

Before Hearing Commissioners
at Canterbury Regional Council

under: the Resource Management Act 1991

in the matter of: proposed Plan Change 7 to the Canterbury Land and
Water Regional Plan

and: **Waimakariri Irrigation Limited**
Submitter 349, Further Submitter 349

Memorandum of counsel for Waimakariri Irrigation Limited

Dated: 2 December 2020

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**MEMORANDUM OF COUNSEL FOR WAIMAKARIRI IRRIGATION
LIMITED**

INTRODUCTION

- 1 This memorandum of counsel is filed on behalf of Waimakariri Irrigation Limited (*WIL*) in response to a question by the Independent Hearing Commissioners (*Commissioners*) during *WIL's* hearing presentation on proposed Plan Change 7 to the Canterbury Land and Water Regional plan (*PC7*). This question arose out of paragraphs 11-13 of the legal submissions filed on behalf of *WIL*.
- 2 At the time counsel advised that it wanted to provide a considered response in writing given the importance of the question (an approach which was accepted by the Commissioners).
- 3 The question was whether any of the three classes of exceptions in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (*King Salmon*) apply when giving effect to National Policy Statement for Freshwater Management 2020 (*NPSFM-20*).

Outline of *King Salmon* exceptions

- 4 As the Commissioners will be aware, the Supreme Court in *King Salmon* held that, when developing plans, there is generally no need to refer back to Part 2 of the RMA because higher order planning documents are assumed to already give substance to Part 2.¹
- 5 *King Salmon* was decided in the context of the New Zealand Coastal Policy Statement (*NZCPS*) – although the principle has also been applied to decisions made under the *NPSFM-2017* (and earlier). No case law appears to address the further implications (if any) of the *NPSFM-20*.
- 6 The Court in *King Salmon* indicated three circumstances which would allow resort to Part 2:²
 - 6.1 an allegation of invalidity of the high level document or its provisions;
 - 6.2 incomplete coverage of “the field” by the planning document concerned where Part 2 may provide assistance in dealing with matters not covered; and
 - 6.3 uncertainty as to the meaning of particular provisions where reference to Part 2 may well be justified to assist in a purposive interpretation.

¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [85] and [90] (*King Salmon*).

² *King Salmon* at [88].

7 Each is addressed below.

Allegation of invalidity

8 WIL makes no suggestion that the NPSFM-20 is invalid.

Incomplete coverage of "the field"

9 It is becoming increasingly clear from previous cases that this is a factual inquiry, with for example:

9.1 the Environment Court in *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* (which was decided under the NPSFM-17), determining that recourse to Part 2 would not add any value to decision-making in those proceedings, as tangata whenua values and tikanga were fully provided for in the relevant regional planning documents;³ and

9.2 the Environment Court in *Lindis Catchment Group v Otago Regional Council*, considering it "safer" to resort to Part 2 due to:⁴

(a) inconsistencies in the Otago Regional Plan: Water for Otago and doubts as to whether that plan gives full effect to the NPSFM-17; and

(b) the truncated form of the NPSFM applying to the plan change suggesting that it is too incomplete.⁵

10 Clearly the starting point for PC7 is the *potential* inconsistency between the NPSFM-20 and Part 2 RMA – in relation to which the NPSFM-20 introduces a hierarchy of 'priorities' which appears to be largely inconsistent with the 'balancing' approach inherent in section 5.

11 In this regard, prior to even the final NPSFM-20 being gazetted, the Report of the Freshwater Independent Advisory Panel had also noted that the hierarchy introduced through the draft NPSFM-20 may be vulnerable to significant legal challenge, citing reservations about:⁶

11.1 the relationship between the priorities and the RMA and a perceived inconsistency between the first priority setting an environmental bottom line; and

³ *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [169]-[170].

⁴ *Lindis Catchment Group v Otago Regional Council* [2019] NZEnvC 166 at [504].

⁵ The only relevant and operative parts of the NPSFM-2017 were some objectives; none of the NPSFM-2017's policies were operative for the Otago Region at the time of the proceedings.

⁶ Essential Freshwater: Report of the Freshwater Independent Advisory Panel (27 February 2020) at page 23.

- 11.2 provisions that explicitly allow for exceptions of that bottom line.
- 12 Those inconsistencies do not appear to have been fully resolved in the final NPSFM-20.
- 13 It is submitted that including a single objective which provides for social and economic well-being as a third ranking priority and one single standalone very brief policy is not sufficient to avoid the need for reference to Part 2. With 14 other policies largely focusing on water quality, it cannot be said that this single policy 'ticks the box' and reliance on it risks a decision being made that conflicts with section 5(2).
- 14 It is important to also remember that the RMA remains the senior document.⁷ The NPSFM-20 provides no detail as to (for example) how and the extent to which economic and social are to be achieved and when (and potentially when not) they will be appropriate to provide for.
- 15 Absent such detail, it is submitted the NPSFM-20 has not (and cannot) have gone to the extent of 're-writing' the RMA or taking economic and social well-being considerations almost entirely out of decision-making.
- 16 WIL therefore submits that it is still appropriate for decision-makers to refer back to Part 2 to (for example) avoid the potential for a perverse outcome which does not give effect to Part 2 of the RMA and more generally to ensure their decisions "cover the field".
- Scope - PC7 cannot fully give effect to NPSFM-20***
- 17 The extent to which it is reasonably practicable for the provisions of PC7 to give effect to the NPSFM-20 is confined by the scope of submissions on PC7.⁸
- 18 In particular, the NPSFM-20 introduces very specific objectives and policies. As these were not in contemplation when PC7 was prepared and submitted on, it is not obvious how submissions made with primary reference to the NPSFM-2017 can now be used to now give effect to the specific policies (and objective) of the NPSFM-20.
- Implementing the procedural requirements of the NPSFM-20***
- 19 As noted above, reference to Part 2 may also be justified where there is uncertainty as to the meaning of particular provisions.
- 20 In this regard, the procedural requirements of the NPSFM-20 would need to be met in order to fully give effect to the NPSFM-20. Until

⁷ *Ngati Kahungunu Iwi Incorporated v Hawke's Bay Regional Council* [2015] NZEnvC 50 at [16].

⁸ See WIL legal submissions at [8], and opening legal submissions for ECan at [18], [25].

this has occurred, there is uncertainty as to exactly how the provisions of the NPSFM-20 should and can be interpreted.

- 21 For example, the NPSFM-20 places greater emphasis on Te Mana o Te Wai, which requires a substantive change in how freshwater is viewed, and brings with it procedural obligations as to how it is to be implemented (with much greater emphasis on engagement and discussion between regional councils, communities and tangata whenua).
- 22 As discussed in WIL's legal submissions, until substantive engagement with mana whenua and the community has occurred in the express context of the NPSFM-20, it is not possible to definitively reach a view on how Te Mana o Te Wai is to be applied.⁹
- 23 Accordingly, in the absence of Te Mana o Te Wai having been articulated and implemented, the NPSFM-20 must by necessary implication be considered 'incomplete'. Reference to Part 2 appears appropriate to 'bridge the gap' that current exists in relation to the NPSFM-20 (i.e. absent the procedural aspects around Te Mana o te Wai).

Dated: 2 December 2020



Ben Williams
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⁹ WIL legal submissions at Schedule 1, paragraph 4.