information. In the case of CPWT/ CPWL we signalled that if we were going to grant consents and recommend in favour of the Notices of Requirement we would need to request further information regarding conditions and reconvene the hearing to deal with that.
3. We issued a preliminary decision in respect of ACWT dated 28 November 2008 and requested further information from ACWT. That further information has now largely been provided, although we are still awaiting a final draft of proposed conditions. The ACWT hearing is reconvening on 22 April to deal with conditions on the ACWT applications.
4. Some weeks ago we signalled to CPWT/CPWL that our provisional view was that we should close the hearing at the end of April, after considering the ACWT further information. We signalled that we did not think that we required any further information from CPWT and CPWL.
5. We also informally advised CPWL that we would most likely be recommending that CPWL should withdraw its Notice of Requirement for the Waianiwaniwa dam and reservoir, and for the associated upper Waimakariri intake and tunnel and that we would be declining associated consents.
6. We also indicated that our preliminary view, was that if we reject the dam and reservoir, we would need to also reject the balance of the project (even if we concluded that some or all of the other components could be acceptable without the dam). This is because the scheme has been presented to us as an integrated package, 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 from what has been advanced to us thus far.

7. We also noted that we have reached a tentative conclusion that (leaving aside the legal issues) the Waimakariri and Rakaia takes could probably be granted (albeit for lesser rates and volumes of take than have been applied for, at least in the case of the Waimakariri).
8. We took the unusual step of advising CPWT of our likely conclusions on the dam, because we considered it appropriate for CPWT to have an opportunity to respond, in terms of how it sees that decision impacting on its scheme and on our decision making power in relation to the balance of the scheme
9. For example, in the event that we conclude that the taking of water could be sustainable within appropriate limits, we need to decide whether it would be appropriate to grant consents for take and use in circumstances where the details of the use would not have been finalised. (The area of land to be irrigated and the volumes of water required for that, depend upon whether or not the scheme contains a storage dam).
10. CPWT has responded with a Memorandum which we attach. In short the Memorandum suggests asks that we do not close the CPWT part of the hearing but instead seek further information from CPWT as to the implications of our likely decision on the dam components for the balance of the consents and Notice of Requirement for Designation.
11. CPWT/CPWL wish to address us on this issue. They suggest that we could still potentially grant consents for other aspects of the project and recommend in favour of the NoR for the lower Waimakariri intake, the Rakaia intake, terrace canals and headrace canal.
12. In our view, given the significant investment in this project and the hearing to date, it is appropriate that we provide CPWT/CPWL with the opportunity to make submissions on this point and for others to respond. Whilst we have some reservations as to whether we could or should do what CPWT suggest, we also accept that an "all or nothing" approach is potentially wasteful of the significant effort that CPWT, submitters and officers have put into this hearing.

(In short, there is a danger that we may throw both the baby and the water out with the bathtub.) We also accept that there are arguments available to CPWT to support the approach it is suggesting. It is also possible that if there are appeals, the Court may find that the dam and associated components are sustainable. In that event, it might be useful to the Court if we have made a first attempt to define whether the other components are acceptable.

13. We have decided on a process to resolve this procedural issue which we consider to be fair to all parties. We will hear submissions from CPWL and from other parties on these matters in early May. (We had considered doing so immediately after the ACWT hearing but Commissioner Nixon who is not involved in that part of the hearing is not available on that date.)
14. We emphasise, that even if we are persuaded that we could consider the other applications matters independently, there is no guarantee that we would find in favour of those. Whilst we have reached some reasonably firm conclusions on the dam and associated components, we have not yet finalised our views on other components and effects (by way of example, we have not reached detailed conclusions on nutrient and mounding issues).
15. We observe that if we were to agree to the request to keep the hearing open, we would need to request further information from CPWT as to the effect of the removal of the storage dam from the scheme on other components of the scheme. For example, we would need to understand the implications in terms of irrigable area and annual or seasonal volumes of take from each river, and we would also need to understand whether it was still possible to have a viable scheme without such storage.
16. It is premature for us to request that information now. At this stage we simply request further information from CPWT by way of legal submissions, relating to whether we could potentially grant consents and recommend in favour of other aspects of the project, if we reject the dam and associated components. We also seek submissions regarding what other information we would require if we embarked on this route and when that information could be provided.

17. We have of course commenced decision writing which at this stage is based upon a single decision which we had hoped to issue by the end of May or early in June. This additional step in the process will unfortunately delay that somewhat, but it is a delay which CPW has requested and we do not think any other party will be prejudiced by the delay. In our view it is in the interests of all parties that as much value as possible is obtained from the process to date. Whether it is reasonable for us to delay our final decision even further, will be the subject of the hearing.
18. Rather than lose momentum on writing up our conclusions, we have decided that we will continue to draft our thoughts on the dam and associated components with a view to releasing that by early June, along with our reasoning for our conclusions. (we may also outline our preliminary thoughts on the Waimakariri take regime). That will be released as a Minute rather than a decision for the reasons we discuss below.
19. Section 103 of the Act, provides as follows:
- (1) *Where 2 or more applications for resource consents in relation to the same proposal have been made to a consent authority, and that consent authority has decided to hear the applications, the consent authority shall **hear and decide** those applications together **unless** –*
- (a) ***the consent authority is of the opinion that the applications are sufficiently unrelated so that it is unnecessary to hear and decide the applications together; and***
- (b) *the applicant agrees that a combined hearing need not be held.*
20. The applicants agreement is required to not hold a combined hearing, but is not required for a separate decision. (We assume however that the applicant has no opposition to a separate decision)
21. We do not consider that...*the applications are sufficiently unrelated so that it is unnecessary to hear and **decide the applications together.***

22. At first sight it would seem that this section prevents us from issuing our decision on some aspects of the joint application ahead of others. On a literal interpretation we would not be making the decisions *"together"*.
23. Accordingly unless we are persuaded otherwise, we consider that we will need to delay releasing our final decision on the dam components until we issue our decision on the other components. That would not prevent us hearing further evidence on the other components, nor from making different decisions on different components. There is also no barrier to us releasing our conclusions on the dam components as a Minute for the information of all parties, but that would not be a decision which could be appealed or final recommendations on the Notices of Requirements.
24. If we accept that we should defer our decision on the balance of the scheme, and request further evidence, then we would most likely reconvene later in the year to hear whatever additional evidence CPWT chooses to provide and to hear any evidence from other parties in response. [Section 41 (3) enables us to request further information of the Applicant].
25. If we ultimately decided to grant some of the consents and recommend confirmation of some of the designations, we would need to reconvene again to deal with conditions. That would mean that our final decision on these other aspects would not be issued for many more months. We are conscious of the uncertainties which that would create and we are very conscious of our duty to avoid unreasonable delay.
26. If we decided that it was not appropriate to continue to hear evidence on other aspects, then we would hope to have a decision on all aspects released by July at the latest.

Request for further information during the course of a hearing and associated directions.

27. We will reconvene the hearing of the CPWT consent applications and Notices of Requirement at 10 am on May 11 2008 at the Convention Centre in Kilmore Street. Following the resumed hearing we will decide:
- o *Whether we should close the CPWT part of the hearing and proceed to issue a final decision? or*
 - o *Whether we should leave the hearing open so as to receive further evidence from CPWT later in the year?*
28. We request CPWT/CPWL to provide the following information its submissions as to:

Primary issues

- (a) The two alternatives set out above.
- (b) Whether if (as signalled) we recommend that the dam, upper intake and tunnel not be confirmed, and decline associated consents, we could still potentially grant some or all of the consents for the taking and use of water and the distribution network and recommend confirmation of the headrace canal, the lower Waimakariri and Rakaia intakes (if we are satisfied that some or all of those other components are in accordance with purpose and principles of the Act.)

Associated issues

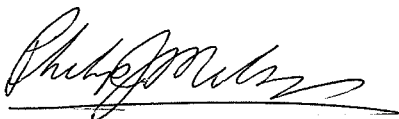
- (c) Would such an approach be contrary to case law which seems to suggest that generally all aspects of a proposal should be bundled together and viewed holistically?

- (d) Given that a scheme without large scale storage may not be able to service the same irrigable area, what implication would that have for the applications to take and use water?
- (e) Could we grant consents to use water if the irrigable area is not settled?
- (f) Could we grant consents to take water if the extent of the consents to use water have not been settled and the final extent of the scheme and therefore its water demands are not well defined?
- (g) Is it necessary for us to be satisfied that the water to be taken is no more than is required?
- (h) If we concluded that we do need to be satisfied, on that matter, what would be the consequence of CPWT not proceeding with a large scale storage dam, in terms of our consideration of the need for what has been sought? (We do not seek hydrological information at this stage).
- (i) 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).
- (j) Could this issue potentially be addressed by a condition which limits CPWT to what it needs for a proposal without a dam or a condition which provided that CPWT could only take and use whatever volume of water is consistent with whatever use consents are ultimately granted?
- (k) If we were to proceed to issue a negative decision on the components which we consider are unsustainable and continue to consider the other components, what additional information would we need and when could that be provided?
- (l) For example, to what extent would we need to revisit the economics and efficiency of a truncated scheme?

- (m) What is the process which CPWT proposes we follow if we accept that we could potentially issue a positive decision on the other aspects of the scheme?
 - (n) Would the resulting delays in our final decision be fair to submitters?
 - (o) Whether it agrees with our approach to section 103 as set out above.
 - (p) Any other submissions relevant to these issues.
- 29.** This information should be provided electronically to all legal counsel and to any submitter who requests it, by 1 May 2009.
- 30.** Given that the issues involved are primarily legal issues we consider that it is only necessary for us to hear responses from legally represented parties and from the two Councils (preferably from legal counsel) however we may be prepared to hear from any other submitters if necessary.
- 31.** Submitters and officers should provide written submissions in response on 8 May, but may add to that response after hearing from the CPWT.
- 32.** This Minute should be sent to all submitters who request the right to be heard at the hearing to date.

Philip Milne

Chair on behalf of the panel.



2 April 2009

