Tabled at Hearing 08/05/2013

Before the Hearings Commissioners
at Christchurch

in the matter of: a submission on the proposed Canterbury Land and Water Regional Plan under the Resource Management Act 1991

to: **Environment Canterbury**

submitter **Hunter Downs Irrigation (submitter 256)**

Legal submissions on behalf of Hunter Downs Irrigation

Dated: 8 May 2013

REFERENCE: BG Williams (ben.williams@chapmantripp.com)

Chapman Tripp
T: +64 3 353 4130
F: +64 3 365 4587

245 Blenheim Road
PO Box 2510, Christchurch 8140
New Zealand

www.chapmantripp.com
Auckland, Wellington,
Christchurch

CHAPMAN TRIPP

LEGAL SUBMISSIONS ON BEHALF OF HUNTER DOWNS IRRIGATION

INTRODUCTION

1 These submissions are provided on behalf of Hunter Downs Irrigation (*HDI*) and will cover the following topics:

1.1 background to HDI;

1.2 key legal issues for HDI in relation to the proposed Canterbury Land and Water Regional Plan (*the proposed Plan*); and

1.3 HDI's evidence/witnesses.

2 As an introductory matter (and as should be readily apparent from the evidence provided), HDI has only provided evidence in respect of two core matters:

2.1 recognition of HDI as part of the existing environment (and ensuring HDI is not subject to 'dual' nutrient management regimes post 2017); and

2.2 consent durations for regionally significant infrastructure.

3 For the other matters contained in its submission, those matters have generally been subject to detailed evidence from other submitters. In the interests of avoiding repetition, HDI has focused on those matters that are more specific to it. That should not be taken as any indication that it is not still interested in the other matters contained in its submission.

BACKGROUND TO HDI

4 The South Canterbury Irrigation Trust (*SCIT*) (to be renamed Hunter Downs Irrigation Scheme Trust (*HDIST*)) was formed in 2005 by the Mayors of Timaru, McKenzie, Waitaki and Waimate District Council. Its primary interest is large scale irrigation infrastructure taking water from the Waitaki River.

5 Meridian Energy Limited (*Meridian*) and HDIST have an agreement to see the formation of Hunter Downs Irrigation Limited (*HDIL*), and the renaming of SCIT to HDIST.

6 SCIT and Meridian are the joint resource consent holders for a resource consent (CRC071029) (*the HDI consent*) to take and use water from the Waitaki River at Stonewall for irrigation use. The consented Hunter Downs Irrigation Scheme (*HDIS*) provides the capacity to irrigate 40,000 hectares, within a command area of 60,000 hectares. Once constructed, HDIS will be the third largest irrigation scheme in New Zealand (after the Rangitata Diversion

Race scheme and the yet to be constructed Central Plains Water Scheme).

7 The consent is of very recent origin – its commencement date is 17 November 2011. The consent was granted after a comprehensive Council hearing with detailed assessments/evidence provided on matters now relevant to the proposed Plan. Appeals to the Environment Court were settled prior to the matter going to hearing.

8 It should be evident from the evidence provided to this hearing that HDIS is a large development with considerable lead time required for factors such as design, financing, further consenting and construction. As such:

8.1 the other consents required for the HDIS (such as those required for construction and operation) are still to be applied for; and

8.2 the detailed design of HDIS, including the final location for the main canal, is yet to be finalised.

9 A 'staged' approach to consenting has been adopted to reduce risk and to better manage the financial outlay required to consent and develop the scheme – and in particular, the significant costs and design work that is associated with obtaining the secondary resource consents and completing the final scheme layout.

10 In terms of wider efficiencies, the staged approach will also ensure that exact water demand and the required conveyance infrastructure (canals and pipelines etc) are known with more certainty prior to consents being applied for – hopefully allowing effects to be more accurately assessed.

11 In terms of implementation, HDIS is unlikely to be operational prior to the 2017 'reference date' provided in the proposed Plan.

12 Despite HDIS having the primary water permits, the proposed Plan introduces an uncertainty which, it is submitted:

12.1 is likely to make it harder to gain the financial commitment for investment in the next stage of work or the large capital requirement for scheme construction; and

12.2 is unnecessary given that the HDI consent and its required management plan framework already contain provisions for the full suite of matters which would be required under the proposed Plan (and in particular those included within Schedule 7).

13 **Mr Ellwood** and **Mr Ian Moore** discuss the HDIS in more detail in their evidence.

LEGAL ISSUES ARISING

Treatment of the existing environment in planning documents

14 Much of the HDIS command area falls within the proposed Plan's nutrient allocation areas zoned 'orange' (at risk) or 'red' (water quality outcomes not met).

15 For any irrigation scheme constructed and operational prior to 1 July 2017,[1] any change to a farming activity that may occur as a result will likely be a permitted activity under rule 5.42, provided the relevant consent includes conditions specifying the maximum amount of nitrogen that may be leached and would be the subject of a Farm Environmental Plan.

16 However due to the long development of HDIS, the effect of the proposed Plan rules is that, beyond 1 July 2017, it is likely that a land use consent will be required for farming activity on each of the individual properties supplied with water from the HDIS. This is because the exemption that previously applied to the HDIS under Rule 5.42 does not continue through to the post 1 July 2017 rules.[2] **Mr Ken Gimblett** discusses these likely consenting requirements in further detail in his evidence.

17 As discussed in the evidence of all HDI's witnesses, the HDI consent contains extensive nutrient management provisions as this issue was considered comprehensively under this consent. HDI considers that requiring further land use consent under the proposed Plan rules essentially revisits nutrient management matters for no apparent benefit. This is particularly as it is submitted that the conditions of consent for the HDIS will achieve the intent of Rules 5.46, 5.48 and 5.49 to control land use effects on water quality.

18 It is submitted that there is no resource management reason to require a new resource consent to control the effects of an activity that are already controlled under an existing resource consent – and the extent to which a consent may or may not have been given effect to should not be relevant to the future application of the plan rules. A resource consent is ultimately a 'permission to do something' and legal concepts around, for example, 'derogation'[3] or 'existing environment'[4] regard a resource consent as existing whether or not it has been both implemented and/or used to its full extent.

---

[1] Noting this is not likely – see the HDIS Development Timeline (**Figure 1** to **Mr Brian Ellwood's** evidence).

[2] Proposed Plan Rules 5.46, 5.48 and 5.49.

[3] For example: *Aoraki Water Trust v Meridian Energy Limited [2005] NZRMA 251.*

[4] For example: *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424(CA)

19 The widely recognised *Hawthorn* principle, for example, advises that the environment (for the purposes of an RMA assessment) is the future state of the environment upon which effects will occur, being:

19.1 the future state of the environment as it might be modified by permitted activities; and

19.2 the environment as it might be modified by implementing resource consents that have already been granted, where it appears likely that those resource consents will be implemented.

20 It is submitted that the proposed Plan is inconsistent with the *Hawthorn* principle.

21 In this instance the controls also provide no additional environmental benefit where existing irrigation schemes are already subject to equivalent nutrient management provisions. There appears to be no resource management purpose served in requiring a scheme such as HDI (or more particularly its scheme members) to go through a dual planning regime.

22 For this reason, HDI has sought a new Rule 5.XX that permits, post 1 July 2017, the use of land for any farming activity if the land holder has shares in an irrigation company that has a water permit which contains conditions addressing nutrient management (including through the use of farm environment/management plans).

23 It is further submitted that this new Rule is appropriate as the proposed Plan should properly recognise, consider and provide for the existing environment (including consents granted in this environment) in its formulation. It should be evident to the Hearing Panel that the resource management issues in the region are affected by the existing environment. As such, the existing environment is frequently recognised through the Canterbury Regional Policy Statement 2013[5] (*CRPS*) which contains numerous references to protecting and providing for existing infrastructure, particularly regionally significant infrastructure (which includes community-scale irrigation schemes).

24 Of note, the Hearing Panel are required to give effect to CRPS Policy 5.3.9:

> **Policy 5.3.9 – Regionally significant infrastructure**
>
> In relation to regionally significant infrastructure (including transport hubs):

[5] Decisions on the Proposed Plan must give effect to the CRPS (in accordance with section 67(3)(c) of the RMA).

(1) avoid development which constrains the ability of this infrastructure to be developed and used without time or other operational constraints that may arise from adverse effects relating to reverse sensitivity or safety;

(2) provide for the continuation of existing infrastructure, including its maintenance and operation, without prejudice to any future decision that may be required for the ongoing operation or expansion of that infrastructure; and

(3) provide for the expansion of existing infrastructure and development of new infrastructure, while:

(a) Recognising the logistical, technical or operational constraints of this infrastructure and any need to locate activities where a natural or physical resource base exists;

(b) avoiding any adverse effects on significant natural and physical resources and cultural values and where this is not practicable, remedying or mitigating them, and appropriately controlling other adverse effects on the environment; and

(c) when determining any proposal within a sensitive environment (including any environment the subject of section 6 of the RMA), requiring that alternative sites, routes, methods and design of all components and associated structures are considered so that the proposal satisfies sections 5(2)(a) – (c) as fully as is practicable.

25 One of the stated methods for implementing this Policy is (Method (1)(a)):

> The Canterbury Regional Council is to set out objectives and policies and may include methods in regional plans which provide for regionally significant infrastructure by reducing constraints on their efficient and effective operation, maintenance and upgrade.

26 It is submitted that the proposed Plan rules that require the HDIS (or its scheme members) to re-consent nutrient management issues are not a method which provides for HDIS with any reduction in the constraint on the efficient and effective operation of the scheme. HDI submits these rules would have quite the opposite effect on the HDIS, because as already explained, these rules will unduly increase costs of compliance and make it harder to gain the financial commitment for investment in the next stage of work or the large capital requirement for scheme construction.

27 For the reasons outlined it is strongly submitted that the proposed Rule 5.XX is appropriate in the context of irrigation schemes, such

as HDIS, that already have a resource consent that addresses nutrient management.

Consent duration

28 HDI considers the proposed Policy 4.76 is overly restrictive in placing a general guideline of a 5 year duration on resource consents for existing irrigation schemes in over-allocated catchments (noting that in its submission it also raises issue with the appropriateness of a 'default' lapsing period of 2 years). The basis of HDI's submission seeking an exemption from the Policy for the take and use of water by regionally significant infrastructure is that the Policy:

28.1 does not accord with the established approach to be applied under the RMA (i.e. section 123) in terms of establishing duration;

28.2 does not recognise the significance of such infrastructure and its benefits; and

28.3 does not recognise the certainty required for investment in regionally significant infrastructure and the significant time such infrastructure takes to establish once consents have been issued.

29 The Hearing Panel will be aware that under section 123(d) of the RMA, a water take and use resource consent can be granted for a term of up to 35 years. If no duration is specified in the consent, section 123(d) imposes a default 5 year duration from the date of commencement of the consent.

30 A decision on what is an appropriate duration is to be primarily made for the purposes of the RMA, having regard to the actual and potential effects on the environment and relevant provisions of applicable planning documents made under the RMA.[6] And in this respect it is submitted that the an applicant/consent holder is entitled to as long a duration as is possible to the extent that such a duration is consistent with the general concept of sustainable management.

31 In particular, it is submitted the proper application of section 5 of the RMA requires a broad overall judgment of whether the sustainable management of natural and physical resources will be promoted. In applying section 5, the purpose of sustainable management will not be fulfilled if the section is, for example, interpreted in a way that gives primacy to the ecological matters in

[6] *PVL Proteins Limited v Auckland Regional Council* EC Auckland, A61/2001, 3 July 2001 at [27]

section 5(2)(a)-(c) over the management functions in the first part of section 5(2).[7]

32 Put simply, in considering the appropriate consent duration, the consideration of economic well-being (such as the security of investment in regionally significant infrastructure and the ongoing benefits of such infrastructure) must be balanced with the perceived ability to avoid adverse effects on the environment by imposing shorter duration consents.

33 The importance of recognising security of investment, particularly for significant infrastructure, should also be evident from the following provisions of the CRPS which the Hearing Panel must give effect to:

33.1 Objectives 5.2.2(1), 7.2.1, 7.2.4 (particularly 7.2.4(5)); and

33.2 Policies 5.3.9, 5.3.11, 7.3.11 (in particularly see the explanation to policy 7.3.11 which refers to existing activities and infrastructure improving their water use efficiency and reducing other environmental effects. One way to achieve this is through granting resource consents for the maximum 35 year term but placing more emphasis on regular monitoring and review of operating consents).

34 **Mr Gimblett** discusses these CRPS provisions in more detail in his evidence.

35 Finally, a number of cases have discussed more specific criteria, including the need for investment security, to guide a consent authority's decision on imposing an appropriate consent duration under the RMA. For example:

35.1 *PVL Proteins Limited v Auckland Regional Council*:[8] the Court discussed the relevant factors that should be taken into account in setting a consent duration:

(a) the economic effects on the consent-holder of a particular consent term;

(b) conditions could be imposed requiring adoption of the best practicable option;

(c) requiring supply of information relating to the exercise of consent;

(d) requiring observance of minimum standards of quality in the receiving environment;

---

[7] *Winstone Aggregates Limited v Papakura District Council* EC Auckland, A049/2002, 26 February 2002 at [22]

[8] At paras [28]-[32], [67]-[68]

(e) reserving power to review the conditions, noting that a review of conditions may be more effective than a shorter term to ensure conditions to not become outdated, irrelevant or inadequate;

(f) uncertainty for an applicant of a short term, and an applicant's need to protect investment for as much security as is consistent with sustainable management, as well as how the term might affect the value of a company and its ability to raise capital, indicates a longer term;

(g) expected future change in the vicinity can be regarded as indicating a shorter term;

(h) uncertainty about the effectiveness of conditions to protect the environment maybe an indication that a short term is necessary;

(i) another indicator of a short term is where the operation has given rise to considerable public disquiet, as review of conditions will not be adequate given it cannot be initiated by affected residents; and

(j) an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, while an activity that generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, could generally be granted for a shorter term.

35.2 *Te Rangatiratanga O Ngati Rangitihi Inc v Bay of Plenty Regional Council*:[9] this case involved the re-consenting of a paper mill. In upholding the Council level decision and the Environment Court decision on consent duration, the High Court held that the imposed term of 25 years would provide security for existing and future investment in the mill. Further, the High Court accepted the findings of the Environment Court that the value of the capital investment being proposed by the Tasman Mill, the value of capital investment that has been regularly made by the applicant in the past, and the need for some security of this level of investment, indicated the 25 year term sought was appropriate.

36 HDI submits there is already appropriate guidance in the RMA, informed and interpreted through case law, on setting appropriate

[9] *Te Rangatiratanga O Ngati Rangitihi Inc v Bay of Plenty Regional Council* (2010) 16 ELRNZ 312 (HC) at 330. The High Court upheld the decision of the Environment Court on duration (*Marr v Bay of Plenty Regional Council* (2010) 16 ELRNZ 197 (EC)).

consent durations. In particular, the need for security in investment must be balanced with, rather than be sub-ordinate to, the need to avoid, remedy and mitigate adverse effects.

37 HDI understands the desire to have policy guidance on this matter in the proposed Plan, rather than rely on case law. However it is submitted that it is not appropriate to have what is effectively a 'one-stop', general policy in Policy 4.76 that does not, for example, adequately recognise the benefits of regionally significant infrastructure.

38 And to state the obvious, in the immediate context of HDIS the matter has recently been through its own RMA hearing process and the Commissioners there considered that a term of 35 years was sufficient to meet the purposes of the Act.

39 It is therefore submitted that the above reasons justify HDI's sought exemption from Policy 4.76 for consents relating to the take and use of water by regionally significant infrastructure.

HDI WITNESSES

40 HDI has provided evidence from the following witnesses:

40.1 **Mr Brian Ellwood** on the background and description of HDI, the HDI Scheme and Farm Management Plans, and how the proposed Plan will affect the HDIS.

40.2 **Mr Ian Moore** on farming and irrigation in South Canterbury, including previous attempts to set up irrigation schemes, the formation of SCIT and environmental sustainability.

40.3 **Mr Ken Gimblett** on planning matters, in particular, rules in relation to nutrient discharges associated with consented irrigation schemes, and consent duration under policy 4.76.

41 All HDI witnesses are providing evidence for HDI.

CONCLUSION

42 The HDIS is regionally significant infrastructure. HDI has sought changes to the proposed Plan to more appropriately provide for its recognition and ensure the proposed Plan does not impede potential investment into the Scheme.

43 In regard to nutrient management, HDI has sought a new Rule 5.XX to recognise nutrient management regimes imposed via existing resource consents, thereby removing the requirement to re-consent these nutrient management regimes. HDI submits this is appropriate where the management regime under resource consents, such as those held by HDIS, already provides a current and robust means to manage nutrients.

44 Finally, HDI has sought an exemption from Policy 4.76 for consents relating to the take and use of water by regionally significant infrastructure. HDI considers this exemption is appropriate to adequately recognise the benefits of regionally significant infrastructure.

Dated: 8 May 2013

Ben Williams
Counsel for Hunter Downs Irrigation