Decision No. C 135/2005

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application for a water conservation order pursuant to section 201 of the Act
BETWEEN	RANGITATA SOUTH IRRIGATION LIMITED (RMA 807/02)
	TIMARU DISTRICT COUNCIL (RMA 808/02)
	TRUSTPOWER LIMITED (RMA 809/02)
	RANGITATA DIVERSION RACE MANAGEMENT LIMITED (RMA 810/02)
	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED (RMA 812/02)
	CANTERBURY REGIONAL COUNCIL (RMA 815/02)
	Submitters
AND	NEW ZEALAND AND CENTRAL SOUTH ISLAND FISH AND GAME COUNCIL
	Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)
Environment Commissioner C E Manning
Deputy Environment Commissioner R Grigg

In Chambers at Christchurch

Submissions by:

Mr S W Christensen and Ms M A Baker for the applicants

Ms A Douglas for the Canterbury Regional Council

Mr P Milne for the Timaru District Council and Rangitata South Irrigation Limited

FINAL REPORT ON A PROPOSED RANGITATA WATER CONSERVATION ORDER

Introduction

[1] The Court issued its interim report[1] on 5 August 2004. Attached to the interim report was a draft Water Conservation (Rangitata River)[2] Order. An interim report was issued to allow the parties to make written submissions on changes or corrections to the draft order as were considered necessary to meet the spirit of the substantive findings and to deal with any matter inadvertently omitted. Directions were made for the lodgement and service of those submissions[3].

[2] By 29 October 2004 three submissions had been received:

(a) From the applicants – the Fish and Game Councils – advising that they and Rangitata Diversion Race Management Limited and Trust Power, Ashburton Rangitata Instream Users Group and the New Zealand Recreational Canoeing Association (who, for convenience, I will collectively refer to as "the applicants") have agreed on suggested changes or additions to the draft water conservation order recommended in the Interim Report. A complete set of proposed changes was attached to counsel's memorandum and it also notes that the Canterbury Regional Council agrees to some of the changes;

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1 C109/2004.

2 Appendix 5.2 to the report.

3 C109/2004 para 264.

(b) From the Timaru District Council and Rangitata South Irrigation Limited ("TDC/RSIL") requesting one change to clause 9(2)(c) of the draft Order; and

(c) From the Canterbury Regional Council ("CRC") seeking different changes especially in relation to groundwater issues.

[3] On 12 November 2004 responses to the submissions were received from the applicants and TDC/RSIL. These commented on each other's previous submissions, and on those of CRC. No response was received from CRC at that time.

[4] Further responses were also received from TDC/RSIL on 7 December 2004 (correcting some errors in the earlier submission) and, pursuant to a further minute from the Court dated 13 January 2005, from CRC on 10 February 2005 and from the applicants on 11 February 2005.

[5] Some difficulties have been experienced in aligning the various responses of the parties. Those difficulties have resulted from some proposed changes being commented on while others are not. In such cases, the lack of comment in opposition has been taken to infer agreement.

[6] The difficulties led to a further draft order being distributed for final comment ("final draft circulation"). The applicant for clarity and consistency suggested minor alterations and those changes have been made to the final draft order. The CRC has signalled that they do not disagree with any of those further changes, no response was received from TDC/RSIL, so again agreement has been inferred.

The changes

[7] The starting point for the changes to the draft order is the comprehensive set of amendments proposed by the applicant (which we call "the redraft"). TDC/RSIL and CRC, in their initial submissions, referred to various clauses of the draft order. Some of those changes were also included in the applicant's redraft, though some were not. The subsequent submissions tended to relate to the applicant's redraft, and opposition or proposed changes to clauses contained in that. Therefore, so far as the

redraft has not offended the spirit and intent of the interim decision, and the other parties have been silent or agreed (specifically or by making the same submission), those changes have been made.

[8] The specific changes covered below relate to matters which were raised by TDC/RSIL and CRC that were not included in the applicant's redraft, or where TDC/RSIL and CRC have either objected to changes or proposed further amendments to the redraft.

[9] The first category of changes relates to the *Interpretation* section of the order, and seems relatively non-contentious. Definitions will be added for "calculated river depletion effect" and "minimum flow" (as per the CRC definition). Minor corrections to the designation of map references are also made.

[10] The next suite of changes occurs in clause 8 of the order: *Restrictions on the Damming of Waters.* Several agreed changes have been made (e.g. replacement of "permitting" with "authorising"). However, CRC raises two issues relating to this clause which differ from the redraft. The first relates to which schedule should be referred to in clause 8(1). The redraft amended the draft order by referring to schedule 2 (instead of 3). CRC submits that it should refer to schedules 1 and 2. There does not appear to be any reason why clause 8(1) should not also refer to schedule 1, so it has been included in the final order.

[11] The second issue for CRC lies in some of the words that are submitted as being too subjective. Words such as "reduce", "material" and "reduction" (amongst others) are of concern to CRC. This issue also arises in clause 9. The issue for CRC is that they require interpretation as to their meaning that could result in unnecessary argument.

[12] The applicants submit that such words are consistent with other water conservation orders and points to those applying to the Buller, Rangitikei and Mataura rivers as examples. The basic submission is that these are not ultra vires and can be included.

[13] While the CRC position is understandable, there are two problems with their position. The first is that they do not offer an alternative to the words in question, which leads the Court to wonder what they would consider an acceptable alternative. The second issue is that a small degree of subjectivity is inevitable on certain aspects of the water conservation order as it relates to a dynamic system. There may be room for some debate as to actual river conditions at specific times. The crucial aspect is that the specific parameters (i.e. the minimum flows) that are set are enforced.

[14] Accordingly, it is hard see how the words that CRC complains of can be replaced without introducing a degree of complexity that is likely to be somewhat abstract and difficult to enforce. Without being offered any specific suggestions, we do not think that the finalising of this order should be delayed by attempting to remove all words that might contain an element of subjectivity. In any event, the Court has confidence in the expertise of the Council's staff to interpret such words in a robust and workable manner.

[15] Moving to clause 9: *Restrictions on Alterations of River and Form*. This clause was both reformatted and amended by the redraft. TDC/RSIL and CRC each had comments on the various changes. Both agree with (or do not comment on) many of the changes made, such the reformatting of clause 9(1) of the draft order. That caused the creation of a new clause 9(2) in the redraft. We will use the redraft numbering from this point on when referring to clause 9, though certain further changes have also been made following the final draft circulation.

[16] The inclusion of a reference to hydraulically connected groundwater throughout clause 9 is also supported. TDC/RSIL suggested a change in that reference from "streamflow depletion effects" to "Calculated River Depletion Effects". That change was in turn supported by the applicants. CRC makes no specific suggestion as to how hydraulically connected groundwater should be referred to, but confirms that its concerns appear to be covered by the applicants suggested amendment.

[17] Clause 9(3) of the redraft, was the focus of submissions from all of the parties. The redraft, as well as including the reference to hydraulically connected groundwater, also deleted other provisions. One was clause 9(3)(b)(ii). That deletion was supported by TDC/RSIL and it again appeared to answer a concern of CRC. The CRC also appeared to advocate the deletion of clause 9(3)(c)(ii). The CRC position was confirmed in its last submission. That course was not opposed by the applicants for the same reasons as the deletion of clause 9(3)(b)(ii): that Klondyke flows above 110m³/s do not need to be controlled by the water conservation order and can properly be dealt with through a Regional Plan. The possible deletion of clause 9(3)(c)(ii) was not referred to by TDC/RSIL. We find that clause 9(3)(b)(ii) and clause 9(3)(c)(ii) can both be deleted. There will also be consequential re-numbering. This has been amended further following the final draft circulation with (a) and (b) now amalgamated, so we are left with clauses 9(3)(a), (b), (c) and (d).

[18] TDC/RSIL do comment on an issue raised by CRC in relation to clause 9(3)(b) and its potential impact on augmentation of as well as abstraction from the naturally occurring river flow. This, it is submitted could result in the minimisation of augmentation. TDC/RSIL submit that the concern could be removed by the replacement of the word “alteration” with the word “decrease”. This appears to be a sensible suggestion and that amendment will be made to what is now 9(3)(a), and also to 9(3)(b), in the final order. No comment was made by the applicants on this point except after the final draft circulation where the change was also applied to the following clause for consistency.

[19] More issues arise in relation to clause 9. The first relates to the words “immediately or within 150 days” from clauses 9(3)(c) and 9(3)(d) [now (b) and (c) after final draft circulation]. The applicant submitted that those words should be removed as potentially confusing. TDC/RSIL submitted that only “immediately or” should be deleted: a 150 day limit being sufficient. The applicant clarified its reason for the deletion of any timeframe at this point in clause 9 by reference to clause 9(9), which is the definitive clause for the calculation of river depletion effects. We agree with the applicant, so the timeframe will be removed from those clauses. It should be

noted that the additions to those clauses, agreed to by TDC/RSIL, mean that clause 9(9) is now specifically referred to in both clauses.

[20] The redraft also added a term to clause 9(3)(d)(i) [now part of 9(3)(c) after final draft circulation] that created, in effect, a one for one additional extraction rate when the naturally occurring flow at Klondyke exceeds 110m³/s. The rationale was to avoid the possibility that abstractors might take more than is allowable as soon as flows exceed 110m³/s at Klondyke. TDC/RSIL oppose that additional term. They say that the amount of extraction at flows above 110m³/s can be "sorted out" through the Regional Plan and resource consent processes. The applicant does not comment further on this point in its later submissions.

[21] How the additional flows above 110m³/s may be allocated can be dealt with in a Regional Plan (as is recognised above when discussing the deletion of 9(3)(b)(ii) and 9(3)(c)(ii)). It is the setting of the minimum flow and maximum extractions at flows above the minimum but less than 110m³/s for the protection of identified values which is the purpose of the water conservation order. We find that the additional clause suggested by the applicants does little more than clarify the volumes available when flows exceed 110m³/s. Accordingly, we can see no reason for not including the additional term. It is intended for clarity, and does not impose any further controls.

[22] Clause 9(3)(e) [now (d) after final draft circulation] relates to the maximum number of principal take sites (meaning sites taking more than 100 l/s), which are restricted to four. The applicants redraft includes an amendment identifying that the maximum refers to these principle sites. CRC sought (and TDC/RSIL supported) an amendment to specifically exclude groundwater takes from the calculation. The applicants confirmed that they agreed with that amendment. However, in its last submissions CRC appeared to do an about-face on this issue and state that the applicant's redraft satisfies CRC's concerns. We find that excluding "groundwater takes" aids clarity, so an amended clause 9(3)(e)[d] will be included in the final order as follows:

(e)[d] if the effect is that the number of takes sites (excluding groundwater take sites) authorised to take more than 100 l/s at each site from those parts of the Rangitata River specified in items 4 and 5 of Schedule 2 is greater than a maximum of four.

[23] Clause 9(5)(b) of the redraft is also amended and that amendment appears to answer CRC criticism of the Court's draft version. That was confirmed by CRC with one minor typographical amendment for consistency between the sub-clauses.

[24] Clause 9(6)(a) of the redraft is amended by the addition of the word "fully" before the word "exercised. That is agreed to by TDC/RSIL and receives no comment from CRC.

[25] Clause 9(8) of the redraft includes minor amendments (renumbering). CRC submitted a changed wording that was supported by TDC/RSIL. However, the applicant's amendment to Item 3, Schedule 3 seems to have the same effect. We find that the applicant's amendment is now sufficiently clear to alleviate the concerns of CRC and should be included in the final order.

[26] There are further amendments in the redraft that similarly answer concerns raised by CRC in relation to clauses 10(2), 11(3)(b)(ii) and 11(3)(d)(ii). These will be included in the final order. Some minor changes for consistency were suggested following the final draft circulation and those are also included in the final order.

[27] The redraft also amends clause 12: *Scope of the Order*. While amending 12(2) the applicants states that it is "unclear why special exception should apply to Department of Conservation". Then, without noting that clause 12(2) of the draft order should be deleted, the applicant re-numbers clause 12(3) to 12(2). This renumbering is continued, clause 12(4) is deleted and clause 12(5) re-numbered to 12(3).

[28] Neither TDC/RSIL and CRC comment on clause 12 so no assistance can be gained by their comments. Without a clear explanation of why the applicant opposes clause 12(2), we find that, in its amended form and as it relates to only minor water

uses that may in any event be otherwise permitted by or acceptable under the water conservation order, clause 12(2) should remain in the final order. The remainder of the clause will again be re-numbered.

[29] The only remaining amendments relate to the schedules which the applicant cross-checked following the final draft circulation and corrected as necessary and whose cross-checking has been confirmed as accurate by CRC.

Recommendation

[30] Accordingly, this Court **RECOMMENDS** that the order attached to and forming part of this final report be accepted by the Minister of Conservation and a Water Conservation Order be made for the Rangitata River in accordance with the terms of the attached order.

[31] We record our thanks to our research counsel Mr Andrew Schulte for pulling all the complex streams of submissions together and for drafting this Final Report.

DATED at CHRISTCHURCH 22 September 2005
For the Court:

J R Jackson
Environment Judge

Issued[4]:

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