

**BEFORE THE CANTERBURY REGIONAL COUNCIL
INDEPENDENT HEARING PANEL**

UNDER the Resource Management Act 1991

AND the Environment Canterbury (Transitional Governance Arrangements) Act 2016

IN THE MATTER of Plan Change 7 to the Canterbury Land and Water Regional Plan

**Memorandum of Counsel for the Director-General of Conservation
(Submitter Number: 160) in response to Memorandum of Counsel for
Waimakariri Irrigation Ltd.
Dated 18 December 2020**

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May it please the Hearing Panel

Introduction

1. This memorandum is filed on behalf of the Director-General of Conservation (DGC), in response to the memorandum filed on behalf of Waimakariri Irrigation Ltd (WIL) dated 2 December 2020. That memorandum came to the attention of the DGC on 9 December.
2. The specific issues raised in the WIL memorandum which this memorandum responds to, are the assertion that the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) does not 'cover the field' in relation to economic and social well-being considerations, or is uncertain in its meaning, and that accordingly, it is appropriate for decision makers to refer back to Part 2 of the Resource Management Act (RMA or the Act) in relation to these matters when considering and giving effect to the NPSFM 2020.¹
3. It is noted that WIL makes no suggestion that the NPSFM 2020 is invalid.

King Salmon

4. A useful starting point is the decision of the Supreme Court in *King Salmon*. The Hearing Panel will be well familiar with the decision. Nonetheless it is useful to briefly set out some relevant passages.
5. Dealing with the context of the New Zealand Coastal Policy Statement, the Supreme Court found that;
“... it is difficult to see that resort to pt 2 is either necessary or helpful in order to interpret the policies, or the NZCPS more generally, absent any allegation of invalidity, incomplete coverage or uncertainty of meaning. The notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances does not fit readily into the hierarchical scheme of the RMA.”²
6. In relation to 'incomplete coverage', the Court commented that;
“there may be instances where the NZCPS does not “cover the field” and a decision maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered.”³
7. In relation to 'uncertainty', the Court commented that;
“if there is uncertainty as to the meaning of particular policies in the NZCPS, reference to pt 2 may well be justified to assist in a purposive interpretation.

¹ Paragraphs 9 – 16 and 19 - 23, Memorandum of counsel for WIL dated 2 December 2020.

² *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [90]

³ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [88]

However, this is against the background that the policies in the NZCPS are intended to implement the six objectives it sets out, so that reference to one or more of those objectives may well be sufficient to enable a purposive interpretation of particular policies.”⁴

8. It is submitted that despite the *King Salmon* decision being concerned with the NZCPS, the Supreme Court’s findings set out above are relevant and applicable to the interpretation and implementation of the NPSFM 2020

Incomplete coverage of ‘the field’?

9. The NPSFM 2020 includes express reference, both in its single objective, and at a policy level, to economic and social-wellbeing.⁵ Economic and social wellbeing are also expressly recognised within the fundamental concept of Te Mana o te Wai.⁶
10. WIL acknowledges these references, but asserts that they are “not sufficient to avoid the need for reference to Part 2”.⁷
11. In essence, the argument is not that economic and social considerations have been omitted from the NPSFM 2020, but rather, that they have not been given sufficient priority.
12. It is submitted that this is not an instance where the NPSFM 2020 can be said to “not cover the field”, in the sense contemplated by the Supreme Court in *King Salmon*. Merely because economic and social wellbeing considerations are not prioritised in the way that WIL may have preferred, does not mean that the clear statement of priority set out in the NPSFM 2020 need not be implemented, or given effect to.
13. The arguments advanced by WIL appear very similar to those advanced by King Salmon, but rejected by the Supreme Court. In particular, in *King Salmon* it was argued that;
“the purpose of the RMA as expressed in pt 2 had a role in the interpretation of the NZCPS and its policies because the NZCPS was drafted solely to achieve the purpose of the RMA; so the NZCPS and its policies could not be interpreted in a way that would fail to achieve the purpose of the RMA.”⁸

⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [88]

⁵ NPSFM 2020, Objective 2.1(1)(c), and Policy 2.2 (15).

⁶ NPSFM 2020 1.3(5)(c).

⁷ Paragraph 13, Memorandum of counsel for WIL dated 2 December 2020.

⁸ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [87]

14. As noted, that argument was rejected, with the Court finding that the NZCPS was “intended to give substance to the principles in pt 2”, and that it “translates the general principles to more specific or focussed objectives and policies”.⁹
15. It is submitted that these findings are equally applicable in the context of the NPSFM 2020, in relation to the management of freshwater resources. Put another way, the objective and policies of the NPSFM 2020 apply pt 2 of the Act and give it substance in the context of the management of freshwater resources. The general principles in pt 2 are translated into a more specific or focussed objective and policies to be given effect to¹⁰ in relation to freshwater management. The objective and policies include express reference to economic and social well-being considerations, and also clearly articulate the priority to be accorded to these considerations. In this way, the field is covered. However, it is not a ‘re-writing’ of the Act, or ‘taking economic and social well-being considerations almost entirely out of decision-making’¹¹.
16. Finally, in relation to paragraphs 11 and 12 of the WIL memorandum, it is understood that the exceptions referred to in para 11.2 were removed from the final NPSFM 2020 as gazetted. Accordingly, these paragraphs appear to be of limited relevance.

Uncertainty

17. As noted above¹² by reference back to *King Salmon*, uncertainty in this context refers to uncertainty as to the meaning of a particular policy. A purposive interpretation is to be applied, and even if the meaning of a particular policy is unclear, reference back to the relevant objective may be sufficient without recourse to part 2.
18. WIL asserts that uncertainty in how the NPSFM is to be implemented in a specific context, means that reference to pt 2 is appropriate to ‘bridge the gap’.¹³
19. It is submitted that this is not uncertainty of meaning in the sense contemplated by the Supreme Court in *King Salmon*. The objective, and policies, are clear in their meaning. While implementation in some respects will be ongoing, and specific implementation steps are required to be undertaken, that does not mean that recourse to pt 2 of the Act is appropriate, and particularly not to read down or re-interpret the objective or policies of the NPSFM.

⁹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [89]

¹⁰ Section 67(3) RMA

¹¹ See paragraph 15, Memorandum of counsel for WIL dated 2 December 2020.

¹² See paragraph 8 above.

¹³ Paragraph 23, Memorandum of counsel for WIL dated 2 December 2020.

20. Notwithstanding that implementation steps, and engagement with mana whenua and the wider the community will be required to fully implement NPSFM 2020 in Canterbury, it does not follow that the NPSFM 2020 is incomplete or uncertain. To the contrary, the NPSFM articulates the fundamental concept of Te Mana o te Wai¹⁴ and describes how it is to be implemented.¹⁵
21. It is acknowledged that the Hearing Panel's task is complex, and that the relatively recent gazettal of the NPSFM 2020 may give rise to some questions relating to its interpretation. However, in the first instance, any such questions should be determined by reference back to the objective of the NPSFM 2020, to enable a purposive interpretation of the NPS' policies and other provisions.
22. It is only in the event that a purposive interpretation can not be ascertained by reference to the NPSFM's objective, and where genuine uncertainty of meaning exists, that reference to Part 2 may be justified. However, in that case, it is the principles set out in Part 2 in their entirety, not merely those that refer to economic or social well-being, which would need to be considered. Again, a purposive interpretation which advances the objective of the NPSFM 2020 is to be sought.

Conclusion

23. In conclusion, it is submitted that there is no incomplete coverage of the field, in relation to economic and social wellbeing considerations, in the NPSFM 2020. Economic and social well-being matters are expressly addressed in the NPSFM 2020. While these considerations may not be prioritised to the extent that WIL may prefer, that does not justify recourse to Part 2 of the RMA in an effort to read down the clear wording of the Objective and Policies of the NPSFM 2020.
24. Nor is there uncertainty of meaning in the sense that would justify recourse to Part 2 of the Act. The purposive meaning of the objective and policies in NPSFM 2020 is clear and unambiguous.



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18 December 2020

¹⁴ NPSFM 2020 1.3.

¹⁵ NPSFM 2020 3.2.