

Tabled at Hearing 14/03/2013

IN THE MATTER of the Resource Management Act 1991

A N D

IN THE MATTER of submissions and further submissions by Rangitata Diversion Race Management Limited on the proposed Canterbury Land & Water Regional Plan

**LEGAL SUBMISSIONS ON BEHALF OF RANGITATA DIVERSION RACE
MANAGEMENT LIMITED**

Introduction

1. My name is Vanessa Hamm. I am a solicitor specialising in resource management law, and a partner with the firm of Holland Beckett in Tauranga.
2. I appear today on behalf of Rangitata Diversion Race Management Limited (**RDRML**), which is a non-profit water supply company abstracting, managing and supplying water for irrigation, generation and community stock water schemes. Its shareholders comprise three irrigation schemes (the Mayfield-Hinds, Valetta and Ashburton-Lyndhurst schemes), TrustPower Limited (**TrustPower**), and the Ashburton District Council as owner of the stock water systems.
3. RDRML has also been asked to present the submissions of Valetta Irrigation Limited (**VIL**) in respect of two particular issues.¹ These submissions were supported by RDRML in its further submissions.
4. The Rangitata Diversion Race (**RDR**) itself is 67k long, was completed in 1944, and spans mid-Canterbury between the Rangitata and Rakaia Rivers. It takes water from both the Rangitata and Ashburton Rivers. The Rangitata River is subject to the Water Conservation (Rangitata River) Order 2006.
5. During the irrigation season, the RDR supplies water to the Mayfield-Hinds, Valetta and Ashburton-Lyndhurst irrigation schemes in mid-Canterbury with the ability to irrigate up to 94,486 ha of land. TrustPower's generation assets on the RDR comprise the Montalto and Highbank power stations with a combined

¹ Rules 5.107 and 5.128.

installed capacity of 26.9MW and annual energy production of approximately 98GWH. The RDR also supplies stockwater to Ashburton District Council.

6. Together with TrustPower (through Highbank), the RDR facilitates additional irrigation within mid-Canterbury by Barrhill Chertsey Irrigation Limited (**BCIL**).
7. RDRML has had relatively close involvement with Resource Management Act 1991 (**RMA**) processes over the last ten years, it having been involved in:
 - (a) A lengthy re-consenting process under the RMA (a decision having been made in April 2003, and having become operative in April 2008 following resolution of appeals by consent);
 - (b) The processes leading to the Water Conservation (Rangitata River) Order 2006;
 - (c) A number of statutory processes concerning both resource consent applications and the development of regional and district plans, including the proposed Natural Resources Regional Plan (**NRRP**);
 - (d) Environment Court declaratory proceedings with BCIL regarding its use of the RDR for conveyance purposes; and
 - (e) A High Court appeal on the proposed Canterbury Regional Policy Statement, where the wording of the relevant provisions did not align with the substance of the decisions.
8. Over that period it has grappled with higher demand for irrigation within mid-Canterbury, a sharper focus on water allocation as freshwater has become increasingly subject to competing demands, a changing regulatory landscape in the form of a new water conservation order, the NRRP, and now the Canterbury Regional Policy Statement 2013 (**RPS**), as well as the change brought about by the collaborative Canterbury Water Management Strategy (**CWMS**) and ultimately the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (**ECan Act**). In terms of the Vision and Principles of the CWMS, given the various uses it supports, it effectively straddles what are now the first and second order priorities. RDRML has kept up with these changes, and has increased the irrigable area of its constituent irrigation schemes, made

its infrastructure available to BCIL to enable the conveyance of its water, and is in the process of investigating large scale storage, and implementing on farm audited self-management to ensure that nitrogen leaching levels are acceptable.

9. RDRML has made detailed submissions and further submissions on the proposed Canterbury Land & Water Regional Plan (LWRP), although its presentation to the Hearings Commissioners today focusses on key matters of concern which fall within the ambit of Hearing 1.
10. One of the changes RDRML has sought is the introduction of the term "*principal water supplier*" into the LWRP and relevant provisions. That term appeared in the NRRP and captures the activities that RDRML carries out. The officers have recommended its inclusion in the LWRP and that is supported by RDRML to ensure that provisions such as rule 5.107 appropriately capture such activities, given that the RDR cannot strictly be called an 'irrigation scheme'. For completeness, I mention that some provisions, such as Policy 4.48, may also benefit from consequential use of the term "*principal water supply scheme*".
11. I also note that the RDR spans the southerly two 'critical nodes' depicted in Schedule 16 – Regional Concept Plan, and is potentially integral to the regional concept for water harvest, storage and distribution described in that schedule.
12. RDRML will also be making submissions in Hearings 2 and 3, with it having a significant interest in Section 13 – Ashburton, which sets Environmental Flow and Allocation Limits for the Ashburton River, and which directly affect RDRML.
13. On a final introductory note, whilst it is understood that at least two of the Commissioners have previously flown over Canterbury, RDRML makes the offer of a site visit to the RDR, if the Commissioners would find that helpful.

Witnesses for RDRML

14. I will be calling three witnesses in support of RDRML's case, the statements of evidence for which have already been pre-circulated as directed:
 - (a) Ben Curry.- Chief Executive Officer of RDRML. Mr Curry's evidence addresses the background to RDRML and its interest in the LWRP, with reference to particular issues of concern. Mr Curry sits on both the

Ashburton Zone Committee, and the Regional Water Management Committee, both of which were formed in connection with the CWMS. He therefore has first-hand experience in dealing with implementation issues arising from the CWMS.

- (b) Nigel Bryce – an Associate Director and Planner with Ryder Consulting Limited with 15 years' experience. Mr Bryce's expert planning evidence addresses the key issues in RDRML's submissions and further submissions.
- (c) Keri Johnston – a director of Irricon Resource Solutions, and a natural resources engineer with particular experience in dam safety matters. Ms Johnston's evidence focusses on changes sought by VIL, which are supported by RDRML, and which seek amendments to rule 5.128 of the LWRP. That rule specifies the conditions on which certain dams are permitted activities.

15. As the evidence has been pre-read by the Hearings Commissioners, the witnesses will focus on summarising key points of their evidence.

Topics addressed in these legal submissions

16. I propose to address you in relation to the following topics which arise as a consequence of RDRML's submissions on the LWRP:
- (a) Relevant context arising from RDRML's appeal on the proposed Canterbury Regional Policy Statement;
 - (b) Proposed LWRP provisions applying to the re-consenting or review of existing infrastructure, including particularly the following issues:
 - (i) Whether s 104(2A) RMA is relevant to a restricted discretionary activity where the matters of discretion do not include regard to the value of the investment of the existing consent holder;
 - (ii) Whether rule 5.96(1) should be amended;

- (iii) Whether it is appropriate to grant replacement consents which continue over-allocation of a particular resource;
- (c) Legal issues identified by RDRML in its Statement of Preliminary Legal Submissions dated 26 November 2012:
- (i) What is the relevance (if any) of Zone Implementation Programmes prepared under the CWMS?
 - (ii) Would any attempt to reduce an allocation from an existing consent holder(s) and reallocate it to new or other water users be ultra vires?
 - (iii) Should the s 32 evaluation expressly examine restrictive provisions (including prohibited activity status) in or limits underlying rules – particularly where they have significant implications for resource users?
 - (iv) Is Policy 4.15 required to be amended to address s 70 RMA requirements?
- (d) Rules 5.107 and 5.128 (raised by VIL in its submission);
- (e) Rule 5.132 (raised by Meridian Energy Limited in its legal submissions);
- (f) Response to evidence of White-water New Zealand (Inc.).
17. I note for completeness, that in its Statement of Preliminary Legal Submissions dated 26 November 2012, the issue was posed as to whether the LWRP can make it a mandatory requirement for water users to be part of a Water Users Group. That was in response to a submission from Federated Farmers (320.212), opposed by RDRML, seeking amendments to Section 13.0 geared towards requiring RDRML to play an active role in Water User Groups. That part of Federated Farmers' submission has now been withdrawn² and accordingly it is no longer necessary to address that in detail.

² Letter from Federated Farmers to ECan dated 13 December 2012.

Relevant context

18. RDRML's submissions on the proposed Canterbury Regional Policy Statement included a focus on two particular matters:
 - (a) The way in which the Vision and Principles of the CWMS manifested themselves in the RPS; and
 - (b) The provisions for existing infrastructure within the RPS.
19. On the first of these, RDRML is supportive of and has been involved in the development of the CWMS. However, RDRML has contended that care should be taken not to elevate the Vision and Principles of the CWMS above all other relevant RMA considerations so that they become goals to be achieved in their own right, distinct from (rather than elements of) the sustainable management purpose of the RMA.
20. Policy 7.3.4 (Water Quantity) of the RPS provides a list of requirements to satisfy in establishing environmental flow and water allocation regimes, with provision for two further matters once that has occurred. The policy, and the way (1)(a)-(f) has been separated from (1)(g)-(h), appears to have been drafted in heavy reliance on the first and second order priorities of the CWMS Vision and Principles. RDRML was concerned, firstly that this appeared to be a 'code' for establishing environmental flow and water allocation regimes, and secondly, that this did not appropriately reflect a more integrated overall assessment under Part 2 of the RMA.
21. The Commissioners' decision on submissions to the proposed RPS noted that existing provisions within the proposed RPS addressed RDRML's concerns, and/or that the matter was addressed by other relevant policies. However, within the RPS itself, and the methods to Policy 7.3.4, there was no link to other relevant policies.
22. As a result of RDRML's appeal, this has now been clarified within the methods to Policy 7.3.4, where Method 1(a) states that environmental flow and water allocation regimes will be established in accordance with all relevant policies including Policies 7.3.10 and 7.3.11.

23. A second key issue of concern to RDRML was the provision for existing infrastructure within the RPS. It clearly supported Policy 7.3.11 of the RPS, but the methods to the policy itself suggested that it related only to the consideration of resource consent applications, whereas the Commissioners' decision indicated that it would also be a consideration in the establishment of environmental flow and water allocation regimes. This concern has been similarly clarified by making it explicit, within the methods and explanation to Policy 7.3.11, that recognising and providing for the continuation of existing hydro-electricity generation and irrigation schemes may include provision for such activities within environmental flow and water allocation regimes.
24. In terms of the LWRP, RDRML is supportive of the explanatory text in Section 2.2 which confirms that the policies are intended to apply as a comprehensive suite, and must be read and considered together. Similarly, the words at the outset of Section 4 that *"The Policies of this Plan implement the Objectives in Section 3 and must be read in their entirety and considered together"* are supported by RDRML. The wording recommended by the officers in Section 2.2, in relation to objectives, in response to Genesis' submission, is also supported by RDRML.
25. I note also that Mr Bryce suggests amendments to Section 2.6 (Limits) of the LWRP reinforcing that it may be appropriate to include provision for hydroelectric power generation, irrigation, Principal Water Suppliers and other activities that involve substantial investment within environmental flow and water allocation regimes.

Existing activities and infrastructure

26. It will be no surprise that as the owner and operator of a substantial piece of infrastructure, RDRML seeks some measure of certainty in terms of the planning frameworks it operates under. It must provide for its use, development and protection, all of which depend on the use of water from two rivers – one of which is subject to a Water Conservation Order, and another for which a new environmental flow and water allocation regime is proposed. However, the RDR itself, the irrigation schemes, the stock water system, and the Montalto and Highbank Hydro-electric Power Schemes are significant physical resources which should be sustainably managed.

27. At a statutory level, the RMA affords some measure of certainty to existing activities and infrastructure through ss 124A-C and 104(2A) RMA.³ At a regional planning level, it is submitted that it is open to local authorities to afford further certainty to existing resource users as an inherent aspect of the sustainable management of physical resources. In particular, in order to sustainably manage the use of a physical resource such as the RDR, the operator of such an asset such as RDRML needs a level of certainty that its use is recognised and provided for. For that reason, RDRML supports qualifications which recognise that ever diminishing effects may not always be possible. Policy 7.3.11(2) of the RPS, which the LWRP must give effect to, is a good example of this where it refers to "*require improvements in water use efficiency and reductions in adverse environmental effects of these activities, where appropriate*".

Section 104(2A)

28. It is understood the Commissioners have queried, in the context of rule 5.96, whether s 104(2A) of the RMA is relevant to a restricted discretionary activity, where the matters of discretion do not include regard to the value of the investment of the existing consent holder.
29. Both ss 104(2A) and 104C are mandatory in their language, but in light of the *Woolley* decision⁴, and the subsequent 2009 amendments to s 87A(3) of the RMA following that decision, it is strongly arguable that the considerations on a restricted discretionary activity are intended to be exhaustive. It follows that if the value of the investment of the existing consent holder is to be a consideration on a restricted discretionary activity, it should be included as a particular matter to which discretion has been restricted.
30. In my submission, there is good reason for that to be included as a matter to which discretion has been restricted, including that at a specific level, the LWRP itself properly recognises that "*Certainty about the ability to both exercise and renew a water permit is important in facilitating investment in irrigation and associated land uses (as recognised in sections 104(2A) and 124-124C of the RMA)*" (Section 1.1.2).

³ The former provisions afford a degree of protection to an incumbent consent holder where faced, upon renewal, with competition for the same natural resource from a new resource consent applicant. The latter provision requires a consent authority to have regard to the value of the investment of the existing consent holder when dealing with an application affected by s 124.

⁴ *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC).

Rule 5.96(1)

31. It is understood that the opening words of 5.96, condition 1, are opposed by Fish & Game, which appears to be on the basis that the words may favour continuing over-allocations. That is not my interpretation of the rule. Condition 1 is simply a means by which activity status is ascribed, and in an over-allocated catchment the condition indicates that unless the proposed take or diversion is a replacement, it must comply with the relevant limits in sections 6-15 of the LWRP. It is certainly not an indication that continuing over-allocation is approved, and the matters over which discretion is reserved are wide enough to contemplate that a replacement consent application will not simply be rolled over. Mr Bryce discusses this further at section 3.0 of his rebuttal evidence.

Over-allocation

32. I understand that the Commissioners have queried whether it is appropriate to grant replacement consents in over-allocated catchments, as contemplated by Policy 4.6 (particularly as recommended to be amended).
33. The National Policy Statement Freshwater Management 2011 (NPSFM) contemplates the reduction of over-allocation over agreed timeframes, with Objective B2 "*To avoid any further over-allocation of fresh water and phase out existing over-allocation.*" In my submission those indicate that there should be no increase in over-allocation, and that over-allocation should be phased out (and otherwise avoided – Policies A1 and B5).
34. The RPS gives effect to this through Policy 7.3.4(2) which similarly seeks to avoid any "*additional*" allocation which would result in "*further over-allocation*", but with conjunctive directions to set a timeframe for identifying and undertaking actions to effectively phase out over-allocation and address adverse effects of over-allocation in the interim. The explanation to that policy states that "*For the purposes of Policy 7.3.4(2)(a), the renewal of water permits are not considered to be additional allocation which would result in further over-allocation*".
35. In light of the NPSFM, and Policy 7.3.4(2) of the RPS, in my submission Policies 4.6, 4.7 and 4.76, together with rules 5.96-5.100 and the sub-regional sections of the LWRP, give effect to both the NPS and the RPS, particularly given that the rules setting environmental flow and allocation limits within the sub-regional sections are likely to underpin s 128 reviews of existing consents.

Legal issues identified by RDRML

Relevance of / weight ascribed to Zone Implementation Programmes

36. A number of Zone Implementation Programmes have been prepared under the CWMS, and we posed the question of the relevance of these to the LWRP process. The Commissioners' Minute 2 dated 3 December 2012 accepted that the *relevance* of those instruments to a decision making process may involve a question of law, but the *weight* to be attributed to them is unlikely to involve a question of law.
37. The Zone Implementation Programmes are 'aspirational' documents which have undergone a consultative process, but not a statutory process. Accordingly, they have arguably not been subject to the rigour that such a statutory process brings. However, as a substantial amount of time and resource has gone into the Zone Implementation Programmes, and as s 66 of the RMA is not necessarily exhaustive in setting out the mandatory matters which a Regional Council must have regard to when preparing and changing a Regional Plan, it is submitted that Zone Implementation Programmes are relevant to the LWRP decision making process.
38. It is further submitted however that the weight to be ascribed to them (which is correctly a matter for the Commissioners) will depend on the matter being considered, and the degree to which what is in a Zone Implementation Programme may be affected by RMA considerations.
39. Policy 4.8 for example expressly refers to "*the priority outcomes expressed in the relevant ZIP*".
40. It is submitted that the most direct relevance to the Commissioners' decision making process is in respect of the sub-regional sections, the development of which has been informed by the relevant Zone Implementation Programmes. However, it is also submitted that the Zone Implementation Programmes are not necessarily determinative as there will be other factors to be considered as part of the First Schedule RMA process including evidence called by submitters, and statutory provisions which must be considered by the regional council in making its decisions on submissions to the LWRP and which were not necessarily considered in the development of the Zone Implementation Programmes.

Allocation regimes

41. The statutory provisions of the RMA contemplate reviews of existing consents (ss 30(1)(fa), 30(4), 68(7), 128(1)(b)), but it is submitted that these do not extend to allocating water away from an existing user, to another user (as opposed to returning water to a water body). This issue is raised by RDRML in its submissions, particularly with regard to Policy 4.4 which, based on the first and second order priorities of the CWMS Vision and Principles gives stated priority to first order priority uses.
42. The reasons for my submission are as follows:
- (a) Section 30(4) RMA provides that:
- "A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:*
- (a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and*
- (b) nothing in paragraph (a) affects section 68(7); and*
- (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and*
- .."*
- (b) Section 68(7) enables a regional plan to state whether a rule relating (*inter alia*) to maximum or minimum levels or flows of water or rates of use of water shall affect, under s 130, the exercise of existing resource consents for activities which contravene that rule. Section 128(1)(b) of the RMA enables a review of conditions of a resource consent for that reason.
- (c) Together, ss 68(7) and 128(1)(b) therefore provide the ability for a regional council to review existing resource consents to align them with maximum or minimum levels or flows of water or rates of use of water specified in an operative regional plan. However coupled with s 30(4)(a), which does not authorise a rule to, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent, a s 128(1)(b) review is inherently for the purpose of effecting changes to sustain in-stream environmental values.

43. Accordingly, RDRML would be resistant to any policy framework in the proposed LWRP which encouraged such an outcome (or suggested that it was possible, let alone appropriate). Mr Bryce addresses this issue at a general level in his statement of evidence, and provides the view that the wording in Section 2.2 of the LWRP (confirming that the objectives and policies are a suite of provisions which should be read and considered together) will assist in ensuring that one policy is not unduly elevated over another. At this stage, it does not appear that there are any rules within the LWRP that, in reliance on Policy 4.4, would underpin reviews of existing consents to achieve reallocation to first order priority uses, and RDRML seeks that it remain that way.

Section 32 evaluation

44. RDRML's submissions have raised concerns regarding the robustness of the s 32 evaluation relating to aspects of the LWRP, which for this Hearing 1 relate principally to the use of prohibited activity status in rule 5.98. The genesis of its concern is that prohibited activity status is draconian. However, the s 32 evaluation examines this in only a cursory manner.
45. Specifically, relevant discussion in the Section 32 Report (August 2012) shows that:
- (a) Most of the discussion about the use of prohibited activity status concerns provisions regarding nutrient losses/changes in land use,⁵ sewage discharges,⁶ or the granting of additional groundwater permits.⁷
 - (b) The discussion on additional groundwater permits indicates that the reporting officers wished to avoid *applications*:⁸

Prohibited activity status for additional groundwater takes beyond the limits set in the pLWRP has been categorised as a prohibited activity. This is a significant difference from the NRRP, and is primarily in response to the Freshwater NPS and the CRPS. The setting of the limits and prohibited activity status to exceed those limits is also in response to the multitude of applications that have been received to exceed the existing NRRP limits as non-complying activities.

⁵ Pages 56, 60, 61, 66.

⁶ Pages 79, 81.

⁷ Pages 40, 102.

⁸ Page 102.

- (c) On the use of prohibited activity status in rule 5.98, the Section 32 Report states:

Under the proposed regime it would be a prohibited activity if applying for water as a first time user, while existing water permit holders can apply to have permits replaced with the new minimum flows and other relevant regional provisions.

46. In terms of s 32 itself, it is acknowledged that it only signals that a greater level of caution should be applied where a rule seeks to impose a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. In such a case, the evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district (s32(3A) RMA).
47. However, when combined with the case law on prohibited activity status, and s 68(3) of the RMA (which requires that in making a rule the Regional Council shall have regard to the actual potential effect on the environment of activities, including, in particular, any adverse effect), it is submitted that it is incumbent on the Regional Council to have properly assessed whether prohibited activity status is appropriate.
48. In particular, the Environment Court decision of *Thacker v Christchurch City Council*,⁹ stated:

[45] That may well be the case. For the purposes of our deliberations however, we consider that the most significant portions of the Coromandel Watchdog case are those contained in Paragraphs [23] to [31], [37] and [41]. In the two later paragraphs the Court of Appeal identified that the appropriate test for imposition of prohibited activity status is whether or not the allocation of that status is the most appropriate of the options available.

[46] In Paragraphs [23] to [31] the Court identified the process to be undertaken in order to determine whether or not the imposition of prohibited activity status was the most appropriate course to adopt. The Court referred to the statutory scheme for plan changes under RMA together with the accepted principles, practices and requirements for application of that statutory scheme.

[47] In particular, the Court of Appeal emphasised the provisions of s 32 RMA which impose an obligation on local authorities to undertake an evaluation at various stages of the proposed plan process. Section 32(1) requires the undertaking of an evaluation before notification of a proposed plan and s 32(2) requires the undertaking of a further evaluation prior to making a decision on the proposed plan (or plan change) under Clause 10, Schedule 1.

⁹ C026/09.

[48] The nature of the evaluation which the City Council and this Court are obliged to undertake in determining whether or not to impose prohibited activity status is described in ss 32(3) and (4) in these terms.

"(3) An evaluation must examine —

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in subsections (3) and 3(A), an evaluation must take into account —

(a) the benefits and costs of policies, rules or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods."

Note: We have cited the post 2005 versions of ss 32(3) and (4) RMA. There are no differences between the pre and post 2005 versions of these subsections which are material for our considerations.

49. In this particular case, there is no discussion of whether prohibited activity status is the "*most appropriate*" of the options available. The most that can be said is that it is compared against the use of non-complying activity status in respect of rule 5.96(2) and the default from non-compliance with that rule to non-complying activity status under rule 5.97.
50. Mr Bryce addresses in his statement of evidence the reasons why RDRML contends that non-complying activity status is more *appropriate*. In my submission, if the Commissioners are minded to confirm prohibited activity status, it is necessary to carry out a more detailed s 32 evaluation as to whether that is the most appropriate course of action before making a decision to that effect.

Policy 4.15

51. A submission by Fish & Game (submission 347.80) sought amendments to Policy 4.15 to address s 70 RMA requirements. Policy 4.15 relates to the discharge of sediment and other contaminants to surface water from earthworks.
52. Section 70 of the RMA relates to *rules* about discharges and accordingly does not apply to Policy 4.15.
53. To the extent that the point could be said to apply to relevant rules, it appears that relevant rules have been cognisant of s 70 (e.g. rules 5.55 and 5.57).

VIL submissions - rules 5.107 and 5.128

54. VIL made two submission points, in relation to rules 5.107 and 5.128.
55. In relation to 5.107, which relates to the transfer of water permits, VIL's submission was that where the location of the take and use of the water does not change, but the permit is transferred to an irrigation scheme (rather than a new owner of the site), it also should be exempt from the requirements of rule 5.107.
56. The officers' report addresses this by stating that "*Valetta Irrigation Limited seeks to add a new rule to provide for a transfer of a water permit to another person at the same site as a permitted activity. It is noted that this is already provided for by Section 136 of the RMA, and does not require a permitted activity rule in the pLWRP.*"¹⁰
57. The relevant parts of s 136 of the RMA provide:
- (1) *A holder of a water permit granted for damming or diverting water may transfer the whole of the holder's interest in the permit to any owner or occupier of the site in respect of which the permit is granted, but may not transfer the permit to any other person or from site to site.*
 - (2) *A holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit—*
 - (a) *To any owner or occupier of the site in respect of which the permit is granted; or*
 - (b) *To another person on another site, or to another site, if both sites are in the same catchment (either upstream or downstream), aquifer, or geothermal field, and the transfer—*
 - (i) *Is expressly allowed by a regional plan; or*
 - (ii) *Has been approved by the consent authority that granted the permit on an application under subsection (4).*
58. VIL's submission does not relate to transfer to a new owner or occupier of the site, but rather to an irrigation scheme. (It is submitted that the same could be said of transfer to a "*principal water supplier*"). In such a case, s 136(1) does not operate to authorise such a transfer, because irrigation schemes or principal water suppliers are unlikely to be the owner of the site, and are also unlikely to be the occupier of the site which is defined in the RMA as "*the inhabitant occupier of any property*".¹¹ Further, the wording to rule 5.107 itself, which applies to

¹⁰ Section 42A Report – Volume 1, page 305.

¹¹ Section 2, RMA. The definition also includes agents and employees for the purposes of s 16 of the RMA.

transfers "(other than to the new owner of the site to which the take and use of the water relates and where the location of the take and use of water does not change)" tends to indicate that it is only those transfers which will be permitted.

59. However, it is not abundantly clear that such a transfer would be regulated by s 136(2)(b)(i) which provides that a transfer to *another person on another site, or to another site* may occur if it is expressly allowed by a regional plan.
60. In my submission, it would be appropriate to provide for the changes sought by VIL, because they are consistent with ensuring the efficient use of water, whereby water take and use is managed holistically by irrigation schemes and/or principal water suppliers. VIL has sought, and suggested, a permitted activity rule. If, as a consequence of the rigid wording in s 136, it is considered that the regional council cannot expressly allow in the LWRP the transfer of a water permit to a person who is not an owner or occupier as a permitted activity, then it is submitted VIL's relief could be achieved through a controlled activity rule, which could read as follows:

The temporary or permanent transfer, in whole or in part, of a water permit to take and use surface water or groundwater to an irrigation scheme or principal water supplier, is a controlled activity, provided the following conditions are met:

1. *The location of the take and use of the water does not change.*

The CRC reserves control over the following matters:

1. *The duration of the transfer.*

[With provision for non-notification].

61. VIL also sought two amendments to rule 5.128, which sets out the conditions on which dams which are not 'large dams' are permitted activities.
62. The first of those changes related to the physical parameters of a qualifying dam, which appear to reflect the equivalent definition of "*large dam*" in the Building Act 2004 (which currently provides that "*large dam means a dam that retains 3 or more metres depth, and holds 20 000 or more cubic metres volume, of water or other fluid*").
63. Ms Johnston's evidence relates to this particular point, and explains why, for the purposes of a permitted activity rule in a regional plan, the conjunctive requirement is not necessary. I note for completeness, that the Building

Amendment Bill (No 4) also proposes to amend the definition of 'large dam' in the Building Act 2004, so that it would read "*large dam means a dam that has a height of 4 or more metres, or holds 20 000 or more cubic metres volume of water or other fluid*". Accordingly, for the reasons set out in Ms Johnston's evidence, I submit that it is appropriate to grant the relief sought.

64. The second amendment sought by VIL to rule 5.128 was to replace the reference to a chartered professional engineer (civil) in 5.128(1)(c) and replace that with a "*Recognised Engineer*" as defined in the Building Act 2004 – being someone who is a chartered professional engineer (whether civil or otherwise) and having other relevant experience and qualifications as set out in the Building Act. The officer has recommended this amendment to rule 5.128, but, for completeness, a definition of 'Recognised Engineer' should also be introduced into the LWRP.¹²

Rule 5.132

65. In its legal submissions dated 28 February 2013, Meridian Energy Limited raised a concern that rule 5.132 might trigger the need for a resource consent application under s 20A of the RMA for the use of long-established structures in the beds of rivers. RDRML holds a similar concern, as whilst its consents authorise the damming of water, they do not specifically include reference to 'use' of the structures in the descriptions of the activities authorised. More particularly, there is a weir on the south branch of the Ashburton River associated with the RDR. Resource consent CRC011245 describes the authorised activity as follows:

To dam the South Ashburton River by means of a weir and intake structure to a maximum height of 1.5 metres above the riverbed, and to divert and take water continuously at a maximum rate of 7.1 cubic metres per second from the South Ashburton River into the Rangitata Diversion Race via an intake structure, at or about map reference NZMS 260 K36:819-192, and to use water for irrigation and stockwater purposes, and to generate electricity at Highbank Power Station.

¹² Under the Building Act 2004, "*recognised engineer, in relation to a dam, means an engineer who meets the requirements in section 149*". Section 149 provides:

- (1) *A recognised engineer is an engineer who—*
- (a) *has no financial interest in the dam concerned; and*
 - (b) *is registered under the Chartered Professional Engineers of New Zealand Act 2002; and*
 - (c) *has—*
 - (i) *the prescribed qualifications; and*
 - (ii) *the prescribed competencies.*
- (2) *In subsection (1)(a), financial interest does not include—*
- (a) *involvement in the construction of the dam as a fully paid engineer; or*
 - (b) *entitlement to a fee for undertaking an audit.*

66. Mr Mitchell has suggested¹³ that the issue could be addressed as follows:

5.XX Notwithstanding Rule 5.132, the use and maintenance of a dam associated with a lawfully established hydroelectricity power scheme that existed on 1 November 2013 is a permitted activity while the resource consent which lawfully established the damming of water behind the dam structure remains operative.

67. RDRML agrees with that suggestion, and asks that the Commissioners include wording to that effect, to appropriately resolve the issue.

Response of evidence of Whitewater New Zealand (Inc)

68. RDRML has noted the Statement of Evidence of Douglas Alexander Rankin on behalf of Whitewater New Zealand (Inc), which levels criticism at the RDR off-take from the Rangitata River, including that "*The river also suffers significantly from the large off-take of water by the RDR and so the chances of catching a good flow and experiencing a good white water run is somewhat reduced from what it would have been formerly.*"¹⁴

69. It will be no surprise that RDRML takes issue with such statements, given that the RDR was re-consented under the RMA and following extensive evidence, and given that RDRML also took an active part in the establishment of the Water Conservation (Rangitata River) Order 2006.

70. In the Report by the Special Tribunal (October 2002) on the establishment of that order, Part VII, paragraph 118 of that report recorded that:

However, the existing RDR consents are not inconsistent with protection of the outstanding qualities and characteristics that we have determined, providing that a satisfactory means of deflecting fish from the intake is installed. Nothing that we propose in our draft water conservation order is incompatible with granting new consents to RDR with similar terms and conditions to the present.

71. That order expressly provides at clause 12(4) that:

This order does not prevent the granting of further resource consents for the Rangitata Diversion Race on similar terms and conditions to those imposed on the resource consents held on the date this order comes into force including a stepped flow regime.

¹³ On behalf of Genesis Energy Limited, in paragraph 7.1 of his statement of evidence dated 4 February 2013.

¹⁴ Paragraph 39.

72. RDRML therefore asks that the Commissioners have no or little regard to suggestions that the Rangitata River suffers considerably from a take which has been in place for well over half a century.

Conclusion

73. RDRML is profoundly aware of, and keenly interested in, the LWRP given that it owns and operates the RDR in reliance on both the use of natural resources, and resource consents obtained under the RMA. Further, the RDR supports various water uses (irrigation, electricity generation, stock water) which are also subject to changing regulatory developments - such as the introduction of nitrogen leaching limits in respect of land within irrigation schemes.
74. A changing regulatory backdrop poses constant challenges for RDRML, not least in terms of the time and resource that goes into dealing with statutory planning processes. RDRML seeks a regional plan which appropriately provides for significant physical resources such as the RDR and its component uses in a sound and workable manner, which has regard to the issues associated with operating significant infrastructure, which minimises (where appropriate) the need to revisit long-established activities, and which properly takes account of the benefits that such infrastructure provides.

DATED at CHRISTCHURCH this 14th day of March 2013



Vanessa Jane Hamm

(Counsel for Rangitata Diversion Race Management Limited)