

**IN THE MATTER OF the Resource Management Act
1991**

**AND Of a notice of motion under
section 149T(2) to decide proposed
Plan Change 7 to the Regional
Plan: Water for Otago (referred to
the Environment Court by the
Minister for the Environment under
section 142(2)(b) of the Act)**

OTAGO REGIONAL COUNCIL

Applicant

Hearing Commenced: 08 March 2021 held in Dunedin

Court: Environment Judge J E Borthwick
Commissioner Bunting
Commissioner Edmonds

Appearances: P Maw and M Mehlhopt for Otago Regional Council
D van Mierlo for Aotearoa New Zealand Fine Wine
Estates Limited Partnership
L Phillips for Beef + Lamb New Zealand Limited
P Williams for the Director-General of Conservation
K Reilly for Federated Farmers of New Zealand Inc.
H Atkins and L Ford for Horticulture New Zealand Limited
C R Perkins for Landpro
H Atkins and L Ford for Horticulture New Zealand Limited
K Reid for McArthur Ridge Vineyard Limited, Mount
Dunstan Estates Limited, Strath Clyde Water Limited
R Dixon for Minister for the Environment

M Baker-Galloway for Otago Fish & Game Council and
Central South Island Fish & Game Council
P Page and B Irving For Otago Water Resource Users
Group
P Anderson for Royal Forest and Bird Protection Society
of New Zealand Inc
J Winchester and S Lennon for Te Rūnanga o Moeraki,
Kāti Huirapa Runaka ki Puketeraki, Te Rūnanga o
Ōtākou, Hokonui Rūnanga (Kāi Tahu Ki Otago) and
Waihōpai Runaka, Te Rūnanga Ōraka o Aparima, Te
Rūnanga o Awarua (Ngāi Tahu Ki Murihiku) and Te
Rūnanga o Ngāi Tahu (collectively Ngā Rūnanga)
P Page & B Irving for Clutha District Council, Waitaki
District Council, Queenstown Lakes District Council,
Dunedin City Council and Central Otago District Council
(the Territorial Authorities)
n J Welsh for Trustpower Limited
H Rennie for WISE Response Society Inc

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MR MAW OPENS

The Otago Regional Council (**Council** or **ORC**) is at a critical stage in its freshwater planning. The current freshwater planning framework in Otago is acknowledged as no longer being fit for purpose. It is a product of its time,
 5 being prepared prior to the National Policy Statement for Freshwater Management 2020 (**NPSFM**). A new NPSFM compliant framework is required and the Council is committed to having that new framework in place by 31 December 2023.

10 The Council is due to notify a new regional policy statement in June 2021. This will include, as objectives, the long-term visions for freshwater in the Otago region. These long-term visions are currently being developed through engagement with communities and tangata whenua. They will express the aspirations of communities and tangata whenua for each FMU, or part FMU.

15 This will provide the foundation for freshwater management in the new land and water regional plan (**LWRP**) and set the basis for identifying values, setting environmental outcomes and environmental flows and levels required by the NPSFM.

20 The Council has committed to notifying a new land and water regional plan by 31 December 2023. The Council science team has created a number of dedicated work streams and has focused on building capacity in order to meet this deadline.

25 In the meantime 312 Deemed Permits¹ and approximately 235 other water permits, representing a significant proportion of primary allocation in Otago, are due to expire. Without an intervening planning response, those permits will be renewed within a pre-NPSFM planning framework and where the expectation on the part of Applicants is that a permit will be granted for a long duration.

30

The critical issue for the Council is that the new LWRP developed through a community-driven National Objectives Framework (**NOF**) process, is not

frustrated by the grant of long-term water permits in the interim. Plan Change 7 (PC7) is the intervening planning response required to ensure that the outcomes of the community-driven NOF process can be effectively implemented within an appropriate timeframe.

5

I now turn to the purpose of PC7. The purpose of PC7 is to allow for an efficient and timely transition to a new land and freshwater management regime that gives full effect to the NPSFM. It establishes an interim planning framework to facilitate the cost-effective and efficient assessment of resource consent applications for the replacement of deemed permits and for the take and use of freshwater.

10

The need for an interim framework stems from the following interlinked issues. First, historically high levels of water taking in parts of the region and an allocation framework in the operative Regional Plan: Water (**Water Plan**) that does not prioritise first the health and well-being of water bodies and freshwater ecosystems. Inadequacy of other aspects of the planning framework in the operative Water Plan in terms of giving effect to the objectives and policies of the NPS-FM 2020. An operative planning framework that has created challenges for Ngāi Tahu ki Murihiku, including in relation to notification decisions and the extent to which consideration of Kāi Tahu rights, interests and values has been able to influence decision-making. Lack of understanding about the current state of Otago's pattern of land use and freshwater resources, and the effect of water takes on these resources when viewed through the lens of the new NPSFM. Uncertainty around the planning framework, including environmental outcomes and limits that will be established in accordance with the NPSFM in the new freshwater planning framework that is to be notified by 31 December 2023. The pending expiry of a large number of water permits and growing demand for water prior to the new freshwater planning framework becoming operative by 31 December 2025.

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These issues were highlighted in Professor Skelton's investigation of the Council's freshwater management and allocation functions and led to the Minister for the Environment making recommendations to the Council under

section 24A of the Act to prepare a plan change by 31 March 2020 that will provide an adequate interim planning and consenting framework to manage freshwater up until the time the new discharge and allocation limits are set, in line with the requirements of the NPSFM. The Minister encouraged
 5 consideration of a narrow plan change that provides for the relatively low cost, and fast issuing of new consents on a short-term basis, as an interim measure until sustainable allocation rules are in place and noted that those consents could, for example, be for a maximum term of five years, or until the new LWRP becomes operative, whichever comes first. It was also suggested that it may
 10 be beneficial to include these provisions in a stand-alone plan change.

In response to the Minister's recommendations, the Council agreed to prepare and notify by 31 March 2020 the Water Permits Plan Change (**PC7**).

15 PC7 was notified on 18 March 2020 and then renotified by the EPA on 6 July 2020 after the Minister called PC7 in, having considered it to be part of a proposal of national significance, and directed that it be referred to the Environment Court for decision.

20 The objective of PC7 (as recommended to be amended by Mr de Pelsemaeker) has been set out in my paragraph 11.

To implement this objective, PC7 (as notified) proposed a two-tiered consenting pathway by which applicants can apply for a resource consent to replace an
 25 existing deemed permit or water permit that expires before 31 December 2025 either as a controlled activity, or where they cannot meet the controlled activity conditions, as a non-complying activity.

At its core, the controlled activity pathway is intended to allow existing activities
 30 to continue for a short period (six years) without exacerbating the effects on the environment until the new NPSFM compliant planning framework is in place.

Longer term consent durations are disincentivised through strong policy direction to only grant resource consents for six years, or 15 years in limited

circumstances recognising that there may be “true exceptions” whereby a six year permit would be inappropriate.

5 The framework seeks to enable the transition to long-term sustainable management of freshwater by reducing the risk of further environmental degradation through avoiding the re-allocation of paper allocation; limiting the quantity of water allocated in resource consents issued in replacement of existing water permits to the quantity of water that has been used in the past; the requirement to carry over minimum flow, residual flow or take cessation
10 conditions on existing consents as consent conditions on any consents that replace existing water permits; and discouraging further investment in irrigation expansion until a new NPSFM compliant planning framework is in place.

15 PC7 does not seek to give full effect to the NPSFM. It is a holding measure that allows existing activities to continue for a short period of time without increasing the effects on the environment until the new NPSFM-compliant land and water plan is in place. This will enable those activities to be reassessed under the new NPSFM-compliant framework rather than long term decisions being made under the current Water Plan, which is acknowledged as not being
20 fit for purpose of not giving effect to the NPSFM.

It is also acknowledged that there are significant challenges associated with promulgating a plan change that has the effect of rolling over existing resource allocation for a short period of time. However, the alternative of not acting now
25 may well result in a situation where any new land and water plan that gives full effect to the NPSFM is unable to be implemented in a timely manner. When weighing those risks, it is submitted that PC7 is the most appropriate option at this point in time.

30 In the remainder of these submissions I address first, the legal framework and the key legal tests relating to PC7. I then provide an overview of the key issues for determination at this hearing in the light of the submissions and evidence, and the Council’s position in relation to those issues. And finally, I touch on the evidence to be called by the Council.

So starting now with the legal framework and the key legal tests. PC7 has been prepared in response to the Minister's recommendations and in accordance with the RMA statutory framework as it applies to a regional plan change.

5

On 8 April 2020, following notification of PC7 by the Council, the Minister for the Environment exercised his powers under section 142(2)(b) of the Act and called in PC7, having considered it to be part of a proposal of national significance, and directed that it be referred to the Environment Court for decision.

10

The relevant tests for the Court when considering this Plan Change are set out in section 149U(1). The Environment Court must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and it may exercise the powers under section 293; and it must apply sections 66 to 70, 77A, and 77D as if it were a regional council.

15

In addition, the Court must have regard to the Minister's reasons for making a direction in relation to PC7; and consider any information provided to it by the EPA under section 149G. Part 11 of the RMA applies to proceedings under s 149U, except if inconsistent with any provision of the section.

20

So I now touch on the Minister's reasons for referring PC7 to the Environment Court. In accordance with section 149U(1)(a), the Court must have regard to the Minister's reasons for making the Direction.

25

1010

25 "Have regard to" requires the decision maker to give genuine attention and thought to the matter.

30

26 In the Direction, the Minister stated that PC7 is a proposal of national significance because:

a) The issues the plan change aims to address have aroused widespread public concern or interest regarding their actual or likely effect on the environment, as indicated by the Skelton Investigation;

b) The plan change involves or is likely to involve the significant use of natural and physical resources while managing the impact of that use on the environment;

5

c) The plan change affects or is likely to affect areas of national significance noting that Otago freshwater catchments provide a habitat for a suite of nationally important non-migratory Galaxias taxas;

10 d) The plan change is part of the ORC's programme to give effect to the National Policy Statement on Freshwater Management;

e) There is also a relationship between the matter and the National Policy Statement – Renewable Energy Generation (NPS-REG) given that that
15 Trustpower, Contract Energy and Pioneer Energy hold either deemed permits or other water permits in relation to renewable energy generation;

f) Failure to implement the plan change has the potential to result in significant and irreversible changes to the environment;

20

g) The plan change is or is likely to be significant in terms of section 8 of the RMA given it is likely to be of high interest to Iwi because of the significance of freshwater management to Māori; and

25 h) The plan change will affect more than one district given that it will apply across the whole Otago region.

27 The Direction states that calling in PC7 as a part of a proposal of national significance and referring it to the Environment Court for decision would:

30

(a) assist the Council by allowing its staff to focus on developing the proposed Land and Water Regional Plan; and

(b) avoid potential delays associated with the Schedule 1 process of the RMA that could complicate the development of a new Land and Water Regional Plan.

5 Information that has been provided to Court by EPA

28 Where a matter has been called in and referred to the Environment Court for decision, obligations are placed on the EPA to provide certain information to the Environment Court.

10

29 In accordance with the Act, the EPA has provided to the Environment Court:

(a) The notified version of PC7;

15

(b) all information received by the EPA that relates to PC7, including the s32 report;

(c) the submissions received by the Council and the EPA on PC7; and

20

(d) a report prepared by the Council on the key issues in relation to PC7 (Key Issues Report).

Legal requirements under section 66 to 70, 77A, 77D

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30 The relevant legal requirements under section 66 to 70, 77A, 77D are set out in Appendix 1 for the Court's reference. I do not propose to take the Court through each of these requirements, but rather focus on the key tests at issue including the requirement to give effect to the NPSFM, the National Policy Statement for Renewable Electricity Generation 2011 (NPSREG) and the

30 National Policy Statement for Urban Development 2020 (NPSUD).

31 I also address the principles of the Treaty of Waitangi.

32 I then go on to address the relevance of the Minister’s recommendation and the Skelton Report to the Court’s consideration/determination of the plan change.

5 Application of NPSFM to PC7

33 PC7 was publicly notified by the Council on 18 March 2020, re-notified by the EPA on 6 July 2020, and submissions were lodged when the NPSFM 2014 (amended 2017) was in force.

10

34 On 5 August 2020, the Government gazetted a number of documents as part of its ‘Action for healthy waterways package’, including the NPSFM 2020, which came into force on 3 September 2020 and replaced the NPSFM 2014 (amended 2017).

15

35 Clause 4.1 of the NPSFM 2020 provides that “[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable”. In accordance with section 80A of the RMA, the Council must notify a freshwater planning instrument, where that instrument has the purpose of giving effect to the NPSFM 2020, by 31 December 2024.

20

36 It is submitted that PC7 does not need to give full effect to the NPSFM 2020. Rather, the Council must give effect to the NPSFM 2020 as soon as is reasonably practicable.

25

37 The situation before this Court with respect to the introduction of the NPSFM 2020 ‘mid-process’, is not new, and has occurred before with previous iterations of the National Policy Statement for Freshwater Management.

30

38 In *Ngati Kahungunu Iwi Incorporated v Hawke’s Bay Regional Council* the Environment Court held that the applicable national policy statement in that case was the National Policy Statement for Freshwater Management 2014 (which came into force following the Council’s decision on proposed change 5

to the Hawke's Bay Regional Resource Management Plan, but prior to the Environment Court hearing the appeal on 3 and 4 December 2014):

[16] Since the Supreme Court judgement in EDS v NZ King Salmon Co Ltd [2014] NZRMA 195 there has been an increased awareness of the need to consider the hierarchy of planning documents, and the degree of control those documents have over the required or permissible contents of the documents ranking below them. Plainly, the senior document is the RMA, and immediately below that are the National Policy Statements (NPS). In this case, this is the NPSFM which came into force on 1 August 2014 and, with some transitional provisions, revoked the 2011 version from that date. ... (Emphasis added)

39 Similarly, in Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council the High Court considered the question of which freshwater policy statement ought to be given effect to, following an appeal and the referral of a provision back to the decision-maker for reconsideration (in this case a Board of Inquiry). The Court acknowledged that the effect of its direction for reconsideration meant that the Board of Inquiry would have given effect to the NPSFM 2011 in relation to most of the Plan Change, and to the NPSFM 2014 in relation to the specific issue referred back to it:

[183] As the Freshwater Policy Statement 2014 will be the operative Freshwater Policy Statement when the Board reconsiders Rule TT1(j), the Board should give effect to that policy. This approach:

25 (1) recognises that the Executive wants the Freshwater Policy Statement 2014 to be implemented as promptly as possible; and

(2) best reflects the requirements of s 67(3)(a) of the RMA which requires the Board to give effect to any national policy statement.

30 [184] Accordingly, the Board should, as part of its reconsideration of Rule TT1(j) invite the parties to make submissions on the meaning and effect of the Freshwater Policy Statement 2014. I appreciate that this direction will mean the Board will have given effect to the Freshwater Policy Statement 2011 in relation to those parts of its report that have not been challenged and give effect to

Freshwater Policy Statement 2014 when re-writing Rule TT1(j). This unfortunate but unavoidable consequence arises from the fact the appeal I have had to consider focuses primarily on Rule TT1(j).

(Emphasis added).

5

40 By contrast, in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, the High Court held that on appeal, the Environment Court was not obliged to give effect to the National Policy Statement for Freshwater Management 2011:

10

[98] It is convenient to start with Horticulture NZ's submission. Section 55 requires a local authority to make amendments to plans required to give effect to any provision in the NPSFM that affects a plan. Those amendments must be made either as soon as practicable, or within the time specified within the NPSFM (if applicable), or before the occurrence of any event specified in the statement. That provision is responsive to the NPSFM, as is s 65(3)(g) which provides that a regional council is to consider the desirability of preparing a regional plan when the implementation of a NPSFM arises, or is likely to arise.

15

20

[99] It is also important to bear in mind that the Environment Court's jurisdiction is functionally limited. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions. I agree with Mr Maassen's submission that the Environment Court does not sit in an executive plan-making and plan-changing role. That is the local authority's role.

25

[100] In this case the NPSFM was gazetted only after appeals and s 274 notices had been filed. I consider that the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step".

30

[101] Policy E1 of the NPSFM anticipates decisions being made by regional councils. Implementation must be undertaken using the process in Sch 1.37 Notification and consultation is a key part of that process. There is no justification for that to be short-circuited through a hurried implementation exercise in the course of a party-confined, and jurisdictionally confined, appellate process that commenced before the NPSFM was gazetted.

[102] I do not, therefore, find that the Environment Court erred in failing to consider the extent to which the POP gave effect to the NPSFM in the paragraphs complained of. Implementation of the NPSFM will need to be addressed in accordance with its own terms, and under Sch 1, separately. Should the Council fail to give effect to the NPSFM, then the appellants may seek declaratory relief from the Environment Court under Pt 12 of the Act, or seek judicial review in the High Court.
(Emphasis added)”

So in short, two contrasting approaches with respect to the High Court, which I will now go on to address in terms of which ought to be preferred by this Court.

20 THE COURT: JUDGE BORTHWICK

It’s funny because my margin note reads: “Are these cases actually contrasting?” I don’t know; I haven’t read them. I don’t know. It might actually turn on – it may be fact specific. So anyway, I’ll let you continue. I take it you’ve got a bundle of cases?

25 MR MAW:

Where did we get to with that? We have an electronic bundle given the size of it and we can make that available. And if there are some particular cases, we could have copies of those printed.

THE COURT: JUDGE BORTHWICK

30 Just those two –

MR MAW:

These two might –

THE COURT: JUDGE BORTHWICK

– just those two of particular notice, of interest. But anyway –

5 **MR MAW:**

Yes.

THE COURT: JUDGE BORTHWICK

– you tell me where you're going to go.

MR MAW:

10 Very good. So, in relation to the Environment Court's rationale for not
 considering the evidence it had before it on the relevance of the new national
 policy statement (which was upheld by the High Court on appeal) was that the
 new national policy statement "only came into force long after the POP [being
 the Proposed One Plan] was well advanced". Further, Kós J emphasised the
 15 limited jurisdiction of the Environment Court and the fact that it does not sit in
 an executive plan-making and plan-changing role.

1020

20 42 In my submission, the approach taken by the High Court in the first of
 the two High Court cases is preferable and ought to be followed here.
 The High Court's approach in that case best reflects the requirements of
 s 67(3)(a) of the RMA, but is also more consistent with the purpose of
 the Act, being to promote the sustainable management of natural and
 physical resources. And further, in contrast to the second High Court
 25 decision, this PC7 process is far less advanced than that process where
 it had been on appeal and the referred back, this hearing being the first
 hearing of submissions on this plan change, and I would say by contrast
 here, the Court is sitting in an executive plan-making role with respect to
 PC7, there having been no other decisions made on submissions to
 30 date.

43 Accordingly, to the extent that there is scope to do so, this Court should
strive to give effect to the NPSFM 2020. In saying that, it is important to
acknowledge that the NPSFM 2020 is in many respects a significant departure
from previous iterations of the national policy statement, particularly in respect
5 of the manner by which the document is implemented.

44 However, the extent to which it is reasonably practicable for PC7 to give
effect to the NPSFM 2020 is confined by both the limited scope/subject matter
of PC7 and the scope in submissions. Council accepts that unless and until
10 certain implementation steps have been followed, the NPSFM 2020 cannot be
fully given effect to. Those implementation steps are set out in Part 3 of the
NPSFM 2020 and involve comprehensive procedural requirements for regional
councils when making decisions on how to give effect to that document. Many
of these processes require substantial tangata whenua and community
15 engagement by regional councils. Given the confines of the PC7 process, the
implementation steps in Part 3 of the NPSFM 2020 are not directly relevant to
the Court.

45 A key aspect of the NPSFM 2020, and a departure from the previous
20 iterations, is the hierarchy of obligations set out in Objective 1 and required by
Policy 1. One of the key changes in the NPSFM 2020 is the further elevation
and articulation of the concept of Te Mana o te Wai. Te Mana o te Wai has the
meaning set out in clause 1.3 and is described as a fundamental concept,
encompassing six principles along with a hierarchy of obligations. The six key
25 principles are first, mana whakahaere; kaitiakitanga; manaakitanga;
governance; stewardship; and care and respect.

46 The hierarchy of obligations is enshrined in the only objective in the
NPSFM 2020, which I have set out in paragraph 46.
30

47 In addition to the articulation of Te Mana o te Wai in clause 1.3 and the
objective, the Council must engage with communities and tangata whenua to
determine how Te Mana o te Wai applies to water bodies and freshwater
ecosystems in the region. Accordingly, while it is possible to initiate action

intended to give effect to the NPSFM, it is submitted that it is not possible to fully give effect to the true intent of the document until such time as the local approach to giving effect to Te Mana o te Wai (as required by clause 3.4) has been determined. This necessarily has a bearing on the extent to which PC7
5 can give effect to the NPSFM, also acknowledging the scope constraints for these processes.

48 There are 15 policies in the NPSFM. It is submitted that PC7 is a step towards giving effect to the following policies, in so far as they are relevant.
10 First. policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai, noting the meaning given in clause 1.3. Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments. Policy 7: The loss of river extent and values is avoided
15 to the extent practicable. Policy 9: The habitats of indigenous freshwater species are protected. Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9. And policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided. Now in relation to policy 11, I would note that PC7 goes
20 some way to implementing that policy but it doesn't go so far as phasing out all existing over-allocation, given the process that needs to be followed to determine the appropriate level of allocation available for the freshwater resources and that process will follow as the implementation steps take place with respect to the new land and water regional plan.

25

49 PC7 is intended to provide an interim regulatory framework for the assessment of applications to renew deemed permits expiring in 2021 and any other water permits expiring prior to 31 December 2025, the date by which the new LWRP (which is being prepared to give effect to the NPSFM and scheduled
30 to be notified by 31 December 2023) is expected to be operative." I'll just interpolate there, it may appear that a two year period is a relatively short period between notification and a plan becoming operative but that's a reflection of the new freshwater planning commission process as opposed to the current two

step process. It's anticipated that the time between notification and a plan being operative will be much shorter."

THE COURT:

5 So this plan will be referred to the commission?

MR MAW:

Correct. "The interim framework is important to ensure that the Council can implement the NPSFM-compliant provisions of its new LWRP in a timely
10 manner, without being constrained by the allocation and taking of water under numerous water permits with long-term durations.

50 Ultimately, a decision-maker (in this case the Court) is required to give effect to the NPSFM 2020, to the extent that there is scope within submissions,
15 noting the constraints of the confined nature of the PC7 and the subject matter therein.

51 As an interim framework, PC7 is not designed to fully give effect to the NPSFM. Rather, it seeks to ensure that the outcomes of the NOF process can
20 be effectively implemented through the new RPS and LWRP."

I turn now to the NPS for renewable electricity generation.

52 "PC7 must also give effect to that policy statement to the extent that it is
25 relevant. This national policy statement sets out the objective and policies for renewable electricity generation under the Act" and I've set out a relevant part from the preamble.

The relevance of that preamble was considered by the Court in *Carter Holt*
30 *Harvey v Waikato Regional Council* and I've set out the relevant passage there. And the objective from that NPS is set out at paragraph 54.

"The NPSREG requires (amongst other matters) first for decision-makers shall recognise and provide for the national significance of renewable electricity

generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities,” and that’s Policy A.

1030

5 “Decision-makers shall have particular regard to the maintenance of the generation output of existing renewable electricity generation activities can require protection of the assets, operational capacity and continued availability of the renewable energy resource,” and that’s Policy B.

10 And that regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district set out in Policy E2.

15

The requirement for decision-makers to have particular regard to the above matters, can be contrasted with the requirements in Policy A that decision makers shall recognise and provide for the national significance of renewable electricity generation activities and Policy D that decision-makers shall, to the extent reasonably possible, manage activities to avoid reverse sensitivity effects on consented and on existing renewable electricity generation activities.

20

It is relevant to note that the NPSREG itself recognises the tension that can sometimes exist between renewable electricity generation and matters of national importance as set out in section 6 and other matters in section 7 of the Act.

25

Given the wording of the NPSREG, particularly the terms "to recognise", "provide for" and "have particular regard to", it is considered that the NPS-REG, to which effect must be given, is not particularly prescriptive in managing this tension. Rather, the NPSREG is worded at a "higher level of abstraction" such that the Council has a greater degree of flexibility as to how it implements the NPSREG in its region than it would if the NPSREG was framed in a more

30

specific and unqualified way. And I note there a passage from the Implementation Guide for that NPS-REG.”

5 In terms of the application of those provisions in the context of Trustpower’s submission, my flag that I do address that in relation to one of the issues to be determined further on in my submissions.”

The third NPS to give effect to insofar as it’s relevant is the NPS for urban development.

10

“The NPSUD came into force on 20 August 2020, after PC7 was notified. A key objective of the NPSUD is that New Zealand has well-functioning urban environments that enable all people and their communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future. Part 4 of the NPSUD includes timeframes for implementation. Every tier 1, 2 and 3 local authority must amend its regional policy statement or district plan to give effect to the provisions of the NPSUD as soon as practicable. There are also timeframes within which tier 1 and 2 local authorities must comply with specific policies including those relating to intensification, the development of a future development strategy (FDS), Housing and Business Development Capacity Assessment (HBA) and carparking. Notably, there is no requirement to amend a regional plan.

15

20

In relation to the NPSUD requirement for Councils to ensure that there is sufficient development capacity, it is noted that Schedule 10A.4 of PC7 only applies to the replacement of existing permits. If new permits are required to provide for growth, then these would be assessed under the rest of the Water Plan, but subject to Policy 10A.2.2 of PC7 requiring a consent duration of 6 years. It is submitted that a consent duration of 6 years would enable councils to meet their obligations under the NPSUD to ensure that there is adequate existing development infrastructure in the short term and would not impede their ability in the medium term to identify funding for infrastructure to support development of land identified in the long-term plan.”

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And again, on this issue, I address in the key issues part of my submissions, the relevance of this NPS to the submission lodged by the territorial authorities.

I now deal with the principles of the Treaty of Waitangi. “Section 8 of the RMA
5 requires the Council to “take into account” the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) when exercising functions and powers under the RMA in relation to managing the use, development and protection of natural and physical resources.

10 In cases under other legislation, the Courts have identified the following principles of the Treaty. The first, the two parties to the Treaty entered into a partnership, and therefore must act reasonably and honourably towards each other and in utmost good faith. The Crown must make informed decisions which will often require consultation. The Crown must not unreasonably
15 impede its capacity to provide redress for proven grievances and the Crown must actively protect Māori interests.

The obligation to “take into account” is a requirement to weigh the principles of the Treaty with all other matters being considered and, in coming to a decision,
20 effect a balance between the principles and all other matters. However, the principles do not necessarily prevail over the other matters that local authorities must “recognise and provide for” or “have regard to” under the Act.

Although the application of section 8 is fact-specific, the Courts have identified
25 specific obligations for local authorities to enable active participation of Māori in dealing with resources of known or likely value to Māori; to engage with tangata whenua in good faith; to see mutual reciprocity and benefit, where possible; to endeavour to protect resources of importance to Māori from adverse effects; and to take positive action to protect tangata whenua interests, which will at
30 times oblige councils to initiate, facilitate, and monitor consultation.

A detailed analysis of the principles of the Treaty and their application under section 8 of the Act is set out in Appendix H of Mr de Pelsemaeker’s Evidence in Chief. How the principles of the Treaty of Waitangi have been taken into

account in the development of PC7 is also set out in Mr de Pelsemaeker's Evidence in Chief at paragraphs [127] to [142].

5 As set out in the evidence of Kāi Tahu ki Otago, the ORC is now working in partnership with interested papatipu rūnanga to ensure that the new RPS and the new LWRP appropriately address cultural rights and interests and values. In the absence of PC7 there is a very real risk that the outcomes of that partnership approach will be frustrated by the granting of long-term water permits. The granting of long-term consents would foreclose the ability to
10 change the status quo in freshwater management in the catchments that are dominated by the deemed permits for another generation.”

I move now to the relevance of the Minister's recommendations and the Skelton Report. “Section 24A of the RMA provides the Minister with the power
15 to investigate and make a recommendation on a local authority's exercise or performance of any of its functions, powers or duties under the Act.

Pursuant to section 24A of the Act, the Minister engaged Professor Skelton to investigate whether the Council was adequately carrying out its functions in
20 relation to freshwater management and the allocation of resources. Professor Skelton's report highlighted that one immediate issue facing the Council was developing a fit for purpose planning framework ahead of the expiry of deemed water permits on 1 October 2021. Professor Skelton considered that interim measures were necessary. He recommended, among
25 other things, that the Minister initiate the necessary legislative process to change the date for expiry of the deemed permits in section 413(3) of the Act from 1 October 2021 to 31 December 2025. This, in his view, would ensure that the replacement consent applications are assessed against a robust policy framework.

30

The Minister considered that there was an urgent need to ensure that an interim framework is in place but was not in favour of changing the RMA to extend the date for expiry of the deemed permits. In response to Professor Skelton's recommendations, the Minister formally recommended under section 24A of

the RMA that the Council” and I’ve set out the relevant passage there. I’ve also set out at paragraph 72, in relation to his recommendation regarding an interim planning framework, that which the Minister also stated.

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“The Minister’s recommendations do not fall within the matters listed in section 66(1) of the RMA that the Court must act in accordance with when considering a change to a regional plan or the matters listed in section 66(2) that the Court must have regard to when considering a change to a regional plan. Therefore, the Court is not required to consider the Minister’s recommendations when considering PC7.

However, despite not being a mandatory consideration, it is submitted that the Court can, and should, have regard to the Minister’s recommendations when making a decision on PC7. It is well-established that section 66(2) of the Act does not create an exhaustive list of matters to be considered. The High Court has held that regard may be had to nonbinding national policy documents as relevant background material, even if those documents do not have any status under the RMA.

20

The Minister’s recommendations are relevant background material to PC7 and should be given weight accordingly. The power of the Minister to investigate and provide recommendations to local authorities is an important component of the Minister’s function to ensure that the RMA is properly implemented. Although recommendations made by the Minister under section 24A of the RMA are not binding, they carry significant weight. Their importance is demonstrated by the consequences for a local authority if it does not act on a recommendation given by the Minister. In such circumstances, the Minister can appoint, on such terms and conditions as the Minister thinks fit, one or more persons to exercise of perform all or any of those functions or duties in place of the local authority or direct a regional council to prepare a regional plan, change to a regional plan or variation to a proposed regional plan to address the issue. The regional council must then act in accordance with this direction when preparing the relevant instrument.

In the context of PC7, there is a close link between the Minister’s investigation into the Council’s performance of its freshwater management and resource allocation functions; the Minister’s recommendation that the Council prepare an interim plan change to provide a framework for the processing of water permits
5 until the LWRP becomes operative; and thirdly, the Minister’s reasons for directing PC7 be called in and referred to the Environment Court for decision.

Given the close link between the Minister’s recommendations under section 24A and the Minister’s reasons for making the Direction, and the fact that the
10 Court must have regard to those reasons when considering PC7, the Council submits that it is appropriate for the Court to place weight on the Skelton Report and Minister’s recommendations when considering PC7.”

I now turn to address the key issues for determination by this Court. “There are
15 two overarching for the Court’s determination that have been raised in submissions and evidence filed on PC7. First, whether an interim planning framework is required; and secondly, if an interim planning framework is required, is PC7 the most appropriate option?

20 These two overarching questions give rise to several key issues for the Court’s determination. These issues are outlined below together with the Council’s position in respect of each issue. I acknowledge that this is not an exhaustive list and parties may frame the issues for determination differently.

25 Some parties disagree with the basis for PC7, including the findings of the Skelton Report and the need for the Minister’s recommendations and consider that there is no need for an interim framework. Other parties agree with the basis for PC7 but consider that it does not go far enough either in relation to providing a simple and cost-effective consenting pathway for consents with a
30 short duration; or in terms of environmental protection.”

So dealing with the question of whether an interim planning framework is required. “In his Evidence in Chief, Mr de Pelsemaeker sets out five significant resource management issues that PC7 is seeking to address. Whilst each of

these issues are addressed in evidence of the parties and are therefore addressed below as topics, it is the combination of these issues that has given rise to the need for the Plan Change. Therefore, it is not necessary for the Court to make a determination on the presence or legitimacy or significance of each issue identified, but rather the question is whether there is an issue that needs to be resolved and can the current planning framework be relied upon to resolve that issue until a new LWRP is notified? Put another way, is a change required to the status quo in the interim?

10 So is there a resource management issue that needs to be resolved? The deficiencies in the current framework are discussed in the Key Issues Report, the Skelton Report and the evidence of Mr de Pelsemaeker, Ms Bartlett, Ms McIntyre and a number of other expert witnesses.

15 These deficiencies are well summarised in the evidence of Ms McIntyre where she considers that the Water Plan framework is inconsistent with the higher order direction for managing freshwater, or hampers the ability to give effect to that direction, in the following ways. First, it does not recognise and address over-allocation, and the approach to setting flow and allocation regimes is
20 inadequate to protect instream values; second, there is an apparent priority for consumptive use over instream values, with only narrow provisions, in policies and rules, to consider the effects of abstraction on natural and cultural values; third, in consent decision-making, there is a strong focus on effects at the abstraction point and inadequate consideration of effects, including cumulative
25 effects, on the broader freshwater system. Hydrological and ecological information is often inadequate to assess such broader effects; fourthly, policies incentivise increased use and increased dependence on water consumption; and fifthly. policy on consent duration gives inadequate direction and provides an expectation of long consent terms.

30

There is an urgent need to develop a new freshwater planning framework to implement the new NPSFM. The outcomes of the NOF process will result in the setting of new environmental outcomes, the use of other or additional instruments and setting of new standards and limits to address these outcomes.

The replacement of 312 deemed permits and approximately 235 number of water permits expiring before that time, will take place before the new framework is in place. There is a history and expectation of long-term consents being granted under the Water Plan. Given the deficiencies in the Water Plan, it is the Council's position that the replacement of permits under the existing Water Plan framework is likely to frustrate achieving the environmental outcomes that will be set in the new LWRP in a timely manner.

Mr Ellison and Mr Whaanga consider that it would also undermine the rakatirataka and kaitiakitaka of Kāi Tahu by foreclosing the ability to change the status quo in freshwater management in the catchments that are dominated by the deemed permits for another generation.

The Council agrees with the position of Nga Rūnanga that it is important that long term decisions on the deemed permits are made in the context of a new planning framework that gives effect to the NPSFM rather than the existing one. This importance is also recognised in the submission and evidence on behalf of the Minister for the Environment.

If there is a resource management issue that needs to be resolved, the next question is can it be resolved under the existing framework? Several parties have raised the issue of whether an interim planning framework (as provided by PC7) is necessary on the basis that the current planning framework under the Water Plan can be relied on. This is in part because parties consider that until a new LWRP is developed, consent applications under the Water Plan should be assessed directly against the NPSFM under section 104(1)(b) and any concerns about "locking in" decisions for the life of the LWRP can also be addressed by reviewing resource consents.

In relation to the NPSFM, the Council must only have regard to any relevant provisions of the NPSFM when considering applications for resource consent under section 104 of the Act. By contrast, PC7 must give effect to the NPSFM.

The question of how much weight should be given to the objective and policies of the NPSFM will vary on an application by application basis. However, many of the policies in the NPSFM have more relevance to plan-making than resource consent applications, which will necessarily go to the weight that is ultimately placed on those policies when assessing a consent application.”

5 1050

THE COURT:

Can you just pause there a second? Why do you say that in your second sentence, paragraph 89 starting with “However”? I’m just struggling with the sentence, that’s all.

10

MR MAW:

Oh right. So the submission that I make is that when you read the policies in the NPSMFM, they are more directed to a Council’s plan-making function in terms of the language used within them such that when considering by contrast, resource consent applications on a case by case basis, they are more difficult to apply. The concern then is that given decision makers in the context of resource consent applications only have to have regard to those policies, it’s somewhat easier to put them to one side or to perhaps apply less weight to those policies given the way in which they’re expressed.

15 20

THE COURT:

Only have regard to under s 104?

25

MR MAW:

Correct.

THE COURT:

141(c). Yep. And your question there is will it – it’s only to have regard to the provisions of the NPS on a case by case, on the resource consent application context. Where that policy hasn’t been articulated in a water plan or in the new land water plan, what then are the Council’s – what weight – what informs the

30

outcomes what is left to be determined on the case by case or is uniformed by a regional plan of action, if you like, with the water plan?

MR MAW:

5 Yes.

THE COURT:

Unarticulated safe to the extent that the applicant may wish to articulate on a resource consent application?

10

MR MAW:

Yes. So the translation of those policies into regional plans which are then applied in the consenting context where those policies are given their colour and their more direct meaning.

15

THE COURT:

Okay.

MR MAW:

20 I think, picking up at paragraph 90: "When assessing a consent application under the Water Plan, regard will need to be given to the hierarchy of obligations in Objective 1 of the NPSFM and whether granting a particular application will prioritise first, the health and well-being of the relevant water bodies and freshwater ecosystems, second the health needs of people, and third the ability
25 of people and communities to provide for their social, economic and cultural well-being, now and in the future. The objective of the NPSFM is not concerned with a single activity or waterbody, but rather with an integrated approach to freshwater management. The policies, in particular Policies 1, 3, 5 and 11, also support an integrated approach to freshwater management, rather than dealing
30 with those issues on a consent by consent approach" for the reasons that we just expanded on. "It is submitted that this is likely to be difficult to determine on a case by case basis" as in a consent by consent basis.

In the absence of an NPSFM-compliant planning framework, it will be difficult to assess resource consent applications and how they might implement Te Mana o te Wai and the hierarchy of obligations in the Otago context.

5 Accordingly, it is submitted that reliance on an assessment of the objectives and policies of the NPSFM in resource consent application under the Water Plan does not impact the necessity for the interim framework set out in PC7.

10 Further, consent reviews under the Act are subject to a number of limitations. Section 128 of the Act enables the Council to initiate a review of consent conditions in specified circumstances, including for a purpose specified in a condition of consent, or where certain rules are made operative (ie, rules relating to maximum or minimum levels or flows or rates of use of water, or
15 minimum standards of water quality, and in the Council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates or standards set by the rule to be met).

20 However, the exercise of a review power under section 128 does not allow the consent to be terminated, nor can amendments to consent conditions have the effect of preventing the activity for which the resource consent was granted in the first place.

25 Ms McIntyre agrees with Mr de Pelsemaecker that reliance on consent condition reviews will not be effective in making significant changes in freshwater management in catchments which, following the setting of limits, are found to be substantially over-allocated or where significant changes to minimum flows or other measures are required to give effect to the NPSFM.”

30 **THE COURT:**

Just pause there a second. I'll have to reread Ms McIntyre's evidence but presumably, she gives reasons for that at her paragraph 80?

MR MAW:

Yes.

THE COURT:

You are hoping.

5

MR MAW:

Yes.

THE COURT:

10 Okay, just reminding you we'll take a break at 11 o'clock so perhaps if we finish at your last paragraph, make it 96?

MR MAW:

15 Yes. So a number of parties – so this is moving onto the balance of these submissions if an interim planning framework is required, is PC7 the most appropriate option? “A number of parties support the need for and intent of PC7 in providing for a transitional framework until a new NPSFM-compliant / fit for purpose framework is developed. However, parties raise concerns about whether, as drafted, PC7 achieves that intent. Key issues raised are:

20 Is the controlled activity rule efficient and effective? Is the non-complying activity rule sufficiently robust? How should social and economic effects be weighed when considering PC7? Should there be a restriction on irrigation expansion? What should the data period be for calculating the rate of take and volume of water? How should the framework apply to hydroelectricity
25 generation? How should the framework apply to community water supplies? How should the framework apply to damming?”

Now, again I reiterate, that's not an exhaustive list of the issues but those having considered the evidence, cover the majority of what I consider to be the
30 significant issues. Other parties will continue to address or add issues to that list as this hearing develops.

THE COURT:

And in relation to these issues, are you – is that intended to cover the schedule as well?

MR MAW:

5 Yes, so I pick up – on the way through a number of these issues, dovetail them to the schedule itself so the schedule is relevant to probably half of the issues which are flagged on that list in terms of how the schedule actually deals with or accommodates particular activities.

10 **THE COURT:**

Because one of the issues, am I right in thinking one of the issues for the schedule is between parties on the schedule is how to clean up, if I can put it that way, clean up the data on the schedule in relation to the schedule.

15 **MR MAW:**

Yes, it is and it's so paragraph E there in terms of the data period, that could easily be brought into the data period and the quality of data. That is a live issue.

20 **THE COURT:**

Yes, yes, yes. It is, okay. All right. Well, we'll take a break for 15 minutes.

COURT ADJOURNS: 11.00 AM

25

COURT RESUMES: 11.18 AM**MR MAW:**

5 So, before the tea adjournment, we had just outlined the key issues that are to be addressed in the balance of the submissions, and we worked through the list on paragraph 96. There is an additional issue that hasn't made it to that list, if I could just flag that now. So at paragraph 96, if you were to add in after the second issue, after the B issue, a B1 or a BA which is: "Should the needs of existing water users be recognised in PC7, and if so how."

10 So, the first of those issues that I addressed at my paragraph 97 is, is the controlled activity rule efficient and effective?

15 "97 The controlled activity pathway is designed to be an efficient and cost-effective option for applicants to continue their activities without exacerbating the effects on the environment until the new LWRP is in place.

20 98 Parties have raised concerns with the efficiency and effectiveness of the rule achieving this purpose and amendments are sought to enable a more cost-effective pathway. However, this must be weighed against the risk of further environmental degradation. The Council is open to amendments to the controlled activity rule provided those amendments better achieve all of the outcomes sought by PC7.

25 99 Some submitters also contend that the proposed controlled activity rule in PC7 has little utility due to the requirement to also obtain resource consent under the Water Plan (which is to be assessed as a restricted discretionary activity) and that most applications to replace deemed permits are expected to be lodged before the rules in PC7 become operative. However, it is submitted that the controlled activity rule for short duration replacement consents is
30 efficient and appropriate.

100 PC7 is intended to provide an interim regulatory framework for the assessment of applications to renew deemed permits expiring in 2021 and any other water permits expiring prior to 31 December 2025.

5 101 The rules in PC7 took immediate legal effect on and from notification as they are rules that protect and relate to water. Rules with immediate legal effect must be complied with.

10 102 This means that on and from notification of PC7 (and until PC7 becomes operative), activities must be assessed under the rules in both the operative Otago regional plans and PC7. Activities may require consent under either the relevant operative plan, PC7, or both. Once PC7 becomes operative (and forms part of the Water Plan), activities will only need consent under the relevant operative provisions.

15

103 Applications for water permits to replace deemed permits expiring in 2021 and any other water permits expiring prior to 31 December 2025 that are controlled activities under PC7 (i.e. they meet the relevant conditions, including that the application is for a short duration – no more than 6 years) may require
20 consent under the Water Plan for a more stringent activity status.

104 It is anticipated that most applications for water permits to replace deemed permits (that generally expire in October 2021) will be lodged with the Council by 1 April 2021 (or 1 July at the latest). This is so that these consent
25 holders can gain the protection of section 124 of the RMA, which provides that if a resource consent is due to expire and the consent holder applies for a new consent for the same activity at least 6 months before the expiry of the existing consent, that the holder may continue to operate under the existing consent until all appeals on the new consent are determined. If applications are lodged
30 3 months before the expiry of the existing consent, it is within the council's discretion to allow the consent holder to continue to operate.

105 Accordingly, it is expected that most of the applications for the replacement of deemed permits will be lodged before PC7 becomes operative and will need resource consent under both the Water Plan and PC7.

5 106 Where resource consent is required under multiple plans, the most stringent activity classification applies to the processing of the consent application. This means that applications for a short duration consent that meet the controlled activity rule in PC7 but require consent for a more stringent activity status in the Water Plan, will ultimately be processed as the more
10 stringent activity status.

107 Some submitters have raised this issue in evidence, and contend that this means the controlled activity rule in PC7 has little utility. However, PC7, and the controlled activity status afforded to the relevant application, will still be
15 relevant to the decision on a consent application.

108 Section 104(1)(b) provides (relevantly):

(1) When considering an application for a resource consent and any
20 submissions received, the consent authority must, subject to Part 2, have regard to:

- (b) any relevant provisions of:
- (vi) a plan or proposed plan

25 109 The test of "have regard to" in section 104(1) requires the decision maker to give the matters genuine attention and thought (but not necessarily accept them), and give them weight as is considered appropriate.

110 The question of weight to be given to the proposed objective and policies
30 of PC7 and the operative objectives and policies of the Water Plan will ultimately be determined by the decision-maker on any consent application. However, there are a number of established principles that should be used as guidance when determining the weight to be given to the PC7 provisions.

111 There are two aspects to weight. First, the weight to be given to the provisions of PC7 and second, the weight (or strength of direction) of its individual provisions.

5 112 Relevant principles that apply to the weight to be given to proposed objectives and policies include:

(a) The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

(b) The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:

(i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making (and the level of objection/challenge to the proposed provisions);

(ii) circumstances of injustice (including to the applicant and to parties opposing a proposal);

(iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.

20 (c) In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions accord with Part 2, the Court may give more weight to the proposed plan (particularly where the operative Plan was not prepared under the RMA).”

25

Perhaps if I can interpolate there. The situation here is that we’re dealing with a plan change which is amending a planning framework that doesn’t give effect to the current NPSFM, so my submission would be that additional weight should and can be applied in the same way as the earlier cases were providing greater weight to a proposed plan prepared once the RMA had been enacted compared to the plans in place pre the RMA.

30

Now, I’ve set out the objective of plan change 7 in paragraph 113, and it’s important to note that the objective set out there is the notified version of the

objective. It should have been the objective as amended by Mr de Palsemaeker and by submissions in relation to it are referring to the objective as recommended to be amended. So, if you just note that that text should be replaced with the objective from the amendments from Mr de Palsemaeker.

5 1130

MR BUNTING:

Which one? Is it (inaudible 11:30:03)'s reply evidence, is that the one you're referring to?

MR MAW:

10 So paragraph 113, so it should be the objective that's captured in the document entitled: "Proposed and changed 7 water permits, recommended amendments marked in as at 19 February 2021.

MR BUNTING:

Thank you.

15 **MR MAW:**

And at, also incorporates corrections as at 4 March 2021.

114 "The objective is implemented by three policies." In relation to consent duration, Policy 10A.2.2 directs that, irrespective of any other policies in the
20 Plan concerning consent duration, the Council shall only grant new resource consents for the take and use of water for a duration of no more than six years. Policy 10A.2.3 directs that irrespective of any other policies in the Plan concerning consent duration that the Council shall only grant new resource consents that replace deemed permits, or expiring water permits, for a duration
25 of no more than six years, except in certain circumstances, a consent may be granted with an expiry date of no later than 31 December 2035.

115 The policies in PC7 are highly directive in their nature. It is well-established in case law that policies:

Expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it.

5 116 Whilst PC7 is in the early stages of the plan-making process, it is submitted that greater weight can (and should) be given to it in decisions on consent applications as it represents a significant shift in Council policy and is a critical first step for the Council to develop an NPSFM- compliant framework and it introduces a coherent set of highly directive objectives and policies.

10

117 Further, applications for controlled activities must be granted. This signals the Council's policy intent that activities meeting the conditions of the proposed controlled activity rule are acceptable and appropriate, such that consent should be granted (subject to conditions).

15

118 Once the controlled activity rule in PC7 becomes operative, any applications that are still being processed (i.e., under both the Water Plan and PC7) will be assessed solely under the new operative rule. This means that the relevant applications will be decided as a controlled activity. Further, at that point in time (and once PC7 becomes operative in accordance with clause 20 of Schedule 1 of the RMA) any new applications will be a controlled activity (provided the relevant conditions are met).

20

119 Rule 10A.3.1.1 also applies to applications to replace existing water permits that expire prior to 31 December 2025. Such applications are likely to be lodged once PC7 is operative. It is submitted that controlled activity status is appropriate for these applications to incentivise short-term consents and ensure that the new NPSFM-compliant framework to be set out in the LWRP can be implemented by the Council.

25

30

Is the non-complying activity rule sufficiently robust?

120 Some submitters, including Kāi Tahu ki Otago, have sought to strengthen the non-complying activity rule framework. Ms McIntyre states in

her evidence that experience to date shows that the policy direction to avoid long-term consents is not strong enough to be effective. Amendments are sought to the non-complying activity policy to ensure that longer term consents do not become the default but are only granted where the outcomes will be consistent with achieving the purpose of the RMA.

121 Whilst the Council does not agree with the mechanism suggested by Ms McIntyre, it does see value in strengthening the policy to ensure framework to ensure that the non-complying activity rule will only apply in situations that “represent a “true exception””.

THE COURT: JUDGE BORTHWICK

Are you going to be talking about true exception?

MR MAW:

Yes we’ve had some discussions about that.

15 **THE COURT: JUDGE BORTHWICK**

I’m sure you have, so say I have that witnesses – I mean it would be unusual to have a policy that says you can have a non-compliant party. It’s in itself an unusual approach.

MR MAW:

20 Yes, when I, and I put to through exception in adverted commas there, the wording of the policy ought not refer to true exceptions per say, the policy needs to be more clear in terms of what it is seeking to achieve, a policy can’t and shouldn’t just be referring to true exceptions. So there’s, there’s a live issue as to how the policy could or should be strengthened in terms of adding to that and
25 that’s something that I intend to explore with witnesses on the way through this process.

THE COURT: JUDGE BORTHWICK

Is it because the language of true exception may be confounding the issues that arise in relation to this particular policy as might also be inclusion of no

more than minor in the policy text itself also confounding what it is that they're actually trying to achieve here. Because ordinarily, non-complying activities, activities that are sitting outside, it you like, you know controlled, restricted, discretionary activities all those activities that are permitted. Now they may well
5 be activities which effects are minor but they're generally sitting outside the provision for activities in policy, is that not right?

MR MAW:

That's correct.

THE COURT: JUDGE BORTHWICK

10 Yes. So there's two elements, there's the narrative of two exceptions is perhaps confounding parties and witnesses but also, what is this, is it appropriate in fact to have a policy that says: "We providing activities of no more than minor effect" and then you know you're going to have challenges with me in terms of what does that mean in a water context where the effects are often not manifest,
15 either individually – generally they're not at manifest individually but manifest cumulatively over time and over space so what did that mean?

MR MAW:

Yes that will, that will develop on the way through.

THE COURT: JUDGE BORTHWICK

20 Okay so you're just saying, Council recognises there's a problem or potential problem and the solution, it hasn't come to but is going to be explored?

MR MAW:

Yes, yes and I think in terms of signalling at this point the Council's position, the Council's position is that they're non-complying activity policy needs to be
25 strengthened to ensure that it's not readily available to applicants seeking to renew permits. The precise way in which that is articulated will need to develop.

THE COURT: JUDGE BORTHWICK

Yes and perhaps the question is whether you are actually having a policy for non-complying activities or more generally a policy which is implemented by a rule for non-complying activities. So in other words the policy itself is not a
 5 policy for activities that are non-compliant so that is part of the language difficulty which is emerging in relation to that, particularly provision.

MR MAW:

Yes and the challenge of having a really directive policy in a situation where you're dealing with an, I was going to say a true exception but something that
 10 you're not actually able or not able to prescribe in the policy and perhaps a shift that the policy needs to shift back into more of an outcome in terms of the outcome that its seeking to achieve rather than dealing with matters which might usefully be captured in the rule itself, so the balance between policy and rule is one which may be worthy of further consideration and you'll see the language
 15 between the rule and the, that non-compliant policy there is quite some similarity there, there may be some benefit in stepping back and separating out again the outcome that that policy is driving at, ensuring that the rule is sufficiently clear about, about how it's achieving that outcome.

THE COURT: JUDGE BORTHWICK

20 Yes. That might be – okay, all right.

“How should social and economic effects be weighed when considering PC7?”

122 Various submitters have expressed concerns about the impacts of PC7
 25 on the well-being of rural communities and the inequity caused by PC7. Concerns are also expressed about the uncertainty that PC7 creates for future productivity and investment. The Council acknowledges those concerns.

123 The RMA and the NPSFM, seek to manage resources in a way which
 30 enables people and communities to provide for their social, economic and cultural wellbeing. However, this is not regardless of ecological considerations.

This is illustrated by the wording of Part 2 of the RMA and the hierarchy of obligations in the NPSFM.

124 As set out in the evidence in reply of Mr de Pelsemaecker, one of the
 5 intentions of PC7 is to caution against further investment in water use until an
 NPSFM-compliant freshwater regime has been established under the new
 LWRP, thereby reducing the potential economic impacts of transitioning to this
 regime. This is to ensure that:

1140

10 (a) People will not overinvest without long term certainty around water
 availability; and

(b) Investments, that would otherwise be made between now and the new
 LWRP coming into force, will not become redundant.

15 Should the needs of existing water users be recognised in PC7, and if so, how?

125 A common theme in the evidence of some parties is that PC7 does not
 give sufficient recognition to the water needs of existing water users. In their
 view, the quantities of water allocated in replacement consents should be based
 20 on alternative methodologies that calculate reasonable water needs for efficient
 use. A number of alternative approaches are proposed including the use of:

(a) the Aqualinc Guidelines for Reasonable Irrigation Water Requirements
 in the Otago Region (2017) ;

25

(b) the reasonable use test set out in Schedule 10 in the Canterbury Land
 and Water Regional Plan ;

(c) methodologies that determine volumes based on existing infrastructure
 30 and provide for sufficient water during dry season ; and

(d) methodologies that calculate the Rate of Take Limit and Monthly and
 Annual Volume Limits for allocating water in replacement consents by

considering both historic water take data and models for estimating reasonable and efficient use .

126 As set out in the evidence of Mr de Pelsemaeker, the Aqualinc
5 Guidelines and Schedule 10 of the CLWRP can result in different outcomes in terms of their effect on catchment-scale allocation and source water body (or downstream bodies). Methodologies that set allocation rates and volumes based on reasonable and efficient use (ie, irrigation needs or water demand) could in some instances result in allocated rates of take or volumes that are
10 higher than the rates of take or volumes of take historically recorded.

127 Further, methodologies for calculating the consented rate of take and volumes using historic water take data of “reasonably good quality” is generally less complex and more cost-effective than applying methodologies for
15 estimating reasonable and efficient use based on irrigation demand.

128 The Council does not support amending Schedule 10A.4 and replacing the proposed methodologies with methodologies calculating reasonable and efficient use based on irrigation needs or water demand, as the Schedule 10A.4
20 methodologies for calculating the Rate of Take Limit and Monthly and Annual Volume Limits allocated in new consents based on historic use data, better achieves the following outcomes that support the short-term, interim nature of PC7:

25 (a) Providing plan users with methodologies that are based on clear procedures and standards that are simple to apply and not open for interpretation, allowing a lower cost for processing applications for resource consent;

30 (b) Avoiding further increase in water abstraction (compared to historic use);
and

(c) Avoiding the reallocation of unused allocation.

129 The Council is however, open to further discussion between experts on how the Schedule 10A.4 methodologies may be refined and improved in order to achieve the outcomes in paragraph 128 above.”

5 Whilst I flag that I come on to deal with the date range for data later on in the submissions, the Council and its witnesses are open to engaging in the expert conferencing in relation to schedule 10A.4. A number of issues have been raised in evidence that would benefit from conferencing of those experts, but through the lens of the outcomes that the plan change is seeking to achieve.

10 **THE COURT: JUDGE BORTHWICK**

The evidence is going to be taken as read and particularly in relation to the first three weeks of this hearing, the evidence has been read and I have dived into other evidence for the common stages of hearing there would be, it is not clear to me yet whether or not the Regional Council is saying that the Aqualinc guidelines are relevant. I understood, and I have forgotten the name of your witness, I'm sorry, it's either Mr Wilson or – Mr Lesley. Mr Lesley. There are three pillars. I'm going to read (inaudible 11:44:38), the applicant's evidence, the schedule at PC7, and also the Aqualinc methodology. So, it seemed to me that he thought Aqualinc methodology was a relevant consideration but it is not actually there in the plan change, so I'm not sure whether that was important or not. What its status is, or whether that's actually part of the underlying concern by parties, is that well here is a relevant consideration, but it is not one which is formally actually in the plan change so therefore the status will wait to be accorded to it is unclear and that's, you know, that uncertainty is driving, if you like, some of the submissions. I'd just like a response on that.

MR MAW:

Yeah, so the Aqualinc guidelines are not part of the methodology set out in the plan, and conceptually, the methodology should be seen as the gateway into the controlled activity role in the sense that if you put the data of historic use into the or through the method and the methodology, it will produce a series of rates, annual volumes, et cetera. So that's the entry condition, one of the entry conditions into the rule. There are then a number of matters to which the

Council has reserved its control and one of those matters is the efficiency of use. So, as I understand matters, when it comes then to considering the utility of or the appropriateness of the conditions of consent, when the consent's being processed, the question of efficiency of use and demand will be considered at that point. So it's not being considered as an entry condition, it's something which sits down in terms of one of the matters to which Council has control. But it's not prescribing and the plan change, precisely how that matter of control was going to be implemented on the consent by consent basis. 'Cos that will depend on the applications that are being put forward.

10 **THE COURT: JUDGE BORTHWICK**

Do we actually have the Aqualinc methodology tabled in evidence?

MR MAW:

That is a good question.

THE COURT: JUDGE BORTHWICK

15 It is a good question. We've received at least 2,000 pages of evidence together with 2,000 plus other pages of documentation so you'll forgive me if I say I don't know where to lay my hands on it if in fact it's actually there.

MR MAW:

20 I'll have to come back to you on whether it's in the bundle at this point or – no, it's not in the Common Bundle. Whether it's attached to anybody's evidence, I can't answer that question for now.

THE COURT: JUDGE BORTHWICK

25 Well I'm just flagging that as an early issue, isn't it? Because everybody's interested in the Aqualinc guidelines in that you all know about it. And so that will be of importance when you come to frame your questions and cross-examinations.

MR MAW:

It's possible.

MR PAGE:

(inaudible 11:47:44).

MR MAW:

Page 23, CB1640.

5 **THE COURT: JUDGE BORTHWICK**

And presumably, it's flagged as a document in the memorandum provided by yourself, Regional Council, or by Mr Page as a document which is discussed in evidence.

MR MAW:

10 Ms Mehlhopt can helpfully address you on that.

THE COURT: JUDGE BORTHWICK

Ms Mehlhopt?

MS MEHLHOPT:

15 My understanding, your Honour, is that there was a request from another party to have that included in the common bundle. I can't, sorry, I can't recall the party.

THE COURT: JUDGE BORTHWICK

But that, I think your submission is that that guideline may increase, may decrease the application rate and volume, is that right?

20 **MR MAW:**

Yes, but within the, in the context of the controlled activity pathway, below the limits that are set by the methodology processing historic use data.

THE COURT: JUDGE BORTHWICK

25 So, if their methodology results in an uplift or an increase in the rate or the volume which has been sought in terms of the application, that wouldn't be available or open to the consent authority to impose it as a condition, is that what you're saying?

MR MAW:

Correct, it wouldn't be available to increase. It could be a tool that the Council uses to decrease allocation below that, which the methodology calculates.

5 All right, onto the next topic, and that is:

“Should there be a restriction on irrigation expansion?”

130 Some submitters have raised concerns about the restrictions proposed
10 with respect to the expansion of irrigation area.

131 Mr de Pelsemaeker addresses this in his evidence in chief and evidence
in reply. He recommends amendments to Policy 10A.2.1 and a new restricted
discretionary activity to enable irrigation expansion where investments were
15 made in infrastructure prior to the notification of PC7.

132 The Council's position remains that it is appropriate for these restrictions
on the expansion in irrigation to remain in all other circumstances. In particular:
1150

20 (a) Any efficiency gains associated with infrastructure upgrades should, as
a first priority, return that water to the waterbody;

(b) There remains a risk of water quality degradation from increased nutrient
losses associated with irrigation; and

25

(c) Further investment in irrigation expansion is likely to increase the
financial and economic risk for water users, especially in catchments where
there may be a need to reduce allocation or water use or achieve a reduction
in contaminant losses in the future.

30

What should the data period be for calculating the rate of take and volume of
water?

133 Some submitters have raised concerns with the date range for data used to calculate the rate of take and volume of water for replacement consents.

134 The Council has recommended some amendments to Schedule 10A.4
5 with respect to these dates and has sought to align the date range with the requirements to meter water takes pursuant to the Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 (amended 2020).” And that is an issue addressed in the Council evidence in terms of the appropriateness of the various date ranges.

10

How should the framework apply to hydroelectricity generation?

135 Trustpower is seeking amendments to PC7 for hydro-electricity generation activities on the basis that the proposed rule framework does not give effect to the NPS-REG (among other things).

15

136 As set out in the Mr de Pelsemaeker’s reply evidence , exempting hydroelectricity generation activities from PC7 altogether is not appropriate because:

20 (a) Hydroelectricity generation schemes can involve a variety of activities including impoundment, diversions, takes and discharges of water, some of which may have a significant impact on the source water body from a hydrological and ecological perspective (due to the scale of the take) and a cultural perspective (i.e. the transfer of water from one catchment to another).

25

(b) There is a need to take a longer-term perspective on the impacts of climate change on freshwater bodies; and

30 (c) The need to ensure that hydro-electricity generation schemes will make the transition towards the freshwater management regime established under the new LWRP in a timely manner.

137 Mr de Pelsemaeker acknowledges the NPSREG and considers that further relief for hydroelectricity generation within the PC7 framework may be

appropriate if it were to be demonstrated that the application of Schedule 10A.4 would significantly impact on the continued operation and viability of hydroelectricity generation schemes.

How should the framework apply to community water supplies?

5

138 The territorial local authorities seek that PC7 is amended to either:

(a) Make better provision for community water supply takes within the framework of PC7 (option 1); or

10 (b) exempt water takes that are required for community water supplies from the PC7 framework altogether and continue to manage these under the existing Water Plan framework (option 2).

139 Ms Kohere and Mr Ensor for the Minister for the Environment support a
15 carefully qualified exemption from strict consent durations for drinking water supplies through amendment to proposed Policy 10A.2.3.

140 The Council does not support the exemption of community water supply
20 takes from PC7. However, there may be merit in making better provisions for community water supply takes within the PC7 framework.

141 The health needs of people (such as drinking water) is a second priority
25 in the NPSFM hierarchy of obligations. However, these takes must still be managed in a way that provides for the health and well-being of water bodies and freshwater ecosystems. Further, community water supplies do not only supply water for human consumption and sanitation, but also for a wider range of other purposes such as rural and stock purposes, irrigation, watering of gardens and car washing. Evidence from the territorial authorities suggests that these uses cannot be separated.

30

142 It is submitted that it is appropriate that community water supplies are included within the PC7 framework as this will provide the best way forward to ensure a freshwater management regime that ensures Te Mana o Te Wai is achieved in a timely and efficient manner. However, Mr de Pelsemaeker has

noted that the application of Schedule 10A.4 to drinking water supplies could be considered.”

THE COURT: JUDGE BORTHWICK

You mean could be considered or needs further consideration?

5 **MR MAW:**

Needs further consideration would better capture it, yes. He's open to improving the schedule to capture community drinking water supplies.

THE COURT: JUDGE BORTHWICK

10 Yes, and then you've got that technical question of where you've got (inaudible 11:55:14) infrastructure which is providing an array of uses –

MR MAW:

Yes.

THE COURT: JUDGE BORTHWICK

– one of which is drink-water, yes.

15 **MR MAW:**

And that is the key reason why those takes do need to be captured by the PC7 framework, just given the breadth of uses that are taking place.

How should the framework apply to damming?

20 143 PC7 captures damming activities authorised by a deemed permit. The damming of water is often likely to cause hydrological alteration with impacts on downstream water bodies, water quality and a range of values, including recreational, ecological, landscape and cultural values.

25 144 Due to the scale of effects caused by damming activities and in light of the direction set in the NPSFM, the Council does not support exempting damming activities from the PC7 framework or providing for longer consent terms for these activities. Managing the replacement consents for these activities within the framework proposed under PC7 and only granting a consent

for a short duration will allow for these activities to be reassessed under the new LWRP framework.”

THE COURT: JUDGE BORTHWICK

5 So one of the issues with the dams is consent to take water or to dam and impound the water. The other issue is the renewal of ageing infrastructure and that’s where the tension arises, is that right?

MR MAW:

10 It does. There’s a live issue in terms of the question of whether a long-term permit is required in order to ensure necessary financial investment in the infrastructure, to ensure that it’s able to be operated safely into the future.

THE COURT: JUDGE BORTHWICK

Yes.

MR MAW:

15 That is something I wish to explore with some of the witnesses on the way through.

THE COURT:

Yes.

MR MAW:

20 But the Council’s position is that because of the effect of dams on a waterway and the significant effect they have in terms of altering the hydrological setting, they do play a significant role in setting a flow and allocation regime. If dams are consented for a significantly longer period of time, the variability for Council then to adjust or alter the flow regime through its new water and land plan may be compromised or frustrated, and that is the key concern in terms of the impact
25 of long-term consents for damming.

THE COURT: JUDGE BORTHWICK

And here you're not talking about dams which might be associated with hydroelectricity. Well you may be, I'm not sure.

MR MAW:

5 It's capturing all dams.

THE COURT: JUDGE BORTHWICK

Capturing all dams, including those dams being used by a primary sector to impound water for irrigation and (inaudible 11:58:00) purposes, is that correct?

MR MAW:

10 Yes.

THE COURT: JUDGE BORTHWICK

And those structures, physical structure, that's a (inaudible 11:58:06), is that right?

MR MAW:

15 It depends where it is. So whether it's an in-stream or an off-channel dam, it would be a different set of consent requirements. But insofar as the damming is captured, it's the dams covered by the deemed permits. I'll just check that I've got that right – yes it is. So it's not... There are number of deemed permits that authorise the dam that are damming permits. It's the replacement of those
20 permits that this plan change seeks to capture by this six-year consent limit.

THE COURT: JUDGE BORTHWICK

Your previous comment as to: "It depends on where it is, on the bed of a river or not," –

MR MAW:

25 Yes, I –

THE COURT: JUDGE BORTHWICK

– that's for land use consent, or something else?

MR MAW:

– in the bed of the river it would be a section 13. Use of the bed of the river, that's a land use permit, yes.

THE COURT: JUDGE BORTHWICK

5 That's a land use permit?

MR MAW:

Yes.

THE COURT: JUDGE BORTHWICK

Okay. Yes.

10 **MR MAW:**

Getting there.

THE COURT: JUDGE BORTHWICK

And so there will be permits issued under section 13 for the physical infrastructure for the dam, correct?

15 **MR MAW:**

Yes.

THE COURT: JUDGE BORTHWICK

Which won't have a time duration, or may have a time duration?

MR MAW:

20 Those in the – I think damming is one of the restricted 35-year –

THE COURT: JUDGE BORTHWICK

135 year?

MR MAW:

Yes.

THE COURT: JUDGE BORTHWICK

And so is part of the issue – and it may not be but in terms of those mining licences now deemed permits, you’ve got the physical infrastructure itself has been authorised – what, under the mining permit, or...?

5 MR MAW:

Yes, although there will be some interplay with the Building Act in terms of whether they also require a building consent as being a large dam or not. So it’s going to be dam-specific, and that’s one of the issues that I’ll flag, I’ll be looking to explore with witnesses in terms of that interplay.

10 1200

THE COURT: JUDGE BORTHWICK

Yes, okay, well I’m flagging it too, then. The interplay between the Building Act, other regulations which govern the safety and lifespan of each of the physical infrastructure together with the water permit is something that we’re interested

15 in. Undoubtedly, it will be explored by witnesses and other parties in cross

MR MAW:

Yes, well hopefully by the end of the hearing we will have some further clarity. Right, so those were the issues that I’ve flagged in opening, and I just reiterate there will be other issues on the way through. So parties should be welcome

20 to frame the issues in their openings as they see relevant to their cases. Finally, I touch on the evidence that the Council will be calling in support of the plan change, of which there will be seven witnesses.

“145 The Council will call seven witnesses to give evidence in this hearing:

25

(a) Roderick Henderson, providing expert evidence in relation to hydrology in the Otago region.

(b) Dr Richard Allibone, providing expert evidence in relation to native freshwater fish fauna in the Otago region.

(c) Dr Antonius Snelder, providing expert water quality evidence in relation to the “State of Lake and River Quality in the Otago Region” report prepared by Land Water People Limited.

5 (d) Dr Julie Everett-Hincks, providing evidence in relation to the Council’s science work programme between the release of the results of the investigation of Professor Peter Skelton into the Council’s use of its freshwater management functions and the upcoming notification of the new LWRP.

(e) Simon Wilson, providing expert evidence in relation to the methodology contained in Schedule 10A.4 of PC7.

10 (f) Sean Leslie, providing expert evidence in relation to the methodology used to calculate water use and water permit limits when processing applications under the Water Plan, and the proposed methodology under Schedule 10A.4 of PC7.

(g) Tom De Pelsemaeker, providing expert planning evidence.”

15

So, it just set out to flag the appendix to the submissions, just contains the legal framework within which the regional plan is to operate in. I don’t intend to take you through that. That’s just the, describe as the standard framework applying to a regional plan. I’ve highlighted the difference here given that we’re dealing

20 with a call in earlier in my submissions. So those are my submissions, may it please the Court. I’m happy to answer any questions if...

THE COURT: JUDGE BORTHWICK

Just have a seat, and I will just race through any notes I have made. So as I indicated, you know, thousands of pages of evidence plus other documentation

25 are either attached to the evidence and/or attached to the Common Bundle. The Court has particularly focussed its (inaudible 12:04:44) these three weeks. So, just by way of a broad comment, don’t expect the Court to know your case, counsel, as you might know your case. It would be unreasonable for it to have that expectation of the Court. And assist the Court when putting questions in

30 cross-examination by directing the Court to obviously the appropriate pages. But if we’ve not picked up anything accurately or are yet to understand the point that is made, is being made, be patient. There are thousands of pages of document which the parties have asked us to look at. But what is of news of

me, rather short plan change. There's not much to it, but it has generated large debate. So, be patient is the first point. Second point is that some of the witnesses, well, they like numbers and so it will be really interesting to – it will be important for counsel to think about cross-examination for witnesses whose evidence is based on numbers. So, Mr Leslie, Mr Wilson, Mr (inaudible 12:05:59) are examples of witnesses whose evidence is largely numeric. How are you going to put yourself on a platform or on a level platform of play that the Court can follow the direction of travel, particularly where the witnesses are not necessarily looking at the same data set or the same case examples. Again, I flag it for your consideration, probably as something that you actually need to be talking about before yourself before you get into cross-examination. Otherwise, you lose the impact of your cross-examination. So bear those two things in mind. I certainly think that's something you can co-operate over.

THE COURT: JUDGE BORTHWICK TO MR MAW:

15 Q. I did have a couple of questions, though. Paragraph 94 page 30, you are addressing section 128. You are also addressing it at paragraph 93, so paragraphs 93 and 94. And a concern held by the regional concern is over the effectiveness of a review under section 128. You note there it doesn't allow the consent to be terminated and nor can the amendments to consent conditions have the effect of preventing the activity for which the resource consent was granted in the first case. The question that I have for you is, what impact if any can a review have on the reliability or efficiency of irrigation infrastructure in particular?

20 A. Yeah, so section 131 of the Act picks up the relevant consideration of the effects on the viability of the activity, so any effects on efficiency, on the reliability of, in this context, water for irrigation would get picked up when considering the viability of the activity. And the way that the argument has typically unfolded in relation to consent reviews is that whilst you may have a plan which has set some new limits, so a new flow regime comes in, the Council then tries to review the conditions of the permit to impose that new flow regime and the argument often put forward by abstractors is that the new flow regime will affect the viability of the activity for which consent is granted in terms of the reliability of water supply, and that's a

relevant matter that needs to be taken into account. And that can be an impediment to a new flow regime coming down into the conditions of a consent. It's relevant through, through section 131 and the viability.

5 Q. Thank you. I had a question of clarification at your paragraph 125, page 37. And sub-paragraph D. And you have probably already touched upon that, but your methodology that you're referring to in PC7 for calculating the rate of taking the monthly and the volumes are looking at historic water, but they're not necessarily looking at the methodology and schedule is not looking at the reasonable and efficient use, but is a matter
10 which is relevant in terms of the matters for which the Council is exercising control?

1210

A. Yes.

Q. Okay.

15 A. So it's not an entry condition it's the –

Q. Not an entry, okay.

A. We like to it an exit condition but it's a condition of a matter of control.

20 Q. Understood. And I suppose by way of just a general comment on your paragraph 119 in here you're talking about the incentive of, how to incentivise short term consents. To put it in layman's terms, that controlled activity role, that's a lever isn't it? It's what some of the levers that one can exercise in a plan context to bring about behavioural change sometimes or to bring about goals or an objective and here it's possibly both certainty the goal and the objectives will have short term consents
25 by making it attractive to apply for the controlled activity.

A. Yes, the intention is to provide certainty that the outcome of applying for a controlled activity will be precisely or understanding what's going to come out of that process in the context of a controlled activity are guaranteed that a consent will be granted in contrast with other activity
30 statuses.

Q. So there's a – it's proven not effect to date because we've got an operative plan which has an IDA rule and a discretionary activity rule which has, undermined might be the right word, undermined it's effectiveness of the controlled activity rule, people are just simply given

all of that and the water plan are just simply applying for a non-compliant activity, that would be right?

A. Yes so there's two things going on there, one is the effect of two planning regimes, ones a plan change at the moment and there's just no way around that. We've looked long and hard at that but from a plan change perspective it is what it is. The second issue is the strength of non-compliant activity policy and whether that's seen at the moment to be not at the, not pitched at the right level because of the applicants that are coming in, that can seep into, to achieve the longer-term permit.

10 Q. Yes.

A. So again, it's –

Q. And so in terms of that lever analogy, it's whether or not you have sufficiently incentivised the controlled activity rule and disincentivised going for something outside of the controlled activity rule and that's also where debate is?

A. Yes and of course the minister is still pursuing a prohibited activity in terms of the second of those levers so in the sense that there's two elements, there's the control – there's the incentive and the disincentive of the carrot and the stick, in a sense.

20 Q. Okay, all right. I thought the minister might get back from that but I might have – You have stepped back from that?

MR BUNTING:

Yes.

THE COURT JUDGE BORTHWICK TO MR MAW:

25 Q. I thought so. I was thinking I must have picked that up wrong in the 2,000 pages of evidence, but yes he has. But certainly has, understandably as the minister of planning the case is to think of the level of disincentive going down that route and that's the lever analogy again.

A. Yes.

THE COURT: COMMISSIONER BUNTING

Q. I've got just one or two, if I may. We were provided I think towards the end of last week there was a deemed permit status, a spreadsheet showing where applications have been made or that are waiting application. Is it possible to get any indication from those that have been made as to what terms are being sought, to give us some idea of those? You probably can't answer that question now I know that but –

A. No I can't ask it right now but I could perhaps have one of the Council witnesses provide an answer to that question, I would suggest tomorrow, when (inaudible 12:14:12), so I'll flag that as something –

THE COURT: JUDGE BORTHWICK

Q. I know your planning witness had some statistics but undoubtedly the updated –

A. Yes.

Q. – was a month ago.

A. Yes.

CROSS-EXAMINATION CONTINUES: MR BUNTING

Q. Para 113, if I can find that. Yes, about the objective. You said the objectives been amended now by Mr de Pelsemaeker, can you just talk to how the notified objective relates to this now in terms of where we're at?

A. So the notified objective is not relevant for the purposes of my submissions so the text in my paragraph 113, the quoted text should simply be struck out and replaced with the objective. Let me just... It should be replaced with the wording in the new –

1215

Q. In the new, in the replacement one, yes.

THE COURT: JUDGE BORTHWICK

There's no – I don't think any parties actually or submit as actually wanting that original objective.

MR MAW:

Not that we can recall.

THE COURT: JUDGE BORTHWICK

Right. What do you mean, in terms of that it's still at the Court to go –

5 **MR MAW:**

Yes, yes.

THE COURT: JUDGE BORTHWICK

So the question from the Commission is whether it's open to the Court to endorse the objective as notified, as it was (inaudible 12:15:46).

10 **MR MAW:**

I think it, it would be open, if you were, in terms of the scope. The scope is the bookends between what was notified, and the changes sought by submitters, it would need to be an evidential foundation in support of retaining the notified version which of course there is assessment through the section 32 et cetera.

15 But from a jurisdictional perspective, there would be scope to retain.

CROSS-EXAMINATION CONTINUES: MR BUNTING

Q. But the Council's position, it's the amended one that is now at play?

A. Yes, the Council's position is the amended version of the objective is the version that it is pursuing.

20 Q. My next question really related to the three matters that Mr de Palsemaeker said he was open to further consider, I think to do with electricity generation, community water supplies and dams. How is it – does he have any idea, do you know, how you might progress such discussions?

25 A. He considered those issues when he prepared his reply evidence and was not persuaded that there was an answer immediately available from that evidence. He wanted to hear that evidence and hear responses to questions both from the Court and under cross-examination in order to assist whether there was a drafting solution that he might then be able to

proffer to the Court in terms of some further reply evidence, which has been signalled in the last week of the hearing in terms of the response to matters as they arise through the case. The purpose or the reason I've flagged within the opening submissions that there are I think three of these issues is to signal to other parties that insofar as they have drafting solutions that might address those issues, they should come forth and share those solutions as soon as possible. And it may play out through the cross-examination of Mr de Palsemaeker as well.

5

Q. And my last question related, her Honour raised a point when you talked about the dates of the assessment of the data.

10

A. Yes.

Q. Was the actual interpretation of the data, which seems to be quite a major issue between some of the technical experts. So that presumably is an issue that should be on the table as well?

15

A. Yeah, it is a live issue and it's captured in the list of topics for the expert witness conferencing noting the comments from the Court in relation to the specificity or otherwise of those topics. But the – and you will have see, if you've had a chance to read some of the hydrological evidence, there is a live issue in terms of how what I'd describe as atypical data might be used within the methodology. So the Council's approach is that the atypical data, so spikes above consented levels, above a margin of error for example, simply get removed from the data set. Other hydrologists have a different view as to whether that data should be otherwise modified and included or excluded. To me, that's a matter which would benefit from some caucusing amongst those witnesses.

20

Q. So the plan change as drafted doesn't seem to address that issues. It seems to be a pretty key issue? Maybe it does in terms of the, what needs to be considered, but in terms of the approach that might be adopted in terms of data interpretation?

25

A. Yeah, the methods –

30

Q. User percentiles and that sort of thing, which seems to be what happened now.

A. Yeah, the methodology should be addressing what's happening with that data being removed, so the methodology is saying it, as currently drafted,

that rates will take above the thresholds is removed from the data set. One of the competing cases recommends some adjustments to the methodology to include that data, but to adjust it in a different way. So, it is a live issue and in terms of the Council's position, it is seeking to achieve the methodology that is able to generate an output that is objectively ascertainable each and every time the model or the method is run. So the – one of the challenges in terms of what to do with atypical data is one of subjective interpretation and that's perhaps the very thing the Council is seeking to avoid in terms of the methodology that it is putting forward.

1220

Q. So that is something that the experts could discuss further at the conference?

A. Yes.

15 Q. And try and reach some understanding?

A. Yes, and insofar as the outputs of that can be run in an objective way, then that's certainly something that the Council's open to considering in terms of refining the schedule to make best use of the data that is available.

20 **THE COURT: JUDGE BORTHWICK**

Well, those are the questions from the Court. Thank you for your submissions and we are ready now to proceed to your first witness, but I suggest we take the luncheon break before we do.

COURT ADJOURNS: 12.23 PM

25

30

COURT RESUMES: 1.34 PM

MR MAW CALLS

RODERICK DONALD HENDERSON (AFFIRMED)

Q. Do you confirm that your full name is Roderick Donald Henderson?

5 A. Yes.

Q. And that you are a hydrologist at the National Institute of Water and Atmospheric Research?

A. Yes, that's correct.

10 Q. And you have prepared a statement of evidence in chief dated 7 December 2020?

A. I did.

Q. And you have the qualifications and experience set out in paragraphs 3 to 9 of that statement of evidence?

A. I do.

15 Q. Are there any corrections that you wish to make to your statement of evidence?

A. No.

Q. Can you confirm that it is true and correct to the best of your knowledge and belief?

20 A. Yes.

Q. If you would like to proceed now with a summary of the key points from your evidence to assist the Court.

MR HENDERSON:

25 Your Honour, in discussion with counsel, I suggested that my summary at pages 4 and 5 was the best that I could do and probably not productive of further condensation. Would you like me to read those out?

THE COURT: JUDGE BORTHWICK

30 I'm in your hands. I suppose the thing that witnesses and counsel need to bear in mind is, you know, we read the evidence, but quite often what we think is of importance to witnesses just because of the tone and tenor of the brief may not actually be what is important to the witnesses. So that is what is really

important, that if there are key messages that you are wanting the Court to understand that you tell us: "These are the key messages." It's not a summary per se, it's key messages I want you to hear. I would also add sometimes a summary is good because there are so many briefs of evidence, and it assists
5 the Court to have its mind or memory jogged.

MR HENDERSON:

Well, perhaps I'll briefly cover off these points. First of all, Otago's diverse climate, this is at page 4 item 16, extremely variable climate and hydrology from Southern Alps to the Central Otago to the coast. Very wide range of catchment
10 yields, if you like, from very, very weak catchments in the Southern Alps to extremely dry ones in Central Otago. This poses certain challenges to water availability and reliability. Water use pressure, perhaps not surprisingly, water use consent, so concentrated in the dry parts of the region, that's water use is dominated by surface water, different from some other parts of New Zealand.
15 More than 90% of the consents by maximum rate are from surface water. In terms of data, I think at point 24 that river flow data are the best way to assess a water resource but cannot be collected everywhere needed for a variety of reasons. So, data is always a limitation when we're doing water resource assessments. There could always be more data. Often, we would argue
20 there's not enough, but that's a difficult argument to make when decisions are pressing. Water metre data as opposed to water flow data collected in river are also an important aspect of understanding the hydrology but are not sufficient to fully describe water use, because the quality assurance issues and unmeasured aspects of water distribution systems, and I list those in number
25 26, things such as leakage and by wash and return water from the irrigation systems, that either are unmeasured or get put into waterways and then taken again and measured twice or perhaps three times. And I guess item 27, that we have made, I would say, very good progress in the last year and a half to two years, working with a group of experts on how to describe the hydrology of
30 the Manuherikia as a particular case study of Otago water, probably one of the more complex ones. And we have arrived at a situation where we have a working model that the experts at least involved are quite happy with now. Tools are available to address Otago's water resource issues, and these range

from national models of hydrological statistics, water budgeting, using water metre data and river flow data, and detailed rainfall runoff and water system modelling. Choosing appropriate methods with recognition of data limitations, assessments can be made for Otago rivers to inform the immediate future issues. And complex catchments such as the Manuherikia, the work done to date by a number of parties is part of Council studies and water use applications, can form the basis of catchment-wide understanding. Now, I note that some of the work in coastal and North Otago rivers is now getting older and might benefit from some updating. And I think the key point is the last one, that uncertainties increase as the methods used rely more on national models and less on measured data. These limitations are due in part to data availability and partly to the, I'd say the Council's timeframe. Perhaps it's the minister's timeframe, but nonetheless the timeframe that's being worked to here. That would be my summary.

15 THE COURT: JUDGE BORTHWICK:

Right, thank you. So Commissioner Bunting has some questions.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

Q. Yes, if I may. Just following up on that last point you made, can you turn to paragraph 81 of your evidence, please?

20 A. Yep.

Q. Which relates to more (inaudible 13:42:09) investments and so on. In the last sentence, you say: "However, the time constraints imposed on the Council," can you just expand on that? Time constraints for what?

A. Well mainly, I guess, I'm thinking of the time constraint of the deemed permit expiry as of October this year. So that, that's, I'm not being the expert in planning, but my feeling is that the subsequent – that that process and the subsequent planning processes that flow from it are somewhat condensed in terms of time. And while we have in the region some very long hydrological data sets, we also have areas where the data sets are partial and intermittent as they have gaps. And I'm not sure that the time available, which I think is in the order of 'til 2023 or possibly 2025, is really sufficient to materially add to those data sets in a way that would

be, certainly in terms of water, of hydrology, that would make a huge difference to our understanding of the hydrology.

Q. So what's happening at the moment? Is there a programme in place to supplement the existing data?

5 A. I think one of the other Council witnesses will talk to the current science programme, but I mean flow recording is ongoing with the current flow recording network, and also as you'll hear with the water quality data collection, as well. So, things haven't stopped, it's simply that more could be done. But I mean I'm sure you've heard that from scientists before,
10 that more can be done. And it's a question of priorities and budgeting and so on.

Q. So where do you think you're at in terms of a desirable level of information? Or is that too hard to answer?

A. We're partway through a contract with the Council for a region-wide
15 assessment of water resource and as part of that, we've been taking some of the national models and updating them and fitting them to Otago exclusive data. And we have achieved some improvements and uncertainty as a result of that process, so that's a plus. The question always with all data used in these settings is whether the uncertainty is
20 acceptable to the parties whose activities are going to be constrained by the findings. And whether they feel the uncertainty is such that more should be done or whether it's acceptable to them. And that varies from party to party, but all of this is the sort of culmination of, well, since 1992, 40 years of various decisions in Otago about data collection and so on.
25 And I, we have to make the, I feel we have to make the best of what we currently have. And that's what we're, NIWA's trying to assist the Council in doing that through a contract. And as I mentioned the Manuherikia study, we've been doing a similar thing with a group of experts who are experienced in that catchment and have worked in the past for various
30 parties over the last 15 to 20 years, in fact, some of them, and know quite a lot about it. So, there is knowledge available, but I think the collaborative process has certainly made us able to get ahead in that particular example so that hopefully we have a hydrology basis there that

parties will take as a foundation rather than arguing about the last litre per second at a particular site.

Q. So do you think what's there at the moment is adequate?

5 A. I feel like it has to be and that you make, that Council will need to make decisions based on what the best available data which is, as I describe this hierarchy of suitability, if you like.

10 Q. Thank you for that. I have just one or two other things. At para 64, if I can, this is coming down to more localised information about metre data and removing sections of data that seem to be results of gaps. There's a term that we've seen that we're not quite sure what it means called "legitimate overtaking". Is that something you're familiar with?

A. Not really. I – yeah, no, I'd have to step back from detailed discussion of metred activity and how Council sees it.

Q. Okay, someone else might be able to help there.

15 A. Yeah.

Q. There seems to be, just reading the evidence of different experts, in terms of you know sort of sanitising the data, if that's the right term, differences of views about what should be in and what should be out. Is that a fair assessment, that there are differences of views between various experts about how to do that?

20 A. Yes, there seem to be. I haven't – I've read a little bit across Mr Hickey's evidence, possibly another couple. And I think there is room for interpretation when you come to this sort of, these sort of data. It's very hard to tell on the face of it whether a particular data series is all good or whether parts of it are less reliable without, and this comes back to my understanding of river hydrology, that we have checking measurements that we do in the river. We measure the river independently from time to time and make sure that the way in which we're producing flow data is still consistent with the configuration of the riverbed, et cetera, et cetera.

25 30 In the case of water metre data, whether it be pipe flows or open channel flows, I'm less clear on the procedures that are put in place to verify the numbers that come from metres. And so, I think you probably have to direct that question about metre data quality to others. I do note in the work that I've been doing, I have arbitrarily set a limit on two times the

maximum consented rate so that I, if data were larger than that, I would remove them. And then I had a procedure for estimating what any metre with missing data was probably doing by looking at all the other metres in the catchment. I haven't been challenged particularly on that methodology for my hydrology assessments.

5

Q. Sure.

A. So I've, I mean, that's just the way I've chosen to deal with it, but I'm not aware, I don't, I'm not aware of an accepted code of practice when it comes to dealing with water metre data and I have a feeling that it's variable around New Zealand and there probably could well be room for some standardisation of the way in which these things are done across the country. But I'm not aware of what moves are being made in that direction. I guess that impetus for that lies with MFE, but.

10

1350

15 Q. So your focuses have been more on using the data, sanitising it, whatever the term might be, in terms of the hydrology –

A. Yes.

Q. – more so than the takes we use for irrigation and –

20

A. Yep because I, I wanted to use the metres to tell me what's come out of the river so that I can add it back to what's measured in the river and come back with an understanding of what the total hydrology is and if possible, what the natural behaviour of the river was because if you have that series you can then model other scenarios, it's much more satisfying to take 40 years of reasonable data and model a bunch of scenarios on it than to use a very short record if you don't have to.

25

Q. Okay thank you. And I had one last question which might be highly technical, you refer your evidence to a programme called GoldSim.

A. Right.

30

Q. And you just, you haven't actually said what GoldSim is, can you just give us an idea?

A. It's basically a simulation package that allows you to build, to take building blocks of water in a catchment and route them, connect them to each other so that the water's going, well down hill and so on but connecting the right streams and the take points and so on and it also contains

irrigation modules where you can simulate the application of water to irrigated land, determine quite a lot by what area you say is available and that's the model that was used I understand, 12 years or more ago to model a Manuherikia and we've in our collaborative group picked that model up again, virtually re-written it. That's all be done, most of that works been down by Ian Lloyd of Davis Ogilvie and the other hydrologists that I mention here have sort of had an oversight of the inputs and outputs and consulted, well Ian's consulted with us when he needs guidance but he's done most of the work on that.

5

10 Q. And is it generally accepted that it's a reliable tool?

A. Well it hasn't been, since we've done this work it's only really been presented to the Council at the moment as a draft report and in some scenario generations I understand it hasn't been exposed to the scrutiny of other parties as yet but I think there are expectation as hydrologists is that it will be made open to people to test and use.

15

Q. So is it catchment specific or is a bit more general application?

A. The GoldSim sort of technology has wider application because how you build, how you use the building blocks is – but how we put them together this time is catchment specific to the Manuherikia, yes.

20

Q. Okay.

THE COURT: JUDGE BORTHWICK

Q. Just following on from Commissioner's questions, we've heard a lot in evidence about the Manuherikia catchment but that as I understand it's one of one catchment out of about 140 catchments, is that your understanding as well?

25

A. Yes.

Q. Of which there are far fewer freshwater management units, I think something like five with a number of those having sub-units.

A. Yes.

30

Q. So it sounded like that in terms of the hydrology and water metering data that that catchment has a better record than other catchments, am I right in thinking that or are there other catchments that are as advanced as Manuherikia?

A. I would put that slightly differently.

Q. Okay.

5 A. Saying that the Manuherikia has more challenges than most of other
Otago catchments and I possible – I accept that in my evidence I've sort
of equated with the Taieri as – for complexity of water movement and
redistribution and management of storages et cetera. From my limited
10 experience on three other Otago catchments, the Lindis, Cardrona and
Arrow, they were must simpler than being more or less, much more simple
drainage networks, far fewer significant tributaries not so many water
takes, very few redistribution systems such as the Manuherikia race
system and so the data, the water take data in those catchments were
subject to similar issues but when those were dealt with it was much more
feasible to reconstruct a natural hydrology based on adding metered data
15 back to the river and that's what I've done on the Cardrona and the Arrow
and we, other people did the Lindis but I picked up on that when we were
at the hearing so yeah, the Manuherikia is just more challenging. I don't
think the metred data per se are not better or worse than anywhere else
but the whole network and the way it's put together and the way in which
water gets out of races and back into other streams does make it much
20 more difficult to deal with.

Q. Difficult to deal with but is it something that you have a good basis of
knowledge about from which you can construct a model. I'm not quite
sure where – this is where the evidence of other witnesses is going?

A. Yeah –

25 Q. The system can be replicated in a model with some degree of confidence
or reliability.

A. Yes, definitely, has been.

Q. And has been, yes.

A. Yes.

30 Q. And so that's one catchment and I think you're saying Arrow and
Cardrona, Arrow Cardrona and Lindis are far simpler catchments in terms
of the movement of water within the system which is represented by that
catchment also able to be modelled or has been modelled.

A. Yes.

Q. But we've got another 136 other catchments and where are we with those because this plan change is actually dealing with those as well.

5 A. So some have data, flow recorders and rivers. They all to the extent that any place in Otago has water metre data, they all have water metre data of I think it's larger than five litres per second takes or whatever so ones that have a hydrological record and water metre data would be potentially be susceptible to the same approach that I've taken and others have done in Lindis, Cardrona, et cetera.

Q. Is that a bespoke model or is that more inputting into your national model?

10 A. No, that's bespoke modelling.

Q. Bespoke modelling.

A. They all have – they all are covered by the national models, of course, which give us – so one level of national models is simply statistical and gives numbers such as mean annual low flow an estimate of mean annual
15 low flow and estimate of mean flow, an estimate of how many times the flow exceeds three times the medium, that sort of ecological flush and flow concept so national models for those with some uncertainty around them. They also all have – oh no, I won't say that – some of them have output from our rainfall model, particularly Manuherikia but that can be
20 available for the rest of Otago as well. In the Manuherikia, we calibrated our model, in the rest of Otago, it's running in an uncalibrated manner so that's another source of – and there you end up with 40 years of hourly flow simulations everywhere in the catchments so everywhere in the region which can be analysed individually to give statistics, et cetera, and
25 then there's the coming down to actual data collected in the region and bespoke systems, as you said. So that's the sort of hierarchy of things and I – our proposal or discussion with ORC for the region wide one for the land and water plan was that some FMUs and or rohe in the case of Clutha Mata-Au could perhaps be dealt with at the national model level
30 or some slightly better version than that calibrated to Otago which we have been in the process of doing but that others had pressures such that, pressure and complexity, such that the bespoke model was the way to go.

Q. Okay, and in that you'd include, I think you said Lindis and what's also referred to as MAC was in the evidence, Manuherikia, Arrow, Cardrona, where bespoke models are warranted.

A. Yes.

5 Q. And they may or may not be warranted outside of those catchments, is that right? Or no determination made?

A. We haven't been in detailed discussions about other catchments. It's more been at the FMU level and we've got a draft report with ORC at the moment which is only talking about the hydrology at this stage, there's
10 other aspects to all of this, the ecology and water quality impacts and that sort of thing which I have to stop short there and say, well that's outside my space. But some of those things are being considered, albeit sometimes mainly at a very general level.

1400

15 Q. I just want to check one more thing. You talked about the FMUs and the sub-FMUs or (inaudible 14:00:28). Are you also talking about, the best bait models will pertain as to a whole FMU or parts of the FMU? Or how will it? Yeah, I mean, it's not clear to me, it will be in the evidence somewhere, whether for example Manuherikia is its own FMU or is part
20 of a wider, large FMU? Could it first answer that question, is Manuherikia part of its own FMU or is it part of a much wider FMU?

A. Manuherikia is a rohe of the Clutha FMU. So that covers the entire Manuherikia catchment from the junction with the Clutha at Alexandra. The Taieri is its own FMU, and so their bespoke model would cover the
25 whole FMU if you were to build something that was operative from Taieri Mouth up the valley. That might be – that would be quite a challenge. It might be more – we haven't discussed this at all, but it may be more productive to perhaps divide the Taieri into the main Taieri that goes up through the gorge and the, oh I can't remember the name of it
30 now, where the hydro stations are. That because they operate sort of quite differently. The rest of the FMUs in Otago are many catchments each.

Q. Are what, sorry?

- A. So many small to medium catchments each, except the Clutha which obviously has New Zealand largest river running through the middle of it, so that makes – the Clutha flow tends to dominate everything you look at, but actually there are many issues on the side. Tributaries that have their own problems as well. So, while we understand, and I've mentioned in here we've got from the Southern Lakes at least 90 years of good hydrology courtesy of power investigations and so on. There's many other smaller tributaries down the Clutha that we don't have very much information at all. Others where we have some, like Nevis, because of power generation or irrigation use. Others, Pomahaka who's its own record, partly because of water resource, partly 'cos of flood issues and so on. So, it's very variable as you move around the region how much information you're going to have to, at your disposal for a particular problem.
- 5
- 10
- 15 Q. Do you know, and you may not because the discussion hasn't been had, where you got a very large catchment like the Taieri or Clutha, the Clutha itself has been divided into smaller sub-catchments. Were there any models for a smaller sub-catchment would be talking to another model in a different part of the catchment? So, in other words, in the case of Manuherikia, is that a closed system or is that an open system which is open to other hydrological inputs at least. There will be other inputs, but hydrological inputs at least?
- 20
- A. No, it would be feasible to have a Clutha model that had sub models that dealt with individual tributaries.
- 25 Q. It would be feasible?
- A. Yes, it would be.
- Q. Have you talked about whether that's actually what Otago region's thinking about, having a model with its own sub parts? Or not.
- A. I'm not sure our discussion shave got really to that level of detail yet.
- 30 We're, with this current contract, we're concentrating at the best way to do a region-wide assessment and after that, we expect there'll be subsequent discussions about, okay, but what about the Taieri and you know, we should do that better perhaps and so on. But we haven't got to that yet. And the Manuherikia is, between us, is sort of an example of

what could be done. And I understand from talking to other parties that some of the work has already been done on aspects of Taieri hydrology that, as part of applications for consents in the past and so on, and some of that work may be available to be adapted as well as we have been with
5 Manuherikia and using the GoldSim or picking up the GoldSim model and revamping it.

Q. All right.

THE COURT: JUDGE BORTHWICK

Those are the Court's questions. Now counsel are going to ask you some
10 questions and certainly may ask follow-up questions as a consequence of the Court's questions as well. Mr Winchester.

MR WINCHESTER:

Yes Ma'am. I was first on the list. I had rather given notice for Mr Henderson and Dr Allibone on a back-stop basis, pending what came in in the evidence-in-
15 chief in other parties.

THE COURT: JUDGE BORTHWICK

Yes.

MR WINCHESTER:

Having had a look at all of that, I wish to seek leave to withdraw my notice of
20 cross-examination for Mr Henderson and also for Dr Allibone.

THE COURT:

That's fine. All right.

THE COURT: JUDGE BORTHWICK

And in terms of "being ready" that you warned us about before lunchtime, I have
25 let Ms Baker-Galloway know that I would be withdrawing. So, I understand she is ready.

THE COURT: JUDGE BORTHWICK

She worked through the lunchtime.

MR WINCHESTER:

Thank you, your Honour.

5 CROSS-EXAMINATION: MR WINCHESTER – NIL**THE COURT: JUDGE BORTHWICK**

So Ms Baker-Galloway, we're with you.

MS BAKER-GALLOWAY:

Yes Ma'am.

10 CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. I just want to go to the first page of your evidence for starters Mr Henderson and again I'm just upskilling myself about the different models that are referred to as well just to figure out which ones are most relevant. Now at your paragraph 8 you talk about your collaboration of
15 the low-flow model of New Zealand and the mean flow model of New Zealand. Can you just put those in context of the models you were talking to Commissioner Bunting about before if they're the same as that national model or, yes?

A. Okay so the low-flow model and the mean flow model of New Zealand
20 are models that only estimate a single statistic. For the low-flow model mean annual low-flow, for the mean flow the mean flow of the river, they estimate them everywhere in New Zealand, the answers are available on a website that never hosts or several various places, people have access to those for the last 10 or 15 years probably and you can go on a map
25 and click on a river and get that estimate of that statistic. So they are the high level model, I guess in my hierarchy of models, they're fitted to a national data set and they work within Otago. I have used them, so the Manuherikia blue book, I can't remember the date but I used them to do

estimates for mean annual low flow for campground and that at the – there's a letter at the back of that that has estimates based on those.

Q. And so the mean annual low flow that the low flow model does, that's the naturalised mean annual low flow?

5 A. Yes.

Q. Now that's, there's something I'm going to be asking further questions about is the relevance of the naturalised mean annual low flow, just so that we've got it on the record and you just summarise for the Court your definition of what a naturalised mean annual low flow is?

10 A. Okay so naturalised means the river as we understand it would've been without any human interference and based on the best available data that we have so I'm not including potential future climate change or any past climate change but we don't really identify past climate change in our records so that's off the table. The mean annual refers to taking the
15 lowest seven day mean flow across each year and averaging those across the period of record. And so that's the statistic and it's widely used in biological assessments in rivers as some sort of lower limit or – but I would refer to it more as an indicator of the low flow condition of the river and given it's, I just, it is, because it's an average, then there are some
20 number that have flows more. It's not exactly normally distributed, so the proportion of those two is not always 50-50, but not a million miles from 50-50, often. So it is the middle low flow estimate.

1410

Q. Thank you, that was helpful. I think it's at one of your paragraphs, you
25 refer to the water balance of the Manuherikia. It might be paragraph 71? Yes, your paragraph 71 where you talked about difficulty in achieving a water balance.

A. Yeah.

Q. Can you just help us out with what that term means?

30 A. It's sort of a water accounting term, I suppose, that we, do we understand how much water is coming into a catchment and what's happening to it, and subsequently how much water is going out of it? And do those ins and outs actually equal each other as far as we can determine, within some uncertainty obviously. And that proved difficult for the Manuherikia,

but there's a lot of reasons for that, and two major ones are the already-mentioned water metre and redistribution systems and their issues of leakage and so on. And the other is a significant uncertainty on how much rain falls in a catchment in New Zealand and that's not only an Otago problem, that's a universal problem. It's very difficult to actually get really good estimates of how much, what your inputs are.

5

Q. If there's abstraction?

A. Before abstraction, even if no abstraction, it's very hard to get an estimate of how much rain falls on a catchment.

10

Q. And when the model, whatever model it is, is being used to identify the MALF, if that's difficult to achieve a water balance, has that estimate of MALF just got a bigger margin of error around it?

A. From the high level statistical models, no, because they are basically regression models based on measured data from catchments all over the

15

country, and the MALF is measured in a river. So, and the rivers that we use are those for which human intervention is minimal. So, we have measurements of actual mean annual low flow, we match those to catchment characteristics and one way or another and we develop a regression model that says, okay, for this river here that we've got no data for, this is our estimate of MALF based on that regression relationship. So that's not effected by whether we understand the rain or whatever.

20

But when we come to, say, trying to run a rainfall runoff model, where the model receives an estimate of rainfall all over the catchment, routes it through the various tributaries and down the mainstream and produces a flow at the bottom, and then we take that time series of flow and estimate a MALF from that. Then that is affected by our understanding of that whole sequence, and when that sequence includes uncertain rain and redistribution and storage of water, then those uncertainties can become perhaps too large.

25

30

Q. So in that situation where you're doing a bespoke model and that's tricky, how much assistance do you get from the national low flow model in that regression you described between like and like?

A. Let's say, so take the Cardrona where we had a flow record part way down the catchment at Mount Barker and we had water metre data, then

the national model doesn't assist at all. It's an independent estimate of mean annual low flow, if you like, so it was one from the national model. There's one from looking at data recorded in the actual catchment and trying to do that water balance of, well we measured this much water at the flow recorder and upstream of it, this much water was taken away. So, we add that back to the flow record and that's our naturalised estimate.

5

Q. Oh, so I think what you're saying there is in your summary that you read out –

10

A. Yes.

1415

Q. – where you said in your paragraph 24, that river flow data are the best way to assess the water resource so that's basically what you're saying isn't it, where you've got real data, that gives you the most reliable –

15

A. Yes, it's a preference, yes.

Q. – an estimate of mean annual low flow, any other hydrological indices you want?

A. Yes.

20

Q. So my next set of questions are going to reference some of Fish & Game's evidence, so if Mr Henderson could be helped to get that folder from behind him? I'm not sure which folder in order it will be in, not sure how they're organised. Volume 1 apparently. And in volume 1, the first brief I'd like you to have handy is Mr Pharrell's evidence. So if you go to I'll just get you to the right page, if you go to page 31 of Mr Pharrell's evidence, just let everyone catch up. And then from page 31, that's where his appendix starts, if you just turn over to where you see policy 10(a)(2) to (3). Can you see that?

25

A. Yes.

30

Q. And just so you understand why I'm asking you these questions, this policy that directs when a noncomplying application might be appropriate in a policy sense and there's already been some talk this morning about the fact that several submitters have sought more certainty and direction in this policy so what's one proposal from Fish & Game is that instead of the words in A, subparagraph (a) being the direction, which as you'll see

we've deleted reference to "no more than minor effects on hydrology", which is what's relevant to yourself; rather than that policy simply saying "no more than minor effects on hydrology" as one of the exceptions, Fish & Game has proposed a table which you'll see there as well and I'm just going to put each of the thresholds, sorry Ma'am.

5

1420

Q. What I have got is a handy file of all of the relief everybody has ever sought in relation to this proceeding so I can go from there and we're just trying to connect to the databases, court databases so just bear with me for one second.

10

MS BAKER-GALLOWAY:

Meanwhile with Mr Henderson can read ahead.

**THE COURT: COMMISSIONER BUNTING ADDRESSES
MS BAKER-GALLOWAY (14:20:28)**

15 **CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY**

Q. So now I'll just check before I ask all these questions, did you read Dr Hays' evidence prior to today?

A. Yes, although –

20

Q. So, just so you know these, this arises out of Dr Hays' recommendations, if we were to a specific threshold that acts as the proxy for no more than minor hydrological effect, this is the proposal from Dr Hays so he's, they'll deal with the first column which is abstraction from service water bodies with a mean flow of less than 5 cumecs, so for those small rivers, if you like, the proposal is that the minimum flow, if the minimum flow is less than 90% of mouth that's a more than minor hydrological change or hydrological effect, would you agree with that?

25

A. I have some difficulty with a minor or major or significant hydrological effect because my possibly limited and fairly numerical approach to hydrology is that it is about how much water there is whether naturally or after abstraction or downstream of a damn or whatever and to say, I don't think, I hope I've never said that say a 10% reduction in the flow is

30

significant or whatever, in terms of the hydrology it's simply is the hydrology. The effect of that reduction in flow on in stream values or any other set of values is my understanding of what, if you like, is what the RMAs about in terms of water and the hydrology itself is fairly silent, in my view, on the significance or otherwise of those changes. They simply are the hydrology, whether pre-development, post development or whatever. So I'm, I mean I could also argue about whether 5 cumecs is a small stream or a large stream and depending where you are in New Zealand and in fact depending where you are in Otago you could have an argument on those grounds as well. So I find it difficult from my hydrological and perhaps overly analytical view of things that I don't have a lot to comment about significance of effects.

Q. So what we're grabbing with, the starting point of this policy as notified was the words and I'm putting it, I'm going to leave out the irrelevant words to your area of expertise so the starting point was: "No more than minor effects on the hydrology of the surface water body," so that was that this policy began with when it was notified, many submitters looked at that and said: "Well that's just a bit too loose, I'm sure we can be clearer than that about what a 'no more than minor effect on hydrology is'. Let's take the guesswork out of it and try and quantify it." So if, I guess if there was to be a hydrological threshold set in this policy to set a threshold of no more than minor, how would you approach it?

A. Yeah.

THE COURT: JUDGE BORTHWICK

I thought the answer was he couldn't answer.

1425

MS BAKER-GALLOWAY:

He couldn't.

THE COURT: JUDGE BORTHWICK TO MR HENDERSON

Q. Because a hydrologist will tell you what the change is.

A. Yeah.

Q. The effect of change is – might be for a different witness altogether, a different expert, is that right?

A. That's right, that's correct.

Q. And then that expert will also tell you what the significance of that effect is. So that's why this objective is kind of a, the policy rather is a kind of a
5 puzzling one using those words. Yeah.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. So I guess what I – if you were just looking at the words in paragraph A in that policy, and they're struck out, but would you actually delete any
10 reference to: "No more than minor effect on the hydrology," would you delete those words?

A. Yes, I think I would argue that they don't have a place in that discussion, mostly, that yeah.

Q. Thank you, that's good. That's helpful. Putting aside your view about
15 whether or not these thresholds reflect something that you could say as a hydrologist that's minor or more than minor or otherwise. On the basis of the data, and the models that you took us through before, it would be possible wouldn't it, for any given water body to calculate whether or not those thresholds are breached or not?

20 A. Yes, you can estimate, for example, the mean flow from a range of models depending on what you have available for a particular water body, yep.

Q. So in terms of proposing something that provides a clear way forward, a clear threshold and that's practically able to be implemented or assessed,
25 we would be able to do that in the context of Otago if these types of triggers were put into the plan?

A. Yes, we can make estimates of the, of a number of flow statistics anywhere in Otago if required.

MR PAGE ADDRESSES THE COURT – EVIDENCE ON SCREEN (14:27:58)

30 **THE COURT ADDRESSES MR PAGE – COMMON BUNDLE (14:28:13)**

CROSS-EXAMINATION: MR PAGE

Q. Mr Henderson, do you have your own evidence in front of you?

A. Yes, I do.

5 Q. Could you look at page 12 where you will find figure 3? And in that figure 3, you've identified the rohe that we are dealing with?

A. Yes.

Q. And you've been discussing with previous questions. And then Manuherikia rohe is in a bright blue, between the yellow Taieri and the greyish Dunstan rohe. Do you see that?

10 A. Yes.

Q. Now, the pattern of green stars you've identified as showing the location of consumptive consents, right?

A. Yes.

15 Q. And perhaps the highest concentration of consumptive consents is in the Manuherikia, would you agree with that?

1430

A. On the face of it, the Dunstan perhaps looks even more concentrated but at that, it's hard to tell, but certainly there's concentration there.

20 Q. And we don't know from this figure which ones have already been replaced and which ones fall within the ambit of plan change 7, do we?

A. No. I wouldn't know, not as far as I'm aware anyway.

Q. So when you were discussing I think with Commissioner Bunting, the MAC catchments, Manuherikia, Arrow and Cardrona. Arrow and Cardrona fall into the Dunstan rohe? Is that right?

25 A. Not sure about the Arrow, that might be in the upper lakes, I'm not too sure about –

Q. You're not sure about that?

A. I'm not sure where the boundary lies.

Q. Okay.

30 A. Cardrona's certainly, pretty sure, within the Dunstan.

Q. Cardrona's certainly there?

A. Yes.

Q. And do I understand your answers to questions that a hydrological model exists for both the Cardrona and Arrow which you are satisfied is inadequate basis for decision making at least in terms of hydrology?

5 A. Yes. There's perhaps – well, hydrological model in the general sense we've been discussing so these are a time series of the naturalised flow at the flow recorder constructed from measured flows and take data. So it's that level of model, not as comprehensive as the Manuherikia one.

10 Q. But in terms of there being a hydrological information base for renewing the permits in Arrow and Cardrona, are you satisfied that the Council has enough?

15 A. I can't really answer for Council on that. I can say that I've provided hydrology to the level that I've been able to for input to the Council process but I couldn't say and I haven't been informed by Council, my client that is, as to whether that hydrology in the end was adequate or it left something to be wanting or whether there were other matters that they really would've like in there but didn't find.

Q. Do you have an instruction or an engagement from the ORC to do anything more with the Arrow and Cardrona?

A. No.

20 Q. Now, also in the Dunstan catchment, we have the Lindis and that's already been reconcented hasn't it?

A. Yes.

25 Q. And we have the main stem of the Clutha and did I understand your evidence that there is a hydrological information base for decisions in relation to the Clutha?

A. Yes.

Q. But is your concern about adequacy of information in the Dunstan rohe really about the number of tribs which feed into the Clutha for which there might be relatively little work yet done by the ORC?

30 A. Yes, there will be – I've not dealt with the breakdown of tributaries that the ORC use – 140 catchments, whatever it was, but I'm sure there are many of those for which there is very little actual measurement and then for those we'd need to use a more approximate model, if you like.

Q. Do you have an instruction from the ORC to build hydrological models for any of the tributaries to the Clutha in the Dunstan rohe?

5 A. The current contract that we have with them is a regionwide assessment and as part of that, we are examining currently the statistical estimation methods and making them particular to Otago but we don't have any brief from that at the present time to construct a more detailed model along the lines of say TopNet or GoldSim for any other catchment in Otago.

1435

Q. Okay. Turning to the Taieri Rohe then.

10 A. Mhm.

Q. The hydrological pattern of the Taieri River is currently managed by Maniototo Irrigation Company through their water permits, isn't it?

15 A. I couldn't really answer that, I'm not that familiar. I mean, I know there are a number of players in the Taieri that influence the flow, but I'm not aware of any dominant, or the dominance of various players or who they are, in fact, apart from Trustpower.

Q. In your figure 3, in the yellow area marked as the Taieri rohe, you can see there is five stars immediately to the left of the T in the word Taieri.

A. Yes.

20 Q. Do you recognise that as being the approximate location of the Loganburn Reservoir?

A. Yes.

Q. And Loganburn Reservoir is operated by the Maniototo Irrigation Company, is it not?

25 A. I'm not aware.

Q. You don't know?

A. No.

30 Q. You're aware that the Maniototo Irrigation Company is obliged to release water from the Loganburn to maintain minimum flows at Paerau and Waipiata?

A. No.

Q. You don't know that?

A. No.

- Q. Are you aware that schedule 2(a) of the Operative Regional Plan Water has minimum flows set for Paerau and Waipiata?
- A. I'm not familiar with the current regional plan for the Taieri.
- Q. You don't know what the minimum flows are?
- 5 A. No.
- Q. And you don't know that they are the same as in Maniototo Irrigation Company's consents?
- A. No.
- Q. Do you have an instruction to build a hydrological model for Taieri
10 between now and December 2023?
- A. Not to my knowledge.
- Q. How long is the GoldSim model for the Manuherikia taken to build?
- A. Many months, possibly a year of time between the various, with the various consultations of experts and Ian Lloyd's time put into it.
- 15 Q. And a group has been formed called the Manuherikia Technical Advisory Group, hasn't it?
- A. Yes.
- Q. And that contains representatives of the permit holders as well as the people that you mention in your evidence?
- 20 A. Yes.
- Q. So you've had the benefit of working with people such as Mr Hickey and Mr Roger Williams who actually operates the Falls Dam?
- A. Indeed.
- Q. And that level of co-operation has assisted the construction of the
25 GoldSim model, hasn't it?
- A. Yes.
- Q. And gives you confidence that it's likely to be adopted and accepted by the permit holders?
- A. That might be a step too far. I, as someone's question, possibly
30 her Honour, that I'm happy that hydrological experts are in accordance about the GoldSim model, but I would wait on the various of them exposing it to their clients before I was going to say that all those clients would be happy with it. I don't, I don't know the answer to that question.

Q. The GoldSim model hasn't been presented to the technical advisory group for sign off, hasn't it?

A. Sign off, probably not. It has been discussed at, I understand, at team meetings, yes.

5 Q. But at least from your point of view, you are satisfied that in its current form, it now provides a hydrological basis for decision making in that catchment?

A. Yes.

1440

10 Q. And tell me, does GoldSim for the Manuherikia assume the presence of the dams?

A. The dams are built into the model and can be turned off or on to some degree as I understand in order to, for example, simulate what would happen if the dams weren't there. I don't think we've got very far down exploring that route yet but the dams are part of the model, yes.

15

Q. Now, sorry to do this to you Mr Henderson but I want to take you back to the Lindis and I'm expecting that Commissioner Edmonds might throw something at me in a minute for doing that but you'll remember the circumstance of the Environment Court hearing the Lindis case, the argument was – or one of the arguments was concerned the appropriate minimum flow for the Lindis, wasn't it?

20

A. Yep.

Q. And the contenders were 900 litres per second or 550?

A. Yes.

25 Q. And you presented the surface hydrology evidence for the Otago Regional Council in supporting 550 didn't you?

A. I presented the evidence.

Q. Yes.

A. And they supported the 550.

30 **THE COURT: JUDGE BORTHWICK**

Q. Sorry, you presented the evidence and I didn't catch the last –

A. I presented the evidence and the Council supported the 550.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Now, one of the dynamics of the Lindis case was that there was a specific water take proposal that could be test through the hydrological model that was created for the purposes of that hearing wasn't it?

5 A. Yes.

Q. And you were able to model the effect of relocating the existing race network downstream in the Lindis and to replaced with a series of inground galleries, weren't you?

A. Yes.

10 Q. And you were able to model the impact if that on the hydrology of the river right from above the first take right down to the confluence?

A. That's correct.

Q. And you were able to model the different take points, the effect of those different take points and the different rates of take on the duration of low flows in the catchment?

15

A. Yes.

Q. And weren't you able to demonstrate by comparing the different take points and the rates of take that in fact 550 litres left more water in the river for more of the time than the higher minimum flow of 900, with the different take scenario added into the model?

20

A. Yes that's an important distinction, the –

Q. Yes.

A. – 900 with one set of take points and 550 with a different set of take points.

Q. Yes but doesn't, from your point of view, that demonstrate the benefit of having specific take scenarios model an understanding of what the hydrological impacts of each take scenario might be?

25

A. Yes.

Q. And do you anticipate that the same benefit but accrue in the Manuherikia if there was a specific scenario presented for you to model the impact of in terms of the relative positions parties might have about minimum flows?

30

A. Yes.

Q. And you know don't you that the Manuherikia catchment, consents all of them have been lodged and are sitting with the Council now?

A. I understand that to be the case, yes.

Q. Wouldn't it make sense to you, as a hydrologist, to be evaluating the hydrological impact of the proposed take permits when assessing the effects of different minimum flow scenarios?

A. Yes.

5 1445

Q. I just have a question to you about the proposition that my friend Ms Baker-Galloway put to you from Dr Hayes' evidence, do you remember that?

A. Yes.

10 Q. And she put to you two thresholds for evaluating what more than minor, or what more than minor means, by reference to percentages of MALF, do you remember that?

A. Yep.

15 Q. Do you know whether Dr Hayes was talking about naturalised MALF or observed MALF?

A. No, I've read his evidence, but I don't recall which, whether he made that distinction or not.

20 Q. Well, let me put a hypothetical to you. Let's assume that Dr Hayes was talking about naturalised MALF. Would percentages of naturalised MALF tell you anything about the hydrological alteration of your proposal against a status quo?

A. No.

Q. No?

A. No.

25 **THE COURT ADDRESSES MR PAGE – REPEAT QUESTION (14:46:22)**

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. If we're talking about percentages of naturalised MALF, would a percentage of changed naturalised MALF tell you anything about the proposed change to the status quo? And I can ask –

30 **THE COURT ADDRESSES MR PAGE – CLARIFICATION (14:46:43)**

CROSS-EXAMINATION CONTINUES: MR PAGE

A. Perhaps I should add assuming that the status quo is the result of various effects such as abstraction and storage management.

Q. Yes.

5 A. And not natural, as it were.

Q. Yes. Because in many of Otago's catchments, the current 2021, as they are today, hydrological patterns of those catchments are quite different to their naturalised flow characteristics, aren't they?

A. Yes.

10 THE COURT: JUDGE BORTHWICK TO MR HENDERSON

Q. So just following up from that last question, do I take it that, and I might have picked this up wrongly, that hydrologists can talk about naturalised flow in one of two ways. One is talking about a river which is in its natural state, that is to say it is not impacted by surrounding land use or activities in terms of the taking abstraction diversion of water.

15

A. Mmm.

Q. So water's in the natural state, both land and water together to get to the natural state.

A. Mmm.

20 Q. And we can talk about naturalised flow in that context. So that's one meaning. The second meaning of naturalised flow is a calculation, if you like, which hydrologists can do to best guess what that natural flow would've looked like, but for changes to water quantity and surrounding land use patterns. Is that right?

25 A. I –

Q. Are you talking about in two different senses?

A. I think I would reserve the word "naturalised" for the manipulation of recorded data to give an estimate of what the natural behaviour would've been. And in the other situation where there are no human influence, if you like, I simply would refer to it as natural flow.

30

Q. Natural flow and naturalised flow?

A. Yes.

Q. And so counsel's last question, that was a question pertaining to natural flow or naturalised flow? What did you understand it to be and what was your answer?

5 A. I understood it more to be about the assessing a river and its flow data in an altered context where there had been an altered context for a long time and sometimes courts take that status quo as the base case and proceed to look at differences from that base case. Other times, they don't. So, that's, as I understood counsel, to be referring to any, quite a few Otago rivers actually and Manuherikia would be a good example
10 where the record of hydrology at the longest flow recorder in the catchment at (inaudible 14:50:02) is affected by manipulation of flows since it began in the 1960s so it's hard – and that's why all the effort has gone in to trying to trying to establish what the catchment might've looked like without all of that to assist I guess anyone who wished to see how
15 things might've been and how they might be different.

Q. And that's your naturalised flow?

A. And that's the naturalised flow series, yes.

THE COURT ADDRESSES MR PAGE (14:50:44)

THE COURT: JUDGE BORTHWICK

20 Q. Did you understand the question?

A. Yes I think so, so that –

Q. No, I –

A. I think so.

Q. – it's me I don't think I do, you see, I understand natural state flows and I
25 understand naturalised flows but I don't understand the question. So perhaps if you could tell me what your answer was pertaining to?

A. So there's quite a lot of emphasis in ENPS and so on about setting these limits and Ms Baker-Galloway referred us to a set of suggested clauses and so on, whether the flow is more or less than five cumecs and so on
30 and those describe hydrology and probably I assume they're meant to describe a natural hydrology.

Q. Natural not naturalised?

A. Or naturalised depending on the data that you're dealing with when you come to discuss a particular river and then the proposed these like, 90% of - it's acceptable to allocate 10% of the mean annual low flow for example or it's acceptable to have a minimum flow that's 90% of them, you know, these sort of numbers and they refer back to estimates of natural and I think Mr Page's comparison was or contrast was: "What does that tell you about a river is effected and has been effected for a long time, what is that 90% or 10% or anything tell you about the current state of the river and changes that a plan change might make to those if you were to leave some version of the status quo in place and make minor modifications."

Q. And so that's the modification to the current status quo, the hydrology?

A. Yes.

Q. And it's not actually looking at the percentage change to either a naturalised hydrology or the natural flow of the river?

A. That's right.

Q. Yes, okay no I understand what you're saying.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

Could I ask a question? It was to do with the status of the applications for consent, deemed permit. I thought you said that they'd all been applied for but I might –

MR PAGE:

In the Manuherikia, yes.

THE COURT: COMMISSIONER BUNTING TO MR PAGE

Q. Because the table we've been given shows there were 44 awaiting application. Is that – I'm just seeking clarification on that.

A. Well, my instructions are that they've all been applied for now. I'm not sure what the problem is with the data that you have is but I can check with my clients if that's the case.

Q. Okay. Would you mind doing that, just – yes. We were provided with some information I think late last week, saying that –

A. I'm aware of that and I have questions for other witnesses about the accuracy of what you've been provided.

Q. Okay.

A. Thanks very much. Thank you, your Honour.

5 THE COURT ADDRESSES COUNSEL – ANY QUESTIONS ARISING
(14:54:05)

QUESTIONS ARISING: THE COURT: JUDGE BORTHWICK – NIL

RE-EXAMINATION: MR MAW – NIL

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

10 QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL

WITNESS EXCUSED

COURT ADJOURNS: 2.54 PM

COURT RESUMES: 3.17 PM

MR PAGE ADDRESSES THE COURT (15:18:05)

MR MAW CALLS

RICHARD MARK ALLIBONE (AFFIRMED)

- 5 Q. Can you confirm that your full name is Richard Mark Allibone?
A. Yes.
Q. And you are a director and principle ecologist of Waterways Consulting Limited?
A. Yes.
- 10 Q. And you prepared a statement of evidence-in-chief dated 7 December 2020?
A. Yes.
Q. And a statement of evidence in reply dated 19 February 2021?
A. Yes.
- 15 Q. And you've set out your qualifications and experiences in paragraphs 3 to 14 of your evidence-in-chief?
A. Yes.
Q. Are there any corrections that you would like to make to your evidence-in-chief or your evidence in reply?
- 20 A. I have two small typos I would just like to fix. On page 11 of the evidence-in-chief paragraph 40, on the second last line it reads: "And seven of the Otago fish taxa have either..." Can we replaced "either" with "the", so it reads: "Have the CD qualifier."
Q. Thank you.
- 25 A. And the second correction is in paragraph 42 on page 12. At the end of the third sentence it reads "ranking", it should read "ranked". Just -ed, not -ing, thank you.

1520

THE COURT: JUDGE BORTHWICK

- 30 Q. Sorry, which line was that?
A. Section 42, line 3.

Q. "Ranked", not "ranking"?

A. Yes.

Q. Okay.

5 EXAMINATION CONTINUES: MR MAW

Q. Thank you and subject to those corrections, do you confirm that your statements of evidence are true and correct to the best of your knowledge and belief?

A. I do.

10 Q. Now, I understand you've prepared a summary of the key points covered in your evidence and your evidence-in-chief?

A. I have.

Q. If you could please state that for the Court and then remain for any questions from the Court or from my friends.

15 A. Okay. Your Honour, I'll start from paragraph 4 on the summary.

1521

THE COURT: JUDGE BORTHWICK

Paragraph 4, not 21? Okay.

MR MAW:

20 The summary from which the witness is reading hasn't been provided to the Court. It's a summary he's prepared.

THE COURT: JUDGE BORTHWICK

Ah.

WITNESS:

25 Ah. Sorry.

THE COURT: JUDGE BORTHWICK

Okay. Less than helpful inasmuch as firstly, it shouldn't be an opportunity to address new evidence or to provide new evidence, and of course that's the problem that the parties in the Court are going to have.

MR MAW:

It is a summary from his evidence and his evidence in reply –

THE COURT: JUDGE BORTHWICK

I see.

5 **MR MAW:**

– but capturing the salient points, and we do have written copies available if that would assist.

THE COURT: JUDGE BORTHWICK

10 Yes. Who wants a copy? Everybody? Everybody wants a copy. Have you got copies so you can distribute those please? Thank you.

MR MAW:

Yes.

THE COURT: JUDGE BORTHWICK

This will be a fast 10 minutes. Three minutes a page.

15 **WITNESS:**

Yes. This is by far the longest of the summaries that will follow from the balance of the witnesses.

THE COURT: JUDGE BORTHWICK

20 All right. Well we're in Judge Allibone's hands. If you can start reading from the summary?

WITNESS READS SUMMARY

25 "Native freshwater fish fauna of Otago. The number of recognised native freshwater fish species and indeterminate taxa in Otago is 31 taxa. The present day taxa can be split into 15 (inaudible 15:23:01) species that migrate to and from the sea and 16 taxa that complete their full life history in fresh water. 15 of

the taxa are also classified as threatened and this includes 13 non-migratory galaxiids and one closely related mudfish.

5 The fish distribution maps in my evidence-in-chief have been provided to provide geographic context in terms of the distributions of threatened fish. The maps do not indicate any priority for management. In addition, I did not note in my evidence-in-chief the data quality issues that are present with the fish survey records, in particular, the difficulty with determining historic data from current data and the accuracy of the data at the fine scale of stream reaches.

10

The key threat to non-migratory galaxiids is predation and competition by or with introduced Salmonids. Habitat loss via habitat alteration and/or water abstraction has local effects and is a serious threat to mudfish. Water quality is a limited issue aside from areas where low flows or intensive agriculture may create detrimental conditions. For migratory species, loss of fish passage is a significant issue causing range contraction.

20 For 13 threatened non-migratory galaxiids, four occur in the periphery of Otago with their main population centres outside Otago. Of the nine Otago taxa, two occur in areas of high levels of water abstraction and irrigation and significant interactions occur. For other taxa, water abstraction occurs within their geographic range but interactions are more limited.

25 The evidence of other experts – other experts have provided indicates varying degrees of support for my listing and prioritation of threats to the non-migratory galaxiids species. Dr Olsen agrees with the list and Dr Dunn agrees in part, but considers hydrological alteration by human activities to be the greatest threat to non-migratory galaxiids.

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I agree with Mr Dunn that extreme hydrological alterations are a concern and can lead to extirpation of non-migratory galaxiid populations. Dry stream reaches or stream reaches flooded by reservoirs will not support non-migratory galaxiid populations. However, the effects of less extreme hydrological

alteration of non-migratory galaxiids are complex and some flow alterations are used to protect non-migratory galaxiids. While plan change 7 will not establish residual flows and remove dry reaches, these drying reaches are often important features that protect galaxiid populations and these flow alterations should be addressed individually.

There are two factors I would reiterate with respect to the assessment of threats presented by water abstraction versus salmonids or introduced predatory fish on non-migratory galaxiids. A, the first is the reversibility of the two threats. The effect of water abstraction can be reversed by removing abstractors and halting the abstraction, whereas salmonid removal is significantly more challenging. The second reason I consider salmonids are a greater threat to the non-migratory galaxiids in Otago is that salmonids are present over a much greater area of Otago and this greater geographic range increases their potential to impact on non-migratory galaxiids. Galaxiid taxonomic issues are still to be resolved and we have limited knowledge of the general ecology of approximately half the taxa.

Knowledge limitations are more significant when assessing environmental tolerances and the effects of water abstraction. I have undertaken work for the Otago Regional Council since 2018 and as part of this work, I have reviewed the state of ecological data available for ORC for the planning purposes. Included in this review process has been the habitat models for the Arrow, Cardrona, and Manuherikia catchments. That found the Manuherikia Galloway and Cardrona habitat models would both benefit from being updated and for the Manuherikia, an additional model would be appropriate for the Omakau reach of the Manuherikia River. Habitat preference occurs for various species, eg, trout. Also required updating in habitat for invertebrates and algal species needed to be modelled.

The state of ecological data is also varied. Some key areas have little, limited current data. For example, the lower Cardrona River has little recent sampling. Recent work have undertaken at the Cardrona River found previously unreported (inaudible 15:27:40). And also located longfin eels that have not

been recorded in the Cardrona River in the New Zealand Freshwater Fish Database records since 1992. This does demonstrate the NZFFD does not always provide sufficient or up-to-date fisheries data. I did not list caveats about the NZFFD data in which evidence in chief, in my opinion, general distributions of most non-migratory galaxiids are reasonably well-known.

However, there remain taxonomic issues to address and at the scale of individual streams, the fisheries data is variable in quality. In addition, some of the NZFFD records should be regarded as historic rather than representing up-to-date presence, absence, and abundance of data for fish in a water body. With respect to the habitat modelling as presented in 2018, I would consider this an overly optimistic assessment of the state of knowledge in the MAC catchments.

With respect to habitat modelling, I agree with Dr Hayes' evidence outlining recommended habitat modelling methods and that the existing habitat models need to be reviewed and updated to account for the age of the models, whether they follow best practice and use up-to-date habitat preferences for a range of aquatic taxa not just fish. I expect there will be significant requirement for updating, replacing, and adding to the habitat model resources available to ORC. This leads me to support Mr de Palsemaeker's opinion that we are lacking information, the existing data is patchy and at times relies on historic fisheries data.

While the ORC has previously commissioned habitat models, these will need updating and I expect additional models will be required for establishing the water management regime in the Land and Water Regional Plan. With respect to fish screens, I maintain the importance of screens is less for non-migratory galaxiids than for migratory or (inaudible 15:29:40) species. This is because only a portion of the non-migratory fish population will be exposed to the entrainment out of water take whereas the majority of all of the individuals of migratory species are exposed to entrainment into water races. I note that recent research has provided important information on the movement of larval non-migratory galaxiids and provides important information for any screen

requirement assessment. The PC7 process does allow time for fish screen requirements for non-migratory galaxiids to be better understood before setting consent conditions for water takes.

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Flushing flows: I agree with Mr Cole that flushing flows are desirable and have ecological benefits however flushing flows can only be provided by rainfall events and in central Otago rainfall events are often unpredictable in their occurrence.

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Minimum flows and allocation limits should be used together to protect ecological values and the two have different roles. The minimum flows are set to prevent unacceptable ecological impacts due to the abstraction induced low flow. Water allocation has a role in preventing flat lining of river flows and providing for flow variation that can improve habitat conditions and refresh a stream during summer low flow periods.

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Water allocation at annual, monthly or other durations can be used to adjust flows and account for variation in fresh events desired.

20 **THE COURT: JUDGE BORTHWICK**

Q. When I read your evidence and I understood your evidence but, when I first read your evidence-in-chief I had wondered what issues are in the plan change, as understood by the Regional Council or as brought to light be submitters, what issues was your brief actually addressing so it's telling me a lot about galaxiids but for what purpose?

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A. There was some, particularly one statement in Professor Skelton's saying – report sorry, not evidence, that said that the plan as it currently is being used represents a threat to non-migratory galaxiids in Otago so part of it was to inform the Court that as a sweep that non-migratory galaxiids, it concerns two species, not all of the species so the distributional info overlaid with the water attraction info where the sites are, it's there to demonstrate that while there is an issue it centres around Central Otago roundhead and Clutha flatheads. The other nine or 10 species however

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many you sort of designate because we haven't got the taxonomy 100%, are less exposed water attractions so Plan Change 7 and the water plan process that goes with it, if you're worried about threatened non-migratory galaxiids it's not all of them and the use of the lumping them all together as a: "They're all at threat," is incorrect in my opinion. It's two species that are exposed to a lot of water attraction impacts, effects, not the whole sweet. So it's again it's just trying to clarify where the issue lies, both geographically and in terms of which species are most vulnerable.

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Q. And you mentioned flatheads and what was the other one?

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A. Central Otago roundhead is the most threatened or – it occurs all of its populations essentially occur within the footprint of irrigation areas or abstraction areas then Clutha flathead is the other one. And the rest much less a degree of interaction with water attraction.

Q. So this brief was responding to something that Professor Skelton had said just providing more detail around the statement that he had made?

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A. In part, yes. I notice in one point in the ORC's description it also mentioned, sort of reiterated, Professor Skelton's comment about threats to non-migratory galaxiids and just, yeah, just clarify, clarification that it's not all the threatened non-migratory galaxiids that are subject to significant interaction with water attraction. I guess the other reason for talking about salmonids is again to, while this is being put up as one of the issues for Plan Change 7 either for or against is that to my opinion it's the salmonids that are a bigger threat, the water attraction is an issue but there are other issues that we could address and make substantial gains in terms of reducing the threat.

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Q. Okay, and so with that clarification in mind, how does this plan change respond to that or does it in fact not respond to that because it doesn't need to respond to any particular issue to deal with non-migratory galaxiids?

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A. I think there we're actually grappling with two issues. One is how you manage non-migratory galaxiids and for some parts of Otago that has a really strong relationship with water attraction management because they're in the same spots. Other parts of the non-migratory galaxiids

management are outside the water traction areas and it's a simply a fisheries management issue so that's one bit. The other part of plan change 7 is the part you would've addressed with the comments on the habitat modelling is how we understand the catchments in ecological terms for trout, invertebrates, native fish, algal species and the habitat modelling in the ecological flow development is what plan change 7 will allow us to improve but at the moment, we've got to the stage with the Manuherikia where we have habitat models linked to GoldSim and a lot of information now on how habitat will change with flow but for catchments like the Taieri, we have one habitat model that was built in probably 1999 around the middle march area and the rest of the catchment has no habitat modelling or information that we can relate flow changes to changes in habitat so for that catchment we need to a fair bit more. Same with the Cardrona where we've been trying to replace a 1999 habitat model with a more up-to-date one that we understand so that when it comes to a hearing process, we can explain that model to the commissioners and we can present it to stakeholders this is what's actually going on so that's the other part of where I'm coming – plan change 7, it gives the time to develop these models, rather than doing consents when we don't understand the catchments and the grounding consents on what we hope is okay with not a lot of understanding of ecological change with flow change.

Q. And so moving on into the future, is it your understanding that under the land and water plan, which now will be an integrated whole of catchment mountains to the sea (inaudible 15:38:09), which isn't necessarily be a lineal concept as I understand it, approach, that when linking to a minimum flow, that the habitat modelling itself links to a model of the hydrological conditions within a catchment, correct?

A. You can do. What we've done in the Manuherikia is first off as far as Mr Lloyd and I are aware, where we've managed to link a quite a hydrological water allocation model GoldSim and it predicts flows and now we can – the habitat models provide an output of at this flow you get x amount of habitat for the species at this point in the river, we can link that to the GoldSim outputs and generate real time series, because

GoldSim works for 47 years of flow data. For each day on that 47 years, we can generate now the habitat available to a suite of species at about 70% of the river length, and we can sum that up and see how changes occur through time. Now, we've never done that before. Normally you would just take the habitat model and say at one cumec, we'd start to lose habitat quite rapidly for this particular species and that's the one we value, we don't want to go below that point and you would look at a duration curve in the river and say oh, we only get to one cumec say four or five days a year or we would get naturally to one cumec 40 or 50 days a year in summer and you'd weigh up the and decide where you'd put the minimum flow, balancing that natural flow regime that the hydrologists give you, and the habitat you want to keep for the particular species of value. That make sense?

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15 Q. Yes. When you say "natural flow", you mean naturalised flow, so that's a calculation of the volume of water?

A. Which goes back to what Mr Henderson was discussing earlier today. If it's a river with – in its natural state, it would just be the flow as it is. If it's been modified, yes you go to a naturalised – or ideally you go to a naturalised flow if you can, and the Manuherikia is an example where we're struggling to get the flow naturalised. So you might not link it back to a natural flow; you would simply say at these particular flows we're meeting a habitat target for a particular species that we desire.

20 Q. So, that kind of sounds like business as usual but quite sophisticated, we're looking at minimum flows, we're looking at you know habitat output as it correlates with those minimum flows, what's that got to do with Te Mana o te Wai and putting health of the water first, the water, not as a resource or a commodity but water first?

25 A. I think if you put aside the heavily abstracted catchments and you looked at the ones that are basically unmodified or lightly mortified you're look at it and say well this is the river in it's natural state and it provides a Te Mana o te Wai, if we alter it well this much in terms of the flow regime we're doing a small amount of alteration in the habitat available for the species. Remember the models are habitat models, they're not models

of abundance of the species, we're telling you how much habitat they have, they may or may not fill that habitat but anyway then you look at it as for Te Mana o te Wai and say okay well we haven't deferred far from the natural so we're probably still supporting that you know, life supporting capacity in general values. The tricky bit is it's not a cut off at a certain point where you don't meet it, it's going to be a gradual sort of – well the end point of no water you're definitely not meeting it, natural flow you definitely are, somewhere in the middle of this come together you decide no, no, no and sort of not meeting to yes we are. And it struck me when looking at these sort of things it's very easy to write the rule, you know, life supporting capacity and so on, you have to get a river very dry before it's not meeting any life supporting capacity and that Te Mana o te Wai sort of, it's a concept but how we fit that into a gradual sort of change in how the river supports life is a difficult call. And then when you move to the heavily abstracted catchments where you've got a lot of existing use you can point to this flow looks good for meeting the Te Mana o te Wai requirements but that is an infraction, let's say 50% of the existing use and then you have a problem about how you manage, how we've got too much water been taken from the river potentially to meet that objective.

20 Q. Yes so and with that in mind, what involvement with the Regional Council in conceptualising of a policy way what does Te Mana o te Wai means if that's your starting, possibly at any point as well?

A. I've had none.

25 Q. None? Who in the Regional Council's been having those discussions that you are aware?

A. You'd have to check with Mr de Pelesmaeker.

30 Q. Okay. So you haven't been approaching catchment models and you've given the example of Manuherikia with an outcome with the fundamental concept of Te Mana o te Wai in mind, that hasn't then reset what you are doing or thinking around –

A. No what we've been trying to do at Manuherikia is just develop a model that works that we're happy with –

Q. A model of what though, I mean a model's just a methodical representation of the environment which depends – which is making a prediction, isn't it?

A. Yes, it is.

5 Q. A prediction in this case about naturalised flows?

A. The GoldSim models makes a whole suite of predictions, not just natural – it doesn't actually go to naturalised flow. It deals with the water run-off you get from rainfall, and then the amount of water you need to irrigate the existing irrigation and allocation blocks, and it has a storage module
10 in there for how much water you've got stored that you can feed into irrigation or to the minimum flow. And then it provides at no point (inaudible 15:44:35) river, the flow at that no – say confluence of tributaries, both the inflowing tributary and the upstream main stem, so that you've got flows at points in the river that we can then link to the
15 habitat model. And because tributaries are at distinct points and so are the takes, you can say from this take to the distributary the flow is x. So in that three kilometres of river we've got say a cumec, and we know from the habitat model how much habitat it predicts is present at a cumec. So we can sum that along the river but what we've got is basically we're trying
20 to build a model that all of the tag agree represents the river as best we can, and then when the Manuherikia reference group says "this is what we want the river to provide in terms of habitat or particular values", we say well, if you want to have an excellent trout fishery for instance in this reach, you'll need about this much water. Or if you go above this flow, in
25 fact you don't get any more habitat because some of the habitats of a certain flow will plateau, so you add more water, you don't get more habitat and we can say "well here's the maximum you get". So once you get the values from the community, whether it's in MRG or FMU process with community objectives, then you go to the model and say: "You're
30 looking for these things, here's where you get them, at these flows." So what we have is the model to inform the community then, and users, this is how you get what you want to get to or this is the trade-off. So if you have this, because it's linked to allocation, the GoldSim one in particular, if you want a really high residual or minimal flow, that means less water

available for out of stream use. So there's the – you know, you've got x amount of restriction on your irrigation, so you can weigh up the options. So the whole GoldSim model is a scenario tester and if we do this, what we get in terms of habitat? Or if we do this, what do we get in terms of irrigation reliability? And how do we balance them, where's the sweet spot, is there one that meets both the ecological objectives and the out stream ones? And the reason we've spent a lot of time on it is because it's obviously a crucial decision process for Central Otago water users and environmental interests, iwi, that we get this right, so we built probably the best model we've ever done to address that and that's taken, yeah, a couple of years.

Q. Remind me again because I'm not sure to what extent this is well covered or well described in the evidence but undoubtedly unknown to some people in this room, what does this modelling is a representation of the naturalised flow or something else?

A. The GoldSim, what it has is it runs a whole stream a different flow scenarios. We have one flow scenario which is called Falls Dam Full.

Q. Falls Dam so Manuherikia?

A. So basically it's water flows in, it has to flow out it's got no storage and then we have no irrigation so that's our baseline basically taking no water out, we're not storing any water and then we can run a status quo scenario which is basically the river as it is today with the –

Q. When you say "as today" and again, forgive me, is as today complete with the existing land users surrounding land users?

A. Yep.

Q. And so your model, your model is making predictions about the flow in the river which is an element of hydrology that you know, I'm not quite sure whether it's substrate or bed of the river or whatever, but anyway, flows in the river, you're making a prediction as set in this surrounding land use?

A. What it does is it tells you about seven or eight blocks of irrigation allocation so this patch like Chatto Creek or Thomsons Creek, it will tell you this is how much water is available for use in here, under this scenario, and it will link to the – we have the irrigation area in that

catchment plotted, modelled, from Groundtruth's real irrigation information so we know how much water it needs. So if we're only getting say 40% of it, it will tell you the reliability supply and it will tell you what's left in the river. Now, the model we've run at the moment for about eight different scenarios priorities the minimum flow so it's got a range of minimum flows campground that it has to meet and then everything else has to be adjusted and as this model runs, the irrigation use for instance is reduced as the flow drops so you maintain the minimum flow. Now at the moment, the model is there, it's developed, we're all pretty happy with it, now we just need to answer the questions the community wants in terms of what scenarios they want to see running it.

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Q. Is that model a complete answer to the NPS? Because it's been – I think you're articulating it as if is and I put to you again, if it's all about minimum flows and ecology, then why would we need an NPS?

15 A. Oh no, I – okay, it doesn't answer it all and one of the – and it depends really again how complex you make that scenario as well and what objectives you're looking for and how well we can relate an objective, our community objective to the models we can do, and there are some gaps in terms of – one of the things we see in the model is for instance is trout habitat. It basically doesn't increase at the campground where the flow recorder is. When you get above two cumecs it seems to flatten out, and you can add more and more water and you get any more trout habitat. But invertebrate habitat increases through the whole flow range, so essentially it says the bigger the flow the more food you've got; you don't get more fish. So if the community objective is just a bit of trout habitat, you can get it at two cumecs. If they want a big trophy fish, then you would actually go to a much higher flow because they get more food. And that's reflecting also the health of the rivers; the more invertebrate and life you've got in it you would say the more it meets that Te Mana o te Wai. But again it becomes a very – it says "conceptual" or judgement call on where you say enough meets it, or you've taken it too far below a line to say it doesn't meet that, because there's no set range for it to be in.

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Q. So if the community view was that you wanted to take, I don't know, nitrates from a level of toxicity grade D, whatever that's equivalent to, and

bring it up to grade A under the MPF, that you were going to allow 30 years for that to happen but in the meantime you had to move from D to C and that had to happen within the next 10 years, how would that then impact on the flow regime? How would your module respond to that?

5 A. It wouldn't.

Q. It wouldn't?

A. Its not a water quality model, it's a –

Q. Because its not a water quality and it's everything to do with the surrounding land.

10 A. Yeah.

Q. So then, that's what I'm getting at. The model isn't the complete answer to everything in this NPS is it?

A. No, no it's not.

15 Q. No, because the NPS makes it clear that you're interested in land and water integration.

A. Yep.

Q. Okay so the model is the answer to what question?

20 A. It's based around habitat, how much habitat is available to organisms and about water allocation for out of stream use. It can show you the balance between those two factors as you change the scenarios.

Q. Right but it doesn't actually then factor in the impact of land use, the land activities on, say water quality?

A. No it won't do that.

25 Q. That which must impact on habitat or maybe not so much habitat but species abundance and all the rest of the stuff that we might be interested in.

A. Again that depends very much on the on land management.

Q. Yes that's what I'm asking you.

30 A. What I'm saying, if you wanted to adjust some of that it might be riparian fencing or it depends very much where your nutrient issues are coming from. If it's direct stock access to a stream then you respond by fencing, if it's nitrate percolating through ground water then it's an irrigation application issue which you would, you know have to adjust. If it's phosphorus coming from overland flow, it's border dyke and flood

irrigation is probably – a moving to spray irrigation, not just for efficiency but for reducing phosphorous run-off might be the thing. So, yeah, it becomes a difficult thing to address, depending on just where your nutrient or your water quality issues are arising.

5 Q. Well the proposition I'm putting to you is it's not – those land use issues are not the issues which are addressed under the model that you're talking about, the Manuherikia.

A. No and it's never been intended to.

10 Q. But it's never been intended to but there are wider questions under the NPS and those questions would be, would go to water quality and land use wouldn't they?

A. Yes.

Q. Okay, well that's helpful, thank you, that is helpful.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

15 Q. Just coming to the plan change we've got here, Plan Change 7?

A. Yes.

WITNESS REFERRED TO PLAN CHANGE 7

20 Q. You've produced evidence and at the end of your response reply evidence you talk about significant requirements for updating, replacing, adding to the habitat so on and so on. Is that for the – more to do with the land plan, water plan that's coming up or how do you distinguish between what's required for this plan change which is –

25 A. For this plan change, given we're running with basically just rolling things over for six years. What I mean is during that six year period it gives us time to develop the models we need for the final, you know, the land and water plan, that under the – using the current models is not particularly valid or they just don't have them so the six year period gives you a grace period to develop new models or check the existing ones are still valid. And then when you do the after the six year period, when you're granting
30 new consents, you have a much better basis, better plan, better informed by appropriate modelling that can then do a much better process –

Q. So that's the focus of your evidence.

A. Yep.

Q. Just looking at the drafting, current drafting over plan change 7, have you looked at that to see whether your evidence has any significance in terms of say the matters of control?

5 **THE COURT:**

Any clearing on the matters of control?

WITNESS:

So you're meaning plan change 7, not the –

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COMMISSIONER BUNTING:

Yes.

WITNESS:

15 No, my evidence is aimed at part of the rationale behind plan change 7 is to give us time to develop the tools to do the land and water plan. It's not about the decision or how you assess consent under plan change 7, a lot of it, it's more about giving us the time to get it right.

20 **COMMISSIONER BUNTING:**

Well, that was my interpretation. Thank you for confirming that, thank you your Honour.

THE COURT:

25 So those are our questions. Who is – Mr Winchester.

MR WINCHESTER:

I'll just briefly address the Court.

30 **THE COURT:**

Oh no, you've already foregone.

MR WINCHESTER:

I have intent to withdraw my cross-examination of Dr Allibone but I was listening to his views on Te Mana o te Wai and certainly, I accept that they're at the invitation of the Court. I didn't detect from his written evidence that that would be a matter he might opine upon. I just really want it noted for the record that I
5 will not cross-examine Dr Allibone on the basis that he said he had not been asked to give a view on Te Mana o te Wai for the purposes of the regional council's planning, that was –

THE COURT:

10 Would that be correct Dr Allibone?

DR ALLIBONE:

Yes.

15 **MR WINCHESTER:**

So he explicitly said that and he also has explicitly, and I think correctly, and I'll make submissions on it said that what is important is not just an ecological assessment but one which is overlain with values and that was the interchange he had with your Honour so I'll just leave it at that but I wanted to have that on
20 the record with your leave.

THE COURT:

No, absolutely because I think these issues are important. Te Mana o te Wai being foundational to the NPS is important also because from memory,
25 although I have looked at the NPS, I haven't looked – the last I looked at it with this in mind but now the foundational element is tracking or should be tracking through all plan and provision not – would that be right? Pretty much as we said in Southland. It's (inaudible 15:57:53) everything that we are doing here to the extent that it's actually intended to.

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MR WINCHESTER:

Indeed, both procedurally and substantively, yes.

THE COURT:

All right, thank you. Ms Baker-Galloway, oh no, Ms Williams.

CROSS-EXAMINATION: MS WILLIAMS

- 5 Q. (Inaudible 15:58:14) speak from where I'm sitting. Dr Allibone, thank you for explaining, I guess, the purpose of your evidence as being about the rationale for the plan change, rather than perhaps addressed to the plan change. And I do appreciate that in relation to – you're really scene setting in terms of the freshwater fisheries and species that are in the Otago region and providing some background to the Court in terms of the fact that we do have an Otago – this suite of – I'm going to call them
- 10 non-diadromous, because that's the term that's adopted by Dr Dunn but non-diadromous galaxiids species which some people call non-migratory galaxiids species, and they're probably reasonably interchangeable of terms but just clarifying that up front. So looking at your evidence, whilst you haven't prepared it perhaps to support Plan Change 7, there are two
- 15 aspects of the plan change which are certainly relevant to the Court's consideration of which I would like to discuss with you and the first of those is the application of the minimum flows in schedule 2A where those flows are in the current schedule but are not yet, I'll put it this way, operative because there was a requirement that either there be
- 20 agreement of all current consent holders that the minimum flows could apply to them or it was awaiting for the expiry of deemed permits in October of this year. So considering that those minimum flow figures are currently in the plan, those are not picked up by Plan Change 7 and would not be continued through, can you tell me what your view is on that?
- 25 A. Well that's kind of difficult to give an answer to. One of the issues that comes to mind straight away is that it depends because there are minimum flows set on a number of rivers and some of those have been set relatively recently, probably following some reasonable guidance and that also in areas where deemed permits in particular are uncommon if
- 30 you went to South Otago it's very going to be little change.
- Q. So those ones I understand would continue, what I'm thinking of I think it's particularly in the Taieri and the Manuherikia where there are existing minimum flows in the plan but they are not applicable currently.

- A. Okay well the Manuherikia can give you an answer that simply the minimum flow is relevant for almost all of the year if ever relevant, because its set at Ophir –

THE COURT: JUDGE BORTHWICK

- 5 Q. Sorry, because it's set at?
- A. Sorry, because it's set at Ophir but the minimum flow (inaudible 16:01:35) 820 litres at Ophir, part-way down the Manuherikia. Now when we're discharging water from Falls Dam to feed the four main irrigation takes, that's Blackstone and Omakau which are upstream of Ophir and there are
- 10 two downstream the Manuherikia take and the Galloway take. Now as long as Galloway and Manuherikia are being supplied with more than 820 litres a second, then you're always going to get 820 litres flowing past the minimum flow site. So if say Manuherikia's taking a cumec and Galloway 1,400, well that's got to be at least 1,400 – sorry, 400 at
- 15 Galloway, 1,400 passing Ophir. Now, but the moment the Manuherikia uses maintain a 900 litre a second minimum flow voluntary at Galloway as well, which exceeds the minimum flow so if we carry on with the status quo and the voluntary minimum flow, the status quo will continue. The minimum flow is irrelevant for the Manuherikia. For the Taieri, I'll take on
- 20 board what Mr Page was asking before about the control of the Maniototo Irrigation Company and how they, it would come down to how they supply water possibly and I really would have to sit down and have a real careful think through any further on your question.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

- 25 Q. Do you accept that given that these are flows which are in the plan now and which any current consent holder should have been anticipating would be applied and indeed what you're telling me, some of them have voluntarily being applying them and a little bit more, do you accept that it is appropriate that that be something which carries on through for a
- 30 controlled activity under Plan Change 7?
- A. Not sure that's my place to say yes or no to honestly.
- Q. All right, if you don't want to answer that's fine.

A. Well, just not sure it's quite how –

THE COURT: JUDGE BORTHWICK

Q. Well you could frame it in ecological terms, what is the ecological down side if there is any, there may not be, to imposing the minimum flow on every applicant for renewal, either deemed permits or replacement permits within one of those given catchments where there are permanently flowing?

A. Okay. In the Manuherikia it's not going to make any equilateral change from status quo because they exceed the minimum flow.

10 CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. But that would be provided that they do at least maintain the status quo?

A. Yes, the only way that it would, in common sense to me in the Manuherikia, that they won't meet the minimum flow as if they're on full restriction like Falls Dam is empty and you're in a drought condition because the only time you don't put water past Ophir if its not supplying Manuherikia Irrigation Company and Galloway, that basically means you've run out of water in Falls Dam and you're in a drought. So but that stage the minimum flow is also irrelevant because you're in drought conditions where everyone is off, even the deemed permit holders who are not subject to the minimum flow probably have no either to take anyway or so little it's become irrelevant.

1605

Q. But remembering that of course the deemed permits will have expired so they will be subject to something, this is the question is should they be subject to the minimum flow?

A. Ideally, yes.

Q. Okay, thank you and similarly under Taieri?

A. Yes, if we're on the same logic,

Q. The other aspect that I want to talk with you, explore with you Dr Allibone is that currently deemed permits have a priority system so that for deemed permits, mining privileges that were granted earlier in time, they always take priority over mining privileges deemed permits that were granted

later in time no matter where they are in the catchment and so particularly where you have a higher priority take deemed permit which is lower down the catchment, that means that lower property takes higher up the catchment are required to allow a certain proportion of water to continue to flow to ensure that the higher priority deemed permit has sufficient water and you're nodding so I'm just going to say that you agree with that?

5

A. No I understand the situation, I've dealt with the priorities so I was nodding about understanding your question and yes, you're right in that sense where you've got a downstream holder with first priority and they could, as I understand things, request other permit holders to turn off to supply their water. However, the alternative applies as well, if the deemed permit holder with first priority is at the top end of the stream, he can take all the water and everyone downstream is not getting any and if the plan change changes that so that they have to share evenly then that priority will then disappear and you'd share and it would depend again if there's any watering sharing agreements amongst the users on how they deal with that resource so it's, there's a theoretical one kind of what you've presented and the real world might be kind of different.

10

15

Q. So just thinking about Plan Change 7 and as described by Mr Maw in his submissions this morning, the intention for the controlled activity is that this would be a continuation of existing activities without exacerbating effects on the environment, so that's, that's, what are the controlled activity pathway is intended to maintain, the status quo. If you have a change in priorities because they are not rolled over as part of Plan Change 7, does that affect your answer?

20

25

A. I think I'll stick with it depends very much on there might be a consent framework that the people are working with but there will also be user agreements on how they may share that so it's very hard to know. I'm not good with planning side of this, how this would pan out, you know in terms of operationally what users would do when the priorities are not there or and how they operate them now may not reflect always how the priorities are –

30

Q. So let's put to one side what users are doing, let's just think about what users rights currently are. So that's saying that they have priorities and they're exercising them?

A. Yes.

5 Q. Yes and that's the current hydrology of those streams/water bodies, the current ecosystems of those streams/water bodies is accustomed to those priorities isn't it?

A. I'm uncomfortable with the word "accustomed" but yes.

Q. It's what they know, if I put it that way.

10 A. Okay, yep.

Q. If you then introduce a degree of variability by not maintaining those priorities you don't actually know what that change in flow is to, what effect that is going to have on the ecosystems and the habitats, do you?

A. Well that's a yes and a no, I'll explain that to you –

15 **THE COURT: JUDGE BORTHWICK**

Q. Sorry, you say what?

A. It's a yes and a no in a sense.

Q. It's a yes and a no, okay.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

20 A. Because in some ways you're talking about a very sort of narrow window you could say of what's going on, this year for instance we've had a very wet January and all the irrigation as far as Ophir and Manuherikia was off for a month. So at that stage the streams are flowing completely natural, the priorities and bits are irrelevant because no one's taking. So the

25 priority issue comes into effect when you have a low flow and then water is not available for all users. So some of the times the change or lack of priorities will do no change to the flow and it depends on the rainfall and water use. On a dry year, yes, depending on how the users depend, decide to operate, the change in priorities could change how the flows

30 change down the river sites. So when you say the "community is not used to change", I wouldn't accept that because some years are very different from others. And what we've been modelling (inaudible 16:10:16)

GoldSim is exactly that; wet years, dry, years, average years. And how it compares to the baseline really varies but on a wet year there's very little change.

1610

5 THE COURT: JUDGE BORTHWICK

Q. Just as a matter of interest, do you know anything about whether or not holders of deemed permits are actually exercising those priorities, or not? Because we hear – we've seen it referenced but I don't think we've seen it landed anywhere in the evidence, in a way which the Court could understand as to the scale of significance of those priorities (inaudible 16:10:49), if in fact they're exercised now?

10

A. You'd have to ask – other party – I get some feelings some are operated, some more enforced than others but there's also quite a bit of water sharing at times. So I think other parties would be best to answer that and it might be a case-by-case. My experience with deemed permits is – and issues about that date back 20 years when I've seen real angst over who has water, but I couldn't tell you the situation today. I'd...

15

Q. For any catchment?

A. No, I mean it's not something I deal with, how the irrigators decide to manage the takes among themselves.

20

Q. The who?

A. I don't deal with how the irrigators manage the –

Q. Ah, okay. Okay.

A. – that allocation issue amongst themselves.

25

Q. Oh really? And so is it accounted for in any model that you've ever seen?

A. No. Things like the GoldSim doesn't, 'cos it treats things as blocks, and it depends very much on how you construct your model. If you could go to the really detailed level you could say yes, take point A here on the stream has priority, so we have to get... Just as Ms Williams has suggested, we have to get water to that one, regardless of what's upstream but downstream we might get none. But you have to have a really complex model to put priority into it, and every take point modelled with its priority assigned, which we can't do for various reasons.

30

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. Dr Allibone, I understand that in the Manuherikia catchment, one of the consents, the current deemed permits which certainly does have a higher priority is the Manuherikia Irrigation Company race, which is, as you've described, at least part-way down the catchment, if not towards the lower end of the catchment, and I understand it's below the minimum flow?

A. Yes, it's below the minimum flow site, yes.

Q. So there is a potential for an impact there, isn't there?

A. Yes. My understanding is, and again subject to parties confirming, this is, that the four main takes on the Manuherikia ration evenly, and we'll have to check that with the irrigators. So if this water storage in Falls Dam drops, and so they have to go to 75% take, all four of the big users take a 25% cut. So as I understand it, Manuherikia in that scenario are not operating a priority and saying: "We'll keep 100%, the rest of you guys can take the cut." They're not doing that as I understand things, but that would be best put to Manuherikia Irrigation Company.

Q. So you would agree then that it would be important for the Council to continue control over the rules or operational procedures of relevant water allocation committees that exist for the catchment?

A. I don't deal with that and I don't know how much control the Council has on the water allocation committees.

1615

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. So as with Mr Henderson, I'd like you to have Forrest and Bird's – my client's evidence Fish & Game, I'm not looking for a new job – in front of you please and go to Mr Farrell's evidence again thanks.

A. Well, I'm not sure I have his evidence. I've got Mr Trotter's, Dr Haze's and Mr Cole's.

Q. Oh it'll be in the – is that the same folder? So if you go to past page 31 of his evidence and then there's the appendix.

A. Yes.

Q. And then flick over a couple of pages till you get to policy 10(a)(2)(3).

A. Yes.

- Q. So just to help you understand why I'm asking you these questions, this is the policy that's intended to provide direction about when non-complying consents might be appropriate so consents that are for longer than six years or for more water than currently used, in a nutshell. And one of the issues that some submitters have is that the policy could be much clearer in its direction about the acceptable thresholds of effects. What is said is notified is that under paragraph A is that activity might be appropriate if it has no more than minor adverse effects on the ecology of the waterbody. So it's no more than minor phrase that I'm interested in discussing with you. As you've explained in your evidence, habitat modelling in Otago, you need more time or your recommendation is more time is needed for the relevant habitat models until they're fit for purpose. Is that a fair summary?
- 5
- 10
- A. Some places, yes. Some places we're good, some places, we're yeah. The models exist they just need to be updated in terms of the habitat preferences used, some places there's no models so you have nothing and some places like the original Lindis model, the model is just uninterpretable and you can throw it out and start again so the Lindis I hope is a one off aberration in that sense but so there's a series of issues, some we can step straight to, some we can't.
- 15
- 20
- Q. And you've agreed with Dr Haze you're both reasonably on the same page in that regard in terms of work being required to update the models so that they provide a more reliable outcome, answer.
- A. Especially for the older models. I mean, when you look at what I did personally back in 2008, 2007 for the Council, we were just modelling fish habitat. These days we do invertebrate and algal species so you look at the whole food web as well as the fish so there are old models that are still valid models but haven't modelled all of the things we would today, they're really easy to update. Then there is a place with no models and there are places with models that just – they don't fit best practice so you'd want to do them again.
- 25
- 30
- Q. So if we had a policy directive that required no more than minor adverse effects for this interim plan change, if that was assessed on a case by

case basis, there's no guarantee these models that are fit for purpose to make that assessment, is there?

A. No one of the things is that we tend to do the models for the big rivers, we don't do it for every little stream, it would be just impossible, we would
5 do it for something that runs you know, 50 litres a second, there's a mean flow, never mind a MALF is 10 or something. So, we use modelling for the big rivers and the important places. For the small streams and little flows, you're just going to come up with some much simpler method and that's what the 2008 Beca report was suggesting as well.

10 Q. The what sorry?

A. The 2008 Beca report that Dr Haze refers to the draft minimum flow guidelines or whatever it's called.

Q. The draft – well let's get it right for the record. The draft national environmental standard for ecological flows.

15 A. Thank you. For very small streams and small takes, you don't go to much effort, for big rivers and high value areas you go to a lot of effort to get it right so it's a moving sort of target this one in terms of what's – what you do for what places.

1620

20 Q. Yes. So let's jump into Dr Haze's evidence then. So this is Dr Haze, this is another expert for Fish & Game and I'd like you to go to paragraph 46 of his evidence.

WITNESS REFERRED TO DR HAZE'S EVIDENCE, PARAGRAPH 46

25 Q. So again, just a bit of back story. Instead of using a test of "no more than minor effects on ecological values", for the purpose of this plan change, what Fish & Game are proposing is a proxy for that "no more than minor ecological effect" and instead just using the degree of hydrological alteration with reference to MALF. And this is – as you'll see in paragraph 46, Dr Haze has taken this in part from the recommendations
30 in that draft National Environment Standard on Ecological Flows. And for example at paragraph 47, it proposes as a trigger that for rivers that have a mean flow of less than five cumecs, the trigger be a minimum flow of less than 90% of seven day MALF and an allocation of more than 20% of

MALF would trigger that “no more than minor” threshold. Would you agree with that as a trigger for a “no more than minor” threshold?

A. So below that threshold you think we would undertake work to assess things?

5 Q. Well the context it’s proposing is to set a quantifiable objective threshold in the policy, rather than “no more than minor”.

A. Certainly I think 90% of MALF and above would be – conservative’s not the right word but pretty safe in terms of if you’re fluctuating, reducing the flow that amount, yes you’re not going to have a significant change. Once
10 you go below that you may not have a significant change, but – yeah, you could use that as a cut-off and be reasonably comfortable that things would be, yeah, good.

Q. Dr Haze’s words in 47 are that: “Those restrictions would,” “If you breached those, would potentially have more than minor effects on life
15 supporting capacity, ecosystem health, mahika kai and fisheries amenity values.

A. Yes. I think it stretches it a little bit, in that the “potential” is the key word there. And 89%, how much different is it from 90? We couldn’t measure. If you go to 50% you’d probably – you would notice it, for some species.
20 If I took the Manuherikia as an example, where we’ve modelled the trout habitat in the lower river, the mouth is estimated to be around 3.9. Now you can drop the river to around two cumecs, that’s nearly 50%, and that habitat proportion for them hasn’t changed. It’s changed the food available to them, possibly, by both the drift rate and the amount of habitat
25 for them but the habitat for the trout hasn’t changed. So, it depends very much on how the individual habitat preferences respond, or habitat use changes with the flow and the shape of the river, but 90% is fairly safe. Where it becomes problematic below that varies with species and river type. So, I’d be happy with 90% as a cut-off.

30 Q. So just to be clear, the 90% is for rivers with a mean flow less than five cumecs?

A. Yes.

Q. And then the next paragraph down: “For rivers with a mean flow greater than five cumecs, the recommendation is minimum flow trigger of 80% of MALF and allocation of 30% of MALF as the trigger.” “The threshold.”

5 A. On the littlest comfortable, not because I don’t want to be correct, because I’m just not experienced working with the bigger rivers. You know, we spend a lot of time in wadable streams rather than things the size of the Clutha and that. So I’d reserve judgement on that one if I could, please.

1625

10 Q. And my last set of questions is just in relation to just picking up a comment of yours in your summary at paragraph 10 and it makes, this is in relation to how manage species interaction between salmonids and galaxiids and your paragraph 10 in your summary agrees and confirms that PC7 will not establish residual flow and remove the drying reaches that are

15 currently excluding salmonids from some galaxiid populations. You do agree though that there are other, there’s other work in play between the relevant statutory agencies to address species interaction that’s ongoing?

A. I’m not privy to the conversations between the Department and Fish & Game.

20 Q. Okay well that’s fine, that clears that up. You do agree that leaving a river to run dry is not the only way you can continue to exclude salmonids from galaxiid populations, you can have imposition of artificially constructed fish barrier, can’t you?

A. Yeah they’re not as easy to put in as you’d like sometimes, I mean you’d

25 need some fall, a good barrier either needs a, well a natural one you’ll find will have to be about three metres high, now if you’ve got a stream of low gradient, getting a three metre high barrier into it and if it doesn’t have the bank slope either you end up creating a very large reservoir which is not what you want so it’s technically challenging and yeah, there are some

30 spots where it’s, areas you might like to put in a barrier in, a physical barrier but it’s not feasible because of the river morphology. In say a highly mobile braided riverbed, you’re not going to try it at all, so it’s just horses for courses.

Q. If the, leaving the river in a case where it continues to run dry from time to time, that could also have an adverse effect on the non-migratory galaxiids in terms of food production, invertebrate food production, compared to restoring flows?

5 A. Well that's an interesting one. There's only one study done on galaxiid sort of food consumption, Dr Alex Yurin, one of the guys sort of supervised for my PhD work years ago did work in Sutton and Stoney Stream on the Rock and Pillars and his conclusion from the galaxiid work after three years was they consume about 30% of the invertebrate production in the stream. The other 70% just accumulates and hatches as insects and flies off to be eaten by spiders or whatever so they utilise, in his experiment the only one that's been done or study, relatively small amount of the invertebrate production so if you halved it you may not impact on them at all because they're not tied strongly to that invertebrate production in terms of maintaining their population abundance and health. Conversely trout on the other hand they used 100% plus of the production. So, you would impact on trout as you reduce the invertebrate diversity because they (inaudible 16:28:31) galaxiids, maybe not. It depends on the scale of that reduction.

20 Q. But if you were managing a river for its overall health, if there's been a vision set in terms of Te Mana o te Wai, it's preferable to restore meaning flows isn't it rather than leave them de-watered?

A. Yes unless they're natural drying reaches, yes.

CROSS-EXAMINATION: MR ANDERSON – NIL

25 **CROSS-EXAMINATION: MS IRVING**

Q. Good afternoon Mr Allibone. I would just like to start with a point made in your summary document, in particular paragraph 6 where you discuss the habitat lots in relation to mudfish and just wanting to clarify what we're talking about there. Does that relate to the image at page 17 of your evidence-in-chief?

30

A. Did you say page 17 or...?

Q. Yes, page 17 I think it's figure number 4.

- A. Okay, partly, it just means the wetlands on that south bank of the Waitaki are vulnerable to willow encroachment and issues like that. They're not vulnerable to water retraction although I did find out late last week that there's a management plan in place being operated by environment Canterbury for the area and yeah looking to manage habitat issues for the populations there so I suspect they're reasonably well looked after.
- 5
- Q. And do you know if any of the permits in that area are deemed permits or permits subject to plan change 7?
- A. No.
- 10
- Q. I'd like to talk about, I suppose one of the key themes in your evidence around gaps in knowledge in relation to fish. I think at paragraph 81 of your evidence-in-chief you talk about establishing research programmes taking sort of two to three years in your experience, is that correct?
- A. Yes.
- 15
- Q. And is it true that those research programmes can be affected by weather conditions from season to season?
- A. When I'm talking about spawning and timing and bits and pieces, no. If you were talking habitat modelling stuff and low flow, yes, yes. That gets problematic.
- 20
- Q. Is that one of the challenges you faced in say the Cardrona catchment or the upper Manuherikia recently?
- A. The – yes, certainly the flow modelling issues have been difficult to deal with because we've had flood events yeah.
- Q. And so that type of issue would tend to extend the period of time required to gather the information you need?
- 25
- A. It can do, or you just decide if it's important that after flood event, you go back and you have another go. Rather than waiting for another year, if you had a flood in January, you go back in February and start again, rather than abandon it until December the next year. So it's a bit of a choices in how much money you – or what you think the weather's going to do, but – yeah.
- 30
- Q. Presuming the flows behave themselves and you can get the type of characteristics you need to do your assessment?
- A. I think for the most part, if you have to do it, you will get it done.

Q. Right. Can you recall when the regional council have said they'll be notifying the land and water plan?

A. I believe it's 2023.

5 Q. December 2023? So would you expect all of the research programmes take two to three years to be completed for notification of that plan?

A. Yes, I expect that's what we're going to have to do.

10 Q. You also talk about a range of data sources that you've utilised for assessing ecological values. Fisheries database, the Otago Regional Council state of the environment monitoring to the extent that it covers the areas you need?

A. I think I mentioned so where it doesn't cover the areas and the database has covers a lot but it has issues with historic versus current data.

Q. So the state of the environment monitoring is of zero assistance to you?

15 A. Not zero but when you have eight sites for the whole of the province, it's only going to assist in local areas.

Q. It's part of the equation?

A. Yeah, but it's not a big part.

Q. And the survey work undertaken by applicants for resource consents?

A. That's all part of what you can pull into the picture.

20 Q. And your own eDNA data that you're producing?

1635

25 A. That is a – it's a science project you could say at the moment that is being developed and it will, you know, what we're doing at the moment is developing the genetic markers so when you take a water sample you have appropriate marker to detect what's up stream. So it's ongoing and I do it as a voluntary contribution to it as I cruise around, NFV I believe and other parties are working on sort of a more funded approach.

30 Q. So there's I suppose a rang of data that we have at the moment that we will pull together and you say that there's more research that you will do in the coming years that will feed into the consent process and to the plan change process?

A. I would hope so yes.

Q. And in essence those sources of data will be the same?

A. So by the same you mean?

Q. The same data will be used to inform the land and water plan as well as renewals of consents?

A. I would assume so, yes, it wouldn't –

THE COURT: JUDGE BORTHWICK

5 What do you mean “the same data”? Sorry, I'm a bit confused.

MS IRVING:

Well the same sources of data, your Honour. The fisheries data bases, fish survey work that's done by the Council or applicants on consent.

THE COURT: JUDGE BORTHWICK

10 So it's a proposition that there's going to be no additional research?

MS IRVING:

Correct.

THE COURT: JUDGE BORTHWICK

15 Q. Is that correct, there is going to be no additional research from here to, I don't know –

A. No.

Q. – 2025 or –

A. I believe the Council has a plan to undertake more work.

Q. You understand that they have a plan?

20 A. Yes and Dr Evered Hinks will address that.

Q. Okay.

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. But my point is that that information will be used both in relation to the plan and in relation to resource consents.

25 A. I expect so.

Q. I'd like to talk about flow management and at paragraph 95 of your evidence-in-chief, have you got that paragraph?

A. Yep.

- Q. So in that you talk about the range of tools that the Council uses to manage water use. Can you tell me what of those tools are being utilised in Plan Change 7?
- 5 A. Of the top of my head, I think the instantaneous rates of takes, the monthly and yearly allocations.
- Q. And no minimum flows?
- A. That would depend on the consent conditions, if for new –
- Q. For replacement of deemed permits.
- 10 A. Yeah I'm not quite sure I can answer that honestly, I haven't, I've read the plan change but I'd want to go back to it further and get it correct.
- Q. Okay. In your experience in resource consent renewals that you've been involved with, is it routine for those to be granted subject to minimum flows where they exist?
- A. Yes.
- 15 Q. Is it routine for consents to be granted subject to residual flows where they are necessary?
- A. Yes.
- Q. Is it routine for consents to be granted with instantaneous take limits?
- A. Yes.
- 20 Q. Annual volumes?
- A. Yes.
- Q. Monthly volumes?
- A. I don't do anything for setting them but I recall them going onto consents at times, yes.
- 25 Q. So for the most part all of the tools that you list in your paragraph?
- A. Are used when they can be, yes.
- Q. Now I'd like to talk briefly about galaxiids, I'm going to call them non-migratory galaxiids. I understand in answer to question from my colleague Ms Williams, that you consider the Clutha flathead and the
- 30 Central Otago roundhead to be the key species that are likely to be affected by consents renewed under Plan Change 7?
- A. Yes.

Q. And in light of your understanding about their existing distribution, the habitat that they occupy, would you consider their habitat to be critical habitat?

1640

5 A. Given they're nationally threatened species, yes, all that habitat would be critical.

Q. And in your view we should protect that critical habitat?

A. Yes.

10 Q. I understand from your evidence that you view salmonids to be the most significant threat to those non-migratory species?

A. To all of them, yes.

Q. Would you agree that habitat such as Thomsons Creek in the Manuherikia is the type of habitat that we need to be protecting?

15 A. Yes, in light of a quick discussion with Mr Hickey earlier today and particularly in some survey work we did in February, it has some very good populations of Central Otago roundheads, according to what's been told to me.

Q. Are you familiar with Laheys Creek?

A. Yes.

20 **THE COURT: JUDGE BORTHWICK**

Which creek, sorry?

MS IRVING:

Laheys Creek.

THE COURT: JUDGE BORTHWICK

25 Where's that?

WITNESS:

It's spelled L-A-H-E-Y-S. It's a tributary of Chatto Creek in the Manuherikia.

MS IRVING ADDRESSES THE COURT – DISCUSSED IN REBUTTAL EVIDENCE (16:41:08)

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. And Laheys Creek as I recall has roundhead galaxiids in it?

A. Central Otago roundheads, yes.

5 Q. And their habitat is being protected, I suppose, at the moment by the absence of a residual flow, to continue to exclude salmonids?

10 A. Yeah. For the benefit of the Court, Laheys Creek is one that I've worked with the applicant on for a number of years. They have a take near the base of the Dunstan Range, which takes, during low flow periods, 100% of the flow, or almost; there's a bit of leakage. So downstream of the take, 500 metres downstream from the take, the stream is dry and it probably remains dry for I think about six kilometres. At the six kilometre mark we have some springs; some of them are possibly fed by leakage from the irrigation schemes, some just natural resurfacing of groundwater. And at the springs and downstream for – I've got to get a downstream limit but I suspect about 500 metres, maybe a little bit further, there's a population of Central Otago roundheads. And then we get into a slightly larger stream, it has a confluence with another tributary and we start to pick up brown trout in reasonable numbers and the galaxiids disappear. So there's a small population in a short section of spring fed stream and along that 500 metres there's the spring at the top and then there's a lot of groundwater inflows. And I believe Landpro gauged it at one stage at the confluence point, it's about 30 litres a second so it rises from zero to, in 500 metres, about 30 litres in summer. And yeah, sitting in there is a little population of roundheads that – yeah, there are trout upstream and downstream of them. They're upstream in Laheys Creek above the water take. The drying reach obviously has nothing and then we have trout downstream of them again in Chatto Creek itself. So they're sandwiched, so we call them "sandwich populations", stuck between trout upstream and downstream. That gives you an insight into it, I hope.

25
30 Q. From your recollection – so the drying reach is believed to be induced by irrigation?

A. Believed to be. I question that a little bit in my own head because we've never done any gauging down the stream during normal flow periods and we see a lot of the tributaries coming off the Dunstan Range there, they

run across alluvial fans. So there'll be some losses to groundwater and that's the point where the spring is groundwater sourced, whether it's all irrigation and leakage from the race or whether it's some natural. Whether that groundwater – losses to groundwater across the alluvial fan is sufficient to dry it, whether it occurs, it hasn't been investigated. So there's some doubt on just how natural or unnatural the losses are across there.

5

Q. I digress slightly but there's a galaxiid management plan imposed as a condition of the resource consent for that creek, isn't there?

10

A. Yes.

Q. Staying with Laheys for a moment, I think Ms Baker-Galloway referred you to the evidence of Dr Haze and the idea of setting a threshold for minimum flows and allocation limits in waterways. Based on – and I think Ms Baker-Galloway said the minimum flow is between 80 to 90% of naturalised MALF –

15

A. Yeah.

Q. – depending on the size of the waterway and an allocation block of 20 to 30% of MALF, naturalised MALF. That's your understanding?

A. Yeah.

20

Q. Setting those default limits, would they have the risk of enabling salmonids' passage into currently isolated galaxiid habitats, in your view?

1645

A. Yeah it's one of the issues and it's the most problematic balancing issue we have here. To restore flows in some areas or to – yeah to what's been suggested there you end up putting the galaxiids at more risk and it's why again I classify the salmonids as more of a problem than the trout, you can play with the irrigation abstraction and reduce its impacts quite easily but in doing so you can let trout go into places that you don't want them be in and it adds this level of complexity to all of the, the water management decisions and again, why Central Otago roundhead is the most threatened, it sits on the valley floor in amongst the abstraction points and the trout and if you play with one, if you play with the irrigation abstraction without the predatory fish issue, you get outcomes you might not want in terms of protecting the fish. So that's again if you got rid of

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the trout you could deal with the irrigation any way you like because there wouldn't be a constraint but at the moment the interactions between irrigation and salmonids constrain how you can manage the water takes and sometimes you definitely don't want to yeah, put a residual flow in or a connecting flow of some of these population.

5

Q. In your view would enabling trout into the habitat of galaxiids be an adverse effect that was more than minor?

A. Yeah, yes.

10

Q. And would it be in direct contravention to policies in NPS around protecting the habitat of indigenous fish?

A. Yeah I can be pedantic and say no because you're protecting the habitat you're just not protecting the fish and that's one thing with the NPS when it says habitat all the time you can protect the habitat but can ruin the fish population. Letting trout in will be detrimental to the fish, it won't necessarily be detrimental to the habitat.

15

Q. Be a bit self-defeating to kill all of the fish but leave them with some habitat.

A. Yes exactly and that's, it's what the NPS says unfortunately.

Q. I'm sure Ms Williams will have something to say about that.

20

A. Well it does also say we have to take into account threatened species so I think that would give us some cover there.

Q. Lastly I'd like to talk to you about habitat modelling. I just want to clarify before I ask you a few questions, you refer to habitat models in paragraph 32 of your evidence-in-chief, I think it's where you say there's 15 or so that you have produced?

25

A. Yes that's correct, I recall doing a few, yes.

Q. Actually it might be in your reply, sorry Mr Allibone. It's in your rebuttal evidence paragraph 32 and then you discuss them again in paragraph 50.

A. Sorry which was the first one?

30

Q. Paragraph 32.

A. Thank you, yes.

Q. So are those habitat models essentially the same, the ones you talk about constructing in paragraph 32 and then the ones that you discuss in paragraph 50 as requiring some updating?

A. Yes and no. I've done 15 as a Golder Associates contractor to the Council in, I think 2007, 2008. NIWA did a whole lot previously in sort of 2003 to 2005, and all of them need updating because none of them invertebrates and algal's taxa, and the older NIWA ones we're also not
5 sure if we can get the raw data to re-run the models. It seems a third party might have it but NIWA don't always have it. So yeah, there's a mix of ones I've done and ones that NIWA have done.

Q. Right, so where they require updating additional of – additional curves, updating of the curves, how long does that take?

10 A. I can do, if they have at preference curves of the area we can do it in five minutes, the model run.

1650

Q. You also discuss in your evidence the challenges with the habitat model in the Lindis case. Can you explain to me what the issue was there?

15 A. The issues were multiple. For a start, the model was built in two places on the river. One a reach up near the upstream monitoring site, I can't recall the name, but anyway, on a stable flow section of the river. The other eight cross sections were built down on the losing reach by the Lindis crossing so they were split by several kilometres of river and some
20 losing and gaining reaches. So when you look at the flow of the seven cross sections at the top, it'd be quite different to what it is down the bottom and yet all of the cross sections put together in the single model that said, say, for trout habitat, 700 litres a second is what we want. But it didn't say where 700 litres a second is in the river because – was it in
25 the drying reach down the bottom or the stable flow reach up the top? And how the other thing with it, when they went and did the calibration, you do a set of cross sections, you go back twice to calibrate the model on different flows. When they went to the drying reach to do the last calibration, it was dry and I have no idea how they modelled zero flow
30 because you don't know which – essentially, how that flow compared to upstream. When it went dry, it might've been a 400 litres upstream or a 200 litres upstream so how they marry –

Q. Litres of – sorry, metres upstream?

A. Sorry. There were seven cross sections about... Lindis crossing, I think it is which is well upstream of – no not Lindis crossing, it can't be. Near the... I'm just trying to remember the name of it. The upper flow recorder anyway, there's two flow recorders on –

5 Q. Lindis Peaks?

A. Lindis Peaks, thank you. And then there were eight down at Lindis crossing which is where the state highway crosses the lower Lindis and that is a drying reach, so it loses flow as you go through the reach. So that for a start violates one of the assumptions of the (inaudible 16:52:08) HaNPSON model. You're supposed to have the same flow at all cross sections. Putting across a drying reach meant that every reach downstream had a slightly lower flow than the previous one so that's a small violation you can account for but how you married up those eight lower cross sections with the seven upstream ones which are very different flow environment to come up with a single flow recommendation for a particular species was I think it would be called mind boggling to all of the experts as a commissioner I asked every expert how to interpret that model and they all said we have no idea and the other issue with it was that while we had a flow sort of flow habitat relationship that none of us understood, that wasn't related to the minimum flow point so because of that when you say oh the model says 700 litres a second is good for instance, you don't know whether that's 500 litres or 200 litres or a cumec at the minimum flow point to get that, there's no relation between that and a decision was about making a minimum flow amongst other things so you have a model that's totally unrelated to the minimum flow site. It's just unworkable. You cannot use it for a decision. And the fact that none of the experts at the hearing built the model or could explain it meant we had no one who could even interpret it. It was a very, very bizarre model that we've never seen anywhere else done like that and quite a few won't again.

30 Q. So as a matter of interest, is this a hearing you sat on as an independent commissioner –

A. Yes.

Q. – or was this the hearing in front of Commissioner Edmonds?

A. I was an independent commissioner for the Lindis plan change, the original –

Q. And do we know whether or not that change when it got to court or not?

A. – yeah. I believe they did a completely new model.

5 THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So what's the purpose of – you're going somewhere. And you're going to lose us unless you signal, start to now signal what your case is to put it bluntly. Where are you going with this?

10 A. Yes, well what I'd like to talk to Mr Allibone about is the need for the habitat modelling to be related to the flow conditions of the waterbody. In particular, we need to understand not just the minimum flow but also where water is being abstracted from the waterbody so that we can understand the relationship between the habitat.

Q. Because the theory of your case will be what?

15 A. Broadly?

Q. Broadly. Yes, broadly what is the theory of the case that in fact you can't have six year consents because?

A. Our theory of the case is in essence that plan change 7 is going to defer achieving environmental gains that can be achieved now.

20 Q. Well, I know that broadly, that's hyper-broadly. What's your theory of your case because you're running a case now in terms of minimum flows and takes, I think, is where you're going.

1655

25 A. Yes, and I think – as we talked about, as Mr Allibone agreed, Plan Change 7 doesn't seek to impose minimum flows.

Q. Mhm.

A. And it won't impose residual flows unless those conditions were already part of the deemed permit or resource consent that are being renewed.

30 Q. It will carry over minimum flows though, won't it? If already on a consent it will carry over, but it won't introduce any new minimum flows.

A. Correct.

Q. Some parties want it and that's a different issue, yes.

A. Yes.

Q. So where are you going?

A. And in deemed permits, predominantly there are no minimum flows and that's the majority of the consents that this land change will apply to.

5 Q. That's interesting. It's actually a matter for evidence, which – some of the background information that we're struggling with. I don't think we've got an impression, at all from this evidence, as to what consents are out there with minimum flows. So, good that you flag it because we're wondering what is the state of the environment. But anyway, where are you going? I really want to understand what your theory is because I don't follow the line of questioning or its relevance. If I don't follow it now, I won't follow it later.

10 A. Yes. So Mr Allibone talks about habitat modelling and whether or not it is a useful tool for assessing effects. And we say that it is but that it also requires a degree of detail about the flow regime that you are assessing, and that that requires not only minimum flows and residual flows but an understanding of the abstraction regime that will be affecting the water body and therefore the habitat availability within it.

15 Q. Just slow down a second. So, habitat flow – habitat modelling is relevant and important?

20 A. Yes.

Q. But it has to be related or related back to an abstraction regime, by which you mean under resource consent, presumably.

A. Yes.

Q. And a whole of catchment or subcatchment minimum flow, correct?

25 A. Yes.

Q. And residuals?

A. And I think one of the challenges that Mr Allibone encountered, perhaps, with habitat modelling during the plan change hearing was the lack of a detailed abstraction regime that allowed the habitat model to be related to flow conditions at the various points along the river.

30 Q. So your proposition will be that if there is no flow regime linked to an abstraction regime, so, minimum flow is attached to resource consents, therefore no meaningful link can be made to habitat. Is that your proposition? Is that where we're going? So therefore (inaudible

16:58:15) Plan Change 7 (inaudible 16:58:17) for all of our obstructors to pursue on a resource consent, minimum flow regimes?

A. Yes.

Q. Yes, I thought so. Okay, so that's the proposition?

5 A. Yes.

Q. Really, that's underlying your whole case, isn't it?

A. Yes.

Q. All right. Thank you.

MR ALLIBONE:

10 Your Honour, may I just add a bit to the question I answered before?

THE COURT: JUDGE BORTHWICK

Q. I've forgotten what it was.

A. Just with respect to Laheys Creek, just quickly. Ms Williams and Ms Baker-Galloway sort of talked a little bit about changing flows, and particularly the change with the priorities but also – and I mentioned in high flow years you don't get the drying reaches. One of the things I haven't done for Laheys Creek, because it's where I do some work, is have a look at it in a drying – in a wet year. We've looked at it in a dry year when we did the work; in a wet year, I don't know the state of that drying reach, whether it's still occurring or whether it's actually flowing through a summer in a wet year. So we have a sort of biased assessment in a slight sense, there.

15

20

Q. Okay.

A. Thank you.

25 **CROSS-EXAMINATION CONTINUES: MS IRVING**

Q. So we'll come back to habitat models and the discussion I was having with you about the utility of understanding the flow regime when you are completing your habitat modelling.

A. Well I think for a basic habitat model you just need to make the model. Then you – as long as you can relate it to a minimum flow site or an abstraction in terms of if you have a flow relationship between the two,

30

and/or the model applies to that reach, that's a key part, then you can just read off the model what you get, you know, in terms of habitat for different flows. So...

1700

- 5 Q. So, you need to understand either the level of abstraction that's affecting the reach you're assessing or the minimum flow that applies to that catchment?
- A. Both, ideally.

RE-EXAMINATION: MR MAW

- 10 Q. Now just picking up on that last series of questions and the articulation of the case theory which may or may not have morphed into a question but I just want to understand your opinion on whether it is required in order to understand effects on ecology for there to be a consent application produced and I've put my question to you this way, can you use the model
- 15 that's generated and run a series of scenarios through that model to understand the effects on, for example habitat quantity through the model that's constructed?
- A. Yes, I mean it's just a model of how habitat changes with the flow. You can look at it under – as the river changes flow just naturally through the
- 20 year. This is the habitat it (inaudible 17:02:05). It doesn't need an abstraction or anything. The model is a model, it's the question you ask it is the important bit I guess of what you want out of it.
- Q. So you don't need a resource consent application in order to understand different flow scenarios?
- 25 A. No.
- Q. The other matter on which I wish to ask you about relates to paragraph 97 of your evidence-in-chief and there you had a list of the tools that were available and in terms of impositions been put on consents under the current regime. Now in your experience when conditions are being
- 30 framed you with respect to those matters, are they taking into account values that have been set through the NPSFM 2020 process?
- A. Not to date because we haven't had the NPS 2020.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

- Q. Just two clarifying questions from me, I asked you a question about water quality and surrounding land use and I thought you said, and I may have picked it up wrong that: “Water quality does not impact on habitat,” but at your paragraph 43 of your evidence-in-chief you seem to say the contrary and I was just really wondering where you were landing with that?
- 5
- A. I refers to the fish and you will with water quality get issues like with nitrate toxicity if it is high enough so the habitat becomes un-occupiable when the water quality conditions are detrimental.
- 10 Q. But you could also get other impacts couldn't you in terms of a change in the micro-invertebrates available for fish for feeding if water quality is impacting –
- A. Yes.
- Q. – them then there's not food for the fish, there's not food for the fish then the quantity of the fish drops away and all those.
- 15
- A. Yes.
- Q. In fact, isn't there host of associated – there's a range of changes in water quality which may, by themselves or together, impact habitat conditions which –
- 20 A. Yes –
- Q. – in species habitat need to –
- 1705
- A. – probably not the habitat conditions but the – I probably got that slightly wrong there but just the water quality will impact on the flora and fauna of the stream and as the water quality changes you will get a response from that call it community which may be a reduction or in some cases an increase, depending on how they deal with the water quality change. Like extra nutrients, you'll probably get more algal biomass and microfibrers. Whereas in fact the opposite happens with didymo; when you get very low phosphorous tends to bloom so the water quality issue will drive changes to the community as they respond and it may be toxicity or it may be a just a growth rate change or abundance.
- 25
- 30 Q. So how are you using the word “habitat”? What do you mean by habitat?

- 5 A. Well, that's probably in that section 43 with the water quality, it probably should just say a reduction and abundance when you're referring to the fish it's possible through the water quality changes but what we don't know is how the galaxiids in particular respond. There's not a lot of environmental tolerance information for them.
- Q. No.
- 10 A. And as I said before, they're not necessarily food limited so you can see some changes in the invertebrates that may have no impact on them if they're not you know, food limited. So it's hard to quantify what the response would be to changes in water quality. Dr Dunn and I tried a bit of work in the upper Manherekia looking at temperature tolerances because we thought there was a limitation on the alpine galaxiid up there. It turned out that the threshold we thought was above their tolerance about 14 degrees, was exceeded in much of the river through the summer and they were still there so that's where our understanding is even
- 15 one aspect of the sort of water quality tolerances is not wonderful (inaudible 17:06:48) one fish, so it's flagged as an issue. And as you say, it stems up through the whole community and we'd probably have better ideas that invertebrates, especially like mayflies and caddisflies, respond
- 20 to water quality decline is that the water quality goes down, their abundance does which has impacts on the food web.
- Q. Habitat you – are you defining habitat quite narrowly in terms of the space these things occupy?
- A. Yes.
- 25 Q. You are? As opposed to the conditions of that space?
- A. Yep.
- Q. That's actually important to know, isn't it?
- A. Yeah, just reading that again and I wouldn't put loss of habitat due to water quality, I would just put impacts –
- 30 Q. If you are defining habitat as the physical space, if you are defining habitat as the condition of that space which is required for abundance if I put it that way, it's quite a different set of considerations come into play.
- A. If you consider the water they live in as part of the habitat, then it is an impact on the habitat.

Q. Yes.

A. The change in the water quality. If you consider the habitat, the physical habitat in terms of the volume of water and the flow in the substrate of the stream, those sort of things, shape of the stream, then that's physical habitat and you could say that habitat in general includes water and the quality of that water. Yeah.

5

Q. Because even if you're talking about the physical habitat, so here change in flow –

A. Yes.

10

Q. – for example resulting in increasing water temperature, resulting in the change of conditions which may or may not be suited for that particular species, I would call that a habitat change, but I don't think you are. I think you're just talking – yes. You've got quite a narrow concept – in your evidence, I'm not talking about personally but in the evidence, the concept of habitat is actually quite a constrained one in terms of physical habitat.

15

A. For the most part, yes. That would be correct, yes.

Q. Okay. So one other thing that I want to just double-check with you. This just comes from your summary of evidence which you tabled this morning, paragraph 22. Now this probably is in your evidence but it's quite a neat little paragraph where you're summing up allocation limits and minimum flows being used together.

20

A. (no audible answer 17:09:18).

Q. And why they're used together.

25

A. (no audible answer 17:09:23).

Q. Yes.

A. Yes.

30

Q. If you have a minimum flow but without an allocation limit, so here it will be a significant question of clarification for the planners but if you've got a minimum flow but without an allocation limit, is what you're risking, particularly during the drier periods during the year, that abstractors will bring the river down to a flat line quicker and hold it longer. Is that the potential that you have, where minimum flows are imposed without an allocation limit also?

A. I'm trying to think of a place – how you wouldn't have an allocation limit. Because normally we – there's some sort of allocation limit.

Q. Well, PC7, some of the relief seems to suggest that to me.

A. Okay.

5 Q. Put everyone on a minimum flow.

A. Yeah.

Q. But what about the allocation limit, right? So I'm not quite sure where the planners are going with this.

10 A. So if – yeah, if we just take it that there's no allocation limit and people have just been allocated a – or given an instantaneous rate of take –

Q. Yes.

15 A. – then they can turn on their abstractions and draw the river down, all of them operating together, till they get to the minimum flow. Whether that happens quicker than if there's an allocation limit, I doubt it because of responding to the instantaneous rate of take. It's not the allocation limit unless... Yeah.

Q. Allocation limits you are using, you would say – therefore am I right in thinking you call allocation limits the daily (inaudible 1711:06) annual volume –

20 A. That's allowed to be taken, yes.

Q. – that's the allocation limit? Okay. So if you have the minimum flow together with those volumes, then you shouldn't be bringing the level rapidly down to a level where it has flatlined at the normal flow.

25 A. Yeah. I can't comment on the rate it would come down. My perception was – Dr Haze has a nice diagram of the minimum flow and an allocation limit showing some small (inaudible 17:11:34) exceeding the allocation limit, so you get some extra water in the stream. And that's again when I was supporting his sort of figure there, that an allocation limit can be used to allow some of those fresh events to pass through the system. If you
30 have a big allocation you capture a lot of those freshers, if the infrastructure allows you to. But if – whereas if you've got a small allocation limit you get more freshers through, which is beneficial for the stream because it gets some extra water and a bit of flushing and it's just

cooler, maybe. Whereas a big allocation limit, you take a lot more of those small freshers, so it's...

Q. And again you may not know but where you have minimum flows imposed, are they correlated with proposed volumes on resource consent? So –

5

A. No.

Q. – methods in addition to the method that we see in PC7 or not? Don't know?

A. I don't know. I suspect not.

10 Q. Right, you suspect not? Okay.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

THE COURT ADDRESSES COUNSEL – HOUSEKEEPING

15 **COURT ADJOURNS: 5.12 PM**

COURT RESUMES ON WEDNESDAY 09 MARCH AT 9.41 AM**THE COURT: JUDGE BORTHWICK**

Good morning, anything arising overnight?

MR MAW:

5 Two issues, good morning.

THE COURT: JUDGE BORTHWICK

Two issues, all right.

MR MAW:

10 The first of which is a correction that I'd like to signal to the amended version of
the plan change document that was most recently filed by Mr de Pelesmaeker.
That's the recommended amendments marked in as at 19 February 2021,
incorporating the corrections as at 4 March 2021. If I can take you to page 6 of
that document, the page numbers in the bottom left hand corner and there you'll
15 see rule 10A.3.1A, if you turn over the page to what is page 7 but unfortunately
there is not a page number there but it's the next page, sub paragraph B at the
top of that page (i), the activity meets conditions 1,2,4,6 and 7, there needs to
be inserted (v) into the group of cross-referenced provisions so insert 5 before
6 and Mr de Pelsemaeker will speak to that correction when he's called to give
his evidence later today or tomorrow. The second issue that has arisen
20 overnight, there's been some discussion between counsel as to the utility of
cross-examining Mr Leslie and Mr Wilson in relation to the methodology ahead
of the expert witness conferencing and Mr Reid will address the Court in relation
to that discussion.

THE COURT: JUDGE BORTHWICK

25 Mr Reid?

MR REID:

Yes, may it please the Court. The discussion that have taken place overnight between Mr Maw and Mr Page and myself about just how to approach the technical issues or the –

5 UNIDENTIFIED MALE SPEAKER:

(inaudible 09:43:47) the technical issues underpinning –

MR REID:

– the controlled activity pathway which are in schedule 10,4A. So the issues around the schedule are really highly technical that they revolve around issues
10 such as selections of data sets, time periods, how best to ensure accuracy is maintained of the record and so, any cross-examination of those witnesses at the moment is going to be highly technical and so my suggestion is that we defer cross-examination of those witnesses – hear from them today, but defer cross-examination of them until the expert witness, the joint statement is back
15 following caucusing.

THE COURT: JUDGE BORTHWICK

Okay, that's your suggestion?

MR REID:

And I'll just, the only other thing I add is that my understanding is that good
20 progress is being made already in relation to those issues amongst the experts.
0945

THE COURT: JUDGE BORTHWICK

It's probably a good idea. I think as I reflected yesterday, some people like to
25 talk in numbers and as opposed to words and it wasn't clear to us how you would approach your cross-examination and to be fair it's not actually clear to us as a, that the witnesses are using the same, where they're using words, using the same language in the same way. So for example, understanding what Mr Leslie and Mr Wilson is saying about percentiles is that what Mr McIndoe is saying about percentiles, actually I don't know and that should

not be the case at this point in time, that we don't actually know whether they're talking about the same thing in the same way. We don't know whether they have disclosed all of the data that they are relying on and assumptions around that data, whether they've even tested the assumptions around – tested those
 5 assumptions and what impact those assumptions might have on their preferred methodology. Don't know that any of that's been disclosed.

MR REID:

No, I quite agree your Honour and that's, that's been apparent to counsel looking at it over the last few days particularly so.

10 THE COURT: JUDGE BORTHWICK

Which is to say don't know your witnesses are following the code of conduct for expert witnesses. Now that's pretty serious when you get to this stage, yes?

ME REID:

Yes.

15 THE COURT: JUDGE BORTHWICK TO MR REID

Q. And so any expert conferencing, you are obliged to be providing your clients or your witnesses a copy of that code. The Court will be expecting the evidence to come in in a way which is reflective of that code in terms of setting out what your starting point is as you start to move from data
 20 facts, assumptions, where you're testing certainties, uncertainties and what impact that might actually have on the schedule. And that might, it should be, must be presented in that way as opposed to two sides lobbying for their preferred methodologies. For my part, I wasn't clear to what extend there is even an argument as between the Regional Council
 25 and the primary sector apart from that as of detail and yet, I'm led to believe there are substantive matters. I wasn't sure so that was necessarily the case, I'm not sure whether OWRUG schedule, the OWRUG preferred methodology in the schedule is the same or different to Landpro. Some people think it's the same as Landpro, I'm not sure
 30 whether it's different to Landpro. I can read Landpro and understand

Landpro what they're wanting, I wasn't entirely sure whether you can read Ms Dicey's preferred methodology and understand all of the steps and this is of course a point to make in relation to the Regional Council, seems to me one of the issues here are a lack of transparency. That is, is there

5 a complete record of the methodology, such that parties, whoever they are, when they're applying for resource consents can be certain that they know how the methodology is applied or is the case that all methodology's have a certain element of discretion and judgement and that – which involves a lack of transparency if you like and therefore a lack of

10 predictability, if you like, as to your eventual outcome under the schedule and actually under the competing schedules. So it's a comment about the competing schedules as well. Is it predictable, is it certain, if I was a farmer would I know that through the gateway as it's been called, the schedule, I could predict myself at my farm gate what the outcome would

15 be or would the outcome be different when I send it in to the Regional Council and that's a comment actually about all of the methods, we wonder whether there's quite a high degree of discretion and judgement being applied, whichever preferred method you go for. Is that appropriate for a rule, that it's not predictable? But I don't know, or have we picked it

20 up not quite the right way...

0950

A. Yes.

Q. Is that appropriate for a rule, that it's not predictable?

A. (no audible answer 09:49:58).

25 Q. I don't know, or have we picked it up not quite the right way? What I can say is what I want to know, before we use up our resources, is what are the issues and I think that the issues as between the competing methods.

A. Yes.

30 Q. So we're not going to use already stretched resources for this Court, where you have not turned your minds to what are the issues. Now we know that at least some of the issues are about cleaning up the data –

A. Mmm.

Q. – but is that the only issue?

A. Mmm.

- Q. So really, I am interested to hear from Wilson, Leslie, next but we want to know, and we will be asking them if you don't, what are the issues from their perspective? Where is the ground or the gap as between their schedule and methods preferred by other witnesses, bearing in mind that actually for some parties the answer is "reject the plan change". So it's not actually about picking up any of these methods but these are fall-back positions. So we actually want to know what are the issues. We don't want to be told "topics". I prefer it to be put as questions which the parties themselves have to answer, or witnesses themselves have to answer in an expert conference. Yes. So there is some ground, if not cross-examination but some ground to cover in terms of getting out of these witnesses where are the issues in relation to the methodology, not necessarily proposing a solution but why would they go to expert conferencing? What do you think about that?
- 5
- 10
- 15 A. Well is there ground, your Honour, for counsel working that out in advance in trying to come to an agreement where we can – about the issues that these witnesses – well, a series of questions perhaps for the witnesses and the other experts to consider and (inaudible 09:52:04) –
- Q. Well there's always ground and I have invited parties to this case to consider appointing their own – you know, I have said, you do not need to wait on the Court to initiate expert conferencing or mediation.
- 20
- A. No.
- Q. You can appoint your own resources and crack on and do that. But the key thing about working out the issues is that actually, you have to be informed by your witnesses. So this isn't about what lawyers think the issues are –
- 25
- A. No.
- Q. – it's about what the witnesses are telling you are the differences framed up as questions for the expert conference, so, in other words an agenda.
- 30
- A. Now we've spoken about that in detail in the notice of conference that we issued for this matter.
- A. Yes.
- Q. It's absolutely critical that it is not lawyers doing this, it is experts doing this, who can understand where are the gaps that need to be bridged.

A. Yes.

Q. I still don't have quite an understanding, a proper understanding yet as to the relevance of the Aqualinc method, other than it is a method that is considered. But again, what are the gaps between any of the preferred schedule methods and the Aqualinc method? What's the ground that needs to be travelled there; should it be mentioned in this plan? We don't know whether what is being suggested is that Aqualinc method should replace the schedule altogether; there should be no technical schedule as we have it. So forget Landpro, forget the methods in (inaudible 09:53:41), forget the method in PC7 but it should be Aqualinc. We don't know whether that's what's being suggested. So, as it happens, if you can work up a proper agenda –

A. Yes.

Q. – we do have Mr Ross Dunlop standing by and we could make him available. We've got to talk to him about it first though but we could make him available sooner rather than later.

A. Yes.

Q. We don't have –

THE COURT: COMMISSIONER BUNTING

20 Do you have a timetable?

MR REID:

I haven't discussed that with my friends, no but these are obviously – there's currently a schedule for the caucusing but it's not until April.

THE COURT: JUDGE BORTHWICK

25 Yes that's right, it's not, so – but Mr Dunlop is available now, so – I think.

THE COURT: COMMISSIONER BUNTING

(inaudible 09:54:29).

THE COURT: JUDGE BORTHWICK

Yes and we don't want to discover this stuff and if you can bring it forward, it should be brought forward, yes.

MR REID:

- 5 No, well I quite agree and it's just a matter of trying to assist the Court as best as we can.

THE COURT: JUDGE BORTHWICK TO MR REID

Q. Yes.

- 10 A. So, I mean my witness is Mr Davoren, who – I'm not sure of his availability to come. He's schedule to give evidence in Cromwell.

Q. Yes.

A. But he's planning to attend the caucusing and I'm sure could come earlier.
0955

Q. Sorry, so your witness is Dr Davoren, isn't it?

- 15 A. Yes it is, yes.

Q. And he's giving evidence on this legitimate overtaking topic?

A. Yes well that's largely it's around spikes and data sets and – yes.

- 20 Q. So in terms of what happens next, very interested, we'll be very interested to hear from the Council's next two witnesses as to where they see the broad, where they see the gaps, the differences between themselves and the other parties in the room and so we can have a better orientation into the evidence of all of the parties. We can check through with Mr Dunlop as to his availability going forward, parties are to check through with their witnesses as to their availability over the next – starting now actually,
25 moving forward are they available for expert conferencing. The direction will be that counsel, having been properly informed by their experts are to propose an agenda for an expert conference and we'll look to see how quickly we can bring that on, how does that sound?

A. That sounds excellent from my perspective, your Honour, yes.

- 30 Q. Excellent, thank you.

A. But just on the original issue I was raising which is the cross-examination of these witnesses Leslie and Wilson today, and also flowing on to a

lesser degree, Mr de Pelsemaeker, whether that should be deferred until after.

5 Q. One of the things, I need to talk to the panel but and again signalled yesterday is actually putting everybody on the same page as opposed to multiple witnesses on different pages proving different points with different data sets and different consents, how on earth do you think that's going to help?

10 A. Well, and that's my point your Honour, is that I just can't see cross-examination on these topics being at all helpful at this stage. It needs to be that the issues need to be rationalised.

15 Q. Yes well no, we don't disagree but that would come with a direction as to – well, that will come with a direction as to counsel conferring about how it is that they can illustrate the efficacy of the methods relative to using a common consent or consents, if you need to illustrate different things, and data sets. So, for example if there is a and there appears to be disagreement over which five year period, to illustrate the efficacy of the method over each different five year period which we have been provided for a single consent, so you've got the single consent, data from the single consent and running that data from the single consent through at least
20 three different five periods that are in evidence so that we can see how things are changing if in fact they are changing.

A. Yes.

25 Q. How it is that witnesses are going to be testing the proposition by Mr McIndoe that, well look if you have a drought in five years then that brings your average down and then throws out whatever your results are reliant – resulting in an unreliable take of water. He might very well be true but how has that been responded to or how can it be responded to in conferencing, how do you test those propositions, easy to say and he could well be right but how is it actually being tested.

30 A. All right.

Q. So how so you think you'll go about that, actually getting – that of course is not really a matter for lawyers, it's actually a matter for experts, can you get yourself on the same page to be testing the efficacy of the different models and different approaches.

A. Well I imagine that can be done, it's an issue for the experts amongst themselves I would've thought and like your Honour's comments.

Q. Does anyone have a different view, Mr Maw?

MR MAW:

5 I don't have the answer.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You don't have to have the answer.

A. In terms of the process –

Q. But what's the process?

10 A. I do see some utility in that unfolding and there of course challenges as to availability of data but it strikes me that the experts might usefully agree on a single data set against which they can test the various propositions through the lens of the types of consent applications that have either come in recently and being processed or – in fact that's probably the best
15 dataset. So I'm confident that a dataset could be produced, against which propositions could then be considered and tested. In terms of the utility of proceeding on with the cross-examination today, insofar as the purpose of today is to identify and to tease out where the differences lie between the competing methods, I do think there's real value in that
20 exercise today because that will inform the agenda for the conferencing. And so insofar as the purpose of either questions from the Court or the questions from counsel that assist with that purpose, I do see real utility in that. In terms of Mr de Pelsemaeker and the cross-examination of him, it's not just the method on which he's given evidence.

25 Q. No, it's not.

A. So there's a large portion of his evidence which I think would be able to be tested in terms of where we're at.

Q. Mmm.

A. But insofar as he's relying on the methodology being produced by the
30 witnesses, I think questions to him on that might usefully follow some conferencing. But it does occur to me that it would be helpful to explore with him what his understanding is as to what *the schedule* is delivering.

So is it delivering a clear and certain and an objectively ascertainable outcome each time with the same set of data as put into it? Is that how he's understood the purpose of the schedule? Because again, I think that informs the job of the expert witnesses in terms of what it is they are seeking to produce in terms of that that schedule. So its purpose becomes important in that regard.

5

Q. So, I'm going to respond to that and then I'm going to come back to the question of the dataset, which is what I'm making a note about. One of the things that has occurred to us overnight would be quite useful for the Court to understand, is to understand whether or not your witness Mr Placemaker – how do you say?

10

A. Mr de Pelsemaeker.

Q. Mr de Pelsemaeker, works within the regulatory context of the Regional Council or is he a policy person? That's the first question and your response to that would be regulatory and consents or is he policy?

15

A. Ah, policy.

Q. He's policy and then the second question is this, it's to actually hear from somebody in consents in the regulatory team, whose responsibility it would be to administer this plan change, how they would administer this plan change. Because that's actually a very useful way for the Court to test, on the ground, to ground truth what the methods are, relative to how it would be administered. And of course it gets back to the Court's observation is, there are a certain amount of discretion and judgement being applied when the applications come in, or not. Is it certain on its face? Of course that question of discretion and judgement actually applies to all of the methods that we have seen to date, or are they all predictable? So, we thought it would assist us to hear from somebody who is actually within the consenting regulatory team, possibly the manager but only if the manager actually has planning experience as opposed to managing people, so is a planner as well. To understand how it is that they would administer that particular method; to also understand more broadly the issue of what is the scale of the problem actually facing the Otago Regional Council? We've heard all sorts of numbers around how many resource consents that are going to be applied for, possibly

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either by the end of this month if they are deemed permits or within two years, and we're looking like something over 500 applications for resource consent. What is the magnitude of that job? What people have been appointed to the Regional Council consents and regulation team in relation to that job? What are the timescales which are going to apply for deemed permits? Are those the times – and the others, actually. If they're all coming in under 124, what is the timeframes that apply to 124? How are you going to approach it, on a catchment by catchment basis, whatever that means, or are you going to approach it on the FMU – by FMU basis, is that how you're going to be approaching it? What are you doing in relation to the decision to come to the Court? Are you going to defer and weigh on the decision for the Court? Actually, you probably can for some time in terms of some of the timing under section 124 but it won't, you know, not indefinitely I would not have thought. so we want to have a better understanding of that because we wondered whether the key issue – well, one of the, not just a controlling factor perhaps *the* controlling factor is the sheer scaling magnitude of resource consent permits which are coming the Council's way. If your team have now taken up processing consents, are they available for the high level thinking which has to go into the land and water plan.

1005

A. Yes and –

Q. So we're trying to get a better feel for that, I think that only at best we've got a very high level feel, actually thanks some information has been given to the minister of environment but provided to us on Friday. Or even those deemed permits might be, you know your scatter plots don't really give us a sense of where those deemed permits might be coming in and from what catchment, or in the rules.

A. I have in mind precisely the person that I think could best assist with those questions and that is the, the team leader of the consents team. I'll need to on availability but it strikes me that the sooner you can hear some of that information the, the better it could be in terms of understanding the issue that is presented in this case. What I would be minded to do is to see, just check on availability as to when that person could be called to

best assist the court with those questions and I have in my mind that this week would be helpful –

- 5 Q. It would be helpful, actually having something on paper would be even more helpful. So it's not, we're not wanting to add to the 2,000 plus pages of evidence considering we that we already have but we're really trying to feel more grounded in terms of the problem which this region is facing and how is that, yes trying to get a better feel for the scaling magnitude of this problem, yes.

THE COURT: COMMISSIONER BUNTING

- 10 Is there a plan?

THE COURT: JUDGE BORTHWICK TO MR MAW

- Q. Yes there must be, a management plan that is to say.
- 15 A. Yes and again the risk of giving evidence from the bar, picking for example the number of people in the consents team that's tripled over the last 18 months in terms of getting ready for the consent applications that are going to be lodged so there is a plan in place and the Council is resourcing itself to ensure it can process those consents in the, within the time constraints that the RMA presents. But in terms of the detail of precisely how that is to occur, I think that's better coming directly from the
- 20 witness.
- Q. Okay.
- A. So we'll look to get a brief of evidence prepared as quickly as possible and then have that witness made available to assist the court, again as soon as possible.
- 25 Q. Very good. Does anyone have any objection to that, the Court having a better understanding about the scale and magnitude of the problems being faced by the Regional Council, which isn't to say it's alone, actually every Regional Council is facing now challenges in terms of responding to the NPS for fresh water management and also the national
- 30 environmental standards but this Council has some unique problems in terms of the sheer number of deemed permits and replacement permits coming in. So has anyone got any difficulties with the Court better

understand the resourcing and the issues, Mr Page you look like you might have a problem.

MR PAGE:

No, not a problem, I encourage the Court to make the enquiry that you are
 5 pursuing with my friend. I was simply contemplating suggesting to the court that they make another direction which is that a map be produced of the applications that are already in and the applications that are yet to come because it seems to me from the evidence that you've got so far, there's real opacity around what the scale of the task is spatially as much as sheer numbers of permits.

10 THE COURT: JUDGE BORTHWICK TO MR MAW

Q. It is a spatial question you are right, we don't have a sense
 geographically. We hear a lot about Manuherikia as if it is the ID
 catchment which it's not and that, that's of concern to the Court, that its
 thinking be dominant can be dominated by a single catchment when
 15 there's upwards of 140 catchments in this region.

A. In your direction from the 28th of October the last year, the first thing that
 you asked for from the Council's evidence was a catchment by catchment
 analysis of what the resource management issue is and it seems to me
 that we're still grasping at that issue.

20 1010

Q. I see these things are very well known to counsel. It's not known to the
 court but it's known to counsel.

A. Well, speaking from OWRUG's point of view, OWRUG only knows about
 its own members' affairs and so we think we've got the thick end of the
 25 permits under control but we actually don't know what the rest of them
 are doing or where they are.

Q. Isn't that of interest, OWRUG, does that only represent primary sector
 interest in the Manuherikia catchment or is it representing interests
 outside of that catchment?

30 A. Oh, no, it's definitely outside of that catchment, Ma'am.

Q. What are the catchments?

A. It has members in the Dunstan rohe. It has members in the Alexandra basin area and in the Taieri catchments as well. So largely Central Otago, to be fair, not coastal Otago but certainly well beyond the Manuherikia catchment.

5 Q. So, that's not asking for a state of an environment, more like a state of affairs at the Regional Council, and that would actually help orientate ourselves better into the evidence as well.

MR MAW:

10 We shall get to work on that.

THE COURT: JUDGE BORTHWICK

Very good. All right. That answers your questions, Mr Reid. No, we don't need detailed cross-examinations on which methodology is to be preferred and why but we do need questions on what is –

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MR REID:

Assistant with identification of the issue.

THE COURT: JUDGE BORTHWICK

– issue identification, what are the gaps we're trying to traverse.

20

MR BUNTING:

On this exercise, what I was unsure about was how is the methodology that you're talking about actually reflected in the plan change? So we've got these guys sitting in dark-filled rooms crunching the numbers and all that and they
25 come up with an outcome. How is that then taken forward into the plan change document itself?

THE COURT: JUDGE BORTHWICK

Which is another way of saying, is the process to the application of the method completely contained within the schedule or are there other processes or
30 sub-processes and exercise of discretion and judgments being made outside?
Now, that doesn't just apply to the regional council but it's actually all methods.

To what extent are they completely documented, therefore, any farmer will know, talking about farmers in the main but any farmer will know that if they apply the methodology themselves, they have assurance, it is predictable what the outcome will be and it's not going to be massaged by the time their
5 consultant gets to it under their method or the regional council gets to it under it. All right. Mr Winchester.

MR WINCHESTER:

At the risk of overcomplicating matters and it's one thing I am likely to do
10 because this process does seem to be getting far more complex than it was originally intended.

My first observation is that I think that having some consenting information is critical and it reflects the conversation I had with my client this morning about a
15 gap of information before the court. One other aspect of that which we haven't specifically addressed is an interpretation issue around the rule frameworks and plan frameworks which are being advanced as to how they might be applied by the consenting team and it may be abridged too far for the regional council consents person to orientate themselves with the different versions of rules or
20 plan provisions which are being advanced and be able to express a view as to how they might be applied in a consenting context.

THE COURT: JUDGE BORTHWICK

Yes. It's really we're interested in that consenting context is how they might be applied. I don't know. Over to Mr Maw whether he thinks the person would be
25 able to get their head around – I guess – who are the candidate methods apart from your own? The candidate methods would be what, Landpro, OWRUG . who else has put up a candidate method?

MR WINCHESTER:

30 My client, your Honour.

THE COURT: JUDGE BORTHWICK

Your client, yes.

MR WINCHESTER:

And Fish & Game.

THE COURT: JUDGE BORTHWICK

5 You've altered the schedule?

MS BAKER-GALLOWAY

I think Mr Winchester is talking more broadly than just a schedule.

THE COURT: JUDGE BORTHWICK

10 Oh, I see, right. Sorry, sorry, I am with you.

MR WINCHESTER:

Indeed, your Honour. It's not just to do with the methodology.

1015

15 THE COURT: JUDGE BORTHWICK

Q. Yes I'm with you, yes I was thinking, didn't think your client had but I was going to go with it –

A. With the methodology – yes, so it is more broadly, it's more around the mechanics of the rules, not necessarily the discrete issue of the methodology in the schedule, and as I said I am loathe to overcomplicate it –

20

Q. No, my gut feeling is that that's an issue for cross-examination I would have thought.

A. That's fine.

25 Q. Because we have, I think it's an issue for cross-examination, yeah, the – how clear and certain the objectives and policies are I think is where you're going to and therefore the rule itself, the limitation with the rule –

A. It's a mixture of the clarity and implementation of the policies and the rules that are being advanced, and I'm certainly content to put that to Mr de Pelsemaeker in terms of his methodology and the other planning witnesses, really the question is, whether that position can be rounded

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out from a Regional Council point of view in terms of their current practice and how they might apply –

Q. Because it seems to me that it is a major issue, in this hearing, the levers, where the controlled activity rule is even a lever, because it requires quite a bit of effort and then of course we see in some parties, minister would be the obvious example, take away the effort and make it the lever that it was intended to be, and then we can see other parties adding in more effort, well if you're gonna add in more effort why don't you just apply for a non-complying resource consent, so, is it that sort of issue that you're getting at, whether it – whether the – how much effort is required from an applicant?

A. Well it's, that is more a consequence rather than a driver although there is no small irony that parties are seeking to tip more into the schedule when they are complaining about cost and uncertainty, but I mean I don't have a witness in that area so that's just an observation from the bar.

Q. My sense is perhaps leave that for cross-examination, we can revisit in expert conferencing if we need to. Would that be about right?

THE COURT: COMMISSIONER BUNTING

20 Yeah I think it could be quite difficult.

THE COURT: JUDGE BORTHWICK

Okay, just so – for broader context, it is not uncommon for the court to make this direction, I can think of one case, Commissioner Edmonds was reminding me of this morning when she and I were sitting, again on a regional plan, not this region, where we asked to speak to the regulatory manager and we said: “Regulatory manager, how would your policy teams prefer policy and rules and (inaudible 10:17:55) work?” He said “they wouldn't”. He said they could not be implemented by the region, which was speaking volumes. So, you know, we had to do something else in that space because his team couldn't implement them. Why not? Because the two teams hadn't talked to each other, as it turned out the two teams hadn't talked to each other. So this isn't actually uncommon, and we would like to know more both in terms of the broad setting and workability of the schedule and yes, schedule, okay. So we'll leave it to

you to have a talk to who you need to have a talk to, let us know when something can be put on paper, scope out what you think would be useful for you to cover and come back to us about that, we can save up cross-examination, for another day, after expert conferencing, we'll talk to, my team
 5 will be talking now to Mr Dunlop to see when he can be made available and where he can be made available, he has certainly read all of this evidence and is well aware of the competing technical issues.

THE COURT: COMMISSIONER BUNTING

10 (inaudible 10:19:05) the court will facilitate that conferencing is that –

MR MAW:

I think it would assist in terms of keeping focus onto the issues in contention, just based on how the evidence seems to have gone apart rather than come
 15 back together. So that would be –

THE COURT: JUDGE BORTHWICK

Counsel to confer and to advise when it is that they will have a chance to talk to their witnesses about the issues agenda, so it has to be informed by the
 20 experts, and you can expert Mr Dunlop to be pressing into that space as well if he's not satisfied that he has a proper understanding of how you see, or your witnesses see what the issues are. Anything else we need to do? I don't think so –

25 1020

MR MAW:

Just picking up on the brief of the, the brief of evidence that will come from the Council's consents team leader, insofar as she has working knowledge that will relate to the Plan Change 7 as notified schedule and I think it would be helpful
 30 to test how that's being used in practice because that's something in which there will be knowledge already, insofar as knowledge as to competing schedules put forward which she will have no working knowledge of those and she's not had to engage with those at this point in time so there could be quite

an exercise in terms of getting up to speed with the relative merits of competing schedules and I don't foresee a huge amount of benefit in the court receiving her assistance on that matter given that she won't have had any opportunity to really, to think about those competing schedules –

5 THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Don't know about that, I mean inasmuch as if she picks up another schedule, I sit clear and certain on it's face or would she have to make enquiries as to the meaning of terms, is that all the information, would she have a sense of well that's, you know, if it comes in this way that's all the information I require or do I already know that I have to be making more enquiries so really its trying to gain an understanding of transparency and certainty.

A. At a principle level there is benefit in that discussion and picking up on the discussion much earlier today around a need for a certain an objectively ascertainable method that is repeatable irrespective of who uses it –

Q. It's a repeatable method, yes.

A. It strikes me that that is the thing that we should all be aiming at and I would have thought that that is what would best assist the consents team but let's hear from her about that.

Q. Because at the end of the day we don't want to make a decision giving you something which all consents then can't administer

COMMISSIONER EDMONDS:

Well it's just that we may need some counsel of guidance material that this, the consents team are actually applying and it would be useful to understand about that as well. There may not be or it might be on a website and available to everyone but I guess we just want to be clear what ruler they're running over things and whether that's publicly available and known.

MR MAW:

30 Yes and there is reference in the evidence that, it's before court in relation to the guidelines that assist with the current water plan and how the calculations

occur and Mr Leslie will be able to assist in relation to that in which perhaps provides a useful contrast in terms of what might best assist the Council and its consents team as a result of this process because I think there are, there have been identified some issues with the current process in terms of clarity or
5 a lack of clarity in terms of a plan that is informing how the calculations occur. So again, Mr Leslie can perhaps just start that discussion today in terms of the current situation, the challenges with dealing with reallocation or allocation on renewal and then contrast that with what's being put forward here and in in terms of the method in schedule 10A. So that's probably as far as we can
10 advance that discussion this morning but it has been helpful in terms of again clarifying the that are at stake in this proceeding. I know propose to move to the next witness for the Council and it's neither Mr Wilson or Mr Wilson, we have two other witnesses to appear before each of those are able to assist us on this topic, the first of which is –

15 **THE COURT: JUDGE BORTHWICK**

Dr Snelder.

MR MAW:

– Dr Snelder.

MR MAW CALLS**ANTONIOUS HUGH SNELDER (AFFIRMED)**

Q. You confirm that your full name is Antonious Hugh Snelder?

A. Yes.

5 Q. And you are a director of Land and Water People Limited and a consultant researcher in the field of water and land resources management?

A. And you have prepared a statement of evidence in reply dated 19 February 2021?

Q. Yes.

10 A. And in that statement you've set out your qualifications and experience at paragraphs 3 and 4?

Q. Yes.

1025

15 Q. Are there any corrections that you wish to make to your statement of evidence?

A. No.

Q. Do you confirm that your statement of evidence in reply is true and correct to the best of your knowledge and belief?

A. Yes.

20 Q. Could you please now proceed to give a short summary of the key points from your statement of evidence and then remain to answer any questions from the court and from my friends.

A. ORC engaged my organisation to undertake a study of water quality state at river and lake monitoring sites in the Otago region using the most up to date available data from monitorings, the scope of the study was to evaluate water quality state and to grade each site relevant to attributes designated in the national policy statement for freshwater. That document which reports the results of that study is appended to my evidence.

30

THE COURT: COMMISSIONER BUNTING

Q. I suppose just an observation really, that you provided all that data but I think you said you've done no interpretation or anything like that of the data is that right?

A. That's correct.

Q. So it's just there for information at this stage is that right?

A. I believe so.

Q. It's not connected to anything to do with –

5 A. No.

Q. No okay, that's my appreciation so thank you for confirming it, thank you.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL

CROSS-EXAMINATION: MS IRVING

10 Q. Good morning Mr Snelder. I just want to start with understanding whether you're aware of whether the similar analysis that you've done was completed under the previous NPS. Because there were attributes obviously in the 2017 amended version of the national policy statement, do you know whether the Regional Council completed an analysis of the

15 water quality against those standards?

A. No I do not know whether they did.

Q. Okay so based on your knowledge is there much that has changed as between the 2017 and 2020 versions of the –

A. The attributes that have changed are some of the – appendix 2B

20 attributes, so the 2A attributes are the same, between the two versions of the NPS, the 2B attributes are new to the 2020 version of the NPS.

Q. Okay. I think as Commissioner Bunting mentioned you say in your brief of evidence that you haven't yet interpreted the results, they're simply an analysis of the data is that correct?

25 A. That's correct.

Q. And so, you haven't yet interrogated the results to understand the reasons for the various grades against those attributes.

A. No there's been no analysis of the relationship to resource use.

Q. Okay. Despite that the data itself helps provide us some insights doesn't

30 it?

A. Yes.

Q. Can I take you please to your appendix C in your brief of evidence, particularly table 6. Doesn't have a page number unfortunately.

A. No.

Q. It's the table relating to nitrate.

5 A. Nitrate yep, yes.

Q. I'd like to take a look at some of the key catchments from a deemed permit perspective, are you familiar with those?

A. Not in great detail but I have some understanding of the geography of Otago.

10 Q. Sure, so perhaps if we start with the arrow catchment.

A. Right.

Q. Fifth row down.

A. Yes.

Q. And we see there that it meets band A.

15 A. Yes.

Q. Perhaps moving down the page to Dunston Creek and do you understand Dunston Creek to be in the Manuherikia catchment?

A. Yes.

Q. Also band A correct?

20 A. Correct.

Q. Turning over the page, if we look at the Manuherikia catchment, those are all in band A?

A. Correct.

25 Q. And the following page, perhaps we look at the Taieri and once again we see that we are all in band A?

A. Correct.

1030

30 Q. So those results would help us understand or at least lead us to believe that with respect to nitrates, water quality against that measure is performing reasonably well?

A. So what that tells us, that attribute is nitrate toxicity.

Q. Yes.

A. So it's about the effect of nitrate on toxicity, nitrate has another effect which is to stimulate the growth of algae.

Q. Yes.

5 A. So these numbers are not necessarily, while they're in the A band in terms of toxicity so they have very low level of toxic influence, it does not necessarily mean that they aren't problematic from a algal growth perspective. To understand that in more detail, you would need to do some more analysis to really understand that.

Q. Yes and the periphyton assessment would assist with that would it?

A. Yes it does.

10 Q. So perhaps if we can go to table 2, your periphyton table, first page of your Appendix C I believe.

A. Yes sorry I'm just getting there.

Q. No that's fine.

A. Right.

15 Q. So my understand the periphyton attribute, we have a national bottom line between C and D?

A. Correct.

Q. And so if we look down the second to last column, we see there's more variability in relation to periphyton than perhaps with the nitrate measure?

A. Correct.

20 Q. So what kind of things contribute to variation in this attribute?

25 A. Right so periphyton is the response of the algae to the nutrient concentration but it also depends on a number of other factors including the temperature, the light available for plant growth and importantly in this case, flow. So the duration of time between flood events that wash the periphyton after is important and any changes in the flow that are caused by abstractions can increase that duration and therefore lead to more instances of periphyton getting to a biomass which is unacceptable.

Q. Do factors such as the presence of didymo influence the outcomes of this attribute?

30 A. Yes, well didymo is a type of periphyton so periphyton is a mixture of many, many things primarily algae and didymo is a type of algae. So didymo influences the biomass that's measured at sites where didymo is present.

- Q. Yes. Can I take you please to appendix C, table 8 which is the clarity table. Factors that might affect clarity would include a number of natural factors. Can I take you to the Dart at the Hillocks in that table by way of example. The Dart River at the Hillocks.
- 5 A. Yes.
- Q. Do you know where the Dart River is?
- A. Yes, I do.
- Q. Would you agree with me that the dart river, at least in part, drains Mount Aspiring National Park?
- 10 A. Correct.
- Q. And so we could or would suspect that the reason that Dart at the Hillocks is at level D is likely to be a natural factor?
- A. Yes.
- Q. Same might apply for the Invincible Creek at Rees Valley Road?
- 15 A. Quite possibly.
- 1035
- Q. If we go over the page to Thomsons Creek, you would agree that Thomsons Creek is in the Manuherikia catchment?
- A. I'm not familiar with Thomsons Creek, I'm sorry. I'm not familiar with that particular location.
- 20 Q. That's okay. Are you familiar with the Kaikorai Stream?
- A. In Dunedin?
- Q. Yes.
- A. I know its geography. I know of its geography.
- 25 Q. From a land use perspective, what kind of activities or behaviours would affect clarity?
- A. In an agricultural setting, stock access to the stream and the banks are an influence. Erosion, caused by that land use, obviously influences the amount of sediment that gets into the stream and affects clarity. In an urban environment, similar; land disturbance, leaving land bare, and erosion of the stream perhaps caused by rapid discharge of storm-water from urban development, urban land, et cetera. Those are the sorts of processes which lead to degradation in stream visual clarity.
- 30

Q. So talking then about the rural land uses and activities near the beds of waterways, are the risks associated with that in part dealt with by the stock exclusion and fencing requirements under national environmental standard?

5 A. Yes, I believe that's the intent, at least one of the intents of those regulations.

Q. I'd like to take you now please to your appendix C, table 20, which is the dissolved reactive phosphorous table.

WITNESS REFERRED TO APPENDIX C

10 **THE COURT: JUDGE BORTHWICK**

Sorry, where are we at? Table –

MS IRVING:

So, for the last two or four pages of the Appendix C, so the last pages of that document. Sorry, there aren't any page numbers, your Honour, so I can't –

15 **THE COURT: JUDGE BORTHWICK**

No. Hold on. I'll just see if I can get an electronic version.

MS IRVING:

It is the last four pages of the brief, your Honour.

THE COURT: JUDGE BORTHWICK

20 Just wait for the Court. All right, what's your question?

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. Again I'd just like to discuss the reasons that we might see elevated levels of phosphorus. Can you explain those?

25 A. So, elevated levels of phosphorus may well arise from erosion. It's generally surficial wash-off which elevates it. So where there might be stock access to the stream or areas of erosion, that's a likely route for phosphorus to get into the waterway.

Q. Do you tend to see it more where irrigation methods are overland flow methods?

A. Correct.

5 Q. And so performance against that measure might be improved if we move to more efficient forms of irrigation with less run-off?

A. Correct.

Q. I have no further questions, your Honour.

THE COURT: JUDGE BORTHWICK

10 Q. In answer to the last question, are you suggesting that the only reason for overland flow is the use of wild flooding or of border dyke? I think that's where that question was going.

A. Oh, no, that's not my intent, no. Sorry, my answer was that overland – well, non-spray methods of irrigation are known to cause a higher wash-off than spray irrigation and therefore can increase the phosphorus wash-off to a greater extent. But phosphorus can be elevated through a simple – a response to rainfall from pasture that might be perhaps eroding, also to stock access to streams with erosion of the banks, et cetera. So there are a variety of mechanisms.

15

Q. Yes, it's a land use issue isn't it?

20 A. Yes. Yes.

Q. And so for example stock access to streams, stock access to critical source areas such as gullies and swales.

A. Yes.

Q. It's a result of applying irrigation water when the soil moisture content is already elevated. Consequently, even under irrigation and efficient irrigation, there is overland flow. There's a whole variety of it.

25

A. Yes, that's correct, yes.

Q. Yes, of which is to do with land use, the various activities taking place, the nutrients being applied and the methods of irrigation –

30 A. That's correct.

Q. – and the timing of irrigation.

A. Yes.

Q. So, quite a complex issue –

A. Correct.

Q. – not merely resolved by moving from border dyking to a spray irrigator.

A. No.

Q. Would that be correct?

5 A. That's quite right, yes.

Q. Okay. Anything else that you need to add to in terms of the questions put to you by counsel about the complexity of understanding nutrients, preferred pathways or other pathways through the environment?

10 A. Well I think you summed it up very well there. It is very complicated, and our understanding of those processes is not complete. But generally we do see a relationship between different types of irrigation and high, higher and lower phosphorus. So we do see improvements in phosphorus concentrations when irrigation is shifted from flooding type methods, wild flooding type methods, to spray irrigation. But you're quite right, it does
15 depend on the practices as well, yes, and it's complicated.

Q. And is the new environmental standards regulating all those practices, just – even the ones that I've touched upon, or only one or two of them? What's the extent of its reach?

A. That's not really my area, so I won't try and answer that question.

20 Q. All right. Anyway, re-examination.

RE-EXAMINATION: MR MAW – NIL

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING – NIL

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL

25 **WITNESS EXCUSED**

MR MAW CALLS**JULIE MARIE EVERETT-HINCKS (AFFIRMED)**

Q. Do you confirm that your full name is Julie Marie Everett-Hincks?

A. Yes.

5 Q. You are the science manager at the Otago Regional Council?

A. Yes.

Q. You have prepared a statement of evidence-in-chief dated 7 December 2020 and a statement of evidence in reply dated 19 February 2021?

A. Yes, that's correct.

10 Q. And you have set out your qualifications and experience in your paragraphs 3 and 5 of your evidence-in-chief?

A. That's correct.

Q. Are there any corrections that you wish to make to either of your statements?

15 A. No.

Q. Do you confirm that your statements of evidence are true and correct to the best of your knowledge and ability?

A. That's correct.

20 Q. If you could now proceed with a short summary of the key points from your statements of evidence-in-chief and then remain for any questions from the Court and from my friends.

1045

A. Thank you. Morena, your Honour.

25 **WITNESS DELIVERS PEPEHA**

My name is Julie Everett-Hincks. I'm a sheep farmer's daughter from South Otago, so this is where I was raised. I am the science manager here at the Otago Regional Council and I have been for nearly two years. I am
30 providing evidence in relation to the Council's science work programme between the investigation undertaken by Professor Skelton and the upcoming notification of the new land and water plan.

The Council's science work programme or following from Professor Skelton's report a number of key areas were identified in which the Council could make improvements to its utilisation of its freshwater management functions.

- 5 This review will recognise that a significant upgrade of the planning framework was required in order to give effect to national direction and that rectifying the current lack of scientific knowledge in the region is necessary to provide a good, robust evidence base for a new land and water regional plan.
- 10 While the Council does hold some scientific data on the state of the environment, the data held by the Council does not identify and explain environmental issues including the causes and location and source and does not contain conclusions as to the significance in this regard.
- 15 In order to achieve the notification of the new land and water plan in two years, the Council has taken a number of prominent steps. These include taking a regional level precautionary approach and that is in simple terms, grouping the freshwater management units into four categories based on degree of modification from a natural state, in order to identify where further hydrology and scientific information should be prioritised.
- 20

Areas with complex hydrology and diverse pressures on competing values will be the subject of catchment specific modelling. Whereas catchment with less modifications will use these regional level precautionary models. The purpose of this approach is to ensure that the science, required science work will be sufficient to inform the development of the land and water plan in the timeframe that was given.

25

Further work is required as a result of the essential freshwater reforms, late in 2020 to create a detailed inventory and development of a monitoring programme. A representative estuary monitoring programme, fish surveys, fish passage, connectivity projects, a review of our primary contact programme to ensure compliance, additional attribute measures at a greater number of sites, this work will inform the development of the land and water regional plan to

30

ensure that it is consistent with and gives effect to the relevant higher order documents.

5 Increasing the capacity and capability of the science team through taking on –
we've done that through taking on multiple additional team members. Professor
Skelton's review in line with the previous independent report found that there
was a shortage of approximately four to six full time equivalent scientists to
carry out the work on practical hydrology and hydro ecology and he also
referenced in that report a shortage of environmental monitoring technicians as
10 well.

Following a reorganisation of the science team in May 2020, the Council have
now created a structure similar to that recommended in previous reports. It
means that once all of the positions are filled, there will be about 21 full time
15 equivalents up from 9.4. While recruitment is ongoing and there have been
additional challenges in terms of sourcing applied scientists at the right level
due to higher demand within New Zealand and an ability to bring overseas
scientists due to boarder closures, these new positions allow internal
knowledge to be built and strong networks to be built with other Council's,
20 Crown research Institutes, Universities and agencies to access national advice
and knowledge.

It ensures the Council has much of the expertise required to inform the future
development of the land and water regional plan and continue on with
25 consistent and robust monitoring systems and regulative reporting, issue
identification and interrelated management without having to rely on external
consultants, short-term contracts and excessive cost to ratepayers. That's my
summary Your Honour.

1050

30 **CROSS-EXAMINATION: MR MAW**

Q. Dr Everett-Hincks, do I take it from your first, or your paragraphs 3 and 4
that your specialist expertise is in animal genetics?

A. And farm systems, agricultural sites.

Q. Yeah so in matters of – I see you haven't attempted to qualify yourself as an expert in giving expert evidence, you're giving evidence as a manager right?

A. That's correct.

5 Q. And so on matters concerning how a hydrological model should be built or an ecological model should be built for a catchment you defer to those who have that relevant expertise do you?

A. Yes that's correct.

10 Q. And that would include your predecessors in your current role Dr Olsen and Mr Hickey?

A. That's not entirely correct.

Q. Well, Dr Olsen's an expert ecologist?

A. Yes.

15 Q. And Mr Hickey has ecological qualifications and experience in preparing hydrological studies?

A. That's correct.

Q. So when they express an opinion about the time it takes to prepare hydrological studies and ecology studies you would defer to their advice?

A. Amongst others advice as well.

20 Q. Were you in court when Mr Henderson gave evidence yesterday?

A. Yes I was.

Q. And did you understand him to say that for the Arrow, Cardrona and Manuherikia catchments, the hydrological models exist to enable the Council to make decisions?

25 A. Yes I heard that.

Q. And you agree with it?

30 A. There's always a degree of uncertainty with any model. Models can be developed for almost anything for almost any degree of data that's available, it's how its – comes down to the level of risk that you want to accept with that model.

Q. Well is the Regional Council proposing to do any more work on the hydrology of the Cardrona Arrow and Manuherikia catchments before it notifies the Land and Water Regional Plan?

A. Can you please clarify with regard to work?

Q. Well, you've explained that all models contain risk.

A. Yep.

Q. And it's a question of how much risk the Council's prepared to accept in using models.

5 A. That's correct.

Q. Right. Mr Henderson told us that models exist for Cardrona, Arrow and Manuherikia.

A. Yes.

10 Q. Is the Council proposing to use those models in its preparation of the land in water regional plan?

A. Yes it is.

Q. It is thank you. Is the Council proposing to build similar models for other catchments?

A. Yes it is.

15 Q. Which ones.

A. Based on the categorisation we have done, on the Taieri FMU, the North Otago FMU and the Clutha Mata-Au main stem.

Q. Those three.

THE COURT: JUDGE BORTHWICK

20 Q. Sorry can you say that again? The – I didn't catch the models.

A. The – we believe that complex, there's complex hydrology issues and diverse pressures on competing values within the Taieri FMU, North Otago FMU, and the Clutha Mata-Au main stem.

Q. So, Taieri, North?

25 A. North Otago.

Q. North Otago and last place?

A. Clutha Mata-Au main stem.

Q. Yes.

1055

30 **CROSS-EXAMINATION CONTINUES: MR PAGE**

Q. But not for any of the tributaries of the Clutha Mata-Au?

- A. It may be that we require more fine scale modelling in different areas. Can I please add that this is the approach we've adopted given the timeframes that we have been given.
- 5 Q. Does that work for the Clutha Mata-Au, main stem for the Taieri FMU and for North Otago FMU? Is that being done within the council or through external engagement?
- A. We're scoping that work out currently we will make that decision as to whether that goes to external consultants.
- 10 Q. So do I take it that for Clutha Mata-Au, Taieri and North Otago that work hasn't even begun?
- A. That's correct.
- Q. What is the deadline for the delivery of that work to enable it to provide the basis for policy formulation in relation to those catchments?
- A. Approximately the end of 2022.
- 15 Q. Now, let's talk about North Otago FMU for the moment. Are you familiar with the various catchments that make up that FMU?
- A. Reasonably familiar.
- Q. So we have the Waianakarua, we have the Shag or Waihemo catchment and the Kakanui catchment, and also the lower Waitaki, don't we?
- 20 A. That's correct.
- Q. So each of those have separate hydrological characteristics and data sets, don't they?
- A. Yes, they do.
- Q. Nobody has been engaged to deliver hydrological models for any of those catchments yet and you're confident that could be delivered by the end of 25 2022?
- A. As I mentioned, we have engaged with others to ensure that we have a regional precautionary approach model as a baseline for the whole region.
- 30 Q. Can you explain to me what that regional precautionary approach model actually contains?
- A. It's based on a hydrology. It's a hydrological model that looks at what the natural state – I will put it in your Honour's terms from yesterday,

naturalised state for many of the modified catchments for those that haven't been modified, it will provide the natural flows.

Q. So we're not talking about constructing hydrological model that utilises actual take data from permits.

5 A. Can you please repeat that question?

Q. So you're not referring to a hydrological model that utilises actual take data from permits in each catchment?

A. No, that's correct.

1100

10 Q. Because the model for the Manuherikia that Mr Henderson was describing yesterday took two to three years to build didn't it?

A. I believe that's the case.

Q. So we simply don't have time for a model of that level of sophistication to be built between now and the end of 2022 for other catchments do we?

15 A. The Manuherikia I understand was an exception, probably the most modified and most complex catchment in the region and potentially New Zealand.

Q. But Mr Henderson described the Taieri FMU as being similar.

THE COURT: JUDGE BORTHWICK

20 Q. Did he? I'm not – that wasn't my recollection of his evidence, can you recall what he said about other catchments?

A. That wasn't my recollection either Your Honour.

25 Q. I thought the Manuherikia he described as the most modified, most complex both in terms of hydrology and also the – where water was travelling within the catchment as a result of modifications but the other catchments, and I thought he mentioned Taieri were simpler, relatively simpler even though there's modification there too. The hydrology and geohydrology or something, isn't that what he said or have I totally misheard him?

30

MR PAGE:

Well can I check his written evidence Ma'am because I had understood from his written evidence that he grouped Manuherikia and Taieri together as having similar complexities.

5

THE COURT: JUDGE BORTHWICK

Q. Oh you can check that, I'm just recalling a verbal response but if you could check and put that, actually put the evidence to the witness from the correct page if that's what you're referring to.

10

A. Your Honour we do understand the Taieri to be complicated, that's why we have taken the approach of undertaking fine scale modelling for the Taieri.

Q. But is it as complex as Manuherikia?

15

A. We are lead to believe that it is not quite but that we do not know.

Q. Okay yes.

MR PAGE:

Paragraph 70 of Mr Henderson's evidence-in-chief is the one I have in mind Ma'am.

20

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Yes, what does he say there?

A. He says: "Two catchments where these approaches may struggles however are the Taieri and Manuherikia, both have significant water storage to provide water for irrigation if rivers are very low, both have extensive redistribution systems based on water races that have been repurposed from their original use for gold mining and both have a high level of water use by comparison with available water."

25

Q. All right and your question is? Based on that, how can this witness be confident that a model build will be available within two to three years?

30

A. Well by the end of 2022 Ma'am.

Q. 2022 yes.

WITNESS:

We will do all that we can to ensure that we can deliver according to the Minister's timeframes. What will be deemed the challenge is how much risk the Council and community and stakeholders can accept with models that aren't
5 fine scale.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. In relation to the Taieri catchment, Mr Henderson wasn't able to help me with the current scheduled minimum flows for the catchment, are you familiar with those?

10 A. Not directly I'd have to refer to the plan.

Q. All right, and are you familiar with the Manuherikia irrigation company consents to operate the Loganburn Reservoir?

A. No that's not my concern.

Q. Has your team – the resource science team of the Otago Regional Council contributed to the preparation of the proposed regional policy statement?
15

A. Yes we have.

Q. And that regional policy statement do you understand is to be notified in early June?

20 A. That's correct.

Q. And do you understand that part of what that regional policy statement is intended to address is the meaning of Te Mana o te Wai in relation to each of the FMUs?

A. That's correct.

25 Q. Nothing further Ma'am.

RE-EXAMINATION: MR MAW

Q. You had a question put to you in relation to whether there was sufficient hydrological information available to proceed to a plan change in respect of the Manuherikia catchment. Is it as simple as simply having sufficient
30 hydrological information and then proceeding straight to a plan change or are there some other steps that need to be undertaken to get to the point of preparing a plan change or a new plan?

- A. Yeah I see that information as the foundation or the base from which all the other layers of data and information need to be applied, such as ecological values, cultural values, land use activity, mahinga kai site, so that is just merely the foundation from which everything else will be based for the NPSFM 2020.
- 5
- Q. So it's the hydrological component is perhaps one piece of a jigsaw, it's not the complete picture?
- A. That's correct.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING – NIL

10 **QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL**

QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL

COURT ADJOURNS: 11.06 AM

COURT RESUMES: 11.27 AM

15 **WITNESS EXCUSED**

THE COURT: JUDGE BORTHWICK

Okay so moving right along and you know we're going to get to your planning witness.

MR MAW:

- 5 Yes and I think that was – the best guess had him coming on at some point this afternoon so, he's ready and I think others in the room are too.

THE COURT: JUDGE BORTHWICK

Okay and I think we're just checking through to make sure that anybody else who might have needed him are also available or – yes.

10 MR MAW:

Yes the list was quite long from memory.

THE COURT: JUDGE BORTHWICK

Yes the list is long but we look to have everybody in the room. Okay, all right.

MR MAW:

- 15 So the next witness that I will call will be Mr Wilson. Just as he's making his way up to the front, I've had a discussion with my friends over the morning tea adjournment and I've offered to lead some further evidence from Mr Wilson to see if I can tease out the differences between the different methodologies that have been put forward in a way to both assist the Court and assist counsel. So
- 20 I'll start with that after he's given his summary and that may then avoid the need for any further questions by way of cross-examination or further explanation or it might not but it may assist with the task at hand.

THE COURT: JUDGE BORTHWICK

All right, thank you.

25

MR MAW CALLS**SIMON SHIELD WILSON (AFFIRMED)**

Q. You confirm that your full name is Simon Shield Wilson?

A. Yes.

5 Q. And you are the manager for Regulatory Data and Systems at the Otago Regional Council?

A. I am.

Q. You've prepared a statement of evidence-in-chief dated 7 December 2020?

10 A. Yes.

Q. And a statement of evidence in reply dated 19 February 2021?

A. Yes.

Q. And you've set out your qualifications and experience in paragraphs 2 to 6 of your evidence-in-chief?

15 A. Yes.

Q. Are there any corrections that you wish to make to either of those statement of evidence?

1130

20 A. There are yes. Evidence-in-chief paragraph 25, the end reads: "Consumptive take greater – "

Q. Just pause.

A. Sorry. The last line reads: "Consumptive take greater than five litres per second." It should be: "Greater than or equal to five litres per second." And paragraph 33, paragraph 33 read: "Any values below zero litres are removed." It should be "at or below".

25

Q. Subject to those corrections do you confirm that your statements of evidence are true and correct to the best of your knowledge and ability?

A. I do.

30 Q. Now I understand you've prepared a short summary of the key points from your evidence, a copy of which will be handed around, if you could just proceed to give your summary once those have been delivered.

A. So my evidence covers the technical input into the development of schedule 10A4 of Plan Change 7. Along with Mr Lesley I was involved in the initial technical development of schedule 10A4 and PC7 before it was

reviewed by the Council's policy and planning team, the methodology in schedule 10A4 was designed to achieve three key outcomes, A) to ensure the applicants are not allocated more than their current water allocation, B) to ensure the applicants are allocated their actual water use and C) to provide a methodology which was simple to apply and not open for interpretation allowing for a lower cost of processing applications for resource consents. These outcomes support the short term interim nature of plan change 7. Schedule 10A4 uses water metre data collected by applicants in accordance with the consent conditions or the water metre regulations 2010 amended in 2020, to calculate the actual rates and volumes of water used. Schedule 10A4 is an objective and certain methodology with less room for subjective interpretation than the approach previously undertaken by the Council when considering water permit applications under the existing water plan framework. My evidence outlines how the method will work in practice and address some of the concerns raised. When an applicant's historic use is consistent then the proposed schedule 10A4 methodology will result in the applicant being allocated water reflective of their current use, if applied across the Otago region the methodology in this schedule will result in a significant reduction in the paper allocation currently assigned to deemed permit and water permit holders with allocation more closely reflecting actual water usage, and as a result of submissions I have made or support a number of amendments to the methodology – recommended or support a number of amendments and they are moving the date analysed to 1 July 2015 to 30 June 2020, amending the method for calculating the annual volume limit to reflect maximum annual volume as opposed to average annual volume, the introduction of rule 10A31A to allow a path for applicants with missing data, and amendments to allow for processing of applications when water metering was not required either by regulations or consent conditions. Overall my opinion is with the suggested amendments schedule 10A4 meets the outcome set out above.”

1135

EXAMINATION CONTINUES: MR MAW

- 5 Q. Thank you Mr Wilson. Perhaps if we could start by you explaining to the Court your understanding about whether the methodology in schedule 10.A4 includes all of the steps that need to be followed for that schedule to be applied.
- A. It does, yes and it was designed to do so.
- Q. So there's no black box that sits out to the side of the plan? The steps are – or the intention was to include all of the steps in the schedule itself?
- A. Yes.
- 10 Q. And you are confident that the schedule in its current form catches all of those steps?
- A. Yes. I think the only piece is whether the data is potentially – has gaps or there's missing data, which requires someone with understanding to look at that and spot that that's the case and that there may be a problem with applying the schedule and that the 10A3.1A might be appropriate. But other than that, the steps for running through the method are all in the plan.
- 15 Q. Now you will have had the benefit this morning from the conversation with the Court in relation to the differences between the alternative methodologies put forward by various parties in this proceeding. It would be of assistance to the Court and to counsel if you were able to tease out some of the differences between the Council methodology and the methodologies that have been put forward by other parties. And if it's a convenient way to do so, it might be worthwhile working through the differences that you've set out in your evidence-in-reply at your paragraph 5 as the basis for describing or discussing those differences.
- 20 Q. Certainly. So there is the issue around a reliability of supply, which is effectively the Aqualinc discussion, Aqualinc being a model to allocate your water limits based on what you will need to maintain your crops with a... Effectively, as I understand Aqualinc, you look at the area you're in and that gives you a rainfall figure. You look at your soil type, then you look at what you're doing and those three variables produce a final number. The key difference that I've identified in my evidence I guess is
- 25
- 30

that Aqualinc in an of itself doesn't deal at all with the available water in the river or the health of the river.

Q. Does the Aqualinc model deal with past or historic use?

A. So I think it's probably worth putting at this point that I'm not an expert in
5 Aqualinc but my understanding is no it doesn't. It looks at modelled need.

Q. What's your understanding about how that modelled need is incorporated within the current planning framework? That may be outside of the scope of your expertise but is that model being used at present by counsel?

A. So, I think (inaudible 11:38:48) it's outside the scope of my expertise but
10 I certainly discussed it with our consents team prior to writing my evidence, to confirm that what I had in there was correct. My understanding is that they take the numbers run by one of the Council's analysts of actual use, and for monthly and annual volume allocations they look at Aqualinc and then they take the lower of those two numbers
15 generally.

THE COURT: JUDGE BORTHWICK

Q. Sorry, say it again? You take – yes, I didn't get that.

A. You take the historic use number.

Q. Yes.

20 A. You take the Aqualinc number, taking the one that's lower, but only for monthly and annual.

EXAMINATION CONTINUES: MR MAW

Q. Are there any other observations that you can usefully share in relation to
25 the reliability of supply differences, or can you tease out perhaps where other methodologies are seeking to incorporate a reliability of supply component to the methodology?

1140

A. I don't think there's a lot to add on reliability of supply. I think key point
30 for my perspective is that it's – Aqualinc is modelled need and doesn't include what's available to use. So doesn't – you can model that you need 2,000 litres out of the river but if there's only 1,000 litres in it, you're

not gonna get 2,000 litres to use despite what you've written on the consent.

Q. And just to be clear, the council's version of schedule 10A.4 doesn't include reference to modelled need.

5 A. No, it doesn't.

Q. Moving onto the next topic, system efficiency. Can you describe some of the differences that arise with respect to this topic?

A. So there was commentary from some other sets of evidence that the reductions that would come under schedule 10A.4 would cause systems to operate in an inefficient manner compared to how they do now and my response to that is that schedule 10A.4 is designed to provide applicants with the water that they currently use, particularly when we get into rate of take, in most cases comes up with a number which is higher than the 95th percentile that the council would generate under the current water plan although as I acknowledge that 95th percentile is a number generated in a report, not necessarily the final number that enters the consent. So the intention when the schedule was prepared was not to affect the existing system efficiency.

10

15

A. Correct.

20 Q. To the best of your knowledge, have any of the alternative models that had been put forward sought changes to the methodology to capture the concerns raised or are they just concerns raised without twigs to the method?

25 **THE COURT: JUDGE BORTHWICK**

So which method, your method?

MR MAW:

To the council, in terms of understanding where the difference between the method lies.

30 **EXAMINATION CONTINUES: MR MAW**

A. So there is one set of – or two sets of evidence that include specific set of recommended changes to the methodology. That's the – we call it the

Landpro method which is largely replicated by Ms Dicey, although with one or two differences. And I can run through the main differences if that's useful.

Q. I think that would be helpful.

5

THE COURT: JUDGE BORTHWICK

Yes.

EXAMINATION CONTINUES: MR MAW

Q. And if we have the document...

10

THE COURT: JUDGE BORTHWICK

Have you prepared something?

MR MAW:

No, I haven't. I've just –

15

THE COURT: JUDGE BORTHWICK

No, it's okay. we can go to our –

WITNESS:

I'm going to refer the Court to paragraph 30 of evidence in reply if that's...

20

THE COURT: JUDGE BORTHWICK

Should we also have in front of actually what Landpro is seeking?

MR MAW:

That's what I was looking for.

25

THE COURT: JUDGE BORTHWICK

Q. Okay, I just need to find that, rather than a brief of evidence. Are you able to talk to – and you may not have it in front of you but are you able to talk to Landpro relief and OWRAG relief?

30

A. I don't have it in front of me. I have the –

Q. We can get that for you.

A. – the seven points that I believe are different from schedule 10A.4.

Q. I just need to see it actually when looking at their relief, though.

A. Sure. Yeah.

5

MR MAW:

Ms Perkins' evidence, 5 February 2021.

THE COURT: JUDGE BORTHWICK

10 We should all have a copy of the (inaudible 11:44:20), which is an attachment to Perkins' evidence and attachment to Ms Davies' evidence.

EXAMINATION CONTINUES: MR MAW

1145

15 Q. Mr Wilson, do you have in front of you the version of the schedule with the marked up changes from Ms Perkins' evidence?

A. I do. So the first difference would be contained on, there's no page number but 10A4.1. Where on the second line you'll see the average actual maximum and the average has been removed, so for rate of take they're suggesting taking the highest rate of take at any point within the period analysed as opposed to the highest rate in each year average.

20 Q. And in your evidence in reply, you explained your reasoning for why you did not accept that was an appropriate amendment, can you just explain for the court your opinion in relation to that suggested change?

25 A. I don't that the changes is necessary, if you take the highest single figure then you're potentially picking up a one off data spike which is well above typical use. It's a more reasonable methodology to take the five highest points and average them and with rate of take you've got a very large data set to work from, means that in order to get their current allocation the applicant would only of had to of used up to their current allocation
30 once each year.

THE COURT: JUDGE BORTHWICK

Q. Say that again.

A. So in order to get their current allocation, if they've used their current rate of take allocation at one point each year then under this schedule 10A4 they're going to get their current allocation back.

Q. As opposed to?

5 A. I guess what I'm saying it that there's plenty of opportunity to get enough data points to get something that's representative and if they are generally using their current allocation then schedule 10A4 will give them their current allocation.

10 Q. That's if they're generally using it and it hasn't been a dry year or a dry series of years?

A. Yes but again even in a dry year they only have to have got to that rate of take once.

Q. Once, okay.

EXAMINATION CONTINUES: MR MAW

15 Q. If you can step through then to the next difference with reference to the Perkins, to Ms Perkins' schedule.

A. Yeah so it's probably then the introduction of a method for auditing the water metre data and there's steps there around data gaps which we should probably address first. So the, currently under Plan Change 7 we say that if data gaps are identified as being an issue then you go back to rule, is it 10A3.1.A, so we recognise that the data gaps can be a problem and will have an effect on the effectiveness on schedule 10A4 but don't necessarily spell out a methodology for filling those gaps whereas Landpro are recommending a methodology to fill the gaps.

25 Q. And when you read that suggested methodology, actually I'll go back a step, so that the position from the Council was to say insofar as there's a data gap there needs to be some further interpretation of those gaps done and therefore, the new proposed restricted discretionary activity pathway was the appropriate place for that consideration?

30 1150

A. Yes.

Q. Whereas the methodology that Ms Perkins is putting forward attempts to solve the data filling cap within the methodology itself?

A. Yes.

Q. Now, when you read the suggestions to how the data gaps are to be filled, do you have any concerns around whether the way in which the gaps will be filled can be done in an objective manner?

5 A. I do, yes. I have two concerns which I cover in my evidence in reply around filling data gaps. The first one is that identifying gaps in data isn't as easy as it sounds and you need on the ground knowledge to work out when something's gone wrong, so you can have gaps for a number of reasons. For example, there are water users in Otago who disconnect their meters over winter so that the pipes don't freeze and burst. You wouldn't want to fill that data gap. It is a data gap that is reflective of what actually happened. So you'd require – while the council's team can look at a set of data and go "oh I think that's a gap", there's then a step that would require information from the consent holder and again, I don't process resource consents but I'd assume documentary evidence that would say why there was a reason for that gap and that it was actually a gap. Then I have concerns over the method that's been suggested for filling those gaps. So Landpro recommend taking the level of data at the start of the gap, the level of take at the end of the gap, averaging them and drawing a straight line in between which might work if the gap was an hour or two but if you're talking about weeks or months then I don't think that's accurate.

15
20
25 Q. So that is perhaps a question of appropriateness as opposed to whether you could objectively ascertain an answer from filling the gap in that manner?

A. Yeah well I guess the objective – well the subjectiveness comes into – you start getting into discussion over whether a gap is legitimate or not and different people might make different calls on that.

THE COURT: JUDGE BORTHWICK

30 Q. What do you mean by "legitimate"?

A. So in the sense of this, I mean that there is a gap because of equipment failure, so water has actually been being taken but the meter hasn't recorded it. But you then get into issues of equipment failures happen

and that's fine but how – what steps have been made to resolve the issue? And there are certainly challenges that consent holders have in getting service providers to do that work, so it can take some time but you'd want to start making a call on, I think in my evidence-in-chief, I have
 5 someone with a five year data gap, for example, whether that's a reasonable data gap that you'd want to try and fill. And that's when you get into a subjective decision.

THE COURT: COMMISSIONER BUNTING

Q. So is that a question about “what is a data gap”, as opposed to “is it a
 10 data gap or is it something else”?

A. So there's the first bit which is “is it a data gap” as in, has something broken or is it just that while they normally take a lot of water in March, it was a wet March and so they didn't take water in March that year? So there's the process you'd go through to say “yes there's a data gap there”
 15 then there's the process you go through to say “do we want to fill that data gap” and then there's the “how do we fill it”.

Q. And so for an expert conference, and I don't know, there may be large agreement on some of these elements but for the expert conference, the three questions would be: “What is a data gap?” “What data gaps need
 20 to be filled?” “How should we fill the data gap?”

A. Yeah.

Q. Or “how should we fill” – that would be the sort of outputs I would expect to see?

A. Yes, yep.

25 Q. So and that's where the differences are also aligned with Landpro?

A. Yeah I think so for this one.

THE COURT: COMMISSIONER EDMONDS

1155

Q. So the question is how should we fill data gap, or is it *should* we fill the
 30 data gap and if so, how?

A. I think you can adopt a standard methodology for how you would do it but the first question for each gap would be should we fill it, and the question before that would be is it actually a gap?

Q. And that's where the disagreements are lying in relation to part of this?

5 A. Yes.

EXAMINATION CONTINUES: MR MAW

Q. The next topic that you raise in terms of differences is treatment of exceedences. If you could explain where some of the differences lie with respect to that topic, then that would assist.

10 A. Yeah, I can. So we're looking at paragraph 7.7 of the Landpro amended version. So the Council's notified version of schedule 10.A4 takes exceedances that are within the margin of error of the metre and rounds them down to the consented limit, and anything above the margin of error is removed. Landpro are suggesting... If I read the words: "Consider
15 whether the exceedance is justified by reviewing if these are because of faulty equipment, flooding or other legitimate issues."

Q. So would that require a subjective assessment at that point?

A. Yes. I'd also, if I can – while flooding, for example, might be a reason why you've exceeded your consent limit and a valid reason for it that you
20 wouldn't take any compliance action on, I'm not sure it's something that you should use to bump your consent limit up.

THE COURT: JUDGE BORTHWICK

Q. So what is the question, then? What question arises?

A. So the question I think is how exceedances should be treated.

25 Q. But the prior question is what is an exceedance.

A. I think an exceedance is clear from the data. You have a limit of how much you're allowed to take. If you're over that limit, it's an exceedance.

Q. And here are we just taking about rates of take or are we talking about volumes as well?

30 A. You – it can happen for rates and volumes.

Q. Rates and volumes.

A. It's much more likely to happen for rates.

Q. So we know what an exceedance is, and then the next question is – so what is an exceedance and you can answer that –

A. Yes.

5 Q. – but the next question is for an exceedance... I don't know, then what? What's your next question?

A. Well I think how should exceedances be treated. So the Council methodology is very simple: if they're over the margin of error, you remove them. You don't take them into account.

10 Q. And all of your methodology is under an RDA rule, isn't it, but Landpro is under a controlled activity rule. Is that how it goes? Where you've got a problem with data, you've amended the plan or are proposing amendments to this plan change to introduce new policy and a rule which is an RDA rule.

A. It's getting into the planning side of things –

15 Q. That's all right.

A. But I believe so.

Q. I think that's right, and then – but that's not – Landpro doesn't like that. Okay. How should exceedances be treated?

A. (no audible answer 11:59:20).

20 Q. Is an issue here that the Landpro method calls for judgement or subjectivity, yes, judgement?

A. Yes. So, exceedances are obvious to spot. They're a number above another number, but then they're calling for reviewing if these are because of faulty equipment, flooding or other legitimate issues. So you start getting into what is a legitimate issue, in order to be considered in calculating your limit. It's interesting that faulty equipment is listed there because faulty equipment can produce exceedances many times a consented limit, which aren't actually reflective of taking at all it's just the metre going haywire. And I, you know, my opinion is they shouldn't be included in a recalculation of a limit but there's a subjective element there in that you're going to have to have a conversation about it.

25

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1200

THE COURT: COMMISSIONER BUNTING

Q. And the significance is it could bring up the historic uses?

A. Correct, so schedule 10A4 with its current treatment of exceedances is a – that’s a backstop safeguard to guarantee that it doesn’t come up with a number more than your current allocation. If you start including exceedances you might come up with a number that’s more than your current allocation.

Q. Okay.

THE COURT: JUDGE BORTHWICK

10 Q. Okay so the question about how should the treatment of exceedances under the methodology seems to be at least between ORC and Landpro questions to do with whether there’s an objective response of a subjective response required?

A. Yes.

15 Q. Or both?

A. Yes.

Q. Okay.

EXAMINATION CONTINUES: MR MAW

20 Q. Does that topic in terms of treatment of exceedances capture the terminology that has been used in some of the evidence around legitimate overtaking and I wonder whether you could assist with what that phrase or how that phrase is being used?

A. So probably various different ways, so I think that the first element is if I call it rather actual overtaking, so some exceedances are reflective of when the water user has used more water than they were allowed to use and some exceedances are reflective of equipment malfunction, so some of them don’t reflect actual usage. So there’s actual and then there’s legitimate in what might we want to consider if we were taking some exceedances into account versus what shouldn’t we consider.

30 Q. So when you think about what might be a legitimate overtaking and I wonder whether we might put a practical example around that so a permit

that authorises a maximum rate of take or an instantaneous rate of take of 100 litres per second.

A. Yes.

5 Q. If the margin of error on the metre is plus or minus 10%, a take of say 105 litres per second would be considered to be a legitimate overtaking based on the margin of error?

A. So yes, it's close enough that the metre can be inaccurate so they might actually be taking at the rate of take so you'd round it down to 100.

10 Q. So the way that the Council methodology works that 105 litres per second in that example would rounded down to 100 litres per second?

A. Yes.

Q. And then just teasing that out a little further, if the rate of, if the take was above 110 litres per seconds so beyond the margin of area on the metre, that data point would be removed from the data set completely?

15 A. Yes.

Q. And again that's where there's a difference in terms of how that exceedance is being used in the Landpro methodology versus the Council?

20 A. Yeah so I think if memory serves what Landpro are arguing is that if the reason for the exceedance was deemed to be legitimate then you would keep that data point in but round it down to the 100.

1205

THE COURT: JUDGE BORTHWICK

25 Q. So your last comment is in relation to exigencies above 10 cent for water taken by – within so exigencies above a margin of error. Landpro the basic proposition is if legitimate, whatever that means, Landpro would round down whereas exigencies above the margin of error, the region takes out the data set and the differences between rounding it down and taking it out of data set, why is that important?

30 A. I think I've argued in my evidence in reply that generally speaking for rate of take, I don't think it will make much difference. I suspect that we use the same filtered data set for volume calculations so I suspect what Landpro are looking at is the later volume calculations so you are adding

a 100 litres for that. Hundred litres a second stays in for volume calculations as opposed to removing.

Q. And do you agree with them, if you leave it in the dataset, albeit rounded down, if you leave it in, that's important for calculating volume?

5 A. (no audible answer 12:06:23).

Q. Or is that a thing that you need to test?

A. I think that's a question for discussion.

Q. That's the question for discussion. Then that needs to be played as a question for discussion too because you could be having a big debate about nothing much at all or you might be having a big debate about something fairly significant. So what do you reckon that question would be? Is there any material difference in terms of either keeping it in rate of take or volumes should exigencies be rounded down but left in the data set? Is that broadly the question?

10

15 A. Yeah, that could be a starting point for the question.

Q. There will be better questions.

A. And the immediate answer will be that it really depends on the data set. Some of them have a lot of exigencies. Some of them have very few.

EXAMINATION CONTINUES: MR MAW

20 Q. This might be a question for Mr Leslie but I will see whether you can assist. Is the timing at which there is an exigence an important consideration as well? So in terms of when during the year it occurs?

A. Generally speaking, no, under schedule 10A.4 but it does depend on the data set so if you had a data set which had gaps for two Marchs and then an exigence for a third March and March was supposed to be biggest of taking then it might have an impact. So you've got five Marches to look at, two of them are empty, one of them is well above the limit so you take it off. You've only got two Marchs left to look at and if that's when take most of their water then timing could have an impact.

25

30 Q. What about in the context of, say a spike, think of a maximum, instantaneous rate of take in a spike on a metre occurring, for example, not in the irrigation season?

A. So again that would feed the discussion around whether it was reflective of actual taking or reflective of equipment failure. So generally when you're looking at these records, you can spot a pattern of what they normally do but just because they normally do it, doesn't mean they always do it. Could've been reflective of the pump breaking and going haywire in the middle of winter as opposed to the metre recording a false.

5

Q. The next topic that you move on to consider is the calculation of the rate of take.

A. Yes.

10

Q. If you can assist by highlighting the differences in the approach suggested again by Landpro and the council's methodology and your opinion on those differences.

A. I think we covered some of that. Landpro are recommending taking the actual maximum rate of take, so the highest single point of data across the period analysed. The council methodology takes the highest point in each year and averages it.

15

1210

Q. So that can be converted into a reasonably sort of clear question of: "Should the maximum rate of take used in any water year be used or should the maximum rate averaged across the water years be used?"

20

A. Yes.

Q. And just to tease out the differences between those two situations, because it may well be that you simply can't resolve which it should be. But analysing a dataset might help highlight the differences and outcomes from applying those two different approaches. In terms of the work that the witnesses could usefully do, would it be possible to apply to a dataset, a common dataset, those two different approaches to examine the differences in output?

25

A. Yes, absolutely. That could be done relatively easily. I think my caution and comment would be that there is no typical dataset. So we could do that on a dataset and it would demonstrate a certain result but a different applicant might come in with a different set of data who would get a different result. So how you choose that dataset would be the challenge.

30

Q. Again, it might be a question for Mr Leslie because he, I recall, had attempted to do some of that comparative analysis between the two methods using a common dataset between the Landpro expert and the council's dataset, so I might explore that a little further with him.

5 A. Okay.

Q. Anything else in relation to the rate of take?

A. No.

Q. So we then move to the calculation of daily volumes. So what are the differences there with respect to the Council schedule and the Landpro schedule?

10

A. So it follows the same thing. The council's schedule takes the average of the – takes the highest day in each year and then averages them. Landpro takes the highest day across the entire dataset with the additional filter that Landpro are recommending leaving in some of the exceedances which might push up that highest day.

15

Q. And this is what you were talking about before in terms of the effect of the instantaneous rate of take on the monthly and then presumably the annual averages?

A. Yes.

20

Q. Is there anything else in relation to the daily volumes in terms of differences or is it coming back to that key difference in terms of whether it's the highest or the maximum recorded or the average that we've talked about?

A. It's coming back to that key difference.

25

Q. We move then to the calculation of monthly volumes. Are you able to highlight the differences in relation to that calculation?

A. So again, same as daily volumes. Council recommends an average of the highest month in each year, Landpro recommends taking the highest month across the dataset.

30 **THE COURT: COMMISSIONER BUNTING**

Can I just interrupt, have you got the copy of the – Mr de Pelsemaecker's latest recommended amendments there?

MR MAW:

Yes the 19 February incorporating 4 March corrections?

THE COURT: COMMISSIONER BUNTING

Q. Yes?

5 A. I believe that I do, yes.

Q. So 10A.3.1 is controlled activity, resource consent required, have you got that?

A. Yep.

10 Q. If you come to 10A.3.1.1, say 4, he seems to – has he taken out the average maximum and replaced it with a limited set, or am I reading that incorrect?

A. I think that is rather than defining average maximum in the text, he's saying the limit as calculated in accordance with schedule 10A.4 and then schedule 10A.4 will tell you that it's the average maximum.

15 Q. Okay.

A. At ...

1215

Q. But you said the average maximum didn't you?

A. Yes it is, it is the average maximum.

20 Q. So why's he crossed it out do you think?

A. You'd need to ask him, I think it's possibly just simplifying it so that if any changes are made they only need to be made in the schedule as opposed to earlier in the text.

25 Q. Okay thank you. Yes I see the schedules worded slightly different, that's...

A. That may be the reason then, I'm –

Q. Sorry Mr Maw, thank you.

EXAMINATION CONTINUES: MR MAW

30 Q. Perhaps Mr de Pelsemaeker can assist with that when he's giving his evidence. We move then to the calculation of the annual volumes, does that follow the same pattern in terms of the differences?

- A. It does with the exception that I agree with Landpro's submission on annual volumes and have recommended that we adjust the schedule to look at the maximum annual volume as opposed to – I guess the difference is, when you're looking at annual volumes you can't take the average maximum it's either the maximum or the average the notified schedule was the average, but I'm now recommending we change that to the maximum.

THE COURT: JUDGE BORTHWICK

Q. Over any dataset period?

- 10 A. Yes so the highest year, yep.

EXAMINATION CONTINUES: MR MAW

Q. Can you perhaps just tease out some of the reasoning behind that?

- A. Yes, so you'll see the detail in Mr Leslie's evidence but effectively that in putting the methodology into practice counsel found that the average volume was being reduced significantly compared to what would be recommended under the current water plan and that wasn't the intent. So we recommended the change.

Q. And so again it's – that's just a refinement to the methodology to ensure that the outcome is being achieved?

- 20 A. Yes.

Q. Now the next topic that you address is the topic of the complexity of schedule 10A4, are you able to explain or to describe some of the differences which have arisen between the Council's version of the schedule and the schedule being pursued by other parties?

- 25 A. In terms of what Landpro have recommended, that would be more complex, not less.

Q. And when you think about complex, what do you, what do you mean there so what are some of the additional complexity being added in that you are concerned about, you may have already covered this territory?

- 30 A. Yeah so there are points where you have to make subjective decisions and then with data gaps for example if you decided that a gap should be filled and had a methodology for filling it, you would then have to do that

which is extra work on the part of the data analyst. And again I should probably add that, if we're talking about subjective versus objective, even with a methodology that's somewhere – it's another place where two different people could come up with two different numbers.

- 5 Q. So we've been through the topics in your evidence in relation to the differences in the method, now I'm going to come and ask you about the hydroelectricity issues you've addressed shortly but stepping back in terms of the issues that were worked through and having now looked at the marked up version in Ms Perkins' evidence again, are there any other
10 observations that you have in relation to the differences with a view to informing a question that might usefully be considered by the experts at the witness conferencing?

1220

- A. So I guess the other question that might usefully be considered is the
15 period of data to be analysed. I think – I've recommended a change and I think Landpro are in support of that change, but Mr McIndoe's expressed some concern about that period. So that would probably benefit from some conferencing.

- Q. And in terms of the Council's version of the schedule, can you just explain
20 your rationale for the date period that you have selected?

- A. Sure. So it comes down to the water metering regulations and when
consents of various sizes were required to have water metering installed. That is table 1 page 5 of my evidence-in-chief. In particular, with – so there are a number of consents where we've required metering before
25 those dates but that doesn't apply to deemed permits. Deemed permits will have metering requirements as of the regulations, rather than on the individual permits.

THE COURT: JUDGE BORTHWICK

- Q. Sorry, say that again?
30 A. So when a resource consent comes in, we might have taken a resource consent at five, at six litres a second that came in in 2014 and said "install metering now". So that individual consent had to have metering installed before the regulations but the deemed permits don't have that. They're

all metered under the regulations as opposed to an individual condition on their consent. And given that a large number of the applications we're talking about under PC7 are deemed permits, it's safer to rely on the regulations than individual conditions.

5 Q. And under the regulations, are they metered, or not?

A. It depends on the size of the take. So all takes at five litres per second or over need to be metered.

Q. Including deemed permits under the regulations?

A. Yes.

10 Q. Yes, okay.

A. The regulations apply to a: "Water permit that allows fresh water to be taken at a rate of five litres per second or more," is the wording from the regulations.

Q. So deemed permits will have been required –

15 A. Yes.

Q. – if they're taking more than five litres per second –

A. Yes.

Q. – to have a water meter installed –

A. Yes.

20 Q. – whereas all other permits, that's probably a condition imposed on a resource consent permit. Is that what you're saying?

A. It depends when the consent was issued.

Q. Yes.

A. So more recent consents will have it.

25 Q. Definitely.

A. Older consents –

Q. Won't.

A. – may not, yeah. And largely under PC7 we're dealing with older consents.

30 Q. Yes. Okay.

A. So coming back to Mr Maw's question, so I've based it off the dates in the regulations because that's when we're most likely to get complete dataset.

EXAMINATION CONTINUES: MR MAW

Q. So those are the dates by which every permit was required to have a meter, every permit about five litres per second?

5 A. Yeah. There's a – it's scales based on the size of the permit. So larger permits had to have them installed earlier and in fact for consents, or sorry, for permits between five and 10 litres, we won't quite get a full dataset but you still should get four years of data, because they were November 2016.

10 Q. In that context, does that lack of data for a year have any significant bearing on the output from the methodology?

A. Again it depends on the dataset. It's not ideal; having the full five years would be better but it comes back to if the use is consistent, then four years will get you their numbers.

15 Q. So that year just simply – it's not that it's fed in as a year of zero dragging down an average, it's just that water year is simply disregarded and any averaging over say four years instead of five?

A. Yes.

1225

20 Q. Any other observations in terms of differences or questions that might usefully be considered?

A. So it links in to the term of data we should use but the council's recommended looking at five years' worth of data and some other experts have said if you have a longer data set, you should look at the full data set so that's probably a question that could be discussed and then I don't
25 know if you've framed this into a question but there is the issue around data quality and again a number of experts have raised what should be done if the metre records aren't accurate but I'm not sure if anyone's suggested an alternative.

THE COURT: JUDGE BORTHWICK

30 Q. So that's not gaps in your data. That's something else?

A. Yeah, so there's a requirement that your metre needs to be accurate to five or 10 per cent but what happens if it's not or what happens if you have spikes for example that aren't exigencies. So you can get spikes

that go over the limit but if you get spikes that don't look typical, periods that don't look typical but are within the limits.

Q. And Landpro doesn't answer that with this methodology?

A. I don't believe so.

5 Q. So this isn't a data gap. This is something else.

A. Yes.

Q. It's quite a large something else, isn't it in this case? Is it something else which could also come under the heading, "Legitimate overtaking"?

10 A. I think that the problem with data quality is that if data gaps are tricky to identify then data quality issues are a lot harder so we've put some safeguards in to deal with exigencies but if you start going down the road of the metre in record that I've provided as per the regulations doesn't actually reflect what I did, what's your alternative evidence and how do you deal with that? I think could quickly become a very big question, yes.

15 Q. But is your understand that nobody has actually proposing to do something about that question?

A. I haven't seen that, no. It would be more that's been presented as a criticism of using water measuring data at all.

20 Q. So is there a question whether water measuring data should be used at all? That's being seriously pursued by any technical witness and any planner?

A. I'm not sure I recall Mr McIndoe's evidence to that level of detail. I know he prefers Aqualinc but I don't recall whether he goes to that level of suggestion.

25 **EXAMINATION CONTINUES: MR MAW**

Q. In your evidence in reply, the final topic that you addressed was hydroelectricity generation.

A. Yes.

30 Q. Are there any recommended changes to the schedule that have been put forward in relation to hydroelectricity generation in term of differences that could usefully be explored?

A. The only one that springs to mind and I'm not sure it's a discussion for the technical experts, was a suggestion that hydroelectricity be excluded from the method in the schedule.

Q. That's more of a planning issue than a technical conferencing issue.

5 A. Yes, I think so.

Q. Now, we've spent some time working through Ms Perkin's marked up changes. Those are the Landpro suggestions. I'm just cognisant that there may have been some further differences as between the OWRUG witness Ms Bright and Ms Perkins.

10 1230

A. So the – sorry Ms Bright or Ms Dicey?

Q. It might be Ms Dicey in terms of the tracked changes.

A. Yep, the difference that I can recall and I don't have Ms Dicey's evidence in front of me but –

15 **THE COURT: JUDGE BORTHWICK**

Q. We will give it to you because it's important that you see what she's writing.

WITNESS REFERRED TO MS DICEY'S EVIDENCE

A. So page 85 of Ms Dicey's evidence.

20 Q. Are you looking at the narrative text or the provisions that she's –

A. The provisions.

Q. Okay, all right. Page 85?

A. Yep so the last page.

Q. Okay.

25 A. So Ms Dicey in point 3 is recommending granting the lessor the historic annual volume or the volume identified by Aqualinc to meet demand in nine out of 10 seasons.

Q. I'll just re-read that. So you think she's recommending the lessor of A or B?

30 A. I think so.

Q. I think so, okay well I guess we can ask her that.

A. I agree the wording is a little –

Q. Yes it's not right, yes. Okay.

A. And so the – that step wasn't included in Ms Perkins' evidence, Ms Perkins was take the maximum historic annual volume and Ms Dicey's is take the maximum historic annual volume or Aqualinc, whichever is less.

5 Q. Right, I'm just going to make a note that this pertains to identify the rate and volume for policy. Here it's amending a provision of the proposed plan. And it's to take the lessor of the history of annual use or Aqualinc?

A. Yep. I should note that that step is similar to the Council's method under the current water plan.

10 1235

MR MAW:

Just looking at – let's say page 83, 82 and 83 of the methodology for auditing water meter data in Ms Dicey's evidence, it's not immediately apparent to me the differences between the council's schedule and the schedule as amended
15 by Ms Perkins, simply because it all appears to be new text, as in the differences aren't tracked in.

THE COURT: JUDGE BORTHWICK

This is the Dicey amendment, not Perkins?

MR MAW:

20 Yes, the Dicey, sorry. There might be some benefit in Mr Wilson taking some time over the lunch adjournment to work through some differences because it appears to me that there are some differences here that we might easily explore.

THE COURT: JUDGE BORTHWICK

25 Q. So one of the things that's not clear to me at all – I mean, I'm quite clear how Ms Dicey differs from the regional council. I'm not clear how Ms – not Ms Dicey, Ms Perkins differs, Landpro differs, I'm not clear whether in – whether how Ms Dicey differs from the regional council, is she recommending a wholly new method or is she recommending a method
30 which is essentially the same as Landpro but she's using different words

to describe the same thing? And I wasn't clear about that. It doesn't really matter where this – if it goes in the plan. That's a legal issue, actually, for the lawyers. But is it the same as Landpro with a bit added on at page 85 or is it actually quite different from Landpro and again, different from the RC?

A. So I can take another look over lunch. My initial reading of it was that it was the same as Landpro with a bit added on. But I can certainly take another look at that.

THE COURT: JUDGE BORTHWICK

10 Okay. I realise we're running into lunch time now. Did you have any other questions on this because that – for me, that's one of the big questions, isn't it?

MR MAW:

No, that's – yeah, that was the last set of exploration in terms of just teasing out the differences between what's been put forward.

15 **THE COURT: JUDGE BORTHWICK**

Q. And this might have been what Mr Winchester was getting at earlier, you know, one of the questions for us is that, you know, this is a method to implement – it's part of the methodology to implement objectives and rules – objectives and policies and so, does it matter which version of the policy or objective that you are going for in terms of coming to a resolution on this methodology? So in other words, you know, given that methodology's implementing something else, does that something else have to be sorted? And of course, that's what the Court was touching upon in its minute saying: Well what's the problem that we're working on here? Do we actually need planners in the room to get their heads around the scope of that problem or does it not matter that the – to the extent that there are differences to yourself and Ms Dicey perhaps, it doesn't really matter what the objective in policy is?

A. I think it does matter.

30 Q. It does matter?

A. Yes. Because I think that some of these recommended additions to the – or amendments will be in the context of other objections to the plan change and might be written to support those other objections. So you need to know what the method is trying to achieve.

5 THE COURT: JUDGE BORTHWICK

This is why we said “leave it” but we can see what your problems in cross-examination is. But we have thrashed this question around in the office, when should we (inaudible 12:39:05) the expert conferencing on the schedule? Both before we even issued directions, it was a matter that we gave a real hard look
 10 at, and then after we issued directions. But I can see the problems in cross-examining. Yes. So how are you going to approach that question? Does it matter? Intuitively it should matter but does it matter?

MR MAW:

I wonder whether as perhaps the first question that experts should be
 15 articulating what it is, the objective or the purpose or the methodology as they understand it because that may actually explain then the differences of position or opinion in relation to some of the questions I’ve worked through today.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yes and again, it goes to the question of: “What is the problem that we’re
 20 working on here, what is the outcome of this method?” Yes.

1240

A. Mr Wilson in his evidence repeated again this morning very clearly the purpose of the methodology from the council’s perspective, in terms of what the methodology was seeking to achieve, I don’t recall reading an
 25 alternative set of outcomes from other witnesses in terms of what methodology was trying to achieve. It’s not that there might not be differences. There may well be differences but they don’t appear to have been articulated clearly and directly in a way where we can see where the difference arises and again in cross-examination, that was something
 30 I was thinking I might usefully explore as a starting point, but I don’t see

any issue with having that as a starting question in terms of the conferencing.

5 Q. So are you thinking this in fact could be something that the technical folk could say if you're desired outcome is x this methodology, if it is y, this methodology?

A. Yes.

Q. Or in fact, x or y doesn't really matter, this is a recommended methodology.

A. Maybe it comes together.

10 Q. Yes.

A. I don't recall detecting or distilling from any of the evidence there was a difference in terms of wanting to achieve an objective under certain methodology but I might be wrong. There may be concerns or may be differences of understanding in terms of what the purpose of the schedule is and that just may provide the explanation for some of these differences.

15

Q. Okay, what is the purpose of the schedule and relative to that purpose, what are the outcomes, I guess we expect and again I'm not sure yet how Aqualinc fits into any of this. Well, no, I can see with the Dicey recommendations that there should be testing against or comparison against Aqualinc and pick the lowest of your schedule, or Aqualinc is the way to go. So that's also question whether that's – is it?

20

Q. The question is Aqualinc guideline is relevant for calculating all of the different categories, whether that's a test tool to compare against methodology, so – haven't explained it particularly well but stepping back, the council methodology doesn't rely on Aqualinc. Processes data and produces a result in relation to each of the different limits that is calculated. That's then an entry condition into the rule. The council consenting officer then has an opportunity to assess whether the amount of water which is applied for, even though it complies with the schedule is still a reasonable amount of water in light of the proposed uses and as I understand it, it's at that point that the Aqualinc guidelines are being used or they're a tool available to be used to say, "Well, okay, yes, we're applying for this much water. Is it actually appropriate to use that amount of water for what you're intending to use?" and that's picking up on one

25

30

of the matters of control in the rule so it's not being used at the same point in time as the methodology to calculate those rates of take. It's being used to test whether the rates of take being used are appropriate in light of the use. So to frame that up in terms of question 4, the experts for their conferencing, it may be a question of should the Aqualinc guidelines be referred to in the methodology and that conceptually I think is what Ms Dicey is seeking to catch in terms of the entry condition adding an additional overlay that the amount of water sought is reasonable in accordance with those guidelines.

5

10 Q. Ms Dicey's going further than that because that becomes self-selecting, doesn't it?

A. It does.

Q. So is that a question for technical people? I guess it depends on the purpose of the schedule and the outcomes expected relevant to objectives and policies.

15

A. I was going to put that to Ms Dicey as opposed to a technical expert. I think it's a drafting issue and how it's being used conceptually, not technically a technical issue.

Q. Yes, but it could be for the technical folk to talk about whether the Aqualinc guidelines should be referred to at all in the methodology.

20

A. And that just may assist with the Court's understanding

1245

A. Yes and that just may assist with the Court's understanding of those guidelines and what they can and perhaps what they can't do.

25

Q. Okay.

A. So subject to some further consideration of Ms Dicey's steps which Mr Wilson will consider over the lunch adjournment. I think we're well – we're past (inaudible 12:45:25) half past 12 –

Q. Yes we'll start again at 2, so –

30

A. We'll start again at 2 and pick back up –

Q. – you can have some lunch, Mr Wilson. I was doing some homework. Sorry about that.

THE COURT: COMMISSIONER BUNTING

Yes, in terms of the expert conferencing, one of the differences that seems to come through in the evidence relates to the way in which the water – assessments are made under the water plan and we don't know, you know, the
5 timeframe for that but presumably things will need to be assessed under the water plan and it's that process that the technical experts seem to have disagreements on as well, I don't know this is, I've stepped into a different area here.

THE COURT: JUDGE BORTHWICK

10 This could be getting into that brief to come, which is your regulatory (inaudible 12:46:10). Well what are they are going to be doing with these 500 applications?

MR MAW:

Yes. So at the moment, the consenting team is required to assess under the
15 operative water plan and Mr Leslie's evidence steps through how the Council has put together a methodology to provide some input for the consent teams consideration but through the lens of policy guidance so, in terms of the operative plan there isn't a schedule that explains this is how you should do these calculations, there's a, it's at a much higher level of abstract – abstract is
20 not the right word – it's at a much higher level in the policy in this method being created to respond to the policy and that's one of the gaps that Plan Change 7 is seeking to fill in terms of providing an objective methodology so that consent applicants know what is or what pops out of the calculation. Whereas at the moment there is a degree of uncertainty and some subjective input required to
25 do that calculation. Insofar as it's relevant to this proceeding, the challenges with that methodology are relevant to the question of whether the methodology proposed is actually objective and behaviour will be ascertained objectively each time it's run and again, Mr Leslie is perhaps the best place to explain some of those differences. And that's then relevant for those parties seeking so let's
30 just go back to the method that's currently being used under the water plan and somehow capture the essence of that in the schedule for plan change 7 which would have some complexities associated with inflicting all of those steps.

THE COURT: COMMISSIONER BUNTING TO MR MAW

Q. But my understanding was that there were differences between the experts and way the water plan approach is being undertaken and a lot of the evidence referred to that.

5 A. So insofar as there as differences in opinion about the current plan, I would submit they're not particularly relevant to consideration of the method and it's purpose under plan change 7, though those are arguments that will be had and presumably will continue to be had until such time as plan change 7 has made it's way through the process.

10 Q. So you're not suggesting that the experts should try and resolve those –

A. I'm not sure they can resolve the interpretation of the current water plan insofar as how that applies to applications that are currently in train.

Q. Okay.

A. A bridge too far.

15 **THE COURT: JUDGE BORTHWICK TO MR MAW**

Q. So we'll take the lunch adjournment, thinking by the end of the day though counsel can confer over their laptops about the series of questions, I think we've taken some detailed notes as to what those questions might be, and to propose an agenda for the expert conference. Now that may
20 change, I don't know, change again when Mr Leslie comes to the table but we will see, yes.

A. Yes I think that should be able to be achieved.

Q. Now there's, am I right in thinking it's Landpro witness Ms Perkins, Ms Dicey are the key contenders if you like with the ORC, there's nobody
25 else out there?

A. As I understand it at this point and other counsel might be able to assist

–

MS IRVING:

Mr Heller is the other witness that's talked about the mythology and the
30 implications of it for the energy water supplies and I note that neither Mr Leslie or Mr Wilson have discussed Mr Heller's evidence. It's a slightly different but

related topic I think to the conversation my friend was so far having was with Mr Wilson.

THE COURT: JUDGE BORTHWICK

And I think you're right and I think the agreement was that we deal with territorial
 5 authorities and hydrogenators separately so as not to confound and get bogged
 down with what are really a completely different set of issues so we'll continue
 to do that confidence that we've got time available for that and we'll be talking
 to Mr Dunlop when we can reach him as to when he will be available so I'm also
 expecting, so I'm expecting the three parties will have technical witnesses at
 10 that conference, Landpro, OWRUG, your client and ORC, will have experts,
 check your availability with your experts and we'll be in touch with you about
 TAs and hydro at a later point in time.

1250

MR WELSH:

15 Afternoon your Honour. In respect of hydro I just wanted to clarify a point that
 Mr Maw put to Mr Wilson. You will recall in Mr Mitchell's evidence he actually
 raises a number of issues with the schedule that aren't planning related they're
 technical issues and so I just thought I should clarify that that, because
 Ms Styles, the planner relies on Mr Mitchell in respect of his technical advice so
 20 he does raise a number of technical issues that haven't been addressed by
 Mr Wilson, Mr Leslie or Mr Henderson. Mr Wilson's evidence only addresses
 outages and a discussion around what is a non-consumptive take.

THE COURT: JUDGE BORTHWICK

Q. I will have to re-read what Mr Mitchell says but are those issues that will
 25 only arise for hydroelectricity generators or are they just general issues
 actually as to drafting?

A. I think they're, well if the schedule is applied to hydro they raise problems
 for hydro –

Q. But are they particular issues for hydro that would not arise for territorial
 30 authorities or I don't know, irrigators?

A. They could arise for territorial authorities –

Q. They could arise, okay.

A. – for example one of the issues just not in order of importance but unlike irrigation, hydro takes water at its maximum consented rate during the wetter months where irrigation doesn't do that. Now that might also imply to the territorial authority in terms of water supply as well, may not but it – so it's not purely a hydro related concern that he raises but they are matters that demonstrate in his opinion why the schedule should apply to hydro. But I just thought I should clarify that Trustpower's position isn't purely planning.

10 Q. No, do you want to have an opportunity to ask whether these are issues that – to explore with this witness whether or not the schedule, the next conference can be confined to matters of interest to the primary sector with hydro and TAs to be dealt with separately or – how do you want to go with this? –

15 A. Well that's –

Q. I just want to know if Mr Mitchell needs to be in the room.

A. – why I suggested to Mr Maw, sorry Ma'am. That's why I suggested to Mr Maw that hydro and the TAs be moved up the order because if there is some appetite from the parties and the experts to exempt hydro for example from the schedule then the experts needn't get into or Trustpower's experts need to get into the finer details around the schedule if they are exempted from that. So that's why I suggested that earlier –

Q. Did not need to get into it.

25 A. Yes.

Q. They don't need to get into the schedule if they're not –

A. If they're not part of it?

Q. Yes, okay.

A. If they are part of it and at the moment the RLCs position is a little bit agnostic or with hydro then Mr Mitchell does need to participate throughout given the concerns he's raised.

Q. Well you two can talk over lunch to see how you want to resolve that.

A. I just thought I should raise it, Ma'am.

Q. No I understand what the issue is.

A. Because it's not a correct characterisation that it's just planning related.

Q. Okay, thank you.

COURT ADJOURNS: 12.54 PM

5

COURT RESUMES: 2.06 PM

EXAMINATION CONTINUES: MR MAW

Q. Good afternoon, we'll pick up where we've left off, Mr Wilson. You've had a chance to cruise over the lunch break the recommendations from Ms Dicey in relation to the proposed methodology. Are you able to highlight to the court any differences between the methodology that she proposes and methodology put forward by Ms Perkins and/or the council?

A. Yes, I can. I found three differences either than the annual volume which we've already canvassed. The first is a slight difference in the process for dealing with margin of error and Ms Dicey says this will be specified on your consent, all latest verification if you can't find the specified anywhere use five per cent when the metre is located on the pipe take and –

THE COURT: JUDGE BORTHWICK

Q. Slow down.

A. Sorry, page 83.

Q. Page what?

A. 83, footnote 39.

Q. It's a footnote.

A. Yes.

Q. Okay so in the footnote 39.

EXAMINATION CONTINUES: MR MAW

A. I don't think it's particularly material difference. It probably more closely matches the notified version of plan change 7 but we've suggested an

amendment to simply discussions around the margin of error which is more close to what Landpro has suggested, which is just five per cent for pipe take and 10 per cent for open channel.

5 Q. Do those margins of error reflect the water metering regulations and the margins of error?

A. Yes, they do.

10 Q. The second one is that Ms Dicey doesn't specifically discuss what to do when there's no written limit. So deem permits, for example, will have a limit for rate of take but most of them don't have volume limits. So schedule 10A.4 specifies what to treat as the volume limit when there is no volume limit defined on the consent and I think Landpro matches that.

THE COURT: JUDGE BORTHWICK

Q. Landpro matches?

A. Matches the counsel's schedule 10A.4.

15 Q. Auckland Landpro match in terms of what to happen if no volume limit and that can be anything? Daily, monthly, annual?

A. Yeah, it's a different steps for each but it can be any of them. I believe Landpro do.

Q. If you could just take me to where Landpro says that.

20 A. So there's no page numbers but in their schedule 10A.42.2.

Q. I've got 10A.4.2?

A. 10A.4.2 then .2 below that.

Q. Yes. Okay.

A. And over the page, 10A.4.3.1 and over the page again, 10A.4.4.1.

25 Q. Okay. Any other differences?

A. So the only other difference and this one probably is more material is that Ms Dicey doesn't include discussion for a daily limit where Landpro and the council both do.

Q. So the daily limits are omitted completely?

30 A. Completely.

Q. Completely, yes, okay. Alright. Do you want to tease out what the differences might be in terms of those omissions?

EXAMINATION CONTINUES: MR MAW

Q. Yes, I wonder whether we might work through each of those and would be interested in your opinion as to the materiality of those differences.

A. Sure.

5 Q. So starting with the first identified difference.

A. Margin of error.

Q. Yes.

A. I don't think that's materially different. It's very likely to end up at the same place of five per cent.

10 **THE COURT: JUDGE BORTHWICK**

Q. Sorry, which is this? I didn't catch that.

A. Margin of error.

Q. The margin of error so that's your footnote 39?

A. Yes.

15 Q. Okay. Do we know why in Ms Dicey's evidence that's been omitted? Or that there is a difference there or do we not know?

A. I don't know. It does more closely match the council's initial drafting which at a second read through stood to be improved hence our recommendations.

20 Q. Okay. So there's a question here whether the footnote 39 in Ms Dicey's proposed method is a material change or not, probably needs to be discussed.

EXAMINATION CONTINUES: MR MAW

Q. So the second identified difference?

25 A. I think that's more material cause you start getting in to, say step 4, if any daily volume measurement exceeds the authorised daily volume constraint on the existing consent cap that daily volume – sorry I don't have – that quite follows but if you don't define what the limit is when there's no limit expressed then I'd assume you're only using if there's a
30 limit expressed?

THE COURT: JUDGE BORTHWICK

Q. This is step 4H?

A. It applies to step 4, step 5 and step 6.

EXAMINATION CONTINUES: MR MAW

5 Q. So if you were to turn that into a question that you might usefully explore in conferencing, how would you frame that question?

A. I guess it would be how should the method deal with authorised limits where none has been set on the document or permit?

Q. That's the document or permit being replaced.

10 A. Being replaced, yes.

THE COURT: JUDGE BORTHWICK

Q. When you say authorised limits, so this is the rate of take and volumes, you're actually talking about both or what do you mean authorised limits?

15 A. I haven't seen a water take without a rate of take limit on it. It generally applies to volumes.

Q. So authorised limits (volumes where non specified on a permit)?

20 A. Yeah, your traditional deem permit will be for a number of heads of water which we can translate into litres per second but it doesn't include volume limits so we treat it as you can take it 24 hours a day, seven days a week, 52 weeks a year, in terms of calculating a limit.

Q. And you say this is missing. Why? What are you pointing to or what can't you see, for example, you can see in your own or you can see in Landpro?

25 A. So there are steps in Landpros and there are steps in my own that define what to do when there's no limit in the document and I can't see a matching step in Ms Dicey's.

1415

Q. I see, yes, right. It's the absence of the "what to do" step, okay. So – because if you haven't got those – that "how to fill in the gap" if you like, for the volume, then how do you implement this method?

30 A. Yeah, how do you work out what's in exceedance if you haven't defined what the limit is?

Q. Yeah, and for many deemed permits, this method is not going to be workable, is I think what your evidence is, it's just simply not going to work because for many deemed permits, they won't have those volumes?

A. Correct.

5 Q. Correct?

A. Yes.

Q. So it falls over at that stage?

A. Yes.

Q. And maybe it was intended to or maybe it wasn't. Yep, okay, all right.

10 **CROSS-EXAMINATION CONTINUES: MR MAW**

Q. And then the third identified difference?

A. So that is that I don't see a methodology for a daily volume limit and that's material simply in the – under Ms Dicey's method, you wouldn't have a daily volume limit.

15 **THE COURT: JUDGE BORTHWICK**

Q. And that's not step 4, because I'm obviously missing something here?

A. Well that's a good point. No, step 4 filters the dataset for daily volumes but then if you go to 15.85, step 1, it says: "From the last preceding five years of audited water metering data, determine the following:
20 maximum rate of take, monthly volume and annual volume."

Q. I see, yeah, okay so that's where your dailies are missing is actually in your methodologies under 15.85.

A. Yeah so the steps 1, 2, 3, 4 and 5 are about filtering the data and then 15.85 is setting the limits.

25 Q. And so the question – can you reframe that again for the record or pose the question for the record, I don't mind who does it but what's the question about daily limits, should there be a daily limit?

A. Yeah I don't know, if we did frame one, I think it would be: "Should there be a daily limit?"

30 Q. Yeah.

A. And I think if you go slightly wider, Mr McIndoe probably raised whether there should be a monthly limit, as well, from memory.

THE COURT: JUDGE BORTHWICK TO MR PAGE

- Q. Yeah, and so that's, you know, one of the – it's troubling myself anyway, speaking for myself, is that Mr McIndoe's evidence is – his recommendations are not necessarily picked up by Ms Dicey, so
- 5 Ms Dicey does have a monthly limit, Mr McIndoe might very well have a different opinion about that. Yeah. Would that be fair? That'd be fair. Mr Page, is that fair? This is the time, really, to speak as well in terms of: have we actually understood the differences? It's not the time to keep quiet if you know that either the witness or the Court has not correctly
- 10 understood what the differences are between, you know, Landpro, OWRUG and ORC?
- A. Yes, we've been paying careful attention to the answers that you're getting and we're with the witness so far on what the differences are –
- Q. So you agree with the witness as to what those differences are, yeah?
- 15 A. Yeah well the matter that you were just addressing about whether Ms Dicey's method has a daily limit, my recollection is no it – no she doesn't because she doesn't see the need for one.
- Q. Okay, so these are not drafting mishaps, this is intentional?
- 1420
- 20 Q. Yes.
- A. Yes. And I understand – to assist about why that is, is the way that the water monitoring regulations work are effectively a daily limit anyway. Because although takes – the permits are expressed as instantaneous takes, ie, litres per second, that's not that the monitoring regulations
- 25 monitors. It monitors daily takes. So if you've got an instantaneous – so if you've got a daily record from the regulations, that's how the instantaneous take is back-calculated. So –
- Q. So what would be the question coming out of that? Well, is it sufficient to say should there be a daily limit?
- 30 A. Yes, well that's an appropriate question, or is any purpose served by a daily limit is another way of expressing the same problem.
- Q. What is the purpose and should there be one?

A. Yes. It was my understanding of the regulations in Ms Dicey's evidence is that the combination of an instantaneous take in the water monitoring regulations effectively gives you a daily limit by default.

5 Q. Mmm, and is it an issue, and I don't know whether it is: what is the purpose of a monthly limit and should there be one? Because here she seems to have a monthly limit.

A. Yes.

Q. Yes.

A. Well that's a fair question because –

10 Q. Well I don't know, because in that sense her evidence might not align with Mr McIndoe's.

A. Yes.

Q. And she may actually have a good reason not to pick up on everything that he says but to go in a slightly different direction.

15 A. Yes. No, your Honour's right about that and –

Q. Yes, so what's the question? Where is your case going on the monthly? That there should be a monthly and this is the methodology?

A. Yes. Well, Ms Dicey's evidence is that there should be monthly limits, and I know that Mr McIndoe has a different view. So to resolve that, the question will need to be posed for them to consider and report back on.

20

Q. Well I don't know about that. Is Mr McIndoe going to be in this expert conference? Is this even an issue if that's what your case is?

A. Yeah. Ms Irving should answer that, I think.

MS IRVING:

25 I think that the difference – or Mr McIndoe's evidences are really around the efficiency measure, and what role that may or may not play in the schedule. So to that extent I think yes, Mr McIndoe needs to be involved in the discussion of methodology and whether or not – where efficiency sits in that. So, he deals with how does the schedule stack up against the efficiency criteria and I

30 suppose the question that I recall Mr Maw asking of Mr Wilson earlier was how – or the operation of the schedule as a gateway with a matter of discretion associated with efficiency, or whether the schedule itself tackles the efficiency

question. And in that sense, Mr McIndoe has provided evidence on the efficiency question. I think he would want me to participate in the conferencing.

THE COURT: JUDGE BORTHWICK TO MS IRVING

5 Q. Yes and to be fair, Ms Dicey's actually saying the methodology should tackle the efficiency question –

A. Yes.

Q. – because that's what she says at page 85.

A. Yes.

10 Q. The question is the role of Mr McIndoe in this expert conference. Has he actually got a role to play on that as beyond the Aqualinc methodology, that is, matters to do with this – the schedule methodology, and I don't know.

15 A. Yes. I mean, I think that he does, because he also looks at how the period of time that you select for the monitoring data may influence the outcome of those kinds of issues.

Q. Yes, yes, he does. And so the question for the monthlies though, because here Ms Dicey's evidence is clear, that there should be a monthly limit –

A. Yes.

20 Q. – he has a different view and I've noted that.

A. Yes.

Q. He didn't know where it went because Ms Dicey is – you know, the case for your client is that there should be monthly limits.

A. Yes.

25 Q. So do we have to spend time asking ourselves whether there should be monthly limits?

30 A. Well I think for the purposes of OWRUG's case, no. Mr McIndoe of course appears as an expert and expresses his opinion on that point. So, he might just say well look I don't think you need one and people shrug their shoulders and that's it.

Q. Well, that's good but what's the relevance to your case?

A. Well, I'm saying I –

Q. It's not relevant.

A. – no, not from our point of view, no.

Q. Okay but to be clear, I now need to now have you on the same page as everybody else. Has this witness articulated what are the principal differences between OWRUG and ORC, and I guess Landpro as well,
5 and has this witness posed generally the questions that need to be asked and answered in an expert conference? Your answer to both questions?

1425

A. Yes, I think – yes they have with respect to the irrigation issues. I think I've raised before lunch that there hasn't yet been a conversation about
10 the implications of the scheduled method for those other water uses and I think particularly for territorial authorities, there's still some work to be done on those question but – or to bear in mind that we need to look at the implications of each of those steps for the alternative water uses that the schedule will apply to, and whether there is a different step required
15 where we're dealing with other water uses.

Q. So to be clear, what are the other water uses besides from hydroelectricity and territorial authority community based water?

A. I'm not aware of any.

Q. You're not aware.

20 A. I think the only other one was snowmaking.

Q. Snowmaking.

A. It's just that I don't have clients that are interested in that topic.

Q. Alright and there's nothing else that I should about before referring this to expert conferencing?

25 A. Not that I know of.

Q. Okay. Alright. Thank you.

MR MAW:

30 That perhaps is a convenient to consider whether issues raised by the hydroelectricity generators and the community groups and potentially the snowmaking should occur within the caucusing on the questions we've discussed today as part of that discussion. I've been reflecting a little on that over the lunch break and formed a view it might be more appropriate to see where the schedule might get to in terms of its relevance to the primary industry

parties as a first step and then the question will be does that schedule then work for those other uses in light of those changes and if not, there may be some further adjustments or changes to the schedule could occur in a way that doesn't upset what's being breached in terms of primary industry that I rather
5 suspect it may complicate matters by introducing those experts in the first stage of conferencing. So I had in mind that we would have a first conference in terms of the primary sector interests and then as a second stage depending on where they reach, it may then be appropriate to ask the question now does the schedule work for the community takes and for the hydroelectricity generation?

10 **THE COURT: JUDGE BORTHWICK**

And insofar as that, the results of that primary sector conference doesn't need to come to court, if you like as soon as it's done it can be held on a file whilst Mr Dunlop then undertakes expert conferencing for the other two or three
15 interest groups and then perhaps where the final overview as to where each of those four interest groups get to. We don't need to see. You've got time to make adjustments as you might need to make adjustments in terms of those conference outcomes. How does that sound? Would that address your...

MS IRVING:

20 Yes.

THE COURT: JUDGE BORTHWICK

And also Mr Welsh behind you. None of this is perfect, Mr Welsh.

MR WELSH:

25 That was going to be my submission next Friday, Ma'am. Saved me a trip back. I think what Mr Muller said has some attraction because whilst Mr Mitchell does cover matters that primary industry people also cover in the schedule, he does, of course we were talking before lunch, come to that from a perspective of hydro so as long as there's an opportunity, if one needs to, to caucus, then I'm happy
30 if it is split and they come in later. I don't think it's efficient for our witnesses to be sitting there while they're talking about irrigation for a day or two, or three or four.

THE COURT: JUDGE BORTHWICK

All right. No, that's fine, that sounds good. We'll make that referral. Mr Dunlop is available. So when are your witnesses available?

5

MR MAW:

I understand they're available over the next couple of weeks so...

THE COURT: JUDGE BORTHWICK

So are we. Ms Irving, when are your witnesses available?

10

MS IRVING:

I need to drag out a large spreadsheet to remind myself. I've got a very colourful one that I'm working off but I can do that. They were mostly available for these three weeks so I expect that.

15 **THE COURT: JUDGE BORTHWICK**

Okay. Good. Who else do I need to ask? Ms Perkins is not here.

MR REID:

Dr Davoren as well.

20 **THE COURT: JUDGE BORTHWICK**

And Dr Davoren. Can you check with Dr Davoren?

MR REID:

He's widely available in the next two weeks, yes.

25 **THE COURT: JUDGE BORTHWICK**

He is available?

MR REID:

Yes.

THE COURT: JUDGE BORTHWICK

Good and you will let me know about your witnesses – no, they may or may not be required.

5 **MR WELSH:**

Sorry, it's hard to work out whether you were talking to Ms Irving or myself.

1430

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. I know.

10 A. Look, I had put to my witnesses that they had to keep that entire block clear, which did cause them some issues. So we will work around, Ma'am, what the Court requires.

Q. All right, okay so we'll make that reference and – we'll make that referral. We are available and we'll quickly convene that at the location which is
15 convenient. Is it Otago or is it Christchurch? Dr Davoren is in Christchurch I think.

A. Yes we will –

Q. Ian McIndoe's in Christchurch.

A. I wonder whether we might just confer over the afternoon tea break in
20 terms of venue and it's probably fairly evenly split.

Q. It probably is, yes.

A. And I should probably also check with Mr Wilson as to his availability because I recall something in the back of my mind about a parallel project that was being worked on but we'll sort that out between –

25 Q. You'll sort that out.

A. Yes.

Q. Let's get on to this as soon as we, as soon as we are able to, the
30 constraint won't be the Court's and confer and file at 9 am this morning so in other words do it overnight, the questions for the agenda but it sounds like the questions that we have discussed are indeed the questions which are supported by all counsel who are going to participating on the primary sector case, yes.

A. Okay, we'll have those questions circulated in a joint memorandum to file first thing tomorrow?

Q. Okay, perfect and you need to consult, just put it through the lens of your experts as well so, it does sound like they've got the ball parameters but just make sure.

5

A. Yes if there's another question that needs to be added –

Q. Yes or a more nuanced question that has been posed, yes so we've got to make sure the experts are on board, good, all right.

A. The final topic that I was going to explore with Mr Wilson was just his comments in relation to the hydroelectricity generators because I know he's picked up on that topic in his reply and I invite Mr Wilson just to address or provide any observations in terms of the relevance of the schedule to the hydroelectricity generators, such that it might inform that second tranche of the conferencing.

10

15 **EXAMINATION CONTINUES: MR MAW**

A. Sure, this is paragraph 56 to 59 of my evidence in reply. I guess the main point I make there is that the schedule is designed to reflect what users are actually doing. If I can recall from Mr Heller's evidence the issue is that for hydroelectricity was that that doesn't necessarily reflect what they might want to do in future given wetter years and that's, that's a fair comment to make, we look at five years' worth of data and the rain fall in that data is what it is and it will reflect what hydroelectricity generators did in those five years.

20

Q. So the question of the date range insofar as it might apply to hydroelectricity generators might be a topic a question on which is conferencing may be predicated?

25

A. It might be and I guess one of the discussions might be what other data they have available.

Q. In terms then of advancing the questions for that second tranche of conferencing I respectfully suggest that counsel could confer on the questions for that as well once we reach that point in time.

30

THE COURT: JUDGE BORTHWICK

Yes, so that doesn't have to be at 9 am tomorrow morning, irrigations going to be big enough but you should confer with your experts on the topic of hydro, snow making and community, yes.

5 EXAMINATION CONTINUES: MR MAW

Q. So that was all I was proposing to do by way of leading the witness through, understanding the differences, there's one other matter that I do wish to cover with the witness and have him produce a further document in answer to one of the Court's questions yesterday as to the duration
10 being sought on consent applications and there is some information about that and then it's captured in a report that I'll hand up and have Mr Wilson produce and then speak to. Do you recognise this document, Mr Wilson?

1435

A. I do.

15 Q. Can you describe it for the Court, please?

A. It's an updated copy of our deemed permit status report that's sent to MFE on a weekly basis and it's a copy that I ran at about 8 o'clock last night.

Q. Do you now produce that as exhibit Council 1?

20 THE COURT: JUDGE BORTHWICK

Q. Okay, so you ran it off at 8 o'clock last night and it's a copy of what, sorry?

A. A deemed permit status report that's sent to MFE on a weekly basis. So you had an earlier copy of it.

Q. On a weekly basis? And this is just a computer generated report, is it?

25 A. Yes.

THE COURT: COMMISSIONER EDMONDS

Q. So it should have yesterday's date on it?

A. Yes.

THE COURT: JUDGE BORTHWICK

Any objections, counsel, to that coming in? No objections, okay, so exhibit ORC 1 are the deemed permit status as of the 8th of February 2021.

EXHIBIT ORC 1 PRODUCED BY CONSENT – DEEMED PERMIT STATUS 8

5 **MARCH 2021**

EXAMINATION CONTINUES: MR MAW

Q. Now, there appears to be some additional information in that report dealing with consent duration compared to the previous iterations, can you step through that further information that is captured on the front
10 page?

A. In terms of the changes?

Q. In terms of the terms for which consents have been sought.

A. So probably about halfway down the page there's a note that says a further 124 deemed permits currently have applications. Previously that
15 was 104. The number who have applied for terms of six years or less has gone from one to six. You still have zero in the six to 15 camp. The consents with a term of more than 15 years has gone from 38 to 57 and consents with no expiry listed has gone down from 29 to 19.

Q. And in terms of those consents, 57 of them with a term of more than 15
20 years, is there some further work being undertaken to better understand the precise detail as to the durations being sought?

A. Yes. So, Mr Leslie will have some further numbers on either the exact duration being sought or putting them into some more specific buckets. He also has – there was a specific question yesterday around numbers
25 since PC7 had been notified and he will have those. This is only looking at deemed permits and includes application from before the notification of PC7.

THE COURT: JUDGE BORTHWICK

Counsel, do you have any questions for Mr Wilson? No questions.

CROSS-EXAMINATION: MR WELSH

Q. I just had a point of clarification, Ma'am, for Mr Wilson around the ORC exhibit 1, Mr Wilson, Trustpower holds over 100 deemed permits and is seeking replacement consents for only four of those, how does your table or your document deal with those other hundred which Trustpower will let lapse?

A. So they are included in all the totals. They'd be included in the current 332 at the top and in all the totals going down. So there are currently 188 deemed permits with no application lodged would include the Trustpower numbers.

Q. So if that's the case, the current number which is currently shown as 332 in reality maybe something more like 230?

1440

A. In terms of what needs to be replaced, yes, but we're reporting on the current position in the consent database and those are current deemed permits which, while I'm aware of that intention from Trustpower, theoretically could have an application come in.

Q. Yes, because notice has been given to the ORC. You're aware that those permits would be let lapse?

A. All right.

Q. Thank you Ma'am, I just thought it was important to clarify that because that's quite a significant number of deemed permits that no witness has actually addressed today that are on the books but are actually going to lapse.

25 **THE COURT: COMMISSIONER EDMONDS**

Sorry, what number?

MR WELSH:

Sorry Commissioner, my understanding is Trustpower has about 107 but let's just say over 100 and is seeking replacement consents in respect of four races which constitutes about seven deemed permits for four races and therefore the remaining circa 100 deemed permits held by Trustpower will be let lapse from 1 October.

CROSS-EXAMINATION: MR ANDERSON

- 5 Q. I've got a couple of questions, in your summary of evidence from this morning, in paragraph 6 you refer to the application of schedule 10A4 as resulting in significant reduction in the paper allocation currently assigned to deemed permit and water permit holders?
- A. Yes.
- Q. With allocation more closely reflecting actual water usage?
- A. Yes.
- 10 Q. Now, in your methodology, you have used in the situation of deemed permits which only have an instantaneous take limit, you've applied those as being taken at that rate 24/7.
- A. To work out their limits? Yes, paper allocation.
- Q. Now, that's not an accurate reflection of what will happen in reality, is it?
- A. No.
- 15 Q. So if you have – the deemed permit was used for irrigation, it would only in fact be a small fraction of the 24/7 authorised usage?
- A. Certainly possible, yeah.
- Q. And so in that sense in relation to the deemed permits, because in your evidence you say that most of the deemed permits only have an instantaneous limit on them, they don't have that?
- 20 A. Yes.
- Q. So that would – if you're seeking to reduce the paper allocation for the deemed permits, isn't that a pretty big gap in the evaluation of that? Because there would still be a paper allocation for all those permits, it's not actually going to be used?
- 25 A. Well, I think that's what I specify in my evidence summary in paragraph 6 and certainly in my evidence in chief where the paper allocation of those deemed permits is significantly higher than what most of those deemed permits use and so using schedule 10A4, it will – they will get a number which is closer to what they actually use which potentially could be quite far from their paper allocation.
- 30 Q. Yes, so the paper allocation is still potentially much less than the actual usual. Sorry, the paper allocation is potentially much more than the actual usage?

A. Currently.

Q. Wouldn't a better way of going about doing it being work out what the average usage is actually going to be and then apply that through schedule 10A4 rather than the instantaneous maximum applied 24/7?

5 THE COURT: JUDGE BORTHWICK

Sorry, I'm not following this. So the goal of this schedule is to reduce the paper allocation?

MR ANDERSON:

Correct.

10 THE COURT: JUDGE BORTHWICK

And your proposition that you put earlier is that the paper allocation was not reduced in what circumstance? Where there's no daily, monthly or annual volume?

MR ANDERSON:

15 Where there's only an instantaneous volume, yes.

THE COURT: JUDGE BORTHWICK

Q. So the question therefore is what is to happen where there is no daily, monthly or annual volume and isn't there a method in the schedule for that? What's to happen if there's not one on it?

20 A. Yes, there is.

Q. There is one?

MR ANDERSON:

And the method is you assume it 24/7?

THE COURT: JUDGE BORTHWICK

25 I see what you're getting at.

MR WILSON:

Yes, because legally that's what they can do.

CROSS-EXAMINATION CONTINUES: MR ANDERSON

Q. So if the deemed permit was used for irrigation and let me know if I'm stepping outside your area of expertise, if the deemed permit was used for irrigation, would it be possible to work out what a proportion of that paper allocation would be?

5

A. I think there'd be a number of complicating factors in there, for example, where the deemed permit's feeding a water race or whether it's being pumped straight out of a river in a pipe take. We can work out how much on average people are using but that it's not quite what schedule 10A4 does but effectively schedule 10A4 is a method to work out how much water they're using.

10

Q. But it's not if it's based on an assumption which says that these takes are being used 24/7 when the reality is that they're not.

A. Well that's only the method used for excluding data so it's saying if they have taken more than they could have taken if they were pumping for 24/7 then exclude the data otherwise it's legitimate taking and consider it in your calculation of how much they're using.

15

Q. The problem is you're not eliminating the paper allocation because the paper allocation is still there. If you're working on an assumption of 24/7 use, you haven't removed the paper allocation.

20

A. That 24/7 use is only used for eliminating data. To be clear, we're only seeking to remove the paper allocation if it's not being used. So if someone is using their paper allocation then they would get their paper allocation back through the methodology.

25

Q. But the point you make in your evidence is that the deemed permits don't use the instantaneous take all the time.

A. In most cases there are 300 plus deemed permits and I haven't delved through the records through all of them.

THE COURT: JUDGE BORTHWICK

30 Perhaps a better way to ask your questions is to refer to the witness to the daily volume limit. The methodology for calculating the daily volume limit which is under 10A.4.2, in particular step 1 which is the methodology that is to apply, as I understand it to a deemed permit where there is no monthly and then to

explore whether your understanding about 24 hour seven days a week actually comes under that methodology or does it come under some other process or some other step?

CROSS-EXAMINATION CONTINUES: MR ANDERSON

- 5 Q. So in paragraph 40 of his evidence in chief – if you go to your evidence in chief in paragraph 40, in paragraphs 40 and 41 you note that: “while deemed permits have a rate of take, most do not have any volume limits. When calculating existing volume limits, the assumption is made that water can be taken 24 hours a day, seven days a week.”
- 10 A. Yes.
- Q. And then you go on to say: “in practice, most deemed permits do not take water this often. Their actual water use is much lower than their theoretical on paper allocation.”
- A. Yes.
- 15 Q. So what – if we are to apply that then your desired outcome of removing the paper allocation doesn’t work with respect to the deemed permits that only have a rate of take limit but not other limits?
- A. It does because they will through schedule 10A4, the limit on the replacement consent will be what they’ve actually used which is different
- 20 from the limit I’m calculating as the maximum limit on the deemed permit.
- Q. Sorry, you’ll have to go through that.
- A. So schedule 10A4 steps through a methodology which says: “your new limit will be what you’ve actually used.”
- Q. Yes.
- 25 A. So paragraph 40 only refers only to where there’s no volume limit spelled out at what level do we start removing data from our analysis? So legally, a deemed permit holder can take up to their rate of take, 24 hours a day seven days a week. Where they don’t do that then the limit on their replacement consent will be lower after it’s stepped through the
- 30 methodology.

THE COURT: JUDGE BORTHWICK

Q. Where they don't take 24 hours, seven days. Which is probably the height of –

5 A. Which will be the majority but I can't speak to all of them and there will be some that raise water on a relatively consistent basis.

Q. And so the clause that I put to you which is suggested that counsel should refer to just by way of example which is schedule 10A.4.2 methodology pertaining to daily volumes. Step 1 clause 1, it's actually in your text, it's attached to Mr Pelsemaeker's evidence. I'm going to call him Tom.

10 That's – have you got that in front of you, the methodology?

1450

A. I do, yes.

Q. Yes, okay so is that assuming that you're going to be granting back 24 hours, seven days a week?

15 A. No, it's assuming that the water can legally be used 24 hours, seven days a week so when we talked about the filtering over over-exceedances, that sets your level for what an exceedance is. The methodology then carries on and says, and sorry you cut off everything above that line and the methodology then carries on and says your new limit is wherever you fit at or below that line.

20 Q. Okay so there's a legal exceedance limit and then there's (inaudible 14:50:42) but historically for deemed permits this is what you're using on a daily, monthly and annual basis.

A. Yes.

25 Q. And for most people it will not be 24 hours, seven days a week.

A. Correct.

Q. It just cant be.

A. Yes.

Q. Nobody irrigates that way that I'm aware but I might be wrong.

30 **MR ANDERSON:**

Thank you, I've got no further questions.

THE COURT: JUDGE BORTHWICK

So probably no issue if that's how it works, thank you. All right, I don't think we've got any questions do we? No questions, so thank you very much that was really helpful – no sorry, Mr Page you did, sorry (inaudible 14:51:10).

5 MR PAGE

I thought you'd invited questions about the exhibit.

THE COURT: JUDGE BORTHWICK

Q. Well yes or actually anything in general if some point that had been said that was not quite right you should be getting it right.

10 A. No we're in the odd position of mostly agreeing with what Mr Wilson said so far so.

Q. Okay good, the exhibit.

CROSS-EXAMINATION: MR PAGE

15 Q. Mr Wilson can I ask you to address the table on the second and third pages of exhibit ORC1, did you put this table together?

A. I didn't, it's a script written by Mr Leslie and then I ran it last night.

Q. Right okay well let me ask you questions about the column and if you don't know because you don't know how the script works just tell me.

A. Sure.

20 Q. The middle column has the heading: "Deemed permits awaiting application" do see that?

A. Yep.

Q. And my questions are directed towards what is included.

25 A. Yes so as I understand it and Mr Leslie may be able to give you a more detailed answer but it is consents for applications that have made it as far as the lodge so accepted under section 88. So it doesn't include received applications would be a number of the Manuherikia.

Q. Excellent, thank you, that was all I needed to know.

THE COURT: JUDGE BORTHWICK

30 Thank you, anything arising Mr Maw?

MR MAW:

No.

THE COURT: JUDGE BORTHWICK

All right, thank you. So thank you very much for your evidence. Sorry Ms Irving
5 any –

MS IRVING:

No questions for Mr Wilson I'm just thinking about the feedback process for the
conferencing and conscious of the fact that neither Ms Perkins or Ms Bright
from Landpro and so won't have had the benefit of listening to the discussion
10 that's occurred today and so in terms of getting them the list of questions and
getting any feedback from them about whether those require additions or
adjustments, whether it might be useful to give them 24 hours to listen to the
audio from today and then provide any feedback to the conference list, we're
not acting for Landpro but I'm just trying to think of –

15 **THE COURT: JUDGE BORTHWICK**

No I know, I know and I – no I know Ms Perkins is not here which in some ways
is surprising because the ORC witnesses are here and that there's major
differences in their approach. Which isn't your problem at all, you're just like,
yes. What do you think?

20 **THE COURT: COMMISSIONER EDMONDS**

Wouldn't the transcript be better?

THE COURT: JUDGE BORTHWICK

The transcript would be better but transcripts not actually available for 48 hours.
As I would've thought Ms Perkins should be sufficiently au fait with the
25 differences now.

MR MAW:

Yes and the same would go for Ms Bright I would suggest, I mean they've read
the Council evidence, they've put their own evidence forward they should

understand precisely where the differences lie. We should of course circulate the list of questions to them and provided they have an opportunity to consider that overnight I would've thought we should be in a position to file tomorrow morning.

5 THE COURT: JUDGE BORTHWICK

I still think file tomorrow morning, we'll get them to them overnight and perhaps signal there's somebody, Cathy if you could signal to Ms Perkins that it's coming.

THE COURT: COMMISSIONER BUNTING

10 And they just be given the opportunity to reserve the right to –

THE COURT: JUDGE BORTHWICK

They will anyway because the process is we will continue to work on those, yes. These things aren't cast in concrete, Ross will be in, will be working –

THE COURT: COMMISSIONER BUNTING

15 Because when we get to conferencing quite often there's a bit of an adjustment made.

MR MAW:

Yes and rightly so as they work through so.

THE COURT: COMMISSIONER EDMONDS

20 And if the date's set so that the transcript would be available for them to read before the (inaudible 14:54:54) that would be a help too.

THE COURT: JUDGE BORTHWICK

Also Mr Dunlop needs to read the transcript as well so it's not going to be before the transcript is here.

25 1455

MR MAW:

But in terms of capturing the topics on which there are differences, I would've thought they would be able to assist very quickly if there were something obvious missing from the list.

5 THE COURT: JUDGE BORTHWICK

Yes, no, I agree so still 9 o'clock tomorrow morning. It's not cast in concrete. These things change and change again as we work through the conference and certainly Mr Dunlop will be in charge of that process.

MR MAW CALLS**SEAN WILLIAM LESLIE (AFFIRMED)**

Q. Do you confirm that your full name is Sean William Leslie?

A. I do.

5 Q. And you're a systems and information analyst at the Otago Regional Council?

A. Correct.

Q. You've prepared a statement of evidence in chief dated 7 December 2020.

10 A. Correct.

Q. And a statement of evidence in reply dated 19 February 2021.

A. Correct.

Q. You've set out your qualifications and experience in paragraphs 3 to 5 of your evidence in chief.

15 A. Correct.

Q. Are there any corrections that you wish to make to those statements of evidence?

A. Yes, in my evidence in chief, in paragraph 17 and again in paragraph 46, I refer to the maximum average rather than the average maximum.

20 **THE COURT: JUDGE BORTHWICK**

Q. Which line?

A. Paragraph 17 line 3.

Q. So it should read sorry?

25 A. It should read average maximum rather than maximum average. Sorry, not line 3.

Q. It's still not clear. If you read the line 3, "annual volumes presently reads, annual volumes from the water use analyse, or the maximum annual." Are we on the same version? That could be it.

A. I'm so sorry. Not paragraph 17, it's in paragraph 46 only.

30 Q. Okay.

A. On page 8.

Q. So second line, instead of maximum average it should read average maximum?

A. That's correct. Yes.

Q. Okay.

EXAMINATION CONTINUES: MR MAW

5 Q. Thank you. Are there any other matters for correction?

A. Yes. I repeat the same error in paragraph 24 of my evidence in reply.

Q. So line 3.

A. And line 7.

1500

10 **THE COURT: JUDGE BORTHWICK**

Q. Paragraph 24 line 7?

A. Yes.

Q. So: "average maximum not maximum average"?

A. Correct.

15 Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. And that was both on line 3 and on line 7 of that paragraph?

A. Correct.

Q. Any other corrections?

20 A. No, thank you.

Q. So subject to those corrections do you confirm that your evidence is true and correct to the best of your knowledge and ability?

A. Yes.

25 Q. Now you've prepared a summary of the key points from your evidence and a copy of that will just be handed around. I'll have you read your summary and then I'll put to you some questions on the document that Mr Wilson had just handed up.

A. I'm sorry, could I get a copy of that off you as well, I seem to have brought everybody else a summary except for mine to the table.

30 Q. Yes if you could proceed with your summary.

A. “My name is Shaun William Leslie, I have worked at the Otago Regional Council since 2008 in a number of roles which focused on the numerical analysis of performance monitoring data submitted to the ORC as the consent authority in response to conditions on resource consents. I developed a process for analysing water taken under resource consent as part of a broader work programme within the ORC. In response to a request from the consents team I adapted this process to provide a description of water take data for the consents team to consider in their decision making when preparing recommendations for resource consent applications on the regional plan water for Otago. A procedurally generated report provides information relating to the rate of take, daily volume, monthly volume and annual volume as well as information relating to the 80th, 90th and 95th percentiles for the rate of take. My involvement in PC7 was to provide technical input to assist with development of the schedule 10AA methodology which involved some further calculations added to the existing process and to provide feedback on how the technical detail was translated to policy. Additionally, I developed and maintained script automations that the ORC uses for assessing patterns in water taking to ensure that this is done on a reproducible and objective way. The evidence-in-chief and evidence in reply that I have provided the Court primarily covers the practical application of schedule 10A4 and attempts to provide some insight as to the expected results of its application compared to the method currently employed under the regional plan Water for Otago. My evidence demonstrates the need to remove a typical data from the datasets before they are processed as once this is done there is a high degree of consistency between the results produced under the water plan method and the method proposed in schedule 10A4 despite the fact the water plan method is subjective while the schedule 10A4 method is objective. In addition to that I touch on some of the issues involved in developing a method to implement and illustrate some examples where it is not the method that is flawed but the assumptions about the underlying data. Also examine the impact that flawed assumptions about underlying data might have on any out of the box analysis, backed by anonymised data

using real water metres and data that is routinely provided to the consents team to provide context for the decision making processes.”

1505

5 Q. Thank you Mr Leslie. Now Mr Wilson handed up a document, produced a document entitled *Deemed Permit Status*, the re-run deemed permit report re-run last evening and I asked him whether some further work was being done to understand the 57 consents for which a term of more than 15 years had been sought. He indicated that you might be doing some further work on that. Are you in a position to provide any further evidence
10 in relation to the duration of consent sought or is that piece of work ongoing?

A. I'm in a position to be able to provide some insight. So I used the SQL script that the deemed permit status report uses as its basis, made some minor modifications to it so that it gave me the real data and I can tell you
15 that there is one application – no sorry four applications with a term of one year. Six, yeah six applications with a term of six years. Three applications with a term of 10 years, 11 applications with a term of 15 years, 10 applications with terms between 16 and 20 years, 20 applications with terms between 21 and 25 years and 65 applications with
20 terms of 35 years and these are applications that have been received or lodged with the Otago Regional Council since the Plan Change 7 was notified.

Q. Now were you here when Mr Wilson was answering some questions this morning in relation to some topics for conferencing that might assist,
25 understand the differences between the various methods being pursued by parties?

A. Yes.

Q. Do you recall that I put a question to Mr Wilson about whether a data set could be constructed to test some differences between the methods in
30 terms of what the actual, I guess, real life output would be under different methodologies?

A. Yes.

Q. Based on your knowledge and experience and understanding of the data sets that are available, could a data set be readily made available in order to test some of those differences between the methods being sought?

A. Potentially yes and some of that is addressed in my evidence for reply.

5 Q. And just picking up on that, for example, in your reply evidence you have analysed some 23 I think it was of the 42 or 43 records that the Landpro witness had relied on to examine some differences between the method?

A. Yes.

10 Q. And so in terms of practically being able to test those differences in conferencing, the data is readily available and you would be able to test and see the differences in the conferencing room?

A. Potentially, yes.

THE COURT: JUDGE BORTHWICK

Q. Landpro uses a different data set from you in –

15 A. They don't – it's my understanding they don't use a different data set from me but they use a different method of analysing the same data but also the pool of consents that they examined in their evidence was slightly different from what I examined in my evidence, so the consents that I examined in my evidence were a subset of the Landpro consents that met
20 certain criteria that made trying to do a bulk analysis easier.

Q. And you set out the criteria in your evidence?

A. Yes.

Q. And by and large they're pretty straight forward sort of resource consents to be testing the methodology against, would that be fair?

25 A. Yes.

Q. I mean that's why you select the criteria?

A. Yes, yeah that's why I chose them.

1510

30 Q. So consents outside of those really straightforward sample. Should they also not be tested to see how the methodology would be applied to them?

A. Absolutely however doing any form of bulk analysis like – in my reply of it so I looked at – I think it was slightly over 400 so doing that kind of analysis becomes more difficult. For example, if you've got the situation we have

one resource consent one deemed permit that has two water meters associated with it, depending on the conditions on the resource consent, you have to look at the rates of take of potentially both water meter individually as well as the combined rates of take or volumes.

5 Q. You looked at 400 because Landpro had? Landpro's actually one of the cases that I hadn't read what their relief is but I have left off reading Ms Perkins evidence. You've looked at 400 because that's what they did or that's all for what reason?

10 A. The catchments that I looked at were based on the catchments that Landpro specified in their evidence. I did that because at that point it wasn't whether or not I was going to be able to get the information I needed from Landpro and also that I could compare my information and my methods to their information and their methods. So I took the starting point of just casting the – given those criteria casting the broader blanket possible that would capture as many of their perimeters possible so I could go back and do a comparison of their method to the method I currently employ or the methods that have been proposed or notified on the Plan change 7.

15 Q. So you're using the one data set?

20 A. Yes.

Q. And by dan set, what do you mean?

A. The method I employed downloaded from ORC's water metre database, downloaded the full length of the water metre record for each of those water metres. And then at my – the method that I currently use analyses the whole data set rather than just a subset of data set. So I performed my analysis and then applied method 10A4, so subsetting it so that it looked at the – for the – looked at the irrigation years as they were notified in the irrigation years according to Mr de Pelsemaeker's amendments.

25 Q. So what I would find useful is to have the methodologies tested as I think you've been endeavouring to do, test the methodologies against a number of scenarios both including the straight forward consent scenario one take one metre versus often what might happen which is two points of take more than one metre. So we can see how each of the methodologies are performing if I can put it that way. So one of the things

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that we're wanting to know is what scenarios? Can the experts agree what scenarios should be tested and what data sets might apply to test the scenarios. That I think involves direct communication to see how each of the, you know, the two groups which is Landpro and OWRUG are coming at I guess the community of interest whether it is the narrow community, this is a simple exercise, you know, it's a simple take or a simple consent versus much more complex scenarios which the method might apply to. So is it possible to actually talk to your counterpart witnesses to see directly, not by email, you know actually talk to people to see what is the most efficient/effective way of testing the different methods?

1515

A. Yeah absolutely. In fact we did receive from – as I said I started my analysis on the assumption that I wasn't going to get any information from Landpro or wasn't going to get the information from Landpro in time but we did receive the information about which resource consents and which water metres they had analysed in their evidence which enabled me to perform the comparisons that I did but there were water – there were scenarios that were examined by Landpro that included multiple resource consents across single water metres or single consents across multiple water metres which were, as I said, outside the scope of my selection criteria.

Q. And that's where I'm guiding you to –

A. Yeah.

Q. – is actually to get everybody be on the same page, what are the scenarios that we're examining because the Landpro scenarios it seems to me are valid scenarios if the method is to apply to them how well does that method then perform is the question, yeah. So that would need to be done, you know, in terms of equipping yourself before you go into an expert conference there would need to be that discussion, what are the scenarios that we are testing, you know, maybe against current consents if that's where – that's probably where the existing consents where the data probably exists especially for metering. What are the scenarios? What are the representative scenarios that we are testing and what

information needs to be provided and by when and to allow that, you know, the three parties to go away and do the testing?

5 A. I would add to that that we also need to agree on different consent uses as well, so for example we need to make sure that we have a supplementary take. For example included in whatever data sets we look at we need to ensure that we have a resource consent that we know is taking water for frost fighting and to cover off those sorts of scenarios so that we can have a look at what patterns there are.

10 Q. Good, well that sounds reasonable. So this is pre-conference engagement, absolutely critical, don't go to the conference and expect everything just to unfold, it won't, unless there's actually quite some degree of preparation done that I think involves communication, direct communication as between the witnesses to work out what is the data set and what are the case scenarios that are being tested and to ensure that
15 they are representative of the, you know, the way that any one of those three methodologies may be employed going into the future. Does that sound like a lot of work or does it sound like, you know –

A. It sounds fair and reasonable.

Q. Fair and reasonable, good, okay.

20 A. As for how many hours of overtime would be having that discussion with my manager at a later date.

Q. So just putting some timeframe around that though, is that sort of like a, you know, by the end of the week job? Is it by the end of two week job? You know just then from your perspective not to worry about Landpro and
25 OWRUG that from your perspective about how much time to get a defensible data set and, you know, suggestions about what is a data set and, you know, representative sample or case scenarios that you're going to be testing?

A. To be perfectly honest with you I'm not 100% sure.

30 Q. Well that'll be imposed.

MS IRVING:

Can I ask a question about that because I think you know we're familiar with a lot of the consents that have gone in that I think would pick up on the issues

that you're talking about so I suspect that between OWRUG and Landpro we'll be able to identify a suite of consents that perhaps cover the field in terms of the issues that might arise which we could provide to Mr Leslie to have a look at and see whether he has any others from his mother applicants that he'd like to throw in as well. But I don't think that's going to be difficult but we're dealing with this all the time.

THE COURT: JUDGE BORTHWICK

You don't think so, okay. Yeah, all right, you're happy with that, that those two parties go first and, yeah...

10 1520

MR MAW:

Yes, I think that's a sensible way forward and so far as other parties are aware of a consent that might be a little bit different. The frostbiting one strikes me as one that's important to capture one of those examples. It would be useful to have those suggestions, and I think it would be consent number and possibly the water meter record number. So I would simply invite other parties as quickly as possible. How realistically how quickly.

20 **MS IRVING:**

I think they can probably do it tonight.

THE COURT: JUDGE BORTHWICK

Right. Not just talking about infrastructure, we're also talking about within the primary sector also. Making sure you've got dairy, sheep and beef, making sure you've got grapes and frostbiting and not to kill it by information overload but it's just testing the veracity and effectiveness of the three methodologies.

MR MAW:

Yes, and I think optimistically it should hopefully flush out the differences in terms of what comes out but also test whether the method can actually be applied to the very consents that are going to be the subject of renewal.

THE COURT:

Yes, exactly.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

5 Q. Just in terms of this process, in your conclusion to your reply evidence, you've put down three or four comments. It's on page 17. The version I have here. Have you got that there?

A. Yes, I've got it.

10 Q. So on 90, "You qualify quick and easy cost-effective solution where necessary data is available." Can you expand or tell us a little about where the data is not available and is that frequent occurrence or not? Do you know?

A. I've dealt with applications that have as little as one season of recorded data available and they were applications that were being replaced to renew for an existing activity. Obviously I can't analyse what isn't there.

15 Q. In your work, is the necessary data usually available or can there be a percentage that don't have a data and then what do you do?

20 A. I do have that information to answer that question but I don't have it on my fingertips right at the moment. Usually my response when I encounter a short data set is to complete the write up and then emphasise in my summary at the end of the document that the data has a lot of reliability because it's a short data set.

Q. Does that become a matter of disagreement between you and the application or whoever is processing the application? Consultant or whoever it might be as to how you deal with that situation?

25 A. I haven't had any feedback from the consents team that I can recall that would indicate that taking that approach is an issue or has caused any issues.

Q. So that's where you are.

A. That's the best answer I can give you to the question.

30 Q. Fair enough. That's okay and the second thing you say that may be using the method may not be flaws in the method where there's problems but flaws in the assumptions or the methods employed by whom?

A. By any party examining the data regardless of whether you're talking about Landpro's method, OWRUG's method or the notified version or Mr de Pelsemaeker's amendments or even my own version, every data analysis has assumptions built into it. The best you can do is try and minimise the assumptions.

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1525

Q. So is this something you've discussed at the expert conferencing?

A. I would expect so.

Q. Yeah, pretty important to try and –

10

A. Yeah.

Q. – get some understanding between the various experts. And para 92 you talk about percentiles. Do percentiles, are they applicable to schedule the new Plan Change method?

15

A. Not directly but it was my intention that short of directives otherwise that I would continue to provide them to the consents team because they provide additional context. Because if I just present you with a maximum average value that's just a number, it doesn't mean anything on its own but if you can see at a glance that the ninetieth, the ninety fifth percentile and the maximum average value are all clustering around the previously consented rate then you can see that there's a really good case to be made that the previously consented rate is, what's the word I'm looking for, applicable, descriptive, valid, justifiable, does that answer your question, sorry?

20

Q. Well so that's the information you would provide –

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A. Yes.

Q. – even though it's – and that's the way you've operated under the current water plan 2?

A. Yes.

Q. And then the consents team take a decision based –

30

A. Yeah.

Q. – on the advice you give?

A. Yes.

Q. Okay well I just wanted to get some clarification, yeah, so thank you.

THE COURT: JUDGE BORTHWICK

All right so I'm going to say by the end of the week for that conferring to happen. Counsel having conferred with their experts to propose scenarios for testing under the three methods and also to identify an appropriate data set which is to be tested and the scenarios to include at least the different methods of irrigation and different land uses. I think it's probably broad enough to capture all of the main interests. I don't know, Mr Reid, is that okay? I can't actually remember what your witness is going to say about the schedule.

MR REID:

10 No that sounds fine to me.

THE COURT: JUDGE BORTHWICK

That sounds fine, yeah, okay.

MR REID:

15 Yes just that I'm not sure that frost fighting is inherently described as a land use but so long as that activity is captured that's fine.

WITNESS EXCUSED

COURT ADJOURNS: 3.28 PM

COURT RESUMES: 3.50 PM**MR MAW CALLS****TOM WILLIAM DE PELSEMAEKER (AFFIRMED)**

- 5 Q. You confirm that your full name is Tom William De Pelsemaecker?
- A. Yes, I confirm.
- Q. You're the team leader freshwater and land at the Otago Regional Council?
- A. That's correct.
- 10 Q. You've prepared a statement of evidence in chief dated 7 December 2020?
- A. Correct.
- Q. And a statement of evidence in reply dated 19 February 2021?
- A. Correct.
- 15 Q. You've set out qualifications and experience at paragraphs 3 through 7 of your evidence in chief?
- A. I have.
- Q. Are there any corrections you wish to make to either of your statements of evidence?
- 20 A. Yes, I'd like to make a few corrections.
- Q. If you can just step through those.
- A. Absolutely. In a number of paragraphs, three paragraphs, I have made reference to number of catchments in Otago. That's in paragraph 33, 69 and 78. I just want to clarify that figure refers to the number of catchments that have water takes on them or in them. The actual number of
- 25 catchments in Otago is much bigger than that but it depends on the way you classify them I guess as to how many there are and that's a more question for hydrologist really.

THE COURT:

- 30 Q. So the point of clarification for paragraph 33 and also 69 and 78 is that where you say that 140 catchments, you're talking about catchments in relation to which there are existing permits to take water.
- A. That's correct.

Q. But there are more catchments than that.

A. Yes.

EXAMINATION CONTINUES: MR MAW

Q. Are there any other corrections?

5 A. Yes. Also on paragraph 51 D of my evidence in chief, I refer to the term “evapotranspiration” that should be evaporation. It’s on paragraph 51. Paragraph 49, I state “ this network has large gaps with many of the region’s ephemeral waterbodies.” I’d like to add to that also waterbodies with drying river reaches that are not sufficiently monitored. I think that’s
10 an important point because those are one of our most challenging rivers really in terms of doing hydrological and ecological assessments.

THE COURT:

Q. So I’m amending line 4 which commences “bodies” and then inserting bodies and also waterbodies with drying reaches?

15 A. Yes. Correct.

Q. And then it goes on “not being monitored.”

EXAMINATION CONTINUES: MR MAW

A. On paragraph 108B, “the replacement of deem permits including deem permits for the”, I’d like to add the taking discharge and then it goes on
20 damming of water.

1555

THE COURT: JUDGE BORTHWICK

Q. So can you read that first line of subparagraph B, so read the replacement?

25 A. Yes.: “The replacement of deemed permits including deemed permits for the taking, discharge and damming of water and water permits to take and use surface and ground water connected to surface water where those water permits expire prior to 31st of December 2025.”

Q. Okay.

- A. Then in paragraph 136 on the third line I make reference to clause 4B where that should be 4A and further down in that paragraph I have sentence starting: "Following clause 3 and clause 4A" again should add A as stated on the paragraph only refers to clause 4. Then on paragraph 5 238 I make reference to the 31st of December 2023 and that should be the 31st of December 2035.
- Q. So second to last line on page 72 should read: "December 2025"?
- A. Yep.

EXAMINATION CONTINUES: MR MAW:

- 10 Q. 2025 or 2035?
- A. 2035.

THE COURT: JUDGE BORTHWICK

- Q. 2035, okay.
- A. Footnote 10 which is, footnote 10 of my, in my evidence-in-chief on page 15 13, that can be struck out because it is superseded by evidence in reply where I acknowledge that there are deemed permits that authorise the discharge of water. And then the final correction in my evidence-in-chief is on paragraph 472 and there I make reference to, right at the bottom of the paragraph policy 10A.2.3.B, that should actually make reference to 20 RMA section 140D(1)(B).
- Q. So read the last sentence, I think it's the last sentence – is it the last sentence you're talking about or the sentence before on paragraph 472?
- A. Yeah this is intentional as policy 10A.2.3.A sets the threshold required to be met under section 140D(1)(B) of the RMA.
- 25 Q. D, I'm missing –
- A. 104 D.
- Q. D, okay.
- A. Yes. 1B.
- Q. All right.
- 30 A. And then in my evidence in reply I've got two corrections. On paragraph 82d, currently the paragraph reads: "The amendments to policy 6.4 set out the matters for consideration" it should make reference

to policy 6.4.19. It's paragraph 82 subparagraph D, so it should make reference to policy 6.4.19. And then a minor typo on paragraph 187 on the third line I state: "the needs of exciting water users", and it should be: "existing water users."

5 1600

Q. Thank you and subject to those corrections, do you confirm that your evidence is true and correct to the best of your knowledge and ability?

A. I do.

10 Q. You've prepared now a summary of each of – a summary with respect to the evidence you've produced?

A. Yes.

Q. You can read that summary out or just hand a copy around.

15 A. Yes, thank you. I might bring it back right to the purpose of plan change 7: "purpose of plan change 7 is to establish an interim planning framework for the cost effective and efficient assessment of resource consent applications for the replacement of deemed permits and water permits for the taking and use of fresh water. While ORC is developing a long term NPSFM compliant planning regime for the management of land and water in its region. This interim planning regime must ensure that the transition
20 towards the long-term planning regime can occur in an efficient and timely manner by providing strong policy direction on consent duration for applications to replace existing deemed permits and water permits expiring prior to 31st of December 2025 as well as applications for new water takes. Plan change 7 as notified initially proposed a two tiered
25 consenting pathway by which applicants can apply for resource consent to replace an existing deemed permit or water permit expiring before the 31st of December 2025 either as a controlled activity or where they cannot meet the controlled activity conditions as a non-complying activity. I note that in response to submitted comments and concerns raised by experts
30 I have recommended a third pathway where applicants who cannot some of the entry conditions of the controlled activity rule can apply for a short-term consent as a restricted discretionary activity. Plan change 7 further enables the transition to a long term sustainable management regime by reducing the risk of further environmental degradation through a number

of mechanisms which are avoiding the reallocation of paper allocation or unused allocation limiting the quantity of water allocated in resource consents for the replacement of existing water permits including deemed permits to the quantity of water that has been used in the past, a requirement to carry over minimum flow, residual flow or take cessation conditions on existing consents as consent conditions on any consents that replace those water permits and also finally by discouraging further investment in irrigation expansion until a new NPSFN compliant planning framework has been introduced. The need for the plan change stems from a number of interlinked resource management issues. First of all historically high levels of water taking in parts of the region and an allocation framework and the operative water plan that does not prioritise the health and wellbeing of water bodies and freshwater ecosystems. Secondly, inadequacy of water aspects of the planning framework in the water plan in terms of giving effect to the objectives and the policies of the NPSFM. Thirdly, a lack of understanding about our region's freshwater resources and the effect of water extraction on those resources. Uncertainty around the planning framework including the outcomes and the limits that will be established in accordance with the NPSFM and the national objectives framework and the new freshwater planning framework that is to be notified in December 2023 and then finally the expiry of a large number of water permits and the growing demand for water prior to the new freshwater planning framework becoming operative by the 31st of December 2025. The plan change has generated a large number of submissions, some of which were in support and others were opposing the plan change or requesting amendments. Key concerns raised by submitters are: social and economic impacts if only providing for short term consent durations, plan changes provisions, force of clawback on actual water use through how schedule 10A4 operates. The plan change does not achieve good environment outcomes or outcomes – or outcomes that are not as good as what the current water plan would do. The plan change fails to provide for a cost effective process, the use of the controlled activity pathway needs to be further encouraged while stronger and more certain thresholds need to

be determined for granting consents under the non-complying activity pathway, exempting specific activities such as damming, hydroelectricity generation and community water supplies from the framework of plan change 7 and the plan change does not give effect to higher order planning documents and is inconsistent with the water plan. In my evidence in chief and evidence in reply I have recommended a number of amendments to reduce the impacts of the plan change on water users that have recently undertaken or committed to investment in irrigation infrastructure, reduce the risk of a clawback on actual water use and improve the ability of existing consent holders to apply for consent under the controlled activity rule. I acknowledge that the plan change does not give full effect to the NPSFM 2020, however, I consider that the plan change with the proposed amendments goes some way to meeting various requirements set out in the NPSFM while enabling an efficient and timely transition towards a long term NPSFM compliant freshwater planning regime. So in my opinion, in doing so, the plan change actually achieves the purpose of the RMA. I am mindful that the amendments that I have recommended do not alleviate all the concerns expressed by submitters. As I have previously stated in my evidence in chief and evidence in reply I am open to further exploring either to considering the expert evidence provided by submitters during the hearing or to expert conferencing how the plan change provisions can be further refined to better achieve the plan change intended outcome. In my opinion there are four areas where further amendments could be considered. The first one is to make the controlled activity pathway more appealing without, however, creating a risk of further environment degradation. Secondly, strengthening the non-complying activity pathway, thirdly, make better provision within the framework of PC7 for higher priority takes and uses that provide for the health needs of people, recognising again PC7's intent to ensure that those activities will be carried out in accordance with the NPSFM compliant management framework of the new land and water plan within the lifespan of the plan." And then finally, amended schedule 10A4: "to better align the rate of take and volume limits determined under the schedule with historic water use, recognising the schedule's intent to

provide for a cost-effective and an objective method to calculate those limits.” I've got a final paragraph but I think that can be struck out because it is superseded by the evidence that Mr Leslie produced.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

5 Q. A just have a few high level questions to try and orient myself in terms of the water plan and the local situation. There's been only exposure I've had to those things was being on the Lindis minimum flow and the primary allocation and resource consent with Judge Jackson and Commissioner Borthwick which wound up towards the middle of last year so just to get
10 myself a little bit orientated, we have schedule 2A –

1610

A. Correct.

Q. – which in the plan here somewhere and I note that some of the parties are suggesting that the schedule 2A minimum flows, I'm to having trouble
15 finding my own scheidung 2A at the moment, page 363, I see I've got volume 1 and I need volume 2, sorry about that. Sorry what was that again, 363. Have you got 363 there or that part of the plan, schedule 2A?

A. I don't have the plan with me or the schedule but I'm quite familiar with it so.

20 **MR PAGE:**

(inaudible 16:11:44).

THE COURT: COMMISSIONER EDMONDS

Q. Thank you. So just looking at these various catchments that have got these minimum flows, is there a plan, some sort of spatial representation
25 of what's covered in terms of these minimums flows, which water courses we're talking about, which waterbodies?

A. Yes we currently do not have within the plan a map that shows how those minimum flows are distributed because I guess that's what you're referring to like, basically a map of all the catchments –

30 Q. Yes, yes I didn't find one in the plan but I thought you might have one somewhere.

A. We have produced one a couple of years ago and I'm sure we can produce one fairly quickly for you.

Q. And so all these minimum flows were presumably they came in to the schedule 2A at different times?

5 A. That is correct. A number of these minimum flows were introduced with the plan and over the years since the plan was made operative we have undertaken a number of plan changes to introduce new catchments into the schedule, the last one is the Lindis although that's still going in process, Pomahaka, Waiwera I think Taieri at (inaudible 16:13:48) as well, were all minimum flows that were introduced subsequent, (inaudible 10 16:13:53) Creek is another one, (inaudible 16:13:54) so it's –

Q. I guess my next question was going to be in terms of the numbers of permits that there are in these waterbodies that are subject to the minimum flows, does the Regional Council have a database on which 15 ones are subject to the minimum flow in terms of consent conditions?

A. That can be fairly quickly produced, yes. We have done it but it is worthwhile updating, yes.

Q. So can you give me some sort of indication of what that might look like in terms of the percentages for example or, of consents or the, I suppose it 20 related into the instantaneous take volumes as well perhaps.

1615

A. In terms of your question as to how many consents have minimum flow conditions on them within those schedule 2A catchments, some more than others. I'm reluctant to make any definitive statements around that. 25 Like I said a while ago, I looked at the numbers. For example, I think from memory, the Pomahaka, I think over half of the consents there have minimum flows on them and others like the Manuherikia of the Taieri, from recollection it's much smaller number.

Q. I was trying to get some sort of gauge on how many people in the tent, if 30 you like, in terms of the minimum flow requirement and how many people were outside the tent.

A. It's very hard to tell you right now but like I said before we're happy to look into that and provide you with an overview or a table so to speak of schedule 2A catchments with number of consents and the with number

of consents that have schedule 2A minimum flows on them. I think that can be done.

5 Q. In relation to the ones that we're largely dealing with here, the deemed permits and the ones that are going to run out shortly and need renewing and those sort of things, is it possible to get a gauge on whether any of those have minimum flow conditions?

10 A. The issue with deemed permits and those especially relevant, I think for the Manuherikia has a lot of deemed permits and deemed permits do not have any conditions to protect environmental values so they would not have a minimum flow on them. It is only a replacement consent for those deemed permits that would get a minimum flow as a consent condition on them.

Q. So that's deemed permits but the other categories?

A. Being resource consents.

15 Q. Yes.

A. There would be in a minority in the Manuherikia catchment in terms of volume and also numerical when I say, refer to volume the volume of water taking, the majority of the water would be taken under deemed permits. They would not have a minimum flow on them as a condition of deemed permit. Some of the resource consents in the Manuherikia might have minimum flows on them. I'm aware that some of them supplementary minimum flows so some will have a minimum flow. The question is whether it's a primary or supplementary. I cannot give you a definite answer to that.

25 Q. Can you just expand on that a little bit for me in terms of the primary and supplementary allocation and the consent? How's that relevant in what we might be dealing with or is it not relevant?

30 A. It is relevant. Let's bring it back to basics. We've got, in our current water plan, a system that distinguishes between primary allocation and supplementary allocation. In one catchment we've got another type of allocation but I won't go into that because it will make it too complex. Primary allocation is basically allocation that gives you the highest surety of supply. It's typically taken by run of the river water takes although some of the deemed permits that provide for damming, they take water all the

time and they actually like water harvesting, they take run of the river takes but also high water flows but primary allocation is most reliable water. The schedule 2A has minimum flows in them and those schedule 2A minimum flows apply to all primary allocation takes so that can be resource consents within primary allocation or deemed permits because we also consider deemed permits to be part of that primary allocation.

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So primary allocation is really like a bucket of water that comprises the quantity of water taken by those primary allocation consents and the permits. We've also got a second type of allocation and that supplementary allocation and that allocation is granted in resource consents when there is no further primary allocation available, so in that case we will allocate water at higher flows. So those consents will be subject to a minimum flow higher than the primary allocation minimum flowing schedule to a – those minimum flows are set in schedule 2B. Those supplementary allocation takes are typically used for water harvesting at higher flows or for snow making as well when – because they take in winter when the flows are higher as well. So those are basically the two types of allocation under the current water plan. I think both are relevant in terms of Plan Change 7 because through Plan Change 7 and subsequently through the new land and water plan what we're trying to do is deal with the primary allocation and kind of come up with a sustainable allocation framework for primary allocation. That will have an impact on the bucket of water in primary allocation that is available through resource consents. Now supplementary allocation, the level at which we can allocate resource consents within supplementary allocation is kind of reliant on or is determined by the bucket of primary allocation. To give an example if we manage to limit the primary allocation we might be able to grant supplementary allocation at lower flows. What we're trying to do currently is to avoid competition between the two.

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THE COURT: COMMISSIONER EDMONDS

Q. Just say that again? I had missed the first part of that. Can you start that sentence again or that paragraph again?

5 A. Yeah so what we're trying to do in managing water is to try to avoid competition between the two takes. So we tried to avoid that supplementary allocation takes, tried to encroach on the water that is available to primary allocation users so that's under the current plan. Therefore we set the limits, the minimum flow limits, for supplementary allocation really high. If you managed to reduce the volume in primary allocation you might have an opportunity to make supplementary water more accessible. Bearing in mind that in the new land and water plan we also need to look after the values in the river as well.

10 Q. So coming back to PC7.

A. Yes.

15 Q. The relevance of this to PC7?

A. PC7 captures not only primary but also supplementary allocation takes. We also want to make sure that we don't look in long-term timeframes for applications for supplementary allocation because that again that framework for supplementary allocation will be affected by the plan review and it might look totally different under the new land and water plan.

20 Q. So just going to paragraph 4 of your evidence –

A. Yes.

Q. – where you talk about the requirement to carry over minimum flow residual flow or take cessation considerations on existing consents –

25 A. Sorry were you saying paragraph 4?

Q. Paragraph 4(c), it's on your page. I don't think these pages are number. In your summary, sorry.

A. Oh it's summary, sorry. Yes.

1625

30 Q. So I just wanted to know if you had a database or anything that listed out things that were listed to – that were subject consents that were subject to residual flow or take cessation conditions I asked you (inaudible 16:25:23) know about minimum flows before. I guess that that was in relation to the schedule 2A.

A. Yeah. I do not operate or administer the database. That would be possibly something that would be in the consents database and I'd have to refer that question to Mr Leslie perhaps or somebody from the consents team. Like I said before, I have –

5 Q. So you've taken advice from them in formulating –

A. I have taken advice from them and we asked to generate a table that looks like all the schedule 2A catchments, how many consents, how many had the minimum flow on them but I would before I hand anything to the Court I would like to have this updated and verified.

10 Q. So that's the minimum flow –

A. Yeah.

Q. – but you've also mentioned residual flow or take cessation conditions.

A. Yes. I am not quite sure whether we have in the database or whether we can abstract from the database an overview of all the consents that currently have a residual flow condition on them or a take cessation condition.

15 Q. I guess I was just trying to understand what's the scale of what might be involved with that and where does it relate to?

A. Yeah residual flow condition in the last couple of years have been regularly applied to resource consents. Minimum flows, in the plan we have a policy that basically states that where we have a minimum flow in the plan for a catchment that has deem permits we do not immediately put those minimum flows as a consent condition on those – on consents in those catchments. We will only do that unless the consent holders volunteer that or upon the expiry of deem permits in 2021. The reason why we're doing that is because we cannot impose those conditions on deem permits unless we get financial compensation and also minimum flows, the way they were, they don't really work unless all the consents in the catchment adhere to them. If you have some consents in a catchment with a minimum flow if some of those consents have a minimum flow condition and others don't there is still a risk that rivers will be drawn below the minimum flow because those consents that don't have the minimum flow as a consent condition, they can keep on taking when the minimum flow is reached. I also want to add that a minimum flow does

not prevent the river from going below it naturally as well. But you really need to have all the consents or the majority of the consents at least when in a catchment adhering to a minimum flow before it actually works.

Q. So there may be some information in these things that you'd need to –

5 A. There may be some information, yeah.

Q. – check that out with the consent people. So we have a number of competing oppositions in terms of PC7 if I could put it that way.

A. Yes.

1630

10 Q. And I'm just a little puzzled by a couple of things and I thought that you might give me your take on them. So we have a proposition, I think, Ms Dicey's evidence, I don't know whether you might have that there, it's page 78, do you have that there now?

15 A. Yes. I was looking at Ms Dicey's summary in the main body of her evidence but yes.

20 Q. Page 78 and I'm just looking down 12.1.2 the permitted activities that she's proposing and then if you go down to 3 where we have any existing requirement condition or priority status applying to the exercise of this permit under this rule shall continue to be legally binding. Now, I just wondered if you could help me with understanding – with your understanding of any existing requirement condition or priority status, perhaps we could start with the priority status, what would you understand by that?

25 A. So that goes back to the deemed permits and I think I will summarise it but I might actually have a summary of what the priority status means in my evidence. I think I explain it in paragraph – maybe not, sorry. Priority status when the deemed permits were issued, they were given a priority and the deemed permit or the mining privilege –

Q. The old mining privilege is what we're referring to.

30 A. That was first issues got the highest priority, subsequent mining privileges had lower priorities and that was basically to protect the rights of the access to water for the holder of the mining privilege that was issued first. Those priorities are still on the mining privileges or the deemed permits stated, they're still stated on there. I am not quite sure to which extent

they are currently being exercised. They are actually not conditions to a mining privilege or a deemed permit, so my understanding is that Council cannot enforce these. It is a matter between consent holders as to whether that structure or that priority system is being adhered to. It might be that water users within a catchment have rationing regimes or flow sharing regimes that are different that are currently in place. So that's what the deemed priority refers to basically. If it would be applicable, I think Ms Dicey's intention would be to preserve this status.

5

Q. And how might you do that then if you're suggesting this is all outside of the –

10

A. It would be very difficult to do. We currently do not have policy in the plan that would support something like that or the setting of conditions. I guess you could make – you could impose consent conditions on new resource consents to replace deemed permits that basically establish a flow regime that mimics those priorities but I would assume that would only apply where all the consents or the consent holders in the catchment coming at the same time for new resource consent and agree to that as well.

15

Q. So you don't see priority as having anything to do with your primary and secondary allocation?

20

A. No.

Q. No? Nothing to do with that, you see it in terms of the mining privileges?

A. Yep.

Q. And other there any existing requirements of conditions that you can think of other than the ones that you've mentioned in terms of residual flows and cessation?

25

A. Some resource consents have conditions on them that they should cease water taking when other consents are being exercised so that could be an example of a flow cessation condition where you're required to stop taking when another consent in the catchment is taking. It might be often the consents held by the same person.

30

Q. I think I'm aware of some examples of those. So just coming back now to the DOC planner's evidence, appendix 1 I think it is, so that's the evidence of Murray Brass. So do you have that there?

A. Yes, I have, yep.

Q. So on page 2 of appendix 1 the submission refers to applied banding or some other suitable flow trigger to retain existing deemed permit priorities and then what we have recommended by Mr Brass is some new clauses. So I just wanted your opinion on these clauses, what you would understand by them and how you would see them being implemented.

5

1640

A. I fully understand where Mr Brass is coming from and I acknowledge the need, I guess, to protect instream values. Mr Brass, however, has also acknowledged in his evidence that it would be a complex and fairly difficult thing to establish coming up with some kind of a flow regime between different consents. It would be something that involve cooperation different consent holders. There's a risk that it kind of detracts from one of the intents of the plan change which is to provide for a quick and cost effective and easy process. So in a way it would make, especially when we put it on the controlled activity rule, it would make the controlled activity rule quite complex. So that's one thought. It's quite expensive perhaps. The other thing is the way the schedule works as well to some degree might actually help to address that concern. The schedule tries to estimate how much water is being taken on an instantaneous rate of take basis but also in terms of volumes daily, monthly, yearly. So what schedules does is it tries to come up with allocation limits that reflect the current pattern of taking, not 100 per cent, don't get me wrong. It will prevent that people with lower priority status will all of sudden ramp up their taking, either instantaneously or in volumes. So schedule might go some way in preserving the order between the different deemed permit holders. As I said before, you also before you establish that you also want to make sure that the priorities are actually still adhered to because if that isn't the case you upset the flow regime and I think there's a number of experts that have already, Dr Allibone was one of them that already have indicated that we need to be careful as well. More water is usually good but not always. In some cases, the current situation might actually help to sustain certain pockets of migratory galaxiids. I'm not saying that this is a good solution long-term but remember this is a very short-term plan change. It will be superseded by the new land and water plan which

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is to be notified – provisions will be superseded by the new land and water plan which will be notified by the end of 2023.

Q. So you're not a fan of what's proposed but I was trying to understand how you might work out what previous deemed permit priorities were and how you might not be able to easily do that or objectively ascertain what they are.

A. We can easily get them because they are stated on the deemed permit. So we have deemed permits at the ORC and the priorities between the different deemed permits are stated on them so that's not difficult. The difficulty is being sure whether those systems are actually observed by the deemed permit holders because we don't enforce priorities.

Q. Okay. So I don't know whether we've got an example of a couple of deemed permits that might illustrate what you're referring to. We may have in the evidence.

15 **THE COURT: JUDGE BORTHWICK**

Q. I think we have deemed permits which illustrate the licensing regime which has been carried over but I think the witness is saying they don't know whether individuals have exercised those rights as between themselves and other permit holders and I guess the question there arising if they have, is that on a continuous basis or was it just for a season perhaps, the dry year so I think it's what your evidence is, is that right?

A. Yes.

25 **QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS**

Q. So just moving down my list, I'm nearly at the bottom of it. What I would like to have a look at now is the evidence for the plan MFE.

Q. ...is the evidence for the plan of MFE in terms of their suggestion on the controlled activity. So I am looking at page 33. So do you have page 33?

30 A. I do.

1645

Q. So the MFE witness has crossed out items B to I and now what's suggested as a suitable substitute is matters covered by the conditions of the existing deemed permit or water permit being replaced and I wanted your opinion as to what you think that might cover whether perhaps we could start by saying do you think that would be broad enough to cover all the items that you had under B2I?

A. It is probably too broad. You know in a way I can, again, Mr (inaudible 16:46:45) has a very valid concern. What he's trying to do is he wants to make the controlled activity rule more appealing, more attractive. The concern that I have with this particular proposal is that one of the key principles behind the plan change or two key principles behind the plan change is to avoid any further degradation and also to make sure that we do not reallocate paper water and that we actually bring the allocation and the new consent in line with historic use. I'm a bit concerned that these – that this recommended amendment would allow people to take more water and better utilise their existing allocation and in a way that would be losing – I mean the point of this plan change is to hold the line and I'm a bit concerned that we're not quite holding the line. But again he's got, you know, the intention behind it I am supportive of that which is to make sure that people instead of going for the non-complying rule get attracted to the control activity rule.

Q. So the next thing I wanted to ask you about was your restricted discretionary proposition and aspect of it. So if you could just find your page 61 I think that will be attached to your reply evidence? So I'm looking at B2, well actually I think you've got B1 but it's really B2 where you have – it's demonstrated in the application that and I guess I'm thinking well this is a threshold requirement for qualifying as a restricted discretionary activity, it's an entry point, so should be objectively ascertainable what it is you need to meet in order to be a restricted discretionary activity and I'm looking at your number 3, the environmental effects resulting from the use of irrigation will be reduced.

1650

THE COURT: JUDGE BORTHWICK

Sorry, Commissioner, what subparagraph are you on?

THE COURT: COMMISSIONER EDMONDS

This is page 61B and then it's got 1-1 but actually the settlement should be 2
 5 and then it's number 3 coming down so the first one's about buying
 infrastructure, the second one's about a more efficient use of water and the third
 one's about the environmental effects. Do you have that?

THE COURT: JUDGE BORTHWICK

Yep.

10 THE COURT: COMMISSIONER EDMONDS

Q. So I guess I just wanted to explore a little more how you would see this
 actually working because there's reductions and reductions, isn't there?
 There's no sort of scale on this so could be a minimal reduction.

A. It would rely on an assessment by an expert that demonstrates that the
 15 expansion which in many cases will be provided through a change in
 irrigation infrastructure that it has an overall net benefit on the
 environment. That could be either through avoiding runoff or that there is
 sufficient buffering between the irrigated area put in place compared to
 what previously there was from sufficient buffering from nearby
 20 waterbodies. It will be – it has to be done on a case by case basis.

Q. So early on you talked about having a net benefit approach so you're
 taking the environmental effects in the round, is that what you meant?
 And then you went onto talk about individual environmental effects.

A. Sorry?

25 Q. You mentioned individual environmental effects like buffering for example
 but before that you talked about a net benefit so I was trying to understand
 what you understood by this so it's quite a broad concept then, isn't it?

A. It is a broad concept. I think with irrigation expansion, if it constitutes a
 change from traditional, say, less efficient irrigation to more efficient
 30 irrigation systems, there are some potential benefits and there are some
 potential risks, like I said before, potential benefits could be a reduction

in run off which has a benefit in terms of you reduce e coli levels potentially in affected waterbodies but a risk is, and that is I think the evidence of Dr Olson kind of states that there is still a risk that there is increased nitrogen input as well from irrigation. So yeah, those – all those different risks and benefits need to be considered, I guess, within the application and adequately addressed.

THE COURT: JUDGE BORTHWICK

Q. Risks and benefits, what was that? All those potential –

A. Well, yeah, you have to do a – I would assume that whoever prepares the application looks at it in a comprehensive manner, you don't pick and choose and you say: "well it's going to reduce the risk of run off without looking at the potential for nitrogen leeching as well." So yeah, the intention behind the rule is really the broader intent behind the rule is that people that have started exploring irrigation expansion before the plan change was notified or before we started talking about it, they will want to maximise that and because they cannot currently apply under the controlled activity can, well they can, but then they lose that investment, they would be tempted to apply for a longer term consent under the non-complying rule for 15 years.

Q. I think we understand where this is coming from, probably don't yet understand what is meant by environmental effects much less how would you know or predict those with any confidence by 2035, so it's only a 15 year period. I mean, you've got an associated policy, yes you do, because you've amended 10A2.1 so and the policy is increase in irrigation area will result in a more efficient use of water but also there, environmental effects result from the use of irrigation will be reduced. How would you test that and is the language – is that appropriate language?

A. So if there would be any concerns around the wording of that I am happy to come up with alternative wording.

THE COURT: COMMISSIONER EDMONDS

Q. So I guess just looking at 2, you mentioned before holding the line was a phrase you used but increasing the area under irrigation, is that holding the line?

5 A. That is why we have specifically subparagraph 3 in there to make sure that the increase does not risk us to lose ground.

Q. I've come to the end of my list, it's nearly 5 o'clock.

THE COURT: JUDGE BORTHWICK

10 Q. I've got questions as well. I'm just going to hold you over on your oath. It just means that you're not to talk to Mr Maw or any other Council party or any other witness but you can talk to your kids. Just try and refrain discussing the case with anybody who's got an interest in the outcome or an interest generally, all right? We will see you back here at 9.30.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

15 Q. Just a question if I may, you seem to have two requirements under that, where there's not a complete set of data –

A. Sorry?

20 Q. This is under this one that Commissioner Edmonds has just been talking to you about, it's just a restricted discretionary and under A3 it says: "where a complete set of data's not available", is that –

A. So the rule basically tries to provide for two circumstances where people cannot –

Q. So it's either/or is it?

25 A. It's either/or so for people that don't have a complete dataset that is required under schedule 10A4 and for people that have started or commissioned an expansion in irrigation infrastructure.

Q. So it's either/or?

A. Yes.

Q. Thank you, your Honour.

30 THE COURT: JUDGE BORTHWICK

So we're adjourned through to 9.30 tomorrow morning.

MR PAGE:

Just briefly, Ma'am, Commissioner, you were looking for a map of the minimum flow areas in the plan, it's appendix B to the regional plan, it's not reproduced in the common bundle but is available online.

5 THE COURT: COMMISSIONER EDMONDS

Thank you, Mr Page.

COURT RESUMES ON WEDNESDAY 10 MARCH AT 9.30 AM**THE COURT: JUDGE BORTHWICK**

Good morning, anything arising overnight?

MR MAW:

- 5 Yes just an update in relation to the joint memorandum with respect to the conferencing topics and Ms Mehlopt will provide an update in respect of that.

MS MEHLOPT:

- 10 Morning your Honour, counsel have conferred overnight with their experts and we do have a joint memorandum of counsel setting out an agenda to provide to you this morning. It is signed by counsel for the Council, OWRUG and McArthur Ridge, it isn't signed by Landpro yet however the memorandum does incorporate the amendments to the agenda suggested by Landpro, so it is reflective of their conditions.

THE COURT: JUDGE BORTHWICK TO MR REID

- 15 Q. Okay so I'll look at that to see how well it accords with what we discussed yesterday and the other tasks that the court wants down prior to that conferencing in terms of you know agreement to the dataset and agreement on test scenarios and so forth and again, you know, I am very concerned as to the role of planners in this and I have expressed that now
20 several times, particularly the ability to pick up on conference outputs where they're not necessarily present at the conference. There was one thing arising though overnight and it occurs to me and this affects you Mr Reid that you obviously think you're going to have a witness, Dr Daveron, at that conference but I don't actually have from you as directed any relief in a separate attachment if that is what you're pursuing.
25 Can you please advise, is your client pursuing any relief, that is amendments to this plan change or are your clients seeking to reject the plan change, so really a bit of a moot point.

- A. The relief that we would be seeking, my clients would be seeking would
30 be the relief that Mr Page's clients are promoting.

Q. Are promoting, okay. So it's Mr Page not Landpro?

A. Correct.

Q. Okay, very good. And then the second thing, that's very helpful so that's all I needed to know, I'm just going to go back to Ms Mehlopt, Federated Farmers filed at my direction relief late Friday and that's obviously proposing something different again, I don't know whether they have a technical witness to support that relief, that is an expert or whether the, Ms Riley who I understand is an advocate, albeit a policy advocate, is going to be supporting that relief but should Federated Farmers be at that conference is the question for you, will they have an expert who's qualified to be at the conference in terms of the code of conduct. Have you thought about the role of FEDS here?

MS MEHLOPT:

I haven't your Honour, I haven't turned my mind to that and I hadn't appreciated that they would necessarily be involved in the conferencing but –

THE COURT: JUDGE BORTHWICK TO MS MEHLOPT

Q. So that obviously got quite a different approach again insofar as I think they're promoting something under the Canterbury Regional Council's plan which might be based on reasonable use as it seems to be the alternative to the Aqualinc approach on reasonable and efficient use so we've got two competing approaches. But I don't know whether they have an expert (inaudible 09:35:07) why experts are necessary is because they're non-partisan and they're qualified in terms of the Code of Conduct. So you haven't turned your mind to that?

25 0935

A. No –

Q. Because if Ian McIndoe must be there and I accept that he should be there because, you know, he's not just supporting the Aqualinc methodology but he's got something to say also about time periods and stuff, you know, which is generally relevant to the schedules.

30

A. Yes.

Q. Then should also somebody from Federated Farmers be there. So what do you think you can do about that? I mean it's not for you to pursue their case, they should be here.

5 A. Yeah I think we can confer with Federated Farmers or Ms Riley about that and have a look at what expert they do have supporting that –

Q. Supporting that.

A. – position.

10 Q. And if it's only Ms Riley then the parties will have to confer about her ability to be there given that I don't think she is – I think she's partisan and that's okay because she's advocating for Federated Farmers but whether that's okay in an expert conference is a total different matter.

15 A. And I think given the position of the other parties with their technical experts being involved in conferencing as opposed to their planning experts I think it would be appropriate to maintain the conferencing with the technical experts in the first instance.

Q. All right, well anyway it's something for everybody to think about because we probably want to have a collective view on who attends for Federated Farmers if it is not a person who is qualified in terms of the Code of Conduct and you'll come back to me over the course of the day?

20 A. Yes.

Q. And you'll file that memorandum with Ms Harlow?

A. Yes. We'll file –

Q. Yeah okay and we'll look at it at the break, yeah.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

25 Q. Mr Anderson?

A. There are two points arising from that. The first one you raised to Federated Farmers but also one that about (inaudible 09:37:10) response and Dougal McTavish and whether he also – he's qualified as an expert in matters which are sort of related but I'm not –

30 Q. Yeah but he's also that advocacy role as well.

A. He's qualified. In his evidence he's qualified himself as an expert. So I don't want to –

- Q. You know what the issues are. I mean don't get me wrong I understand that Mr McTavish that in the order sense of the word he would be probably recognised as an expert within his field but he's also advocating and so that's where the problem comes. Again it's something for counsel to confer. Again it's a question that, you know, yeah should he be present at the conference and that reminds me it's not just (inaudible 09:37:57) response but Southern somebody who also filed at my direction the relief that they were seeking but are probably self-represented I think.

MS MEHLHOLPT:

- 10 I believe so, your Honour, Southern Lakes Holding Limited.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT

- Q. Southern Lakes Holding Limited, self-represented. Now they're taking it probably again in quite a different direction from everybody else but they're self-represented.
- 15 A. Mmm.
- Q. All right, well I don't know. Again people should be present at the – at least for this witness should be present at this stage at this hearing to be able to put their questions. How do you think we should proceed?
- A. With the conferencing and the participation –
- 20 Q. With Southern –
- A. – of those parties in that conferencing.
- Q. Yeah.
- A. Given that they don't – Southern Holdings haven't lodged any evidence as I understand it –
- 25 Q. It's kind of a submission come evidence statement which –
- A. Yes.
- Q. Yeah.
- A. And they would have an opportunity to comment on the joint witness statement that was produced following the conferencing.
- 30 Q. Okay so you think just allow them to, all right. Well that's one way of handling it. Allow them to come in that way because the Court's not

bound by anything that the experts say, all right, because it's not a mediation.

A. And they would be entitled to speak to that in their submission that would provide to the Court.

5 Q. All right so that's Southern who otherwise – okay.

A. And just – sorry –

Q. All with Mr McTavish for (inaudible 09:39:42) what do you think?

A. Yes I know that he had requested to be present at the expert conferencing –

10 Q. He has, yeah.

A. – previously, there is – I do agree that there is an advocacy –

Q. Role, yes.

0940

A. – an advocacy role in that although he's addressing the technical aspects
15 of the plan change so I think if we're restricting it to experts in that conferencing that would appropriate that he has the opportunity to speak to the joint witness statement and a presentation of their case at the hearing as opposed to being involved in the conferencing itself but why his response may have a different view on that but I don't understand that
20 they're here to speak to that.

Q. So I guess we can advise of the expert conferencing and see if there are
any other persons who say they're qualified to join or even if they're not
qualified to join would wish to join and then what sort of protection around
that or measure we can put around that given any advocacy role we would
25 just play it by ears is what I'm saying. Anyone got any difficulty with that?
No difficulty, okay. Thank you. Sorry, Mr Anderson why so we'll keep an
eye on whys.

MR ANDERSON:

30 There's one other matter if I may. I would like to seek leave to put a late cross-examination notice in for Mr Hayes.

THE COURT: JUDGE BORTHWICK

Mr Hayes?

MR ANDERSON:

He's the fish and game fresh water ecologist. The question I want to ask him are related to Mr Allibone's evidence about (inaudible 09:41:29) populations of galaxiids and whether he's put in a flow table which he thinks is a good idea and I want to ask him some questions about whether or not the flow table will resolve an impact on the galaxiid that Dr Allibone had referred to and that hadn't arisen earlier so that's why I'd like to seek leave to do that.

10 **UNIDENTIFIABLE SPEAKER (09:41:53):**

Why it hadn't arisen.

MR ANDERSON:

In my mind. I don't want to say there was no evidence about that but until when he gave that evidence orally that's when I thought I'd like to test that against Mr Haye's on that point.

THE COURT: JUDGE BORTHWICK

I don't think there would be any difficulty with that. We're actually now ahead of time. So Mr Cooper would've picked up on that sitting at the back of the court. Did you get that?

MR COOPER:

Sorry, Judge. It's a bit hard hearing (inaudible 09:42:21).

25 **MR ANDERSON:**

I can raise that point.

THE COURT: JUDGE BORTHWICK

Somebody coming in on cross-examination giving a late notice but Mr Anderson's going to tell you about that.

30

MR ANDERSON:

Thank you, your Honour.

MS MEHLHOLPT:

Your Honour, one final housekeeping matter for the morning. We do have
 5 hardcopies of the two High Court decisions that we were referring to in our legal
 submissions regarding the NPS that we will provide to Ms Harlough this
 morning for filing for you.

THE COURT: JUDGE BORTHWICK

Good and that's a reminder actually to all counsel for the bench at least one
 10 hardcopy of the decisions that you're referring to. Otherwise I'll have to go back
 to the office and print them off myself which is something that you can be doing,
 not putting that one on me.

QUESTIONS FROM THE COURT CONTINUES: JUDGE BORTHWICK

Q. So we're back again with court's questions for you and there are already
 15 questions for me and (inaudible 09:43:21) of just trying to understanding
 again what is the problem that we're working on and as I see it. I want to
 talk to you about your operative water plan. That's the first observation
 and the change that's proposed is a change that pertains to the taking
 and use of water, Is that correct?

A. Correct to the extent that it also captures deemed permits that go beyond
 20 the taking and use of water. It also captures deemed permits for the
 damming and the discharge.

Q. Yes. It captures damming and the discharge deemed permits as well.

A. Yes.

Q. And that's the use of water for the purpose of damming? In other words
 25 impounding water behind a dam and discharge is discharge of water?

A. Discharges of water, often from dams you have discharges, releases of
 water or it could be a by wash.

Q. By wash being what in relation to?

0945

30 A. I'm not an expert in the field but a by wash is basically where water is
 taken into race, they want to maintain a certain flow within the race so any

excess water that is taken at the point of take is being discharged again into the source water body.

Q. Is that something that – I guess it depends on the spatial location of that by wash but is that something that could be a non-consumptive take is how some people refer to it?

5

A. From memory, there's a description of non-consumptive takes in our water plan and also in the water metering regulations. I cannot recall the exact wording but basically what it comes down to is that you take the water and discharge back at the approximate location.

10

Q. So there's a spatial element there.

A. If that doesn't happen then you actually get a localised dewatering in the waterbody and I wouldn't call it a consumptive take and it wouldn't be interpreted that way under the definition as well.

15

Q. Just remind, I didn't intend to ask you this, where did you get to in terms of those takes uses that are non-consumptive – are actually non-consumptive?

A. So all the takes –

Q. What was your recommendation?

20

A. My recommendation is that consumptive and non-consumptive takes are captured by the framework in plan change 7.

Q. And the rationale for non-consumptive is what?

A. For including them in the plan change?

Q. Yes.

25

A. Because a lot of the takes that are considered to be non-consumptive are actually strictly speaking don't meet the definition, also –

Q. What does that mean?

30

A. For example, if I may refer to the evidence of Trustpower, they talk a lot about non-consumptive takes but actually water is taken into a race and is taken out of the water body for a considerable distance. Also, I think it's important to consider the intent of the plan change which is to set us up for a new land and water plan within which we might have a new framework for managing non-consumptive takes as well. The whole water plan is under review. That means that we want to reconsider

current activities as soon as possible and bring them in line with the framework within the land and water plan.

Q. Okay. So I got myself diverted, so this is a water plan and primarily it's concerned with the taking use of water and may also be some deeming permits which concern the damming of water and also the discharge of water but primarily it's the interest here about the taking use of water. Would that be fair in terms of the submissions of the respondent?

A. Both because the reason for including damming as well is because often you have networks, irrigation schemes that operate under suite of permits some of which are damming, some of which are water and you want to consider them actually under the same framework.

Q. And that was what I was going to come to next. I don't have a sense from anyone's evidence to what extent does this plan or any regional plan provide for the integrative management of resources, natural physical resources and when, for example, Trustpower needs – or anybody needs to apply for further for a new resource consent or to rollover existing consents so a replacement consent, does that at the same time trigger a need also to apply for a land use consent associated with any, you know, the relevant land use activities and a discharge permit or can the water permits travel quite independently from those other activities, independently both – yeah independently as in at another time?

0950

A. That is definitely a risk that is – that currently exists.

Q. And why does it exist?

A. What I was going to say that there's definitely a risk that exists if we exclude certain activities from the Plan Change 7 framework –

Q. So my question was not about the plan change framework.

A. Yeah.

Q. My question's about your operative plan.

A. Yeah.

Q. I need to get a better sense as to what extent there was integrated management of natural and physical resources?

A. In terms of land use controls, we don't have any land use controls except where it affects or except where we talk about land in the sense of the

bed of a river. We have actually – I have to correct that. We do have some land use controls or land use rules relating to drilling of bores but that's about it. We are proposing under Plan Change 8 to introduce a number of land use controls as well. So we are trying to amend the plan to a small extent to give greater consideration of that integrated management in the interim while preparing a new land and water plan. But at the moment it is very limited.

5

Q. Both under this plan and any other regional plan that you may have. I understand you've got more than one regional plan.

10

A. We do, yes.

Q. You do. So how many regional plans do you have?

A. We have a regional plan air, a regional plan coast. We have a regional plan waste and a regional plan water. The intent is to basically consolidated the provisions currently that the (inaudible 09:52:29) management of waste and also management of water into a new plan that will also have a wider approach towards managing land. So the waste plan and the water plan will be consolidated into a new plan that goes beyond managing land as we currently do.

15

Q. And so for example your waste plan, which I haven't had a look at, that waste plan is it there where you would expect to find controls on the discharge of contaminants generally or are there none?

20

A. Only in relation to landfills.

Q. Only in relation to landfills, okay.

A. And a number of other discharges for example what we're doing now is reviewing the rules relating to the discharge of oil on roads.

25

Q. That's PCA?

A. That is PCA, correct.

Q. So let's forget about PCA.

A. Okay.

30

Q. Let's talk about what you're doing now.

A. Yeah.

Q. So I understand what the problem is that you're – this potential scale of the problem that you're responding to. So waste deals with landfills. The current regional plan for waste is concerned with landfills?

A. Primarily, yes.

Q. Primarily?

A. Yeah.

Q. Anything else or was it –

5 A. Like municipal landfills but also on farm landfills, smaller landfills, yeah.

Q. Anything else or was that about it?

A. That's from recollection.

Q. So in terms of the discharge of contaminants, is it your evidence that the extent to which this regional council manages the discharge of contaminants is under its regional plan waste and then it's confined to landfills on farm or in municipal areas?

10

A. Sorry could you repeat the question?

Q. To the extent that this regional council seeks to control the discharge of contaminants from, say, that's specifically what I'm interested in?

15 A. From water?

Q. From water, yeah?

A. Yeah.

Q. It does so under its regional plan waste and then only in relation to landfills whether on farm or municipal, is that what your evidence is?

20 A. Yeah so discharges from landfills are managed under the waste plan. Discharges from – point towards discharges or non-point source, discharges from rural activities are managed under the current operative water plan.

0955

25 Q. Is that done under chapter 7 of the operative water plan?

A. Correct. Chapter 7 includes the policies for managing discharges or water quality. Policies and objectives.

Q. To what extent does chapter 7 manage discharges from the primary sector?

30 A. I assume you've referred to non-point discharges.

Q. Yes.

A. They would be captured under the policies in 7B which are policies in general that apply to both point source and non-point source and then policies in 7D.

Q. Are there any rules which pertain to sectors within the primary sector? So primary industries. For example, are there any rules which pertain to discharges from dairy shed use acknowledging that (unclear 09:58:30) dairying in Otago.

5 A. So the key rules that actually apply to the primary sector would be in chapter 12C of the water plan. We have again – we're trying to update those through plan change 8. We have a number of rules in 12C that could apply to discharges from dairy sheds. An example of which would be 12C0 rules, some of the prohibited ones.

10 Q. Is it your evidence that there are no rules targeted at the primary sector? So if there's a rule it only applies because generally speaking in a nonspecific sort of way the activity comes under that rule?

1000

A. So are you referring to plan change 7?

15 Q. No. I'm trying to get a handle on how the Council currently manages in an integrated fashion, if it does at all, the taking use of water discharge and damming activities that are going on in this region.

A. Yes at the moment we are not managing an integrated –

20 Q. You're not managing in an integrated fashion and why do say that, because that's actually really important, why do you say that?

A. We have very limited provision in the plan or a policy that currently allow us to consider the land uses, specific land uses when it comes to assessing consents for discharges.

25 Q. And what's the problem with that, why is that a problem – I'm assuming that's a problem because you're – why?

30 A. The plan is basically the rules that refer to discharges, we're currently effects based so we only look at what is the effect on the waterbody, the receiving waterbody, that is a, from a monitoring point of view that is sometimes very difficult from an implementation point of view as well so as part of the new land and water plan we're reviewing that approach and try to be a bit more proactive as well in that regard.

Q. You say its difficult monitoring an implementation, why?

A. The plan rules, a lot of the plan rules rely on a permitted activity approach which means that it's the land holders responsibility to monitor the effects,

often, like I said we're trying to get to a more proactive way of managing the permitted activity, the effects based permitted activity approach often the effects are measured after the activity has taken place which makes it harder to go back or to react to that especially with discharges as well,
 5 there is often a delay involved for example certain land uses, the effects of that could be leaching and the effect of that by the time nutrients travel through the ground – I am not an expert on this, I'm just –

Q. But you're in expert in policy writing though and so your response to the problem, you have to identify the problem and therefore what the
 10 response is so that there is a delay in time and also spatially as to where that effect may emerge within the environment and the Council becomes aware of it when it arises, where this plan does not seek through resource consents anyway to manage the use of natural and physical resources, so that's the problem and in approaching it that way you are reliant on I
 15 guess people in communities to be self-monitoring, am I within the ambit of the conditions and standards which are on this permitted activity rule, so the obligation is on the people in the community?

A. To a certain extent, the community, the land holders sorry, the land holders will monitor the effects of their activities, we still have the
 20 responsibility to monitor the trends within the receiving waterbodies as well.

Q. But what I think what you are saying is that when there is a problem, it is after the fact and your ability to respond is reactive not proactive?

A. That is definitely a consequence of the current framework in the plan for
 25 managing rural discharges.

Q. That's rural discharges and you, what would you, how would you describe a rural discharge?

A. A discharge?

Q. Yes.

30 A. That is the result of a rural activity, a rural land use, primary sector land use.

1005

Q. So we're talking about dairy shed washdown or are you talking about...

A. Irrigation.

- Q. Washdown, irrigation, what else?
- A. Land use in terms of whether it's dairy, sheep and beef, forestry.
- Q. So it's the interplay between the land use and discharge. It's just not discharge by itself and your evidence is mostly these activities are permitted and whilst council has a responsibility to monitor the environment where there's change and an effect that is consequential upon change, so the change could be a change in water quality for example, and an effect that is consequential on that change at the moment, council's responses are largely reactive where those lands...
- 5
- A. There is also the issue around uncertainty as well.
- 10 Q. Uncertainty and how would you describe uncertainty?
- A. Uncertainty also for landholders because there's a lot of variables at play, rainfall might change leaching rate as well. So one moment, they could find themselves or discharges from run off, one moment they find themselves complying and the other moment not.
- 15 Q. And this is with the standards in the permitted activities.
- A. Correct.
- Q. And you wouldn't know moment to moment whether they're complying or not because it's self-regulation or self-monitoring.
- 20 A. Well, under the permitted rules, yes.
- Q. Under the permitted rules. The only time you'd know there is a problem is if you actually had seen something in the environmental data which has been collected.
- A. Correct.
- 25 Q. My impression and I might be wrong is that under this water plan you're able to apply for a take and use but it's not tied to also an associated obligation to apply for all other resource consents so the scenario, for example is this. I'm an irrigation company and I want to apply for take and use but it's not linked with any other land use consent that I might require or discharge permit that I might require as an irrigation company or in terms of the people to whom I'm supplying might require. So that there's no holistic assessment under this plan of the proposal but the proposals can come in in quite a disjointed fashion, is that right? Or am I wrong in thinking that?
- 30

A. Well, there is no mechanism in the plan that requires or encourages I guess landholders or consent holders to do so.

5 Q. So there's no mechanism in the plan that encourage or requires, I suppose where there is a proposal to take and use water, either by a large entity like an irrigation company or perhaps by an individual to apply at the same time for any associated land use or discharges or damming permits as may be required and it doesn't sound like they're particularly required. So is that right?

10 A. No, that's correct. Like for example, if you're landholder, you think you cannot meet the thresholds in the plan, you wouldn't be required to apply for the discharge consent at the same time as you apply for your water take.

Q. I see so is that a problem? Is that one of the problems that you're dealing with?

15 A. From a planning perspective it would definitely make it easier. Let me rephrase that. You'd probably achieve better environmental outcomes.

Q. Why do you think you'd achieve better environmental outcomes?

1010

20 A. I guess you could – there is a risk I guess if you consider different consents at different times for the same activity but for different aspects of that activity. There is a risk of inconsistency I guess in terms of the policies from which guidance is taken. There is especially the case if you would consider them under a different planning frameworks which is a risk now with the requirement to develop a new plan and the outcomes in the plans, the current plan and the plan that is to be notified are likely to be different as well.

25 Q. So the extent to which there is that integration of all uses, you know, the discharge damming land use and water permit applications, the extent that you can have an integrated application really does depend on the applicant volunteering –

30 A. Correct.

Q. – or coming to that themselves?

A. Correct.

Q. There's no policy imperative driving that approach?

- A. Correct.
- Q. And you can't require it?
- A. Correct. I do understand that there's, in a case law, I think a bundling principle which, yeah.
- 5 Q. And this plan doesn't bundle, if you like?
- A. No, no.
- Q. But other regional plans do bundle would that be fair?
- A. Possibly.
- Q. Have you had a look at other regional plans or not?
- 10 A. I have, yeah.
- Q. So I have just a specific question about fish passage. I understand that the NPS are clause 2.6 has a policy in relation to fish passage which is any regional council must include in the following fish passage objective or words to the same effect in its regional plan: "The passage of fish is maintained or improved by (inaudible 10:12:18) structures except where it's desirable to prevent the passage of some fish species in order to protect the desired fish species, their life stages or their habitats", (inaudible 10:12:28) been a fair amount of evidence about exactly that.
- 15 A. Yeah.
- 20 Q. Has the ORC or does the ORC propose to bring down that policy in its operative plan?
- A. We haven't taken any steps yet.
- Q. No steps, yeah.
- A. The idea is to have this policy or a similar policy in the new land and water plan.
- 25 Q. Is this policy relevant to Plan Change 7 or not?
- A. The issue is definitely relevant to Plan Change 7.
- Q. The issue is because there's lot of evidence about fish competing with each other.
- 30 A. The policy is relevant to an extent that you can take for example an application comes in, it is captured by Plan Change 7 under the RMA because it's a proposed plan you can have regard to the NPSFM.
- Q. Is this a matter that we should have regard to when deciding whether to impose your proposed controlled activity rule?

A. (no audible answer 10:13:47)

Q. In so far as you have reserve control over certain things of interest to fish?

A. Yes. So fish passage is one of the things that we can set conditions on under the control activity rule. Also under the non-complying activity rule we could consider that. I think it's definitely a relevant issue and it is one of the reasons as well as to why we extended the scope to damming activities as well. It is a requirement to provide for this under the NPSFM by capturing deem permits that relate to damming. We can make sure that when those activities are reconsented after being granted a short-term consent that we can align them with whatever measures that are – will be proposed and subsequently become operative in the new land and water plan dealing with fish passage.

Q. So just to paraphrase or reflect back what I think I've heard is that the retention of controls pertaining to fish passage when deciding whether to retain them or not, this NPS objective or provision is relevant to a determination of that matter.

1015

A. Mhm. Yep.

Q. Okay. Is there anything else in the NPS or indeed the NES which made the relevant to making a decision on proposed plan change 7 apart from fish?

A. I believe definitely the issue of efficiency, the idea of plan change 7 is really to provide for an efficient and cost effective reconsenting pathway. However, given that the NPSFM requires this to be efficient, not just in application but also in allocation of water, I think it's important that council should retain the discretion to where needed impose conditions on that matter.

Q. So this is efficiency in allocation or efficiency in use?

A. Both. Yeah.

Q. This is an allocative plan in so far as with all that's being done here, as many will be rolling over existing permits.

A. Yes, but an aspect of the plan change is to address allocation specifically unused allocation.

- Q. Unused allocation. So what's NPS or NES provision dealing with allocation that you're referring to that you have in mind?
- A. Policy 11.
- Q. Policy 11. Okay. This is NPS?
- 5 A. Correct.
- Q. Or the NES?
- A. Correct.
- Q. The NPS. Okay. What page? Have you got that there?
- A. Page 9.
- 10 Q. Page 9. Okay, so policy 11 is also relevant when having a look at allocation in terms of, if you like, removing the unused allocation together with efficiency.
- A. Yes.
- Q. And is that one of the reasons why the council in terms of efficiency of use the council is mindful of Aqualinc method as being a relevant matter which it should be taken into consideration and a matter which would be relevant when looking under the matters of control, I guess?
- 15 A. Mhm.
- Q. That's where Aqualinc comes back in.
- 20 A. That's where Aqualinc comes back in to however there is a tension. What we're proposing is to first and foremost align the new allocations with historic use. The Aqualinc guidelines, there's a risk that if you look at the need of a consent holder to apply certain volume or rate of take to his land, you'll end up with – if you apply those guidelines you could end up with a volume or a quantity of water that exceeds historic use. The reason for that is that sometimes people have not fully utilised their consented volume and then have consequentially not optimised their irrigated area. In some cases, people only irrigate certain paddocks at certain times of the year when the water is available. Aqualinc ignores that. It looks at a demand on a yearly basis. That is my understanding. There is an example I think in the evidence of Mr Simon Webb where his current use is below what would Aqualinc recommend and so we want to avoid further allocation as a precautionary measure, that's why we prioritise first looking at historic use.
- 25
- 30

1020

Q. Okay, with that said Ms Dicey's, I know Ms Dicey has a lot of methodological differences but one of the things that she proposes is that it's the lesser of Aqualinc or historic use.

5 A. Yes.

Q. Does that respond to your concern or not?

A. I've given it consideration and I think I agree with the broader principle.

Q. With the principle of that, yes.

A. If you look at the lesser of historic use and the Aqualinc guidelines you come up with something that will avoid over allocation or further allocation, excuse me, and that is at the same time efficient. The key thing however is how you calculate historic use.

10

Q. Yes, that's a different issue.

A. That's a different issue and so that is something to bear in mind, the other thing is, I come back to the fact that we want to provide for a cost effective process as well by doing those assessments both assessments, it is likely to increase the costs for applicants as well.

15

Q. Yes I know but you're envisages this, aren't you? You're, I thought that was your evidence under policy 11 you envisaged that applicants will come back to you and will say using a method, you know, Aqualinc method or equally for Federated Farmers, the ECAN method in its plan which is a reasonable use method as well.

20

A. Not under the plan change 7, on the plan change 7 we would require applicants to look a – or we would look at historic use assessments only but we have the opportunity under the (inaudible 10:22:35) of control and the controlled activity rule to also look at efficient use if required.

25

Q. Yes, if required by whom?

A. Consents officers, if they – the consent authority, they have the discretion to set conditions on that in the replacement consents.

30 Q. What circumstances would they look at efficient use?

A. They would look at whether there's any, they would look at the irrigation method, they would look at leakage, yeah.

Q. Why would they even be interested?

A. You still want to provide from an opportunity I guess to make steps to more efficient use as well.

Q. I see, so applicant can provide historic take but you can then in your discretion also have a look at the reasonableness of that –

5 A. Correct.

Q. – and if they're leaky or inefficient then say, no you can't have your historic, you can have something much less?

A. Yeah, it's –

Q. Soemthing like that?

10 A. Yes.

Q. Now just testing that a little bit further, I didn't think you were wanting to knock peoples historic uses – and that's what was attractive about this is that you are simply by and large rolling over. You're knocking back –

A. That is correct, yeah.

15 Q. So I'm a border dyke coming to you and – which isn't the most efficient use but it's a wide spread use, would you look at my operation and go well I don't like that you ought to be on a pivot irrigator? How would you use this, that's what I'm asking you?

A. I agree with what you're saying, the first thing is to provide for, to make
20 sure that people get their historic use in their new allocation but as a consents officer, which I'm not, I would, yeah, have a discussion with the applicant and see if there is some way of increasing efficiency.

1025

Q. So this gets back to the problem that you're working on. Is this a very
25 confined plan change where you are going "I've got an immediate problem within the regional council, I've got all of these deem permits and replacement permits coming through in the next, you know, 24 months. We don't have a fit for purpose water plan or regional plans in place and also the RPS is about the be re-notified. The best we can do is just simply
30 roll them over on historic use", and I understand that problem and therefore what might travel with the investigation of that problem but you're kind of having a bob each way aren't you, saying: "Well that's your historic use border dykes, (inaudible 10:26:06) and now we want you to

become efficient.” Is that the problem that you’re working on is my question increasing efficiency? What is the problem?

A. To this plan change?

Q. Yeah?

5 A. To this plan change we are not trying to solve the efficiency of use problem but we don’t –

Q. But you’ve just told me you are and, yeah.

A. We want to keep the door open if there are any possibilities, you know, we want to –

10 Q. Because that’s a bob each way in it, and you know in terms of having a really – in terms of minimising the cost I guess for the primary sector but it may apply more broadly, minimising their cost and making this really attractive?

A. Yeah.

15 Q. “All we’re going to be doing is rolling over your consent conditions.” Now you’re requiring them to become efficient.

A. Not requiring, it’s not a requirement. It is just a matter that we listed in there to provide consent officers with the – if needed and if really appropriate to set conditions on those measures but there’s no policy to support it and it wouldn’t be a standard requirement for every consent.

20

Q. But you see there should be a policy for it shouldn’t there? If efficiency gains is what we’re after there should be both – that should be reflective and somehow in your objective and also your policies, would that not be fair?

25 A. It would definitely provide better guidance.

Q. Well actually it’s just a requirement, isn’t it, because you’ve got, you know, policies, implemented objectives, rules, methods, implement policies, that’s how it goes so we would need to see that –

A. Yeah.

30 Q. – policy, you know, beginning with policy (inaudible 10:27:57) but we’d need to see what is your outcome and then travelling all the way through down to the rule and that there’s no sudden reservation of a discretion which is un-related to your objective and policy. That’s normally what you would expect to see in terms of the draft and technique here, okay. So

you're saying is: "Okay we've got a matter of control here which would be useful for consent officers to have in the ordinary course", I would understand that because there's not the ordinary course and there is no policy which is driving efficiency gain.

5 A. Mhm.

Q. Isn't that a problem with the proposal that I'm putting to you?

A. I guess it creates a policy you pointing at a policy gap –

Q. I'm pointing at an orphan method that has no parent. Okay we'll just leave that there. It's something to think about. Are there any other orphans in that rule or any other rule, any other orphans that don't have any parents? Things that can't be parented by your objective or by your policies?

1030

A. Not that I can think of, your Honour.

Q. Okay. That probably requires just a bit more thought as to where the objective as you've written it, transitioning towards long-term sustainable management, whether that's captured there but again as a policy question how then is that brought down through the policies but it's something to think about in terms of what you want to get out of this. What is the imperative here? Is that to roll over and allow the policy team and the consents team time that evidently it needs to have an integrated – to think about a plan that provides for integrated management of natural and physical resources? Or do you want them?

A. If I may add to that, your Honour, and a number of submitters have pointed that out as well, the objective itself does not state an outcome, an environmental outcome.

Q. It doesn't.

A. We have considered and I've considered it and thought about it. The outcome really and that is captured in the objective. The outcome is really to establish that framework. That's what is captured by the objective. There is a risk of stating an environmental outcome in your objective that it's not going to be achieved through the policies because that's not the intent of this plan change really. This is a very confined plan change in terms of scope. Just a simple rollover. The outcomes that we want to go towards haven't been decided yet because that is a process that we're

undertaking to our FMU process and that needs to be done in accordance with the **(unclear 10:32:46)**. It's not within the scope of this plan change so it's purely procedural if you wish.

5 Q. Yes, purely procedural which is how I understand it. May be that's not captured by the objective but there is no environmental outcome in terms of avoiding further degradation or reducing degradation of water quality, is there?

10 A. It's not stated in the objective. It is captured by policy 10A21 for the matters that are listed. They seek to achieve that. they point at a number of tools to achieve avoiding degradation.

Q. Avoiding degradation.

A. Yeah.

Q. Okay. So it's avoiding degradation, Is that right? Avoid an increase or avoiding it per se or?

15 A. This is not what is in the policy but that is what the intent is for policy 10A21.

Q. You want to avoid degradation?

A. We want to avoid further degradation, losing ground really.

20 Q. You want to avoid losing ground. Okay. So when you're talking about degradation you're now no longer talking about that term as it might be understood in the NPS.

1035

25 A. Yes, I do actually because – if I may, just, I'm just gonna take the definition but stated the definition of degradation or degraded in paragraph 9 of my evidence in reply. By avoiding any further or by limiting the risk of further water abstraction and irrigation expansion or intensification we really want to make sure that we're not getting further away from the attribute stage or from the take limits because that's how allocation limits are now called in the NPSFM that we're not getting further away from achieving those.

30 Q. Okay through an increase in water attraction or an increase in the area under irrigation?

A. Yep.

Q. Because – carry on.

- A. Also by making sure that we carrying over any existing minimum flows or residual flows, again if we would not have that there is a risk that we kind of, worsen environmental outcomes.
- 5 Q. Because environmental outcomes are they effect of quite a large number of activities, that's both the taking use of water, the land use, the discharge, the damming changes the environment, would that be fair, first there is a change as a consequence of those activities, correct?
- A. Correct, yes.
- 10 Q. And as consequence of that change there may be an effect?
- A. Yes, correct.
- 15 Q. Within the environment which is including both the natural environment and including people in communities, there is an effect, that effect might be expressed immediately or it might take a long time to emerge and it may emerge, correct, that would be correct, immediately or over a long period of time?
- A. With water quantity the effects are usually quite immediate, you know, if you take water out of a river you see immediately a flow loss –
- 20 Q. Yes that's why I said actually a range of activities, not just water quantity. So the effect of associated activities with the water quantity emerge over time, either by themselves or together with other changes within the environment.
- A. Mhm.
- 25 Q. Yes, okay. So whatever's happening now, if there is an effect or an adverse effect of what is currently happening in terms of the taking use of water will continue to happen over the next six years –
- A. Correct.
- Q. – if you like. This plan change is not working on those problems?
- A. That is correct.
- 30 Q. That is correct and so when you're talking about degradation, you are avoiding further degradation you are talking about an additive change with consequential effect, that's what you want to avoid (inaudible 10:38:47).
- A. Correct.

Q. To the extent that you can given that you don't in fact, you say the plan is not managing in fact a array of activities which are also associated with the taking use of water.

A. Not simultaneously, yes.

5 Q. If at all because most these other things are permitted.

A. Yes.

Q. Okay. So anyway, by degradation what you're seeking to avoid is any additive change?

A. Correct.

10 Q. As a consequence of the taking use of water or an increase of area of land under irrigation, you are not working – that's correct?

A. That's correct, yes.

Q. And you're not working on the problem of the existing state of the environment whether that is degraded or not relative to any attribute or value?

15

A. It's not –

Q. It's not that?

1040

20 A. It's not that. I think it's – we're dealing with complex issues really. We have a limited time window available to develop a new plan and we'll need all the time to deal with those issues. This plan change has been developed over in accordance with the Minister's recommendation over a three month period.

Q. Yeah, mhm.

25 A. So, yeah, it wouldn't be – it would be – I think you need to be careful as well and we've heard that before. It's a complex hydrological and equiological environment and we need to be careful as to how we are seeking to achieve an environmental improvement.

30 Q. And some parties say you should be. That's what I gather from your (inaudible 10:41:09) –

A. That is correct, yes.

Q. – working to improve the state of the environment?

A. Yes.

- Q. And we'll hear shortly from them I suspect but looking at the issue of not increasing the area of land under irrigation, you have recommended an exception for folk that have purchased or made a financial investment in irrigation?
- 5 A. Correct.
- Q. Infrastructure prior to the 18th of March 2020, correct/
- A. That is correct.
- Q. And how many folk do you know are in that category?
- A. I don't know.
- 10 Q. You don't know. Who raised this then?
- A. It came to this expert evidence of Ms Marr who –
- Q. Marr?
- A. – acting on behalf of beef and lamb.
- Q. Beef and lamb?
- 15 A. Yeah.
- Q. So anyway you've got a new amended policy 10A21 and to recognise people within that category and you said provide and the increase in area under irrigation will result in a more efficient use of water than the existing use of water. What did you mean by that?
- 20 A. (no audible answer 10:42:29)
- Q. So we're looking at 10A2.1Bii, first part of two, what did you mean a more efficient use of water than the existing use of water?
- A. More efficient application of water because often application method is linked to environmental risk. It is – again there are – I'm not an expert in
- 25 the area and there are many variables but more efficient uses generally reduced to risk of run-off or, yeah, that's – so basically what we want to do here is people that have invested discouraged them from applying for a longer term consent (inaudible 10:43:14) complying rule but also put in a few – a safety net so to speak to make sure –
- 30 Q. You don't need to defend what you're doing because I actually understand what you're doing, I'm just wondering how this policy's going to be implemented, that's all, "so I am an applicant who has – can prove that I have made that investment, so tick, and I now need and I would like

to increase the area of land under irrigation but I am not in fact going to be taking more water so I'm still coming under my historical use", correct?

A. Yeah.

5 Q. So the increase – but the area of land, just say it's dry land currently, so the increase in area of land under irrigation will result in a more – so the increase in the area of land under irrigation results in a more efficient use of water. I don't get that. You know you're – to be able to use the same bucket of water more efficiently I might need to change from border dyke to a spray irrigator for, you know, for the land in total –

10 A. Yes.

Q. Sorry just, again, what's that getting at? You want to see a change in irrigation Infrastructure or what do you want to see?

A. Irrigation method and how the water is being used more efficiently.

15 Q. Does that depend on your clocks though? I mean is it possible to say three days on this block and, you know, two days on that block? No change in efficiency, it's just a different method of irrigating it?

A. Yes it's possible, yeah.

1045

Q. So it's just using the same bucket of water but differently.

20 A. Correct over a greater area.

Q. Over a greater area. Okay. I'm not sure how that would work. "Environment effects resulting from the use of irrigation will be reduced." What does that mean?

25 A. We want to make sure that it doesn't result in degradation of receiving waterbody because that comes back to what we're trying to on this plan change like avoid further degradation.

Q. So what are the things under consideration there?

A. Any discharges that might be resulting from the practice or the proposed activity.

30 Q. So you are going to be irrigating a new block of land, suggest that you might also be undertaking a different land use activity on the new block. If you're moving from dryland to irrigation more than likely you could be moving from irrigation to more intense – it's already under irrigation. I

don't know. This is complex. To look at environmental effects, you would need to be looking at land use and discharge at least.

5 A. You need to look at land use, discharges, land management practices as well. So it's actually described pretty well in – I think the evidence of Dr Chrystal as well.

Q. Mhm.

10 A. Which shows that you might be able to increase the area without there being additional adverse effects or you might actually potentially – because I think it's not a rule of thumb but in some circumstances you might actually get to a more environmentally friendly outcomes.

Q. A benefit so accepting that that is the case, do these words drive for that outcome?

A. Yes.

Q. You think so?

15 A. That's the intent.

Q. That's the intent. Okay.

A. If you don't meet these outcomes stated like more efficient use, and an environmental benefit then the applicant would need to apply under the noncomplying rule.

20 Q. This being a water plan and with no other associated land use or discharges, would this policy have to operate in tandem with PC8 in order to be effective? In other words, would you not just simply get an applicant saying, "well, you know removing from border dyke into spray that's efficient. We reduced run off." They might say that. but unless you could demonstrate what the nutrient loading was and what other land use management techniques are happening on that land, you couldn't assure yourself that, in fact, there was either a benefit or is there an effect?

25

A. With regards to plan change 8, there is no overlap. Again.

30 Q. I'm really surprised that you say that because plan change 8 is now backfilling the absence of land use control, isn't it? To a small extent.

A. To some extent but again the focus is on the land and water plan.

Q. So I'm asking you what do you think an application is going to come up with here? Are they just saying they're going to change the nozzles on

the irrigator? That's more efficient therefore there's less effects or are you expecting something else?

A. I would expect an expert assessment especially when it comes to looking at the effect of potential discharges.

5 1050

Q. And that's picked up under your RDA stuff?

A. Correct.

Q. Okay just looking at the discharges how's that picked up?

A. There is, in terms of the matters of discretion?

10 Q. Yes how are the land use and discharge matters –

A. Yeah it would be the last one out.

Q. It would be the last one out, okay. Yes, is that something that you could be a little bit more specific about rather than just any adverse effect because any adverse effect I bet you the planner will say it's restricted to water, it's just a change of nozzles on the irrigator, we're more efficient, there's less runoff, that's it end of story.

15

A. I think so.

Q. You think so?

A. No, yeah agree–

20 Q. No I'm just putting it out there because you've got a rather significant change sitting here and you don't know – which has come in from beef and lamb and you want to respond to them, it's a reasonable consideration in your view, but you don't know how many people are actually in this category, so I'm just, yes.

25 A. I don't know, the best I can do is make a guess. Because we are currently in a process where a lot of deemed permits are expiring I think the deemed permit transition or replacement process often goes, from observation, it often goes hand in hand with some unfarmed changes, that is an assumption.

30 Q. So you'd want to test that wouldn't you?

A. No want to test it but I want to provide in case that would be the case, yes.

Q. Yes okay but I think you'd want to test that assumption in terms of knowing how many people are potentially within this category and might

want to take advantage of that, you want to also, I think, I'm going to suggest also think about the words 'adverse effects' and whether or not that's actually useful language in this context where at best your managing risk.

5 A. I agree and I think –

Q. Over a short period of time.

A. Yes, it's come up with relation to other matters as well but whether we can be more specific around thresholds, think that will be discussed later on especially in relation to the non-complying rule as well whether we can work specific in terms of quantifiable thresholds on to it.

10

Q. Well yes and no but just be, if risk management is all you can achieve is reasonably what you can achieve within a very short period of time because these rules are applying to a short period of time because other people have got other views and (inaudible 10:53:35) but if it's risk management as opposed to being able to categorically predict an adverse effect emerging within the same time period in the future, then think, you know, you'd need to think about the language and such that it's redolent of the issue that you're working towards and not using old language which may not serve its purpose within a water context is what I'm suggesting.

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COURT ADJOURNS: 10.54 AM

COURT RESUMES: 11.20 AM**CROSS-EXAMINATION: MR WINCHESTER**

Q. Good morning Mr de Pelsemaeker?

A. Good morning.

5 Q. I want to start some questions regarding the basis for PC7 and the alternatives proposed and then I want to deal with some of the areas of difference between you and Ms McIntyre for Nga Runanga. Now the first issue I want to address with you is around problem definition and you'll be aware from some of the planning evidence that there seems to be a
10 degree of denial that there is a problem that PC7 needs to solve, would you agree with that?

A. I agree, yes.

15 Q. But in many respects the situation in Otago is pretty unique, isn't it, because you've got significant reliance on deem permits, a significant number of deem permits and some degree of inaction by the council in addressing this issue for the 30 year duration of them but those are all relevant factors aren't they?

A. That is correct, yeah.

20 Q. And you've got significant over allocation in many catchments, that exists as a matter of fact doesn't it?

A. We haven't really – well the current plan does not define over allocation. We haven't really established the limits that will be in a new plan so it's hard to kind of say where and to what extent we're dealing with over allocation but there is, in my opinion, there's high levels of water use and
25 it is – there is definitely a risk that we're dealing with over allocation and, yeah.

Q. And I believe in your evidence-in-chief the regional council considers there's a growing demand for consumptive uses, so demand is on the increase as well isn't it?

30 A. It is. We've got a, yeah, we've got a number of growing population centres and also in the rural area we see an expansion, yeah.

Q. And there seems to be no dispute, certainly from the regional council's perspective that the existing regional planning framework is inadequate

to manage the demands on fresh water and it doesn't – it's not necessarily entirely reflective of the Treaty of Waitangi principles, is that a position you would agree with?

5 A. I agree. The current plan limits the ability to give consideration to values that are relevant to iwi.

Q. And would you also agree that the regional water plan reflects a prioritisation of use of water and reflects a paradigm of commoditisation, it sees water as a useable resource first and foremost?

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10 A. One of the problems with the water plan is that it's got a number of objectives when it comes to managing water and those objectives can be conflicting. For example we've got an objective that basically states we need to provide for the needs of primary and secondary sectors and then we've got another objective that says you need to provide for life support and capacity when there's a conflict and when you cannot provide for both the water plan does not give you any guidance, so it's really hard to – it doesn't reflect the priority under the NPSFM.

15 Q. If I can maybe approach it from a different direction. We've got case law now on the national policy statement for freshwater management for 2017 version, the Southland Regional Plan case law, are you familiar with that?

20 A. I'm not familiar with it, no, not in any detail, no.

Q. Well in terms of the concept of a paradigm shift in the way of thinking about freshwater, are you familiar with that terminology?

A. Yes, yeah.

25 Q. And so what you have and certainly in the Southland context was a very clear finding that the NPS 2017 reflected a paradigm shift in thinking about freshwater.

A. Mhm.

30 Q. And now we've got the 2020 freshwater NPS and that is quite explicit around what prioritisation should occur to give effect to (inaudible 11:26:51) and so you've got that quite different way of thinking about freshwater haven't you?

A. Yeah.

Q. And the fundamental requirement of that is to put the needs of water bodies first isn't it?

A. Correct.

5 Q. So when you think about that and combine that with the other Otago specific factors, you would agree then that there is a significant probably in the way freshwater needs to be managed in Otago, do you?

A. Correct, yeah.

10 Q. And the Minister for the Environment has issued a direction that PC7 be considered by the Environment Court and has identified a number of reasons that he has given as to why it's a matter of national importance and you'll be familiar with that direction are you?

A. I have read them, yes, yes.

15 Q. And obviously some planners have not addressed that matter in their evidence but based on your knowledge and understanding, is there anything in the Minister's direction and reasons that you disagree with? Because you're entitled to give an opinion as to whether there's any gaps or there's anything missing there or inaccurate.

A. No.

20 Q. Thank you, I now want to just move to one of the alternative regimes that has been advanced by some of the planning witnesses and some of the parties and that is a suggestion that plan change 7 is unnecessary and that we should be dealing with NPS implementation through consent renewal process and it can all be dealt with through a consenting process. So my understanding is that the bulk of renewals of deemed permits and existing water permits would be dealt with as a restricted discretionary activity under 12.1.4.8?

A. Correct.

Q. And are you familiar with that particular restricted discretionary rule?

A. Yes.

30 Q. So that's common bundle, your Honour, common bundle 1 page 182, 183. Just before we look at that rule, Mr Pelsemaeker, are you familiar with a resource consent decision made by an independent commissioner on behalf of the Regional Council, *Last Chance Irrigation Company Ltd*?

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A. Yes, I am familiar, I've read it but it's a while ago.

Q. And that related to an application for renewal for water takes from some waterways draining the Old Man Range in the Fruitmans area and which are partially used to fill (inaudible: 11:30:51), is that your understanding?

5 A. Yes.

Q. And in that decision made by an independent commissioner, it was a very firm finding made that under rule 12.1.4.8 there was no ability to consider values of interest to Kāi Tahu or any cultural effects, is that your understanding of that decision?

10 A. That is my recollection.

Q. Yes. So that's an obvious issue if we're going to continue down the 12.1.4.8 route with all of the renewals, isn't it, because in a way that excludes consideration of a reasonably material consideration, doesn't it, if Otago Regional Council adopts that position.

15 A. Correct and especially in light of the NPSFM and the compulsory values and the new NPSFM.

Q. Yes. And so if we look at rule 12.1.4.8 and we assume that we're going down a regime of renewal of resource consents, have you thought about the ability to have regard to the national policy statement for freshwater management under all of those matters of discretion, is that something you've thought about?

20

A. Yes.

Q. And have you reached a view about that as to whether you can shoehorn the NPS into any of these matters?

25 A. It refers to a number of mechanisms such as the minimum flow which arguably could provide for these matters but the plan itself does not – the primary objective that guides setting up minimum flows does not provide for consideration of cultural values. So I would say – you could argue that there's an indirect link but it's not a clearly defined link. It would be better if it was more explicit.

30

Q. Yes because nowhere amongst those matters does it say that you're entitled to have regard to any relevant national policy statement, does it?

A. It doesn't.

- Q. No. Okay and so looking ahead if we assume we're going down this path, you could imagine there would be some debate if for example my clients wanted to introduce consideration of the NPS and applicants did not, there'd be quite a strong debate about the relevance of those matters, wouldn't there?
- 5
- A. It would follow from, I believe, the wording in the RMA which says: "have regard to", which is not the same as: "give effect to", so there is.
- Q. And you're familiar with section 104C of the RMA which deals with what you can have regard to for restricted discretionary activities?
- 10
- A. Yes.
- Q. Thank you. So let's just put that to one side and let's assume that everyone agrees you can have regard to the NPS under this rule. So that's an assumption I want you to build in when you're thinking about this, in terms of a matter to have regard to, and I realise you're a policy planner rather than a consents planner, the NPS wouldn't be an overriding consideration, would it? It would simply be one of a number of matters to have regard to.
- 15
- A. Correct, there's no obligation. The other thing as well that I think is an issue with that is that the NPSFM sets out a process of outcomes that need to be achieved but the outcomes themselves still need to be determine to run off framework or through an RPS in which you define what (inaudible: 11:35:40) means or the long term vision so you don't have the actual endpoint so it's really hard to make a consent decision that actually achieves that.
- 20
- Q. Yes and so you wouldn't be – while the requirement is not to give effect to the NPS through a consenting regime, you wouldn't be able to give effect to it anyway because you wouldn't know what the endpoint was, is that correct on a case by case basis?
- 25
- A. Correct, you could take some guidance from the policies but I think the endpoint itself, as the limits or the outcomes or the attribute states – target attribute states that you said in your plan.
- 30
- Q. And so essentially one of the things you might have to do is try and identify Te Mana o te Wai and define it for individual applications, wouldn't we?

[SOUND INTERRUPTION FROM 11:36:40 TO 11:37:05]

THE COURT: JUDGE BORTHWICK

We're going to sort this. I say with confidence because court security has gone out the door.

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MR WINCHESTER:

I might box on, your Honour.

THE COURT: JUDGE BORTHWICK

You might box on? If we need to pause, just pause, this is too important to be lost.

10

CROSS-EXAMINATION CONTINUES: MR WINCHESTER

Q. So you would also need to consider, wouldn't you, the regional water plan framework as another relevant matter?

A. Correct.

15 **[SOUND INTERRUPTION]**

**THE COURT: JUDGE BORTHWICK ADDRESSES COUNSEL –
CONSTRUCTION NOISE PAUSE IN EVIDENCE (11:38:40)**

MR MAW:

We could usefully use the time just to talk about the timeframes for the production of further evidence from the consents team (inaudible: 11:39:04)

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THE COURT: JUDGE BORTHWICK

Yes.

MR MAW:

The plan is to call two witnesses from within the consents team. The consents team manager is across the broader work programme in terms of how the consents team is preparing to process the applications that are to be lodged. The second witness will be a consents planner who has been processing

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consent applications including applications lodged post the notification of plan change 7 so for the real world experience, their plan change has been considered and applied today.

THE COURT: JUDGE BORTHWICK TO MR MAW

5 Q. Right and that real world experience, how's that relevant? I mean, I don't want them discussing the applications as such.

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A. Some of the questions that you had identified when it was suggested that the Court might be assisted by this evidence are outside the scope of
10 expertise of the manager of the consents team so having a second resource available in terms of how the plan changes are being interpreted in terms of some of the matters of control and et cetera was considered that the officer processing might be better placed to answer those questions.

15 Q. Alright. Okay.

A. What I had in mind was calling the two witnesses jointly to fill the question from the Court and it may well –

Q. You mean not producing anything written in writing?

A. Oh, no, they've both produced written brief of evidence but just in terms
20 of making sure the right person's able to ask the right question that may be more efficient.

Q. Okay, because there's an overlap.

A. We'll get the evidence produced first and perhaps make a call on that. As to timing we were working on having that evidence really at some point
25 tomorrow and then lodged and it'll be a matter of timetabling those witnesses and I'll need to talk to my friends about other witness availability as to when we can slot them in but presumably the sooner the better.

Q. Yes, about the scene setting. I think it's really important. That sounds good. Anyone got any difficulties with that? No. Okay. I'm obliged to
30 thank your witnesses. We're good to go.

CROSS-EXAMINATION CONTINUES: MR WINCHESTER

- Q. Thank you, your Honour. Thanks Mr De Pelsemaeker for your patience. Now, my last question was around the need to also consider the regional water plan framework as a relevant matter and I think we've talked about the way that it seems to prioritise consumptive uses. So you've got that factored – have regard to, you'd agree and it also favours long consent durations, doesn't it?
- 5
- A. It doesn't give much direction in terms of consent duration. It's more like a list of matters but it creates an expectation for long consent durations and the practice has shown that that has been the case.
- 10
- Q. Thank you that's helpful. Would it be fair to say that the existing RWP framework doesn't deal very well with the concept of accumulative effects? It tends to deal with things in a very much case by case basis.
- A. It is a difficult matter to grapple but I agree with you in general, yes.
- 15
- Q. When you've got those factors to also take into account you'd agree that for a restricted discretionary activity application you're going to struggle to achieve the NPS goal of putting the needs of a waterbody first, aren't you?
- A. Yes.
- 20
- Q. And I think you've referred to the procedural directions in the NPS around tangata whenua involvement and they occur several times around clause 3.4 and other related clauses, don't they?
- A. Correct. Yep.
- Q. So if we go down this framework that simply won't occur, will it?
- 25
- A. The risk is that you create a framework that will be – sorry the regime that will be in place will be determined by consents as you'll have difficulty to bring them in line with the regime that will be in your new land water plan.
- Q. And that's the exercise that regional council and mana whenua have embarked on at the moment, isn't it?
- 30
- A. Correct.
- Q. And both parties are seemed to be placing quite a lot of weight on that.
- A. Correct.
- Q. So you then think about the ability to take into account treaty principles. Treaty principles aren't referred to in rule 12.4.1.8, are they?

A. No.

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5 Q. And in the absence of going through the procedural requirements of the NPS, which is itself a reflection of three different principles then that effectively, that couldn't happen under this regime could it?

A. No.

10 Q. Thank you. I want to now just deal with some differences between you and Agnes McIntire and I wonder if the simplest way to do it is to have a look at your latest recommended version of plan change 7 so that's the one that incorporates your amendments of 4 March, do you have that at hand?

A. (no audible answer 11:45:52).

15 Q. I wonder if you also just have your evidence in chief at hand because I just want to, I want to keep going on your new restricted discretionary activity rule and you've had some interaction with the Court about some of the detail and purpose of that but I just want to ask some further questions around that. So in your evidence in chief and I look in particular at your analysis at page 107 and paragraph 365 and following and there's quite a detailed analysis there which runs for, my maths is not particularly
20 good but about six pages where you analyse the concept of why increasing the extent of irrigatable area is not a good idea and you've very thoroughly identified in that analysis all of the reasons given in submissions as to why you might make provision for that.

A. Correct.

25 Q. And you've rejected all of them.

A. Correct.

Q. And so it was only when you saw the evidence of Ms Marr that you thought this is a new or different factor that needs to be accounted for, is that the position or did it just make you think again?

30 A. It was not just the evidence of Ms Marr, I believe that there's a number of experts that have said that irrigation expansion, while it creates a risk does not always create a risk of environmental degradation. So I've that into account as well.

Q. Well my reading of your evidence in chief and I look in particular at paragraph 371 on page 111 is that you've gone through that information and the positions of people including recognising that there is some scientific evidence to that effect and very firmly rejected the concept of increasing the irrigable area so –

5

A. Yeah.

Q. – I'm interested as to the basis for the change and it does seem to be inconsistent with what you've just said.

A. Yes, so there's two key reasons why I wanted to discourage in my evidence in chief irrigation expansion. One is for ecological considerations, the other one was for economic implications for landholders. We want to avoid that they're going to invest more and then the investment is going to be redundant. The change in my evidence in reply stems from the fact that A. I've been able to consider some evidence

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that points at certain ways of mitigating environmental impacts and secondly, because in the cases where I've provided for, so where people actually already have made the investment, there's a likelihood that they will apply for a 15 year consent to maximise what they've invested in. The intent of the plan change is actually to provide for six year consents so I'd rather have them applying for a six year consent than for a 15 year one.

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Q. But I think you said in answer to a question from her Honour that you don't know the scale that this particular issue and what your proposed rule is intended to address do you? You don't know how many people it might apply to?

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A. No it wouldn't – the timeframe that was available to me I've not been able to make that assessment.

Q. And in order to be effective at addressing your concerns, you'd agree that in terms of the drafting of the rule it needs to be clear in terms of its application, it can't be open to debate or discretion?

30

A. I think clarity is a good thing so I agree with you in that respect, yes.

Q. Can we just have a look at some of the drafting aspects?

A. Yeah.

- Q. And let's look at your new rule. If we look at the conditions for entry, so if we're on page 6 of the document and the rule's set out there and it says: "It's a restricted discretionary activity providing the following conditions are met." My understanding was in answer to Commissioner Bunting yesterday evening that after (ii), under (a), that should be an *or* rather than an *and*, is that correct?
- 5
- A. No, sorry I might have – it should be "You have to comply with (a)(i)(ii) and (iii)", and *or* at the end of (iii)." Probably should – from a drafting perspective it should be either (a) or (b).
- 10
- Q. I see.
- A. So – does that make sense?
- Q. Yeah, well, probably not but that's how I thought and I'm just going to go through the rest of the rule but that at least explains your intention, so thank you. Now you had some discussion with her Honour this morning about the ability to measure the reduction in environmental effects which is one of the factors that needs to be demonstrated in an application. And last night I think you suggested that you might take a net benefit approach?
- 15
- A. I could have worded that better. I think it's an overall – sorry a benefit, yeah.
- 20
- Q. Well let's just think about as a for instance, what about the circumstance where the extent of an irrigable area had or raised issues of concern from a cultural perspective but in all other respects there were demonstrable reductions and effects of other relevant effects.
- 25
- A. You mean ecological effects or, yeah.
- Q. Well I guess that's part of the issue. What is the bundle of effects to be considered and do you see the issue that you may have to place weight on certain effects at the exclusion or expense of other effects because by my reading of this rule if there is a concern about cultural effects and an increase in cultural effects, all it needs is one increase in effect of a relevant type of effect and you don't qualify or is that not the intention?
- 30
- A. Could you repeat that?
- Q. Well let's say you have an assessment before you that says there will be a reduction in effects in terms of discharges. There will be a reduction in

nitrogen application. There will be improved water use, and that's a benefit. A concern has been raised by mana whenua about a cultural implication that they are concerned that there's a cultural effect because of potentially increasing an irrigable area. Is that one concern enough to prevent an applicant getting through the gate or do you trade one off against the other?

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A. Yeah, that's the issue against using the word environmental because it captures everything, so I agree that the provision could benefit from being more precise in that regard.

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Q. Okay. Alright. Thank you. In terms of the need to demonstrate that a financial investment in infrastructure has been made and that is dealt with in that first factor, infrastructure for irrigation on the additional area to be irrigated whilst purchased or ordered with a deposit paid. So just thinking about the evidence that would need to be furnished to satisfy that, what if someone's entered into a conditional contract to purchase irrigation infrastructure, is that enough? Is that a sufficient commitment?

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A. You'd have to link it to the area specifically, like you wouldn't accept any – I'm not a consent officer but I would expect that to be a relevant consideration making sure that it's linked to the irrigated area that is proposed to be expanded.

20

Q. But I'm talking about the commercial arrangement that's been entered into by the application and a supplier of infrastructure. Doesn't your rule require you to reach judgements about the nature of the arrangement that's being entered into and whether that's a sufficient commitment?

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A. The evidence should include assurances that some financial commitment has been already.

Q. Alright.

A. Or investment.

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Q. And there's no dollar threshold specified, is there?

A. There is not, no.

Q. In terms of the type of equipment, it needs to be a judgement exercise as to whether it's relevant to increasing the irrigable area, doesn't there?

A. When you refer to equipment, do you mean irrigation equipment?

Q. Yes.

A. It would need to be demonstrated that it's more efficient in use.

Q. And that it's infrastructure which is directly related to increasing the irrigable area.

5 A. Yes.

Q. So you can see, can't you that there's some judgements calls on some quite unfamiliar areas that might need to be made by regional council officers in terms of application of this rule?

10 A. Yes and no. Yes, in terms of there would need to be some judgement calls made. No, in terms of under the RMA at times we already have to consider investment or financial implications so my expectation would be that the consent holders have done similar assessments already.

15 Q. Yes but there's a distinction isn't there between matters over which discretion is restricted and specific conditions of entry so that you can rely on a rule?

A. Yep.

Q. Alright. Now, the rule as proposed doesn't make any provision for consideration of cultural matters or effects, does it?

20 A. Not explicitly. The word environmental, environment the way it is defined by the RMA captures everything but that is, as you pointed out, previously something that could be made more specific.

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25 Q. Okay well just in terms of that issue, can we turn over the page to page 8 and the notification clause that's been drafted, and I think that's the same as the notification clause that appears earlier?

A. Yep.

Q. Just want to try and understand what it is the intention is here because it starts off with a very clear direction that they'll be no limited or public notification, that's the first sentence isn't it?

30 A. Yes.

Q. But then it makes reference to limited notification to effected order holders in terms of section 95F of the RMA, I won't ask you to look at it but my reading of the Act is that that relates to affected orders under the Marine and Coastal Area Act, do you, is that your intention because that deals –

A. Actually –

Q. – in coastal matters?

A. Yes that is my recollection, yes.

Q. And is that the intention though of this?

5 A. No.

Q. No.

A. No.

Q. Okay. So is this an exception to the general rule that there'll be no limited or public notification, is that the intention?

10 A. Correct.

Q. And so it does seem to be a mistake in reference to Marine and Coastal Area orders but looking just at the last part of that, where relevant under section 95B3 of the RMA that relates to statutory acknowledgment areas, so is your intention that where a statutory acknowledgment area is effected that limited notification may be given to mana whenua?

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A. Correct.

Q. I see.

A. I think, if I may add to that, also it might be good to be able to consider downstream effects as well on coastal areas.

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Q. Okay, thank you. But clearly that drafting and that notification clause might need a bit of a twig in terms of what the intention is?

A. Yes, I'd be open to reconsidering that.

Q. And in terms of the rule that you drafted, the new restricted discretionary activity rule, did you seek the input of the Regional Council consents team in terms of interpretation and drafting?

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A. No, I did not have the time to do that.

Q. Thank you. Now, the last question I want to ask you is around the concept of true exceptions and you'll recall when Mr Maw gave his legal submissions on the first day he had an interchange with her Honour about the concept of true exceptions being able to be considered under the non-complying activity rule, do you remember that?

30

A. Yes, I do.

Q. And is your intention with drafting the restricted discretionary activity rule that the circumstances it deals with is a true exception or is it just a new pathway for consenting?

5 A. It's new pathway for consenting because it ultimately achieves the same, or is intended to be achieve the same outcome as a controlled activity rule which is a short term consent for six years.

Q. But gives you the opportunity to decline it because it's restricted discretionary?

A. Correct.

10 **THE COURT: JUDGE BORTHWICK TO MR WINCHESTER**

Q. Sorry, which other non-complying, which rule are we one?

A. I was asking whether the restricted discretionary activity rule was and the circumstances it dealt with was in the nature of a true expectation or whether it was –

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Q. I see, yes.

A. – or whether it was a whole new distinct consenting pathway –

Q. And the answer was?

A. And the answer is the latter.

20 Q. The latter, distinct.

A. Yes.

THE COURT: JUDGE BORTHWICK TO WITNESS

Q. And then following up on the last comment for how many years?

A. Six years.

25 Q. You still think a whole new pathway for a six year consent is what you hope to get out of this? Yeah, okay.

A. Yes because the risk is that people that already have committed to an investment are going to apply for a – under the non-complying activity rule for 15 years. But it's ultimately we want to keep that a true exception.

30 Those non-complying activity rules should be for the true exception. Therefore we want to try to capture as many people as possible under

either the controlled activity rule or the restricted discretionary rule for six years consents.

CROSS-EXAMINATION CONTINUES: MR WINCHESTER

5 Q. No that's very helpful, so if I understand you correctly the true exception is the granting of a consent for longer than six years –

A. Correct.

Q. – and being able to make a case for that?

A. Correct.

Q. Thank you it's very helpful.

10 **CROSS-EXAMINATION: MS WILLIAMS**

Q. Mr de Pelsemaeker, I'm actually going to start with the 2020 National Policy Statement and Te Mana o te Wai and just for the record this is common bundle the start of volume 3. So the fundamental concept of Te Mana o te Wai as expressed in the National Policy Statement is that
15 it's a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment who protects the Māori of the wai, Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment and the community. And I'm not going to
20 go on to the second clause there. You have certainly referred to the obligations and again just to reinforce there is a hierarchy of obligations in Te Mana o te Wai they prioritises. First the health and well-being of water bodies and freshwater eco systems and it's particularly the freshwater eco systems I guess which I want to discuss a little bit with you
25 because we've been talking quite a lot about water bodies but I don't think we've been talking about eco systems. So we have heard the evidence of Dr Allibone that we have in Otago a heap of freshwater fish species and he's described those in his evidence and in particular what we do have in Otago is we have these threatened (inaudible 12:08:48) fish and
30 we have a lot of them and quite a few of them are in places which interact with water extraction and you have told us this morning and yesterday

that part of the purpose and the intention of Plan Change 7 is to ensure that there is no further degradation of freshwater and of eco systems?

A. Correct.

5 Q. So one of the outcomes of Plan Change 7 must be that we do no inadvertently further degrade those freshwater eco systems which amongst other things are supporting the threat of (inaudible 12:09:37)?

A. Correct.

1210

10 Q. One of the matters which the Director-General raised in his submission is the ability to impose controls to protect those threatened species and so if we're looking particularly at the controlled activity, we certainly have some matters of discretion in there, this is rule 10A.3.1.1 I think. Yes, so we certainly have some matters of discretion in there over intake method and flow rates to avoid or mitigate fish entrapment. So essentially that's
15 (inaudible: 12:10:53) now. We also have at paragraph D provision of fish passage and so that picks up on at least two of the factors which are going to be important to our non-diadromous fish species. Mr Brass suggested in his evidence, and it was also in the Director-General's submission that there be some additional matters of control. Do you have
20 Mr Brass' evidence there?

A. I do.

25 Q. It may be simplest to go to his appendix which is from page 27 of his evidence. Apologies, the appendix doesn't appear to have page numbers on it – oh, it does at the top. I think it's going to be easier to look at where it's consolidated rather than the individual portions so perhaps if we look at the consolidated version which starts from page – bottom of page 6, top of page 7 of the appendix. In answer to a question from her Honour this morning where she was exploring with you again this concept of avoiding further degradation, you told her Honour that policy 10A.2.1 set
30 out a number of tools to avoid that further degradation to avoid losing ground and bottom of page 6, top of page 7 is a consolidated version of changes to policy 10A.2.1. And where I'm focusing on is the new suggested paragraphs G and H. Recognising that we have, in the national policy statement there's focus not just on water bodies but also

on freshwater ecosystems, remembering that we are trying to avoid further degradation in the Otago Region and that these are a threatened species with a lot of interactions with water extraction, do you consider that perhaps not with the exact wording that's set out in Mr Brass' evidence but that it is appropriate to have those as tools which are available to avoid that further degradation?

5

A. If this was a long term planning regime I would definitely concur with you. I consider though that the policy itself gives support to the controlled activity rule. Controlled activity rule; it is anticipated that it has a limited lifespan until the new plan is introduced. I have considered this but I also consider (inaudible: 12:14:58) which states that after he looked at plan change 7 he did not consider there to be a risk of extinction on those non-migratory galaxiids. Also, the controlled activity rule – and I think it's a shared concern amongst quite a few parties involved in this procedure to make it as accessible as possible requiring applicants that would apply under the controlled activity rule to undertake assessments that would inform the measures you're alluding would make the cost – would add significantly to the cost of those applications which could cause them to apply for a longer term consent.

10

15

20 Q. Although they would still have to pass through the non-complying threshold test, wouldn't they?

A. Correct.

THE COURT: JUDGE BORTHWICK

Sorry, why was that?

25 **MS WILLIAMS:**

They would still need to pass through the threshold for a non-complying activity.

THE COURT: JUDGE BORTHWICK

I've lost the train. I thought the question was whether you should put these additional measures in the control activity rule or have I got that wrong?

30

MS WILLIAMS:

That's exactly – sorry, your Honour, it was just that the longer term pathway is only available for non-complying activity.

THE COURT: JUDGE BORTHWICK

5 Then you'd have to go there, true.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. And that in part is because we're trying to avoid that further degradation in terms of the non-complying rule being the longer term consents.

A. Yes, the intent is to get as many applicants applying for short term consent. Another consideration is that some of the populations, while I acknowledge that extraction can have an impact or habitat alteration can have an impact, in some cases, and that's been discussed previously as well, they are there because of a certain flow regime that is in place. So, yes.

15 Q. I'm going to come onto flow regime because that's also very important but just for the moment dealing these additional matters of control which are proposed, and I'll move on particularly to rule 10A.3.1.1 and that is additional matters K, L and M which are on page 9 of the appendix to Mr Brass' evidence. What you have also told us in your evidence to date is that these are all matters of discretion for consents officers, is that right?

A. Under the control activity?

Q. Yes.

A. They are limited to the ones.

Q. Yes and these are matters of discretion for consents officers so not all of these matters of control will apply in all application.

A. That's correct.

Q. And the Council whilst it has told us that it has limited information, it does have some information about where the galaxiid species are and indeed, there's a bit of a discussion in both Dr Dunne's and Dr Allibone's evidence about the extent of mapping of where the galaxiid habitat is.

A. There is – my understanding from reading the evidence, there is a good level of understanding around the distribution but there is still quite a bit of knowledge to be gathered around these specific locations.

Q. But there is certainly some information available about locations?

5 A. There is some.

Q. Yes. Because these are matters which are discretionary, it really becomes a matter for the consents officer to basically look at the existing information the Council has and from that, make a call whether or not it is appropriate to impose conditions to deal with non-diadromous galaxiids in this particular case, doesn't it?

10

A. That is correct.

Q. And not having those matters listed in the matters of control means that they cannot be considered?

1220

15 A. They – I guess they can be considered but they cannot be addressed.

Q. Yes, they can't be addressed.

A. Directly.

Q. Thank you. I'm going to move on from that. I have already explored with Dr Allibone the issue of priorities and I'm going to address that again with you and that was something that you also discussed with Commissioner Edmonds yesterday and what you told Commissioner Edmonds yesterday in your evidence is that the council has records of deemed permits?

20

A. Correct

25 Q. So it has that information available to it because the deemed permit itself states whether or not they're priority permits or not?

A. Correct.

Q. You have also proposed as part of plan change 7 that existing cessation of take conditions would carry on to replacement consents?

30

A. Correct.

Q. In some respects the way the priority works is a de facto and in fact a de jure currently cessation condition, isn't it? It's just not one that's imposed or enforced rather by the council.

A. That is an important distinction I think because a condition needs to be complied with and the council needs to enforce that. Whereas I'm not an expert in this area but I'm not sure if there are any sanctions upon not adhering to priority if there would be an agreement within consent, within
5 deemed permit holders within a catchment, amongst impairment holders within a catchment to deviate from that and have an alternative arrangement.

Q. So I'm not talking about an alternative arrangements. I'm talking about legal rights because these're existing legal rights and whilst the council
10 may not be enforcing them, certainly the current priority holder can.

A. They can.

Q. And given that the council has knowledge of them, even if the council is not enforcing them, the council has knowledge of them, where a current priority holder on a deemed permit, that is that priority is important to
15 them, would you not expect that priority holder to inform the council of that as part of their application for a new replacement permit?

A. I think that's a question that probably can be better answered by consents officer.

Q. If a consents officer is aware that that is something which is important, as
20 I say, they have visibility of what the priority is, even if it's not currently enforced, it could be translated into a take cessation condition because that's effectively what it is, couldn't it?

A. It could be translated into a take cessation condition. It could be embodied by another condition shared amongst consent holders within a
25 catchment and that being a condition on the consent. There are number of ways.

Q. So given that and given that the priorities in the way in which they're exercised means that we have freshwater ecosystems which are habituated to the exercise of priorities, isn't it important to continue those?

30 A. Umm...

1225

A. Yesterday I already explained that some of the (inaudible 12:25:07) patterns might not fully to a degree be reflected in the volumes and the limits, the rate of take limits and the volume limits set on the new consent.

That will basically prevent people of a lower priority to ramp up their takings so others lose access. I also acknowledge that it's a very – sorry it was acknowledged by Mr (inaudible 12:25:43) that's it's a complex matter, not easy to deal with. The intent is in relation – because we're

5 talking about the (inaudible 12:25:52) relation to the control activity rule to make the rule as simple as possible. So therefore it would add another layer of complexity, another layer of cost that would drive people towards a longer term consent.

Q. Is it adding another layer of complexity and cost when this is an existing

10 right which is being exercised and which the council are aware of? Where is the additional cost?

A. Well first of all there needs to be an agreement between all the consent holders.

Q. But this is the point is that there doesn't need to be an agreement because

15 it is in the deemed permit.

A. But the deemed permit will expire.

Q. Yes.

A. So my understanding, again I'm not an expert, the priority system will cease to exist. It is not automatically carried over into the resource

20 consent regime, so therefore – yeah in summary the RMA does not provide for these priorities to be retained.

Q. It certainly doesn't post-October this year.

A. Yeah.

Q. And that of course is precisely my point is that the priorities exist at the

25 moment. They are being exercised at the moment. We have water bodies and freshwater eco systems which are used to, this is the way they operate at the moment. We don't want to have further degradation. There's a need to continue the priorities post-October onto these replacement consents.

30 **THE COURT: JUDGE BORTHWICK TO MS WILLIAMS**

Q. Isn't the issue that you're addressing though the question of what is the risk?

A. Yes.

- Q. And so what is the evidence or, you know, perhaps a better way of approaching this is to point out in your, you know, in your evidence or in the evidence of any other party how this risk is articulated both in terms of the rights whether they are exercised and how are they exercised. I am just wondering whether you are working on facts or you are working on assumptions and the assumption is that, well it is a fact there are rights. The assumption is they're exercised and a further assumption is that they're exercised on a continuing and variable basis which has resulted in a change of in a hydrological flow to which eco systems have become habituated and so if all of those assumptions are proved true I understand the problem.
- 5
- 10
- A. Yes.
- Q. The question is are your assumptions true?
- A. Yes and I would have to say that's not addressed in the Director General's evidence.
- 15
- Q. No.
- A. I believe it is addressed to some extent in the evidence before the Otago Water Resource Users Group and potentially some others and so –
- 20
- Q. Possibly referring to that evidence then, you know, if that is the case for, you know, those other parties putting that evidence to the witness would be a better way to go because I think this witness is going: "I have no knowledge", or "the regional council has no knowledge", and so you're not going to get anywhere, you know, so, yeah, here is again there's a risk in the environment, what is the likelihood of the risk? That's tested by the strength of the assumptions.
- 25
- A. Yes, your Honour. I would have to say though unfortunately I have not at this point read all of the OWRUG evidence.
- Q. Well how about you just park it up and come back to it after lunch, how about that?
- 30
- A. So yeah.
- Q. Yeah it's actually lunch-time, that's a good place to stop. We're bang on 12.30 so it's a good place to stop. Have a look at it.
- A. Yeah.

Q. But that's, as I see, yeah it's not that I don't understand, I understand what the problem is that you're putting but, you know, is there is a risk is the question.

A. How big is the problem?

5 Q. Yeah and how do we –

A. Is it a real problem or is this just hypothetical?

Q. Is this hypothetical, yeah, yeah, but I certainly understand what the problems that you're putting.

A. Okay, thank you.

10 **THE COURT ADDRESSES WITNESS – REMAIN ON OATH (12:30:29)**

COURT ADJOURNS: 12.30 PM

COURT RESUMES: 1.45 PM**THE COURT: JUDGE BORTHWICK TO MS WILLIAMS**

Q. Where were we, Ms Williams?

5 A. Yes thank you your Honour. So before lunch Mr de Pelsemaker we were exploring or I was exploring with you the issue around application of deemed priorities and her Honour suggested perhaps that I find some evidence to that point to put before you so I have thought about that and looked into that somewhat over the adjournment and where I've got to your Honour is that I don't think there is any particular evidence currently
10 before the Court which I can point to. What I would put to the Court is that when you have the laypersons/lay parties appearing before you in Cromwell that I expect that that will be an issue for some of them and that might be an issue that the Court could explore with those persons.

Q. Yes I mean those folk are wanting to maintain those priorities?

15 A. Yes.

Q. Okay but you won't be there?

A. I won't be there your Honour, I'm sorry. I am expecting to either be in Invercargill or in the High Court.

20 Q. The only other witness that you can put this line of questioning to would be Ms Dicey who also –

A. Yes and I am going to cross-examination Ms Dicey, your Honour.

Q. – wants to retain it. And I did check her evidence and I couldn't see any reasonings there, you'll need to explore with Ms Dicey why she makes that recommendation.

25 A. Yes.

Q. All right, thank you.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

30 Q. So really the only, just concluding matter I just want to put to you Mr de Pelsemaeker, is that again in terms of the controlled activity if there is no provision for continuation of priorities, perhaps as a take cessation condition as one of those matters of control then again it's simply not something that can be addressed, is it?

A. Correct, yep.

Q. Thank you. Moving on to the application of schedule 2A and the minimum flows which are in the schedule but currently not operative?

A. They are operative but they are not imposed as a condition on consents.

5 Q. Okay and in the conversation or discussion that you had with Commissioner Edmonds yesterday, what you told the Court was that in part that was because the large number of deemed permits in some of those catchments meant that the minimum flows were not going to be effective because you would have a large number of consents effectively
10 which would not be subject to those minimum flows?

A. Correct.

Q. What we now have however is a situation where the deemed permits are expiring and where we anticipate that for I think we've got it down to around 200 but still quite a sizeable number and particularly in the
15 Manuherikia catchment a sizeable number who are all applying for replacement consents at the same time.

A. Correct.

Q. Does that change your view about the utility of the schedule 2A minimum flows?

20 1350

A. In regard to the Manuherikia, we heard previous evidence I believe we, that the minimum flow actually is irrelevant because it's an augmented river. At the point where the minimum flow is measured you have flows released from Falls Dam that artificially increase that flow so the real
25 bottleneck of the river is further down the minimum flow site. With regard to other rivers, the schedule 2A minimum flows, they're going to be reviewed. In some cases, there's quite some technical work done behind them and other cases, especially with older ones, the ones that were set at the time the plan was notified and made operative, there is in some
30 cases no or very little scientific basis for it. so the effectiveness of those minimum flows is in some cases at best doubtful. The other matter that I thought about as well is and I thought about it in relation with your earlier proposal about maintaining existing flow regimes. How do the two work together? Because if you have a minimum flow requirement all of a

sudden, the irrigators that were previously in a priority system might have to change how they take water so it was one of the reasons also why I didn't have a clearest ear as to how the two would work together, those two requirements, so to speak.

5 Q. Again though, looking at your proposed wording for rule 10A311 which is that controlled activity rule, paragraph f, that's on the next page, I think, is the matter of control dealing with minimum flow, residual flow or take cessation condition.

A. You're talking about page 7, Is that correct?

10 Q. Yes, I am, I think. It's a bit hard to tell. It's in your revised corrections as at 4 March 2021 version of the plan change.

A. Yeah, so it is a matter of discretion and I think it is also...

Q. That may be replicated in the restricted discretionary rule.

A. It's in the restricted discretionary rule, yeah.

15 Q. I'm not actually discussing that but we'll leave that to one side. Actually the way it's phrased in the rule here is simply minimum flow, residual flow or take cessation conditions. It's only when you go up to the policy 210A21D that's where it talks about existing residual flow, minimum flow or take cessation condition being applied to a new permit.
20 I guess there's a distinction and I'm wondering if there's a useful distinction between the existing minimum flow et cetera in the policy as opposed to the matters of control which are reserved in the rule, which actually don't make that distinction.

A. No and that's deliberate. Because the policy basically sets out a
25 requirements which you need to meet in order to get resource consent. If you don't meet it you don't get a resource consent. The wording in the matter of control and also the matter of discretion which refers to minimum flows, residual flows or take cessation conditions in general allows consent officers to go beyond that but it's not a requirement. It is at their
30 discretion really.

THE COURT: JUDGE BORTHWICK

Q. Can we just pause there? I just want to think about your answer plus also looking at the provisions at the same time. Is that kind of like the same

issue I raised? What's this matter of discretion? Okay. You pursue it. This is interesting, how will it be exercised relative to any policy.

1355

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

- 5 Q. So there is this issue which her Honour has alluded to already with you this morning around where is the support for the matters of discretion in the policy and the objectives and I'm going to put that to one side for the moment but coming back to the matters of discretion in the rule which are helpfully up on the screen there, what you've now told us is that this is not
- 10 confined to existing minimum flows, residual flows or take cessation conditions?
- A. That is correct.
- Q. There is then the ability for consents officers to – if they are dealing with all applications for a number of takes from a catchment to impose a
- 15 minimum flow consistent with the current schedule 2A flow?
- A. Or if there is no minimum flow in the schedule, another minimum flow condition or a residual flow condition, that's correct, yes.
- Q. There is a bit of a policy gap though and is that sufficiently accounted for in that current wording in policy 10A.2.1?
- 20 A. Well the wording in policy – sorry, 10A.2.1.D only applies in circumstances where there is a minimum flow condition or residual flow condition on an existing consent. It requires you to set it over, it does not provide you with policy direction to set a minimum flow in all circumstances.
- 25 Q. And I'm certainly not asking for that policy direction because I accept that there is a lack of information, we've had evidence about that, my point is where we have flows which are set admittedly some time ago and admittedly perhaps on limited information but there is at least something there.
- 30 A. Sorry the question is?
- Q. So the question is you have a figure, it's in the plan, it's been in the plan for some time, it was in the plan with the expectation that it would be

implemented by October this year, what is the harm in allowing that to then apply?

A. In an ecological sense, there would be, in general, I'm not an ecologist here, there would be, I would assume, little harm.

5 Q. And there could indeed be a benefit couldn't there because it is requiring at least a level of ecological ecosystem protection?

A. There could be a benefit, yes.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

10 Q. So just to check that I've understood this correctly, your evidence is that there is a policy, a general policy together with a controlled activity, an RDA rule with an entry condition pertaining to an existing residual flow, minimum flow, cessation condition. If that exists on your water permit, it is to be concluded in the application?

A. Correct.

15 Q. Okay, so we're past that gateway and assuming all other gateways then in terms of deciding the resource consent, the Council reserves control over the following matters including minimum flow, residual flow or cessation conditions and how you imagine this working is that all applications provided they pass the gateways regardless of whether or not they have existing conditions of that ilk, matters of discretion include
20 minimum flow, residual flow or cessation conditions?

A. Correct.

25 Q. So they may not have – so for example I might be an applicant, I don't have one of those existing conditions but nevertheless I'm through the gateway.

A. You're through the gateway, yes.

Q. And I could be exposed to a minimum flow, residual flow or cessation condition?

30 A. If there is a need for that or a clear benefit then yes, officers have that option.

Q. So what's the policy that is implementing in terms of a need for it or a benefit for it?

A. There is no policy within plan change 7 for that.

Q. So are we looking like another orphan provision here? What would guide the consent officer's decision making?

A. It is a standalone chapter for existing water permits so you'd be confined to the scope of what is in ORC chapter 10A.

5 Q. But you've said this provision's orphaned?

A. One of the considerations that consent officers may have regard to is the NPSFM as well, for example.

Q. Well that's actually the point that Mr Winchester makes and makes with very good reason is whether or not that consideration could be brought
10 down when looking at a controlled activity or RDA, so that's actually a legal issue which his lawyer will now have to grapple with. Mr Winchester makes the point because Mr Winchester had a case of Ngai Tahu involving (inaudible: 14:01:31) diversion recently where that very issue came up, would that be correct, Mr Winchester?

15 **MR WINCHESTER:**

Yes.

THE COURT: JUDGE BORTHWICK

So that's a legal issue, it's a pretty significant one if the Council's thinking: "this will all work out because we can bring this down, it's a relevant consideration",
20 and it's not and the absence of parents – it's going to be important as well so we just need to think about that. I guess that's for re-examination whether it truly is orphaned but if it is then what? Thank you. Ms Dixon?

CROSS-EXAMINATION: MS DIXON

Q. Good afternoon De Pelsemaecker.

25 A. Good afternoon.

Q. I want to take you to a number of paragraphs in your evidence in chief so if you make sure you have that handy please as we start and my first question is actually really one I hope just of clarification, so if we can start with paragraph 108 please of your evidence in chief?

30 A. Yes.

- Q. You say in paragraph 108 that the key outcome that PC7 is seeking to achieve is to facilitate at least in part the transition towards a new long term sustainable freshwater management et cetera, in part or entirely? Surely entirely.
- 5 A. Well, we cannot achieve – there will be existing consents that are not captured by plan change 7, consents that are granted before the plan change is notified and they could be for a long term so it will be hard to transition them towards that new planning regime within the lifespan of the plan.
- 10 Q. But we are transitioning towards a new framework.
A. That is correct.
Q. And that is the purpose of this plan change?
A. That is correct, yes.
- 15 Q. If we can go from there please to paragraph 27(b)(iii)? And in that paragraph you're discussing, first of all, Professor Skelton's report and then the Minister's recommendation on the back of that report which is to prepare a plan change that will provide an adequate interim planning and consenting framework to manage freshwater et cetera. Adequate means, in my suggestion, do enough, something less than perfect, would that be a fair definition or synonym for adequate? So the recognition here is that this plan change is not going to be all things to all people but it's going to transition as you were saying before?
- 20 A. It's a transitional plan, it is not our intent to fully give effect to higher order planning documents.
- 25 Q. Sure. Paragraph 44 please next. At paragraph 44 you say that there are five significant resource management issues that PC7 seeks to address all of which are strongly interlinked, I just want to explore with you slightly what you mean there by to address because in fact what you're really saying, I think is that PC7, to use the words you've used elsewhere is holding the line in order that in fact the coming land and water plan can address these issues.
- 30 A. I agree with you. Really, a better phrasing would perhaps be that PC7 stems from these resource management issues and that those issues actually require us to take action. The plan change by itself cannot

address things like gaps in our data and things like that. It does address some aspects of it, for example, we're trying to go some degree in – we're trying to make some headway in terms of dealing with the allegation issue through the plan change but yes, I agree with you.

5 Q. But the plan change is not going to solve those problems, is it?

A. Not entirely, no.

Q. With that in mind, I want to turn to the two issues that you have expressed some hesitancy over and in fact have left open until you heard – I think you said until you heard the evidence in cross-examination I think of other
10 witnesses and the two issues that I'm referring to are the question of hydrogeneration and how it's provided for and secondly, that of municipal supply which of course includes drinking water. Now, both those issues are subject to national policy statements in their own right, is that correct?

A. That is correct, yes.

15 Q. So in the case of hydrogeneration we're talking about the NPS renewable electricity generation?

A. That is correct, yes.

Q. And in the case of drinking water, and it's drinking water I'm particularly concerned about, it itself is covered by the NPS Freshwater Management
20 2020?

A. That is correct.

Q. And there is an obligation for a plan to give effect to NPSs under the Resource Management Act?

A. That is correct.

25 Q. So let's just start with the hydro question then because I think it's important to understand in light of the fact that this is an interim plan change and your expressed view that in other places that this is about rolling over, holding the line et cetera, that the scale of hydro issues that might be subject to this particular interim plan change before the land and
30 water plan comes into force, I presume you're aware for example that the Clutha scheme is consented to 2042?

A. Yes, I'm aware.

Q. And the Waipori scheme to 2038?

A. Aspects of it I believe.

- Q. I'm sure Mr Welsh can address that more with you but the point that I'm making is that the big takes, the big schemes are in fact not going to be subject to this plan change because by the time they come around for re consenting, the big water takes, we hope very much that the new land and water plan will be firmly embedded in place, do you agree?
- 5
- A. I can confirm that that is definitely the case for the contact consents.
- Q. So in reality, we are talking for the lifetime of this interim planning position about some deemed consents which need to be rolled over and Mr Welsh said yesterday that given the number that are being surrendered, I think we're down to about something like seven in this context, is that your understanding of the situation that applies during the lifetime of the interim plan change?
- 10
- 1410
- A. I could not confirm the exact number –
- 15
- Q. Sure.
- A. It seems a reasonable number but I do consider that there are a number of hydro schemes operating, not necessarily with a deemed permit but with a resource consent within deemed permit dominated catchments as well so it is almost like a holistic system in a way that we need to consider.
- 20
- Q. I accept that but the focus has been on not locking in big takes and my point to you is that this is an interim plan change with another –
- A. Yep.
- Q. – real plan coming and actually these really little danger of locking in big takes given what's at stake in the next few years, is that a fair affirmation?
- 25
- A. (no audible answer 14:11:11).
- Q. It's just a question of getting the thing in proportion really.
- A. What do you mean with locking in?
- Q. The concern is that anybody who consents anything during this period unless they're confined to a six year period or whatever, it's about preventing big water take concedes getting 35 year consents as has been
- 30
- the –
- A. That's correct.
- Q. – pattern in the past.
- A. Yes.

Q. So isn't it a reasonable position, particularly given the national policy statements that sit behind hydro and we haven't talked about drinking water but also sit behind drinking water, that actually addressing those issues doesn't need to happen in the context of this plan change but in fact can wait for the land and water plan that's coming.

5

A. Yes and I think that's the appropriate way because there's a cascade of planning documents that we need to take into account, we have an RPS but as you know it's being reviewed as well.

Q. Yes.

10

A. I would assume that dealing with matters such as how you deal with community drinking supplies hydroelectricity we will get some direction on that in the RPS, it then makes sense to incorporate into the new land and water plan and I think that's the right place to set up a framework specifically for that.

15

Q. Thank you. You see my concern is, and it's not just about those two issues but a broader concern, that as we go further and further in cross-examination and evidence and discussions into the detail of what should be in this particular plan change more and more is being added and I particularly noted your comment this morning that in answer to I think to the Court that we and I think you were talking about Council want to consider activities as soon as possible and bring them in line with the new land and water plan and forgive me if I haven't written that down absolutely accurately but that was the gist of what you said. My point to you is, this is interim, there are something like 500 consents, I think we're down to about 200 or so of the deemed consents but there's still another 200 or so at least so four to 500 consents sitting out there that have to be dealt with in very short order. Isn't the risk, if you start to anticipate activities that really belong in the new, in the coming land and water plan, the risk that this plan change simply will not be able to deal with what it has to deal with in the next few months and after is becomes operative?

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A. This plan change is intended to allow those activities to continue as they have done in the past so if that is a risk – if you consider, is that what you mean with a risk or?

1415

Q. The risk is that the consents simply can't be processed in the time. What I'm thinking about is in addition to your comment this morning which to me looks as if you're trying to do more in this plan change that is actually an interim position but I'm also thinking about it a discussion you had this morning I think with her Honour around what some of the conditions and the controlled activity rule might lead a consent officer to look at and it was the discussion around efficiency. The more we put into, if you'd accept those rules, and the plan change is kind of growing all the time. The more that goes into those rules the more planning officers have the opportunity or the invitation or the discretion to start looking behind those controlled activity conditions, the more complicated this process becomes and the more at risk it is of actually being able to achieve what it is intended to achieve, isn't that true?

A. The key objective is still to make sure that we get those activities aligned with a new management regime as quickly as possible. So I guess it's a trade-off. We can add perhaps more complexity but if that serves the bigger purpose I guess it might be worth while doing that.

Q. But we're looking for something that's adequate. We're not looking for perfection, yeah?

A. Yeah.

THE COURT: JUDGE BORTHWICK

I think counsel's proposition is that you add less complexity, would that be it? Yes.

WITNESS:

Yeah.

MS DIXON:

But that's my concern about the way in which more and more is being added into this plan change as we go.

THE COURT: JUDGE BORTHWICK

It's the question of where are those discretions that you talk about and to be fair I hadn't actually appreciated until Ms Williams cross-examined you as to the minimum flow discretion, where's it going to take you? Is it going to get your
 5 consents team bogged down processing consents when they ought to have their mind on something else and I think that's the problem and that's the problem that I think that the Minister is trying to – it lies behind the Minister's own amendments or preferred relief, yeah.

CROSS-EXAMINATION CONTINUES: MS DIXON

10 Q. Yes, your Honour, I'm thinking about where the Minister began in this exercise and as expressed actually through the evidence but it seems to be that – and I'm putting really to Mr de Pelsemaeker that there's a risk that just – we lose sight of that and the whole plan change is actually undermined by its own weight at the end of the day.

15 A. In terms of, you know, providing for sufficient capacity to deal with all these consents that it's not a question that I can answer. As an organisation I think obviously, you know, needs to take that into account and provide for that. In terms of adding complexity, initially if we take it back to Mr Skelton, Professor Skelton sorry, his recommendation was just
 20 to simply roll over, let some of those activities continue. We've added a little bit of complexity to that, not a lot I would assume, but again I come back to the issue like if we start carving out certain activities out of the plan change then it becomes also more difficult to achieve the outcomes because the outcomes need to be achieved and I'm talking about
 25 outcomes in a non-environmental sense, by all those activities working towards the same outcome as well.

Q. But if those outcomes can wait till the land and water plan shouldn't they wait till the land and water plan?

A. Yes but we do not set environmental outcomes in Plan Change 7.

30 Q. Yes. Just coming back to the NPSs for a moment, one of the outlying I suppose type questions is if there is going to be some specific provision made for hydrogeneration, in particular and also for municipal water, where that should lie in the plan change?

A. So I recommended that my view on that was to keep those activities within the scope of Plan Change 7. Specific concerns were raised about really the ability of those operators and those consent holders to abstract sufficient water. I think that is a very mechanical issue that can be best addressed through the schedule just making sure that the schedule does not act as an impediment for those activities to continue to operate in the manner that they have.

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1420

Q. I understand that. My question to you really is though isn't it appropriate that matters which are subject to a NPS should be in the body of the plan change itself rather than a schedule?

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A. I don't think so. Again, because this is an interim planning framework, we propose to deal with these through the land and water plan. While they are subject to NPS, I think we need to make sure that all the NPS are achieved at same level and I think by providing for those activities now in plan change 7, there's a risk that we lock ourselves in.

15

Q. It's not a question of whether it's appropriate to provide for them. My suggestion obviously is it is. It's where in the plan change that it goes and I'm interest in your comment that you think it's appropriate to put it in a schedule.

20

A. That was my thought. I consider it – the evidence that was provided by Ms Styles in relation to hydroelectricity generation. Mr (name 14:21:41) as well and I think on behalf of MFE and I'm happy to discuss these in more detail but they did not seem to achieve what I believe to be the intent or what I think is the intent of the plan change.

25

Q. It may be a matter that can be subject to the planners conferencing.

A. Yeah.

Q. The last matter I wanted to discuss with you, Mr de Pelsemaeker is actually an extension almost of the conversation we've been having. It's around the general framework of the plan change. Would you accept that when this was drafted that the intent was that there would be a controlled activity rule and a noncomplying rule and the two would act more or less like carrot and stick. Here's the controlled activity process, the carrot is, yes you'll have to put up with six years if you're an application, six years

30

is what you're going to get but it's a nice, simple, straightforward process and you have some certainty around it. If you're not willing to accept six years, then you can go down the noncomplying pathway and obviously life is going to get more difficult. That was the carrot and stick approach?

5 A. Correct.

Q. Alright. And I presume that you'd accept too that the nice clean lines of that, if you like, have got a bit lost by the fact that lying behind the controlled activity rule is the continued survival of the operative water plan and as a result of that as Mr Lloyd discussed it in his legal submissions,
10 as a result of that because applicants find themselves effectively having to apply for a restricted discretionary status rather than the nice, straightforward controlled activity status, in fact, they're tending to apply for noncomplying activity and try and get the longer timeframe. That's what's happening.

15 A. Yes.

Q. In practice, that's the way it's working out. Coming back again to that point that I've made before about the scale and magnitude, the number of applications that are sitting out there to be processed and getting this thing workable. If at all possible for the planners to caucus not just on the
20 methodology which is well underway and organised and obviously the methodology is an aspect of the controlled activity rule but if a planning caucus were able to get some consensus on the shape of the controlled activity rule itself, would you consider there will be some merit in trying to get that rule operative early and obviously this is a discussion we would
25 have to have with her Honour and the commissioners, but some merit in trying to get the controlled activity rule operative so that in fact this problem of the restricted discretionary activity status lying behind could fall away and that would assist the late deemed applicants and it would assist the applicants looking to make their applications, the ones that
30 expire in 2025, so they're applying over the next couple of years. Can you see that there would be some merit in trying to reach that sort of position?

1425

A. As an interim measure you mean? So made the control activity operative and keep on working on fine-tuning the non-complying pathway is that –

Q. Almost like dealing with this plan change in stages?

A. Speed has always been of crucial importance for the plan change to be effective so I would agree with you.

CROSS-EXAMINATION: MS GALLOWAY-BAKER

Q. Now Mr de Pelsemaeker I'm just going to pick up on one point that her Honour took you to at the start in terms of how the operative regional plan integrates between changes in land use and water takes and you were asked some questions about when a land use creates either leaching through the soil or over land discharges and you just touched on briefly that it was a – started off as an effects-based permitted activity framework and just to round that off I just wanted to take you to the rules I think you were thinking of in the plan, so they're in volume 1 of the common bundle. If you go to common bundle CB218?

WITNESS REFERRED TO COMMON BUNDLE 218

THE COURT: JUDGE BORTHWICK

And if you can just give me the rule reference?

CROSS-EXAMINATION CONTINUES: MS GALLOWAY-BAKER

Q. And the rule reference is 12C11A. So is it correct that that rule there is the permitted activity rule which states that where you meet the limit in schedule 16A you are effectively a permitted direct discharge?

A. Correct.

Q. And that rule applies from 1 April '20 or applied from 1 April 2020, is that correct?

A. Correct but we have undertaken a plan change recently, Plan Change 6AA which defers the dates by which that aspect of the rule compliance with the schedule becomes mandatory.

Q. So is the version in the common bundle not been updated to reflect that? Should it say 2026?

A. I think it –

THE COURT: JUDGE BORTHWICK

So this is a permitted activity rule?

MS GALLOWAY-BAKER

Mhm.

5 WITNESS:

It is in the schedule, sorry. It is in the schedule.

CROSS-EXAMINATION CONTINUES: MS GALLOWAY-BAKER

Q. Well no, no, I've just got the version I've downloaded from the website,
the council website. The version on the council website of 12C11A from
10 1 April 2026 –

A. Mhm, yeah.

Q. – for schedule 16A limits apply.

A. Yeah.

1430

15 Q. So perhaps the common bundle could be updated. So in that case where
you've got a change of land use that comes with it a potential change in
overland flow and directors charge to a surface water body there are no
water quality limits that apply until 2026 now?

A. That is correct.

20 Q. And the same situation is for the leaching of nitrogen isn't it?

A. That is correct.

Q. Which is rule 12C.1.3, the nitrogen limits in that rule do not apply until
2026?

THE COURT: JUDGE BORTHWICK

25 Q. What rule was that again sorry?

A. 12C.1.3.

CROSS-EXAMINATION CONTINUES: MS GALLOWAY-BAKER

Q. So from April 2026 depending on what nitrogen sensitive zone discharge
is in, there's limits of kilograms of nitrogen per hectare per year so they

don't kick in until then and until then the only control on nitrogen or if you think of it as the permitted baseline is down in ii – B(ii) of that same rule so the current permitted baseline for discharging nitrogen is that you're permitted as long as you are keeping your overseer records, that's the only control isn't it in the permitted rule?

5

A. That is correct.

Q. And just around that of plan change 8 doesn't address either that overland flow rule or the discharge, the diffused discharge of nitrogen does it?

A. It's, the gap in terms of the management of nitrogen has not been filled by plan change 8. To some degree there NES which sets a limit on synthetic fertiliser, nitrogen just (inaudible 14:32:31) fills that but I acknowledge that it's not a complete fill at all and within the water plan there's nothing. The plan change 8 does try to address a number of water quality issues to partially fill the gaps created by plan change 6AA but we mainly target to the plan change high risk activities such as animal waste systems and affluent plants.

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Q. Okay thank you. Right so now again just picking up from something that her Honour asked you about this morning, in terms of whether there's an environmental objective to this plan change as opposed to just a process related objective, so as notified the objective 10A.1.1 it is a process, a solely process related objective, it does not refer to any environmental goals our outcomes, is that correct?

20

A. That is correct, yes.

Q. There is a general vague reference to long term sustainable management, that's about as close as it gets, isn't it?

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A. That is a reference, what we refer to there is the planning regime that will be established on the land and water plan.

Q. Now I could have a laborious cross-examination on this theme but I could go straight to the point which is in several places, not just in your written evidence but even today, you have said quite sensibly that one of the aims of this plan change is to halt environmental degradation and prevent further over allocation.

30

A. Correct.

Q. Now that would not be too difficult to articulate in objective 10A.1.1, something along those lines in what Fish and Games witness Mr Farrell has done in his marked-up version as a start at articulating the environmental part of the objective alongside the process part. So perhaps if you have a look at that version of Mr Farrell's tracked changes. So you've got that?

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1435

A. Yes.

Q. So one way of articulating the environmental arm of the objective of this plan change is a statement along the lines of protect the health and wellbeing of waterbodies by avoiding further degradation of freshwater. Would you agree that that's consistent with the environmental objective of this plan change?

10

A. Avoiding further degradation of freshwater I would agree. If you look at protecting the health and wellbeing of waterbodies in isolation it is something that requires a lot more than just avoiding further allocation.

15

Q. Exactly. Which is why you have to link it very explicitly to the fact this is a steppingstone towards protecting health and wellbeing by degradation now for starters. That's the intent of tying those words to the first limb of Te Mana o te Wai, protect health and wellbeing of water by avoiding further degradation at the moment because this is a process whereby we're buying more time. It's intended to read in that context.

20

A. Yes, I know. I agree with you but the words avoiding further degradation of water also goes beyond merely managing water quantity or allocation which is something this plan change does but it does not address discharges.

25

Q. Correct. But it's not inconsistent with the aim of this plan change, is it?

A. No, but the risk, as I mentioned before, of having this wording in the objective is that you won't achieve the objective through the policies and the rules of the plan change by itself.

30

Q. What if you qualify that then to take away the risk of the water quality aspects, avoiding further degradation caused by overallocation, qualified again?

A. Can I look at a definition of overallocation?

Q. Yes, sure because we're going to get there anyway.

A. Again, it's a tricky one because overallocation is defined also by making reference to limits in general which can be take limits as well as resource limits which again brings us to water quality aspects and same with words degradation or degrading. They go beyond purely managing water quantity.

Q. No, you're absolutely right. In terms of the NPS, we can't make an NPS finding of degradation in this context because degraded is – every limb is very explicitly linked to the values that had been identified for the FMU, the target attribute states for those values the limit set so we can't make a NPS finding but when can't make an NPS finding we can look at part 2. Part 2 requires that life supporting capacity be protected that the significant habitat of important indigenous species be protected and to a certain extent the habitat of trout and salmon also be protected. We can make a finding about degraded in that part 2 context, can't we?

A. Does that create a risk that there's going to be tension between how it's defined in a part 2 context and how it's defined in the NPSFM? I guess does it create a risk of – sorry I'm not intending to ask you questions. It's not my intent. I just want to –

20 1440

Q. Well I'll put it to you, you are concerned about the tension between a part 2 finding that's inconsistent with an NPS definition, is that your concern?

A. I think at the end of the day whatever we write as planners is going to be used by consents officers and you want to be – and that's been – the point has been made before. You want to be as clear as possible and avoid the risk of different interpretations. It's about consistent decision-making so I'm not trying to dismiss your suggestions. I'm just trying to gage what the implications might be.

30 Q. And it might be, and there's a theme here from my friend's questions, the less discretion there is in that – what's meant to be the carrot rule, that very easy rule, the less discretion there is in there the smaller that risk is of confusion.

A. That is correct, yeah.

- Q. So still looking at Mr Farrell's drafting, another suggestion from Mr Farrell is that he's actually separated out the three additional limbs that were in the policy, A, B and C which were more processed limbs of your objective, he's suggested that as those are doing clauses or doing provision if you like that it's more appropriate that that as a policy do you agree with that?
- 5 A. I think a policy generally sets out how, so in that regard I don't see any issues with the policy as suggested, yeah.
- Q. I'm sorry I skipped down too fast. The other change in the main limb of the objective is the deletion of the word *resources* after freshwater and Mr Farrell's reasoning for that is that that turns water into something that's for human use, it's looked at as a resource, it's anthropocentric rather than water having its own mana mauri hauora and so by deleting the word *resources* it changes that focus, that paradigm, so would you agree with deletion of the word *resources* from that limb?
- 10 A. It does make – it doesn't create any problems at all. I think – I appreciate Mr Farrell's rationale and yeah I think it's sensible and it doesn't really, like I said, it doesn't create any problems for the objective talking about freshwater instead of freshwater resources.
- Q. And it's more consistent, isn't it, with the objective on Te Mana o te Wai the first limb that –
- 20 A. Correct.
- Q. – is just about the water, not the people?
- A. Correct, yeah.
- Q. And the other change is deletion of the phrase *long-term* from the main limb of the objective. Do you have any problem with the deletion of that word, those words?
- 25 A. I initially – my response to that was we really want to distinguish between this planning framework which is a process-driven planning framework and the planning framework that is going to be in the land and water plan. The long-term makes it clear that the sustainable management will be achieved through a new land and water plan not by this plan change, hence my recommendation to stick to the word *long-term*.
- 30 Q. Shouldn't we not assume – sorry double negative. It might not take long.
- A. Hopefully not.

Q. Why should we assume now that that is going to be a long-term process given everything that we've still got to come?

A. It's not a long-term process, it's a longer term planning regime, a planning regime that will be in a longer term than this one.

5 THE COURT: JUDGE BORTHWICK TO WITNESS

Q. What you mean to say is: "In the long-term there will be this new plan." That's really what you're getting at.

A. Correct, yes, yeah.

Q. In the long-term, you know.

10 A. Which is not that long.

Q. In the long-term (inaudible 14:44:50), yeah.

1445

CROSS-EXAMINATION CONTINUES: MS GALLOWAY-BAKER

15 Q. So now I just want to turn to your evidence-in-chief and your paragraph 44 that you were taken to by my friend, where you've identified the five significant resource management issues and what I, again to try shortcut to the answer that I was hoping you'd give me at the end, isn't it correct that in addition to those five matters, the other significant issue that this plan change addresses is halting over allocation and degradation associated with that, the holding of the line is the significant issue that this plan change is actually addressing, isn't it?

A. That is actually the response in the plan change.

Q. Probably the first significant issue, isn't it, that this plan change addresses?

25 A. I'm trying to avoid asking you questions, are you referring to the current state of the environment as –

30 Q. Yes, so what I'm referring to is the current state of the environment in places is degraded, we've got lots of evidence from Edward Allison, we've got Richard Allibone, we've got the Department of Conservation witnesses, we've got Fish and Game witnesses, all have given evidence in various places about where there's degradation associated with extreme allocation.

A. That is the case for some places but acknowledging that there are some data gaps, so we cannot make give an overall picture of what the state is of the environment throughout the region and that is one of our issues that we're dealing with.

5 Q. But the other issue is that there is information that there is degradation associated with the level of abstraction and that is why you need to hold the line and not let consents be granted on a case by case basis?

A. Yes.

10 Q. Now, I just want to jump quickly to the controlled activity rule and this is just picking up on, again, some themes from my friends about whether there should be the entry point to the controlled activity rule that refers to schedule 2A minimum flows and what became apparent to me when Mr Henderson, I think, was being asked questions – might have been Mr Allibone in terms of the Manuherikia and the Taieri specifically and as
15 I took it from, I think it was Mr Henderson's exchange with I think Ms Irving that the schedule 2A minimum flows for the Manuherikia and the Taieri are already complied with by virtue of the design of the Falls Dam release and the augmented flows and the top storage and Upper Taieri releasing flows and so on and so forth, so I just wanted to clarify with you, is your
20 understanding that the schedule 2A minimum flows for the Manuherikia and the Taieri are actually currently complied with anyway as a consequence of how those schemes are run?

A. Definitely for the Manuherikia, for the Taieri I know or I recall that the Maniototo Irrigation Company maintains the minimum flow at certain
25 points in the river but the Taieri has five different minimum flow sides and I could not give you a clear answer as to whether those other minimum flows are adhered to.

30 Q. Because what I'm trying to understand is whether or not submitters seeking that the scheduled 2A minimum flows be added as an entry point requirement to the controlled activity rule, is that actually an issue given what's happening in the schedule 2A catchments and do you have a feeling for whether there are deemed permits that are currently being used that take below the schedule 2A minimum flows? Is this actually a problem we need to worry about and if you can't answer it, what I was

going to suggest is we've got exhibit ORC 1 with the current summary of deemed permits not applied for or in train, I don't think it would take too much to compare that list of catchments with the quite honestly quite limited list of catchments in schedule 2, there's not actually that many
5 minimum flows in there and (c) if any of the outstanding deemed permits are actually relevant to the schedule 2A minimum flows and then get to the bottom of the Taieri situation as well.

THE COURT: JUDGE BORTHWICK

We can do that over the tea break. Can you remind me whether it's the case
10 that some people who are seeking minimum flows, the scheduled term minimum flows do so without proposing an allocation block at the same time and I don't think that's you, I think your client is minimum flows and allocations.

MS GALLOWAY-BAKER:

No, we're just focused on the minimum flow because allocation block, that's a
15 big change if you oppose that as an entry point.

THE COURT: JUDGE BORTHWICK

Okay, I just want to go back to where your relief is. For example, in your control rule, the entry point would be an application that's put up a minimum flow but there's no allocation block otherwise applying to that rule.

20 MS GALLOWAY-BAKER:

No.

THE COURT: JUDGE BORTHWICK

That potentially could be problematic. I can ask the questions and you can ask the questions as to why that might be potentially problematic but –

25 MS GALLOWAY-BAKER:

To not have an allocation block?

THE COURT: JUDGE BORTHWICK

Yes. For the reasons that Dr Hayes – I think Dr Hayes is your witness.

MS GALLOWAY-BAKER:

Yes, that's right.

5 THE COURT: JUDGE BORTHWICK

So isn't his evidence that minimum flows allocation blocks work together and so if you've got a large number of people coming onto a new minimum flow then the potential for that is to bring the level of flow in the river down to the minimum flow and hold it there in dire conditions and that's problematic I would have
10 thought or potentially problematic for the environment, so I wasn't quite sure why we were suggesting that here.

MS GALLOWAY-BAKER:

What I'm exploring and this is just for the controlled activity six year rollover, on the assumption that some of these deemed permits – this is the assumption
15 that we actually need to clarify, is this actually a thing? Is this an issue that some of the deemed permits are taking water below down from the minimum flow to be a bit less –

THE COURT: JUDGE BORTHWICK

They could already be under there.

20 MS GALLOWAY-BAKER:

So it's already under it, so all that would do is bring up the bad situation a little bit higher for the same amount of time, so the flatlining, yes, but in the context – what Fish and Game agrees with is that this controlled activity rule should be as easy as possible to get through and if everyone is currently complying with
25 the 2A minimum flows where it's relevant to this plan change then that's easy, they are actually already complying, that's not a disincentive but if there are quite a handful of them that aren't currently applying and that turns into a disincentive to even look at the controlled activity rule, I think that's a very important point for everybody to understand.

THE COURT: JUDGE BORTHWICK

And I think in part of that discussion – I mean, we talked about Manuherikia and Taieri as if they are only the two catchments which of course they're not, we don't have a sense yet when people are talking about those two catchments, are they talking about the FMU scaled catchments which are kind of super catchments or something – which is not an FMU but actually quite smaller than that and that's what this operative plan applies to. I'm going to ask Mr Maw to have his regulatory witnesses clarify that. We don't have a sense yet for each of those schedule 2 catchments, we have no sense as to how many permits are actually out there and of those permits, what are up for replacement because they're deemed or because the water permit's are up for replacement in the next two years, what's trucking along not up for replacement which may have a minimum flow though it does sound doubtful, that they do have any minimum flows imposed. So I don't know what's under the line, what's above the line. So we're sitting there going: "we're a bit blind actually – potentially to the implications of this policy and are very concerned you'll flatline the river."

MS GALLOWAY-BAKER:

Mmm, make it worse or it might not be an issue.

THE COURT: JUDGE BORTHWICK

Or it might not be an issue. So if you need more information and we certainly think you need more information to pursue this because Dr Hayes' evidence is so legible, so it was good evidence on the relationship but you need to be asking me and I'll ask Mr Maw. You can ask this witness but I just think it's coming in such a piecemeal fashion which is no criticism of you because it's just a function of questioning. It would be actually good to get it on paper.

MS GALLOWAY-BAKER:

Yes, and we agree about what matters we need to figure out so I'll leave it for now with this witness.

THE COURT: JUDGE BORTHWICK

And perhaps talk to Mr Maw over the break. Do you want to park it there and talk to Mr Maw and then we can come back?

MS GALLOWAY-BAKER:

5 Sounds good, yes, thank you.

COURT ADJOURNS: 2.56 PM

COURT RESUMES: 3.26 PM**MR MAW:**

May I just, before the tea break there was a discussion around the production of some further information in relation to which of the catchments shown on the deemed permits report that goes to the Minister are also covered by minimum
5 flow in schedule 2A of the plan.

THE COURT: JUDGE BORTHWICK

Q. That's certainly part of it, yes.

A. That part of it can be done relatively quickly and easily and it's probably
10 already being done and will be produced from the consents team leader with her evidence so it'll come through in that form. The second question or the second element in relation to whether the catchments where there is overlap, whether the permits are already compliant with those minimum flows is a far more complicated question and if you think about the
15 example given where the Falls Dam is controlling the minimum flows it may well be that there's a control taking place that's not captured for example on each and every deemed permit that might be further downstream so that –

Q. Are control taking place though?

20 A. Sorry, a –

Q. You said that a control taking place.

A. A control by virtue of a condition on a permit further down stream so it's not just an exercise of looking at each of the deemed permits within a particular catchment and checking whether each of them has a minimum
25 flow recorded on each permit because one permit might be controlling the minimum flow for the entire catchment or a part of a catchment. So I'm told that that exercise just isn't a straight forward exercise to do unfortunately which perhaps highlights the risks associated with whether the rules accommodate schedule 2A minimum flow or not.

30 Q. So part of the issue in this case is that in some ways some parties evidence is presented using Manuherikia as an example and perhaps Taieri to a certain extent, is if everything is find there, whatever fine means

in terms of minimum flow, therefore these provisions can apply or reject the plan change or therefore these provisions and it's like well, it might be fine there but is it fine in every other catchment, I don't know. I don't know, we're just a little blind and maybe we're wanting too much information but you know we have this, there's an element of uncertainty that we have in relation to the relief being pursued by some parties.

1530

A. Yes and the convenient response is to say that the onus is on those parties but the reality is that council has the type of information that they might be seeking to rely upon and the council staff are looking to produce where they readily can produce that information when it's been requested and where it can usefully assist but this question what happens in the other schedule 2A catchments outside of Manuherikia and Taieri, that's complex question and it's perhaps highlighting some of the challenges including those restrictions within the planning framework.

Q. Yes and that's exactly so but we're getting close to it. The problem is in terms of the problem that we're working on is that process or is it environmental or is it both? Now, your witness says process but to me these provisions are plainly working on both so we'll see whether that should be so and obviously parties have quite divergent views.

A. Yes, I think we just need to see how that plays out over the next little while.

Q. So I'm not sure where that takes us in terms of – and again with the spatial relationship between your FMUs and catchments. It's not clear. Possibly that evidence is in 5,000 pages of documents out there. I don't know but actually that was one of the reasons for bringing forward those entry folk, they would be able to set the scene.

A. Yes, so they're producing a series of maps showing spatially the extent of permits still outstanding, those in process and those that have been processed to assist with the spatial understanding of the permits and train and those to come.

Q. That's the deemed permits. You got deemed permit, you've got replacement water consents and then you've actually got that baseline permits which are out there which are not up for renewal in any sense

and into the mix, you might have minimum flows either in schedule 2 or actually you might have minimum flows because that's what policy 6412 says you should have. I have no idea whether that's being implemented.

5 A. Yes, again, one of the maps that's being worked on is showing simply by coloured dot permits that have a minimum flow versus those that don't have minimum flow imposed on them so again, you will be able to see spatially just what the spread is and having looked at drafted – that there are dots of different colours so there's a mix. I haven't drilled in to see whether there's a consistent pattern within particular FMUs or catchments yet but hopefully that information will start to assist in terms of the current state of affairs.

10 Q. Yes. So it's an implementation of plan question really. You've got lots of policies about minimum flows. Are they being implemented and can they be implemented? You've got an answer on the can with deemed permits but for everything else where they're being implemented and may be the answer there was also if you can't implement for one, it's not much point implementing for the other. So actually minimum flows and allocation blocks are not implemented and if that's the case we just need to know that and therefore know what the hydrology is.

15 20 Q. Again, the consent planners will be able to assist just with their direct experience having been processing applications under now both regimes for a little while.

Q. Okay.

A. That was all. Thank you.

25 **CROSS-EXAMINATION CONTINUES: MS GALLOWAY-BAKER**

Q. I'd like to move on to the non-complying policy now and I'm again looking at Mr Ferrel's marked up version. As I understand it, the purpose of this policy is twofold and I want you to tell me if I'm correct or not. One is it to act as a disincentive for people to even try and go through the non-complying consent pathway.

30

A. Are you referring to policy 10A23?

Q. Yes. As I read it there's two reasons for this policy. One is to act as a stick, as a disincentive for people to go through the non-complying

pathway and the other, if they do choose to go through the non-complying pathway is to put in place a precautionary policy direction to protect the environmental outcomes that might come from such a consent?

1535

5 A. Correct as well as give direction around consent duration.

Q. And duration?

A. Yeah.

Q. So three purposes then?

A. Yeah.

10 Q. Disincentive but if you come here precautionary environmental test and still strong direction as to short consent duration?

A. Yes.

Q. And then when you evaluated the proposal that has been put up based on the evidence of Dr Hays and then reflected in Mr Farrell's evidence, you've addressed that in your reply evidence at paragraph 150?

15

A. That is correct. I assume so. I definitely addressed it.

Q. Yes you did. And then your paragraph 150A, one of the reasons you currently don't support the proposal is in the third sentence of paragraph A say: "The amendments recommended by Ms McIntyre and Mr Farrell could prevent water takes with less than minor or de minimis adverse effects from getting consent for more than six years?"

20

A. Correct that was my interpretation of reading the table recommended by Mr Farrell. I came to that conclusion when I considered the allocation rate. In under the role that we first to allocation rate, he talks about – he sets a certain threshold, 20% of flow allocation or 30%, 25% in some cases. I interpreted that but it is actually one of the things that I wasn't 100% sure about but I assume that it will refer to the aggregate of all the consents within or from that water body, is that a correct assumption?

25

Q. Well that's possibly a drafting issue isn't it?

30 A. Yeah. If he relies on the table from Dr Hays, Dr Hays sets those threshold considering the combined allocation from all the consents, so I assume that that is the rationale that is applied up here as well.

Q. Yes.

A. And so in that case if that becomes the threshold the state of the water body in terms of allocation becomes the determinant not the effects of the activity because you might have an activity with a negligible effect. That wouldn't be granted consent because of this. So kind of changed the intent as to what was initially proposed in the plan change proposal.

5

Q. I was just going to say if there was a consent that had an application that had a negligible effect, there is still the alternative non-complying pathway, though, isn't there, under section 104D(a) that if effects minor or less it doesn't matter if you're contrary to the policy to get through that non-complying gateway is still a consenting pathway to be assessed on the merits isn't there?

10

A. That is correct, yes.

Q. So that really takes away your first concern in subparagraph (a) doesn't it?

15

A. That is correct, yeah.

Q. And then your other concern in subparagraph (b) that you've articulated is that the thresholds rely on the hydrological parameters?

A. Correct.

Q. And you've got a concern that some of those might be problematic to calculate in terms of uncertainties?

20

A. There are some uncertainties. To give you an example when we started looking at the naturalised mouth of the (inaudible 15:39:39) so of the initial figures had a margin of error of 500 litres per second which isn't not a small volume of water, so that was where I was coming from in relation to the (inaudible 15:39:52) you might have the same issue based on the current available information held by ORC to determine what is a naturalised mouth.

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Q. Although that wasn't the impression we got from Mr Henderson on Monday was it when these questions were put to him, his evidence was more certain than the concern that you're expressing.

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A. It would be possible, my understanding from Mr Henderson, is that it would be possible to come up with a regional model based on a refined national model that applies to the Taieri but in the Taieri as well he

pointed, if I recollect well, to the complexities of the hydrology there as a result of modification due to water taking and in some cases releases from Loganburn as well.

5 Q. All right, and then finally on this point again, so you obviously read the evidence of Dr Hayes?

A. Yes.

10 Q. And as you will be familiar with his recommendations, if I just take you to say his paragraph 107. And so the section that I've taken you to is his more comprehensive discussion and explanation of where he's come to with the table but at 107 he refers to the document that was prepared in support of a draft NES for flows and levels and you've also referenced that document I think in your evidence in chief at your paragraph 65.

A. Yep.

15 Q. So you're familiar with that as well and Dr Allibone referred to it as the 2008 Becker report?

A. Correct.

Q. Which represented a, I think his words were, I'll say it, it represents a consensus of a set of experts that were engaged to help prepare the report for the Ministry for the environment, is that your understanding?

20 A. That is my understanding.

Q. And Dr Hayes also later in his evidence in chief refers to additional report, the (inaudible 15:42:20) report at his paragraph 115 which is international review of scientific research on the same issue in terms of setting flow thresholds?

25 A. I can recall that Dr Hayes referred to that but I'm not familiar with that report.

30 Q. Now obviously we will get to see Dr Hayes' evidence on these flow thresholds and what they protect and what they don't protect, I expect there'll be some testing of that so I'm not asking you to second guess the outcome of that. But should those thresholds holdup and can, should we be able to rely on them as setting a precautionary threshold, doesn't that make this policy clearer and more directive in terms of achieving that precautionary limb that we discussed?

A. It's a, a point that has been realised before putting in quantifiable thresholds might, will probably help to clarify what are no more than minor adverse effects. For, on some values, I'm not sure whether they can apply to all the values that are relevant for that waterbody, I'm so not hydrologist so I don't know what the applicability is across all the waterbodies. The guidelines made reference to a distinction between waterbodies smaller than five cubic metres or more but I think it would be a, in my personal opinion, I think it's definitely worth while considering applying that in at least some circumstances. I'm happy to participate in that, yeah. I just had a few more questions as well when looking at the evidence of Mr Farrell. What if you cannot calculate MALF in a reliable way, Dr Farrell came up with an alternative solution as well as to looking at the instantaneous flow rate as an alternative. My initial thought was at what level, is that a medium flow, is that a mean flow, so I think there's a little bit of work to do in cases where you cannot apply it but it's worthwhile looking into.

1545

Q. Thank you. Then the final set of questions is related to concerns from submitters that plan change 7 will cause them to defer investment into upgrades on their farming businesses and you've addressed this in your reply evidence in a couple of places and one place was specifically in relation to an investment to address climate change and your response to that was – that's at your reply paragraph 59 and 60 that it's not that long a deferment given everything else that is in train from the Climate Change Commission and so forth. Is that a fair summary of that response?

A. Correct, I think climate change issues require a long term approach. If we would bring that into this plan change it would take us too long to develop actually those provisions and have them supported by suitable information, make the purpose obsolete probably.

Q. Yes. Then just on this topic of investment, if we look back at the period leading up to 2021 when many of these permits and privileges expired, there has been leading up to that point and there's a lot of detail in the evidence, significant investment on some farms into their infrastructure

despite the fact their permits or consents were expiring in 2021, you're aware of that?

A. I am aware of that, yes.

5 Q. And possibly a reason for that is that there wasn't a clear message in the planning framework to be cautious about investment in that context?

A. Well, the planning framework – one of the issues, and I hope I addressed that appropriately in my evidence or I have addressed it is that our current planning framework especially policy 642A in combination with the policy on duration creates the expectation that what you've been using the past 10 you will be able to continue to access for long term. The NPSFM clearly now put some caveats around that in terms of where resources overallocated or degraded so in order to transition to a new plan that gives effect to the NPSFM thought it would be prudent to include that in the plan change as well.

15 Q. And you explain in your paragraph 60 in your reply evidence that one of the intentions behind PC7 is to caution against further investment in water use so you're not shying away from that, it is one of the intentions that sits behind it.

A. Yes.

20 Q. And in terms of any relevance that the NPS has and what weight can be given to people's desire to invest and being frustrated from investing for a period of time, there is – I think there is probably only one or two provisions in the NPS that I want to take you to that might be relevant to that consideration, the first is policy 15, you got that?

25 A. Yes.

Q. CB674, so policy 15: "communities are unable to provide for their social, economic and cultural wellbeing in a way that is consistent with this national policy statement", so that enablement of those wellbeings, that's the only policy you can really look at when you're considering what weight 30 to give to this issue of deferment of investment, isn't it?

A. Correct.

Q. And any weight that you do give to that has to be – it's qualified, it's in a way that's consistent with this NPS, so it's qualified by the three priorities of Te Mana o te Wai?

A. Correct.

1550

5 Q. And even when you get into the real nuts and bolts in the NPS down at 316 and 317, which is about 316 is setting environmental flows and levels and 317 identifying take limits. Now I know we're not applying these provisions now but those provisions make no reference to even existing investment let alone future investment, do they? They're not relevant to the setting of limits and flows and takes?

10 A. Well, no, I think the NPS is quite clear that you've got apply Te Mana o te Wai and the three priorities in setting these limits.

CROSS-EXAMINATION: MR ANDERSON

15 Q. Many of the issues that I was proposing to traverse have been covered by my friend so we won't be effectively long. Have you got your evidence-in-chief there Mr de Pelsemaeker? Can you go to paragraph 371?

A. Three hundred and –

20 Q. Three hundred and seventy one, is that better? Now this is your reasoning for not supporting an extension of irrigation in consents, correct, and you're reasoning behind that, if I read this correctly, is that you haven't done the NPS compliant with the quality work yet and there are areas in Otago where reductions maybe required in order to meet the requirements in relation to water quality?

WITNESS REFERRED TO EVIDENCE-IN-CHIEF

A. That's correct.

25 Q. Those processes haven't been run so we don't know what those reductions might be?

A. That is correct.

30 Q. So in some places everything might be fine or we can carry on as we are. Some places it might be status quo but some cases might need a reduction?

A. That's correct.

- Q. And while that is the case we don't want further investment in irrigation in case that investment becomes lost because of a necessitated reduction in discharges and nutrients?
- 5 A. That is correct. When I read the evidence, the evidence pointed that it is possible to have a no increase in adverse effects, but I was wondering what if you need to actually claw back on contaminant discharges, so that is actually the reason why?
- Q. I was really referring because what I wanted to do was put to you that the reason why you changed your mind and just explore that a little bit with
- 10 you.
- A. Yes.
- Q. So that was your position in your evidence-in-chief?
- A. Correct.
- Q. And in your reply evidence you've considered the evidence particularly of
- 15 Dr Crystal?
- A. Correct.
- Q. And he says that we can actually increase the amount of irrigable area and in some cases reduce the effects?
- A. Correct.
- 20 Q. And based on that evidence you have reached the view that we can create a rule which provides for a reduction in environmental effects as being okay to get consent on a restricted discretionary basis?
- A. Correct.
- Q. Now the point I want to put to you is that the requirement for a reduction,
- 25 that may still not meet given that there's no quantum on that and it could be a small reduction or a large reduction. If we have a catchment which is over allocated and required a significant reduction in nutrients to become NPSFM compliant, you might end up with a mismatch. Can I explain what I mean by mismatch?
- 30 A. Yeah.
- Q. The mismatch is that you've got an irrigator who has decided they want to do some more irrigation, they want to increase the area and they've made an effort to reduce their losses to the most extent they reasonably can?

A. Correct.

Q. And then they've got their consent and then you get an NPS compliant framework which requires an increased reduction in N losses. That's a plausible situation?

5 A. That is a plausible, yeah.

Q. In that situation, isn't it that the risk you refer to you in your evidence-in-chief at 371?

A. Well the restricted discretionary activity tries to achieve again that we're not having a worse effect and also consents granted under that rule and the recommended amendment, the restricted discretionary rule, would be for six years which would allow you to review that activity relatively short term.

1555

Q. But isn't the problem that you've allowed this activity to commence on the basis that it's done the most it can to reduce its environmental footprint but that might not be enough to meet your NPS compliant one in which case the very risk you talked about in 371 hasn't actually been addressed, the risk being the risk that the investment will be lost because irrigation equipment won't be able to be used?

20 A. That is correct. I guess the key concern though was that people who have already committed to an investment that they would go for the non-complying rule and would get the consent for a longer duration. So the plan change itself it tries to discourage investment, we don't actually – it's an implicit consequence of the plan change and intentional but we don't – we –

25 Q. Can I interpret your answer for you and you can let me know if it's right? We've got these levers which is the controlled activity is the lever that we want to make as easy as possible and the key determinant of that is term, the six year term.

30 A. Yes.

Q. So in terms of your two levers, you're adding a lever to the term one which is restricted discretionary to make the lever of non-complying less palatable?

A. Yes, that is the intention.

Q. Now, in relation to the way in which you've drafted this provision, you've referred to a reduction in environmental effects?

A. Correct.

5 Q. Now, an increase in irrigation can have a range of adverse effects on the environment, can't it?

A. Yes.

Q. It could have adverse effects on landscape?

A. Possibly.

10 Q. It could have adverse effects on terrestrial ecology if that involved the clearance of areas which was currently indigenous vegetation? These are just possible adverse effects.

A. Yep.

Q. It could have adverse effects on water quality?

A. Yes.

15 Q. And those could manifest in a variety of ways, you could have nutrient discharge going through groundwater into surface water, you could have e coli making its way into surface water and then when you talk about the effects being reduced are you talking about – so if we say there's a (inaudible: 15:57:43) adverse effects in relation to increased irrigation, is the reduction in relation to all of them or just of them? So if you had a – was the intention behind your draft that you could balance these effects to achieve an overall reduction or simply you had to achieve a reduction in each one?

20 A. It would be the full suite of environmental effects and not kind of a trade-off, yeah.

25 Q. So the intention is that if there was – if for example in an outstanding or important landscape, it would reduce the effects on landscape which doesn't really make sense as a concept?

30 A. It would be also like referring to a – landscape matters could potentially be on a district plan as well so would not directly be applicable to matters that you control to your water plan.

Q. So the intention in this is not to – when you talk about adverse effects of landscape, you're not referring to – adverse effects of irrigation you're not referring to landscape?

A. Given that this is a part of a water plan, I would assume that any ecological effects would pertain to the realm of the water plan.

Q. Right, so when you're talking about environmental effects you're only referring to environmental effects on water quality or quantity?

5 A. Yes.

Q. And so then if we had the situation where we had a potential increase in improvement in for example water quantity because you're taking less water because you're being more efficient but an increase in relation to one but not all of them, you would fail your test?

10 A. Yes.

1600

THE COURT: JUDGE BORTHWICK

Q. Just while we're there, I'll just cover off a question which arose in relation to what Mr Anderson had to say and what also what Ms Baker-Galloway had so say. We were talking about effects on water quantity, water quality. Did you mean to include or capture those activities which evidently are permitted under the water plan? So Ms Baker-Galloway took you to rules in chapter 12 to do with the discharge of nutrients et cetera.

15

20 A. These are not captured by plan change 7.

Q. No.

A. No.

Q. So when we're talking about no effect on water quality, those activities which are permitted under the rules that Ms Baker-Galloway took you to you wouldn't be looking for an improvement there? Those activities are permitted. You wouldn't be looking to exercise a lever and start to lift the game in terms of nutrient application and controls of it?

25

A. The framework does not alter how those rules apply. Yeah.

Q. No, yes, that was the point of my questioning and I think the other questioning of counsel, what do you mean environmental effects? It's easy to say but what's actually in your mind? Is it stuff which is permitted, are you meaning to catch this stuff which otherwise is permitted in the

30

plan or not? What's the broad range here? You're going to think about this overnight because you're coming back tomorrow by the looks of it.

A. I know and we had the discussion yesterday as well, your Honour, and I acknowledge that as I said yesterday there might be an opportunity to sharpen up those provisions.

5

Q. Okay. Good. Alright. So we're with Mr Welsh.

CROSS-EXAMINATION: MR WELSH

Q. Sorry, Mr de Palsemaeker. It just carries on one lawyer after another.

10

A. It's not good. It's not good.

Q. I would say that typically at this time of the day it's the counsel that gets in trouble with the bench rather than the witness so you might be on safe ground. I just want to pick up some of your answers to questions that Ms Dickson posed you and Ms Dickson's series of question were largely aimed at suggesting to you that the council may have lost sight of a quick and simple and cheap plan change and really what are we dealing in the context of hydro and she put to you about the Waipori scheme which is one of the larger takes or activities in the Taieri and said that the consents for those don't come up for renewal again until 2038 and you said aspects of that and Ms Dickson left that for me to follow up. What do you understand as to be the outstanding consents for the Waipori scheme in Taieri?

15

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A. My recollection and I'm sorry if I have it wrong but the Waipori scheme operates on a number of deemed permits which are gonna expire now but at the same time I think it was in Ms Foran's evidence. She hinted at another suite of consents for which they would lodge applications I think in 18 years' time.

25

Q. In sorry what?

A. Eighteen years' time.

30

Q. Yes. I'll put this to you and see if you agree. That what Ms Foran was relating to was when the Waipori scheme in deep stream which is associated with it are up for their next renewal. The Environment Court granted consents in 2001.

A. That is yeah.

Q. And they're up for a renewal in 2038 and what we're talking about for Waipori and the deemed permits are seven deemed permits. You would've heard I mentioned that to the court yesterday which Mr Mitchell
5 says contributes only five per cent of the Waipori influx. Do you recall that?

A. What you said or what Mr Mitchell said?

Q. Both I suppose.

A. Both.

10 Q. A fair question.

1605

A. Yes, I recall both, yeah.

Q. And just for the record if I suggest to you that the Paerau and the Patearoa scheme which is in the Maniototo and also owned by Trustpower, those
15 consents don't expire until 2034. You'd have no reason to disagree with that would you?

A. No.

Q. I'm not going to try and do amendments to the clauses by committee today. I'm going to try and focus on some of the higher order documents
20 and just take a step back first and look at the Skelton report?

A. Yes.

Q. Which is the sort of genesis for this whole plan change and Professor Skelton doesn't, it would be fair to say, wouldn't it, that he doesn't really address hydro at all. He mentions Trustpower's 96 permits
25 that it intends to surrender and that's the extent of his assessment of hydro, would that be fair in terms of your recollection?

A. I believe so. That's my recollection, yeah.

Q. And the limited consideration of hydro and the NPS on renewal energy generation, that limited assessment has flowed through to the section 32
30 report hasn't it where there was only 10 lines dedicated to that issue and no assessment of any of the policies or objectives of the NPS?

A. That is correct.

Q. And in the keys issues report, those 10 lines reduced to nine lines and it seems to be that the key message from both the section 32 report and

the key issues report is that the NPSREG is not given effect to but a framework's provided, is that a fair summation of those two documents as they relate to hydro?

5 A. That is correct and that is quite intentional. As I probably have said before, the intention to provide for a framework for hydro is to incorporate that in the land and water plan.

Q. Yeah and I'll come to that in a moment. And would it be fair to say that the drafting of the plan change has essentially had at the forefront of its mind irrigation consents and I'll give you an example –

10 A. No.

Q. The notified version of the schedule was entitled *Methodology for Calculating Assessed Actual Usage of Surface Water Takes for Irrigation Purposes*.

15 A. I agreed to the letter that was initially in there and I recommended to change that. The issues that Professor Skelton alluded to, one of them, and a key one, is the inadequacy of the water plan to deal with allocation and that includes a wider range of uses not just irrigation.

Q. And one of the inadequacies of the water plan, you'd accept, is that it does not give effect to the NPSREG does it?

20 A. There is very little reference to hydroelectricity generation except for –

Q. And that's in respect of the Waitaki?

A. Yes that's the only one, yeah.

Q. So you would accept with the general proposition it doesn't give effect to the NPS?

25 A. Correct.

Q. And your answers to Ms Dixon appeared to me at least to suggest that we'll kick the can on giving effect to that higher order document in the new plan?

A. Correct.

30 Q. And that would represent, would it not, some 10 years, circa 10 years, after the regional council was required under the NPS to give effect to that NPS and the regional plan?

A. Correct, yes.

Q. And Plan Change 7 perpetuates this, does it not, because it doesn't contain any references to renewable generation at all?

A. Correct.

5 Q. I just want to talk to you and clear up something around Mr Wilson's evidence which I didn't put to him because a) I wasn't here in the morning and it was decided we weren't crossing him but it is probably a planning matter and Mr Wilson opined that hydro takes are consumptive because of the definition in the water plan which uses the definition from regulation 4 of the water takes and the reporting dregs, do you recall that?

10 1610

A. Yes.

Q. But that's not quite the entire story, is it? The water plan also treats hydro in the same sense as other non-consumptive takes.

15 A. It does describe that but I personally don't believe that that description matches the description or the definition of non-consumptive in the regulations.

Q. No but the explanation for policy 632 makes it clear that hydro's categorise with non-consumptive takes? You'd accept that.

A. I accept it.

20 Q. And Mr Henderson, he described the Clutha scheme, one of the largest in the country is also being non-consumptive in his evidence in chief at paragraph 23, didn't he?

A. He did, yes.

25 Q. But in any event, whether it's consumptive or not consumptive, you would accept that the NPS reg doesn't distinguish or it applies to both consumptive water takes for the purposes of the regulations and non-consumptive water takes provided they are for renewal electricity generation, doesn't it?

A. My recollection from reading it is that there's no distinction.

30 Q. And notwithstanding that, one of your key intended goals of plan change 7, you've stated in a number of times in your evidence is to discourage further investment in water dependent economic sectors, isn't it? And that reference is to one of your quotes at 393 of your evidence in chief?

A. Yes.

Q. Do you consider hydrogeneration to be a water dependent economic sector?

A. Yes.

5 Q. And in your summary you made a slight and subtle change to that language in that in paragraph 4D you said one of the methods that plan change 7 transitions to a sustainable management for freshwater is by discouraging further investment in irrigation expansion, so you narrowed it down to irrigation expansion?

A. I believe so.

10 Q. But you still stand by that one of the purposes of this plan change is to discourage investment in water dependent economic sectors including hydro?

A. My reading from the NPS renewable energy generation especially the preamble which I refer to is that we – might be best to reference or to read
15 it out loud: “NPS does apply to the allocation and prioritisation of fresh water as these are matters for regional councils to address in a catchment or regional context and may be subject to the development of national guidance in the future.” So what I'm getting at is that even with activities such as hydro which are provided for (inaudible: 16:13:49) and NPS, we
20 still need to make sure that it is undertaken in accordance with the priorities set in the NPS freshwater management and be able to have those activities operating in accordance with a regime that gives effect to the NPS freshwater.

Q. Sure but we're not in a full allocation hearing for a plan change are we?

25 A. We are not.

Q. We're not and the Court is sitting instead of the Regional Council and I think Mr Maw accepted that the NPS does apply. Have you approached that the NPS is of no relevance to plan change 7?

A. NPS renewal energy –

30 Q. Sorry, I'll move onto FM later, too hard with all the acronyms at this time of day.

A. It is relevant.

Q. Okay. The relevance or the application of that relevance seems to me in your evidence that you suggest that whilst we don't give effect to the NPS reg in plan change 7, we provide a framework, is that your fancy twostep?

A. That's the intent.

5 Q. I just want to look at that, so the framework in plan change 7 is the same framework for hydro as it is for every other application for water take, isn't it?

A. That is correct.

10 Q. And that framework operates to actively discourage investment in renewable electricity generation and other water-related economic sectors, doesn't it? You've accepted that.

A. Again, caution applied because of the need to sort out allocation issues and water management issues.

15 Q. And that framework for hydro applies a schedule that Mr Mitchell will give evidence on, has provided a statement that the schedule will result in lost generation and inefficient use of the resource.

20 A. That is correct but also in my evidence in reply, I have indicated that it might be an opportunity to look at how the schedule applies. The intent of the schedule is to claw back on paper allocation, not to restrict actual use or historic use.

25 Q. Yes, in your reply at 124 you've said: "it may be appropriate if there were to be demonstrated that the application of schedule 10.4A would significantly impact the continued operation and viability of what you call HG schemes. Now is there an applicable planning document that provides recognition for renewable energy generation that's owned that – should I say, is there an applicable statutory planning document providing that recognition of renewable electricity generation is only necessary if it's demonstrated that the planning framework would significantly impact on the continued viability and operation of the scheme?"

30 A. I think that is basically NPS renewable energy generation that you're referring to, am I correct?

Q. No, this is your test in your evidence in chief at paragraph 124. You've suggested you're willing to reconsider the application of the schedule if Trustpower, I presume it's Trustpower, can demonstrate to you that the

schedule will significantly impact the continued operation and viability of the scheme in question of Waipori scheme, now I'm asking you where did you get that test, are you aware of any planning document that says one only needs to take into account the NPS on renewable energy if it can be demonstrated that there would be such an effect on it?

5

A. Sorry, maybe it's the time of day but I'm really struggling.

Q. Maybe the question, I'm really asking you where have you come up with this test that it's necessary for Trustpower to demonstrate to you that the schedule will have a significant impact on it's continued operation and viability before you will reconsider the application of the schedule and I'm asking you where did you get that test from, is there a planning document that supports you?

10

A. No, there is no such planning document, no.

Q. No, that's where I was getting to.

15 **THE COURT: JUDGE BORTHWICK**

Q. Do you need to take a break to be fair? You've been on the stand all day.

A. I'll see how I'll go.

MR WELSH:

It may speed things up if he takes a moment, maybe it's the questions.

20 **THE COURT: JUDGE BORTHWICK**

Q. Well, no I was actually thinking a recess overnight if the witness is tired, you should be because you've been on deck all day.

A. Sorry.

Q. And there's no need to apologise.

25 A. I'm okay. I was just – I think what you hear and what you hear in your mind are sometimes different.

MR WELSH:

Well, I only get one go at this but I'd like to know if we are recessing because I've got a hotel to find and some flights to arrange.

THE COURT: JUDGE BORTHWICK

How long do you need to finish your questions?

MR WELSH:

I've got a fair way to go, Ma'am.

5 THE COURT: JUDGE BORTHWICK

You've still got a fair way to go?

MR WELSH:

Yes and it is what it is, the children won't care that I'm not home, the dogs may but the children won't.

10 1620

MR DE PELSEMAEKER:

I'm happy to go a bit further. Are you happy for me to respond to your question?

15 MR WELSH:

I think you did. You said no, there was no planning document.

MR DE PELSEMAEKER:

There was no planning document, yeah.

20

MR WELSH:

Ma'am I'm in your hands. Do you want to proceed?

THE COURT: JUDGE BORTHWICK

I'll continue if you're okay.

25

MR DE PELSEMAEKER:

I'm okay.

CROSS-EXAMINATION CONTINUES: MR WELSH

- 5 Q. Mr De Pelsemaeker, I just want to suggest to you that placing such a high bar in respect of the schedule where the expert evidence from Mr Mitchell is the schedule doesn't work and will have effects that are directly contrary to what the NPS are seeking, I wonder how much of that comes down to your desire to hold the line, a term that you have used repeatedly in the last couple of days.
- 10 A. It's two matters really. One is you refer to the evidence of Mr Mitchell which demonstrates that there are shortfalls in terms of what would be allocated under new consents would be less in some cases. I have other evidence provided by other witnesses, Mr Leslie in particular who considers that there are generally a good level of agreement between historic use and what is generated by the schedule. As a planner, I'm trying to evaluate which one should I give weight –
- 15 Q. May be if you approach it this way. The only rebuttal evidence or reply evidence filed by the council in respect of Mr Mitchell was that by your data analyst, Mr Wilson who commented on two aspects. One outages where he suggested, "well, if there's missing data and there's an outage. It's half. You don't go control. You go restricted discretionary." And the other aspect we've already covered, which was consumptive, non-consumptive. Mr Henderson, the council's hydrologist and Mr Leslie don't provide that counterbalance to Mr Mitchell's expert advice. There is no other expert advice on the matters Mr Mitchell gives evidence on.
- 20 A. Yeah.
- 25 Q. So do you accept that?
- A. I do. Yes.
- Q. Okay. In respect of drinking water, you also state at 1.12 of your reply statement that you consider that matter of better providing for drinking water supplies is a complex one.
- 30 A. Yes.
- Q. And you have not yet fully consolidated your views on the matter around drinking water.
- A. Yes.

Q. Given what we've talked about and what's been stated about hydro is it fair to characterise that issue in the same respect for hydroelectricity that it's complex and you haven't fully consolidated your views around how we deal with hydro?

5 A. In both cases, in my opinion, it can be best dealt with within the framework. Making sure either through the method or through the rules that the method does not impede on or does not claw back on actual use. In terms of drinking water, the NPS is quite clear that it's a higher priority use. Whether higher priority use compared to third priority use is not compared to Te Mana o te Wai.

10

Q. We'll come back to the hierarchy of uses in a moment. So is that fair to say then that you're still to consolidate your views around hydro in terms of how it is appropriately provided for in plan change 7?

A. Yes.

15 Q. I'm coming now to NPS. I should largely be talking about the freshwater management.

A. NPS, yep.

Q. So you've confirmed in your evidence in chief and reply that plan change 7 does not nor does it seek to give full effect to the NPSFM.

20 A. Correct.

Q. But the approach taken in plan change 7 has been to give effect to the NPSFM to the extent it can, that's right?

1625

A. Correct.

25 Q. And in some parts as we've gone through the last two days, probably more accurate that you're inviting the Court to give effect through plan change 7 to parts of the NPSFM, because at the moment it doesn't fully achieve that does it, as much as it can reasonably –

A. Yes.

30 Q. – and practically do. Okay, I want to look at a couple of the policy's that you haven't, you've mentioned then insofar as setting them out but haven't provided an analysis of and the first one is policy 4 and policy 4 reads: "Fresh water is managed as part of New Zealand's integrated response to climate change"?

A. Correct.

Q. Doesn't it?

A. Yep.

5 Q. And you would accept that hydrogeneration is clearly an important part or important in the context of the nation's response to climate change, isn't it?

A. Correct.

10 Q. But it's fair to say, is it not that the approach of plan change 7 is to kick the climate change can, too much alliteration at this time of day, down the road to the new regional plan?

A. Correct.

Q. Because it's silent on giving effect to policy 4 isn't it, plan change 7?

A. Correct.

15 Q. Similarly, policy 15 which Ms Baker put to you: "Communities are unable to provide for their social, economic and cultural wellbeing in a way that is consistent with this NPS." Electricity generation is important in that context of wellbeing too, isn't it?

20 A. Correct, it's important but I also read this policy as policy 15 requires a lot of policy's to be met, you know, you need to still comply with all others, it's not a pick an choose one.

Q. No I understand that although plan change 7 is picking and choosing, isn't it?

A. In what sense?

Q. In the sense that is doesn't deal with NPS REG.

25 A. Oh yes, yes.

Q. And it doesn't deal with all the policies that it could give effect to now.

A. Mhm, that's correct.

Q. And you haven't provided any analysis on policy 15 in your statement of evidence, have you?

30 A. No.

Q. Now, I want to come to the order of hierarchy and your answer just before suggests that, may suggest a reason for that. The third order of priority in the NPSFM relates to the ability of people and communities to provide

for their social, economic and cultural wellbeing now and in the future, doesn't it?

A. Correct.

5 Q. And you consider, is it fair to say you consider renewable electricity generation to be in that third order priority under the NPS?

A. It is not that simple, reading the NPS, the NPS is quite silent on it except it makes a distinction, it's not really a distinction but it does provide for some hydroelectricity schemes to be included in an appendix I believe, one of them being the Clutha and so it provides an exemption for those –

10 Q. In terms of –

A. – but not for others.

Q. Yes, but that's in terms of attributes isn't it, those –

A. Yes.

15 Q. – five schemes are described as the five largest and they have a free pass, or a less of a obligation when it comes to attributes. What I'm talking about is the order of priority and I'm wanting to know from you whether you consider renewable electricity generation to be a third order priority?

1630

A. Yes.

20 Q. And the second order of priority relates to the health needs of people and then it's brackets: "(such as drinking water)" doesn't it?

A. Yes.

Q. And you state in your evidence in chief at 342 that water takes from drinking water are a second order priority?

25 A. Yes.

Q. Do you accept that water takes for electricity generation are also a second order priority under the NPSFM?

A. In my opinion, it's within the third category.

30 Q. All right, well let's have a look at that, the NPS second order refers to health needs of people and then uses the word specifically: "such as drinking water." So would you accept that the word: "such as", means that drinking water is an example of something that is a health need of people? So "such as" rather than "i.e.

A. Yep.

Q. And so that would suggest, would it not, that “such as” or that list of drinking water by the use of the word “such as” is not an exhaustive list?

A. Correct.

5 Q. And it being the NPS clearly contemplates that there may be other health needs of people, doesn't it, beyond drinking water?

A. Correct.

Q. And do you accept that the electricity generation is critical to people's health?

10 A. It contributes but is it critical? Again, I still think it's, in my opinion and it's just one opinion, the health needs refers to drinking water as well as things such as availability of water for hygiene purposes. I had not anticipated hydro to be in that category.

Q. Yes but it may be, would you accept that?

A. Maybe, according to – yep.

15 Q. According to the authors to the section 32 evaluation report for the NPS freshwater management, have you had an opportunity to read that section 32 analysis?

A. Bits of it.

20 Q. And those authors noted in respect of policy 4 at page 46 and Ma'am, this isn't in the common bundle but I have some hard copies but I'll read the quote anyway: “contributes”, this is talking about policy 4: “it contributes to achieving the objective of 2.1.1(b) which is the health needs and (c) by preserving hydroelectricity flexibility which will secure renewable electricity generation which is important for meeting the health needs of people, clause (b) as well as enabling communities to provide for their social, cultural economic wellbeing now and into the future, clause (c).” So my question is do you accept that it is open for a finding that renewable electricity generation can be a second order and third order?

25 A. On that basis, I stand corrected, yes.

30 Q. And does that cause you to reconsider where you think the framework for hydroelectricity should be in plan change 7 as a second order priority?

A. Not really because still it is subordinate to the first order one and that is looking after the health and wellbeing of water bodies and puts it in line

with drinking water and that is how we intended to treat those two activities in plan change 7 so in the same manner.

THE COURT: JUDGE BORTHWICK

5 Q. Sorry, I don't understand, are you saying that – I don't understand. Are you saying you intended the health needs of people such as drinking water and the generation of electricity to be on the same level?

A. Yes, they're both captured by plan change 7 framework.

10 Q. They're captured by plan change 7 framework but did you see them as meeting the second part of objective 2.1 of the NPS in terms of the three priorities?

A. I agree with counsel.

Q. Okay, so you put hydro together with drinking water as the second priority to be address?

A. Yes.

15 Q. Okay, I've got you.

CROSS-EXAMINATION CONTINUES: MR WELSH

20 Q. Now I want to talk briefly about Trustpower's relief and the term "carveout" has been bandied around a bit, is it fair to say that some of the relief that Trustpower seeks is some specific provisions or in your language, a framework for renewable electricity generation? Just a different framework?

A. It is different framework, yes. It's a suite of provisions from recollection.

25 Q. And in rejecting or applying to that framework as set out by Ms Styles, you say that's inappropriate because renewable electricity generation may have significant impacts on the health and wellbeing of water bodies and other values?

A. Yes, correct.

30 Q. Now you're not for a moment suggesting that the effects associated with Trustpower's four deemed permit applications will generate anything like significant adverse effects? Maybe I should put it this, you're not the processing officer because you've said several times your not in

consents, you're not the processing officer for those applications, are you?

A. No, I'm not.

Q. And have you reviewed those applications?

5 A. No, I've based myself on key evidence that was provided by Ms Styles and Ms Foran and Mr Mitchell.

Q. And none of that evidence identifies significant adverse effects associated with those applications, did it?

10 A. I cannot recall whether they are specific to the applications but some of the descriptions in Mr Mitchell's evidence and Ms Foran's evidence describe activities that are from hydrological or ecological or a cultural perspective would have an adverse effect.

15 Q. There's a difference between having an adverse effect that's relevant which is anything over de minimis. There's a big difference between something that's greater than de minimis and something's that significant but my question is you're not suggesting, are you, that the Trustpower applications for these deemed permits will generate significant adverse effects having not seen them?

A. It would be hard to make that assessment, yep.

20 Q. So it would be hard to stand by your assertion that they may have significant adverse effects?

A. Correct.

25 Q. In terms of the plan change, let's assume that there are applications out there that do have significant adverse effects, is it your view that providing a consenting pathway with no ability to decline such an application with a six year term is appropriate?

A. Is that the –

30 Q. Turn it around, so I'm saying assume that there are some applications out there that do generate significant adverse effects, given the consenting pathway that plan change 7 provides of a six year controlled activity...

1640

Q. Plan change 7 provides of a six year controlled activity provision, would that be appropriate to have no ability to decline that activity even though

it generates significant adverse effects for at least a period of six more years?

A. Well, in the context that it would be for a period of no more than six years.

Q. Together with 124, it could be longer than six years, couldn't it?

5 Applications may take a year to process and be granted and go through the process?

A. Yes.

Q. So you're quite comfortable with a significant adverse effect on a deemed permit carrying on for at least six more years?

10 A. Yes, but I would not want to stretch it too much beyond six years.

Q. Alright. You in fact acknowledge that under plan change 7 there could be some worse outcomes environmentally than what could eventuate if an application were processed and assessed against the operative plan.

15 A. In reference to schedule 10A I believe I have based on some assessments that were done by Mr Leslie we identified that while the methodology takes away paper allocation you could end up with rates of take that are slightly higher than what would be granted under the practice that is currently carried out to give effect to the operative plan.

20 **MR WELSH TO THE COURT:**

Q. Ma'am. I've only got about four more questions.

A. Just wondering where this is going. Where is this going? Are we talking about dams or are we talking about throwing it open now to all activities?

Q. I'm not talking about dams at all.

25 A. Okay. Hydro, sorry, hydro.

Q. I just wanted to know the witness in his reply evidence indicated it wasn't appropriate to provide for the relief that Trustpower seeks because it could generate significant adverse effects but the reality is, the planning framework that the council's put up specifically it could enable an effect that is significant with no ability to decline that.

30

A. Well, it may enable something significant. Certainly it might enable increased effects that's the –

Q. Well, my point is that.

- A. – change with subsequent effect where the significance of the effect I don't know but anyway. What this plan change is not doing is avoiding effects, nor reducing them, it's rolling them over.

CROSS-EXAMINATION CONTINUES: MR WELSH

- 5 Q. Now, one of the other reasons that you consider that specific provisions for sought by Trustpower are not appropriate is because there is a need to take a longer term perspective on the impacts of climate change on fresh waterbodies, you do that at 1.2.3B. Do you appreciate the irony in citing climate change as a reason against providing for relief on
10 hydroelectricity?

- A. I think there's two aspects to it, one is climate change helps in a response – sorry, hydroelectricity helps in responding to climate change and helps with resilience of communities but at the same time hydroelectricity can be effected as well by climate change, specifically the supply of water that
15 is needed to support hydroelectricity generation. So given that you have a variety of uses, how we're going to deal with the impacts of climate change on flows and what that means for allocating water to different uses is something we need to sort out in the land and water plan, that is where my, that is where it was coming from.

- 20 Q. All right. Two more questions, on the topic of climate change at paragraph 150 of your evidence in chief you set out the section, relevant section 7 matters but you have, or the most relevant, but one of the only two section 7 matters you omit is 7(J) which is the benefits to be derived from the use and development of renewable energy. Was that an
25 oversight or do you think 7(J) has no particular relevance to plan change 7?

1645

- A. I did not include it because we are not specifically providing provisions in plan change 7 for hydroelectricity generation.
- 30 Q. Okay and is that the same reason why you excluded or omitted objectives and polices in sections 4.2 and 4.4 of the RPS relating to climate change and renewable electricity generation respectively?
- A. Correct.

Q. Correct, okay, thank you.

THE COURT: JUDGE BORTHWICK

When I say we're rolling over the effects I guess that just, it depends somewhat on whether this is a process orientated plan change or process and
5 environmental plan change and it's not clear what the outcome there will be. I suggest we do take the break because I suspect you're probably quite tired having been at this all day, I had thought Mr Reid we'd get to you tonight but unless we had any confidence you'd finish in 10 minutes I'd, I think we'd head home?

10 **MR REID:**

Well I've had a discussion with my friend Mr Page, he's raising most of the issues that I was going to discuss. The remaining issue that I had related to the schedule which is being dealt with via the inaudible (16:46:34) anyway and the only other point I was going to question this witness about was related to
15 the restricted discretionary pathway. That's already been canvassed extensively, I did have my own client's scenario to put to this witness but I'm not sure, it probably doesn't really add anything that – they're a vineyard, the sort of scenario that my learned friend Mr Anderson was putting to the witness sounded more like a convert dairy conversion type expansion scenario whereas
20 my clients dealing with a small expansion of their existing vineyard which they've already committed to. So that was, that was the only matter that I really wanted to raise with the witness but I'm really content, I'd like to get away this evening –

THE COURT: JUDGE BORTHWICK TO MR REID

25 Q. You're okay to come back tomorrow?

A. Well I'd like to –

Q. Or finish tonight, that's what I'm asking.

A. I'd like to finish tonight so that I can get away.

Q. Okay so just on that small matter and otherwise Mr Page is going to pick
30 up the balance of matters that you're in to sit in?

A. Yes.

Q. Okay, all right, hopefully it's – how long do you reckon you need?

A. Just a few moments.

CROSS-EXAMINATION: MR REID

5 Q. So Mr de Pelsemaeker, Mr Anderson questioned you, I think about how you'd got to your position regarding the restricted discretionary pathway and I think you, it's really a recognition that for those who have committed to, already committed to an expansion, they've already taken the financial risk that you're seeking to avoid with the plan change in part, is that correct?

10 A. Yes.

Q. And so as I said to her Honour, the scenario that Mr Anderson painted was, it sounded as though he was getting at a dairy conversation or pivot conversation, something of that nature so I'm just going to put to you the scenario that my clients are facing, so they have an existing, they are an existing series of vineyards on the Manuherikia scheme and they are, so they're located nearby to Alex, Alexandra and they have been developing their vineyards since 2002 throughout the 2000s since then. They initially established their infrastructure piping storage on the basis that it would irrigate a certain hectareage and they haven't quite fit, they haven't quite got to that number but they have always planned to do so. So I just want you to assume for current purposes that they would be able to show that they have no, they'd be able to meet your criteria in terms of the rule relating to existing discretionary – to restricted discretionary activities so that's your 10A3.1(A)

25 A. 1.

Q. B.

A. Yep.

1650

30 Q. 2, 1,2 and 3. So one, they would be, so they have already committed to the infrastructure. Two, they would be able to show an improvement in efficient use because they're using the same amount of water over a larger area and then with three, what they might be able to show and just for the purposes of discussion, they might be able to show that they had

no additional effects on the environment. So really the status quo. Water quality wise, landscape wise, whatever. So isn't that exactly the sort of scenario that you would want to encourage into the restricted discretionary pathway as against them going through non-complying?

5 A. Correct. Yes.

Q. So the issue there is what her Honour discussed with you this morning which is what is meant by the notion of an improvement or a reduction in environmental effects and whether that's really necessary in the context of this plan change.

10 **THE COURT: JUDGE BORTHWICK TO MR REID**

Q. Alright. It's two notions. What is a reduction? What are the environmental effects? What's any of that mean?

A. It begs the question as to what it does mean, your Honour, yes but by real proposition is, is this the sort of scenario that the witness would see a benefit from encouraging into the restricted discretionary pathway as opposed to the non-compliance?

15

Q. Yes but you haven't told me what effects your clients will be working on and this is the critical issue neither has this witness.

A. Yes.

20 Q. So is it the effects that I put to the witness in the morning which I thought the broader answer was yes but now is an answer no if those effects are otherwise covered by permitted activity rule which is virtually everything apparently Otago? What effects are left to be managed under this rule is actually a really big issue and we have no clarity. So when you say effects, what do you mean? What's left over that's not permitted?

25

A. Well, I'm just working on the base of the rule, your Honour. I'm not sure what it means.

Q. I know. Neither do I and it's really important and I do think perhaps he needs to sleep on it, think about it. It's actually huge. I mean you can ask him but I think it's huge.

30

A. I can't take it any further, I don't think. It's an issue that whether sleeping on it helps. It's something that needs to be given some consideration and I don't know whether the questions about that topic are really going to be

able to solidify that issue that needs clarity. In terms of a written rule about what this exactly means.

Q. When you say your clients are committed do you mean the infrastructure is already in ground and purchased on the land?

5 A. Yes. It's really a question of storage as to the dams and the piping network. That's already in place.

Q. It's already in place. It's just that they haven't actually irrigated this block and would like to now.

A. Yes, quite, yes. It's largely done but not quite finished.

10 Q. So it's not a conditional contract of purchase subject to getting a water permit or anything like that.

A. No.

Q. I understand. Okay.

A. That's all I had.

15 Q. Perhaps we'll think about that overnight because this is really big. I don't know how it's covered off in s 32 but this is huge, what you mean or don't mean.

UNIDENTIFIABLE SPEAKER

20 (inaudible 16:53:42)

THE COURT: JUDGE BORTHWICK TO MR REID

Q. I don't know. I don't know. I mean there's also a question whether this is something you can do by yourself. I'm not asking you to confer with other people but it's almost got an implementation theme to it too. In other words what your consents team are thinking about. How they actually implement this policy and that very much could be something which might be referred to conferencing. If there's merit and I can certainly see it from your client's point of view. Infrastructure is already in the ground, on the ground so it's not as if you're talking about have made enquiries or have a conditional contract. It's not that.

25

30

A. No, it's not that.

Q. It's actually already existing and again that's really important. So what was this meant to cover. People like yourself at least or is it meant to

cover somebody on the other end that has been working towards putting a new infrastructure, it's not in the ground, it's not on the ground? It will not be committed to until there is a water permit or the renewal of the water permit, is it meant to cover then? I don't know, is that sufficient commitment, I don't know. It sounds like lots of discretion in that restricted discretionary rule.

1655

A. I take your point, your Honour.

Q. And that's actually a consents team sort of question too, isn't it, it's actually what would they make of it.

MR REID:

So my suggestion your Honour is that the Council formulates a considered position on it, perhaps in writing, comes back to the court and gives the parties an opportunity to comment on that.

15 **THE COURT: JUDGE BORTHWICK**

Q. Yes, what do you think Mr Maw?

MR MAW:

More homework.

THE COURT: JUDGE BORTHWICK

20 Q. Well not necessarily overnight either, this, I'm just wondering if we finish with Mr Page's questions, release the witness from his oath on the basis he's going to come back which he is actually going to come back anyway but start thinking about these issues of this is the policy, that's the consents team, how does this, you know, how does this actually work together.

25 A. It strikes me, if you look at the genesis of this RDA rule it's a rule put in in response to evidence from submitters so its not a rule that was assessed in the original section 32 report and where we find ourselves in this exercise has been very helpful in terms of identifying perhaps the breadth of what could be covered in terms of the language. It strikes me that the

30

topic would benefit possibly from some conferencing with parties insofar as they have expert planners who have raised this issue to which Mr de Pelsemaeker is now responding to but in the alternative Mr de Pelsemaeker being released from his oath following cross-examination to further consider this issue in consultation with those that will be implementing this framework.

5

Q. Yes and really shake it down, in terms of is his understanding of this policy the same as somebody who would actually implement this policy, really critical. Not that this policy, it's the whole package.

10

A. I think there's clarity over what the issue is that the witness is trying to address through this rule, it's just that the way in which the rule responds or seeks to respond appears very broad on it's face and uncertain in terms of what environmental effects means and what reduction means in this context.

15

Q. And who is captured anyway and whether you need to or whether you actually stop being so kind and say (inaudible 16:57:45) consents which is where the Minister would go. So you know, that's a –

A. Well it's –

20

Q. Now do you need an RDA rule for Mr Reid's client or can Mr Reid's client be swept up in the controlled activity rule?

A. Yes well –

Q. I don't know.

A. It is still a six year consent –

Q. Still a six year consent.

25

A. The RDA consent is. Yes it's the expansion of the irrigation area in the controlled activity rule which is required a response.

Q. No I understand that. Okay well if you are going into conferencing it will be, in terms of the pre-conferencing or even pre-mediation work, all parties would need to get themselves, would need to be revealing, you know the standard positions, what is the position, why, counsel would need to understand what those different positions are and come back with a response, you know, the way that we've been managing Dunedin Plan and also Southland Plan, almost looks like a mediation actually when everybody reveals what their positions are and you go, oh yes but –

30

A. Yes well it would certainly help and particularly understanding those parties that had raised this issue and I'll need to refamiliarize myself with precisely what relief they were seeking and how that fits in in terms of where this issue is at at present.

5 Q. Okay well Mr Page you might want to push it around a bit more tomorrow or not, but anyway that seems a sensible way – I'm just saying, you know, if you don't need to pursue then obviously don't but if you want to pursue it to some extent do but sounds like there's an agreement that there needs to be more work done on the RDA rule.

10 **MR PAGE:**

Yes, my clients don't have a particular interest in that rule but we do have an interest in the issue which has given rise to the rule so I'm going to explore a lot of things tomorrow with Mr de Pelsemaeker about what the goal because it seems to me that part of the difficulty with the state of the hearing at the moment
15 is we don't have – it's clear whether we are just dealing – that we're dealing with a substantive plan change or whether there's a hybrid on which there are two paths, a procedural path and a substantive path.

1700

THE COURT: JUDGE BORTHWICK

20 I don't know that there's a hybrid.

MR PAGE:

With respect, that seems to me the different function of the controlled and non-complying rule.

THE COURT: JUDGE BORTHWICK

25 I think there's lots of environmental stuff under that control too.

MR PAGE:

Yes, I agree. The question's whether there should be.

THE COURT: JUDGE BORTHWICK

- 5 Q. And that's a question, so it seems to be a hybrid plan, it's not a process. Only it's a process in environmental. Now here's the issue; it's whether or not this plan change was tested with the consents folks and they understood it to be a blend of both process and environmental and we're content with that but the policy, in putting your hat on as the policy person, you didn't foresee that they were these substantive environmental things travelling through with some of the matters of control or restrictions on discretion.
- 10 A. May I respond to that?
- Q. Sure.
- A. So the environmental measures that are in the plan change are there because they are actually mechanisms that are currently in the plan, for example, the clawback on paper allocation, the minimum flows, those are mechanisms that have been set under the current plan. This is a standalone chapter which means that for activities that deal with – sorry, for the replacement of existing permits we cannot consider other provisions in the plan, therefore, we brought those into – those critical ones, we brought them into the standalone chapter. Does that make sense?
- 15 20 Q. I think you're saying this is a process plan only where you're trying to remove the paper allocation and cap, if you like, the individual takes and volumes.
- A. That is correct.
- 25 Q. That's your process plan. But matters of control and matters of discretion look to be substantive environmental concerns.
- A. They are wider, yep.
- Q. Did you mean that because you've actually said at different times: "no, it's a process, it's not environment", but actually the two seem to be travelling together and that's the problem of what is the problem we're working on here and so you've got a range of responses from folk.
- 30 A. Yep.
- Q. And with that in mind, did you check with – firstly, is this your drafting for the plan change?

A. Sorry?

Q. Did you draft the plan change?

A. It's stated early on in my evidence, the plan change was drafted because we were constrained in time.

5 Q. No, did you draft it?

A. No, I did not draft it.

Q. You didn't draft it?

A. I provided input in the drafting.

Q. Okay.

10 A. The recommendations, however, in my evidence in chief and in my evidence in reply I have drafted those.

Q. Yes, they've come through. So you've got this plan change, was this plan change, was it vetted or run by consents?

15 A. It was partly developed with consents and yeah, relevant bits, yeah, and they definitely reviewed it.

Q. I'm not sure where this leads you. You know, is it a process? Is it environmental, is it both? Does the Court just make a decision on what it is but it's the key issue and it has been the key issue since we started.

MS WILLIAMS:

20 Your Honour, I didn't want to just raise one issue which is in relation to the new restricted discretionary rule. That of course is something that has come in Mr De Pelsemaeker's evidence in reply in response to the evidence various positions, because it was evidence in reply, the Director-General does not deal with (inaudible: 17:04:35) the restricted discretionary rule, the plan is true for
25 (inaudible: 17:04:39)

THE COURT: JUDGE BORTHWICK

Unfortunately that's the process where you've got this plan change sitting with the court and it's not your usual exchange evidence and reply evidence but that's the purpose of cross-examination and I think it's a fair point that you're
30 raising.

MS WILLIAMS:

It's just that if we're going to conferencing, your Honour, I do want to leave open the opportunity for the planners who have not commented on the RDA rule to still be present –

5 THE COURT: JUDGE BORTHWICK

And I would have thought that that was something in fairness that (a) you could lead from your witness and if not lead, put on paper. Not that I'm inviting another 2000 pages of paper but if in listening to all of this and there are concerns of the drafting and that can be addressed – yes, not just as a draft but also in a
10 narrative fashion.

MS WILLIAMS:

I just wanted to flag that now, your Honour.

THE COURT: JUDGE BORTHWICK

Fair enough and it was flagged in the directions, the opportunity to file
15 supplementary papers was always there and so yes, it's there, you can file, you just need to let me – just need to flag that that is what you're doing and we can manage that but I'm not inviting people to put in the breadth of evidence that they have so far, it's working against you but yes, it doesn't need to be that way. All right, so where do we get to? We get to this is something that actually needs
20 some serious thought and testing with the consents people. It may be that you won't carry through with this but the witness needs more time.

MR MAW:

Yes, and that will be something to explore when the witness has finished this round of examination in terms of where to but it's certainly – the process to date
25 has identified some of the issues which weren't necessarily foreseen.

THE COURT: JUDGE BORTHWICK

No, that's always the process, yes. Exactly, that's always the process. So you know, in case people out in the gallery don't know, this is the process, you start a hearing and then the relief changes and changes again; there's nothing

unusual about that. What's unusual about that is actually the fact that we've got a first instance decision so that's slightly unusual. Well that is a (inaudible: 17:07:14) the first time and also we're trying to make the process work within the usual procedures of the Court but we'll get there. Supplementary evidence is always available, just have to let me know and then I have to let Mr Cooper programme it in the back and he's not listening, more impact on his schedule I think. So we're adjourned through to 9.30 tomorrow morning and you remain on your oath.

WITNESS STOOD DOWN

10 **COURT ADJOURNS: 5.07 PM**

COURT RESUMES ON THURSDAY 11 MARCH 2021 AT 09.53 AM**THE COURT: JUDGE BORTHWICK**

Good morning and sorry for the delay. I think you know that we're having technical difficulties which of course is the problem of sitting outside of a courtroom. But anyway we repaired and we have a fallback. Thank goodness
5 because we have (inaudible 09:54:13) with us so we do have a good fallback should we have the same fault again. So that's nice and I apologise about that. Good morning I hope you're well rested overnight. It's only an hour and a half more. So I think we're with Mr Page. Over to you.

10

MR PAGE:

Thank you, Ma'am. What I would like to do before starting with Mr de Pelsmaeker is briefly address the Court.

THE COURT: JUDGE BORTHWICK TO MR PAGE:

15 Q. On?

A. On OWRUG's theory of the case and where we are at the moment. That will signal to the court where the questions are going and it will also signal to Mr De Pelsmaeker where the questions are going.

20 Q. Any difficulties with that? I don't know. May be. I don't know. You need to think about that in terms of the impact of that address on the witness.

MR MAW:

25 Yes, I'm a little uncomfortable with that sitting in the back of the witness' mind. The witness is here to answer questions put to him to best assist the court without engaging in what a theory of the case might be so.

THE COURT: JUDGE BORTHWICK TO MR PAGE

30 Q. You see, the difficulty is, if where you're going with your questions is not obvious to the court, I'll intervene and today many of the questions have not been. They just haven't and I say that having read your entire evidence. We would expect you to test with this witness facts and assumptions underpinning his planning opinion. That would be obvious

from your evidence where you'd be going in that regard or should be obvious. Might not be in some witnesses' cases. I feel uncomfortable you describing to this witness what your theory is. I don't know where you will go with that I don't know what impact it would have on him.

5 A. Alright.

Q. By all means, perhaps describe it to us when the witness is out of the room.

10 A. I won't take that any further. I was intending to be helpful because I've been conscious in observing the court that where OWRUG is going is not readily apparent to the court and I want to address that at some point and I thought it might assist you with the questions but if you see concerns about that then I won't.

15 Q. You are going to have to address that in your opening where you're going. I mean, at the moment, I think your primary relief is that you want the plan change rejected.

A. Yes.

20 Q. To me anyway, there are certainly legal issues arising and your option 2 and 3 which you will have to make succinct and clear submissions about but we can talk about that later but you want the plan change rejected. The relevance of some of the questions to the reject was not always apparent in the line of cross-examination that has been taken. Other than to echo perhaps what Ms Irving was trying to communicate, which is that your client thinks that there will be a better outcome if it is left for the primary sector to provide for the needs of the waterbodies than it would be for this regional council to undertake its statutory planning function as it proposes to do over the next five years and I think that's what your theory was.

25 A. Yes, although –

30 Q. And without getting too much further than that. Otherwise I'll just simply send this witness out and you can tell me about it.

A. – well, I'm not sure how to answer the question now in a way that – well I wonder whether it is actually worth a brief discussion about that in the absence of the witness because I'm conscious that we may well all be at cross purposes.

Q. Might well be.

A. So that was the purpose of explaining to the court where OWRUG thinks this is going but I'm alive to your concerns about doing that with the witness in the room. I'd actually prefer that we spent a short time
5 discussing where OWRUG is going in the absence of the witness if the court's prepared to accommodate that.

MR WINCHESTER:

Sorry, your Honour. If I may just intervene. I have a planning witness sitting in
10 the back of the court as well.

THE COURT: JUDGE BORTHWICK

I would exclude all witnesses from this process.

MR WINCHESTER:

15 Yes, thank you.

MR MAW:

All witnesses would need to be excused if we're going to go there to avoid the issues which would be concerned about.

20 **THE COURT: JUDGE BORTHWICK**

Yes, prejudicial impact. Okay. Alright. Ms Williams, you've got any thoughts about this?

MS WILLIAMS:

25 I think, your Honour, that I can understand why Mr Page wants to put this before the court now and I think that's potentially helpful. I also agree however that doing so with witnesses present is problematic and that it's perhaps a matter which the court needs to be aware of but that then the witnesses are able to answer without having thought through or having contemplated in. It
30 just preserves their integrity for the court.

THE COURT: JUDGE BORTHWICK

Okay. Agreed. So the direction is all witnesses to this hearing are excluded which means that you will have to remove yourself possibly or probably from the foyer as well because you'll be able to hear. I suggest you just go out to
5 the café or hang close because this won't take long. That's the entire room.

MR WINCHESTER:

Also be a direction that those that remain don't relay the exchange to the witnesses.

10 THE COURT: JUDGE BORTHWICK

I will. I'm just seeing if anyone is going to remain.

UNIDENTIFIABLE SPEAKER:

Your Honour, do you want me to make sure this is not transcribed, recorded or
15 videoed?

THE COURT: JUDGE BORTHWICK

It can be transcribed. It should be captured on the audio at least.

UNIDENTIFIABLE SPEAKER:

20 Which goes up onto the website.

THE COURT: JUDGE BORTHWICK

Oh, no. There is no confidentiality around it. It can be captured on the audio and transcribed. Oh, no. there's problem about that, isn't there? There's timing issue. How would we (unclear 10:01:41) this?
25

MR MAW:

(inaudible 10:01:43)

THE COURT: JUDGE BORTHWICK

Okay. so we will not capture it on the audio but it needs to go to the transcription
30 service such that they can transcribe if directed but they will not be directed to

transcribe it. it will not be uploaded either to the AVL or to the audio. Does that make sense? Can we do that?

UNIDENTIFIABLE SPEAKER:

5 I believe we can edit it out.

THE COURT: JUDGE BORTHWICK

So effectively we're now in chambers and there's still a record running should there need to be for other purposes it being captured but it's not to be uploaded nor transcribed.

10 1003

LEGAL DISCUSSION (10:02:44)

COURT ADJOURNS: 10.57 AM

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COURT RESUMES: 11.38 AM

LEGAL DISCUSSION (11:38:03)

THE COURT: JUDGE BORTHWICK

Thank you everybody for your patience. There's been a lot of discussion which
5 was better to take place in chambers as counsel were reflecting on their
individual cases and we didn't want that to populate the minds of witnesses but
Mr Maw is going to briefly address the court about where the regional council
has got to.

10 **MR MAW:**

Thank you, your Honour and for the benefit of those that haven't been in the
room for the last couple of hours. The regional council will be producing some
further supplementary evidence attaching to it a further marked up version of
plan change 7 that focuses the plan change back onto procedural matters only
15 as opposed to the procedural matters plus the environmental matters. That will
be circulated just as soon as we're able to do so anticipating this week in terms
of that document so that's what's going to follow. We're simply going to now
proceed with the witness.

THE COURT: JUDGE BORTHWICK

20 And perhaps the only other comment to reflect on is the NPS for freshwater
management.

MR MAW:

Do you want me to address?

25 **THE COURT: JUDGE BORTHWICK**

Yes.

MR MAW:

One other matter that the council's going to be addressing is the relevance of the policies within the new NPS that must be brought down into existing operative and proposed planning instruments.

THE COURT: JUDGE BORTHWICK

5 So now we're with Mr Page and his cross-examination.

CROSS-EXAMINATION: MR PAGE

Q. Mr De Pelsemaeker. I'm going to start at tab 1, volume 1 of the bundle. I wonder if you have it?

THE COURT: JUDGE BORTHWICK TO MR PAGE

10 Q. We're up to the regional plan, are we?

A. Yes.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. So that's the operative regional plan under tab 1.

15 **UNIDENTIFIABLE SPEAKER:**

(Inaudible 11:59:42)

CROSS-EXAMINATION CONTINUES: MR PAGE

A. Yeah, I've got a recent copy actually.

Q. Never mind. We're going to ancient history so happily this one will do.

20 A. No, but it's correct. That's your perfect plan.

1200

Q. All right, can you have a look at common bundle page 4 please? So the common bundle numbers at the top corner.

A. Yes.

25 Q. And what you will see is there is a table called: "chronicle of key events", don't you?

A. Correct.

Q. And if we go down to the seventh line in that table you'll find plan change 1C water allocation and use, won't we?

A. Correct.

Q. And plan change 1C was made operative on the 1st of March 2012?

A. That is correct.

Q. All right. Can we now then turn to page common bundle 80?

5 THE COURT: JUDGE BORTHWICK

What provision are you looking at?

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. We should find policy 6.4.0A. Do you have that?

A. Yes, I have.

10 Q. Thank you. And is this the policy that is referred to, I think in Ms Dicey's evidence as the one requiring permits to be issued only for an efficient use allocation of water?

A. I don't have – can you –

15 Q. Let's not worry about what Ms Dicey says about it, let's have your opinion, is policy 6.4.0A concerned with allocating no more than is required for the purpose that the water is required?

A. That is correct.

Q. And it was introduced by plan change 1C in March 2012?

A. I believe so.

20 Q. Do you know that since March 2012 through this policy the Otago Regional Council has been encouraging water permit holders to adopt efficient water use practices?

A. Yes.

25 Q. And that includes and has included investing in water storage through dams and pivot irrigation infrastructure?

A. Yes.

Q. And do you recall that Council engaged an officer to liaise with farmers to encourage them to that end and the person who was engaged for that purpose was none other than Ms Suzy McKeeg?

30 A. That is correct.

Q. And since March 2012 you agree that million of dollars have been spent by farmers in Otago in efficient irrigation infrastructure under policy 6.4.0A encouraged by the Regional Council?

A. I find it a reasonable assumption.

5 Q. Yes. Because the Regional Council's advice to permit holders has been that if they can show that their use of the water is efficient, they are more likely to get it back on a renewal of their permits, right?

A. In combination with policy 6.4.2A that would be the case, yes.

10 Q. Yes and 6.4.2A just for our recollection is the policy concerned with only getting back the water you can show you've actually used?

A. In catchments that are fully allocated, yes, that's correct.

15 Q. And so not only have farmers been spending millions of dollars on dams and pivots encouraged by the Regional Council, they've also been spending millions of dollars on the research necessary for applications for renewal of their permits in anticipation of 1 October 2021, right?

A. Again, I find it a reasonable assumption.

Q. Well you've been involved in some of those such as the Lindis case.

A. Yes.

20 Q. So do you understand, having spent all that money, how stressful it is for farmers to be told now under plan change 7 that they can only get their permits back for six years because the Council may not want to reissue them with any water rights in six years' time?

A. Yes.

25 Q. Well let's come to the reasons for that then. Do you have paragraph 44 of your own evidence available, your evidence in chief on page 14 of your brief?

A. Yes.

Q. And here at paragraph 44 you set out the issues that plan change 7 is seeking to address, right?

30 A. Correct.

Q. And I want to take you through them one by one. The first under A is a lack of understanding about the state of the Region's freshwater resources and the effect the water takes on those resources. When you are referring to a lack of understanding, do you mean that the Regional

Council lacks an understanding of that issue? It's not the permit holders that don't understand, it's the ORC.

A. That is correct.

Q. So that's a fault if you like of the ORC not of permit holders, you agree?

5 A. In terms of – can I qualify that?

Q. Yes.

A. I accept that water users might have a better understanding of quantities of water taken from water bodies, in terms of the effects of water takes, I cannot speak on behalf of water users.

10 Q. Yes but your evidence seems to be directed at the need for an interim regime because the Council lacks an adequate understanding of the issue.

A. That is correct, yes.

15 Q. Let's come to (b) then; uncertainty about the environmental outcomes, limits and flows from the NPSFM 202.

A. Yes, that's correct.

Q. Now again, that is not a circumstance brought about by water permit holders, is it? The need to address that issue?

A. No.

20 Q. Thirdly, that allocation may not prioritise the health and wellbeing of waterbodies of freshwater ecosystems, that's a reference to the first tier of Te Mana o te Wai, isn't it?

A. Correct.

25 Q. So how the allocations have prioritised that issue is a matter for the Regional Council, it's not something that permit holders have brought about?

A. Correct.

Q. Coming to (d) is an easy one, an adequacy of the current planning framework, that's the Regional Council's responsibility, right?

30 A. Correct.

Q. And (e) the pending expiry of a large number of water permits, again, it's not permit holders that have orchestrated that circumstance, is it? That's a function of the law.

A. Yes.

Q. So my question to you is that if none of the issues that are erasing pertain to anything permit holders have done, why is it that it's permit holders that have to pay for applying for temporary placeholder resource consent applications?

5 THE COURT: JUDGE BORTHWICK

When you say "pay", what do you mean? Do you meant the fees for filing an application or do you mean something else?

CROSS-EXAMINATION CONTINUES: MR MAW

10 Q. I'll break it down into two parts, firstly do you accept that an application for resource consent, there's a cost in preparing an application that the permit holder bears?

A. Correct.

Q. And the cost of the Regional Council processing those resource consents are recovered from the applicants, aren't they?

15 A. Correct.

Q. Now given that plan change 7 has been brought about for reasons unconnected with permit holders, why is it that permit holders are being asked to pay for the consent process required to give the ORC breathing space to get its house in order?

20 1210

A. In response to that I think it's important to understand that the plan change itself does not impact on consented uses as the old consent at present. The plan change kicks in when people are going to apply for a new consent, I admit that this plan change 7 creates a degree of uncertainty but that uncertainty I believe is inherent in how the RMA works as well, consents are null in (inaudible 12:10:59) they, they expire unless an activity is permitted or has a status of control that can mean there is no guarantee that consent holders will get a new permit going forward. So I accept that the plan change creates social and economic or economic impact, it has economic impact and it creates social stress, I do not want to underplay that but at the same time what we also tried to do by giving the renewal of existing deemed permits and resource consents take

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order, we've given them a controlled activity status as well which I believe gives them in some way security as well be it for a short term but it is a layer of certainty that would otherwise not be provided.

5 Q. Okay I want to bring you back to the transaction cost of the process, I accept that the deemed permit holder on the 1st of October 2021, they were always up for a new application weren't they?

A. Correct.

10 Q. But what plan change 7 does is now create a two-step process doesn't it, we've got short term consents until 2026 or seven or whatever it might be, I forget and then there's another application for substantive consents at that point moving forward haven't we?

A. That is correct.

15 Q. So we've got from the permit holder's point of view they've gone from a one step application for a renewal to a two step application for renewal, correct?

A. Correct.

Q. And they pay for the lot, even though it's not their fault?

A. That is correct.

Q. Why is that fair?

20 A. Again I do not want to underplay the stress that this causes but fairness is not something that is dealt with under the RMA. We have tried to the controlled activity pathway as well to give, to reduce the cost of the initial consent and I acknowledge that under the current circumstances where you have two plans that might be difficult and –

25 Q. Can I just get you to pause there, just to be clear, when you say under two plans –

A. Sorry –

Q. – do you mean that because we also require consent under the operative plan at the moment as well as PC7?

30 A. Correct. So we've got like a legacy issue and I acknowledge that where people have been probably preparing for a consent for a number of months or years, they've invested in that, then they apply for a consent under proposed plan change 7 but the current operative rules still apply so it's kind of a complex process. One of the reasons why this plan

change has been called in is to speed up the process in which we currently are so the plan change can become operative more quickly. Once that is resolved hopefully we can have a framework in place that allows at least the first step or the first consent process, the one for the short duration to be as cost effective as possible.

5

1215

Q. You understand, don't you that at least the deemed permit applications will need to be in by the end of this month if they're allowed to continue under s 124?

10

A. I do understand that.

Q. So for those applicants their activity status is fixed on the date of the application, right?

A. I do understand that.

15

Q. So by the time PC7 becomes operative the horse's already bolted on whether the controlled activity pathway is available because their activity status is fixed on the date of the application.

A. I agree with you. I've asked myself that question as well. What about deemed permits? Then I asked myself the question well, if you take the deemed permits out of the equation, would there still be a benefit to the plan change? And I believe so because new permits will be granted. Does it make sense knowing that you're going to develop a new land and water plan and that needs to be notified by 2023, needs to be operative by 2025 does it make sense in that context to provide for longer term consents? The answer that I arrived to myself was probably not. So I think there's a wider issue than deemed permits.

20

25

Q. Sure. When I read the Minister's recommendation to the council, it seems to me that the focus of the Minister's concern was the deemed permit renewal process. Is that not your understanding of what the Minister was concerned about?

30

THE COURT: JUDGE BORTHWICK TO WITNESS

Q. Could we just bring that document in front of? I'm not sure whether you've got it? You should have it.

A. I have it.

Q. That's alright. We'll give that to you. you should have that before answering the question. Generally speaking you should have the documents before answering questions. So we've got the Minister's decision.

5

UNIDENTIFIABLE SPEAKER:

I'm looking for?

THE COURT: JUDGE BORTHWICK

The Ministerial direction – which decision do you want? The direction to refer
10 to the court?

MR PAGE:

No, it's the recommendation under 24A, Ma'am.

THE COURT: JUDGE BORTHWICK

15 Recommendation under 24A. I know it's on the website. It's appendix D to your evidence in chief. Let's just have a look at that before you ask the question.

MR PAGE:

Can I refer the witness to the passage that I had in mind, Ma'am?

20 **THE COURT: JUDGE BORTHWICK**

You can but I'm just concerned to make sure that witness knows generally what the content of that document is so that he's read it and then you can refer to the passage. So just take your time reading it, Mr de Pelsmaeker.

25 **MR DE PELSMAEKER:**

Is there a specific page?

THE COURT: JUDGE BORTHWICK

Have you read the document?

30

MR DE PELSMAEKER:

I have read the document, yes.

THE COURT:

Okay and the passage.

5

MR DE PELSMAEKER:

I have read it in preparation for the hearing. I have not read it now.

THE COURT:

You should read the document. That's the time that I'm allowing you.

10 1220

MR PAGE:

Perhaps If I break the proposition down into bite size chunks, Ma'am the witness might find it easier.

THE COURT: JUDGE BORTHWICK TO MR DE PELSMAEKER

15 Q. Have you read the correspondence?

A. I have read the response of Minister Parker.

Q. So you've read the letter of David Parker.

A. I have, yes, that's the letter of –

Q. It's appendix D to your evidence.

20 A. – November, it doesn't have a date on it but it's from November 2019.

MR PAGE:

Yes, thank you.

THE COURT: JUDGE BORTHWICK

25 Your question?

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. For context, this recommendation responds to the report from Professor Skelton, doesn't it?

A. It does.

Q. We can see the on the second page of the recommendation a heading “Rollover of deemed permits.”

A. Yes.

5 Q. And you’ll see the Minister accords Professor Skelton’s advice that the expiry date for deemed permits be extended by legislation.

A. Yes.

10 Q. And the Minister goes on to say “I’m not in favour of changing the RMA to extend the date of expiry of the deemed permits. A 30 year transition period was already provided to manage the issue. I prefer that the ORC take steps to resolve the matter rather than taking up the time of the parliament.”

A. Yes.

Q. Then he goes on to describe the urgent need for a planning framework and makes a recommendation on the third page.

15 A. Yes.

20 Q. Half way down is a paragraph numbered three because it was the third recommendation. “Prepare a plan change by 31 March 2020. That will provide an adequate interim planning and consenting framework to manage freshwater up until the time that the new charge and allocation limits are set in line with the national policy statement for freshwater management.”

A. Correct.

25 Q. Right. So do you take from that recommendation that the Minister was primarily concerned with deemed permits but recognised in the following paragraph that there were also others that would be caught up in the process?

30 A. The Minister refers to between 400 and 600 future consent applications. If we look at the report that we’ve provided to the court couple of days ago, the total sum of the deemed permits and also the ones that are not deemed permit that will be renewed or need to be renewed prior to 2025 brings us up to a total of about 500 so I assume that that is part of the context. It is a wider context than just deemed permits.

1225

Q. Yes the recommendation captures those other permits but it arises from the Minister not accepting Professor Skelton's recommendation about the deemed permit roll over day?

A. Correct, yeah.

5 Q. Now if we're looking for a way to hold the line I think you were expressed it in answers to questions yesterday, in a way that doesn't cost permit holders any money, wouldn't a permitted activity rule that contains parameters concerning historic use of water be a cost effective way of providing that interim framework until the LWRP gets notified?

10 A. It would be a cost effective way for current consent holders but in my evidence in reply I stated some concerns about that approach and I can probably refer to paragraphs, that's in paragraph 82 of my evidence in reply.

15 Q. Okay, so lets take those from paragraph 82 of your reply, you say that the paragraph (A) the costs associated with the use of this resource for private gain would fall on the wider public, what costs are you talking about?

20 A. Not referring to monitoring costs, my understanding is that above five litres per second we still have to monitor but I need to read the regulations again to make sure that I'm on the right track there but in general with permitted activity conditions there is no obligation on consent holders to monitor.

Q. And so you're saying that's something that counts against the permitted activity rule?

25 A. It is usually Council that would probably need to monitor the effects of those activities on waterbodies.

Q. Is the monitoring that you have in mind that permit holders should do addressed by the controlled activity rule?

30 A. The controlled activity rule does allow us to put compliance monitoring conditions on those consents. And also with controlled activities Council usually has a better understanding where those (inaudible 12:28:58) occur, at the moment we have a number of permitted – and that's one of the issues with the current plan, we have a number of permitted activity rules in the plan related to the taking and use of water. It's, like I said,

one of the issues that we're dealing with is also in terms of our fresh water accounting, getting a better understanding of where those stakes are and what is the volume so I think those types of issues are quite common for permitted activities.

- 5 Q. Okay but isn't the permitted activity rule for example that Ms Dicey had proposed in her evidence, directed at simply allowing permit holders to carry on as they are under their existing permits, so it's only those people that would have the benefit that is existing permit holders, that would have the benefit of permitted activity rule and only to the extent of their existing permit so you know exactly the location of the take and what their allowed to take.
- 10

1230

- A. That is correct, however, I guess it does raise some issues around the transfer of the locations of point of take. When it's a permitted activity, how can we manage that? How can we keep track of that?
- 15

Q. But that's already a discretionary activity in your plan, isn't it, transferring points of take?

A. If it's a consented activity, yes, but if it's a permitted activity, I could not.

- Q. All right. But that's a question of transferring points of take from that specified under a permit, that's really just a bit of draftsmanship to deal with, isn't it? In terms of framing up a permitted activity rule?
- 20

A. Could be but it was not within the rule that I considered or the recommended relief that I considered.

- Q. All right then. Let's look at 82B then, a permitted activity status to be effective in sustainable managing water resource, the standards and terms apply to a need to be certain, unambiguous and relevant.
- 25

A. Mhm.

- Q. Isn't it possible simply to require the standards and terms of the existing permits to be stated if all we're effectively doing is rolling the permits over for six years?
- 30

A. Correct, however, various permits have various conditions. For example, there are permits that often – I refer to tax cessation conditions where you have a number of permits within a catchment. They cannot be exercised at the same time. It would be really hard to draft or to make sure that

those situations are provided for across the Region through a permitted activity rule that applies across the Region.

Q. So are you anticipating for comparison purposes that the controlled activity rule will enable that sort of machinery to be inserted into controlled activity permits?

5

A. That could definitely be done, yes.

Q. Now, I want to come to (f) where you raise the question of a permitted baseline and I don't understand your reasoning in paragraph 82(f) about what the permitted baseline is that you are concerned about. Can you explain that to me?

10

A. It was basically a point that was raised with – sorry, by Ms McIntyre and when I thought about it, I considered it a valid point. From recollection, the issue that she's pointing at is that if you have a permitted activity, a permitted water take, if the effects are of a certain scale then other activities that would require consent but that would have similar activities would prevent notification of that activity. That is how I interpreted the –

15

THE COURT: JUDGE BORTHWICK

Q. Sorry, I didn't actually quite understand, can you perhaps rephrase that?

A. Yes, because you have a permitted activity or a permitted water take with certain effects, the consequence could be that similar activities that have

20

–

Q. Similar effects, yes.

A. With similar effects but that required consent, that it would preclude notification of those activities when they are applied for.

25

Q. Well, not sure we jumped to notification but maybe Ms McIntyre can address that but is how do you understand the baseline on a section 104? Are you talking about – the baseline, I'm assuming you mean here the baseline under section 104 of the Act.

A. Correct.

30

Q. How do you understand that provision?

A. Can I read section 104 again?

Q. You can but before you do, tell me, is this something that you normally do in your job, apply – you're not a consents planner.

A. No, I'm not a consents planner.

Q. Okay. So in this piece of evidence you're responding to Ms McIntyre has said?

A. And that I thought was plausible.

5 Q. All right, sorry Mr Page.

CROSS-EXAMINATION CONTINUES: MR PAGE

10 Q. No, you've explored the point Ma'am, so happy to move on. So if the permitted baseline point turned out to be of no concern, can you see that a permitted activity status which would only benefit people who hold existing permits for the duration of plan change 7, why that be a more efficient way of simply saying: "we're holding the line here, carry on as you were until we've sorted out the land and water regional plan."

15 A. In principle, yes, but I think through the conversation I alluded that there are some intricacies, I believe, to different circumstances in which water is being taken and it would be really hard to capture that in a permitted activity rule.

Q. Yes. So your answer to that concern is to put all the permit holders through a consent process at their cost so that you don't have to worry about it, is that the answer?

20 A. Yes.

Q. All right, I was left unclear yesterday in answers to questions whether you regard some of Otago's catchments as being degraded. Do you have a view about that?

25 A. I think there's a degree of uncertainty and that's – the issue around degradation or overallocation as in essence the same, you need to have certain limits and in the case of degradation, target attribute states, I believe, before you can that call, that assessment.

30 Q. So is your point that there may be catchments that are degraded but in a technical planning sense, you are unsure whether you can use that term as it's defined in the NPS, is that where we are?

A. That is correct. The definition of degraded refers to target attribute states, we haven't said those. It refers to environmental flaws and levels and we

haven't said those, so it's an assessment that at the moment we cannot make in relation to this NPSFM.

Q. The evidence of Ngai Tahu suggests that at least from their point of view there are catchments in Otago that are degraded from the taking of water, isn't it in there?

5

A. It is, yes.

Q. Yes. Well, have you had a look at clause 3.20 of the NPS that you will find on common bundle page 686? So that is volume 1 tab 4 page common bundle 686?

10

A. Yes.

1240

Q. Clause 321 – subparagraph 1 I mean, “If a regional council detects that an FMU or part of FMU is degraded or degrading it must as soon as practicable take action to hold or reverse the degradation for example by changing a regional plan or preparing an action plan.”

15

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. You're at clause sorry?

A. Three 20, paragraph 1.

Q. Three 20, paragraph 1. I was looking at 321 thinking that's not right. That's the definition.

20

A. No, that would be wrong.

Q. So paragraph 3, clause (**unclear 12:40:31**), 20, subparagraph 1. Just be careful because transcription have to record this.

A. Yes.

25

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. So is your position that paragraph 1 of clause 320 doesn't apply or do you think it might?

A. I guess the key words are “as soon as practicable”.

Q. Yes.

30

A. As soon as practicable means not the same as immediately and therefore in my opinion it is better to defer that to the land and water plan which is

not too far away from – in to the future and which will be developed in accordance with the regulations in the RMA.

Q. Yes but you know, don't you that a lot of applications for resource consents in the Otago region have already been lodged in with the council?

5

A. Correct.

Q. For replacement permits?

A. Correct.

Q. What I'm asking you is whether clause 3.20 paragraph 1 might be applicable to the catchments that the permits relate to?

10

A. In the absence of NPSFM, in the absence of limits and attribute states that are set under this NPSFM, I cannot make that.

Q. You don't know?

A. I don't know.

15

Q. Okay. Well, if you don't know just say don't know. That's just the way it is. Do you get the sense though from the NPS that the council should be moving to at least start giving effect to tier 1 of Te Mana o te Wai as soon as practicable?

A. Sorry I'm just thinking.

20

Q. I'm not hurrying you. You take whatever time you need.

A. I think to be honest as soon as practicable needs to be interpreted within the wider context of the NPSFM. There are number of principles within the NPSFM that pointing at some as the integrated management of resources, **(unclear 12:44:30)** as well and that leads me to believe that the NPSFM seeks councils to undertake action as soon as practicable in a holistic and integrated way.

25

Q. Do you have objective 2.1 paragraph 1 of the NPS in front of you? Common bundle page 673.

1245

30 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Sorry, which objective are you on now?

A. Objective 2.1

Q. Okay.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Do you have that?

A. Yep.

Q. That sets out the objective of the NPS.

5 A. Correct.

Q. And it sets out the requirement to prioritise three elements of Te Mana o te Wai and the first is the health and wellbeing of waterbodies and freshwater ecosystems, right?

A. Correct.

10 Q. That's got nothing to do with human values, does it? That's pure science.

A. I think it might go beyond that if I'm honest. When you read 10.1, sorry, when you read objective 1A, you would read that within the context of Te Mana o te Wai which also includes Maori of waterbodies and I'm not an expert in this field at all but my understanding is that it goes beyond western science if I may use that terminology. There's a cultural health aspect related to it as well or could be if Te Mana o te Wai is defined in that way. So I would think that it goes beyond purely ecology and hydrology.

15

Q. The health needs of people are dealt with in the second priority, aren't they?

20

A. Correct.

Q. And cultural wellbeing is the third priority or at least included in. Correct?

A. Correct.

Q. So if we're talking about the needs of waterbodies and freshwater systems themselves that's a matter of research and scientific expertise to understand what those needs are, isn't it? That's the difference between the 1st, 2nd and 3rd priorities.

25

A. I think the 1st priority when I refer to the cultural health, it was in reference to the cultural health of waterbodies. Again, I'm not an expert in this whereas the 3rd priority refers to the cultural health or the wellbeing of communities.

30

Q. Okay. Alright. That's your understanding of it.

A. And I'm not an expert, yeah.

Q. So what I will do is I'll state my next question a hypothetical assuming your understanding isn't correct.

THE COURT: MR PAGE

Q. Is correct or is not?

5 A. Assuming the witness' understanding is not correct.

Q. Not correct?

A. Yes.

CROSS-EXAMINATION CONTINUES: MR PAGE

10 Q. If priority 1 is a matter of science and the adequacy of the science about the needs of waterbodies and freshwater ecosystems, and we have the science available to us to set limits to protect priority 1, shouldn't we get on that do that right now?

1250

15 A. In response to that we need to get onto it as quickly as possible but the risk is that we are doing this through a resource consent process and there are a number of risks associated with that. First of all we don't know what the end point is going to be, where we need to be at and I think it came through in some of the evidence provided by OWRUG, Mr Graham, that actually having to go through a stacked process or an incremental
20 process where you get towards the end point in different stages, that has a cost associated with it as well. The consent process as well is different than a planning process, the NPSFM is quite clear in my view that it seeks to achieve outcomes to a planning process in consultation with communities and with tangata whenua and then my third consideration
25 would be that you could, to some degree, get there and there being in terms of making considerable progress but to do that also on a catchment scale you need to be in a situation where all the consents come in at the same time which would allow you to be consistent in your decision making as well. If that's not the case I think consents would be considered on a
30 case by case basis potentially in absence of the outcomes with different outcomes as well.

Q. So let me pose two counter factual for you to compare. The first is that under the applications that are before the Council now, minimum and residual flows might be imposed because that's what they promote. Secondly for the next six years under plan change 7 there are no limits at all that protect tier 1 of Te Mana o te Wai. Why do you prefer the latter than the former if we're protecting tier 1 of Te Mana o te Wai?

A. I don't think that it will, I accept that consents that are granted now will, if they would not set environmental conditions on them I would accept that the effects of those takes or the adverse effects of those takes would continue for the next six years. However, plan change 7 does not preclude any gains to be made within the next six years, the overseers work programme is to have a plan notified by the end of 2023. When it's notified the provisions can already be taken into account so from 2024 onwards progress can be made.

Q. But is it the Council's proposition here that they simply want to roll over the existing permits for six years, isn't that what's being advanced against counter factual were permit holders are saying "no, we're ready to go and we're happy to impose limits"?

A. Correct.

Q. That's kind of bizarre isn't it, that the permit holders should be advocating for limits to protect tier 1 of Te Mana o te Wai and the ORC are saying "no, we're nothing for six years".

1255

A. I guess that, the situation that you described there applies to a number of catchments in Central Otago. First one that comes to mind is Manuherikia and there's few other ones but they're deemed permit dominated catchments. I think it's important –

Q. Arrow and Cardrona would be two other examples.

A. – Arrow and Cardrona as well but the plan change goes beyond Manuherikia. It tries to deal with an issue that is wider.

Q. But you know, don't you that both the permit holders and council on behalf of the people of Otago have spent million of dollars in the last five years in the Manuherikia on signs and modelling to set minimum flows?

A. Yes.

Q. Mr Henderson told us that the hydrology information to do that is there and ready.

A. That is correct.

Q. So why are we putting it off for six years?

5 A. Because hydrology is one important piece in a wider puzzle. Other pieces being the outcomes, there are other – in Manuherikia I admit that the technical information is complete or largely complete but the approach to one catchment – I don't know if it's quite appropriate to have the situation in one catchment determining how we manage other catchments in the
10 region.

Q. Imagine you're a Central Otago roundhead galaxiid. You're facing extinction. Do you mind if you face that for another six years without any limits that protect you?

A. It is definitely something that I thought about as well given the – when I
15 was contemplating the evidence of Department of Conservation and also given the priority status that's been given to threatened species under the NPSFM, but I also considered the evidence of Dr Allibone which says that in some cases some of those populations might be there because of current practices and that the risk of extinction within the large span of
20 this plan change is very limited.

Q. That's your understanding of his evidence, is it?

A. I believe that it is in his evidence.

THE COURT ADDRESSES MR PAGE – LUNCH BREAK (12:58:55)

COURT ADJOURNS: 12.59 PM

25

COURT RESUMES: 2.06 PM**CROSS-EXAMINATION CONTINUES: MR PAGE**

Q. I have two topics which should be done and dusted inside 10 minutes.
Mr de Pelsemaeker, on page 28 of your evidence in chief, you discussed
5 the reasons why you don't consider that a review power under section
128 of the Act is a sufficient way to impose limits that might be approved
under the land and water regional plans, do you have that?

A. Yes, correct.

THE COURT: JUDGE BORTHWICK

10 Page 28 or paragraph 2, sorry?

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Page 28 Ma'am, it starts at paragraph 89. And you are concerned that
under section 131 the Council on a review has to have regard to the
viability of the consented activity, right?

15 A. Correct.

Q. And that that might constrain the efficacy of a section 128 review in
implementing limits?

A. Correct.

Q. Doesn't the same issue arise under section 104(2)(A) of the Act where a
20 consent authority must have regard to the investment of the existing
consent holder?

THE COURT: JUDGE BORTHWICK

Which section was that?

CROSS-EXAMINATION CONTINUES: MR PAGE

25 Q. 104(2)(A), Ma'am. So whichever path you follow a consent under section
104 or a review under section 128 bump into the same issue?

A. Correct.

Q. Now it is the Council's operative policy to impose limits and catchments
through a section 128 review process, isn't it?

A. Correct.

Q. And that's policy 6.4.5 of the operative regional plan at common bundle page 89, can we go to that?

A. Yes.

5 Q. You have that?

A. That's policy 6.4.5?

Q. Correct, you have that?

A. Yes.

10 Q. Good, yes nearly at the bottom of page common bundle 89. So we have there the minimum flows established under the policy specified there, will apply to resource consents taking of water as follows, that's fairly directive language isn't it "will apply as follows"?

A. Correct.

15 Q. First we don't need to worry about today in the case of take supplied after 28th of February on the grounding of consent, secondly there is a list of catchments starting with the Taieri, above Paeroa in between Sutton and Outtrim, Welcome Creek, Shag, Kakanui, (inaudible 14:09:57), Lake Hayes, Waitahuna Trotters, Waianakarua, Pomahaka, Waiwera, Lake Tuakitoto, as defined in schedule 2A on a review under s 128.

20 1410

A. Correct.

Q. And we know, don't we that a whole of catchment, s 128 review has been completed for Waianakarua, Pomahaka and Waiwera.

A. I'm definitely aware of Pomahaka and Waiwera.

25 **THE COURT TO MR PAGE**

Q. What was the last one?

A. Waianakarua. Pomahaka and Waiwera

Q. Waianakarua. Yes.

CROSS-EXAMINATION CONTINUES: MR PAGE

30 Q. So you're not aware that that's been done for Waianakarua.

A. No, I was not.

- Q. Then we come to 6.4.5C and we see the (unclear 14:10:56) catchment area in Manuherikia upstream of Ophir and also a number of parts of the Taieri catchment.
- A. Yes.
- 5 Q. Again, we see that the council will impose minimum flows under s 128.
- A. Correct.
- Q. The (unclear 14:11:20)'s already been done, hasn't it? Because it's been completely reconcented.
- A. Correct.
- 10 Q. The council in exercising policy 645 hasn't experienced the constraints you're concerned about in your evidence, has it?
- A. No but if I may add to that my recollection about the Pomahaka and the Waiwera were both catchments when we set the minimum flows there was no issue around allocation. Those catchments did not have the same
- 15 level of pressure, as I may put it that way, as Manuherikia or some Central Otago catchments.
- Q. So you're expecting drier catchments, if I could put it that way, imposing minimum flows might be a little more contestable?
- A. I would expect the impact of minimum flows in those catchments on the
- 20 access or the reliability of water to have bigger impacts.
- Q. Okay. So that might tell us something about the scale of the job but it is council's policy to do that catchment by catchment by review of all of the permits in the catchment at the same time. That's what it does.
- A. That's in the practice, yep.
- 25 Q. Now, I'm going to come to the plan change 7 text, policy 10A.2.3. This is the version – I think we call it the 4 March version. Now, do you have policy 10A.2.3 in front of you?
- A. Correct.
- Q. Do you recognise this as being the policy that is implemented by the non-
- 30 complying activity rule?
- A. Correct.
- Q. Now, you know, don't you that non-complying activities come with a jurisdictional barrier in s 104D of the Act?
- A. Yes.

Q. And there is a policy gateway and an effects gateway?

A. Correct.

Q. And the effects gateway is formulated as being no more than minor effects on the environment?

5 1415

A. Correct.

Q. And we see in policy 10A.2.3A, the policy also has the same gateway no more than minor effects. See that?

A. Yes.

10 Q. Is it your understand that consequence of the policy being drafted in that way is that if you fail the effects gateway in 104D, you also fail the policy gateway under 10A.2.3 subparagraph A?

A. Correct.

Q. What is served by that?

15 A. The intent of the policy is to provide that gateway for activities that have no more than minor effect. The rationale being that it is more appropriate to grant 15 year consents for activities that we are certain about that they don't have more than minor adverse effect.

20 Q. Okay. When you're talking about more than minor adverse effect, what is the environment that you have in mind in the drafting of that? Is it the environment absent the permits being renewed or is it the baseline environment as defined by the NPS?

A. The environment – so the first one.

25 Q. You remember from the debate from the (unclear 14:17:07), we call it the Ngati Rangi naturalised environment, didn't we?

A. Yes.

Q. Is that what you have in mind that this relates to? That more than minor effects test is the Ngati Rangi naturalised environment absent the permits that are being renewed?

30 A. Or any activities, I guess, that would be present within that environment that would continue for a certain amount of time.

Q. So it's not a completely non-human environment. It's only the permits that are subject of the application which are absent from it. Is that what you mean?

A. Subject to the application or that are deemed to expire within short amount of time, yes.

5 Q. We know, don't we from the way that applications have been coming into the council that they're coming in on a whole of catchment basis, aren't they? Arrow has come in as a catchment, Cardrona, Manuherikia, Strath Taieri. You've got whole catchment applications coming in being dealt with. Yes? So if the environment for a whole catchment that is being considered under policy 10A.2.3A, is absent any of the water take permits that exist in that catchment, how could any application possibly pass that test?

10 A. The non-complying activity status was envisioned to provide for activities that have really small effects where we would be certain. I actually –

Q. Can I pause you there?

A. – yeah.

15 Q. When you say “really small effects” compared with what? Compared with the status quo or the baseline as the NPS calls it? or compared with Ngati Rangī environment?

A. It would be with the first one, yeah.

Q. Sorry, I've forgotten which the first one was.

20 1420

A. The environment that would be naturalised plus any activities that would be –

Q. So you are intending that that test is the Ngati Rangī test on that policy absent the permits that are being applied for?

25 A. Correct.

Q. When we return to the conversation that we had this morning about the implementation of the first tier of objective 2.1 of the NPS and the ability of applications to impose limits that have the effect of delivery tier 1, do you think that there should be a merits pathway to allow such proposals to be considered under the NPS?

30

A. The effect of the pathway being longer term consents.

Q. Because it's going to cost a lot of money for new infrastructure to give effect to those limits, isn't it? It's a bit like Lindis, are you expecting tens of millions to be spent on a six year permit to give effect to limits?

A. The limits haven't been set yet.

Q. No, but that's what I'm saying; if the applicants can put in place limits to protect tier 1, why can't we have a merits process to test those rather than bump into a jurisdictional barrier under section 104(1)(d) where those merits may never get to be tested.

5

THE COURT: JUDGE BORTHWICK

Put that question again, I didn't quite catch the second half.

MR PAGE:

So if a proposal can impose limits that protect tier one values, why can't that be considered without bumping into a jurisdictional barrier under section 104(d) which could lead to the merits of those limits never being tested? Because it's a jurisdictional barrier.

10

THE COURT: JUDGE BORTHWICK

And this is the effects limb?

15 **CROSS-EXAMINATION CONTINUES: MR PAGE**

Q. Yes, that's the effects point, Ma'am.

A. Two considerations; one is that to your freshwater visions process you also come up with timeframes for achieving limits that haven't been set yet. The risk is that if you grant longer term consents through that pathway, you're alluding to – you're going to miss that deadline.

20

Q. Well you may not because you've got a section 128 review part.

A. Yes but the review clause, like I said before, it hasn't really been tested in heavily allocated catchments. Secondly, as I outlined in my evidence as well, there are some limits to it, for example, and I do not want to scaremonger, but you cannot cancel a consent especially when you're looking at clawing back on allocations as well, a minimum flow is a temporary restriction whereas an allocation is an ongoing limitation on your consent. So the financial implications of that would be different and the consideration of section 131 could have a different outcome.

25

Q. So your concern is the ability to implement target attribute limits if a consent is granted? Your concern is that section 128 mightn't get you there?

A. Correct.

5 Q. But we will know, won't we, when the RPS is notified what Council's date for achieving the target attribute limits and permits is going to be?

A. Proposed date.

Q. Yes.

A. So it still has to go through a freshwater planning process.

10 Q. But the counterfactual – let's suppose that your concern carries weight, the counterfactual that there is a future risk that section 128 mightn't be effective at imposing attribute targets is that we impose none now.

A. Sorry, could you repeat it? I think I missed one.

15 Q. Yes. Your concern is that if we grant long term permits now under the non-complying activity rule, so let's say it's 15 years, Council's ability to impose target attribute limits under the NPS is not going to be effective under section 128, that's your concern, right?

A. Yes.

20 Q. What I'm putting to you is that the counterfactual is this; for the next six years there are no limits at all and so isn't that an environmental risk that can be managed through the consenting process at least in the meantime? So the risk isn't entirely one way, is it?

A. There are some risks but under the plan change there is no framework, holistic or comprehensive framework to deal with them and like I mentioned before, the plan change has a limited lifespan and to some degree once the land and water plan is notified or the RPS as well, we can start making progress on that front.

25 Q. Okay. Well, here's a proposition for you; is there anything in the language of policy 10A.2.3 that wouldn't just as logically lead to a fully discretionary activity status for permits up to 2035?

30 A. Potentially.

1430

Q. So you're looking at the language of policy 10A.2.3?

A. Correct.

Q. For clues about why that necessarily leads to a non-complying activity status instead of a discretionary status and you say there's something there?

5 A. It's a difficult question, if you're asking if a discretion – if you could provide for longer term consents as a discretionary activity or under a discretionary activity pathway it is something that I am happy to (inaudible 14:31:13) contemplate but I would like to think it through and I would like to, I wouldn't want to be wed to those specific words as well.

10 Q. Sure, I think we all are probably in that space. Let me put a proposition to you which explains the problem from OWRRUG's point of view, you know that about 90% of the applications have been lodged are for non-complying activities, your own data tells us that?

A. Yes.

15 Q. The point at which the jurisdictional barrier under section 104(D) is tested is in the decision makers decision, isn't it?

A. (no audible answer 14:32:02)

Q. So we go to a hearing, we present our evidence, decision maker makes a decision and decides whether the jurisdictional barrier is passed, that's how it works isn't it?

20 A. Mhm, yep.

Q. And that's all going to be after the 1st of October this year?

THE COURT: JUDGE BORTHWICK

I'm not following this, also we're well over 10 minutes so how long do you need to wrap it up?

25 **MR PAGE:**

This is my last question Ma'am.

THE COURT: JUDGE BORTHWICK TO MR PAGE

30 Q. Last question so I'm not following the question. The proposition is that this Council will not decide the applications lodged before 1 October, is that the proposition?

A. That's the proposition Ma'am.

- Q. That's assuming that there is no decision from this court before 1 October that is a decision that is a controlled activity which is I think where the Council's now going and where several parties want it so obviously different to what your client wants I think but I'm not certain now your client wants permitted activity. As the case narrows why do you think there wouldn't be one way or the other permitted or controlled, why do you think that's not going – why do you think there would not be a decision, I've already indicated we would use all of our resources to get a decision out as soon as we can.
- 5
- 10 A. Yes, your decision Ma'am, you've indicated will be before then but the Council still has applications for non-complying activities on its books.
- Q. Yes, so, is the decision – let's put it this way, if the decision is controlled activity, is it then and that plan becomes operative assuming there's no challenges to the High Court as the controlled activity rule, then the applications are processed as a controlled activity, are they not, I can't see how white section 88(A) would attach to say perversely: "Well you were non-complying and you remain non-complying even though the operative rule is controlled" that would be a really perverse outcome I would've thought in the circumstances but anyway the outcome is easy to –
- 15
- 20 A. Well that –
- Q. – get around.
- A. – that contemplates Ma'am that the non-complying activity rule disappears.
- 25 Q. That's true and so there could be another, there could be a non-complying activity rule in relation to the same or a different policy and I think a different policy which is now under contemplation as the Regional Council has said, whether it retains the structure, who knows?
- A. So my proposition –
- 30 Q. It's all, yes what is your proposition because it now because really quite theoretical and I'm wondering what I'm going to do with it.
- A. Well it's important because there are unintended consequences at play here, in my submission.
- Q. Need to get to the point.

A. Right.

Q. More quickly than what you're doing.

5 A. Okay, let's suppose that there is still a non-complying activity pathway in the Court's decision and so the applications on foot still have to be determined as a non-complying activity, right and let's suppose that those applications are decided after the 1st of October when the deemed permits expire. If under s 104D a decision maker decides that there is no jurisdiction to grant those applications then all the water is lost and there's no opportunity to reapply, is there?

10 1435

Q. Sorry, I don't understand the question. I'm not following the theory at this point. Why wouldn't there be jurisdiction to consider a non-complying activity if there was a rule in the plan to that effect?

15 A. Because the 104D barrier may not be passed and we won't know whether the 104D barrier is passed until we've got a decision in hand.

Q. So the proposition is you apply for resource consent. The activity status is s 104D and so that's applicant's proposition and presumably the applicant will be saying, well we've passed both or one or other of the gate, of the threshold test and you won't know until you get a decision.

20 Okay. I've got that.

A. Yes, that's right. So if 1 October has passed when that decision is in hand, the controlled activity pathway is not available because it only is available to those with current permits. Because the permits expire, sorry, this is a submission now rather than a question for the witness.

25 Q. Well, it is and I think it's a completely hypothetical and maybe it is actually better for submission. So you're saying that if you're an applicant, if you're currently a deemed permit holder, you apply for resource consent for a non-complying activity and you're unsuccessful and a declined consent then you no longer have a permit. Is that what you're saying?

30 A. That's right.

Q. Alright. That's right. That might be right and that might be the risk for going down that activity pathway. Maybe. Don't know. I need to hear from council but yes but that would pertain to absolutely everybody seeking to renew a resource consent who are in that position. Everybody.

The thing is when you apply to renew an application for resource consent, there is no guarantee that you're going to get it. Isn't that the law? It's nothing that this council is doing. It's just the law.

5 A. That's right, Ma'am but the problem that's unique to permit holders is that the controlled activity pathway is only available to them for so long as their permits are on foot. This plan change has come so late in the process that it's an all or nothing choice. You apply for a non-complying activity if you want a longer term consent because you've got a lot of money to spend on infrastructure but if you don't get it you cannot go back and
10 apply under the controlled activity pathway because your permit has expired and that's it. That's game over. No more water.

Q. Well, that might be the operation of the statute which problem it is parliament's and to which your client's response is use s 124 in a way which arguably is ultra vires the Act which is one of the legal issues that
15 we've flagged that you need to consider the position in law about that particular relief.

A. My submission it is a consequence of the Act but the real problem here is the timing of this plan change. If we were here a year ago, I wouldn't be making this submission because there would be time enough to test
20 the pathways and go back to controlled activity if we can't through the barrier but that time has gone. The applications have to be in by the end of this month and it's inevitably going to take beyond the expiry date of the permits to have them substantively considered. I mean we're working everyday with the council staff and contractors on how they're processing
25 these applications.

Q. Yes, I understand that. I do think it's a matter best left for submission and it's a matter which really goes to the basis of the application. You could bring yourself within the controlled activity rule whatever that ends up being but you could bring yourself within that or you take the riskier
30 pathway of it being declined under s 104D so perhaps I haven't yet understood what you're saying how that arises apart from operation of the Act.

1440

Q. Isn't that the stick and carrot approach of this plan?

A. Well, it's not clear to me that the regional council have understood the consequences of the non-complying activity pathway.

Q. That you may be declined your resource consent?

5 A. We may not have an opportunity if we're not able to get through the 104D gateway to go back to the controlled activity pathway. We will not have that opportunity.

10 Q. I suppose you can always make an application in two basis, couldn't you? Isn't that the answer? You either or and the decision maker would go this way or that. I mean it's not (inaudible 14:40:49) decision maker but isn't that the response you bring yourself in, you give the decision maker the opportunity to consider the substantive merits of the proposal as it is non-complying or you say, failing that, let's go for controlled and tick it over for another five years and that's accepting that there are risks to the environment. There must be. There's some talk about that in this hearing
15 but there must be continuing risks to the environment. That's not lost on us. The determination will go how do you weigh the relative risks between the different parties' outcomes. That I think gets weighed not under tier 1 but under Te Mana o te Wai, the foundational principle. That is a matter for legal submissions which I can sit in later. So I don't know how far you
20 want to take this because you can ask this witness does he not understand that you could be declined resource consent under s 104D. You can ask him that.

A. Well, we've explored that now.

Q. But I think it doesn't matter what he thinks. We know that.

25 A. No, of course the witness understands that it could be declined under 104D. It's the consequence of that decision that the water is no longer available to be allocated is the kicker.

30 Q. Yes, and there seems to me that there is a pathway through that. The fallback position is take it as a controlled, if you're not successful on the merit, you take it as a controlled and Mr Maw is nodding as if this sounds like a good idea. So that you're managing your risk and it's all about risk management, particularly for farmers. You're managing your risk. If you're unsuccessful this way, the council can still consider it as controlled

because after all the council is not wanting to turn off farming. It has made that really clear.

A. I accept that, Ma'am. My client's concern is that the law of unintended consequences may apply and that is exactly what might happen.

5 Q. What's that that they switch off farming?

A. If we don't get through the 104D gateway test after the 1 October, it's game over.

10 Q. Well, we can have Mr Maw respond to that having taken his client's instructions but I can't see what would preclude the consideration of the application of two alternate basis given particularly that this council does not want to do anything other than preserve the historic position of farmers going forward. If that is its position why would it not accept an application on two basis providing you bring yourself properly under the basis. Now, Mr Maw can take his client's instructions and he can get back to you about that.

15 A. I'll leave it at that point and sit down.

CROSS-EXAMINATION: MS IRVING

Q. Mr de Pelsmaeker, I'd like to start with discussing the various functions that the regional council has under the Act which is set out in s 30.

20 A. Correct.

Q. So you would agree with me that the council has functions related to the allocation and controls on the taking and use of water?

1445

A. Yes.

25 Q. That they have a function to establish and implement provisions to ensure sufficient development capacity?

A. Yes.

Q. And they also have a function to establish and implement provisions that achieve integrated management of natural and physical resources?

30 A. Yes.

Q. And when we talk about integrated management in the context of regional Councils, would you agree that's both amongst the various functions that

the regional council holds but also functions that are administered by the regional council and other territorial authorities?

A. Yes.

5 Q. At paragraph 110 of your rebuttal evidence you talk about plan change 7 being the best way forward for managing freshwater and ensuring Te Mana o te Wai is achieved?

A. Correct.

Q. You don't refer there to the other functions that the regional council has, it's a focus on the freshwater functions?

10 A. Correct.

Q. Now the evidence filed on behalf of the territorial authorities particularly that of Ms McGirr and MR Greenwood discussed how plan change 7 is likely to compromise their ability to meet their requirements to provide development capacity and to provide safe drinking water supplies, you've read that evidence?

A. Yes, I have.

Q. So you put it to you that plan change 7 doesn't appropriately serve the various functions that the regional council has under the Act?

20 A. I believe it does, when considering the evidence from Ms McGirr, Mr Greenwood, Mr Twose as well, I looked at the other functions that you referred to of regional councils, integrated management and also providing for development capacity and I also looked at the national policy statement because in the end that is probably like at the moment the leading document –

25 Q. This is the urban development –

A. Sorry, yes -

Q. – national policy.

1450

30 A. – urban development one, yes. And I went through the objectives and policies and I asked myself the same question that you just posed me and to me there are a number of objectives and policies in there that actually point towards the fact that giving integrated – sorry, giving effect to the other responsibilities can better be done through the land and water plan. I also looked at the obligation to meet various, to develop various

strategies and things like that, I looked at the timing of plan change 7, the timing of the requirement of the territorial authorities to develop future development strategies which I believe is in 2024 or something and I actually thought that it all hangs well together. We've got our new land and water plan which is going to be notified in 2023 that can inform the future development strategies that need to be done by 2024. At the same time there are things such housing and business development capacity assessments that need to be done by territorial authorities but to my understanding haven't be done yet, they need to be done this year. So I think through plan change 7 given that it's an interim planning framework, we cannot appropriately give effect to these requirements because the baseline work hasn't been done. It's a short term interim plan change, it's not a long deferral. Also going back to the objectives and the policies, the first objective actually talks about –

15 Q. Which document are you referring to?

A. The end goal there is the healthy and safe environment, to put it in my own words. I think that is also the end goal of the NPS for freshwater. It's more appropriate that Council tries to provide through one planning framework that is developed at the same time.

20 Q. So I think both Ms McGirr and particularly Mr Greenwood discussed projects that councils have on foot now to provide water supply or obtain access to safer more reliable water and expressed concerns about how six year terms could compromise the delivery of those projects, does that not create an issue in achieving the objective of the NPSUD that you just referred to?

A. The first priority is still giving effect to the health and – sorry, getting a bit tired, the first priority is making sure that freshwater bodies and associated ecosystems are healthy.

Q. Are we talking now about the national policy statement for freshwater?

30 A. For freshwater management. So providing for the drinking – for the health and wellbeing of people is subordinate on that. In that regard, I think a short term timeframe for those activities is the most appropriate way forward.

Q. I won't pursue that any further. Secondly, I just want to talk to you about I suppose the second priority in the freshwater NPS which is obviously about providing for the health needs of people and refers to drinking water as being an example of that. I want to discuss what we mean by drinking water. So if we take a community water supply scheme, they generally take water, it goes to a reservoir or into a treatment plant and gets treated to the drinking water standards and distributed, so that is all drinking water, isn't it?

5

A. Well, it is treated to a drinking water standard, it is not all used as drinking water is my understanding.

10

Q. Right so once it has been treated and is sent out into the distribution network, how do we decide when it is drinking water and when it is not drinking water?

A. I guess that depends on the end user.

15

Q. And how does the network know?

A. When I read the evidence I believe if I recall correctly that it would be very difficult to distinguish.

Q. Once it's being treated and being distributed?

A. Correct, yes.

20

Q. And so that presents a challenge, doesn't it, when we are applying the schedule 10A method?

A. Correct.

Q. And so how do you propose we fix that?

THE COURT: JUDGE BORTHWICK

25

I thought that was the matter for conferencing next week? If you haven't considered that, you should say so but I thought you guys were conferencing that.

MS IRVING:

30

We can leave that until then, I don't know if Mr De Pelsemaeker was participating in the conferencing.

THE COURT: JUDGE BORTHWICK

I don't know that he was either and in fact, I was expecting a memo about that this morning but I haven't seen it yet and I thought maybe planners and technical people were going to be there, that's what I think I was told by
5 Mr Cooper late last night but we haven't seen the memo.

MS IRVING:

Okay, I'm happy to leave that there if that circle back for conferencing doesn't appropriately address it. Let's leave it there for now.

THE COURT: JUDGE BORTHWICK

10 Your people are going to be there.

MS IRVING:

Yes.

RE-EXAMINATION: MR MAW

Q. The first topic that I want to start with is hydroelectricity generation and if
15 you turn the clock back to late yesterday afternoon, my friend Mr Welsh asked you some questions in relation to the way in which plan change 7 operated with respect to the generation of hydroelectricity. He put to you some examples of what I would colloquially describe as the big schemes, the big run of river schemes but do you have an understanding of the
20 range of hydroelectricity generation schemes within the region?

A. Schemes or activities because well, there's both to my understanding. There are a number of smaller privately owned hydroelectricity generation turbines but then there's also a number of schemes spread out across the region. I am not an expert on this but there are quite a few catchments;
25 Roaring Mag, (inaudible: 14:58:51), Manuherikia, (inaudible: 14:58:57) Waipori scheme, all different scales. Clutha, sorry.

Q. Insofar as you're aware, is the water that goes through some of those turbines taken and used for a range of purposes?

A. Yes, for example, the Fraser Dam and the Falls Dam on the Manuherikia River both are schemes where the water is used for hydroelectricity power as well as for irrigation or a variety of other users.

5 Q. And so care would need to be taken in terms of how those applications are considered through lens of plan change 7? They're not just hydroelectricity uses?

A. Correct.

1500

10 Q. My friend Mr Page put some questions to you today in relation to some of the risks associated with plan change 7 in so far as potential environmental enhancement might be delayed for a six year period. There is nothing in plan change 7 that would preclude primary sector making improvements. So there are no impediments to that occurring?

A. No.

15 **THE COURT: JUDGE BORTHWICK**

Q. Making improvements?

A. Yeah.

Q. Sorry, what do you mean by that?

20 **MR MAW:**

Yes, there are no improvements to environmental enhancement occurring.

THE COURT: JUDGE BORTHWICK

As a voluntary action.

MR MAW:

25 Yes.

THE COURT: JUDGE BORTHWICK

No. No. there wouldn't be any.

MR DE PELSMAEKER:

30 No.

THE COURT: JUDGE BORTHWICK

No. Okay.

RE-EXAMINATION CONTINUES: MR MAW

5 Q. And then just a final question of clarification. I'm not sure I quite caught your response but there was a discussion where you were encouraged to put yourself into the mindset of a roundhead galaxiid –

A. That was pretty hard.

10 Q. – I think it was and you'd referred to Dr Allibone's evidence and I had understood that your recollection was that there was status quo did not present any risk to that population in terms of a risk of extinction. Did I understand that correctly?

A. Correct and I can – probably it's best that I just refer to the paragraph. Hopefully I can find it.

Q. Perhaps paragraph 24 of his evidence in reply?

15 A. Twenty four of evidence of reply?

Q. Yes.

A. Yes, yep. Correct. I think it's actually in a number of other paragraphs as well.

THE COURT: JUDGE BORTHWICK

20 Q. So what are you confirming there? Does that jog your memory that your recollection was correct? No risk of extinction.

A. Yes.

Q. Or was it something else?

A. No, no, no, that's correct.

25 Q. No risk of extinction?

A. Yep.

Q. Okay.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL**QUESTIONS FROM THE COURT: COMMISSIONER BUNTING– NIL**

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

WITNESS EXCUSED

MS WILLIAMS:

I'm just wondering if this is a good time to perhaps flag there was a discussion this morning about the possibility of having a panel of planning witnesses and I guess my concern is that Mr Brass and the other planners have prepared
 5 evidence based on the plan changes notified. We have moved on somewhat from that. We have the 4 March version. We're going to have another version. I'm just really wondering about the utility of cross-examining planners on something which actually is no longer perhaps before the court. So my suggestion is that perhaps we could explore the prospect of having a panel of
 10 planners altogether once they've had the opportunity to consider the further evidence that's to come in in turn. Perhaps as a way of short-circuiting some of the process.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. I suppose the answer is it depends on what comes out and whether there
 15 is general alignment as between the planners. I suspect there won't be alignment across the planning sector if I could put it that way. I think as for cross-examination, I'm in the council's hands or the parties' hands. There may yet still be very good questions going to test facts and assumptions that then go into underpin this new document so there might
 20 very well be legitimate reasons to cross-examination. So it depends but I appreciate the initiative and for everyone here, you know, if your evidence is overtaken by subsequent development by the Regional Council I think you just need to tell us that and particularly if it's a deletion of evidence so that we know that we don't have to take that into account
 25 and then were moving on from the different starting point, or a different basis anyway. But we're open to it and we'll just see what you, how things lie when we see the product from the Council.

1505

A. Well we do know that Mr Maw is very good at running panels of planners.
 30 Q. Yes, is that from Southland?
 A. Yes.
 Q. Yes.
 A. Anyway I just wanted to flag that now your Honour –

Q. Yes I know, we're open to that. Probably the only thing that has caused our ears to prick and might be complex, potentially complex which is the issue that you've already raised, is the issue or priorities and it's not just an evidential issue, I think it's the legal instrument issue as well you know because I understand these priorities whilst recorded on the deemed permit are effect a license as between, you know, water permit users which then are expunged if you like on the 1st of October but which nevertheless, Minister had recommended come through, it was picked up in the section 32, seemed to be dropped actually, I think it has dropped in the plan change or for some reason its not, it's not clear to me where that is and so if it comes back in then how does it come back and what is it, is it something that is enforceable by the Council, is it something as between the consent holders, that requires a lot of careful thought and to which we can make no suggestions (inaudible 15:07:03). It's, that's complex, quite apart from the extent to which they're exercised and are within the flows of river flows now and of course your witness makes the point well if they're exercised there's a trace in the water metering anyway so that's actually very, very complex. So you might not get anything tonight, I'm thinking for the regional Council. But you know that sort of thing, you know before we launch into cross-examination, launch into panelling witnesses you know, possibly would warrant region putting up something, it being tested by the lawyers and then redirecting that into a planning conference.

A. Right Ma'am, thank you.

Q. As opposed to, you know, empanelling planers and, yes, I don't know, this is now very, everything's in play with this plan. We'll have afternoon tea and then we're in your hands Mr Winchester.

MR WINCHESTER:

Yes thank your Honour and I might just signal in terms of timing, I'm hopeful that I can get through submissions and get through my first witness who is going to be Mr Whaanga who has travelled up from Southland with a number of supporters and of course is, there's also Mr Paul and Ms Thompson who wish to present. My understanding is that there is to be no cross-examination of

Mr Whaanga any longer, I may be incorrect about that assumption, in which case it could just proceed to Court questions but I may just

THE COURT: JUDGE BORTHWICK

No cross-examination.

5 **MS BAKER-GALLOWAY**

I might mind.

MR WINCHESTER:

Well look I'm relaxed about that bit, my anxiety Ma'am is about allowing Mr Whaanga to finish tonight and because a number of the people who have
10 travelled up need to be back on the road this evening so it would assist if we could do that and so I won't, I'll get through my legal submissions as quickly –

THE COURT: JUDGE BORTHWICK

If we have to sit beyond five and that's convenient to everybody that's what we'll do.

15 **MR WINCHESTER:**

Thank you your Honour.

COURT ADJOURNS: 3.08 PM

COURT RESUMES: 3.31 PM

MR WINCHESTER:

(Inaudible 15:31:42) Mihi and a karakia.

TE REO MĀORI INTRODUCTION / PEPEHA

5 COURT SINGS OPENING KARAKIA

MR WINCHESTER:

Afternoon your Honour, members of the court. That's somewhat of a hard act to follow but I will do my best. I'll briefly introduce these submissions and they were drafted last week and they have sought to anticipate a number of the arguments that may be advanced from the evidence. They largely do cover that although some seem to have been abandoned and some new ones have emerged as we've gone through the week and I've sought to update the submissions to do that but I may need to depart from them in a couple of instances because there's been some important interpretational matters raised today which I think it would assist the Court if I address. So I'll alert the Court to where I seek to take matters as read as well. So starting at paragraph 2.

OPENING SUBMISSION FOR NGĀ RŪNANGA READ BY MR WINCHESTER

2. For Ngā Rūnanga, the relationship with their takiwā is one of whakapapa and ahi kā with extensive occupation and use patterns. As kaitiaki, Ngā Rūnanga are bound to ensure the wairua and mauri of the land and water are maintained. Degradation of the waterways and land negatively impacts on the mana of individuals and their hapū and iwi, as well as their collective identity.

3. The reason for Ngā Rūnanga to be involved in resource management issues in the Otago region arises not only from the recognition of their interests in Part 2 of the Resource Management Act 1991 (RMA), but is inextricably linked to the settlement of Treaty of Waitangi claims, including Te Kereme that resulted in the Ngāi Tahu Claims Settlement Act 1998 (Settlement Act).

4. While the Settlement Act was intended to result in the recognition and protection of mahinga kai, the evidence shows this has not happened. As explained in the statements of evidence of Ms McIntyre and Ms Bartlett, the submissions of Ngā Rūnanga arise from deep concerns about:

- 5 (a) the failure of the existing planning framework in Otago to appropriately recognise and make provision for the relationship of Kāi Tahu with freshwater in the region; and
- (b) the risk that long term resource consents granted within that framework will lead to entrenchment of over-allocation and further
- 10 marginalisation of Kāi Tahu interests and values for another generation.

5. It is submitted that the prevailing resource management paradigm in Otago is predicated on water being regarded as freely available for use and as a commodity, rather than being valued in its own right and being made available

15 for the instream needs of waterbodies. This commoditisation and consumption paradigm, and the desire for this to continue to prevail over other values, is apparent from the evidence of a number of submitters.

6. The current position is founded on a series of historical and cumulative

20 legislative actions which has resulted in authorisations to use water for limited and discrete uses being transformed into longer-term and often expanded authorisations for very different purposes. The continuation of these rights has often been exempt from regulation and has involved allocation of a valuable resource for “free” in economic and environmental terms. On the other hand,

25 this regime and the unregulated use and allocation of water has had, and continues to have, very significant costs to the environment—and in particular to the rights and interests of Ngā Rūnanga. Instream values and the needs of water bodies have been largely ignored.

30 7. Water abstraction in Otago is characterised by heavy allocation pressure on some waterbodies and by increasing demand. The pressure on waterbodies is exacerbated by the continuance of deemed permits that are exempt from regulation until their expiry in October this year. The rights attaching to these permits have become more entrenched over the same period that

Ngā Rūnanga have experienced the loss of their economic and spiritual base associated with waterbodies.

1540

5 I pause at this point your Honour and refer to a question posed by my learned friend Mr Page to the Council's planning witness where he made reference to the stress for farmers about the risks that they face and just to put that into context, your Honour, if one reads the evidence of Mr Ellison and Mr Whaanga you will understand that there's been stress for Ngā Rūnanga at the impacts on
10 their interests and their Taonga for over a century in some instances so the rural sector doesn't have a mortgage on that issue, your Honour.

8. Proposed Plan Change 7 (PC7) is founded on the fact that the operative Regional Plan: Water for Otago (Water Plan) does not offer flow and allocation
15 regimes for catchments in the Otago Region which give effect to the NPSFM 2020. It is also deficient in appropriately recognising or providing for the rights, interests and values of Nga Runanga in freshwater (and fails to identify the relationship, established by the Settlement Act, of Ngai Tahu ki Murihiku to freshwater in parts of the region).

20

9. It is submitted to be very clear that there is a significant problem which needs to be addressed, which is identified in both the Skelton Report and the Minister for the Environment's direction for PC7 to be referred to this Court. The Minister's direction means that PC7 is, as a matter of fact and law, a matter of
25 national significance. It is notable that a number of parties appear to deny the existence of a problem or seek to diminish its significance, and also appear to call into question the basis for and merits of the Minister's Direction. This Court must however, when making a determination on PC7, have regard to the Minister's reasons for making a direction. It is not a matter that can be ignored,
30 and there is submitted to be no reasonable basis for the Court to accept the "do nothing" approach advanced by some submitters. To do so in my submission would involve the Court not properly having regard to the Minister's direction and would simply perpetuate the status quo.

With your leave Ma'am I'll take paragraph 10 as read, it seems to be reasonably fairly understood about the aim of PC7, obviously there's an issue as to whether the current drafting accurately reflects that.

5 11. The PC7 provisions would essentially enable the assessment of applications and the issuing of resource consents subject to conditions for a short duration, during which time a new regional planning framework will be prepared. The PC7 framework is consistent with the response of the Minister for the Environment to the Skelton Report. It is intended to be largely
10 "procedural" rather than substantive in nature and that is certainly my client's understanding of the purpose. Unlike recent planning processes in neighbouring regions, PC7 is genuinely about "holding the line" in terms of preventing further environmental degradation and inappropriate decision-making through the application of a manifestly inadequate current planning
15 framework.

12. PC7 is far from ideal but it is largely an appropriate response to a unique set of circumstances and a regrettable history of mismanagement and inaction. For that reason, there is a risk in seeking that PC7 go much further than is
20 intended, and seeking to make it something that it is not.

1545

And at this point your Honour I reflect that there were a number of questions from my learned friend Mr Welsh yesterday afternoon about renewable energy
25 generation and I think I fell into that category about slightly missing the point, there were certainly relevant issues nobody was denying that they were relevant but they're not really at the genesis of this plan change and I would also submit that well intentioned as it is, the restricted discretionary activity rule advanced by Mr de Pelsemaeker in his reply evidence falls into the same
30 category, it's, it is taking PC7 somewhere where it doesn't need to go and goes further than is necessary.

13. The development of a new and appropriate planning framework for the region will take time, and it will take time to start having practical effects on the

environment once it is implemented. If however long term allocation decisions are made through granting consent for replacement of deemed permits or renewal of other consents before this framework is in place, there can be no question that its effectiveness will be undermined.

5

And I've set out the basis for Ngā Rūnanga's general support for PC7 in paragraph 14(a) that's a reflection of what's stated in its original submissions and I'll develop both of these matters in further detail in these submissions your Honour so I will take that as read and move to paragraph 15.

10

15. If there is a concern about "rights" that might be affected in terms of existing users of water, and about the cost of seeking short-term consents or bringing about changes or improvements in water use, then several matters are submitted to be relevant:

15

(a) The basis for those "rights", which have never been properly tested against the RMA, has effectively created significant benefits for their users for free in an environmental and economic sense, while resulting in significant costs to the environment;

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And I'll pause there your Honour and there was a line of questioning from my learned friend Mr Page this afternoon that's relevance to the merits of the plan change is difficult to understand but it was essentially around unfairness in terms of payment for the process and why should we have to bear these costs. Well there's a simple answer to that 1) None have been borne to date and 2)

25

the users are seeking a privilege, not a right.

30

(b) These "rights" need to be set against the context of the rights, expressed in legislation, that Nga Runanga have been guaranteed and which have not been upheld. In most instances, the evidence is clear that privileges have been granted, some for well in excess of a century, that have never had any regard for the rights and interests of Nga Runanga; and

(c) During the same time period in which the rights associated with deemed permit holders have increased, Nga Runanga have experienced

significant physical, economic and spiritual loss, as the mauri of waterbodies and sources of mahika kai have declined due to the loss of quantity and quality of water in the rivers, streams and wetlands.

5 And there are some quite sorry tales, particularly in the evidence of Mr Ellison, about the draining of important lakes and the dispersal of whānau as a consequence.

10 16. This has resulted in an understandable loss of confidence in the resource management system to ensure that legal rights and interests in freshwater are appropriately recognised in Otago. Seen in this context, some short-term inconvenience and additional cost for users that might result from PC7 is hardly unfair or unreasonable.

1550

15

And I'll pause again your Honour and I say that the controlled activity pathway has been available and to the extent that the ship has sailed, that is at the election of the applicants who have chosen to go down the non-complying pathway. Yes that might impact on the long-term effectiveness of PC7 but it is, it shows somewhat of a disregard for the intention of PC7 but that is their choice. In my submission if that consenting pathway was exercised it should at least enable users some additional time to prepare for the significant changes in practice and thinking that will be required in order to properly give effect to the requirements of the NPSFM which is a luxury that users in some other regions do not have and I'm sorry to stop again but one of the matters that clearly requires additional time on the part of some of the participants in this process is probably understanding and interpreting what the NPS means and, in my submission that's apparent from the line of questioning around the priorities in the national policy statement and the objective, particularly the first priority and I'll explain what I say is the correct interpretation of that but that change in thinking and understanding has to happen because if we go down that path then the NPS and it's implementation cannot be achieved, in my submission. I'll move to paragraph 18 and the available alternatives which have been put to the Court and they appear to be.

- (a) A continuation of the status quo, which will result in decisions on resource consent applications that will compromise the effectiveness of the impending new regional planning framework; or
- 5 (b) An amended PC7 that attempts to give effect to the NPSFM 2020. As has been outlined above, this is not acceptable to Nga Runanga because it has not involved mana whenua to the degree anticipated by the NPSFM 2020. The result would inevitably be inadequate from both a substantive and procedural perspective.

10

As has been outlined above this is not acceptable to Ngā Rūnanga because it has not involved mana whenua to the degree anticipated by the NPS and the result would inevitably be inadequate from both the substantive and procedural perspective. In each of the alternatives is discussed below including their

15 consistency with the principles of the Treaty of Waitangi.

20

20. The position of Ngā Rūnanga is that PC7 is necessary. It is not however intended that it give effect to the NPSFM 2020, nor that it should be subject to further changes that attempt to give effect to the NPSFM 2020. Rather, PC7

20 should provide an interim regime that ensures that the effectiveness of the new freshwater planning framework, which is currently in development, is not compromised. In the circumstances, allowing time to correct the settings for freshwater management in Otago and not repeat the mistakes of the past is submitted to be critical.

25

And nobody is pretending that the current situation is straight forward, it is a fairly horrible accident of timing and confluence of different legal instruments coming together but I think your observation was this afternoon your Honour, that's the law and that's the position we're in and it's, your pointing the finger at

30 the Regional Council in this circumstance for advancing PC7 is simply the wrong thing to do, in my submission.

21. It is submitted that of the three options, PC7, subject to the modifications

recommended by Ms McIntyre, is the most appropriate way of meeting the relevant statutory tests. Importantly, for Ngā Rūnanga, it is also the most consistent with the principles of the Treaty of Waitangi and their application.

5 I refer to section 8 of the RMA and what I say the Regional Council is required to do to take into account those Treaty principles when exercising its functions and my learned friend Mr Maw has provided detailed advice which has been included in Mr de Pelsemaeker's evidence-in-chief, outlining Treaty obligations and I set out in paragraph 22 what the Environment Court said in relation to
10 freshwater in Southland which was required in relation to having to the Treaty principles and in my submission there's an obvious parallel when you look at those five matters and compare them to the procedural requirements and substantive requirements in the NPS, there's a very strong relationship between the Treaty principles and the procedural requirements of the NPS so I say that
15 the Treaty appear to be infused in the NPS and that's why it's important to go through the process.

1555

Alternative 1 – a continuation of the status quo

20

23. The operative Water Plan does not give effect to the NPSFM 2020 because it is incapable of addressing over-allocation and is deficient in its ability to manage the effects of water abstraction, particularly the effects on values of importance Ngā Rūnanga. The direction it provides for decision-making is also
25 inconsistent with the direction in the NPSFM 2020 through prioritising consumptive use over instream values and not giving appropriate consideration to cumulative effects.

24. The Kai Tahu submission refers to a concern that the current policy
30 framework favours long consent durations even in over-allocated catchments. Likewise, Mr de Pelsemaeker identifies this as an issue that is likely to frustrate a timely transition to giving effect to the NPSFM 2020 (a concern shared by Ms McIntyre).

25. It is quite clear that if permits continue to be granted under the current planning framework for timeframes of up to 35 years, this will undermine the new regional planning framework and limit its ability to give effect to the NPSFM 2020. It is also submitted that long term water allocation decisions (that will
 5 persist into and beyond the life of the new framework) are inappropriate because they are inconsistent with the Te Mana o Te Wai paradigm – a long-term consent duration amounts to prioritising use ahead of any other considerations.

10 I set out at appendix 8 of these submission and explanation of Te Mana o Te Wai and part of that is derived from the Court's decision in (inaudible 15:56:58) Livestock which is the Southland water and land plan matter, obviously that deals with the NPS 2017 but clearly today the position was put very starkly in questions from my learned friend Mr Page to Mr de Pelsemaeker about what
 15 Te Mana o Te Wai now means under the current NPS and it's probably, it's probably the right time to address that your Honour.

THE COURT: JUDGE BORTHWICK

Okay, I'll just turn to the NPS.

MR WINCHESTER:

20 So, if we look at page 5 of the NPS and 1.3 it starts that: "The fundamental concepts of this NPS is Te Mana o Te Wai" and the comparison to the 2017 NPS is that that was the matter of national importance so as to whether there's any difference in terms of it being a foundation concept I say there's not, there is now much more detail in terms of the framework and the principles around
 25 Te Mana o Te Wai as stated in 1.3. But in terms of the concept as explained in paragraphs 1 and 2, there is really in my submission very little difference from what was stated in the preamble to the 2017 NPS and then we move to the sole objective of the NPS. So – sorry I should go back your Honour, go back to paragraph 5 of clause 1.3 and it refers to the hierarchy of obligations in Te Mana
 30 o Te Wai, that prioritises first health and wellbeing of waterbodies and ecosystems, second the health needs of people such as drinking water and third the ability of people in communities to provide for their social and economic

and cultural wellbeing. And that is of course reflected word for word in the objective sole objective of this NPS. And so really the question is what, well there's a number of questions but certainly based on the position put to you and Mr de Pelsemaeker this afternoon, what is the exercise that is required to

5 establish what the first priority means in terms of Te Mana o Te Wai. And my understanding of what was put to the witness was that it's a scientific exercise, it's limit setting and it's about science. In my submission that is wrong. The limits are the result of following through the exercise that is required by this instrument, this national policy statement and a reading of the national policy

10 statement in the round is very clear that while a limit might have a numeric value and may be able to be explained by science, it is overlain by and informed by community values and priorities, the interests of mana whenua, the interests of existing users and a range of values. So describe it as something that can simply be derived from the existing science is a fundamental misinterpretation and misapplication of this instrument. And one of the suggestions that I inferred

15 from my learned friend's questions was that cultural interests were a third order priority. And that simply cannot be right and the reason I say that is sprinkled liberally throughout this document. "Policy 2, requires that tangata whenua are actively involved in freshwater management (including decision-making

20 processes), and that Maori freshwater values are identified and provided for." Doesn't get any clearer than that. Then most of the initial clauses of the implantation part of the NPSFM for example 3.2: "Every regional council must give effect to Te Mana o Te Wai and in doing so must actively involve tangata whenua in freshwater management as required by clause 3.4B. Engage with

25 communities and tangata whenua to identify long term visions, environmental outcomes and other elements of the national objectives framework." So I mean I could go on. But it is an absolutely fundamental point and if that is the position of OWRUG then in my submission, it even further demonstrates the inappropriateness of the alternative pathways that they are suggesting.

30 **THE COURT: JUDGE BORTHWICK TO MR WINCHESTER**

Q. Can I ask a question?

A. Yes you may your Honour.

Q. You may wish to finish, if you finish the development of the argument about Te Mana o Te Wai I wanted to ask you a couple of things?

5 A. Well I mean as I said I could go on but in my submission it is so blindingly obvious as to how properly interpreted and read in the round this national policy statement must be applied, that I needed go on but equally it's of such critical importance to this hearing that it's really important the Court understands and I guess teases out whether what I'm saying is correct or not.

1605

10 Q. I appreciate the opportunity to have this discussion because it's a new NPS, I had two things. Firstly, the fundamental concept, this NPS doesn't as other NPS do say it is a matter of national importance, whatever, rather it's so it's got quite a different structure, I'm right in thinking that's a bit unusual in terms of what's gone – different, not unusual it's different from
15 what's gone on before so in this case they've talked about a fundamental concept. I would understand the word fundamental as if something that's fundamental it is foundational and it is travelling now with everything that we do in relation to the NPS and everything that then follows with the lower order planning documents. Is that how you would understand
20 fundamental, that it's travelling through now through all of the plans in the hierarchy and all decisions?

A. I do say that that's the correct. Interpretation and part of the reason I say that is because of the language that then follows which is, there's no discretion in it, clause 3.2.2: "Every regional council must give effect to
25 Te Mana o Te Wai" it is highly directive.

Q. So it's (inaudible 16:06:18) our thinking and that was also my thinking in relation to the (inaudible 16:06:25) case and that was the point, that was intention in that case is did people understand that Te Mana o Te Wai was the fundamental concept and now is actually travelling through all
30 plan provisions and hence you had that quite a long dialogue from me at the beginning of the decision how could it be that we had at times quite generally wordy objectives which (inaudible 16:06:57) seem to be happy with, they're happy with it because traveling with those words is this foundational concept of Te Mana o Te Wai, it makes sense and the

outcomes are clearer if you understand that the two travel together and so one of the decisions was to put into place an interpretation section that said exactly that, if it wasn't clear but it seems to me – it was certainly clear I think so Southland Regional Council and it was clear to (inaudible 16:07:21) it wasn't necessarily clear to the parties but that was one of the outcomes from that hearing. It seems to be that it is clearer now, much clearer now under this NPS that Te Mana o Te Wai now suffuses everything we're doing including this decision. So I think you're agreeing with that and you don't need an interpretation section to say that, that that is the effect of this NPS.

A. I am agreeing with that your Honour and once it's understood then I think – and particularly things as important as the procedural obligations under here and they're very directive as well and they're directive for a reason because of the complexity of fresh water and the differences from region to region and catchment to catchment and so the suggestion that we can just go and do some resource consents and make up limits through those processes that reflect the complexity of process and the overlay of values that are required, both in terms of the science, community interests, tangata whenua interests is, it's an incredibly dangerous suggestion in my submission. And that's why there is a willingness given, dare I say it, the mess we're in at the moment in Otago for my clients to allow that breathing space to get it right.

Q. And in allowing that that's accepting also the state of environment continues, may even under the existing permits worsen because you know that is the risk, it's just a cumulative of added effective through space and through time and your client accepts that?

A. Yes and they forgo recognition of their interests and a role in those short term consents.

Q. So also in (inaudible 16:09:31) and also I think by the Waitangi Tribunal as well I said (inaudible 16:09:37) is water centric approach, it's not Māori centric, it is not the part that addresses Māori interests and then we can ignore it for everybody else in the community, it is water centric and it applies to all New Zealanders and nothing changes I would've thought under this NPS and you're agreeing with that.

A. No, no.

1610

5 Q. I'm just wondering whether, you know we've heard a lot of questions about the tier 1 obligation but I'm wondering and this is the legal question, whether the tier 1 obligation and I know you're addressing it, it's not just a science question but I'm wondering if that point is made clearer under clause 3.2 of the NPS and here clause 3.2 is now dealing with Te Mana o Te Wai: "every council must engage with communities and tangata whenua to determine how Te Mana o Te Wai applies to waterbodies and freshwater ecosystems and every council must give (inaudible 16:10:37) Te Mana o Te Wai and in so doing must a) actively engage with tangata whenua, b) engage with communities and tangata whenua to identify long term visions, environmental outcomes and other elements of the (inaudible 16:10:50)" and here it comes: "c) apply the hierarchies of obligations when developing the long term visions, implementing the (inaudible 16:11:00) and developing objections." So in other words the hierarchy of obligations whilst it travels with Te Mana o Te Wai as the foundational principle, the clause that was being referred to which is clause 2.1 the objective is, is that picked up in following community engagement and specifically in the development of long-term visions, the (inaudible 16:11:33) and objectives and policies, is my question.

15 A. Yes.

20 Q. It's you know, it's a bit out of turn if you like to go – let's talk about tier 1 and the implementation of tier 1 before we actually have whole a picture thinking as a consequence of engagement with community, people in community?

25 A. Yes, it almost like a test for, that one returns to at every point through the process and you're right, I think your Honour, that just because you've got the matters stated in paragraph 1 as the first priority you don't just deal with them first. You deal with them all in an integrated way and develop a framework which responds to all of those priorities. So and I also would observe that one could've been forgiven for thinking there was only three players or three or four players that have interests in this issue being users, the Council and mana whenua but it's very clear that it's about

communities and I certainly accept that my learned friend Mr Page's clients represent a substantial part of the community but they're just part so look it's, there's always the question of the tale wagging the dog, they say they've got all the science ready to go, that's fine but it's the regional council's job to plan.

5

Q. All right, thank you.

A. Sorry I'm rather distracted but I'll seek through the submissions not to go back over those points and I'll recommence at paragraph 26, your Honour.

10 **MR WINCHESTER'S SUBMISSION CONTINUES:**

There appears to be little debate that Treaty principles have not been taken into account under the current planning framework, nor the decision-making under it. As Mr Ellison outlines in his statement, until recently, most resource consents were granted for the maximum term available under the RMA of 35 years, or over three times the statutory life of a regional plan. The evidence of Mr Whaanga is that mana whenua have a long held principle that the decisions of this generation should not bind the next generation, even more so when the mauri of the wai and the whenua are degraded and the duty of kaitiakitanga demands that it must be restored. If the current trend towards granting consents for terms that extend into the life of the new regional planning framework continues, Kai Tahu will be locked out of freshwater management for another generation.

15

20

25

27. This situation is submitted to be fundamentally inconsistent with the Treaty principles, and would undermine the ability of Kai Tahu to exercise rakatirataka and kaitiakitaka. It is submitted therefore that long term decisions on the renewed or new permits must be made in the context of a new planning framework that gives effect to the NPSFM rather than the existing one.

1615

30

And I've referred to the decision of this division of the *Court v Clutha District* case and simply that the court had recognised a policy in the Kai Tahu ki Otago Natural Management Plan to oppose the ground of permits for the taking of

water for a period of 35 years and there's a companion policy in the Southland iwi management plan which is Te Tangi and I've footnoted that. Another reason why this pathway is inappropriate is that the water plan does not give effect to the NPSFM in terms of Ngā Rūnanga values.

5

30. Policy 2, requires that tangata whenua are actively involved in freshwater management (including decision-making processes), and that Maori freshwater values are identified and provided for. In addition, it is noted that the fundamental concept in the NPSFM 2020 is Te Mana o Te Wai, which is discussed in further detail below.

10

31. It is submitted that the existing objectives and policies in Chapter 6 of the Water Plan that direct decisions on water abstraction do not recognise Ngā Rūnanga values, and therefore cannot give effect to the NPSFM 2020.

15

32. Schedule 1D (referred to in Policy 5.4.1) identifies spiritual and cultural beliefs, values and uses of significance to Kai Tahu, and Policy 5.4.2 requires that priority is given to avoiding effects on these values in the management of freshwater.¹⁸ As set out in the evidence of Mr Ellison, Schedule 1D was intended to ensure that Kai Tahu values associated with freshwater would be appropriately considered.

20

33. Schedule 1D is not however referred to in:

25

(a) any other objectives or policies within Chapter 6 relating to water abstraction; or

(b) any of the restricted discretionary rules in Chapter 12 that apply most water abstraction.

30

34. Rule 12.1.4.8 sets out the matters for discretion for the restricted discretionary Chapter 12 rules.

And I referred to the last chance decision yesterday and brought it to the attention of Mr de Pelsemaeker, I won't read that out your Honour but the hearing commissioner there made a very clear determination as to the

relevance of cultural values under that restricted discretionary activity rule and might be painful but I think he's right in terms of application of the rule on its face and you know that is possibly an unintended consequence but that creates a major problem in terms of the ability of Ngā Rūnanga to have any effective involvement in any consenting under the existing plan framework.

35. Some submitters have suggested that there is the potential for the NPSFM 2020 to be considered (under section 104(1)(b)) when renewal decisions are made under the operative Water Plan.

10

36. The replacement of the deemed permits under the operative Water Plan is however pursuant to either a restricted discretionary or discretionary activity rule. The vast majority of the deemed permits would be treated as restricted discretionary, as they are all captured within the primary allocation definitions (only supplementary allocations in excess of the first supplementary allocation block are discretionary).

15

So it's just a tiny proportion of renewals that would ever be discretionary.

THE COURT: JUDGE BORTHWICK

20 Q. How do you know that in terms of finding out that information, is that, as a consequence of enquiries or is this somewhere in the thousands of pages of documents that we've got?

A. Its in the evidence Ma'am.

Q. It's in the evidence somewhere, okay.

25 A. I think it's Ms McIntyre –

Q. Oh it's Ms McIntyre's evidence?

A. Yes or, it may even be in Mr de Pelsemaeker's but there's no real dispute that the renewals of existing consents are all under that RDA rule.

Q. Okay.

30 MR WINCHESTER'S SUBMISSION CONTINUES

37. To the extent that the restricted discretionary activity rule is relevant, it is submitted that this will raise significant interpretation issues as to whether or

not the NPSFM 2020 could be considered. Under section 104C of the RMA, when considering applications for a restricted discretionary activity, the Regional Council must consider only those matters over which a discretion is restricted in national environmental standards or other regulations, and matters
 5 over which it has restricted the exercise of its discretion in its plan or proposed plan.

38. Similar to the ability to consider effects on cultural values, the NPSFM 2020 is not explicitly included in the matters of discretion under Rule 12.1.4.8. It is
 10 also submitted that it cannot simply be “read in” implicitly to any of the identified matters.

39. The consideration of the NPSFM 2020 in the context of consent applications could therefore be limited (and is likely to be the subject of considerable debate)
 15 as to the extent it can be considered under section 104C of the RMA – let alone be given significant weight.

1620

I have sought to anticipate an argument which hasn't yet emerged Ma'am in
 20 paragraphs 40 to 42 and 43 of the Act, essentially that in some respects the NPSFM 2020 is incomplete or invalid or doesn't cover the field and it therefore recalls to part 2 by be had and so I've set out an analysis of why that's incorrect and also in appendix B to these submissions outlined why the NPS and particularly the way it orders priorities is in fact entirely consistent with part 2 of
 25 the Resource Management Act.

THE COURT: JUDGE BORTHWICK

- Q. Why would someone raise that – so is someone saying, it's not incomplete in the sense that the PC7 has not fully implemented it but NPS is inconsistent in and of itself?
- 30 A. Well I'm anticipating that someone might raise it to say: “Well we're going through this expensive, difficult, pointless exercise as a stepping stone to give effect to the NPSFM” when it doesn't even fully reflect part 2 of the Act so it's yet another reason why this shouldn't happen and we should

just go a consenting pathway and we can just apply part 2 and balance social and economic considerations with other considerations.

Q. So you've heard that argument or that criticism made of the NPS?

A. No I'm speaking to anticipate it Ma'am I haven't heard it yet.

5 Q. No I mean out there in the community, generally have you heard the shade being thrown at the NPS in that way?

A. Yes I have.

Q. You have? That's what I'm getting what.

A. Yes that argument is being made by some irrigators in the Canterbury plan change 7 matter.

10

Q. Right.

A. That the NPS was incomplete and therefore recalls to part 2 of the Act could be had so I'm seeking to hear that off and seeking to give the Court some, something to fall back on in the event that the argument is made, it's really a tool for the Court but it is very much my client's position.

15

MR WINCHESTER'S SUBMISSION CONTINUES:

44. Despite this, it is submitted that a "do nothing" approach and reliance on the NPSFM 2020 through the consenting process is not the most appropriate method. Quite apart from the material limitations on having regard to the NPSFM 2020 for restricted discretionary activities, there are other significant problems in seeking to apply the NPSFM 2020 even assuming it could be fully considered, such that it cannot be said to be an effective alternative to PC7.

20

45. In terms of an assessment under section 104, the consent authority must "have regard to" relevant provisions. It is well established that the term "have regard to" is not equal to the term "give effect to", which is what the new future planning framework is required to do²⁴ regarding the NPSFM 2020. Even if the NPSFM 2020 was given very considerable weight and there was no recourse to Part 2 of the RMA, the consideration of the NPSFM 2020 under section 104 would not amount to its implementation. This would require ad hoc case-by-case assessment of individual applications, involving interpretation an application of the NPSFM 2020 on an individual basis for each application, all set against the context of a manifestly inadequate regional planning framework.

30

46. It is submitted that consideration of the NPSFM 2020 under section 104 on a case-by-case basis could not give effect to the NPSFM 2020, in a fundamental way. Part 3.5 of the NPSFM 2020 establishes that Te Mana o Te Wai requires a ki uta ki tai approach, which in turn requires that local authorities must:

- (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hapua (lagoons), wahapu (estuaries) and to the sea;
- (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
- (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and wellbeing of waterbodies, freshwater ecosystems, and receiving environments.

So that's just a single example of, which in my submission illustrates the difficulty in a consent based approach, quite apart from all the other relevant considerations in that instruments.

20 1625

47. It is submitted that a ki uta ki tai approach, and therefore Te Mana o Te Wai, cannot be fully realised in the context of making decisions, or conditions, for individual consent applications. The need for mana whenua to be involved in those processes would be highly inefficient and an undue burden on resources. So effectively you'd be expecting my clients to one, be able to submit, two raise relevant considerations and then tell the decision maker what Te Mana o Te Wai meant and looked like for an individual waterbody in an individual application and in my submission that's nonsense.

30

This is apparent particularly when considering the significant investment of time and effort currently under way between the Council and mana whenua, in an appropriate and carefully considered manner, consistent with the expectations of the NPSFM 2020 and Treaty principles

48. For all of these reasons, any assertion that the NPSFM 2020 can be given effect to, without PC7 and via section 104, is fundamentally flawed.

5 49. If it is the intention of some parties that section 124 of the RMA could be
relied upon to exercise existing rights, under their existing permits, until a new
planning framework is operative (i.e. reactivating renewal applications made
under the existing planning framework, and/or completely bypassing the PC7
provisions), it is submitted this would be both an invalid and inappropriate use
10 of section 124.

50. is intended to cover situations where a consent applicant has lodged
an application for renewal, so that they can exercise their existing rights while
the application is processed and any appeals on the application are heard and
15 determined. It is not for the purpose of putting an application “on hold” for an
indefinite period while existing rights are exercised without further scrutiny or
regulation.

I’ll just pause there and reflect on the exchange your Honour had with my
20 learned friend Mr Page this afternoon about it being the end of the line if one
sought a non-complying activity and got declined, well 124 still applies if they
chose to appeal and as they chug through the appeal process they can still rely
on section 124, that’s what it’s for.

25 51. This intention is supported by the statutory limits within the RMA regarding
how long a consent can be placed “on hold” for. It is open for an applicant to
request that its application be placed “on hold”, and while the consent
application is “on hold”, the applicant could continue to exercise its rights under
section 124. A notified consent application can however only be suspended for
30 a maximum of 130 working days (approximately 6 months). After 130 working
days has elapsed, it is at the consent authority’s discretion to return the
application to the applicant, or to continue to process the application.

52. It would be a misuse of section 124 for applicants to put their application on hold indefinitely in order to wait for it to be entirely assessed against a new and appropriate freshwater planning framework, quite apart from the inappropriateness of maintaining the existing consents, without any further
5 scrutiny, for a significant period.

And there'll be a risk there that I note in the footnote your Honour is that under an existing permit or a deemed permit, potentially the paper over-allocation could be exercised under section 124 and create quite perverse outcome and
10 significant environmental risk.

In any event, the continuation of granting of long-term consents in the context of existing over-allocation, and the environmental and cultural effects of that, is not acceptable to Ngā Rūnanga. It is also anticipated that this position is not
15 one which the Council, properly appreciating its statutory role and functions, would accept.

1630

53. For completeness, in so far that it is relevant to applicants seeking to extend
20 irrigable area, it is submitted that section 124 will not allow an applicant to carry out activities that go beyond what is provided for in existing consents. If an application for resource consent is for an activity on a greater scale and/or covering a greater area of land than is covered by the original consent, section 124 cannot be relied upon. The section does not envisage nor cover any further
25 consents being granted under the umbrella of the original consent but merely preserves the status quo.

54. Section 128(1)(a) of the RMA specifies that a consent authority may review the conditions of consent where there is provision for review in the consent,
30 while section 128(1)(b) allows for a review to occur to align the levels, flows, rates or standards set by an operative regional rule.

55. Some parties have suggested that the ability to reassess resource consents, once a new planning framework is in place, can be provided through

consent reviews under section 128 of the RMA. Section 128(1)(b) only applies to operative rules, so cannot be relied upon until a new planning framework is operative.

1630

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And I'll stop at that point and observe that we've got PC7 going to be in place potentially for a short period and then a NPS compliant planning framework to be developed and implemented, it's potentially some time before section 128(1)(b) bites in terms of new limits that are set under a new framework. I don't know how long but it's an important point as to when one can rely on that power in section 128(1)(b). So it's not enough that there's a proposed plan and proposed limits, that can't be a basis for reviewing.

10

THE COURT: JUDGE BORTHWICK

Oh I see, so the point you're getting at there is it's no solution just to say well you can put that as a condition on a resource consent and then you can have some a surety that it's all going to happen, is that what you're saying – well and even if it did happen its years off is the second point.

15

MR WINCHESTER:

Well paragraph A deals with a review specified in the conditions so that's one pathway, the other pathway is where there's new rules or limits set but they must be operative is my point which is so, it may be some way off before that (inaudible 16:32:38)

20

MR WINCHESTER'S SUBMISSION CONTINUES:

56. It is also submitted that that reliance on consent condition reviews will be ineffective in making significant changes in freshwater management in catchments which are substantially over-allocated, or where significant changes to minimum flows or other measures are required to give effect to the NPSFM 2020. One of the more obvious examples is the Taieri, the allocation at the moment is six times the, what the minimum flow is is my understanding.

25

THE COURT: JUDGE BORTHWICK

Q. Six times the size of the allocation block?

A. Yes, sorry, yes.

Q. Primary allocation block.

5 MR WINCHESTER'S SUBMISSION CONTINUES:

There's inevitably paper over allocation but I think the evidence is that there's already 31 renewals been granted in that catchment. How much of the primary allocation block at the moment which is set under a completely different planning regime do they consume. So what it means is you've got to go through
 10 the NPS exercise to get a new fully considered regime in place. And then the implication of that may be a significantly different primary allocating being available and then potentially you've got existing permits, how to you ramp them back to the extent required under a review to get anywhere close to the primary allocation limit that might be set. And at the moment there's a massive gap.
 15 And even assuming significant paper allocation there's still likely to be a significant gap so one can just imagine what an unpleasant exercise section 128 reviews would turn into in those circumstances. Do you just chop everyone's allocation by a proportionate amount so that you get back to the, the relevant allocation limit? There's always going to be exceptions, there's
 20 always going to be arguments.

1635

57. This is because, although section 128(1)(b) provides for the use of consent condition review processes to ensure existing consented water takes are made
 25 subject to minimum flow provisions and may go some way to addressing over-allocation, the use of review processes may not be able to phase out over-allocation in its entirety or in all circumstances. In this respect, the Regional Council does not have the power to cancel a consent upon review, and would only be able to reduce the amount taken by a certain extent. It is also anticipated
 30 that consent holders would resist material changes or reductions to takes or consented uses on the basis of the non-derogation principle.

58. Despite the limitations of section 128, it is acknowledged that there may need to be some reliance on this section, out of necessity and to the extent possible, in relation to the 31 resource consents that have already been granted. However, for the reasons stated above, it is an inadequate “backstop” and reliance on it should be completely minimised. I would characterise it as the use of a backstop to address an aberration because that is how unusual this particular situation we are in is. It is so far from the norm, so a suggestion that you can somehow fix it and use this very limited statutory tool to fix something of this magnitude is, in my submission is no feasible.

10

Summary of these alternatives

59. It is submitted that all of these options are either materially flawed or inappropriate, and do not provide any reasonable or effective pathway to tackle the current problem. They involve somewhat artificial or strained application of statutory processes and provisions, and reflect an unwillingness on the part of their proponents to “grasp the nettle”. And I’m possibly being unkind in that certainly my learned friend Mr Page’s clients seem very keen to get on, it’s just they want to get on on the wrong basis so they seem to be willing to grasp the nettle but not through the correct process.

20

The reality is that PC7 already buys water users time and provides a pathway to enable a suitable transition to the future regulatory framework. By contrast, these options can be characterised as “kicking the can down the road” and achieving very little other than perceived short-term convenience.

25

Alternative 2 – amending PC7 to attempt to give effect to the NPSFM 2020

60. This is not a viable option and would not be consistent with the Minister’s direction. PC7 should not be amended to better give effect to the NPSFM 2020 because the intent of PC7 is not to establish a framework that fully gives effect to the NPSFM 2020, but rather to provide a “holding pattern” that does those various things

30

(a) Allows existing activities to continue, without increasing their impact, for the short period required to develop and put in place an NPSFM-compliant framework;

5 (b) Facilitates timely review and reassessment of these activities within the new framework;

(c) Minimises the potential for substantial long-term water allocation decisions to be made in a planning framework that has been shown to be inadequate to achieve the purpose of the RMA; and

10 (d) Increases the ability for a new regional planning framework to do this effectively.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. You're thinking about who's submission in particular?

A. Well I detect traces of it in some of the OWRUG evidence and I certainly for a while Fish and Game potentially in terms of some of their relief was, sort of (inaudible 16:39:30) but as I think Ms Baker-Galloway correctly identified only in terms of entry points rather than a substantive outcome so there's, there's elements of that throughout but it's most evident from some of the user groups.

15

Q. Although a reaction in the case of Fish and Game a reaction to the notified plan if you have to go down the, should be better articulated. So this is in anticipation of users saying, what, saying PC7 should be amended to put into place substantive environmental considerations if you like and on that basis have longer consents, I'm not quite sure where you're going there.

20

25 1640

A. Well potentially I am the suggestion is being made that some sciences out there that could inform some limits or that sort of more substantive factors could be built in or perhaps we could amend PC7 to enable the NPSFM to be clearly had regard to subsequent consenting processes.

30 Q. I see, haven't I seen than if any relief though, it could not have been clearer for people to have filed their relief but for some not clear enough so that, we've chased them and got that in but I don't think I've actually seen that yet.

- 5 A. Yes look it's not expressly made clear in any submission that I'm aware of however it seems to be a natural consequence of certainly some of the evidence which builds on that subincision and the, essentially – and it's somewhat of a hybrid in that it's, still assumes that PC7 is inappropriate and really fundamentally shouldn't be approved but that you could, you could do some other things to it that might make it more effective in the short term and that may go some way towards giving effect to aspects of the NPS.
- 10 Q. And were you thinking and this is a bit pointless this question perhaps because I think the regions going to walk in a different direction anyway it's notified plan but were you thinking that in relation to some of the amendments which had been recommended by Mr de Pelsemaeker?
- 15 A. Well no probably not and I certainly wouldn't classify the RDA rule as seeking to give effect to the NPS, it's simply as you said, it's a third pathway. No, I wouldn't say that that's apparent from the Regional Council's evidence at all.
- Q. But that would be the case, I could see if the submission was, if you invoke the phrase Te Mana o Te Wai by bringing it directly into the plan change therefore everything is, you know, okay.
- 20 A. Well that, where does one start because Te Mana o Te Wai deals with not just quantity but quality and land use and interactions with other resources so –
- 25 Q. Well that's right, so it's never good planning is it just to grab words and phrases from superior documents, handing them down with no articulation.
- 30 A. No, that's right. so, I mean the essence of this pathway is that it fails again for fundamentally the same reasons, particularly in terms of procedural reasons and the significant process that (inaudible 16:43:38) are involved in with the regional council which is entirely envisaged and anticipated and indeed directed by the NPS so I don't want to diminish it but it's not really an appropriate alternative to put a bit of NPS fluff into PC7 and say that it will serve a purpose because it simply can't. it will be far less effective than the intended procedural plan change.

Q. No I think I understand where you're coming from and it's not to say that you don't foresee that there may need to be some amendments to, you know, this planning instrument, that's not the point that you're making –

A. No.

5 Q. – at all it's, no understand.

A. No it's just a question of, it comes back to the question what is the purpose of PC7 and it was never intended to be substantively giving effect to the NPS and with your leave your Honour, I'll take paragraph 66 and 67 as read and in terms of it needing to substantively give effect to the NPS, in
10 in my submission, I adopt what's been said by my learned friend Mr Maw in his submissions I think and in it's entirety around that aspect. I wonder if some of this might be a little bit redundant given that – well not necessarily redundant but might need to be reconsidered once we see what the regional council produces but I think it is worth recording that from my
15 client's point of view, the two non-negotiables in terms of what they think needs to go in is set out in 68 (a).

1645

MR WINCHESTER'S SUBMISSION CONTINUES:

(a) There must be a clear incentive for applicants to apply for short term
20 consents as controlled activities, relative to seeking a consent for a non-complying activity; and

(b) Long term consents must only be granted for true exceptions.

And the incentive issue is an interesting one in that potentially the horse has
25 bolted given the information we have furnished about the number of consents so it seems that most renewable applications have been made and accordance with section 88(a) of the Act they at the moment will be assessed either as a mixture of restricted discretionary and non-complying under the PC7 framework. So people have made that election. There is still the opportunity
30 for people to think again and withdraw their current applications or at least seek to modify them to have them considered as controlled activities or in the alternative as I think you suggested you can make an application for an activity with is either controlled or non-complying.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

- Q. So in terms of that and the two expectation test and who applies that anyway but putting that (inaudible 16:47:26) expectation to one side from your client's point of view this isn't to take away from Ms McIntyre's evidence, the policy framework seems to be easier if there was an enabling provision making short term consents and a disabling long-term consents so those are the two policies with rules matching. That doesn't mean you can't apply for resource consent as a non-compliant activity. The point I think being made by Mr Page and I think Mr Maw is probably a good one in as much as under the current policy 10A2.3 with the inclusion of the words "no more than minor effect" that is problematic, as soon as you've got a proposal that has more than minor effect you're knocked out under a section 104(D) test there -actually also knocked out automatically under the policy test because the same test is in there so you're knocked out both ways, it doesn't seem to me to make a heck of a lot of sense that phrasing and problematic for very good reasons. So rather than looking at true exception, not true expectation what's your view about just more regular way of a policy approach with enabling and avoiding and the carrot and the sticks and rules, we don't have to worry about true exceptions or even think about what those true exceptions might look like, they will self-select if they are there as a section 104D which is not, (inaudible 16:49:19) if it's for a longer duration consent should be for minor effects, in other words they're through that gateway. I don't know, it still requires some thinking because you know they might still yet get tripped up on the decision of the duration and the policies but.
- A. Look I think, I think it's a planning issue.
- Q. It's a planning issue.
- A. And it's a drafting issue and I've got no doubt that you will get a useful perspective, an entirely useful perspective from Ms McIntyre about that once she sees the new provisions but I suppose from my client's perspective a pathway that is, is not a pathway they don't really mind but as to whether it's the appropriate method I do accept that the drafting could be improved in a way and we went through this exercise in Southland –

1650

Q. We did, where people were not –

A. – generally not grant consents and avoid and all that sort of stuff so there are ways of getting there –

5 Q. So let's not do that again.

A. We might need to call on Mr Maw again to hot tub some witnesses.

Q. The exercise also and I recall this very vividly of lets imagine what that true exception would be and it was all hypothetical and no, it didn't really help the Court so you know people were trying to you know, carve out an exception for something they couldn't imagine anyway and so we had a lot of talk around that.

10

A. Yes.

Q. So it is a planning exercise.

15

A. I think it is and there's plenty of competent planners here who can apply their mind to that. So I think I can probably go to paragraph 82 and I should probably say subject to a workable regime under PC7 which addresses a lot of the issues that we've seen.

MR WINCHESTER'S SUBMISSION CONTINUES:

82. It is also unclear why a short-term permit would frustrate investment in more efficient irrigation technology, as this would be a benefit to the permit holder as much as the environment, unless the consent holder is doubtful they will likely secure the same allocations and conditions under a new freshwater planning framework. It is submitted that this scenario again illustrates why short-term consents and an interim 'hold the line' approach is needed to enable meaningful change in catchments which have issues with over-allocation or insufficient flows.

20

25

83. Concerns about the cost of engaging in the renewal process for short-term consents can also be largely addressed by controlled activity status becoming effective as soon as possible (possibly through an interim decision of the Court), and by ensuring the simplicity of that consenting regime as proposed by PC7 is largely maintained. And again in light of the evidence before the Court I guess I'm on the fence about that as to whether it would be effective but I think if the

30

Court was able to make an interim decision subject to all of the complexities that come with that and say: “Here’s a controlled activity rule” and do so in sufficient time, parties may think again and they may actually see that the incentive is worthwhile and I don’t take it any further than that your Honour and
 5 I don’t intend to put pressure on the Court in that regard because it’s entirely a matter for you. But it simply is a reflection of my clients support for that -

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Is that in response to Ms Dixon suggestion?

A. Mr?

10 Q. Ms Dixon made similar suggestions last – yesterday.

A. Yes, yes indeed. So the summary and conclusion, I will really only read a paragraph 86.

MR WINCHESTER’S SUBMISSION CONTINUES:

86. From the perspective of Ngā Rūnanga, the most important aspects of PC7
 15 are its ability to ensure that the new regional planning framework will not be undermined by the granting of consents which have a long-term duration, and its ability to prevent further degradation of the environment until such a time that the new plan is operative. In order to achieve this, it is willing to accept the ongoing impacts of short-term consents which effectively extend the current
 20 unsatisfactory situation, and largely forego its rights and interests being recognised or provided for through that short-term consent process.

So I apologise for length but those are my submissions.

THE COURT: JUDGE BORTHWICK

25 Thank you. That’s all good. Thank you.

**MR WINCHESTER CALLS
DEAN WHAANGA (SWORN)**

MR WINCHESTER:

5 Just a procedural point, your Honour. You will recall that Mr Whaanga's
evidence is reflective of the korero he's had with Mr Bull and Ms Thompson who
are also wishing to present. After Ms Baker-Galloway has asked some
questions which I believe she has, I'm just seeking your guidance as to whether
10 it might be appropriate for Mr Bull and Ms Thompson to join Mr Whaanga and
possibly make their presentation and then it would be all three of them available
to answer any questions from the Court? How would you prefer to play it?

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. I would be happy with that. certainly I have offered that in other like cases
that people should come together as one voice, if you like so that's fine.
15 You were thinking being sworn in together? Is that what you were thinking
or not?

A. No, I wasn't, your Honour. No but it's simply that Mr Whaanga's evidence
is a collection of the Mana whenua voice and I think he feels that
responsibility adds some weight and he can speak to that. I don't want to
20 put words in his mouth. But I'm really flexible about that bearing in mind
the time.

Q. The time is no issue for us if it's no issue for you other than I know that
you would like to hear Murihiku's case today because they need to return
so I accept that.

25 A. Indeed. Well, we'll perhaps start by getting Mr Whaanga sworn and then
my friends can answer any questions.

MS BAKER-GALLOWAY TO THE COURT: JUDGE BORTHWICK

Q. I wasn't anticipating changing the order and that the court would have
30 questions first for Mr Whaanga.

A. I'll need to confer with my friends from the bench.

Q. Because if the Court does that then I may no questions depending on
where the Court goes.

- A. Because I had read and understood what was being said and the importance of what was being said but I haven't had a chance to talk.

EXAMINATION: MR WINCHESTER

- 5 Q. Kia ora, Mr Whaanga. You produced a statement of evidence for this court dated 5 February 2021?

A. Correct.

- Q. Do you confirm your full name is Dean Whaanga?

A. Right.

- 10 Q. And that you have the role and the qualifications and experiences set out in your statement of evidence?

A. Right.

- Q. Do you have corrections you wish to make to your statement?

A. No.

- 15 Q. Thank you. Will you now confirm that to the best of your knowledge and belief your evidence is true and correct?

A. Right.

- Q. Now, I understand you wish to give a brief summary of your evidence. Can you please do so? And when you're working through your statement just alert the Court to where you're referring.

20 **SUMMARY OF EVIDENCE READ**

- (Maori 16:59:02) Thank you very much for the opportunity to be able to present my evidence here today. My evidence is actually as been said, it's just not my evidence. I stand presenting on behalf of our whānau, our iwi, our hapū and as Mr Ellison said previously in his mihi to our ancestors we believe that they're here with us and the mahi that's for us and our children to follow us.
- 25

1700

- 30 So if I may, page 3, my introduction, my pepeha. It also explains my evidence. So Motu Pohue is my maunga and even though it's Bluff. I'm from Bluff. I'm a sea person. My water is actually saltwater but moana is to Ara a Kewa, which is Foveaux Strait. My whenua is Tarere ki Whenua Uta. Now, we have a strong relationship with Otago in terms of the waka

Takitimu and and Tarehe Whenuata from our ancestor, Tamatea-Pokai-Whenua.

5 Within my evidence, it talks about Tamatea-Pokai-Whenua being up the Clutha or the Mata-Au the mahi, so doing travelling and working in those areas. So there is a strong connection between and always has been through whakapapa through landscapes with our whānau in Otago. We're one and presenting this in the value of kotahitanga, working together as one people, and then the waka Takitimu, we have our hill. It's 10 also named Te Karehua Tamatea, the captain of waka Takitimu and the wharenui at Otago is Tamatea as well so we have strong connections and we value and as kaitiaki want to maintain our relationships and our responsibilities in terms of looking after our whenua and our responsibilities to the inland area which is now interest of Murihiku 15 whanau, the mātou and up into the upper lakes.

So we have Ngāi Tahu, Kati Mamoe, Waitaha *and I'm* Ngati Kahungunu, all of the same waka and I stand on behalf of these people.

20 So if I get a bad sleep tonight, I believe that I may have hopefully – my tupuna, just saying, hey, maybe you might have missed something but anyhow our marae is Te Rau Aroha. It's that whole idea of 100 loves and we greet all our people in here and share that we've got a kaupapa today and a very important kaupapa and we acknowledge each other as Mr 25 Ellison did. Our tupuna is Tahu Potiki, famous ancestor lived up the North Island and from ancestor must remember that (Māori 17:03:06), his wife is extremely important or the most important in that relationship and my name is Dean Whaanga Tihei Mauri Ora.

30 If I may skip to paragraph 5, My evidence explains the relationship of Ngāi Tahu ki Murihiku with the lands and waters of Te Mata-au and the Catlins. Therefore, my evidence explains the following things, whakapapa, whānau relationships of Te Mata-au and Catlins. Our responsibilities as

mana whenua to act for the benefit of waters and lands throughout our takiwā, ki uta ki tai, which is a value that you've heard quite a bit about in the last hour or two and Mātauranga, tikanga and that guide how we act as kaitiaki within Murihiku and within the *Ngāi Tahu Takiwā*.

So some thoughts for whakaaro. Going into paragraph 8. I mention this whole idea that How we look after the waters of Te Mata-au and connected lands has an impact on te mana o te wai, on the mana of our people and the mana of our tupuna. So we've got a real responsibilities as kaiaki to look after the waters within our – and we feel that deeply. We feel the hurt that our ancestors have had in terms of their inability through restrictions and access to whenua, we feel that hurt. We've got this opportunity now through this mahi that we're all do together to make a difference and maintain the mana of that wai and hence the mana of our people and the mana that our ancestors wish us to carry on with.

1705

So in paragraph 9, we talk about water. It forms the origins of life itself and we have a strong whakapapa from Matiaha Tiramōrehu that talks about our origins of water. Water being, as we know from the periodic table, hydrogen and oxygen, some of the first elements and our whakapapas say right back in the very beginning of time that water was one of the first things to come upon this universe so it's interesting that our whakapapas are very tied into a general thinking about how the universe evolved.

When we're in the presence of mountains of the falling of tears from Rangi and myths of Papatūānuku that rise up as they mourn for each other so (unclear 17:06:07) we have our own cycle as iwi and it really fits into what western science might believe that a water cycle is that there is a reciprocation of tears or water that goes up and back between the sky and the earth. So we acknowledge that. So whakapapa, it connects us to the lands and the waters of Mata-Au, the migration stories of our

5 people. We have oral histories that tell us how we're connected to the lakes. These are passed on orally to us and we have an obligation to pass them on. We say Taonga Tuku Iho, those treasures that get passed on between generations and stories and our ancestors' stories are one of those taonga.

10 So Rākaihautū, that's mentioned in paragraph 11, he and his people walked to South Island from Whakatu Nelson all the way through naming and doing karakia at the lakes as he comes through the South Island, finishing up in Mirihuku, one of the lakes there so some people personify that story and that he put his ko in the ground, his digging stick and dug up the lakes but we also say that he, as a respect to the water, put his ko in the ground did karakia and acknowledged what a beautiful place that we have upon Te Waipounamu.

15 If you were to go to our marae or especially to our marae down in Bluff, you would hear the korero about the water and in one of our walls it talks about how important our waterways are. It talks about the *mātou* and when we get our guests coming down from Central Otago, we tell them that their connection is from Bluff or Motupōhue to Te Ara a Kiwa, joining with the tides of Te Tai o Arai-te-uru, going up the Mata-Au and those rivers and waters flow down from where you live in uruuruwhenua. So we make those links through water to people that come to our marae and we show them the water wall. We say, "Look, we're connected because of the water."

20 Another example of why water is so important to us. The pounamu and the pathways to go inland to our pounamu fields up at Wakatipu. They access through the rivers, especially the Mata-Au and we say that the rivers and the streams are our highways of yesterday. So you would put *mōkihi* and at the top and float back down so that saves walking. So water, in getting that taonga of ours, the pounamu, the waterways were essential to get there and the feed is that fed that main stem of the Clutha.

They were especially important in that they provided sustenance and food for us on our travels.

1710

5 So in the past, there was always that knowledge that where you went up the Clutha there were places of kai you could rely on and you would know what time of year, you would rely on what certain kai. So our waterways were our pathways.

10 So in a modern context, paragraph 15, we don't have that same ability to get onto the whenua anymore. The foods ain't there. I might say anyhow. The tuna that was (unclear 17:10:43). I was unfortunately involved in some monitoring up in the Caldrona around some tuna and what we were told, there is only one female tuna left in the Caldrona back in that time, five years ago and it was quite sad to hear that there was only one female
15 tuna so what happens when she decides to migrate, does that mean that's a loss? An extinction in that waterway? So they only found one. There may be others but it's a sad indictment of where we are at in terms of environmental or management of our whenua and our waterways.

20 So in a modern context, our people still travel inland. We're not a people that lived in the past. We're here today and our children will be here in the future and they will want to good kaitiaki of our whenua. Hence us being here today to talk about looking after and maintaining a healthy waterways, healthy landscape for us and our children so they can go up
25 there, they can hunt rabbits, pigs and deer as they do but they've lost the birds like the weka and the Maori quails and those birds that were here in the past. So we've lost a lot of tuna and those waterways aren't there through depletion.

30 Paragraph 16 talks about whānau and kaitiakitanga and still the responsibility to maintain that role in the catchments of Otago Southland. Unfortunately, Frances Diver who was here, she's one of our toa that has lived beside the Clutha river all of her life and recently just told me that she moved from a house beside the river that she had lived in for 49

years. When I rang her up last week and said, “Look, we’re doing this. You are kaitiaki up there.” She just was about up there immediately, straight off the phone, coming up. She wouldn’t even let me shout her a cup of tea when she got here which means that role of being a kaitiaki, her responsibility, it’s in her heart. She knows that she has that role to fulfil like the rest of us do and I know that she really wanted to be here but whānau is pretty important to us once she had to get back to the river. So I’d just like to acknowledge that there are many kaitiaki here, it’s not just Maori that are kaitiaki. There are a lot of people out there that have a responsibility to ensure that our landscape and water’s looked after and that’s a little bit about the concept of Te Mana o te Wai that we talk about in NPS.

Number 17 talks about our place names and how place names and the landscape can give you an idea of how things were used in the past and what they should look like now. There are some wonderful place names that we can potentially talk about but it gives us our connection. We know that we had a connection in the past. We’ve still got these names and we’ve continued to use them and we continue to, as good kaitiaki, want to be able to say that’s a place where we should be expecting really healthy rivers and really healthy resources so place names are really good indicator for us, just in terms of health of waterways and what they should look like.

We have other water stories in paragraph 20. We have the wonderful Hakitekura story, one of our tipuna up in Whakatipu or Queen’s town who is famous for swimming that lake.

1715

And travelled up and down the Mata-Au back over to here Otago to Waihola and went back and forth on their travels, on their food collections. So great story that we have in our houses. We show and we talk about this tipuna of ours that had their great association by swimming lake Whakatipu and I don’t know if anyone’s done it since but it’s a bit for a lot of us.

Twenty one. There's been some huge impacts since the Treaty of Waitangi and land sales for Ngāi Tahu. We have the Roaring Meg and the stone bridge that were damaged, we believe, by some jealous goldminers. That's one of the stories we had when we went on a hiko as whānau. That jealous goldminers blew little bit of the rock structure that was across the Kawarau river. We've lost a lot of our rapids and Mahinga kai places to the dams and stuff like that. That's why the other parts of the catchment are really important for that kai, to the mainstems, a lot of water in the mainstems but after the side, we really need those to be in a healthy condition. So there's been huge loss for us.

Twenty three. There are lots of stories and this was just an example of a story that Frances gave me. That was Frances that had to leave unfortunately our toa and I love the story because it's another version of an existing story and that's a bit about how we tell stories as (unclear 17:17:11). Don't think that there's one story and that another one's wrong because it's the message within the story. So the Kōpūwai story that talks about an ogre or a taniwha, whatever you might light to say but it's also part of the korero around water and access from the coast of our people up to this and being captured by these taniwha. There's so many stories on our landscape and that's why our landscape is really important.

Twenty four. It talks about Reko and actually our people showing so called discoverers, European discoverers all the way and while doing that they followed the old trails and one of the old trails was of course down the Clutha and back through (maori 17:18:13). The approach we're using, ki uta ki tai, (unclear 17:18:23) using, paragraph 26, from the tapu of the mountains, the sacredness of our mountains and how the water gets little bit of sacredness, not all the mana. Water comes from the mountains of course. That's one of the reasons there's mana in water that it comes all the way down ki uta ki tai and it talks about whānau right at the mouth of the Mata-Au or the Clutha and their village is set up down by the sea and their use of the coming in and out of the Mata-Au to collect ducks on

Pomahaka, kanakana on the Pomahaka falls. Unfortunately I don't know where those falls are anymore. It's sort been lost in time. The tuna and the koura, crayfish, so there's a lot of reasons why our people based in South up and down waterways and that's a good example of up until very recently our people – there's still some of that family in the bottom of the Clutha at the Marunuku reserve.

So we have some real famous tipuna that were born down there and have relationship with this river but no need to mention it.

We've been doing little bit of work down in Southland with councils and through other processes to understand water, to understand our values, to understand what a healthy waterbody is.

1720

Also one of the outcomes of that is that we know that a waterbody is healthy when a range of indigenous species are present and part of a food web and fully functional ecosystem so some of the values and objectives that we hope to seek down there in our joint roles as kaitiaki with council, with other integrated catchment approaches to looking after our waterways.

So if I go to paragraph 32, we gave focused our talks throughout the Mata-Au and the Catlins on restoring mauri and waterbodies that have lost flow through drainage or over-abstraction, working to provide for te hauora o te wai, the health and well-being of waterbodies, including restoring connectivity between waterbodies. That's what we're after.

That is our contemporary relationship with the places our people can no longer access and the waters which have been impacted by development. It is the way that we honour our tūpuna who fought and died defending the takiwā and who sought to create a foundation for the generations to follow. We are here to speak for the health and well-being of our waterbodies, to seek their restoration wherever they have been degraded and depleted, and to protect them to prevent any further loss

or degradation. It is the same reason our tūpuna fought Te Kēreme, the Ngāi Tahu claim, for a century and a half.

5 Thirty-six. I note that this was referenced at Mr Winchester's evidence as well. We have long held a principle that the decisions of this generation should not bind the next generation, even more so when the mauri of our wai and our whenua are degraded and the duty of kaitiakitanga demands that it must be restored. Therefore TAMI, on behalf of Ngāi Tahu ki Murihiku, has been arguing for short term consents until a new land – that
10 might be a mistake there. So, we're just looking at assuring that the lands and water are not degraded any further. Kia ora.

THE COURT: JUDGE BORTHWICK

It's really important that you're here, treaty partner and as you say at paragraph 35, "the treaty is always speaking." And I understand the importance of the
15 stories as you've brought them through in your evidence. I also understand the significance of (inaudible 17:23:05) being with us here today and also for future generations that are (inaudible 17:23:11) as well. I don't have any questions because I understand the salience of your evidence and the importance to you to come back into this regional plan, if I can put it like that where the regional
20 plan, particularly through chapter 6 and chapter 12 has diminished the voice of Ngāi Tahu ki Murihiku and your relationships with the waterbodies so thank you for your evidence and I don't have any questions.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. Thank you, Ma'am. Mr Whaanga I'm going to ask you some questions
25 that might reference Ms McIntyre's evidence and it also might reference Te Tangi a Tauira which is in the common bundle. Just wonder if we could get the volume 4 of the common bundle to Mr Whaanga and Ms McIntyre's brief as well and he has actually (inaudible 17:25:08) to common bundle page 1170. So that should be the page that has section
30 on mahinga kai.

A. Alright.

- Q. Go down to page 126 and yes, 3412 that piece there in the second column is what I'd like to look at. So I'm starting in middle. I was wanting to pick up on and maybe tease out a bit from your evidence, paragraphs 14 and 15 where you talk about the past connection with the inland, land and waters and mahinga kai and then you move on in 15 to sort of the more contemporary context, how that connection to the land and the resources is still undertaken by whānau and just looking at how that's expressed in (inaudible 17:27:08) as well. It wasn't as still central to the Ngāi Tahu ki Murihiku way of life and in the second paragraph, it's about places, ways of doing things, resources that sustain people, the work that's done, the gathering of all natural resources so what I'm interested in understanding better is, in terms of that part of the relationship with the water and the natural resources and Te Mana o te wai and those now what we're calling the three priorities, does that fit into both the first priority in the exercise of manawhenua in the context of that first priority about the Te Hauora o te wai as well as the second priority, the health of people?
- A. The first priority around looking after water, always putting water at the first that in the past that was probably the water and putting it first – and the kai was always there so sort of naturally that those things within the water systems existed so water was put for us and when you come into more contemporary now, with uses, I think we probably swung it little bit into the uses, probably down to third tier and so we've – I think if you put water first, everything else comes right. Put it at forefront of your mind, putting water first, everything else comes right so when we go up to Central now, we're looking for different types of kai, you know the rabbits and those sorts of things. They're not the traditional (inaudible 17:29:07) so we've lost that mana association with the terms of kai that we would traditionally have. So in terms of the kai that we got out of the water, putting water first where we haven't done that appropriately because there's not those species that are in the water anymore so the mana of the water is not there, well it's decreased. Water will always have mana but it will have more mana if it's got good, clean flow and it's got all those species that we desire as mahinga kai for us is feeding the belly and

giving the people manakitanga or looking after our manaki, the role of hospitality for your guests, having those foods is very important so we must get that right. If we get the water right, that's got the kai in it, we can give hospitality. Our mana increases, the mana of water increases so presently with low flows and the lack of kai you'd traditionally feed oneself on, I believe that first tier – that we're missing that. we're not giving water first priority and we're taking it probably down to the second layer, third layer, yes so. We'd like to turn that around.

5

Q. In terms of how to articulate those three tiers of Te Mana o te wai in the Muruhiku context. I understand it's an ongoing work in progress but attached to Ms McIntyre's evidence is the draft.

10

A. Sorry I'm not up with Ms McIntyre's evidence.

Q. No, that's okay. So in the sort of in the second half of Ms McIntyre's evidence, if you get to the end of her evidence at page 35, and then there's some attachments. So I'm looking for appendix 2. Have you found that?

15

A. Is that page 35?

Q. Turn over 4 pages to appendix 2.

A. Yes.

20

Q. She describes it as a draft regional policy statement currently being developed so this is work in progress as I understand it but if you turn over to page 3 of that appendix. You will see an LFP1 prioritisation.

A. I wonder if this section is better explained by Kaitahuki Otago who has put this – appears is part of the Kaitahuki Otago plan? That would be alright?

25

Q. Yes, I can certainly put that to Mr Ellison tomorrow. That was all I had to ask. Thank you, Ma'am.

RE-EXAMINATION: MR WINCHESTER – NIL

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK

Thank you very much for your evidence. I'm just a little unclear what's to happen next.

5 MR WINCHESTER:

Mr Bull and Ms Thompson as contributors to Mr Whaanga's evidence would like to present in support briefly. I will ask them to come forward. It's in the nature of a lay presentation, Ma'am.

10 MR BULL:

I haven't got much at all to add to what's already been said and I guess I'm just supporting Dean when he talked about that concept, kaitiakitanga and then the reasons that I came along today was to show my support and the kaitiakitanga that kaitiaki are responsibility of being here today and I was going to talk about
15 Te Mana o te wai and kaitiakitanga and different things but it's all been said. It really has all been said the things that I was gonna say and now I would be repeating what has already been said so I guess for the sake of time, I don't think I need to be saying those things. I guess perhaps just a Te Mana o te wai if I could just –

20 THE COURT: JUDGE BORTHWICK

I would appreciate that because you know me from the Southland case but I still think – the thinking around Te Mana o te wai is not in its infancy in Muruhiku all amongst iwi generally bringing it into the court context in a European context and translating and helping people understand, bringing people with you if you
25 like and everybody has to come along with us. We're all in this waka together so it's actually about bringing people along and if you can assist us in that and it's just people in this room with that, I would be grateful.

1735

30 MR BULL:

I will attempt to. I guess all I can do is share my interpretation whether everyone agrees with it or not is another matter. I guess I take the pleasure in perhaps suggesting I was part of that concept and the development of that concept in

being – and then for us to find that has basically been accepted as being relevant and it's been given high priority now, I feel like my task is done honestly. Because Te Mana o te wai to suggest to us all that the health and wealth of the wai is in such a state as to sustain those natural resources that

5 rely on that wai to supply and Dean just touched on it at the end of his korero about (inaudible 17:36:14) things we want that to provide for us. It's not just about what we as humans want to – for that wai to provide for us. It's about what's needed to be provided for within that so those creatures and flora and

10 always just promote the thought of Te Mana o te wai but my idea in time was environmental – coming on about environmental capital, we've got established environmental capital. He used a concept of – we all understand financial capital and that we invest money and we establish a capital. We establish a capital so we can get a return of that capital.

15

For me, that's a similar thing to Te Mana o te wai is that we invest and we establish a capital. We don't touch that capital. We don't touch capital. We don't just start digging in to your capital and then it just starts to disappear so if we can establish that capital and then only take what that capital can return for

20 us and so when it comes to time of allocations and limits setting, we don't go into that capital to start allocation or limit setting or anything. We need to go what's over and above that Te Mana o te wai, that environmental capital that we've established and so that's probably the best way of describing that. I don't know whether that's helped anybody at all but it really is – it's not and I'd say

25 once again, it's not just about us humans.

I might touch on Dean talking about mahinga kai, so that term quite often here said mahinga kai, and everyone's (inaudible 17:38:15), yeah, kai, food but what's it take for that kai to be made available and once again not just for us

30 but for all other creatures of the world.

I go muttonbirding on the Southern, (unclear 17:38:31) around Rakiura. The islands there are in such a state and trees grow and there the birds can live in them and such like but it all depends on how much *tūtāe* comes on to the ground

from the birds. The same birds that come on and deposit their *tūtāe* on to the ground that brings those trees up and from that point up and then the birds and then the spreading the seeds and the plants and suchlike. I guess it's Mana o te whenua starts happening there but Te Mana o te Wai, I use that place. I still
 5 feel comfortable dip my hands in the water and drink from the creeks in that place and for me Te Mana o te wai is good and healthy there. The bush grows over top of the creeks, it shades out. We've got nothing, no weeds or *tūtāe* or any – well, *there's actually because there's hundreds and thousands of tiki on the (inaudible 17:39:30)*. So it goes (maori 17:39:34) and is in a (inaudible
 10 17:39:35) and the suchlike but it's in its natural state and so is all the creatures that live in there, living in their natural state. So for me, that is what Te Mana o te wai is and I am so pleased. The Treaty, I've got nothing to say here, I – the treaty I've been busy dealing with like agencies, mainly in Murihiku and I've been trying to get and convince everyone the treaty doesn't belong just to us
 15 Iwi, treaty belongs to us New Zealanders us Kiwis and the treaty is a piece of legislation perhaps, I'm trying to understand it's a tool so if we truly want to achieve the outcomes we want and I'm sure I find quite often we spend time and we talk to each other instead of about each other, ultimately we all want the same thing anyway and that's good, clean and sustainable resources,
 20 water, it's for us and for our children, you know our children after us and their children and their children and their children. But I just say I encourage us to all consider the treaty as another one of those tools that we can all, is that one of the tools, is it a sharp tool, is it a blunt tool is it a hammer or a chisel or a nail or what is that tool, but it is just another for us to be using and so I just
 25 encourage us all to look in that direction and think perhaps use those, one of those tools. So yeah.

1740

THE COURT: JUDGE BORTHWICK

Q. I need to ask you a question seeing I have you here, when, we were
 30 talking about water having mana and in part the mana is from the mountains but water has mana itself, how do I, in a decision describe to another audience what mana means in that context, the water having mana, it will always have mana, it may be diminished if its polluted and

so on but it has mana, how do I translate that in a way that's meaningful and can be grasped?

A. My only answer is I would suggest that unless that water has the capacity to sustain the life that you will naturally find in that space, in that waterway then you haven't achieved that mana. I've made statements that, people come to my marae and I'm expected to stand there with supposed mana and talk about the resources around me but when I have to stand there and say: "Don't touch the kai moana because the rivers bring in tutae and stuff into the kai moana that makes it unsuitable to eat" then my mana, I haven't got my full mana with many Māori because I should've, that's kaitiaki I should've had the capacity to disallow that not allowed that to happen and not to have allowed the riverway that carried all that paru into the kai moana so until the waterway has the capacity to I guess act in its natural state you, it has a certain mana but it hasn't got the full mana –

15 Q. It is not fully –

A. – for me Te Mana o Te Wai is right up there, you know.

Q. So it's not fully itself as you're not fully yourself if you cannot offer –

A. Yeah if you can't offer what you naturally should.

Q. It's diminished, okay.

20 A. I mean that's a big question of life isn't it, what is that life force in the water that we, we all humans, animals, creatures and plants everything relies on, what is that element and I'd suggest it's Māori. That's what that is. So kia ora.

Q. It has been, it is really helpful because these are big ideas, they're well known ideas but not to everybody and the challenge I think of the NPS is bringing all of New Zealand now on board and that will take some time and you know, being able to communicate that and what that means for people is critical.

1745

30 A. I guess I just, I just sort of (inaudible 17:44:42) I stand here supporting my iwi whānau but I'm just as, for me it's as important, I'm a Flannigan also and it's (inaudible 17:44:59) and so it's just important to me that as kaitiaki I'm not doing the mahi that I'm doing just for iwi, I'm doing it – I have just as big a responsibility to my pakeha whānau as well. So if I could have

gain and with the opportunity I've got – I guess by recognition through a treaty and deeds of settlements and suchlike, then that gain such naturally flows to the rest of the community also so kia ora.

5 **MR WINCHESTER:**

Ms Thompson as well, Ma'am and I think she's got some important words to add.

THE COURT: JUDGE BORTHWICK

Ms Thompson.

10

MS THOMPSON:

Kia ora, te koutou. Stewart and Dean have more or less said it all now but I've just got a couple of live examples of mahinga kai and our association with water.

Myself, I am a mahinga kai practitioner. I go mutton birding as does Stewart. I

15 harvest kaimoana I do track and transfer of (spelling 17:46:12) with my husband

and I'm a tanga titiaki kaitiaki which gazetted under the South Island Customary Fishing Regulations as is Stewart. Part of that is management of our coastal areas, our kaimoana and our fisheries. Without good, fresh, strong, healthy freshwater our kohanga, our estuaries where our babies are, they are no good.

20 Without fresh, clean, strong, healthy water, our shellfish aren't good which means, like Stewart said, we've failed because everything needs freshwater from the ki uta ki tai.

Another example I've got is (spelling 17:47:06). While the Crown actively tried

25 to exterminate them a number of years ago and they survived. Today, I am

ashamed to hear that there's one left, Dean, willing to do something about that but what I was thinking was, well we have a lot of structures, maybe (spelling 17:47:28) ended up being (inaudible 17:47:31). Honestly, where have they gone? But (maori 17:47:38) is one of our taonga that's right at the top. Our

30 people fought hard during our claim which brings me to the ninth tall tree,

mahinga kai and all our natural resources with one of a nine tall trees that Ngāi Tahu fought hard for. So we just have to remind ourselves of that. What else did you say that I was going to say, Dean?

Our mahinga kai trails. We still do those trails except we're not doing the whole trail. Some whānau are doing it in Queenstown, some are in Moeraki, some are in Queenstown, some are doing pounamu, some are doing titi. They aren't
 5 dead. Some of them are barren, some of them are dry and some of them we've lost our taonga along the way. An example of that is our weka. We now have to go to the Chatham Islands to get feathers for our korowai. They originated from Hawea, (unclear 17:48:44). So we've lost a lot along the way but as tangata whenua, mana whenua, our responsibility is to ensure that our
 10 mokopuna have what we've got, nothing less. So in terms of holding the line I heard today is holding the line 2017, is holding the line 2000, is holding the line 1996 because the activities that we as Māori, we as part of our communities, what we can do now in 2020 isn't the same as what we could in 1996 so we would've all failed, not just Māori, us as community and us as a people would've
 15 failed if our children cannot go into the water and swim.

In terms of rights and privileges, I agree it is a privilege, it's not a right but with that privilege comes our responsibility to manage it together and it's for the benefit of us all.

20

Tikanga is about doing the right thing and the right thing is about working together and achieving the agreed outcome for everybody.

Just in closing, for Ngāi Tahu *whānui* to be rangatira and kaitiaki over our wai,
 25 Ngāi Tahu *whānui* need to walk the path paved by our tupuna, (maori 17:50:32) but we have been stomped and tramped on (maori 17:50:38). Going forward we would see our success as if we can be rangatira and kaitiaki o Te Mana o te wai, Mana o te whenua and Mana o te Ngāi Tahu *whānui*. *Kia ora koutou*.

THE COURT: JUDGE BORTHWICK

30 Thank you. A good of mine said Ngāi Tahu all about mahinga kai and by that I think she meant that the full expression of the land, the water and the people is through mahinga kai which is available and plentiful and in abundant, redolent of a healthy environment. Would you agree with that?

MS THOMPSON:

Absolutely.

THE COURT: JUDGE BORTHWICK

5 And anything less diminishes the mana of the people and the land and the water
and which as I understood has impact not merely as a food source but also it
has cultural and spiritual and well being impacts and this is why you're here
today. It's not just about food. It's about the impact on people and your
diminishment and the lessening of your well being which is why you're here in
10 this room today. So I've understood that correctly.

MS THOMPSON:

Kia ora.

15

MR BULL:

Can I butt in?

THE COURT: JUDGE BORTHWICK

Yes, of course.

20

MR BULL:

Talk about the wellbeing and talked about the diminishing of the opportunities
to go and associate mahinga kai and just talking on the way up North, (inaudible
17:52:26) talking about the mātauranga the understanding, the knowledge of
25 all those resources and how they come about and what's needed so that's
another part that we're slowly losing because when people haven't got the
opportunity to go participate in their cultural practice and they lose all the
knowledge and they stop passing it on. If you understand where the moon is
and where the tide is and way these things do and what they're doing, so that
30 mātauranga, that's slowly getting lost away from us. That's going to be one of
the effects on that well being, health and social well being, the whole lot of it.
Kia ora. Thank you.

THE COURT: JUDGE BORTHWICK

Thank you.

MR WINCHESTER:

5 Your Honour, thank you for sitting late to receive that evidence and information. Tomorrow morning we will start with Mr Ellison assuming there's nothing else that intervenes then Mr Bartlett. I guess it's still open as to whether you want to or need to hear from Ms McIntyre but I do probably apprehend that's premature.

10 THE COURT: JUDGE BORTHWICK

Possibly premature unless there's any questions to test, if you like, Ms McIntyre's thinking to date because she was making some recommendations but if that testing is not needed now then we can rearrange the schedule. I'm looking at Mr Cooper, he's heard that. Yes, so possibly
15 premature.

MR WINCHESTER:

Thank you, your Honour.

COURT ADJOURNS: 5.55 PM

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25

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COURT RESUMES ON FRIDAY 12 MARCH 2021 AT 9.38 AM**THE COURT: JUDGE BORTHWICK**

Good morning, any matters arising overnight? No matters, any memorandum overnight?

5 MR MAW:

It has been furiously worked on and the, we're aiming to get it in by mid-morning, we're extremely conscious that that memo needs to be filed to ensure that arrangements can be made for dates within, in the next couple of weeks so it is being worked on.

10 THE COURT: JUDGE BORTHWICK

It's also so that I can get it out to other interested parties who are not actually here in the court because I've identified at least three others in relation to the general farming matters and I'm not, all the TAs will be, the TAs are represented but I'm not sure whether there's other hydro interest in the hydrology expert conferencing so there's also fairness issues involved here, that would be good and you know what I'm going to ask of you which is not that you just give me some broad level topics but that parties have turned their mind to their differences and are able to articulate those differences. I think preferably in series of questions because if you're asking yourself the question normally people are driving to the heart of their differences. So we've done that, we've done that for the primary sector conference, need to do that for the territorial and hydro conference as well, we are not going to use our scarce resources where things have not been thought through to that level. That actually goes for the other plan changes. All right, thank you. Mr Winchester.

25 MR WINCHESTER:

Morena your Honour, just before I call Mr Ellison, there was just a matter that your Honour asked a question about my legal submissions yesterday that I wasn't able to answer on the spot and that related to paragraph 36 of the submissions and the point there was that I made the submission that the vast

majority of the deemed permits would be treated as restricted discretionary as they are captured within the primary allocation definitions-

0940

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

5 Q. And I said how did you know that because this is part of the ground setting of.

A. The source for that information is the Regional Council's key issues report.

Q. All right, so that's the key issues report?

10 A. Yes. So I should've footnoted that –

Q. No it's all right.

A. – I apologise. But I don't understand that to be disputed by any party.

Q. Okay. Mr Page.

MR PAGE:

15 Sorry I'm just picking up on that, that's the activities status of the applications lodged that my friend was addressing, yes, we need to understand the key issues report was prepared before most of the applications had been lodged and so the question about what their different activity status is, my understanding is different to what has been presented for some of the main
20 ones which are fully discretionary activities.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Well if I could put the issue this way, under the, the clients that you represent have sought resource consent recently and they've applied under both plans and in relation to the operative water plan, the majority
25 of those applications filed as RDA or discretionary or non-complying activities?

A. The bulk of them are fully discretionary Ma'am.

Q. Fully discretionary, okay.

30

MR WINCHESTER:

That's helpful your Honour and no doubt there'll be some information produced on that so I can't take that any further, sufficed to say I was just wished to alert you as to the source –

5 THE COURT: JUDGE BORTHWICK

Source of the information –

MR WINCHESTER”

My position, yes. Now Mr Ellison is the next witness for Ngā Rūnanga so I propose now to call him if you have his statement at hand.

10

MR WINCHESTER CALLS**EDWARD WELLER ELLISON (SWORN)**

Q. Tēnā koe Mr Ellison, do you confirm your full name is Edward Weller Ellison?

5 A. I do.

Q. And that you have the qualifications and experience set out in your statement of evidence?

A. I do.

10 Q. And you've produced a statement of evidence dated the 5th of February 2021?

A. Yes.

Q. Do you have any amendments or corrections to that evidence?

A. I do.

15 Q. If you could just identify those in a relatively structured manner, perhaps in order and allow the Court time to follow those.

A. Thank you. Morena, in my summary I have the corrections. The first one is at paragraph 37, the last line of that paragraph and it's to change 'ake ne', I, should have an I on the end, 'ake nei'. Have you found that, it's just adding an I to the N-E, so it's –

20 Q. So that's the last line there?

A. Yes.

Q. Yes thank you.

25 A. Paragraph 53 on the fifth line where it has "well through" it should read: "Wellbeing through". Paragraph 80, first line if you could change 'Tairai', it's meant to be 'Taiari', that's paragraph 80, first line and in paragraph 91, last line it's a typo.

0945

Q. Paragraph 81?

A. Paragraph 91.

30 Q. Paragraph 91. Okay.

A. Last line, paragraph 91. It's just typo. That funny word should be expiry.

Q. See my eyes just autocorrect. He was telling mistake but I couldn't find it because I had corrected it in my mind but anyway I've noted expiry.

- A. Thank you and paragraph 119, first line 'Kai Tau' should be 'Kāi Tahu', of course and then paragraph 122, third line, should be cumulative over, we're missing an r on the over.

CROSS-EXAMINATION CONTINUES: MR WINCHESTER

- 5 Q. And we've added one to the allocation. Thank you, Mr Ellison. So subject to corrections, do you confirm that to the best of your knowledge and believe, your statement of evidence is true and correct?
- A. I do.
- 10 Q. Thank you. Just before you give a summary of evidence, I just would like to ask you a couple of question about matters that have arisen since the commencement of the hearing. My learned friend, Mr Page, for the resource uses group has advised that fundamentally all renewals applications have now been lodged with the regional council, are you aware of that?
- 15 A. No, I learned of that this morning.
- Q. Yes, and in terms of consultation on the renewal applications can you advise the court the extent of consultation by applicants with Kāi Tahu about those renewal applications?
- A. To the best of my knowledge, the best way to describe it would be
20 spasmodic, limited as far as to the fact that all but two are lodged that sort of surprised me.
- Q. In relation to Manuherikia renewals are you aware or have as to the level of consultation on those applications?
- A. To the best of my knowledge zero.
- 25 Q. None?
- A. No.
- Q. Yes, thank you. Is there another forum in which Kāi Tahu is involved with the irrigators and the resource users that might be regarded as a forum where Kāi Tahu views on applications or renewals might be gleaned?
- 30 A. Well, many years ago we instituted here in Otago the cultural impact assessment process, probably in the 90's, early 90's and that seems to be the structured and most effective way one for us to understand the proposed activity and have a site visit and develop a report, a cultural

report that identifies the issues which we then discuss with the applicant. That is what we've practised now for well over 25 years.

5 Q. Thank you. To the best of your knowledge, how many cultural impact assessments have been sought by applicants for renewals in this process?

A. I'm not able to really accurately answer that because as I initially said it's spasmodic and it's not clear to me that there's (inaudible 09:49:50) much coverage at all.

10 Q. Are you aware of any cultural impact assessments having been carried out for a renewal application by Kāi Tahu ?

A. One or two I think.

Q. Thank you, Mr Ellison. That's helpful. If you could now take the court through a summary of your evidence and then remain and answer any questions.

15 **MR WINCHESTER ADDRESSES THE COURT: WRITTEN SUMMARY PRODUCED (09:50:17)**

20 A. Kia ora. Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga are mana whenua within the Otago region. Our interests in the inland lakes and mountains and along the Mata-au (Clutha River) are shared with Ngāi Tahu ki Southland.

25 Whakapapa describes bonds, relationships, and connections, and binds Kāi Tahu to the lands, waters and all life supported by them. Tribal whakapapa gives rise to a spiritual relationship and respect for the mauri (life force) evident in wai māori, and to the rights inherent in rakatirataka and the associated and fundamental duties of kaitiakitaka.

30 The protection of the wāhi tūpuna (cultural landscapes) that reflect the long history and traditions associated with the settlement of Otago by Kāi Tahu whānui is sought by mana whenua. Wai Māori is an integral and enduring part of our wāhi tūpuna. The Otago landscape is criss-crossed by many and varied waterbodies, from many sources,

including lakes, awa (rivers) and their tributaries, puna (springs), and groundwater.

5 Following shortly after the signing of Te Tiriti o Waitangi (the Treaty of Waitangi) and the Ngāi Tahu / Kāi Tahu land sales, settlement and the development of pastoral farming resulted in the profound loss of mahika kai resources. I gave evidence to the Waitangi Tribunal on the Ngāi Tahu Claim at Ōtākou marae in 1987. My submission focussed on the loss of our mahika kai resource and places of procurement

10

The Waitangi Tribunal inquiry eventually led to a settlement and apology from the Crown. The Ngāi Tahu Claims Settlement Act 1998 included cultural redress mechanisms, to recognise and give practical effect to Ngāi Tahu mana over taoka resources and wāhi tupuna.

15

The principles of the Treaty of Waitangi imply a partnership, to be exercised with the utmost good faith. Effective partnerships mean that mana whenua are involved in natural resource and environmental management at both the governance and management levels of decision-making.

20

However, the Regional Plan Water has not proved effective in enabling Kāi Tahu to exercise rakatirataka and kaitiakitaka, nor has it proved effective in providing for Kāi Tahu values and the values of our wāhi tūpuna.

25

The engagement of Kāi Tahu in the review of the Regional Policy Statement and the development of the Land and Water Plan is an opportunity to provide for cultural values and interests in wai māori and reflects the resetting of the Treaty partnership with the Otago Regional Council.

30

Kāi Tahu are concerned at the granting of replacement water permits

for consent terms that extend beyond the life of the new land and water plan. This will lock Kāi Tahu out of freshwater management for another generation and will significantly delay the restoration of the mana and mauri of Otago's waterbodies. Thank you.

5

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. So, Mr Ellison, I know you through your decisions that you've made as an independent commissioner and you've been an independent commissioner probably for decades, would that be fair?

10 A. 2005 I think.

0955

Q. It's looking like decades. So you're someone and so you are someone who will be familiar with the NPS statement for freshwater management under its various iterations as a decision maker, apart from anything else, correct.

15

A. True.

Q. And in this case the Regional Council on a process orientated plan change which in principle is supported by Kai Tahu to roll over existing permits or existing permits to taking, use water for a period of six years subject to the identification an imposition of conditions which effectively limit those permits to actual use. That's what the process proposition is and that approach as I understand it is, comes with a full recognition that that will mean that the adverse that already exist within the environment as a consequences of the taking, use of water and together with all of the activities that go with taking and use of water, land use activities, discharge and so forth. They will continue to subsist within the environment either at their present level or cumulatively worsen, that is the potential without any additive extraction or anything else happening, would that be fair?

20

25

30 A. Yes, your Honour, yes.

Q. And you're going into this knowing that that is what is the proposal, correct?

A. That is correct.

Q. And as I understand it Kai Tahu say that that is a better result that fixing the problems or attempting to fix the problems now through individual resource consent applications?

5 A. That is our position, we do think that to try and fix them now will result in a longer term problem, it'll not only impact this generation it could be another generation before they get a chance to address and redress so it's a short term potential loss but the long term future would be much better if we are able to put the consents through a new framework that is consistent with the NPSFM 2020.

10 Q. And why is that so, now I, for the benefit of the room and for myself, why is there a greater benefit in your view waiting until the planning instruments, you know, any future plan, any RPS are notified and made operative, why is there a better outcome for the environment which includes people and communities so it includes Kai Tahu?

15 A. Firstly I think is that our values and interests have been pretty well disabled despite the current plan and previous plans and there's been a continued deteriorated and loss since the inception of the RMA Act and we see that continuing, it's been encouraged even in past, policy decisions or announcements so we think that if we are not able to bring
20 the consents into a new and fit for purpose framework, that deterioration will not be halted, continued, it'll be continued. We talked, I talked about in the, to the Waitangi Tribunal about 10% of the wetlands left, well we keep hearing that figure but it's way below that now, since that time, 1987 I think I gave that evidence, those wetlands have continued to disappear
25 at an accelerating rate over the last 20 years. So that's the scenario we have faced, we've been disabled, by and large within the process so that's why we're so committed to seeing a fit for purpose planning framework brought in that is compliant with the NPSFM 2020 which is a steady improvement on the National Policy Statement before it.

30 1000

Q. So we heard a line of cross-examination from one of the parties yesterday which was we have the science now to understand how to provide for the health and well being of water bodies and fresh water systems. We have the science and are able to respond now. Do you agree with that

approach ahead of a plan that does respond to Kāi Tahu and also brings into account the aspirations and values of people in community?

5 A. Science may be gathered but our perspective on that is that is specific in terms of measurement and in the past has reductionist approach to addressing values in the environment.

Q. Tell me about that a bit more. What do you mean by a reductionist approach to values?

10 A. Well, you know you get you to bottom lines or limits whereas from a cultural perspective and if we take the cultural perspective there is a much broader, holistic, cumulative, catchment wide approach and it's clear to us that despite the science we can continue to degrade our water.

15 Q. So is what you're saying there that science might tell you something about minimum flows and cessation conditions but (Māori 10:02:20) and the integrated management of land and water will tell you something much bigger about an integrated, a whole of catchment approach to upholding Te Mana o te wai and its three values?

20 A. Yeah, that has been a frustration for our people that if we get engaged in the resource consenting processes less so planning but this cumulative impact tends to be bypassed by consenting process. If it isn't addressed properly in the planning framework and so from our perspective to protect out wetlands and values, it's not just (Māori 10:03:09), it's broader than that. It's the health and the well being of a waterway and the people who live by it or have an interest in it. There are many other values that we believe beside the measurement, three sides to be taken into account and given effect in the way that our natural resources are managed. We spend – we heard yesterday from some of our Ngāi Tahu, from Southland talking about, well it's not there now, the mahika kai. The side effect of that is that the mātauranga. To us that's as important as the language. You may have heard the language could be lost in one generation so can mātauranga.

25

30

Q. I know I understand that. It's not just loss of kai, mahinga kai. It is everything in fact goes with the practice of mahinga kai. I understand that. The cumulative effects, how in Otago has that been able to be

stepped around and I'm wondering whether it has something to do with the cumulative in effects but can you comment on that?

A. Can I clarify mean, do you mean within the Otago planning framework that that is existed?

5 Q. Yes because I had heard from other witnesses that this plan doesn't deal with cumulative effects very well and I was wondering if you could comment on that, whether even the idea of effects absent truly integrated approach to land and water management is something that can ever be known outside of may be an immediate response within locality or take and the use?

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A. I think that probably goes to the regional plans, operative plan and the experience of working with it and we've appeared and put our cases. We seem to be, as I've said earlier on, we're disabled. This doesn't give us a hook. There is no hook there to ensure cumulative catchment approach as a trace been understood and applied. It's a permissive plan. I think the regional plan, water is permissive, it stains out for that in New Zealand context.

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Q. So this plan change is not giving full effect to the NPS and nor is it intended to as I understand it, it is to enable the regional council to start to get on a proper footing or foundation that it can understand the resource use and then start to make forward looking plans for the integrated management of land and water. Do you agree with that? You're nodding.

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A. I do, your Honour.

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Q. So we have two competing narratives. One is that the council should be able to have that time which Kāi Tahu endorse and the other narrative is that the primary sector should be able to get on and regulate their lives by having an opportunity to apply for resource consent and both narratives are going to have to be reconciled somehow and I think under this NPS and I'm wondering how you would go about it as a decision maker. I thought it would be reconciled under the foundational principle but again there's been other suggestions, well, you know, some other policies are in play even if only to a little extent. So how would you approach that? You've got competing narratives of competing cases. I'm

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not asking for the answer. I'm asking where would you look for the answer?

5 A. The answer doesn't exist at the moment in terms of the framework. It's to be yet developed. I think given the journey we've been on and I'm heavily weighed toward getting that framework in place and despite the fact the rural sector may have to go for short-term consents. I think that is a fact of life that they will need to understand and accept. The deterioration, the performance of the council the 30 years, the opportunity to address these things earlier. They've all been there. It's been known from 1991. This is the situation we in Otago have got to. I think there's all of those elements come into place and in fairness to the whole community and of course to Kāi Tahu. I think we're bound to follow what we now best which is exhibited in the NPSFM 2020 to do our best not only for this generation but future generations. It's intolerable to attempt to bypass them.

10 Q. So if you bring this back to this plan change and making a decision on this plan change, is it the task for the Court to reconcile the competing cases, at least two broad competing cases directly under the foundational principle or is it the foundational principle plus other provisions, other policies? Do you want to comment on that?

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25 A. I think I understand the question in terms of this plan change, plan change 7. I think there's the opportunity to do, to apply as well the foundational principles for that, and I understand that pragmatism of the short term and trying to get a solution to go forward for that short term, is that what you're

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Q. Yes, that's what I'm addressing so in principle, applying the foundational concept absent application of other policies, you think in principle that is an approach that the Court could take –

30 A. Yes.

Q. – when considering and deciding upon the completing, the competing approaches?

A. I would think the Court is also bound to do that.

Q. Okay, well those are my questions, thank you, anybody have any questions?

THE COURT: COMMISSIONER EDMONDS

5 Q. So we've heard quite a lot of evidence about the resources that the Council has and needs to put in to the development of the land and water plan and it has occurred to me that the same dilemma perhaps might be facing Kai Tahu in that. I mean you no doubt have a level of resource and you have priorities that you might need to establish in regard to that and we've heard there's a whole lot of applications coming down the pipe, 10 are you able to comment on how you see that in terms of PC7?

A. Yes, the planning framework work by the ORC has certainly ramped up considerably and it's quite a significant component of our work now for Ngā Rūnanga through their entity (inaudible 10:12:12) and our equivalent (inaudible 10:12:13) in Southland. They are challenges that we are 15 stepping up to as everyone else to in the community. Terms of the resources consents that have come in in relation to this plan change, the fact that we have not been approached by the applicants puts us into an invidious position because the cultural impact assessments are resourced by the applicants and allows us to put resources in do that 20 work. To bypass that process throws us into having to cover the cost of that out of our own resources so it's, that is monumental issue now.

Q. Thank you, Mr Ellison.

CROSS-EXAMINATION: MR MAW – NIL

CROSS-EXAMINATION: MS BAKER-GALLOWAY

25 Q. Tēnā koe Mr Ellison.

A. Kia ora.

Q. So I'm just going to start with some words and phrases at the moment to start with so if you've got the national policy statement in front of you and just before I get into the actual words I just want you to go down to 30 provision 3.4(1)(a) which requires as part of the process that there be the identification of the local approach to give effect to Te Mana o Te Wai, so

that's kind of where I want to head with you at the moment, is just to understand that a little bit better from, from at least from Kai Tahu's perspective.

A. Yes.

5 Q. So then if we go back up to the, I think it's 1.3, the principles I think they're called, sorry fundamental concepts, the fundamental concepts and we've got the six principles in clause 4 and three of those are Māori terms. In terms of the Kai Tahu perspective on what these terms mean in the Otago context, are you able to run through A, B and C – or lets, maybe let's start with A because I've got a specific question on B, if you start with A, mana whakahaere. Is there a more local interpretation of that or has the NPS summed that up accurately?

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15 A. First of all, I think it was early last year or it may have been late last year (Māori 10:15:26) Ngāi Tahu developed their guidance framework to interpret Mana o te wai from a Ngāi Tahu perspective. That was not required by the regions to adopt per se. It was simply a guidance because the principle of Mana o te wai is placed by appliance. What mana applies at the place and perspectives of the local mana whenua. So we understood in Otago that we would develop our own interpretation of it from our perspective and understanding guided by the tribal framework, guidance only and so we did that in the winter I think last year. I thought I brought it. I haven't got it at the moment but we developed that paper I think you were referring to yesterday as a guidance and the principle of that is to reflect our tino rangatiratanga, our mana whakahaere which is referred to here. This is how we saw Mana o te wai in Otago. I underlined the point our perspective not to say the community and other organisations develop their own and need to develop, including the regional council, their own community wide understanding of Mana o te wai but our position was that community wide interpretation could never work if they didn't have clearly what manawhenua thought, their perspective what is on that so I'm not sure if that's answering your question.

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Q. That's probably enough for starters. Then I wanted to ask you a question about what kaitiakitanga means in that manawhenua context and I read in the KTKO Natural resources plan that the Kāi Tahu meaning of kaitiakitanga is broader and different to the RMA meaning so again I was just wondering if that was something if you look at the NPS definition, is that sufficiently accurate or again is there nuances that it's important for us to understand in this local context?

A. Kaitiakitanga is an invented word. It was established for the RMA act. It then was further clarified when Ngāneko Minhinnick interpretation, the way it was being interpreted because anyone thought they could be a kaitiaki. Kaitiakitanga can only really be practised by the mana whenua of place. That is our position on kaitiakitanga. Legislation can never fully understand the māori word and you've got to be careful how you incorporate māori terms and words into legislation. It is for mana whenua of place to fully interpret and exercise and understand how a term like kaitiakitanga works.

Q. Will that go the same for manakitanga? The third principle there?

A. Yes, manakitanga is a very universal concept and very important and once again it's central to our role as manawhenua. It's something we hold dearly to us in how we practice and share and involve and include people and welcome them. There's huge perimeters to it and our relationship with our environment is very much connected to that manakitanga cause in a sense, papatūānuku manaaki is us and we've got to do it, return it. That's where that utu fits in but is that enough on that?

Q. That's helpful, thank you. So even though the NPS refers to the role of in participation by tangata whenua, in this context, you're being very precise and more specific that it's actually the manawhenua participation that's important here. I just wonder if you'd explain the difference between those terms so we're all on the same page.

A. We would interpret tangata whenua when we're talking about natural resources as the people who have whakapapa to place and all tangata whenua are mana whenua. So to be precise and authentic in the way we exercise our role as kaitiaki, we must understand that whakapapa connection and duty comes out of that. So we would go further than what

the legislation. Legislation is not always precise. It's a broader concept and we work within that to create a clarity to who, what and when.

Q. Thank you. So now, just moving on to that document we referred to yesterday. I think it's attached to Ms McIntyre's evidence. So if you can grab that. So it's appendix 2 and what I'm interested in exploring is under the policies heading LFP1 Prioritisation. Am I correct that this is the current drafting, if you like so obviously work in progress and like you say, it's the Kāi Tahu perspective and eventually there will be a combined community version maybe of this. But at least in that context, it's a starting point for how the three prioritisations in the NPS are expressed. So for starters, this policy, LFP1 expresses objective 2.1 from the NPS?

A. Yes.

Q. If we look at the first one first, so the NPS is short. It says first the health and well being of water bodies and freshwater ecosystems and this has been expanded on in Ms McIntyre's appendix to include Te Hau Ora o te wai and Te Hau Ora o te taio and the exercise of mana whenua to uphold these. So could you perhaps explain those first two terms? Te Hau Ora o te wai and Te Hau Ora o te taio so that we can understand what that brings to the first priority.

A. Well, Te Hau Ora o te wai is the health and wellbeing and what it provides to the taio, health and wellbeing of the water and the environment, interaction between them that they are not separate. There's a connection there.

Q. Is that in that ki uta ki tai, interconnected in every direction and dimension?

A. It is really from tops of the mountains of a catchment down to the sea, land and water. Absolutely connected and interconnected.

Q. To the land and the water. And then the final phrase, and the exercise of mana whenua to uphold these. So that brings the mana whenua's actions and relationship into this first priority so can you may be explain and expand on that to help us understand?

A. Yeah, I understand that the national policy statement doesn't do that. From a mana whenua perspective we cannot separate ourselves from land and water and our resources. We do not and we won't have that

understanding of our connection to the environment. It's not a natural thing for us. If we take our traditions and beliefs we go right back to the beginning before there was light and so it's unnatural for us to be separate from the environment, we're one and the same. You may have heard of the phrase: "I am the river and the river is me" that sort of, if I used that analogy, we don't necessarily use that here but I'm just using that as an analogy.

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10 Q. Okay thank you. And then perhaps before I move on to the second priority I just want to talk about Mahinga kai also for a bit and again I was looking at the natural resources plan, natural resource management plan 2005. So if I could maybe get that up on the screen and I think you might have a paper copy there Mr Ellison, not sure.

A. It's in the bundle is it?

15 Q. Could we get Mr Ellison a copy, yes in the common bundle. I think it's in the volume 3, yes it's at the end of volume 3. And if you go to page – common bundle, in the top right corner there's numbers, CB857.

A. Yes.

Q. Which is hopefully page 35 of the plan?

20 A. That's right.

Q. Cool and so this plan was prepared back in 2005 and there's a photo there, a young man left of the pole, is that you?

A. That's right, younger, younger.

25 Q. If we, couldn't resist, if we scroll down to the bottom of that page there's a paragraph there, I'll read for the record: "Mahinga kai or places where food resources could be produced or precured included the Taieri, the South Taiga Wetlands, Coastal Otago from the Otago Harbour to Naga Point, the catchment area of the Clutha River including the Manuherikia Valley and Major in there lakes and beyond (inaudible 10:27:52)." So that's a very general statement at the start and then there is a lot of detail throughout the plan, first generally in respect of the state of Mahinga kai and there's objectives and policies generally and then there's also catchment specific descriptions of the state and the issues and policies and actions. Perhaps I'll take you to an example of the Taieri where that's

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in the document which is page 123 of the document, so CB945. Have you got that Mr Ellison?

A. Yes I have.

5 Q. So in terms of how that describes the state of the Taieri in 2005, in general terms has much changed, so is this document still a really good reference for us?

A. It is quite good, we do have a copy of a March 2021 report of the lower Taieri on water quality and it deteriorating is I think, overall it's deteriorating still, yes so from 2005 it was done by Tipa and associates
10 for Kai Tahu and the Taieri particularly from Allenton Down, yes, it appears to be getting worse.

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Q. Worse.

A. Mhm.

15 Q. Water quality?

A. Mhm.

Q. And under that heading 9.4.2 in terms of the issues the first issue is low flows and or dewatering of significant reaches of waterways is affecting Mahinga kai habitat, is that still the situation?

20 A. Generally in many places that's right where there is abstraction occurring, yes.

Q. And that's why the policy under 9.4.3 first policy is to encourage the development of the Taieri river as a mountains to sea corridor, so that would, you know, if you expanded on that policy is that more than just
25 better connectivity and a stronger flow?

A. Yes there's fish passage issues, there is wetland compromise or reduction occurring in the catchment, huge number of deemed permits there in the upper Taieri and probably not a lot – the major wetland that used to be there they call it now Taieri Lake but it's traditional name was
30 Tu Nga Hekitaka, it (inaudible 10:31:27) used to be two kilometres wide, I don't think you have to walk very far to get from one side to the other, no look, seems to be increased impact, yes, in the catchment.

Q. Right, okay. And then perhaps if we look at the Clutha catchment which starts on pages 131 so CB953.

A. Yes.

Q. And again scroll down to the issues heading, 10.4.2. And so does description of the Clutha catchment include tributary such as the Manuherikia valley?

5 A. Yes the Clutha Mai Tahu catchment is quite large, yes. Right up by the catchment, the whole catchment.

Q. And again is this still a fair summary or is it really because of the scale of that catchment, it's at quite a high level given the complexities of the tributaries versus the big main stem of the Matao?

10 A. Look its still an accurate summary, those issues still exist and probably have intensified in some places in some stretches of some rivers and parts of the catchment, they are, yes, that's a continuing trend. Can I elaborate further?

Q. Yes, absolutely.

15 A. In 1880 Hori Kerei Taiaroa in trying to impress upon the Crown where our people gather their Mahinga kai held hui all over the South Island and interviewed Kaumatua in 1880 and produced a report called the HK Tiaroa report and he named these places and the elders named what they gathered there, it's remarkable if you look at that report now and go back to those places including many in Otago what is not there and that was in 20 1880 he was concerned.

Q. Right.

A. And it's just continued so what we've done here, 2005, I believe has accurately described the situation then, I wouldn't say it's improved.

25 Q. I was going to ask that, has it improved since 2005?

A. No.

Q. No, okay. And then Mr Whaanga yesterday talked a little bit about sort of the contemporary practices of people who live on the coast going in land and still, you know, connecting with the land, gathering natural resources, whatever's available, that's, is that anything you'd like to elaborate on because your evidence has focused on the past practices rather than 30 contemporary connections?

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- 5 A. Well, many of those practices were diminished partly through poisoning of rabbits, killing the weka, training of wetlands, private property you weren't allowed on. A lot of those practices, mahinga kai diminished significantly including even down on the lower Taieri but as I was saying to her Honour before the mātauranga that goes with those customary practices is so important. It's not only the practice of going and getting it's how to catch, how to preserve the places, the stories that go with those places, those rights that are held there. They're all things that keep us connected and allow us to even better exercise kaitiakitanga. That's why we keep pressing on despite the invisibility of some of these taonga. It's just a function that we do and continue what (unclear 10:36:11) or did in 1880. We seem to be doing that every generation and spending more time doing that than doing the catching.
- 10
- 15 Q. Maybe we're at a turning point. So with that, I do want to go back to the second priority in the LFP1. So in the NPS, it's just referenced as health needs of people with an example of drinking water and what we've got in this draft is an elaboration of that. So also obviously reference of te hau ora or te tangata but we've got interacting with water through ingestion such as drinking water and consuming harvested resources and
- 20 immersive activities such as harvesting resources and bathing. So from the Kāi Tahu perspective those two expansions, if you like, of health of people, it's obviously partly comes from mahika kai practices and the act of harvesting and eating and the act of being in the water. So is there anything you can expand and elaborate on that to help us understand?
- 25 A. I think we've expanded on that point that is in the NPSFM because our interaction with water does necessarily include eating mahika kai or resources that come out of it or are reliant on healthy water so it's imperative to ask that that is retained or regained. It's not a matter of just being able to swim. I think it's actually really interactive, interconnected
- 30 association we have with water.
- Q. There's still probably two things that you could look at from the (Maori 10:38:22) perspective is that as long as I don't get sick when I eat this or drink this or touch this, I'm fine or is it I need to eat this food or get in the water and connect to that water to be healthy and well?

A. It's probably two parts to it really. Traditionally there were categories of water used for certain purposes or there might even be rāhui restrictions put on different times. Some water was tapu, other water wasn't. So I think I've got the gist of your question. The water should be of such quality and quantity, I suppose and I think quantity comes into it to ensure there's quality in the water that there is no risk and we're able to freely interact with that waterway and continue customary practices, use and remember stories and ways of doing things which is really leading into that mātauranga retention without which you cannot really fully exercise kaitiakitanga.

Q. So it is deeper than just making sure that you don't get sick if you drink the water.

A. Mhm.

THE COURT: JUDGE BORTHWICK

Q. Can I ask a question because I'm really interested in this line of questioning? It's not just physical wellbeing. It's well being in terms of the full expression of an individual's identity and being which and you're nodding to that, because I've got to pick this up on the transcript. You're nodding. You're agreeing.

A. Yes.

Q. And that I posited this in the Southland (Maori 10:40:35) case. That also includes mental health and again you're agreeing with that as well as spiritual health and the health of the community of Kāi Tahu and the interconnected that you have there. Would that be a fair summary? It's a full expression of life.

A. It is. At a top end, our people when they're doing rituals, they will often use water as a form of removing tapu or assisting in a particular ceremonial process. The water has many elements of meaning to our people and it is not just that physical place to go and gather kai. There's our people when they look at and measure the mauri of a river for example, they will look at and get the sense, yes, that's got some good life forms or it's conveying a meaning to them that gives them a sense of connection to their past and their elders because that's what their tupuna

saw. That's what it was like and all of those things add to that spiritual connection. It is. There is a spiritual connection. Well, clearly, if you've got a whakapapa connection to a place. That's quite an important attachment.

5 CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. I've just got one more topic to cover off and then I've finished. I think we're getting pretty on top of this issue but the ability for Kāi Tahu to participate properly in a consenting process on a case by case basis and what I've (inaudible 10:42:29) from everything you've said but also in Ms
10 McIntyre's evidence she sets it quite clearly at paragraph 26, where she said that the requirement for giving effect to Te Mana o te wai include a central role for mana whenua in freshwater planning and management and in decision making processes and there's some evidence on the table in terms of consent processes in recent times. There was one example I
15 wanted to ask you about which was in the Kyeburn catchment. The replacement resource consents were applied for I think back in 2016 and you were involved in that process?

A. I was, yes.

Q. And Fish and Game appealed and Kāi Tahu joined as a 274 party and we
20 went to mediation and it all finally got resolved in 2019. Do you remember? So it was under the 2017 NPS technically. In terms of that process, from Kāi Tahu's perspective, and Te Mana o te wai, looking backwards and looking forwards, how did that shape up?

A. I wouldn't say that the 2017 NPSFM reference to Te Mana o te wai played
25 a big part in that process. Not to my experience.

Q. And the ability for Kāi Tahu to participate meaningfully resourcing wise? How was that?

A. We exercised that role but the framework or the planning framework that
30 the process was working under was not really conducive to outcomes that were going to reflect well for us.

Q. So those are 35 year consents in terms of outcomes, how well is that going to be for the next 35 years, that catchment from your perspective?

A. Not very well really, I suppose. It's 35 years. We'd say that's nearly two generations. Disconnect will result from that.

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Q. Thank you.

5 CROSS-EXAMINATION: MS IRVING – NIL

CROSS-EXAMINATION: MR PAGE

Q. My recollection of the (inaudible 10:45:15) case, Mr Ellison was that Ngā Rūnanga gave evidence in support of the application, is that not your evidence, your recollection?

10 A. That was in the end what happened but yeah.

Q. Because the key issue that fell to be addressed particularly at the Council hearing and subsequently was the protection of Taonga species galaxiids in the tributaries to the (inaudible 10:45:47), from Trout incursion, wasn't it?

15 A. That was the issue, one of the issues, yes.

Q. And the (inaudible 10:45:59) catchment group agreement on a management process with Ngai Tahu and with the Department of Conservation to establish processes to protect galaxiid species in the tributaries and you were supportive of that outcome, weren't you?

20 A. That was an outcome that we supported, yes.

Q. Now I want to come to questions that Mr Winchester put to you about Manuherikia, do you recall that in 2017 Aukaha prepared a report on the cultural values of the Manuherikia for the Otago Regional Council?

A. I do.

25 Q. And you were one of the reviewers of that report?

A. I was.

Q. And the context at that stage was that the Otago Regional Council were pursuing or preparing itself to pursue a plan change to set flows in the Manuherikia and in the 2017 report, Aukaha Limited identified values that were relevant to that process?

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A. Yes.

Q. And it was Aukaha's recommendation that limits be imposed because Aukaha was concerned about the catchment being degraded and there needed to be remedial limits to protect Ngai Tahu's values in the catchment?

5 A. It was, I would add the report was done in haste given the framework that was underway at that time, it was not the final report.

Q. Right and then subsequently the Otago Regional Council published a further report in May 2020 entitled: "Freshwater management values and aspirations for the Manuherikia Rohe" did Ngai Tahu have a role in assisting the Regional Council in preparing that report?

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A. They may have, may have drawn on that 2017 report which was interim.

Q. All right and Otago Regional Council established various groups to be working on the limit setting process didn't they, there was a Manuherikia reference group that was established by Ngai Tahu declined to take part in that?

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A. We declined to be members of that, we did not exclude Rūnanga who may wish to participate.

Q. But the Ngā Rūnanga chose not to participate in the Manuherikia reference group didn't it?

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A. I think one or two went up for a while.

Q. And the Otago Regional Council also established something called the technical advisory group for Manuherikia to didn't it?

A. Mmhm, yes.

Q. And same applies, Ngai Tahu chose not to participate and neither did Ngā Rūnanga.

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A. The technical advisory group I think had some involvement from Aukaha staff.

Q. Right. And to your knowledge, has that work contributed to a document which is not yet been adopted by the regional council which is a draft (inaudible 10:50:02) policy statement?

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A. In terms of the MRG report do you mean?

Q. Yes.

A. Yes that's not yet adopted, yes.

- Q. Are you aware that the Manuherikia catchment group was formed to represent all of the permit holders that were applying for replacement permits?
- 5 A. I am, I could elaborate further why Ngai Tohu went on (inaudible 10:50:48).
- Q. Are you talking about the Manuherikia reference group or –
- A. Yes.
- Q. – the catchment group?
- A. Sorry, not the, the MRG, the reference group.
- 10 Q. Yes but the Manuherikia catchment group incorporated is a body formed by permit holders seeking to replacement consents, you're aware of that?
- A. Yes, not familiar with it greatly but yes.
- Q. And were you aware that there have been field day meetings between the catchment group and Ngā Rūnanga through the course of preparing their applications?
- 15 A. I understand some of that has happened, yes.
- Q. Now in paragraph 113 of your evidence, you express concern about the mana of Ngā Rūnanga being diminished by having the status of submitters on resource consent applications as opposed to being at the decision-making table, do I understand that that's a concern?
- 20 A. I'll have a look at the particular paragraph.
- Q. Page 29, paragraph 113. I've not used your words, I'm just trying to get the gist –
- A. Right, no I didn't recognise the words. Sorry, paragraph?
- 25 Q. 113.
- A. Yes.
- Q. If you just spend a moment and re-familiarising yourself with that.
- A. Yes.
- Q. Now of course plan change 7 can't do much about that, can it, about Ngai Tahu's status in the statutory decision-making process is what I mean.
- 30 A. No, not plan change 7, no.
- Q. But there are mechanisms in the Resource Management Act to transfer or share functions to Iwi authorities, aren't there?
- A. There are.

Q. To your knowledge have steps been taken towards that end in relation to freshwater in Otago?

A. No.

5 Q. Is that something that Ngai Tahu aspires to or is there some other reason why that's not being explored?

10 A. I, yeah well we're well aware of that transfer of function option and the potential for that to probably reflect, Hiranga tiratanga (inaudible 10:53:49) in the management of water but we're also well aware of the short falls of it and why it has, might've only been applied once or twice in the country.

Q. Okay, can you explain what the short falls of participating as a decision-maker might be because you're an experienced decision-maker yourself, I'm kind of surprised.

15 A. Well you know we need to set up a framework for managing water in that way, set up the capacity to have the transfer of function. What we have been focussed on is getting our partnership working with the Regional Council rather than mimicking the Regional Council function and that is what we have been concentrating on instead being on reference groups, it's about getting that partnership working at the level of decision-making.

20 **THE COURT: JUDGE BORTHWICK**

25 Q. Can I just clarify the decision-making level, is that in terms of being a decision maker or a contributing author or in partnership around the writing of plans or is that decision making in terms of being an independent commissioner who is engaged to consider applications in the current framework?

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30 A. Probably not so much that, it was what we had been doing and in the experience of what we've seen elsewhere around the Ngai Tahu Rohe is that reference groups or, what they call them in Canterbury – zonal groups, they ultimately undermine Ngai Tahu partnership.

Q. Can you say why, can you, I think that's what counsel's trying to draw out of you, why is that so?

A. Because inevitably they'll operate at the Regional Council level with an agreement and then there's all of these reference groups or zonal committees occur and then individuals are appointed to them, they may or may not have expertise in all matters that they're dealing with. Then the subcommittees set up, I ultimately they get isolated, minimised and ineffective and the partnership stops and so that is why we've said to Regional Council and why the Regional Council have agreed that 1) we have people on the strategy and planning committee 2) they are fully for voting rights and also we have a land and water regional plan governance committee, it's not a decision making body but it's where we see the work of the reference groups. So that we're able to input and provide at a partnership level, I'll have those decisions and be informed at the earliest stage. Yes, it'd be nice to have –we're involvement in the reference groups but that's the experience we've had from observation as well elsewhere. That is not a tangata whenua framework friendly I would say.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Is your hope or intention that once the land and water regional plan framework is settled, that Ngai Tahu or Ngā Rūnanga specifically will not need to participate in the resource consent application process that must inevitably follow?

A. No, no we have, that's what Aukaha are there for, as the vehicle for Ngā Rūnanga to be engaged at all levels, resource consents, planning, policy, I'm sorry I couldn't imagine us not participating in a consenting process.

Q. Because, I think this is where Ngai Tahu's perspective and my client's perspective kind of departs. Famers are intentionally pragmatic people, you know because you're one, what they want to know is how much water must be left in the creek that their families been living next to for 100 years before the get to feed their animals and from a farmer's perspective, that is – and I think you said so yourself that Te Mana o Te Wai's place is specific, each creek and each river and each catchment is different and it has different qualities, different needs, different histories, different fauna and flora and so where the NPS, where the rubber hits the road really

matters is on each of those decisions on each of those creeks. Do you kind of get that point of view?

5 A. Yes I do I understand that and that is how it's operated in the past and also led, leads into non-catchment approach, not cumulative, it's that dilemma around cumulative effects.

10 Q. And so that's why it's so important isn't it, in fact the NPS encourages it, that when applications come to be considered, they should be hold of catchment applications to allow all of those cumulative effects to be on the table when those little creek by creek decisions get to be made. You agree with that?

1100

A. Yes, I've been in some of those processes.

15 Q. This is where I think everybody was at cross purposes on the last change application, wasn't it? where you gave evidence and I appeared for the applicant which seems to be the standard pattern because Dr (inaudible 11:00:41) who was the commissioner in that case was considering applications to take from five tributaries of the Clutha at Lake Roxburgh wasn't he?

A. Yes.

20 Q. And the issue of concern to the commissioner was what residual flows should be imposed at each of the points of take which were up on the old man range, right?

A. Yes.

25 Q. And last chance called Mr Heki who had conducted fish surveys and hydrological surveys of each take point in each of the creeks and you gave cultural evidence for Ngā Rūnanga and called a planning witness but wasn't the problem that confronted Dr (inaudible 11:01:46) was how the values that you were describing actually translate to setting a residual flow at a point of take that with all due respect you hadn't been to and
30 neither had your planning witness been to? Isn't that the problem that a commissioner faces and you've faced that as a commissioner? How do you deal with that as matter of evidence?

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. This is the thing that NPS is meant to be resolving, isn't it? Let's be clear, you're putting to this witness a pre-2020 NPS framework, is that not so?

A. I'm exploring –

5 Q. Where you say assume there's going to be a take and what do we have to do in order to minimise the effects on the environment? Whereas the NPS is saying, no, no, let's not treat water as a commodity in first instance, let's treat water as having values which are integral or intrinsic as to itself from what is required for health so there has been a
10 fundamental change in approach or are you saying nothing's changed? So where are you going with this?

A. - no, no, no, my previous proposition to Mr Ellison which I had understood that agreed to a point was that the rubber hits the road for the NPS when you're actually making decisions about individual waterways and so what
15 I'm exploring with the witness now is how do you make those decisions and he's –

Q. About individual waterways?

A. – yes. So he's raised a last chance case in his evidence as has the planner as being a plan failure case. I'm testing his thinking as not only
20 an expert witness in that case in this but also as an experienced hearing commissioner. How do you make decisions for individual waterways that give effect to the NPS?

MR WINCHESTER:

25 May I intervene?

THE COURT: JUDGE BORTHWICK

Mhm.

MR WINCHESTER:

30 This is precisely the line of questioning put to Mr de Pelsmaecker yesterday which relied on the premise that you can give effect to the NPS through individual consent decisions and if Mr Page wants to put that proposition to the

witness because that's the distinction. If he's saying you can give effect to the NPS through individual consent decisions –

THE COURT: JUDGE BORTHWICK

Without a ki uta ki tai framework and Te Mata o te wai having been in –

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MR WINCHESTER:

So the decision in my submission needs to be put with a lot more precision than a general proposition of this nature.

THE COURT: JUDGE BORTHWICK

10 I think that's fair, either something has changed for this NPS or it has not changed with this NPS. Something very fundamental has changed with this NPS or it hasn't. So what is your proposition?

CROSS-EXAMINATION CONTINUES: MR PAGE

15 Q. My proposition Mr Ellison is that even when we have a Te Mana o te wai within the land and water regional plan, do you accept that there will still need to be individual decisions being made about individual waterways that reflect that?

A. Well, in principle that's what we've endeavoured to address for a long time. We've produced an iwi resource management plan in 1995 to benefit the regional council and applicants. We re-did that one in 2005. We developed a D1 schedule for the water plan, comprehensive we thought at the time. I think that's what we have tried to do to address your question which is how can you provide information and guidance to decision making both for the applicant, the council and ourselves decision makers. So we as Ngā Rūnanga in Otago have tried to step up to the plate and we've established Aukaha in 1997 fire bombed, on our first day of business but we're still here and that's to provide and be a part of the process and effective but the pathway hasn't been always that easy. We've stepped up to the mark though.

25
30 Q. But it is a massively complex task, isn't it? Dealing with all of the different characteristics of all of the different rivers and streams and creeks in

Otago and it is a massively complex task for Ngāi Tahu. It's not just it is for applicants.

A. Yeah, look. I just did a bit of a tour of part of Otago two weeks ago with whānau and it's a big area.

5 Q. Yes, so one of the problems that Professor Skelton was tasked to investigate was how to resource that consenting process. Do you see a difficulty with if all of the consents now are given a six year term, in six years' time albeit with a NPS compliant decision making framework, we've got everything coming back together adhered at the same time?
10 Do you see value if it were possible to achieve this in staggering that workload in some way so that particularly Ngāi Tahu's resources but also the consulting community and applicant's resources are devoted in some kind of orderly priority over a longer period of time?

A. My experience in Canterbury, we were doing 10 years, some cases less,
15 many more consents. I probably wouldn't have a full sense of the difficulties that we're going to face but I know it's a hurdle. It's a challenge. I think it's the significance of the issue of not having the deemed permits sorted is added considerably to this pressure. So that's a consequence of those.

20 Q. In the notified version of plan change 7, there was a non-complying activity pathway for consents up to 2035, wasn't there?

A. Believe so.

Q. Is that a pathway that you support? Applicants being able to seek consents for up to 15 years?

25 A. I think I would adhere to what our (inaudible 11:09:45) yesterday. We support the short-term.

Q. So it's six years for any consents, not 15 years for those that want to get on and are prepared to face the hurdles that a non-complying activity presents.

30 1110

A. Look, probably it's not much area really to explore too much I don't think around the nature of the activities.

Q. Okay. In answer to a friend from Ms Baker-Galloway, you described what Ngāi Tahu's understanding of the second tier of Te Mana o Te Wai in the

NPS includes and just to refresh our minds, the second tier objective 2.1 reads: “second, the health needs of people such as drinking water.” And I think you described the concept of the health needs of people as wider than drinking water and includes bathing, use of water to prepare kai, are there other examples that we should use, be thinking of that’s part of tier 2?

5

A. Well what I explained to Ms Baker-Galloway I think was reasonably comprehensive and I would say it’s not a Ngai Tahu position, this is Ngai Tahu in Otago position. Look if I sat back and thought about it I could elaborate more but I think I gave the broad response to Ms Baker-Galloway.

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Q. Yes. From a Ngai Tahu perspective would you envisage municipal water supplies as tier 2 matter?

A. I probably would I’m just thinking, it’s also part of C.

15

Q. Okay, thank you.

RE-EXAMINATION: MR WINCHESTER – NIL

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING – NIL

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS– NIL

WITNESS EXCUSED

20 **COURT ADJOURNS: 11.13 AM**

COURT RESUMES: 11.45 AM

MR WINCHESTER:

Thank you, your Honour, the next witness for Ngā Rūnanga is Ms Bartlett and I'm assuming she'll be the final witness for the day, I suspect that's the case.

5 THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Possibly unless Ms McIntyre is here, we could quite – there were a couple of matters we wanted to explore with Ms McIntyre in terms of understanding her evidence. Now I know that that is prior to anything that the Regional Council is going to do and the evidence may well change in response to that but the, we thought it was useful just to tease out some of her thinking on some recommended changes but thoughts?

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A. If we've got the time Ma'am, it's –

Q. She may not even be here.

A. – probably useful exercise but obviously I expect it would be on the understanding that Ms McIntyre would be released from her oath.

15

Q. Absolutely, yes, yes.

A. Wouldn't be held over a considerable time. Yes that's fine so I guess we'll see how we go with Ms Bartlett. Do you have Ms Bartlett's statement?

Q. I do.

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MR WINCHESTER CALLS**MARIA BARTLETT (SWORN)**

5 Q. Morena Ms Bartlett, do you confirm that your full name is Maria Bartlett and that you have the experience and qualifications set out in your statement of evidence?

A. That's correct.

Q. And you have produced for the purposes of this hearing an amended statement of evidence so that incorporates some changes to footnotes and associated matters dated 17 February 2021?

10 A. Correct.

Q. And do you have any additional amendments or corrections to that statement?

A. No, the statement stands.

15 Q. Thank you, do you confirm that to the best of your knowledge and belief your statement of evidence is true and correct.

A. I agree.

20 Q. Thank you. Now I understand in terms of the summary of evidence you intend to read to the Court your executive summary so perhaps do that and remain where you are and answer any questions from the Court and my friends.

THE COURT: COMMISSIONER EDMONDS

Excuse me one minute, you've mentioned the 17th of February, my evidence in my folder is dated the 5th of February.

THE COURT: JUDGE BORTHWICK

25 There were some minor edits which have been tracked and updated and it might not have got to you Commissioner. I think insofar as those changes are not substantive and I don't understand that they are, are we able to just, we'll continue with questioning and –

THE COURT: COMMISSIONER EDMONDS

30 Yes I'm sure I can manage I just wanted to be clear.

EXAMINATION CONTINUES: MR WINCHESTER

Q. For the Commissioner Edmonds' benefit there was some missing footnotes and reference which have been added in just for the sake of completeness but the actual substance of the evidence is not changed at all.

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A. I will just qualify that a little because it was a reference to attachments and one, like in the earlier version there was a reference to an attachment that had all of the statutory acknowledgments in the, they weren't there in the lodged evidence and so the amendment was to refer back to the submission where they all are sitting so yeah.

10

Q. Right. Thank you.

A. That was one of them anyway.

Q. Thank you, Ms Bartlett, if you want to read your executive summary and then remain where you are.

15 EXECUTIVE SUMMARY READ

Waihopai Rūnaka, Te Rūnangao Awarua Rūnanga and Te Rūnanga Ōraka Aparima (Ngāi Tahu ki Murihiku) are statutorily recognised as mana whenua within the Otago region, specifically Te Mata-au, with a focus on the upper lakes region and true right tributaries.

20 1150

Ngāi Tahu ki Murihiku rights, interests and values have been adversely affected by water abstraction practices in Te Mata-au over many generations, as acknowledged by the Waitangi Tribunal and I would add as elaborated on by Mr Ellison and Mr Whaanga in their evidence.

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The Regional Plan: Water for Otago (RPW) maintains a regime for freshwater management that was established prior to the Ngāi Tahu Settlement with the Crown and prior to the national direction for freshwater management in the successive National Policy Statements for freshwater 2011, 2014 and 2020. Proposed PC7 begins the process of moving on from that regime by seeking to 'hold the line' in terms of allocation and use of freshwater, while a new freshwater planning framework is developed.

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Ngāi Tahu ki Murihiku have not always had capacity to be involved in plan development in the Otago region ,nor has their status as mana whenua along with Kāi Tahu ki Ōtākou or relevant iwi management plans, been recognised in the Otago RPS or Otago RPW. Ngāi Tahu ki Murihiku now have sufficient capacity to be actively involved in review of the Otago Regional Policy statement and development of a new land and water regional plan for the region.

10 Provisions of the RPW have created challenges for Ngāi Tahu ki urihiku working with the plan over time, including in relation to notification decisions and the extent to which consideration of Kai Tahu rights, interests and values has been able to influence decision-making.

15 There is little evidence to suggest that the relevant provisions of the Otago RPW were designed to address Ngāi Tahu ki Murihiku rights, interests and values in freshwater. Rather, in my opinion, they support the continuation of existing consented activities, including deemed permits.

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I think that paragraph 18 talking about term. I will just skip across I think the statutory term of 35 years has been well covered.

25 Paragraph 19, The way in which the Otago RPW manages allocation and flow regimes provides little ability to address mana whenua rights, interests and values or give effect to Te Mana o te Wai as required by the National Policy Statement for Freshwater Management 2020 (NPS-FM 2020). Therefore, proposed PC7 is a necessary change to the RPW but can only be regarded as an interim step.

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Decisions by the consent authority to grant water permits with long durations as non-complying activities remains a concern to Ngāi Tahu ki

Murihiku. So I note here that I defer to the planning evidence of Ms McIntyre for how that issue may be managed. Kia Ora.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. I just have one question and that related to your Paragraphs 82 and 83.

5 When I look at your paragraph 82, you talk about the first priority for any efficiency gains in water use as the water should go back to the waterbodies to support the health and wellbeing. That's what you say in 82 so I'm just trying to understand now what you mean in your paragraph 83 and whether that is closely related to the reason that you're giving in 10 82. So in your 83, you talk about the position being predicated on the basis that there is no resource consents granted which have long durations. That's one thing. Another thing is increasing the amount of water taken and a third thing is the area of land irrigated so it's that last point that I particularly want to ask you about, particularly given that 15 there's been a suggestion that perhaps there are situations where that area of land irrigated ought to be able to be extended as long as perhaps the amount of water required isn't.

A. So I think there is a close relationship between paragraph 82 and paragraph 83 and the position of Ngāi Tahu ki Murihiku is to not just 20 hold the line on the water abstraction but hold the line on its area of use and advocacy, and so that final sentence of paragraph 82 is providing some rationale for that position which is that we have seen a tendency to, you know – naturally on the case of the water uses, seek to maximise their water use within the allocations as they 25 change to more efficient forms of irrigation and that can often correspond with a greater area of use and the mana whenua view of that is that is likely to further entrench the abstraction and the use, and that the context for the concern is particularly where there's heavy abstraction pressure and overallocation and the mana whenua experience is that that is common where deemed permits 30 are present and in Te Mata-au there are high concentrations of

deemed permits and that is a taonga, wahi tupuna, or mana whenua. Has that answered the question?

THE COURT: JUDGE BORTHWICK

Q. Can you just say again “water’s common”?

5 A. I’m not sure where I used that word.

Q. Just said it a moment ago. It doesn’t matter. I’ll pick it up from the transcript.

A. Thank you. I think I was talking about the common experience of mana whenua in processes under the current RPW.

10 **THE COURT: COMMISSIONER EDMONDS**

Thank you for that clarification.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. I had a question talking about the Mata-Au as well. Very large water body and I’ve heard in another case and it’s the largest water body in this
15 country so therefore what’s the problem in terms of the take and use. Do you want to comment on that? What is the problem because you’re dealing with that at paragraph 77? This is your amended evidence or 78 in terms of your original brief of evidence and here you’re saying, “to be effective, PC7 needs to provide guidance on avoiding granting additional
20 water for abstraction from that river and its tribs.” So what’s the problem if it’s the largest waterbody in the country for granting more water under the current planning?

A. So I think that in the korero yesterday and in Mr Ellison’s korero this morning the importance of the tributary, the health and wellbeing
25 tributaries is significant to mana whenua and particularly given the impacts on the main stem of the water body. You will see in the statutory acknowledgements, I put the ‘s’ on the end because it’s (inaudible 11:59:13) and te Mata-au that recorded in those statutory acknowledgements is what was lost during the establishment of the
30 hydroelectricity scheme and the ongoing impacts of that scheme are highlighted in Te Tangi a Taurira as an issue on te Mata-au of concern.

Additional to that, you'll find in Te Tangi reference to concern around abstraction and overallocation of waterbodies and that referring to these tributaries and when you look at the evidence of Mr Whaanga and he was talking about it yesterday and I believe Mr Bull also made reference to the veins of Papatuanuku so you might think of the Te Mata o as the artery and you might think of all of the tributaries and associated wetlands, springs, ephemeral waterbodies, they're all part of the circulatory system if you like, the veins and capillaries. So yeah, a focus on the stem would not, it does not capture (inaudible 12:00:52) and does not capture Maturanga and the basis of, well I was going to say Te Au Māori but here we are talking about Te Au Ngai Tahu, the way in which mana whenua approach resource management and experience the natural world.

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15 Q. Thank you, those are my questions. So Ms Baker-Galloway has some questions for you.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. Kia ora.

A. Kia ora.

20 Q. And I'm just, probably just picking up on that while you're on that theme, when Mr Bull was talking last night and he was talking about, you know when the mana of the river has been reduced it's got less flow, it's producing less kai and then the flow on effect it has to him as kaitiaki and his mana, in your experience, you know you're at the (inaudible 12:02:11) helping process these consents that come across your table, even recently have you see an application grabble with that concept when they're assessing the effects on abstraction from waterbodies?

25 A. No. I think, my observation is that practice and understanding is, of Te Mana o Te Wai under the 2017 NPS and the 2020 and of Ngai Tahu (inaudible 12:02:54) and Kai Tahu Ki Otago rights, interests and values is low and I would, I recall of the three applications that Stevie-Ray, Leah and I, she's here, I just wanted to acknowledge Stevie-Ray, she's here in 30 the court room with us. Stevie and I attended three hearings in the

second half of last year within the Dunstan Rohe and the first of those all of the material presented to the hearing that was coming from sources other than Wai Tahu Ki Murihiku who were the only submitters present – no, my apologies, in the first one Fish and Game were present, apologies to your client. But the evidence presented was barren in relation to Te Mana o Te Wai, in that instance there was some 200 pages of case law, tables, it was something like that, it was at least 100 pages – there was bundle of material that was tabled and Te Mana o Te Wai appeared once in a footnote in that bundle. What that told me was that there was a low level of – I can only put it down to practice in the region that was blind to the NPSFM 2017, blind to the determination of the Environment Court in proposed Southland water and land plan and what those findings have then in relation to Te Mana o Te Wai under the NPSFM 2017. What I have seen in the subsequent couple of hearings is some, an increased acknowledgment of Te Mana o Te Wai, I have yet to see any depth in understanding or practice of that concept.

1205

Q. And those 2020 hearings that you've referred to, you've got those summarised in your table 1 on page – my page 18, just in terms of precise timing were they issued so that 2020 NPS came out in August 2020, were they before or after that?

A. Sorry I thought it was September, 3rd of September.

Q. It's got August on the cover, it might've come out in September.

A. Jolly good, so the first of those was prior to, definitely the last one we attended, the 2020 NPS was a factor, I honestly can't remember about the one in the middle as to which, timing wise, I probably should've double checked before I came this morning.

Q. No that's –

A. It's possible that counsel for the applicants who are present may be able to elaborate on that for the Court.

Q. And in some of those consents in your table you've explained at paragraph 76 that some had no residual or minimum flow requirements imposed?

A. That's correct.

Q. And again from your perspective of being at the coal face and you've gone through a lot of these processes, in an ideal world, once the land and water plan is implemented the NPS and Te Mana o Te Wai, do you envisage that Ngai Tahu would even need to take part to defend the mana of the wai and the flow that's required to sustain that?

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A. So first correction is I wouldn't say that I've been involved in a lot of processes in this region so I just want to be really clear and actually if you'll just allow me, I might get you to repeat the second half of your question if you just allow me a wee moment here. So I was in Te Whakariki the strategy and influence team of (inaudible 12:07:30) from 2012 to 2018 prior to coming down to support Aukaha in 2019 on secondment from (inaudible 12:07:44). In that period from 2012 to 2018 I and my team, I was part of a strong team at Te Whakariki who worked with the freshwater – or we were part of the freshwater iwi leaders group, the technical group that worked with the Crown of the day and to bring Te Mana o Te Wai into the 2014 version of the NPS and then again to strengthen it in the 2017 version of the NPS. Over that time I co-authored a report in 2015, the Te Mana o Te Wai Tu Wai Ponamu case study that was drawing from the experiences of (inaudible 12:08:37) Otago, Ngai Tahu Ki Murihiku and Te Atiawa in Waikawa. The point of that report was to assist (inaudible 12:08:48) to understand the challenges faced by mana whenua in giving life to Te Mana o Te Wai in the 2014 version of the NPS. And so from, and I would note that during that period of time, 2015 something quite special was obviously happening in Murihiku as the first expression of Te Mana o Te Wai was written into the proposed Southland water and land plan. Now that was a collaboration between Elsa Cain who is also in the court today and I want to acknowledge her presence, so she was there working for Mana Whenua in Murihiku at the time, for Te Au Marama, so I'm now sitting where she was and I was sitting in (inaudible 12:09:38) so we trying to take what was coming and what we had worked hard for within the tribal authority to establish Te Mana o Te Wai in the 2013 NPS, it was a weaker position at that time for the concept, to see that translated through to the regional planning framework and opportunity existed in Murihiku for that to happen. It is

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extraordinarily heartening for me to see where that has arrived at. Sorry, this is bit of an emotional response but the effort required of the tribal authority at papatipu runanga to get to that point is extraordinary so it has been wonderful to be working with Te Ao Marama in the FMU process this last year to take it to the next step of implementation.

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When I cross back over the regional council boundary and I look at where Kāi Tahu ki Otago are with the planning framework and being in those consent hearings last year and finding so little acknowledgement, care or respect was really dispiriting. I felt the burden of Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku. So this plan change process in my mind is so significant for this reason and I see no reason why Otago couldn't be where Southland are right now in five years' time, in six years' time. The troubles that the irrigators are experiencing right now, I think once the fundamental concept of Te Mana o te wai is embedded in the RPS which we are undertaking right now and pretty excited actually about that draft. It hasn't yet hit the outside world but that collaboration process of Ngāi Tahu ki Murihiku working with Kāi Tahu ki Otago, working with the regional council has been a really great process even though it's been truncated. It's a very difficult timeframe to be meeting but ki uta ki tai, te Mana o te wai, rangatiratanga, mana, they are all woven through the draft. So once that has an impact on development of the land and water regional plan, I am quite certain that the landscape that we're all working with including the irrigators, including the council for the irrigators, that landscape is going to be significantly different. The journey taken to get to that land and water regional plan outcome will in itself be an assist to the region, to all parties undertaking resource management or engaging in resource management processes in the Otago region. You cannot circumvent or bypass that journey. What Murihiku have learnt through that Southland regional planning process is how significant that journey is. You can't go around it. You just can't circumvent it. The journey itself is important and in this case that journey, yes, it's going to have to happen in a much shorter timeframe. I am quite confident that can be achieved. I have already seen what can be achieved in the drafting of the RPS. I

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am quite confident that as te Mana o te wai under the NPSFM 2020 is embraced and understood here.

We're going to see significantly improved outcomes for mana whenua for waterbodies and perhaps you might want to put those around the other way in recognition of the hierarchy of obligations but for mana whenua those two are one in the same because of whakapapa. I think that probably goes to point that was being explored around where cultural sits in the hierarchy of obligations. So I think once you understand whakapapa, there is no distinction from the mana whenua side between the health and wellbeing of the waterbody and the health and wellbeing of mana whenua and others. I might stop there and you can ask your second bit of whatever you wanted to say.

Q. No, I think I'm going to stop too. Thank you, Ms Bartlett. I've got no further questions.

15 **RE-EXAMINATION: MR WINCHESTER – NIL**

WITNESS EXCUSED

**MR WINCHESTER CALLS
SANDRA MCINTYRE (SWORN)**

MR WINCHESTER TO THE COURT: JUDGE BORTHWICK

5 Q. Just before I introduce Ms McIntyre's evidence, would it be helpful for Ms McIntyre to read a summary of the evidence or is that not the Court's intention? I had detected that you had some quite confined questions that you wanted to put to her.

10 A. We do. We're wanting just to explore the thinking around the recommended changes to policy 10A2.3. It's quite directed and bearing in mind that this evidence may change depending on what's to come from the regional council. No, it won't change in substance but the responses might change.

15 Q. I will have Ms McIntyre sworn and get her to confirm her evidence on the understanding that this is quite confined questions.

A. Yes.

Q. Was the Court also anticipating any cross-examination?

A. I think that's a matter for counsel.

Q. Okay.

20 A. Then they also wish to explore the recommended changes as well. Just to have a better sense of that going forward and bearing in mind, we're expecting Ms McIntyre to come back.

Q. Indeed.

25 A. So that's not for closing on any of that nor on the ability to change her responses in response to something else coming out of the regional council. That's anticipated.

Q. Completely understood, Ma'am. I just wanted to make sure we were on the same page in terms of what this exercise is intended to achieve so right.

30 **EXAMINATION: MR WINCHESTER**

Q. Do you confirm that your name is Sandra McIntyre and that you have the qualifications and experience set out in your statement of evidence dated 17 February 2021?

A. Yes.

Q. And like Ms Bartlett, you've made some amendments to your original statement of evidence so what we should be looking at is amended statement of evidence dated 17 February 2021.

5 A. That's correct.

Q. Are there any further amendments or corrections you wish to make to that statement?

A. I discovered when re-reading through my evidence there was a page that somehow mysteriously didn't reflect the amended version. So there are just a small number of references to other evidence that didn't get in there so if I can take you to paragraph 63.

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THE COURT: COMMISSIONER EDMONDS

Q. I just need to say that I don't have that version of the evidence either. The 17 February version so it may not be significant but it might just be something we need to be aware of.

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A. It may help the Court that the only amendments that were in that evidence were essentially some amendments to the cross references to other evidence of the Kai Tahu case because those had not reflected the final version of the evidence.

20 1220

Q. So the substance of your paragraph remains the same?

A. Yes.

Q. Is that right?

A. Yes, there is no change at all to that.

25 Q. Okay, look thank you for that.

EXAMINATION CONTINUES: MR WINCHESTER

Q. There's an additional copy here, Commissioner Edmonds which you're welcome to have of the 17 February version. So we're at paragraph 63 Ms McIntyre –

30 A. Yes.

Q. – page 26?

A. There was actually one amend – one correction in paragraph 63 which isn't related to the cross-references and this is that I noticed that in the fourth line I refer to RWP framework, that of course should be the RPW, the regional plan water.

5 Q. Thank you.

A. Then in the following sentence my evidence refers to Mr Ellison and Mr Whaanga's evidence, in fact that should just refer to Mr Ellison's evidence. Then if we move to paragraph 64 again there is a reference to Mr Ellison's and Ms Bartlett's evidence, again that should just refer to Mr
10 Ellison's evidence and that occurs twice in that paragraph and the reference to Mr Ellison's evidence that should footnoted there is to paragraphs 114 to 117 of his evidence and paragraph 133.

Q. 114 to?

A. To 117.

15 Q. And for footnote 59 to?

A. And to 133.

Q. Thank you.

A. And there is one more correction at, one the, sorry I'm just working out which paragraph we're at now, it's a couple of pages over on page 30 of
20 the amended evidence footnote 64 there is a reference to Mr de Pelsemaeker's evidence which has just got a question mark against the paragraph, that should, that question mark should be replaced by paragraphs 89 to 90.

Q. Was that at footnote 65?

25 A. 64.

Q. Thank you.

A. That's all.

Q. Thank you, so subject to those corrections and amendments do you
30 confirm that your evidence is true and correct to the best of your knowledge and belief?

A. Yes.

Q. Thank you, please remain and answer any questions from the Court.

CROSS-EXAMINATION: – NIL

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. Good afternoon, I just wanted to explore the amendments you've proposed to the non-complying policy just to understand what you intent by them and the reasons for those amendments, so perhaps the easiest thing to do is just to turn to 10A2.3 in appendix 4 and start from the top so that's if we start with A(1).

A. Yes.

Q. And perhaps this is the easy one, schedule 2(A) I did ask the Council's key witness about that and we turned up scehdule 2(A) and we see that there are minimum flows applying to catchments in scehdule 2(A)

A. Yes.

Q. So that's my understanding correct?

A. Yes, that's correct.

1225

Q. Sop the consents officer would turn that up and see whether the activities, the catchment area is identified in scehdule 2(A) and whether the activities that are proposed comply with the minimum flow.

A. Yes.

Q. So is there any amplification you need to make on that?

A. Well I'm –

Q. In terms of the reasons?

A. What I was trying to do in looking at ways to improve this policy is my, I began on that path basically because of the problem that has already been traversed in the court about having a policy which essentially just repeats the other of section 1.0.4(2) so it just refers to no more than minor adverse effects and the difficulties that takes us into in terms of applying that non-complying policy. So I was trying to identify circumstances in which, well this is also against the context of my evidence in which I've generally agreed with the Regional Council that there are some significant gaps still to be filled in terms of the information that is available to be ale to give us some confidence in making decisions about long term consents that will actually provide Te Mana o Te Wai and the difficulty of doing that in the current framework. So what I was looking to do was to find, to identify some circumstances in which we might have a degree of

confidence that there had been sufficient work done to be able to say:
“Well you know, we might have some circumstances here in which we
could subject to the particular characteristics of application, we could
potentially contemplate that we’ve got enough confidence that there won’t
5 be significant – well there won’t be more than minor adverse effects that
w can actually look potentially at a long term duration of consent.” So that
was my starting point and I found it quite difficult to try and identify those
circumstances and in the end the schedule 2(A) regimes seemed to me
10 to be really the only clear circumstance that was pointed to in the plan
where there had been a process which looked at the waterbodies more
broadly than just at that individual consenting, you know, what are the
effects at this point of take type approach so because in the development
of the schedule 2(A) regimes there had been a broader consideration of
15 what the needs of the waterbody are and there had been a broader public
process in terms of testing that information and looking at, you know,
some evaluation of the different values that different sectors of the
community have in relation to that, that this could be a circumstance
where we had a degree of confidence. Now I did have some reservations
20 about that which have been heightened from the evidence of
Mr de Pelsemaeker and others at the Regional Council in terms of the
robustness of the regimes in schedule 2(A) and from work that I have
been involved with with the Regional Council and looking at the work that
is starting to happen on the FMU processes now, then I have some
distinct reservations about whether some of those regimes in schedule
25 2(A) will actually give us the confidence that we are providing
appropriately for the needs of the waterbody. So I have since preparing
this evidence also had a look at the other alternatives that have been
proposed by other witnesses and the more I think about it the more I am
preferring the approach that Dr Hayes and Mr Farrell for Fish and Game
30 have proposed which is an approach that looks at what the degree of
change to the flow conditions in the waterbodies is. It seems to me that
there is a logic to that approach which gives us a bit more confidence that
we are sort, we are keeping in that, you know, in the area of where we
can have some confidence that the effects will not be more than minor so

I am quite attracted to that approach as a better alternative than what I've proposed here.

1230

5 Q. Okay but I think I'll just first deal with my questions so for now I thought we might just park A(2) and look at (B) because that deals with the schedule 2(A) maximum primary allocation.

10 A. My reasoning for that is essentially the same reasoning as I think Dr Hayes has talked about in his evidence, that a minimum flow requirement without an accompanying limit on the amount of allocation doesn't effectively look out of the needs of the waterbody because essentially you get into the situation where you have a flat lining of the approach, if you can take as much water as is available above that minimum flow then you're not actually providing for the natural variability of flow that is needed to support the waterbody so I felt that it was really
15 important to ensure that if we were going to take this sort of approach we needed to make sure that the limit on allocation was part of that consideration,

20 Q. So some of those primary allocations, in terms of the numbers that there are in schedule 2 they are basically exceeded by many, many times, are they not?

25 A. Yes they are and the implication of that would be that if somebody wanted to take this route there would have— it seems to me that it would, it's something that could potentially apply in a situation such as the grouped consent applications in the Manuherikia where the consent applicants have been working together and in terms of what they are going to do in terms of the regime across the catchment so in those circumstances where you have a number of applicants looking at things together then it is, I think possible for them to look at how their, the overall allocations that they applying for relate to those allocation limits in schedule 2(A) and
30 to see how they can work together to fit within that. I think if they, in the circumstance where they can't come up with anything to do that, we don't have any conf – we can't really have any confidence at all that they are not going to have more than minor adverse effects on the waterbody.

Q. So what's your thinking on this now in the light of what you've said about the evince of Dr Hayes and Mr Farrell?

A. I think the, the thinking behind it is essentially the same, I think Mr Farrell and Dr Hayes approach is a more precautionary approach and I support that more precautionary approach, I accept that in terms of trying to apply an allocation limit in this context, it's something that is pretty difficult to do if you are looking at individual applications individually. It seems to me that the value comes in if you are looking at something like that Manuherikia situation. I think where you are looking at an individual application which wouldn't provide the circumstances in this regime, there would still be the potential for the applicant to argue in terms of the other limb of s 104 to that in terms of that the effects are not more than minor and that's essentially where they'd be left too. I suppose the context to having what I accept as a very high bar for the non-complying activity is that – I think my evidence has hopefully made clear my view that in general we should not be at this stage of process B granting long-term consents. We need to be allowing the new planning framework to be developed so...

1235

20 Q. So that was another question I had perhaps it's a good time to ask it. Your reason for the 2030.

A. Yes, in having a look at the 2035 timeframe, 15 years, the situation in Otago is an interesting situation. In Otago until very recently there seems to have been absolutely accepted practice that people will get 35 year consents and because that has been the accepted practice then it seems also to have been – I suppose generally accepted that if you have anything less than 35 years, you're actually imposing some quite significant limitations and when I started looking at plan change 7, I thought, 15 years that's a lot better than 35 years.

30 Once I started thinking about it little bit further, I kept being reminded that that is actually – that situation is quite out of step with what's happening in other parts of the country and in the neighbouring regions that I think, as Mr Ellison has already mentioned this morning in Canterbury, it's very common that consents are granted for less than 10 years. I understand

the same is the case in Southland. The 15 year consent term while it is a significantly better situation than a 35 year consent still potentially takes you out beyond the life of the next land and water regional plan. So it still essentially means we're going through the development of a new framework and unless Mr Page is right and all of this can be dealt with in terms of consent reviews, which I suggest I don't agree with, unless you can do that then a 15 year term is still taking you into the next iteration of the planning framework. So it undermines what happens in this land and water plan, so for that reason I've recommended that the consent term be reduced to 10 years so then we can be certain that all the consents that are being granted between now and when the new framework gets put in place will be reassessed during the life of that plan.

Q. So do you see an issue with it being six years?

A. Issue with the controlled activity being six years?

15 Q. No, is there a reason for an additional four years for a non-complying as opposed to the controlled activity? I was just wanting to understand your rationale in terms of the additional four years.

A. The justification for having a non-complying path is that there are quite possibly some circumstances in which there may be a good reason why a longer duration might be able to be granted and that may be potentially some of the circumstances that have been raised by the parties who are looking at things like hydroelectricity and drinking water supplies. I have some reservations about the extent of the carve outs that they're looking for there but there are potentially some situations in there where there might be a good argument that a longer term is justified. There may be some circumstances in which we do have confidence that the effects are not going to be more than minor in terms of the way we are needing to look at effects under the new NPS which is I think a much stronger test than we have had in the past but there may be some circumstances in which we can be confident for example, if somebody is wanting to abstract a reasonably small volume of water from something like lake Wanaka where we can be confident that there are not going to be effects so there may be circumstances there in which it is reasonable for someone to be able to put up the argument that they could have a longer term. If you

don't do that then you end up being in situation of having a controlled activity and a prohibited activity and I think that's a pretty difficult thing to justify in terms of the framework that we work under the RMA. So I thought we need to provide a non-complying path. It's just how can we make that something that we know isn't going to get us into a worse state that we are in at the moment.

5

Q. So perhaps we could come back to A2 now.

A. A2 is essentially a circumstance such as the one that I was just referring to. For example, where you may have a take which has come from a tributary that is running into somewhere like lake Wanaka and the applicant's proposed shift the take from that small tributary and to then take directly from the lake. In that circumstance, there is clear reduction in the effects of that activity and similarly we have seen some applications recently of the type where somebody is talking about shifting from a tributary of the Mata-au to then take directly from Mata-au itself, which obviously has a lot more water as your Honour has mentioned this morning. It has quite a lot of water in it so in those circumstances as well. I thought it was useful to encourage applicants to be looking at those sorts of changes in their activities so that it's shifting us more into the sort of situation we're probably likely to be having to look at under a new framework when we're having to look at properly addressing overallocation. It seems to me entirely likely that when we get into that framework, one of the potential solutions that we will be looking at to reduce overallocation would be encouraging applicants to shift from small waterbodies to waterbodies that can accommodate a whole lot more water use so it's shifting a little bit in that direction essentially.

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Q. So what do you mean by reducing the environmental impacts? Is there any sort of magnitude of reduction and what environmental impacts would you be considering as part of that consideration?

30

A. I would be looking at it in terms of the policies in the NPS as the first stages the objective and policies in the NPS. I would be asking myself the question, is the shift going to enable us to better provide for te Mana o te wai and to better give effect to the policies in the NPS? That would be my starting point.

1245

Q. Now I think there was, there has been a suggestion earlier that there's a lot of work still to be done in terms of FMUs –

A. Yes.

5 Q. – in fact to work out what attributes and values you want and what you require to achieve those so how would that interact with what you've just said in relation to reducing environmental impacts?

A. I think the further we get down, get through the process of developing the frameworks for the FMUs the better equipped we are going to be to
10 assess those things. The approach that the Regional Council is taking in terms of their FMU programme is to do that work in parallel with the broader development of the broader land and water plan framework so there is some work, I mean in work on the Manuherikia FMU has started now, there has been work down on the Arrow and Cardrona – rohe sorry,
15 rohe rather than FMU, in the Arrow and Cardrona situation for example the Regional Council has actually identified a recommended flow regime at the moment that has no legal standing because it's sitting in the Council, it has gone to the councillors, it has some legitimacy I think because it's been through the process and it seems to me that as the
20 work in those FMU processes develops, I mean and similarly in the Manuherikia there has been quite a lot of work that has already been done at this stage in terms of identifying the values of the Manuherikia and the objectives associated with those values so I think as the work progresses in those all of that provides information that can be taken into account in
25 processing these consents, it's not, it's not information that has statutory weight but I consider that are still, it's still relevant information that can be taken into account in making those decisions, particularly when it has been through the community process that is involved in those FMU processes. So it will, it will be become easier to do this over the next
30 couple of years essentially I think.

Q. Thank you, Ms McIntyre.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

- Q. And I have some questions as well, also on the same provisions and I just wanted to understand your thinking as it is today, acknowledging that it might change when Regional Council files supplementary evidence.
- 5 And so just starting off with the last matter which the Commissioner addresses under the policy 10A2.3 and environmental impacts and you said you had looked to the NPS to describe, or for guidance on what are the relevant impacts and relevance of those impacts, Mr de Pelesmaeker had quite a different approach, he, he did not, when using – his
- 10 understanding of environmental effects would exclude matters which are otherwise permitted under the water plan, this was I think when we were in discussion about the RDA and there's got to be a reduction of environmental effects and we said: "what effects?" thinking does that then taken into an approach at an integrated way or potential effects of an
- 15 increase in land under irrigation. Initially he said yes and then he said no, you know it certainly didn't mean to somehow bring back into play if I could put it that way, effects which are otherwise permitted in this plan, the water plan. And so has what you got here, how does it drive consideration under the NPS?
- 20 A. That's a good question, I think we could include better direction on that, in that policy.
- Q. I'm just reflecting better direction because I think if you're wanting to continue with this, applicants would just simply say: "Well that's permitted".
- 25 1250
- A. Yep.
- Q. "Therefore acceptable, therefore off the table, so whatever therefore environmental impacts didn't mean those other things are permitted." I could see that argument being run pretty easily.
- 30 A. Yes, I have in looking at what is the sort of scope of amendments that is appropriate to make to this plan change –
- Q. Well there's that too and everybody's got to come back to this.
- A. And I have been very, very conscious of the fact that we don't want to turn it into something it isn't. It is a hold the line approach, we don't want

to – and I think it would be dangerous to try and pre-judge what other things that might come in development of the new framework and trying to try to develop that new framework through this plan change so I –

5 Q. Is this kind of like hold the line plus, this, what you've got here which is trying to make sense of a policy which frankly does not make sense, you know because it's a callants policy it's not actually a policy.

10 A. Yes, yes my concern in looking at this policy was the experience that we have had in terms of what is actually happening with the deemed permits and that was evident from I think Mr Leslie's, the figures that Mr Leslie provided earlier this week, the majority of the consents being granted and the majority of consents being applicated for are being applied for long term so clearly this non-complying policy is not working so I was focused on seeing how we might be able to tighten it up and give better direction, I accept fully that my suggestions are not the perfect suggestions and it is, it has been quite a difficult thing to try and work out how to do while not taking this plan change further than it's appropriate to take it.

15 Q. I had also been wondering whether it was a step too far, I can certainly understand the rationale from moving a take of a trip and into the main stem but that presupposes something about the health of the ecosystem in the main stem which, and the evidence for that would be what, and again, you know, I can also imagine you'll get arguments like for the Clutha main stem well that's just a large body of water.

20 A. Yes, I agree and I also have that concern, I think – I've had some difficulty in working out how you would, how to clearly draft this policy and from looking at the alternatives the other people have proposed I think everybody's been struggling with this a little bit. What I and some of the other witnesses have been trying to do is to see if we can tighten it up, at the same time we need to be clear that what we're not doing is making it a default position, what I was wanting to do and just in this was say was to get across that these are circumstances in which a longer term duration could be contemplated, it shouldn't be that it's assumed that a longer duration consent in these circumstances will always be appropriate, this is a non-complying activity you have to give it a full assessment in terms of the effects so these circumstances in which should be contemplated

25

30

but you would need to look at all those other things like what is the particular context of this application, what is the state of the environment here and what are the effects going to be so this is, but to try and draft the policy so that we were providing some clearer direction as to circumstances in which it might be contemplated without saying yes we will grant consent in these circumstances for a long term has proven to be a bit difficult.

1255

10 Q. No and I get that and I guess we're yet to see what's to come in terms of a policy from the region that follows the mandate of this executive so that might actually take some of the effort away but it's not to be inferred that Kai Tahu says that if you're taking water off a main stem then everything is okay.

A. No.

15 Q. No and I'm wondering whether that's actually part of the challenge of the words that we see here and then what did environmental effect mean and how would you run that in an application, particularly absent an objective that's actually articulating clearly an outcome for the environment, you know, it really is kind of a lot of words there but it seems to be a process driven, it's a process driven objective not process plus.

20

A. Yes.

Q. Okay so I think you're accepting that there's problems, potential problems with this but it's trying to improve what was there which I think is also what Mr Farrell's evidence is trying to do, it's a reaction to the original draft.

25

A. Yes, we're looking at what gains we can get essentially.

30

Q. Okay, there were my questions. So those are the Court's questions, does anyone want to ask this witness questions to understand the thinking behind where Ms McIntyre was when she landed on this page as opposed to where she might be now and I'm grateful, you've indicated that there's been a shift anyway at the commencement of your evidence. Mr Page?

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING NIL

MR PAGE:

I'm torn slightly, I mean there are questions that I want to ask Ms McIntyre but on the other hand I'm also conscious that we're going to get another draft on Monday of the proposal and it all might be a waste of time and so the questions
 5 that the Court had around the non-complying activity policy were obviously of interest of hear that now but –

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. It might change and it might.

A. Well that's right and so if you were wanting to deal with that policy now –

10 Q. Not really, I'm just trying, for my part was just trying to understand the witnesses rationale for this non-complying policy, you know particularly does this witness say that if you move all takes off trib then everything's fine from her clients perspective, answer, no this is a policy that is in response to, you know, the notified version of this proposed plan which
 15 otherwise it, yes, and I understand that but I just wanted to make sure there was, you know, I was clear in my own mind is there any inference as to what is okay to be taken from this and I think the answer to that is no, you shouldn't take that inference. This an (inaudible 12:58:18) to something which has been put up by the region. I think when you get to,
 20 you know it's over to you whether you want to ask some questions now but I would've thought when we get something from the region and everybody's had a chance to look at that and Ms McIntyre files some supplementary papers about that, you know, it's open to you to explore if there is a change in position, why the change in position if you like and
 25 put the original brief to any supplementary brief. Does that help?

A. I think it tells me I should wait.

Q. Tells you you should, very good. Also it's lunch time, but that's not a good enough reasons. Okay, tells you you should wait, very good, anybody else? Mr Maw you wanted to say something?

30 **MR WINCHESTER:**

Well Ma'am I certainly, just one question which might clarify or amplify where the Court seem to be going but I'm happy to wait for Mr Maw because –

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. He knows something?

A. No, I detect he may have a question along those lines.

Q. All right, okay.

5 MR MAW:

No I was just going to flag that the questions I was minded to explore today had been explored in the questions that the bench has put to the witness and it would be unfair I think for me to explore some of the thinking based on a draft I have in front of me but that the witness hasn't had a chance to consider.

10 THE COURT: JUDGE BORTHWICK

Yes no it would be actually.

MR MAW:

It best wait.

1300

15 THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

A. Well yes with that in mind I think it may just tease out your Honour's questions, particularly around clause ii of the policy and bearing in mind that Ms McIntyre, you've responded that the intention is not to signal that a main stem take is acceptable as an alternative to take from a tributary.

20 If you think about that issue that you're looking to address in II as between the concept of risk and effects, can you advise the Court where the balance lies in terms of your thinking, what you're seeking to address with II?

Q. Well, I guess and if we're looking at it in terms of risk and I think it's
25 probably quite helpful to look at it in that way is that we essentially I'm suggesting that the risks are likely to be less if you move to the lake or the main stem or the groundwater than the risks are in the smaller tributaries.

A. Yes, but not necessarily acceptable.

30 Q. Not necessarily acceptable. No. it needs to be considered case by case.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Understood. Alright. Thank you very much. We're going to see you back again possibly probably next week. That sounds like I'm really certain that I know what's going on in this hearing so probably over to you, Mr Maw. What's going on?

5

A. Things going on but pertinent to this issue the intention is to have a further running dog of the plan change so to speak circulated on Monday so we will work on that over the weekend with a view to getting that out to parties, really as quickly as we can. Once that occurs, think it's going to be a question of timetabling in terms of when we can sensibly get the planners back in front of us. It'll depend on how we undertake that process as to whether we just continue proceeding party by party or whether there's merit in having the planners either or called together or called sequentially. So I don't have a fixed view on that at all on that at present it's largely going to depend on responses to the next draft that's circulated.

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15

Q. Have you been circulating drafts?

A. No, not yet.

Q. Okay. Could usefully be done your (inaudible 12:02:40) giving supplementary evidence. When's that? That was indicated to be with us yesterday. So we're thinking now.

20

A. Yes, Ms Mehlhopt's working is with two witnesses at present on that with a view to getting that finalised as soon as possible for filing.

Q. Is that today or do you actually sensibly need the weekend? Because all of this impacts on other people too.

25

A. Can't immediately answer whether they will be there today. If you give me a quick moment I can send an email to find out. My understanding was that that evidence would be slogged in on Tuesday morning subject to other adjustments to the timetable being made to accommodate that.

30

Q. I think in terms of fairness to other counsel who may have questions, the timing is obviously critical. If we get that Tuesday it's not going to give them anytime. We even get it Monday, they will have other things to do on Monday in terms of this process so it's important to get an answer back and I guess counsel can reserve their position as to whether or not they

need more time than Tuesday for follow up questions as well. They're in the best position to be able to advise the Court. So let us know and update either during the day or 9am Monday and we can touch base with counsel as to how they position but it's not just counsel, it's any party which might have had an interest in this as well. So that's that as to whether we hear from planning witnesses sequentially really matter for the counsel to decide having an opportunity to review and again respond, being the world of difference between a response and reaction. I'm quite happy for a fluid hearing process and just taking witnesses as they come but it's about potential prejudice.

5
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A. Yes, there's a balance between perhaps the prejudice and the efficiency that's created by proceeding in that manner but until parties have actually had a chance to see what's now being proposed, we can't really advance that.

15 Q. It probably goes without saying whatever is actually proposed by policy planner needs to be checked through by a consents or regulatory person so that what's proposed is actually able to be implemented and clear, certain and enforceable. So I think that actually goes without saying and what I think from my own part, speaking for myself, would be quite helpful possibly also for the person who's fronting that brief of evidence as well, is a brief explanation of how they think it works because I know from Mr de Pelsmaeker we were working through how does it work and had that check been done frontend some of these problems might have actually revealed themselves. Frontend by Mr de Pelsmaeker this is how it works.

20
25 A. Yes, just so I'm clearing about that, the Court would be assisted if the consents planner was able to provide some comment in relation to the next iteration that comes through.

THE COURT: COMMISSIONER EDMONDS

I'm with that.

30

MR MAW TO THE COURT: JUDGE BORTHWICK

A. That's actually not too big a ask noting that we have time this afternoon with the person from the consents team to work through the new iteration

of the plan to make sure that this question about the practical workability can be addressed so we should be able to pick that up and file some supplementary evidence together with those changes just stepping through how it might actually work. Again, in terms of the outcome from this entire process assuming that some version of plan change 7 makes it through needs to be practically workable.

5

Q. That's right and there needs to be a clear understanding by the regional council how it would administrate. So it's those sorts of questions we've had. If you don't have a minimum flow and as a matter of discretion about a minimum flow, will there be a minimum flow? And the evidence was no and then the evidence was yes. When we were looking at effects so there is a new RDA provision about environmental effects, what effects? And the evidence initially was all effects and then the evidence was well, certainly not those effects which are permitted. So it's like what are the four corners of this? Is whatever's proposed sitting within it mandate and is now neatly confined within those corners and it's clear, certain and enforceable?

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A. The optimist in me is fairly well certain that those issues should be addressed in what's coming through. It's been useful highlighting those issues but again in terms of having the consents officers over that from the practical perspective of what do you do with an application that then comes in? What does it look like?

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Q. I understand this is what it requires of me as a consents officer. This is what I would ask.

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A. Alright. We'll do what we can do get that information through with further refinements. We can (inaudible 13:09:22) that way. Now, I haven't had a response from Ms Mehlhopt who may well be in transit at present back to here in relation to the timing of the other two briefs of evidence. I'll update the Court through the registry just as soon as I know when those briefs will be ready.

30

Q. Okay. Once counsel had an opportunity to consider them can advise whether Tuesday in practice is a suitable date for actually hearing that supplementary evidence or do you require more time to formulate questions or to take advice from your own experts as to the content of

those briefs and those briefs will include the consents officer briefs together with supplementary evidence from a policer planner to do with the PC7 rework of the PC7, yes, so you think the three will come together?

5 1310

A. Yes.

Q. Okay no, that sounds good. And then starting, looks like a Tuesday date for that and then planners, depending on timing can follow that and you can talk to Mr Cooper as to individual time restrictions because there may well be for some of the planners but Monday morning, otherwise who are we starting with?

10

MS WILLIAMS:

If I can assist your Honour, I believe that's the Ms Dixon (inaudible 13:10:48)

THE COURT: JUDGE BORTHWICK

15 And probably just the one witness maybe with Mr Ensor to...

MS WILLIAMS:

I'm going to be catching up with Ms Dixon later on today your Honour, I had already suggested that it might be wise to perhaps delay Mr Ensor for the Tuesday and I think I'll reinforce that to her, particularly now knowing that we have this additional information coming on Monday morning and knowing that Mr Ensor to have the opportunity to consider it and reflect and then present evidence on that.

20

Q. Well I suspect her first witness won't take all day so who's coming after that?

25 A. So then for the director general we have Dr Dunn who also needs, is wanting some clarity because he's wanting to get away by midday Tuesday at the latest.

Q. He's your freshwater ecologist?

A. Yes, after that we have Mr Brass and I've already flagged to the court Mr Brass' time and restrictions but we're working on those as best we can.

30

Q. And then, but he's your planning and –

A. So we just have freshwater ecology and planning, we didn't have any other.

5 Q. But you might not run your planning Monday, you might run, call him Monday?

A. So Mr Brass was expecting to present on Tuesday but again, given where we've now landed he actually may want to not present and go away, do Marlborough and come back on Friday but that would just require a bit of juggling of..

10 Q. That's okay. All right and then still looking to get to you Ms Baker-Galloway on Monday.

MS BAKER-GALLOWAY:

No Ma'am, I'm in the High Court in Wellington on Monday so I'm not going to be here and that might leave me, I'll just have to check in terms of questions for
15 Dr Dunn because I was banking on him being on Tuesday so I'll just work through that with my friends.

THE COURT: JUDGE BORTHWICK

Q. So we might get to you, the earliest we'll get to you is Tuesday.

A. And that's the earliest ill be here.

20 Q. So then we'll be looking to bring forward Wise Response maybe, yes that'll probably fill up Monday.

A. I was hoping to ask Mr MacTavish questions as well. That could be dealt with actually I can probably ask a favour.

25 Q. That's fine as well, okay no that sounds fine. Higher degree of co-operation on this hearing, no that sounds all good so we've got a broad batting order anyway for Monday and then coming back into the ORC case on Tuesday. Probably, possibly.

MR MAW:

30 Yes I'm just, I do have a slight update, unlikely to be today but certainly before Monday which is ambiguous so I will get greater clarity just precisely when they'll be ready.

THE COURT: JUDGE BORTHWICK

Q. Sounds like they're working in the weekend.

A. Undoubtedly.

5 Q. And of course these things are better well done than undercooked or overcooked as the case might be but well done. And I can't emphasis how important it is not to rush it, you know, to make it your best foot going forward. Thank you very much so we're adjourned for today anyway and back here at 9.30 on Monday. No, there's one more thing.

TE REO MĀORI FAREWELL

10 **COURT SINGS CLOSING KARAKIA**

COURT ADJOURNS: 1.17 PM

COURT RESUMES ON MONDAY 15 MARCH AT 9.37 AM**THE COURT: JUDGE BORTHWICK**

Good morning, just for the benefit of the record I will note as to who is in the room. So Mr Maw and Ms Mehlhopt for the regional council. Ms Williams for
5 the Director-General of Conservation, Ms Dixon for the Minister of the Environment, Ms Irving for Territorial Authorities and Mr Page for OWRUG, Mr Welsh for Trustpower. Any other party that wants to enter an appearance? Okay. Thank you. So quite a bit happening over the weekend and who would like to talk about that? So if you've got any issues you want to raise so I can
10 make a note of those.

MR MAW:

Yes, I thought I would for the record take the Court through the documents that have been filed, not through the documents themselves but highlighting what
15 has been filed and then secondly I intend to seek leave to file a further piece of supplementary evidence from Mr Wilson in relation to an answer to a question he gave when he was giving his evidence which turns out to be incorrect and it's material so I'll flag that.

THE COURT: JUDGE BORTHWICK TO MR MAW:

20 Q. And it's material? So that's Mr Wilson.
A. Yes, yes.
Q. Mr Wilson was one of those folk that I wanted to talk to you about this morning. Anything else you want to raise with the Court this morning before we commence?
25 A. No, those were the two issues.

THE COURT: JUDGE BORTHWICK

Anybody else wants to signal issues that you need to raise before we commence hearing? Who wants to talk about the evidence that has been filed and wants to talk about the expert conferencing? So we will start with the expert
30 conferencing first. It is my view and the view of Mr Dunlop that you will need a full day for the hydro conference and a full day for territorial authorities

conference. At the moment they are being scheduled for Thursday, Friday. I understand that the only impediment for a full day for hydro is that Mr Wilson is not available. I don't think that the advice as to his unavailability given in the memorandum of the 10th of March that he was unavailable is sufficient.

5 Although we now have an explanation from, I think probably you, Ms Mehlhopt as to why he is unavailable. So the Court has two choices. Either direct that he be there and ORC does whatever it needs to do in relation to its meeting or we reschedule the conference. So which way would you like us to go?

0940

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MR MAW:

The meeting that is causing the issue for Mr Wilson is one that has been long scheduled with multiple participants and he has signalled and we have signalled to the Court since this date was floated, his unavailability.

15 **THE COURT: JUDGE BORTHWICK TO MR MAW**

Q. And by signalling did you mean just including a two word indication that he was unavailable without any supporting explanation?

A. In terms of the way that the draft memorandum was put together, parties were invited to record the dates on which they were unavailable and all
20 witnesses recorded dates. Some witnesses recorded significant windows where they were unavailable. No witness had recorded any reasons at that point in time so the first iteration of the document simply recorded unavailability of witnesses.

Q. So when did you record that he was unavailable because he has another
25 meeting to go to?

A. It would have been on the Tuesday of last week to other parties and Wednesday of last week to the court.

Q. And you gave the explanation for his reason for his unavailability in that
30 memorandum? No, you didn't, did you? No, you didn't. Look. We're pouring in an enormous amount of court resources into this hearing and the view of the court was that we should be doing expert conferencing in the weeks that we were not sitting. We have tried to accommodate everybody by interposing the expert conferencing during the hearing and

that's with consequential impact on the schedule for the hearing. So how would you like us to proceed? I don't know whether somebody else can sit in on that meeting instead of him but the court can't organise itself together with many other parties around the availability of one witness. I don't care when the (inaudible 09:42:02). I've already indicated it should not be proceeding during the course of this hearing but trying to accommodate parties we've tried to do that with the inevitable impact on the court's schedule. So what do you want us to do? We're not going to give you a half day conference if it doesn't result a result. That would be a waste of time and resources. It's a full day. That's what you've been given.

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A. I will simply need to come back after the morning break in relation to that meeting. I've asked a number of times as to whether that meeting can be shifted and the answer I've consistently had back is no, that's a meeting that can really be shifted. It was shifted to accommodate the window for conferencing which was to follow this first tranche of hearing and there are a significant number of participants involved in that and again Mr Wilson's attendance at this conferencing is critical given his involvement in the schedule. At best I can do is to ask a final time in terms of whether that can be accommodated and if not we will simply have to find another date for the conferencing that was otherwise to start on the Thursday.

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Q. You will and you will have to do so as soon as possible. I don't even know as matters stand whether the court has been able to find a location for this conferencing given the amount of dealing as between parties but not looping the court in terms of its own resources and capacity to be able to secure venues. At least we have a commissioner. That is one thing that we've managed to secure for you but there's a lot of knock on effects across this hearing and for all of the participants as well so you come back by 10.30 at the latest as to whether or not the council can move its hearing or does this conference need to move and if so where is it moving to? So far, the only participants in the hydro conference are ORC and Trustpower, Is that correct?

A. Yes.

Q. Alright. Well, if it has to move it has to move, Mr Welsh and I really don't see why we're going at breakneck speed anyway over conferencing for Trustpower. It doesn't have to be concluded this week.

5 **MR WELSH:**

No, Ma'am. I haven't been pushing for that date but I just understood from the messaging from Mr Cooper that the preference was for it to be on the 18th and 19th and at one stage Trustpower was being vacated on because we're scheduled to be heard on Friday which may or may not happen.

10 **THE COURT: JUDGE BORTHWICK TO MR WELSH**

Q. Which may or may not happen. I know. One of the things that I'll come back to you this morning is formally in a minute is whether or not we can reallocate you to another week.

A. Ma'am, I will do whatever the Court provides. It was a suggestion even that we will be vacated to Cromwell which we would do if that assists. So I'm not pushing for that date.

0945

Q. Right.

A. It's just that I need to organise my witnesses and tell them and their various commitments but Ma'am, one of the options may be that perhaps that the Trustpower conference proceeds on the Thursday and perhaps the parties agree that hydrology aspects are discussed which Mr Wilson's not a hydrologist.

Q. No, I think you can have all your witnesses in. The differences between the parties on matters to do with hydrology are certainly unclear to the Court which is why the court wanted the conference to take place after the cases for the parties so the Court could at least tease out where those differences were lying. The Court doesn't know. So I don't know how sensible it is to have Mr Wilson there or not there and hydrology just proceeding. I don't know. That is why the strategy was to have the evidence called so we can start to have a clear understanding of the differences.

A. Yes, Ma'am, that's useful because the message had been coming back at least to me that the opposite was true –

Q. That we had a clear understanding?

5 A. – that the Court wished to prioritise the conferencing over the hearing of the witnesses. So that's useful, Ma'am.

Q. We need to get Mr Cooper back in the room but that is not the Court's view. Court's view has been consistently that we will conference during the weeks that we were off. It was the parties that had requested that the Court conference prior to the adjournment. I did not initiate that myself.
10 There was a lot of reasons not to do so but trying to accommodate you we've looked at it.

A. Ma'am, all I can say for myself is that I haven't pushed for the conference this week. I was trying to accommodate what I understood to be the directions of the Court and the Commissioner who had a preference that
15 it be prioritised this week so Ma'am if it doesn't work it doesn't work in terms of dates, but certainly I wouldn't want the Court to have the impression that Trustpower or I'd say ORC in respects of the hydrology have been pushing for the 18th or the 19th, Ma'am.

Q. It's not the case, okay. Good.
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MR MAW TO THE COURT: JUDGE BORTHWICK

A. Quite to the contrary those were the two dates that each of the council's witnesses were not available. Message had come back that those were the dates on which the conferencing was to happen.

25 Q. All of us are clear and we will make sure that Mr Dunlop and Mr Cooper are clear that the Court's preference for all conferencing was after the evidence in chief had been heard so we could see where the cross-examination lay as indicated, Mr Wilson, understand what the gaps were therefore I have a sensible conference. There was a request last week
30 that at least the primary sector be brought forward and then a request no hydro and territorial authorities need to leapfrog and away it goes. But it's not a sensible process. It's extraordinarily hard on the court to manage because we're only receiving work. We're not in amongst the discussions that happen between counsel.

A. The order just in terms of that issue was a function of the parties trying to respond to what we had understood the direction from the Court was to proceed next week with conferencing so I think we've been at cross purposes in terms of the dates and the timeframes.

5 Q. We've been at cross purposes. We are content to take the expert conferencing after the evidence has been called.

A. In a sense, the sooner the better provided we can get the right people in the room and Mr Dunlop has availability. If we can line those things up and we're doing all we can to do that as soon as possible because there would be some merit in having some of the joint witness statements from those experts back because it feeds into the planning response, particularly in relation to the schedule but again organising and making the arrangements is proving challenging but the parties are doing what they can with the availability constraints.

10 Q. Alright. So that we have a clear understanding moving forward what is proposed in relation to what I will call the primary sector conference on the schedule? The timing of that.

A. Next Wednesday, I understand is looking like a date that appears to work for all parties and Mr Dunlop.

20 0950

Q. Right, I think it's a two conference, not a one day conference, if you put inadequate time for your conference you're going to get a poorly considered result or an inadequate result and its just a waste of time and resources so next Wednesday, so Wednesday Thursday are all planning – well no, are all technical witnesses available?

25 A. That relies on Dr Davoren being available for the two days rather than the one day.

Q. Yes it does.

A. He had constraints over a two week period but was able to make himself available for that one day, he may be able to make himself available for a two days, we'll follow up.

30 Q. Do you know, should the Court sit at the convenience of individual witnesses or does the court sit with its work programme ahead is inconvenient as it is to witnesses and parties?

A. The parties need to do what they can do assist the court.

Q. It's a two day, I think it's a two day conference and that's with technical witnesses, now we have repeatedly suggested that the output of that technical conference needed to be communicated in person to planners, I don't see any arrangements proposed for that. I haven't changed my view so I'm going to direct it so that will be a matter for Mr Dunlop to manage whether all of the planners are present or just one or two, a representative who can then communicate to the other planners but there has to be some satisfactory process about communicating back to planners in person. Ideally the planners should be there observing but apparently that's inefficient for reasons that haven't been explained so have you got any comment about that?

A. The issue in terms of the planning participation is one of whether, of ensuring the technical witnesses have the opportunity to finish the technical work before the planning overlay is imposed or the planning view comes to part, in a structured way ideally the experts do their work and the planners then pick that work up and then say: "Well what does this mean for the planning framework?" My view is that the planners shouldn't be informing of influencing the way in which the schedule is being prepared in the sense that it's for the technical witnesses to work through the issues identified with that schedule rather than getting into planning issues at fundamental questions which ultimately the Court will have to address.

Q. Well I don't think the Court has actually suggested that the planners pile on it in on a technical conference but were there in the capacity of observing it. Now if that's not to happen there still needs to be clear communication by the technical witnesses as to the outputs of that conference. I have seen far too many times as a judge and practitioner when planners have simply failed to understand the salience or significance of some technical matter which has been conferenced or been communicated by expert witnesses, they've got to be on the same page whatever that page is in terms of a joint witness statement. So my suggestion is that if they're not sitting in and observing and that happens plenty of other conferences but if that's not appropriate that they observe,

that there is an arrangement such that the joint witness statement is communicated to the planners in person.

A. Yes that, it strikes me that this may be able to be addresses by having day 1 of the two day conference for the experts, day 2 the planners observing –

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Q. My, well, possibly or that there is opportunity at least for the second half of day 2 to observe what the outputs are. Mr Dunlop's preference is not to allow witnesses to disappear for three days before deciding a joint witness conference but rather that the statement be signed at the conclusion of the conference or at any other time as he directs and again the reasons for that are obvious, when people leave the room often their positions and thoughts change so that direction that you sought won't be made, the direction will be that you are to sign either at the end of the conference or at any other time as facilitator directs but there has to be opportunity for one or more planners to receive a briefing my technical witnesses as to what was agreed and why which should be the same as whatever's in that joint witness statement, that needs to be accommodated, they then can take it back to the rest of the planning folk, presumably they will need to take it back to the rest of the planning folk, who will then reflect on those outputs and in a facilitated conference, that's my suggestion, in the week, in one of the weeks that we're not hearing come together to review what are the impacts on the schedule, whether there remains one schedule, as there currently is applying to those three sectors broadly or whether there's going to be three schedules, I don't know but some reconciliation process will need to take place. So there needs to be a planners conference specifically directed on the schedule itself.

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A. Yes and I accept that. It's a question of how should the input be included in the planning framework in so far as they're of the view it should be.

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Q. Well, that's right. It's of course perhaps if required or if appropriate and of course one of the reasons that I flagged very early on before the hearing commenced and if you don't know what problem you're working on and what's that schedule going to look like anyway and that seems to

me to be something is the problem of the schedule is the problem and again I don't know because it's not really addressed in the evidence of Mr de Pelsmaeker but whether or not the Aqualinc methodology is part of that schedule I don't know because the words efficiency are now taken out. So that's your input problem. So planners are there at the input prior to the schedule because the schedule is just a method implementing the plan as well as picking up the outputs of the conferencing and then implementing those in some way as required.

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A. Yes.

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Q. So that was the process that we will try to wrap around this. So where are we going?

A. I think the first step is the expert witness' conferencing. I will talk to my friends over the morning tea adjournment in terms of whether there is a desire by each party to have their planner in the room for the duration of the conferencing or whether they're content to have two or three planners participate with a feedback loop then following that conference. The output of which will be a signed joint witness statement which will then be followed by planning conferencing. I think that's where we get to on this and timing again for the planning conferencing as soon as possible but in all likelihood in that window between the 1st tranche of hearing time and the 2nd tranche.

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Q. Alright. So a two day conference Thursday, Friday next week for the primary sector conference with a clear directions around which planners are to be in attendance and when in terms of understanding the presentation of the conference outputs and with a further planning conference specifically on schedules and the reconciliation – or probably be a reconciliation exercise after the three individual tranches of expert conferencing and how that is then picked up in the plan if in fact it should be picked up in the plan and that to happen in the weeks that the court's not sitting including Easter and to allow time for that I would've thought at least two days and the suggestion is that also be facilitated. More problematic is the question of your inputs into that process because I don't know where people stand in terms of the latest revision of evidence. Have you got any thoughts on that?

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A. I do have some thoughts but it would be premature for me to express those thoughts until I've actually received some feedback from parties in terms of where we're at. It's a moving feast in that regard. I'm optimistic we may have moved forward but I don't know yet.

5 Q. So Mr Cooper you've just come back in the room and there's been some confusion around conferencing. What's going to be clear is that hydro and territorial authorities will be given a full day to conference. There is no imperative that their conferencing take place this week. Court's view has always been that it follow the evidence but it seems that there has
10 been at least from the Court's perspective a desire to conference earlier than the hearing of the evidence so we're scheduling that into the weeks that we were not sitting with the hope that or expectation that by the time we got there that we would've heard the evidence, understood the differences and that with those differences in mind the parties could
15 conference. There's been quite a bit of confusion arising because parties have then requested primary sector go early and then there's been some leapfrogging with territorial authorities and hydro and then how might that be accommodated, though quite why they needed leapfrog anything I don't know. But plainly, counsel to get directions from its client. Morning
20 tea, whether or not Mr Wilson can be excused from this meeting but if he can't the conferencing for hydro will not take place on Thursday because they need a full day. My expectation around this process is when people are telling you their witnesses are not available that you will tell me why their witnesses are not available because lawyers know that the Court
25 would never just go, "Oh well, that's a pity." There has to be a very good reason why they are not available so lawyers know to be now communicating that in writing and giving that to me so there's likely to be some movement but we will see on the territorial authorities and possibly but certainly hydro. Coming back to hydro, you've got a client Pioneer
30 which has made a submission, yes, you, Ms Irving, I think. You're representing Pioneer or not?

MS IRVING:

No, I'm not. Pioneer of course operates hydro from form stands. That's possibly where you've got that mixed up.

5 THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Yes, that's possibly where that's – because I am concerned that there are the hydrogenators quite apart from Trustpower which have made submissions and their interests have to be taken into account but only Trustpower I think is calling technical evidence so I guess only Trustpower
10 can go into the conference and I thought falls and dam was generating hydro but there are likely to be, I suspect, privately owned hydro schemes as well. Would that be right? Do you know anything about that?

A. I don't, to be honest. I know Pioneer generation have consents but operate or exist beyond the term of plan change 7 so their interests are
15 only affected in so far as full stand deemed permits are subject to plan change 7 so that perhaps explains why they haven't actively participated in this process. But beyond that I don't have much familiarity with –

Q. And you're not acting for Pioneer in anyway?

A. – no, I'm not.

20 Q. Sorry, I think you've just got picked up where we were making enquiries as to who the other hydro operators were. We knew at least one and we thought there's possibly more and so the relevance of that question is why do we have a technical conference that addresses itself to Trustpower's own interest? Where those interests may not coincide with
25 Pioneer or may not coincide with other hydro generators but that's something you can assist us on, Mr Maw?

MR MAW: TO THE COURT JUDGE BORTHWICK

A. There's not much further we can add to that given the lack of
30 representation both by counsel and by having any technical witness available with respect to those interests. If we think about the expert witness conferencing there is no witness to put in the room for that interest. My recollection is there is no planning evidence called by

Pioneer in relation to the way in which hydroelectricity is considered through the planning framework so...

Q. There's just a submission only, is that right?

A. Yes.

5 Q. Alright, in so far as that there are other hydrogenators that have made a submission, obviously whatever the product is of that technical conference which then gets communicated to the planners, your planner at least is going to have to consider his position in relation to the other submissions in terms of responding to the output from that technical
10 conference.

A. Yes and Mr de Pelsmaeker is alive to that issue and when you look at the reasons given in terms of the response to hydro he has been careful to ensure that he's not just responding to the Trustpower interests and there were passages in his evidence talking about some of the other hydro
15 schemes. So there were mixed schemes my words not his, in terms of water being taken both for hydroelectricity but also put into races which is subsequently taken for irrigation so Mr de Pelsemaker's alive to this issue and we'll need to remain cognisant of the effect of any adjustments that might be being pursued by Trustpower insofar as understanding how
20 those adjustments or refinements might work with respect to other schemes.

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Q. All right, that's all I need to hear, thank you. So you're to come back after morning tea, you having had a chance to talk to your friends about the
25 timing of sequencing of hydro and territorial authorities, I don't see there being a problem with territorial authorities, safe to say that a full day is to be left for that conference this week.

A. Yes, I mean I had thought the logical order was the primary sector followed by the TAs and the –

30 Q. Well so did I but –

A. – hydro and –

Q. – it leap frogged over us and I really don't know why because I don't care to put it bluntly because I'm not going to see the products, I would not have thought until the planners had seen the outputs so it's, you know.

A. We'll work on that.

Q. All right, okay, good. Anyway, we're all on the same page hopefully. That brings us back to your briefs.

5 A. Yes so my two issues I flagged are still to be addressed, so the briefs that have been filed over the weekend and leave for Mr Wilson so I'll perhaps deal with what was filed over the weekend first.

Q. Yes.

10 A. So three briefs of evidence were filed and the first was a supplementary statement or evidence of Mr de Pelsemaeker dated 14 March. That evidence has two attachments which are marked up versions of plan change 7. Now in terms of the two attachments, the first of those documents shows tracked and amendments against the 4th of March version so it can be seen what's been removed out following what had been recommended in the reply evidence from Mr de Pelsemaeker. The
15 second attachment, attachment 2 is a tracked change version as against the notified version of plan change 2 which is a cleaner looking document in the sense that it doesn't have the additions that have subsequently been removed, it's just showing what's shifted from what was notified but the view was that parties and the Court would be better assisted by seeing
20 those changes from the reply version to understand what's been taken but also the plan change from what was notified. So that's the first brief that was filed, the second brief was a statement of evidence of Ms Gilroy dated 13 March, Ms Gilroy is the manager of the consents, or manager of consents at the ORC. Her evidence has attached to it at the back some
25 maps that have been discussed last week showing the various applications that have been lodged and where they have been lodged so that the Court can see spatially what is currently being processed. There are also some maps, a map on the very last page showing the consents that are located in schedule 2(A) catchment, so capturing the overlap
30 between the deemed permits and the catchments set out in schedule 2(A). Ms Gilroy will be able to step the Court through those maps in some more detail when she gives her evidence. And then the third brief of evidence is a statement of evidence from Ms King dated 14 March. Ms King is a team leader of consents and has first-hand experience as a

consents processing officer and has been dealing with deemed permits or applications to replace deemed permits that have been lodged, including recently so has the first-hand experience of implementing plan change 7 as notified and provides her evidence in relation to some of the challenges that have resulted from the application of some of the matters of control and discretion, or not discretion matters of control I should say.

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Q. All right and then you're going to provide another brief of evidence from Mr Wilson correcting any error which was an error that would be material in some aspect –

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A. Yes.

Q. – do you want to be drawn on that?

A. Yes I'm quite happy to and the evidence has been prepared, Mr Wilson gave an answer in relation to a question from my friend Mr Welsh in relation to the Trustpower permits and there was a question around whether the hundred or so permits were included in the 322 deemed permits that appear on the record, the Council team sought to show those permits on a map and it became apparent relatively quickly that those deemed permits were not entered into the system on the basis that the Council had understood that they wouldn't be pursued so it's not simply when one looks at the number of deemed permits that it's 322 minus 100 give or take, that's 322 minus the five that have been entered.

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Q. Right.

A. So that –

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Q. So this is questioning in relation to a report sent to the Minister?

A. Yes, it was, they were questions in relation to that report that has the 322 recorded and there were some discussion and it came up a couple of times last week in terms of whether the 322 was actually closer to 222.

Q. Yes, in terms of the scale of the problem?

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A. Yes.

Q. And I think it is relevant and that would've been the inference I would've taken.

A. Yes.

Q. And so his supplementary brief, unless parties oppose that, his supplementary brief is important I think to correct the record. Mr Welsh?

MR WELSH:

Absolutely Ma'am, it was one of those instances with one asked the question
5 without knowing the answer and it was simply a seeking a –

THE COURT: JUDGE BORTHWICK

That's not cross-examination.

MR WELSH:

No it's not but it was actually just trying to seek some clarification if that was the
10 case, I didn't know whether it was the case or not so I think that supplementary
evidence would be very useful because that's all I was after was the answer
whatever that is.

THE COURT: JUDGE BORTHWICK

All right, no worries, so that'll come in when do we think?

15 **MR MAW:**

We do have copies now so we can circulate that.

THE COURT: JUDGE BORTHWICK

All right no that's good we can do that. So I had some questions about the
evidence that you filed, looking for the hearing schedule and I'm not sure
20 whether it's the latest hearing schedule but we'd agreed to adjourn late last,
late Friday we'd agreed to adjourn Tuesday morning so everybody could find
some time in the schedule to actually look at the briefs of evidence and for quiet
reflection and to take advice from their witnesses as I understood the purpose
of the adjournment and the adjournments also needed by the Court so while
25 we have, the documents came in late yesterday and we've only had hard copies
this morning and so we hadn't sat down and studied the evidence and so need
an opportunity to do that as well. So I'm not sure whether that's actually
reflected yet in the hearing schedule but tomorrow morning is actually an

adjournment. What is in the hearing schedule, well firstly when were you intending to call those four witnesses, is that tomorrow?

MR MAW:

I was anticipating we might call them tomorrow afternoon so once the –

5 **THE COURT: JUDGE BORTHWICK**

Tomorrow afternoon, four witnesses?

MR MAW:

Yes.

THE COURT: COMMISSIONER EDMONDS

10 So the schedule currently only has two witnesses so.

THE COURT: JUDGE BORTHWICK

I'm not sure whether this is the up to date schedule.

THE COURT: COMMISSIONER EDMONDS

The one that I was given this morning?

15 **THE COURT: JUDGE BORTHWICK TO MR MAW**

Q. That's okay, tomorrow morning is an adjournment and we'll be calling four witnesses tomorrow afternoon in the Regional Council. So anyway, the plan change as notified and that being the plan change that was ratified by the regional council is proposed as I understand it to be amended by
20 Mr de Pelsemaeker, correct?

A. Yes.

Q. And so parties that have, submitters that have made a submission on the original notified plan are able to have that submission on the original notified plan, still taking into consideration and decided, correct?

25 A. Yes.

Q. Okay, that's what I needed to know, that's really important so the second thing is that somewhat unusually, Mr de Pelsemaeker talks about the

Council's position when actually you're to communicate that, what we needed to know is what is the view of the planner as a planning witness and so there's some confusion, there may be some confusion amongst the parties. Is this the view of the witness or is this the view of the council?

5 And you will understand the significance of that. How would you like to respond to that?

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A. The brief does express the view of the witness. The language perhaps hasn't clearly articulated that and Mr de Pelsemaeker will be able to confirm that when he's called tomorrow I would have thought so in so far as the way that evidence has been framed Mr de Pelsemaeker was participant in discussions but ultimately recognises it's his evidence and the council recognises it's his evidence and his opinion that he's giving so understand why the questions are being asked but again it's Mr de Pelsemaeker's evidence and his view being expressed.

10 Q. Okay. Good. I see you will need to lead that from your witness because if you don't I think other parties will in cross-examination.

A. Yes.

20 Q. Okay. So the status of the notified plan there is no walking that back. It's notified and the parties are entitled to make submissions on that and have that considered by the Court.

A. Yes.

25 Q. Okay. So then the other matter that arises is for the changes which are now proposed. Those would need to be changes which are being sought by a party to this hearing or within scope of that?

A. It needs to be scope for those changes and my understanding was that where changes have been made there was a reference to where the planner considered scope to exist but there does need to be scope for the changes.

30 Q. Alright. So there just needs to be consideration that whether that has been carefully done so that the Court in every instance can pick up a submission and go, "Yes, I can see where that arises."

A. Yes.

Q. Okay. There's probably going to have to be some legal submission around it as well.

5 A. Yes and in that regard I think it's important that parties understand that this is the evidence of a planner. It's not determinative of an outcome here and parties are still welcome to pursue the changes that they are seeking to plan change 7 from what was notified.

10 Q. No, okay. That's important and I'm glad that you've made that statement. The only other thing which I think still needs to be addressed by yourself and perhaps by the other lawyer's present is the status of those NPS objectives which are to be included without any further fee schedule process.

A. Yes.

15 Q. The NPS 2020 objectives, there's three of them and the planning witness says, "well, that's a matter for another plan." Is that correct in law? I just need to know what your thinking is around that and would be drawing on you also, Ms Dixon and actually all of the lawyers present to understand those three provisions or the NPS says and I can give you the references, one's fish passage, one's wetland and one is something to do with rivers. There are objectives which NPS say are to be included in a regional plan without any further fee schedule process. He says not and so I'm looking to you as counsel to guide us on the law to do with that.

20 A. He is and he says not as I understand it because the requirements are still (unclear 10:18:44) into an operative plan whereas plan change 7 is a proposed plan at this point in time but there's still a live question of what is the effect of the inclusion of those in the operative plan and then what might happen once plan change 7 assuming it makes its way through this process in some shape or form? What happens in terms of the inclusion of those objectives into operative plan change 7?

30 Q. So very much a matter for legal submissions because none of that – we can't expect (unclear 10:19:13) flavour of that at all actually from the evidence and because it is a matter of legal submission.

A. Yes, and very alive to that and the challenges with that and my friends are too so I anticipate you will hear something further about that during the course of today but I'm just cognisant that – I will call it the council's

reply at the end of the hearing in so far as there will be any form of reply. The Court would be assisted by a submission from the council in terms of what it's doing in that regard sooner than the end of the hearing then I'm happy to address that point directly much earlier.

5 Q. Yes, tomorrow I think will do. Actually much earlier.

A. Yes.

Q. Alright and I'm also looking for guidance from all counsel in the room also about the status of those three provisions and if you want the references I can look them up now or you might already know the references off the top of your head. Ms Williams you're looking like you know the references off the top of your head.

10

MS WILLIAMS:

A. Yes, your Honour. It's 3221 which is in the natural and the wetlands, 3241
15 which is the rivers and 3261 which is the fish passage.

THE COURT: JUDGE BORTHWICK

Q. I think that's right. Okay. So how do they get brought down into a plan change? Or can they get brought down into a plan change or an operative plan? Do they influence any outcome under this plan change or not? I
20 mean obviously those issues are very much alive for your client in particular. So I do expect counsel to assist and the regional council to address tomorrow. But any thoughts over the weekend as to how this actually impacts your evidence so you've got a breathing space tomorrow.

25

MS DIXON:

A. Just making sure I understand. You're not meaning in relation to 322,
324 but generally the timeframe of how we're going to manage that today.

Q. Yes, generally speaking.

30 A. I have come to the conclusion last night looking at the changes that Mr de Pelsemaeker was suggesting that it would probably not be particularly helpful to the Court to hear from either the Minister's planner or from the Department of Conservation, Director General's planner because they

need to get their heads around exactly those points that you have been raising and also to work out perhaps how much of their evidence is still relevant or whether it's been superseded and so on so my thinking was that probably wouldn't be particularly helpful to the Court to hear from them today. In fact, they may as well go straight to the adjourned period tomorrow morning when the planners are to put their heads together. Without any reference to anybody, I was actually thinking that it might be helpful to the Court to actually hear from the new witnesses this afternoon if they were available.

5

10 Q. If they were available whether we move straight to them. I was wondering how does your policy person's evidence sit quite apart from anything that Mr Ansell might say and they may need an opportunity to consider this?

15

A. We did have a meeting last night over a hot laptop as it were in order to try and work out exactly that question. Mr Hugh's evidence is reasonably high level and actually deals with this sort of bigger issues of how this was approached within the Ministry and what the Minister's views were and so on. She has taken the position in her evidence anyway that it effectively in terms of the actual drafting she is guided by Mr Ansell, who is the planner that's been called. My feeling is that her evidence could be given this morning and she's here if there were questions that subsequently arose it might be more sensible to hear her this morning and then perhaps for her to be recalled if that were necessary rather than to hold her over.

20

Q. We will start your case tomorrow if we get to the regional council's case today.

25

A. We do have an issue of availability for Ms Kohere tomorrow. We're very hoping that she could be heard today even if she does have to return at some point.

Q. Okay. Thank you, Ms Williams.

30

MS WILLIAMS:

A. (inaudible 10:24:01) availability constraints for the Director General's witnesses, your Honour, so Dr Dunn is available today and tomorrow morning only. Tomorrow morning we've not set aside to do the planning

thinking. I don't disagree with that but it does mean that we need to get Dr Dunn on today. Mr Brass also has a constraint because he has the other court matter in Marlborough for at least Wednesday and Thursday when he's involved in the mediation on the Marlborough plan on (inaudible 10:24:34). I'm not quite sure what it is because I haven't had any involvement but he has that constraint. So he's available today, tomorrow, Friday potentially but not Wednesday, Thursday. Coming back to his evidence in chief as provided to the Court, your Honour, again, a great deal of the evidence is commenting on the notified plan change and so it's not entirely irrelevant but it's less relevant than it was.

1025

Q. Well true except that he might like some of the bits back.

A. Yes.

Q. So that, yes, okay. Mr Page?

15 **MR PAGE:**

We have no particular constraints we're concerned about, we're happy to accommodate my friends in calling the evidence (inaudible 10:25:29) and DOC today. I had not anticipated asking questions of the Regional Council's new witnesses this afternoon but if that's what suits best then we'll do it.

20 **THE COURT: JUDGE BORTHWICK TO MR PAGE**

Q. Now one thing that occurs to me from last week you indicated that your client signalled a position change, I want to see it, well I mean obviously that was prior to knowing that this was coming along as well but we need to see it so we need to understand again where your case is tracking, either in relation to persisting with the relief as in Ms Darcy's evidence which is, you know, as per the submission or whether it's now going in a different direction which was what was signalled in court, we need to see it to understand the (inaudible 10:26:21) and direction of the questions.

A. Well I understand the Court's need about that, there is of course a difference between how expert witness is thinking in response to what they are hearing from sitting in the court compared with obtaining instructions to amend OWRUG's case. I can tell you that we have

arranged a meeting tomorrow morning to discuss OWRUG's position. So I can't communicate an instruction before then.

Q. So what is your intention going forward, both in relation to A) your client's instructions because you signalled a change last week –

5 A. Yes.

Q. – and B) and I don't, yes, it could well be that your client has a different view but whether Ms Dicey is on the same page is quite a different thing which is I think what you're signalling.

10 A. Well because OWRUG is a very large group of water permit holders to be fair having to consult to them and advise them about what has transpired and to take instructions is not something that happens in five minutes, so it's simply the case that they won't have had the time to receive advice either from Ms Dicey or from Ms Irving or myself about what has transpired and what they should now be thinking about doing and that's the purpose of tomorrow morning.

15 Q. Okay and so when will you be in a position to communicate back to the Court?

20 A. Well I expect to be able to communicate that orally tomorrow afternoon unless my client asks me for more time while they consider what their instructions are likely to be but in terms of filing a formal position document for the court to see and to have on its record, that's not likely to happen before, sort of mid to end of the week I wouldn't have thought but I'm hoping for the Court to have it this week anyway.

Q. Well you signalled a, quite a change in substance –

25 A. Yes.

Q. – last week.

A. Yes.

30 Q. I think it is only fair to the court, it is the court's expectations that that be now considered and documented, if in fact that is a change of position and it's only fair to the other parties, because otherwise the (inaudible 10:28:50) being asked in cross-examination will not be understood and the fairness of statements elicited from cross-examination which are incomplete in some sense in terms of where your client might be going could well be questioned so we need to know, has there been a change

in position from your client and we need to know, I would've thought, Wednesday which just sounds like a random day but how are we to understand what the importance, where you're going with the questions for any of the planning witnesses coming up is what my concern is.

5 A. Yes, I'm alive to what your concerns are but I am constrained by the speed of what I can give advice and obtain instructions and that is of course complicated by what we've received over the weekend.

Q. Well yes and that's the other factor.

A. Which my clients largely haven't seen so they need to be told about what that contains and give the opportunity to give me instructions about that.

10

1030

Q. All right, Wednesday morning, 9 o'clock, I expect, if there has been a formal change in position I expect that to be documented and communicated to the court and the other parties what that change is because that was signalled last week quite apart from any further changes which have been signalled now by the Regional Council. My understanding is that you'll take instructions on both those tomorrow –

15

A. Yes.

Q. – large group, as you say and I understand that as well, large group who's interests are not necessarily aligned but 9 o'clock Wednesday morning to communicate the position whether you are continuing with the original relief which I think is subject to jurisdiction and scope is open to you, like everybody else to continue with.

20

A. Yes, I will have something filed by 9 am on Wednesday.

25

Q. Right and then I want, that will be together with, if there is a change in position, what is that change and how that's going to be communicated and by whom in evidence as well and the time (inaudible 10:31:08).

A. Yes.

Q. All right thank you.

30

A. As your Honour pleases.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All right so where do we get to in terms of trying to make the best use of today?

A. I think we start with Ms Dixon for the Minister and hearing from her policy witness today, she's available and I would've thought we could proceed through with that evidence. In terms of Mr Ensor, there may be questions for Mr Ensor in relation to some aspects of his evidence in much the same way as we had questions of Ms McIntyre, or there were questions of Ms McIntyre –

Q. Just points of clarification, it's useful to get them out sometimes now.

A. Yes, and if it assists I can signal I have some questions which perhaps fit into that category and so we could use some of that time for that purpose but we probably don't need to if we can use the time usefully elsewhere so that's, in terms if we can get to the regional council witnesses today if that's a better use of time so that Mr Ensor only has to then appear once to answer the full range of questions that might be more efficient.

Q. Okay so what are you suggesting, that we start with Ms Dixon's opening?

A. Yes.

Q. Move to at least the policy witness?

A. Yes.

Q. And then..

A. And then question mark over Mr Ensor and perhaps we can have a discussion about that in the break as to whether that's a constructive use of our time today. We would then move to the opening from Ms Williams and here we would hear from Dr Dunn in terms of ecology. I don't know how many questions there will be for Dr Dunn, things may have advanced following last weeks questioning of Dr Allibone and we may be able to proceed to quite swiftly is my view with Dr Dunn so we may be able to proceed through that, Mr Brass like Mr Ensor, there may be some questions but not the full range. If we, and I'd need to check availability, but if we hold Mr Ensor and we hold Mr Brass we may then be able to proceed straight on to the Council witnesses in terms of the supplementary evidence which was produced over the weekend and have that produced to assist with parties understanding of that material, particularly Mr de Pelsemaeker's amendments to the, recommended amendments to the plan.

Q. All right and it seems to me that you're in a very similar position to Mr Page in terms of having a clear view as to the ambit of your case and your case it's actually the operation of the three objectives in the NPS.

A. Yes.

5 Q. It's just pointless going through this exercise unless we know where you stand and then can understand what the salience of the questions are.

A. Yes.

Q. So very much like Mr Page. So how will that then, so are you saying that you don't need to know that ahead of, in the policy planner, maybe for the
10 Minister or for the witnesses for Ms Williams?

1035

A. Yes with respect to the policy planner, my questions don't relate to the relevance of those three objectives, in relation to Dr Dunn so the council's position on the inclusion of those matters is going to be more of an issue
15 from a plan drafting perspective rather than the technical evidence perspective.

THE COURT: JUDGE BORTHWICK

Alright. Ms Williams and Ms Dixon are you happy proceeding on that basis that
20 we don't need to hear from the council first about the operation whether those three objectives from the NPS attached to this plan change. We don't need to know their position prior to moving to your policy witness and prior to moving to Ms Williams' witness or do we? I think it needs some quiet reflection. It's the same case as Mr Page. What is the case for the council when putting its
25 questions?

MS DIXON:

I have touched on it on my legal submissions, your Honour. I will just put to the RMA the relevant section. I am happy to proceed and hear what council has to
30 say about it later. I think we can proceed on that basis. Not sure what Ms Williams might think. She might have a different view.

MS WILLIAMS:

I have touched on certainly the fish passage matter in my legal submissions that I have drafted and I think we can proceed on that basis, your Honour.

THE COURT: JUDGE BORTHWICK

5 Alright. Very good. Mr Winchester you've put yourself up with all of the discussion, any thoughts?

MR WINCHESTER:

Very efficient, your Honour. It's been neatly encapsulated. I'm certainly quite
10 happy for the Minister and the Director General's witnesses to go ahead. I think it's a valuable use of time. Their evidence somewhat appears to sit independently. It's related to the case but not necessarily the relief so I think it's good use of time. Ms McIntyre will be available to come back this week if required subject to timing and I think she will be (inaudible 10:37:24) over the
15 regional council's evidence. I think it may assist to get the evidence on record obviously and possibly to have Mr de Pelsemaeker in particular available to give that evidence possibly today because everything else sort of flows from that in a way.

THE COURT: JUDGE BORTHWICK

20 Alright. Okay. Thank you. Mr Page?

MR PAGE:

(Inaudible 10:37:52)

THE COURT: JUDGE BORTHWICK

25 Happy? Alright. Ms Irving?

MS IRVING:

(Inaudible 10:37:55)

THE COURT: JUDGE BORTHWICK

30 Mr Walsh?

MR WELSH:

(inaudible 10:37:56).

THE COURT: JUDGE BORTHWICK

5 Alright. Any issues? Are you quite content moving that way?

MR WELSH:

Ma'am, I'm trying to learn by osmosis in terms of – I'm a little bit constrained. I spent large part of the weekend trying to catch up on the transcript but I'm very
10 conscious there were parts not included in the transcript that in terms of the in chambers discussion and I have tried to speak to my friends who're all busy trying to deal with their cases and all have slightly different views as to what transpired and where we are heading so I'm not sure not being here means I'm the less confused or more confused, Ma'am.

15 **THE COURT: JUDGE BORTHWICK TO MR WELSH**

Q. So what are you confused about? Has the directions around conferencing assisted today?

A. Absolutely Ma'am. The one matter I'm still a little bit confused with and I've tried. It's very difficult for a day transcript to pick up exact point but
20 there are some reference about the planners coming back this week perhaps for a hot tubbing. I just need to know that because I have a witness.

Q. No, well, no, somebody might have suggested that last week that they all come together in a hot tub and I didn't know that that would be necessarily
25 be good because each party has to consider their positions because even those that are generally aligned say with the Minister's position which seems to be now more closely – regional council's more closely aligned with the Minister, their interest are different and so I couldn't see the value in putting planners in a hot tub.

30 A. Thank you, Ma'am. It was just that that was one suggestion. The other matter I'm just still perplexed on is having received this evidence, is it the Court's expectation that the other parties will file further evidence?

Q. Could do if you wish.

A. Or is the Court willing to have that witness, the planner be led slightly to comment on the new evidence or the new plan change as recommended by Mr de Pelsemaeker?

5 Q. I'm in your hands. There is a direction that if you wish to file supplementary evidence you just need to tell us and you can do that or you can lead the evidence but I think where parties are changing their position it should be in writing so there can be no issue that the Court has or has not picked up from leading questions or cross-examination what the case was. So if you've changed your position in response to anything.

10

A. No, Ma'am I haven't.

Q. You haven't, okay so probably nothing needs to be filed but if you did both in response to this evidence or generally changed the position, it would need to be in writing so there is no misapprehension about what the four corners of the case is.

15

A. Yes, Ma'am. That's very useful. Thank you. I'm sorry that I had to take out the court time for my points of clarification, Ma'am.

Q. Thank you. Any other points of clarification which are needed? None. Very good. So Ms Dixon.

20

MS DIXON OPENS

(Inaudible 10:41:03) copy of my submissions in front of you? Now these were written over the weekend and printed yesterday about lunchtime so I'm going to probably not read some parts of them and I will interpolate to some extent as well in an attempt to respond to the material that was filed by ORC yesterday. It doesn't change the Minister's position but it might be helpful to the Court if I note some things on the way through.

25

So starting then, Ma'am, at paragraph 2, the Minister supports the intent of PC7. However, there are issues of drafting and substantive content with PC7 which need addressing and that I think remains the case. I will discuss these and proposed amendments to PC7 in these submissions. What I probably won't do is to discuss proposed amendments in any great detail in these submissions because that position has changed but I will talk about it to some extent.

30

The next session deals with background and I've started with the deemed water permits in Otago and I suggest that I don't probably need to read paragraphs 3 and 4. They're on the record in my submissions but I can probably take you
5 instead to paragraph 5. So at paragraph 5, I've made the point that the expiring deemed permits must be replaced by resource consents and applications must be lodged by 1 April 2021 or 1 July 2021 at the discretion of Council. That is that of course if the water takes are to continue that they must be replaced. As we've heard in the course of this hearing a number by various parties are in fact
10 being surrendered. Exactly how many deemed permits remain to be replaced has been the subject of some debate in this hearing. But it seems likely that allowing for some hydro consents to be surrendered, there will be approximately 230 authorising the take and use of water. That number is obviously not correct as we've heard this morning through the clarification about
15 how the consents to be surrendered by Trustpower, in fact, it (inaudible 10:43:31) included in the calculations. And I would actually refer your Honour to Ms Gilroy's evidence. The new evidence filed last night at paragraph 23 and 24 sets out very clearly the position for deemed permits, expiring permits, how many the council is processing and how they're dealing with them and it's
20 probably just fair to say it is a very large number, probably more than in fact we were anticipating. So going to the last sentence of that paragraph, his represents a significant proportion of primary allocation of freshwater in Otago. I think that position remains.

25 At paragraph 6, I've talked about the background difficulty which is that the regional planning framework against which these applications to replace water consents would be assessed It is common ground in this hearing that the operative Regional Plan is simply not adequate. It pre dates even the first National Policy Statement for Freshwater Management 2011 and has
30 effectively enabled the granting of 35 year consents which have locked in allocation in a way that would frustrate any attempt to address over allocation and environmental degradation in future. Over 80 catchments have no flow or allocation limits other than a region-wide default minimum flow of 50% of MALF.

And the next couple of paragraphs simply set out the, from the Minister's perspective what happened.

5 In 2018, the ORC intended to notify a significant plan change to set minimum flow rates for the Arrow, Cardrona and Manuherikia catchments. ORC paused this proposed plan change intending instead to progress a new Land and Water Regional Plan (LWRP).

10 In August and December 2018, the Minister wrote to ORC expressing concern about the decision not to proceed with the plan change. On 22 March 2019 the Minister met with ORC to discuss his concerns.

15 And that triggered the Skelton Investigation which I look at next. Probably not necessary unless you want me to take you through the conclusions, the focus of Professor Skelton's investigation, perhaps, just to go to paragraph 11.

THE COURT: JUDGE BORTHWICK

20 Q. I was going to just say do you agree with, or ask rather, do you agree with Mr Maw in terms of the relevance that the recommendations and the reasons for the recommendations made by Professor Skelton are relevant matters for this Court to consider?

A. In short yes I do Ma'am and actually I'm coming to that, I've got a specific section in my submissions which I do want to address you on.

Q. Sure.

25 A. So Professor Skelton anyway concluded that that there wasn't an RMA compliant planning and consenting framework in place and he made a number of recommendations, as we know.

SUBMISSIONS CONTINUE:

30 That pursuant to section 24A of the RMA, the Minister recommends to the Otago Regional Council that it takes all necessary steps to develop a fit for purpose freshwater management planning regime that gives effect to the relevant national instruments and sets a coherent framework for assessing all

water consent applications including those that are made to replace any deemed permits.

5 That pursuant to section 24A of the RMA, in order to achieve recommendation, the Minister recommends to the Otago Regional Council that it adopts the following policy and planning programme of work: Which is set out in the two bullet points at the top of page 5. Bur turning to paragraph 12.

10 Professor Skelton also recommended that the Minister initiate the necessary legislative process to change the date for expiry of the deemed permits of s413(3) of the RMA from 1 October 2021 to 31 December 2025. And I wanted to address that. So in terms of the Minister's recommendations.

15 The Minister was not in favour of changing the RMA to extend the date for expiry of the deemed permits which would have allowed applications to continue to be made under the old planning framework. The Minister considered that a 30-year transition period had already been provided (under legislation) to manage this issue, and therefore he preferred ORC develop a plan change by 31 March 2020 rather than Parliament intervening. The plan
20 change would provide an interim planning and consenting framework to manage freshwater up until new discharge and allocation limits are set in line with the now NPS-FM 2020.

The Minister wrote to ORC recommending both a new land and water plan and an interim planning and consenting framework that would apply until the LWRP
25 was developed.

30 On 16 December 2019, the Chair of ORC wrote to Minister Parker accepting recommendation 3: that it prepare a plan change to be an adequate interim planning and consenting framework to manage freshwater up until Otago Regional Council's Water Plan becomes operative. The letter states that "the focus of this plan change is to be the processing of applications for water permits (including those to replace deemed permits.)"

And I think it's worth just pausing there for a moment, your Honour, to look at that letter in light of Mr de Pelsemaeker's new evidence yesterday. Mr de Pelsemaeker at paragraphs 5 and 6 of his evidence talks about an extraordinary meeting that was held by Council I think on the 27 of November 5 2019, so that was the meeting that considered the Minister's recommendations and in his evidence he talks about exactly what was resolved at that meeting, the, and actually the minutes are on the websites, as is the agenda on the Council's website and I looked at them last night in light of this. And the reason why the extraordinary meeting is important is of course this is Council itself 10 saying: "This is how we want to conduct this plan change and accepting the Minister's recommendation" and following that meeting, the Council wrote the letter that I've just referred to and the letter is attached to Mr de Pelsemaeker's original evidence in chief at appendix E and it's also in the common bundle in volume 5, tab 12E page 1550 if you want to refer to it but the letter is in the 15 same terms as the, as you would expect, as the Council position as recorded at that meeting. And essentially what the letter says is that at the extraordinary meeting: "Council agreed to prepare and notify by the 31st of March a plan change to be called the water permits plan change that will provide an adequate interim planning and consenting framework to manage freshwater up until the 20 Otago Regional Council's water plan becomes operative. The focus of this plan change is to be the processing of applications for water permits, including those to replace deemed permits." And then the letter to the Minister goes on to set out five key principles which I'd invite the Court to have a look at in more detail but in essence, one of those matters is efficiency of time and cost for both 25 Council applicants and other parties and I will a bit later in my submissions actually come back to one of the other matters that were one of those key principles. So the submissions I'm making your Honour is that it was an understood position as between Council and the Minister but also it was Council's stated position that this was to be an interim: "an adequate interim 30 planning and consenting framework." And very much a transitional framework. And on that basis, picking up from paragraph 16.

Accordingly, ORC developed Plan Change 7 – Water Permits. It also developed a plan change called the Omnibus Plan Change (proposed Plan Changes 8 and 1) as it incorporated both discharge management and waste matters.

- 5 In February 2020, the then Chair of ORC asked the Minister to use his powers under s 142 of the RMA to call in the plan changes as nationally significant proposals as they had aroused widespread public concern regarding effects on the environment and involve significant use of natural resources.
- 10 On 8 April 2020 the Minister issued directions to refer the plan changes to the Environment Court for decision as proposals of national significance. On 6 July 2020, the Environmental Protection Agency publicly notified the Minister's direction and the plan change, PC7.
- 15 I think turn to actually look at what is in plan change 7 and that is what I am going to suggest I don't take you through, the position is moving all the time. Other than to make the point that in essentials, we are still dealing with the same thing, it's intended to be a plan change to address the deemed permit situation and those that will expire by 2025 and the same framework of, you
- 20 know, policies that are directed exactly at those matters are still there, the rules that bounce off those policies are still there so the detail is changing but not as it was set out basically as the plan change was notified. Instead I want to pick up at page 9, because I think it's important to talk about limitations on this plan change in light of the letter and the record of the extraordinary meeting that I've
- 25 just been talking about. So starting from paragraph 23, The Skelton Report and Mr De Pelsemaeker in his evidence expand on the significant resource management issues that Otago is grappling with: Lack of understanding about the state of the region's freshwater resources, and the effect of water takes on these resources; the Inadequacy of the current planning framework in terms of
- 30 giving effect to the objectives and policies of the NPS-FM 2020; Uncertainty around the environmental outcomes, limits and environmental flows that need to be established in accordance with the NPS-FM 2020; Allocation that may not prioritise first the health and well-being of water bodies and freshwater

ecosystems; and The pending expiry of a large number of water permits and growing demand for water.

1055

- 5 As I discussed with Mr De Pelsemaeker last week, these are not resource management issues with the exception of the expiry of the water permits that PC7 itself addresses. Rather, PC7 is intended to put in place a temporary, interim regime that will, use the expression we've all been using, hold the line, ensure that long term consents are not granted that will lock in over allocation, and provide a transition to a Land Water Regional Plan that itself addresses and resolves these issues.
- 10

In my submission, this plan change will fail if its transitional nature and these acknowledged limitations are not kept in mind. That is, Council will simply be unable to deal with processing the volume of consents and permit holders will be able to continue under s 124 of the Act under the deemed permit or existing permit parameters.

15

And I take onboard the evidence that has been filed and I'm sure whether it's Ms King or Ms Gilroy who talks about the resourcing up that council has done and I appreciate that is sizeable and the sheer numbers of consents that they are dealing with is acknowledged and how to actually deal with them in the time it is a recognised problem but it doesn't change my submission that fundamentally if this plan change gets too complicated what's likely to happen is that a lot of these consents continue under s 124 and therefore what the plan change is intending to put into place won't happen.

20

25

THE COURT: JUDGE BORTHWICK

- Q. I take it the specific risk there, if I could put it that way is that if they just continue under s 124, the deemed permits in particular then there is an opportunity to ramp up the taking pending the processing of the applications for resource consents. So that's the risk that's encapsulated by just continuing under 124 is an increase in the rate of take and volume
- 30

of take in anticipation of the plan change becoming operative if that's the direction.

A. Yes, using the –

5 Q. No, in fact, if it becomes operative they will just continue to use it up until their resource consents are processed.

A. Yes.

10 Q. It's this specific risk that environmental risks may increase pending the processing of the resource consent application because the system itself has now become bogged down with the sheer volume of applications made.

A. Yes and because the deemed permits in particular, the allocation of water under them is extremely generous of course. They operate from a different time. By today's standards, they are large amounts of water and that water can carry on being taken so the environmental degradation will continue and so on.

15 Q. Yes, I think that's what I'm asking you that in terms of the actual risk. From the Minister's perspective, if you bog this plan change down by looking for outcomes including positive environmental outcomes that will increase the time taken to consider and process the resource consent applications during which period there may be an increase in the use of the water and therefore an increase in the effect on the environment. That's the risk that you're actually addressing with 124 submission. Is that right?

20 A. Yes, yes, your Honour. I think it also defects the whole point of the fact that parliament said these deemed permits were to expire on the 1st of October 2021 and what this will mean is that actually they don't expire in practical terms on the 1st of October so whatever issues there are associated with the deemed permits and I think everybody accepts there are many, they simply continue.

30 Q. Alright. I think I understand.

MS DIXON'S SUBMISSION CONTINUES

So picking up at paragraph 26, It is required to be "an adequate interim planning and consenting framework and that's my emphasis. To manage freshwater up

until the time that new discharge and allocation limits are set". "Adequate" basically implies that it should do the job, be fit for its "interim" purpose. It can be better than the status quo, and that is the advantage of this plan change as opposed to simply extending the life of the deemed and expiring permits. An extension would have allowed a continued period of applying for consents under the deficient current planning framework and the likely granting of more consents of long duration which of course this plan change has the ability to stop. Further, one of the acknowledged deficiencies of the operative Water Plan would have been continued. That is, when renewing existing permits to take and use water, a consent is granted with a volume no greater than has been taken under an existing consent in at least the preceding 5 years which has allowed users to maximise their take in that period and artificially lock it in for consent renewal

But there is a balance to be struck between a plan change that rolls over the old rules and one that attempts to anticipate the full Land Water Regional Plan to come and I put it to Mr De Pelsemaeker that his description of wanting "to consider activities as soon as possible and bring them in line with the new Land and Water Plan" was risky. Anticipating the new Land and Water Plan is not the role of this plan change and the risk is that the applications, as we've been discussing, cannot be dealt with expeditiously because they are effectively being assessed against the framework to come. I will come back to that shortly.

That said, for the plan change to be "adequate" it must give effect, to some extent, to the National Policy Statement for Freshwater Management 2020 which I will turn to in a moment.

Finally, the essential approach of PC7 is precautionary and is supported by the Minister. That is, it is intended to curtail the potential for further increases in water use and further investment in land uses that rely on the consumptive use of water, until a fit for purpose freshwater management framework has been set under the new Land and Water Plan.

THE COURT: JUDGE BORTHWICK

We'll take the morning adjournment there. Also a matter for discussion I think over the morning adjournment is where have parties got to in terms of the scenarios to be proposed for the primary sector conferencing. They were due to the court on Friday. I haven't seen anything and I would expect now those scenarios to have been agreed. They're not with the court, you're not getting conferencing, so it's all part of your pre-conference work.

MS IRVING:

10 A list has been circulated and I think we're just waiting to see (inaudible 11:03:47).

THE COURT: JUDGE BORTHWICK

And that is agreement on a data set together with scenarios which – I think we've talked about testing irrigation type or infrastructure type because there's range of scenarios there together with – I guess scenarios as to land use and water metering seem to be the three things in play in Ms McIntyre's evidence. Now that should've been filed with the court so I want an update on that. Thank you. Otherwise, we're taking adjournment and we will get back to your submissions.

20 **COURT ADJOURNS: 11.04 AM**

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30

COURT RESUMES: 11.45 AM

THE COURT: JUDGE BORTHWICK

Do we need to know anything before we proceed with you Ms Dixon about any discussions over the morning adjournment?

5 **MS DIXON:**

(inaudible 11:46:01).

THE COURT: JUDGE BORTHWICK

Anything that Mr Maw wants to tell the Court?

MR MAW:

10 Yes I'll, there is an update to provide and Ms Mehlhopt has been working furiously over the break and can provide that update.

MS MELHOLPT:

So your Honour in terms of the primary sector expert conferencing we do have agreed, dates where parties can be valuable for that being the 24th and 25th of

15 March.

THE COURT: JUDGE BORTHWICK TO MS MELHOPT

Q. Is that next week?

A. That's next week.

Q. And what days are those? Tues- Monday, Tuesday, Wednesday.

20 A. That is Wednesday, Thursday is my understanding.

Q. Wednesday, Thursday and have you got a venue or are you wanting the court to find a venue?

A. We don't have a venue as yet so I can liaise with the court around finding a venue.

25 Q. Yes, okay so you'll need to, we'll be – I mean obviously having a venue is one of those important things which is why the dates are important as well, we'll feed that back to Carina Kelly who's the mediations manager and we'll say that those are the dates, 24· 25 and there's to be co-

operation as to the location of the venue. I'm not sure whether she's begun her search yet or she could've just been waiting for the days but unless anybody has serious objections ORC is one of the those potential venues, particularly if, unless objections because it's not neutral ground.

5 Any thoughts about that? No thoughts about that. Okay. Good, all right, so we'll leave that in hand and we'll let – so Carina, Cathy, Carina Kelly to know also was to know that plan for the primary sector next week.

A. And we were working through options for the hydro and community water supplies conferencing and we were working on the basis of the 30th and
10 31st of March but then if the Court is wanting to have that conferencing take place this week Mr Wilson, we have made further enquiries around the meeting that he is required to attend, he has had in, or approval from a manager that he can, for him not to attend that meeting, it does expose Council to some risk in terms of it's been involved in the process to date
15 and now Mr Wilson won't be able to participate but if the conferencing does need to go ahead this week that can be accommodated or if it follows the primary sector conferencing I have liaised with other counsel and witnesses are available the 30th and 31st of March.

Q. Well, there's no imperative for conferencing to happen this week other
20 than parties wanted TA and hydro to take place prior to the primary sector, we're agnostic because we're not expecting to see the outputs of those conferences until they're ready to be filed because they need, yes, it's a process to manager of Mr Dunlop, you'll have three conference outputs which are then transmitted to the planners which are then transmitted in
25 some form to the Court, there may need to be, as I said, reconciliation across the three, whether it's one schedule end up with or three schedules or something else entirely, I don't know but you'll have to think about the question of transmission, now it may well be that the parties will want to see the technical outputs prior to the planners, really looking for
30 your guidance on this.

1150

A. Yes and in terms of the sequencing of conferencing, I guess from the council's point of view. The preference would be to have that primary sector conferencing first and then the hydro and community water supply

conferencing. Now, the plan is for hydro and community water supplies are attending those conferencing days so they will be in the room and then a follow up planning conferencing session in the days between the 7th and 9th of April but I'm still confirming availability for those dates given other parties' planner's availability but in terms of the sequencing of it how we anticipated that that would work.

5

Q. Alright. Was that 7th and 9th ?

A. There's three days between the 7th and 9th of April that we're confirming availability for the planners to conference.

10

Q. With a two day conference for planners.

A. Yes.

Q. Alright. That sounds sensible subject to confirmation. That sounds like a sensible plan and if we release a minute to that effect it will be subject to further direction of Mr Dunlop.

15

A. Yes, your Honour and to update you in relation to the scenarios, counsel for OWRUG has provided a list of scenarios to and they've been working with Landpro on that. they have provided that to the regional council and Mr Wilson and Mr Leslie are working with that this morning and liaising with the other expert witnesses. We have a long list of resource consent examples and they're working through the practicalities of how the parties would work through that in conferencing and therefore the scenarios that they're working on. So that is being progressed this morning, your Honour.

20

Q. So there's a possibility that a conference is simply going to be killed by overloading the conference with the sheer volume of data and information which may not be particularly necessary to test the various proposals which are out there so that needs to be considered as well.

25

A. Yes and it depends on the expectations of other experts as to what they were actually physically going to work through in the room versus work done prior to the conferencing and how that works so the experts are talking to each other about that at the moment.

30

Q. So two observations. One is that there had to be an agreed data set and to get an agreed list of scenarios so it's not agreed then a list of scenarios.

A. Yes.

- Q. Preferably agreed but you can't get the list of scenarios so broad that you're going to kill that conference. That should not be an outcome of the list of scenarios but you have to be testing what are probable or likely scenarios that this plan change will need to respond to in some way.
- 5 That's just your first step and it should've been with us on Friday but I understand it's still being worked on. The second step and this is the step that I was going to lead Ms Dunlop was then what pre- ADR work has to be undertaken by each of the interested parties? So with that scenario and that data set being run your preferred methodology was how I saw it
- 10 working out with the exchange of data whether it's an excel spreadsheet, I'm not sure how that all works out but just say that the methodology is embedded into an excel spreadsheet that is run for ORC's witnesses and transmitted as such to the witnesses for the other parties who will do likewise. That may not be running off excel but we actually have to
- 15 understand what is the programme, the software or whatever which is underlying the preferred methodology so it's visible and so that everybody can satisfy themselves that what is being run is actually transparent and repeatable so it is a basis then go into conference. You don't want to run (inaudible 11:54:14) conference. I would not have thought anyway. We
- 20 won't allow it so that's the why you'll have to allow yourself some time.
- A. Yes, and that's what I understand they're working through at the moment in terms of the practicalities and ensuring that what is being worked through is worked through in a transparent manner as well and it takes time to work through each of those scenarios so they need to factor that
- 25 in as well.
- Q. So in terms of what the Court's expectations are firstly being on the same page of the data set and the selection of scenarios, is there anything that needs clarification as to what the Court's expectation of this process is firstly getting yourselves in the same page? No. Then secondly, there
- 30 may be and probably highly likely to be some event where parties then prove or test their preferred methodology using the data set and using the examples given as at least to form some basis for discussion and that that be circulated in a way that other witnesses can test the underlying

assumptions or perimeters. No difficulty with that? We're all on the same page? Alright. So you will be with us today about the scenarios?

A. They are working on that and I will get an update at lunch time about where things are at.

5 Q. Good, it's just that Mr Dunlop asked me at morning tea where were they so he's on top of that and he's chasing me so I'm chasing you so that's how it goes.

A. I will find out and update at lunchtime.

Q. Alright. Very good. Thank you. Anything else? No, okay.

10

MS IRVING TO THE COURT: JUDGE BORTHWICK

Q. Your Honour, can I just clarify that TA Hydro conference, we're now agreed will be the 30th and 31st of March.

A. I think so.

15 Q. Yes.

A. Yes, that's good. So subject to Commissioner availability, subject also to the court being able to put in resources such as the venue and other resources which are required. It will be running on the later days and on the matter of other resources courts made its requirements quite clear about what is to be in a room including also a scribe who is familiar with the topic for discussion. It's not really helpful getting in a planner or somebody else who has no idea what this might all be about, shouldn't be a witness obviously but somebody who's actually at least has a working knowledge of the methodologies being in the room as the scribe.

20

MR MAW:

Yes, that's certainly something the council's alive to and somebody had been identified that would have sufficient background understanding but who's not appearing in the case as a witness. So we will make sure that that person or

30 somebody like that person is available to scribe.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You might need to talk to folk here. The only other thing that came up in the memorandum that I was somewhat surprised was that parties didn't

require (unclear 11:57:38) response. Now, actually that's not your call, is it? It's a bit cheeky even saying that. So if I have a party who has called an expert or someone who can qualify themselves as an expert who has made a submission on a relevant matter, they're entitled to be there and ordinarily the court would direct them there. I had thought maybe Mr McTavish he was presenting (unclear 11:58:07) but it looks like it's Dr Renny who is representing (unclear 11:58:11) and Dr Renny is the advocate so I can't see that there would be a problem in principle of Mr McTavish if he has an interest and if wise has made a submission on point I can't see why they would be excluded and indeed I thought I had made this point clear when we were talking about this expert conferencing I had assumed that parties were bringing into and contact with everybody else who might have an interest who'd called expert evidence.

A. Yes, the issue as I recall was a question of whether it was the expert evidence and not given the way it had been framed –

Q. That's right. It looks like Dr Renny is the advocate.

A. – that being the case we will liaise with Mr McTavish and check as to his availability.

Q. Yes. Okay. Thank you. Anything else? No, except you, Ms Dixon for the rest of your submission.

MS DIXON CONTINUES OPENNING SUBMISSION

We were at paragraph 30, your Honour. I was about to talk about the legal framework and in fact really about two legal issues that I think arise. At paragraph 30, I've said essentially that the various planning witnesses have discussed the legislative framework that applies including Part 2 matters and they don't appear to be in contention. Objective 10A.1.1 (while it may need some tweaking and obviously that is still being worked on) achieves the overriding purpose of the RMA by facilitating the transition towards a new long-term management regime for the region's freshwater resources that will be contained in the plan to come. Regarding s 8, the Council has provided a memorandum which sets how the Council has applied Treaty principles to PC7.26 Te Rūnanga o Ngāi Tahu (the iwi authority) Aukaha (representing the Otago rūnaka), and Te Ao Marama Inc (representing the Southland rūnaka)

have expressed a level of satisfaction and comfort with PC7. And I think that was the gist really of Mr Winchester's case to you last week.

1200

- 5 The Minister's power to make the recommendation he did regarding a plan change under section 24A of the RMA does not appear to be in issue.

There are two legal issues I wish to address. The weight to be given to the Minister's reasons for making the direction that PC7 be referred to the Environment Court, but I should add in there, the weight also to be given to his recommendation regarding the plan change, and the appropriate approach to national policy statements in this plan change.

10

So the heading that follows: "Weight to be given to Minister's direction" should also say and recommendations.

15

On request of ORC, the Minister called in the proposal by way of his powers in s 24 and pursuant to s 142 RMA. Section 149U (1)(a) provides that the Court must have regard to the Minister's reasons for making the Direction.

20

"Have regard to" requires the decision maker to give genuine attention and thought to the matter.

In the Direction, the Minister stated that PC7 is a proposal of national significance and at 35 I have set out what is contained in the direction unless you wish me to I wasn't going to go through those.

25

So at 36, the Direction states that calling in PC7 as a part of a proposal of national significance and referring it to the Environment Court for decision would:

30

- A) assist the Council by allowing its staff to focus on developing the proposed LWRP; and

- B) avoid potential delays associated with the Schedule 1 process of the RMA that could complicate the development of a new LWRP.

In his opening legal submissions for the Council Mr Maw has explored the weight to be given to the Minister’s Direction and also the relevance of the Minister’s recommendations and the Skelton Report. He notes that the Minister’s recommendations do not fall within the matters listed in s 66(1) that the Court must act in accordance with when considering a change to a regional plan or the matters listed in s 66(2) that the Court must have regard to when considering a change to a regional plan. Therefore, the Court is not required to consider the Minister’s recommendations when considering PC7.

He goes on to submit that the Court should nevertheless have regard to the Minister’s recommendation when making a decision on PC7 as s 66(2) is not an exhaustive list of matters to be considered. He goes on to note that the Minister’s recommendations are relevant background material to PC7 and should be given weight accordingly. And then I have quoted Mr Maw from his paragraph 75.

THE COURT: JUDGE BORTHWICK

I just want to read that again.

MS DIXON’S SUBMISSION CONTINUES:

Mr Maw goes on to point to the directive powers in ss 24 and 25.

Finally, Mr Maw submits that given “the close link between the Minister’s recommendations under section 24A and the Minister’s reasons for making the Direction, and the fact that the Court must have regard to those reasons when considering PC7, it is appropriate for the Court to place weight on the Skelton Report and Minister’s recommendations when considering PC7.” And I adopt that submission.

THE COURT: JUDGE BORTHWICK

- 5 Q. Thank you, can I ask you, what is recommendation and what is reason, have you addressed that in your submission, what was the recommendation as opposed to what were the reasons, have you got a reference to that?
- A. The recommendation is the question of the way recommendation 3 is framed around the adequate interim planning and consenting framework to manage freshwater et cetera so the specific recommendation, the Minister made a number of course –
- 10 Q. Yes he did.
- A. – in terms of covering the whole approach –
- Q. So this submission –
- A. – but it's recommendation 3.
- Q. – so this submission is directed - so it's recommendation 3?
- 15 A. Yes.
- Q. Okay.
- A. That I'm specifically talking about there.
- Q. I might actually get that submission in front just to make sure that we're all on the right page, same page. So that was, this is attached to
- 20 Mr de Pelsemaeker's evidence?
- A. Yes, the letter, well the Minister's letter with the recommendations I think is appendix D to Mr de Pelsemaeker and then the Council's response following the extraordinary meeting that we were talking about earlier at which they adopt that recommendation 3 is –
- 25 Q. All right I'm just –
- A. – the volume 5, tab 12E CB1550 letter, so that's the recommendation I'm talking about that that specifically frames the Minister's expectations around what this plan change will do and then the Council's response affirming that recommendation.
- 30 Q. So I have now before now appendix D of Mr de Pelsemaeker's evidence-in-chief and that's a letter from the Minister, the Honourable David Parker, to the chair and councillors of the Otago Regional Council and your submission is not directed at recommendations 1 and 2 but is directed at recommendation 3?

A. In this case your Honour, yes, because that's the specific recommendation that deals with PC7 and therefore is relevant to these proceedings and I would also submit, in terms of this question as to whether or not Mr de Pelsemaecker is reflecting and adjusting his position to streamline the plan change more, whether he's reflecting his own view as an expert planner or whether he's reflecting where Council is coming from that if you look at what Council has said it is doing in terms of that extraordinary meeting and the minutes of that and then this letter to the Minister, in my submission he is reflecting the position that Council had intended to adopt, now that's not to say that every single thing that's in Mr de Pelsemaecker's proposed version of last night –

Q. Where you mean latest one?

A. The latest one.

Q. Yes the latest one, yes.

15 A. I would reserve some position around the drafting.

Q. Yes no I understood.

A. But it's heading, that is what Council intended by this plan change.

Q. Yes but I think also though that's what they intended and then they notified something that I think you described as being environmental plus so that's what they intended but the instrument, the planning document they notified went beyond that intention, that seems to be the, what are you saying?

20 A. It starts to and I was talking earlier about trying to get this balance between making this thing work and just kind of rolling over what was there and actually using the opportunity that the plan change provides to set some environmental bottom lines but nevertheless, ones that apply with certainty and don't require a lot of discretion on the Council, I'm going to come to that actually but a lot of discretion on the Council processing.

Q. In asking you the question though, I take it that there's no issue, that it is the notified plan that people made submissions on –

30 A. Yes.

Q. – and you know if they saw something in that notified plan and particularly in terms of a controlled activity rule and the matters of discretion there, or indeed perhaps the policies that they wish to advance but which the

Council's now or Mr de Pelsemaeker has retreated from, they can still advance that because that's a submission on the notified plan.

A. Yes.

5 Q. Yes okay. So I know that the direct – the submission is particularly directed to recommendation 3.

A. Three.

10 Q. And of appendix D which is the letter by the Minister and the reasons for that recommendation, when you're talking about the reasons for the recommendation and again I want to make sure that I'm addressing the right thing at the right time, the reasons are those –

A. The reasons are really set out, well they're set out in the Minister's letter with the Skelton Report and also reflected back to the Minister in a way in which the letter of the 16 December letter from the Honourable Marian Hobbs.

15 Q. Yes.

A. To David Parker, the Honourable David Parker.

Q. But the reasons for the Minister's recommendation are they those matters that you quote at paragraph 35 of your submissions? No that's a different document altogether isn't it?

20 1210

A. No, that's dealing with the calling in.

Q. Yes, it is, yes. So the reasons are those which are, the reasoning contained in the –

A. Is in his –

25 Q. – in appendix D as a whole?

A. Yes and particularly in his letter to Council containing the recommendation following his receipt of the Skelton Report.

Q. Okay.

30 A. Perhaps just one final point on that your Honour and that is to say that given the way that Council adopted the recommendation, the way they reflect the Minister's language back to him, we're talking about giving weight to something where in fact Council and the Minister are not inconsistent, they're on the same page, so giving weight to the Minister's

thinking is in effect applying what the Council themselves chose to do in any chase.

MS DIXON'S SUBMISSION CONTINUES:

5 So moving on then to national policy statements, we're all agreed a regional plan must give effect to any national policy statement. And the one that is obviously first up is the national policy statement for freshwater management 2020 which came into force on 3 September 2020. Despite its being the NPS-FM 2014 (as amended in 2017) that was in force when PC7 was re-notified by the EPA on 6 July 2020, it is no longer relevant.

10

The NPS-FM 2020 sets the direction for freshwater quality and quantity management in New Zealand. It states objectives and policies for the management of freshwater through a framework that considers and recognises Te Mana o Te Wai as an integral part of freshwater management. The NPS-FM 2020 requires the management of freshwater to prevent further overallocation and phase out existing overallocation.

15

The objective of NPS-FM 2020 introduces a hierarchy of obligations in Te Mana o te Wai. This hierarchy prioritises:

20

A) First, the health and wellbeing of water bodies and freshwater ecosystems and I know that you've been taken through this but;

B) Second, the health needs of people (such as drinking water); and

25

C) Third, the ability of people and communities to provide for their social, economic and cultural well-being.

30

Consequently, the NPS-FM 2020 requires a comprehensive review of freshwater management in Otago. Granting individual long-term consents prior to this process taking place, has the potential to make implementation of the NPS-FM 2020 more difficult (i.e. requiring the review of more resource consents). Importantly, given the first priority under the objective of the NPS-FM 2020 is the health and wellbeing of water bodies and freshwater

ecosystems, granting long term consents may undermine efforts to give effect to the NPS-FM 2020 through the new LWRP.

5 Importantly, clause 4.1 of the NPS-FM 2020 provides that “every local authority must give effect to this National Policy Statement as soon as reasonably practicable.” Councils have until 31 December 2024 to notify planning instruments that fully give effect to NPS-FM 2020.

10 All parties in this matter appear to agree that the NPS-FM 2020 applies. At issue is the extent to which it should be given effect in this plan change. The NPS-FM 2020 anticipates progressive implementation. Council accepts that until certain implementation steps have been followed, as set out in Part 3, the NPS-FM 2020 cannot be given effect to fully. Many of these steps require substantial tangata whenua and community involvement with regional councils.
15 Giving effect to the NPS-FM 2020 is also limited by the scope of submissions.

Given these factors, the clear limited intent of PC7 and the need to ensure that this plan change works in the interim so that the coming LWRP can address over allocation as required by the NPS-FM 2020 in future (by ensuring further
20 takes are not locked in for long consent terms in the meantime), it is appropriate that only the essential aspects of the NPS-FM 2020 are incorporated. Such an approach is in the interests of a regional plan change that is limited and responsive to the need to enable short terms to be imposed on the consents now being sought in large numbers. I understand that the Court is considering
25 this and the policies that may apply to such an approach. Now, I footnoted the policies that we have talked about this morning 3.221 regarding wetlands, 3.241 regarding rivers and 3.261 regarding fish passage and I’ve made a point in my footnote that given this morning’s discussion requires some addressing that to require the clause 1.7 of the preamble apply s 55(2)(a) of the RMA to require
30 the immediate amendment and inclusion of these clauses into the current plan and my point is that that does not mean these additions need to be addressed specifically in PC7 and I note that’s also the position that Mr de Pelsemaeker has taken I think in his supplementary brief of evidence.

1215

And my submission is that these matters are mandatory or they are required matters that must go into the regional plan and that is the effect of subsection (2)(a) of s 55. I certainly don't dispute that but that doesn't mean that it has to be this plan change that does it. My understanding is that councils have their own procedures for simply doing what the NPS anticipate which is that they put these into the plan other than through the schedule 1 process and there is no particular timeframe for doing that so I would imagine for example given that there's little bit of leeway about exactly the language that's used. It can be words to like effect as well as the exact language that's used in the NPS. I would've imagined that a council has to go through the process, for example of deciding where is the most appropriate place to incorporate these three new provisions into its regional plan given every regional plan has a slightly different structure so in my submission, I would assume that a council would work through that process and would do that itself through the regional plan without the schedule 1 process but not necessarily through PC7 either.

THE COURT: JUDGE BORTHWICK TO MS DIXON

- Q. Alright. We will think about that over lunch. It's not that the court is considering. The Court is simply raising this to understand when these things already are inferred to be included in the operative plan and/or this plan change because of the provisions in the NPS. Because if they are then how do they get addressed? So it's just closing again trying to understand what are the four corners of the problem we're addressing.
- A. And I suppose my submission is that yes, that is for the council to address but there is room for the council as to exactly how they do that. It doesn't have to be through PC7 which is different I think from the question about what happens in relation to Te Mana o te wai which I know you have discussed with my friends last week as well. I think the word used last week was "infuses". Someone used the word "infuses", must infuse the plan change because it is now absolutely central to the way in which the NPSFM operates. And I would submit that has to be correct but that again in a practical sense, that probably means what's going into this plan change when we look at the drafting has to be tested against that position.

It's not that anything in particular has to go in as a result of Te Mana o te wai.

5 Q. No, and I think that was the proposition I had last week to the court was in so far as that there are many different interests and I've forgotten how much relief we've got. Just say 20 different positions of relief, how does one reconcile that? And the proposition that I had is that that gets reconciled directly under the foundational principle not necessarily under tier 1 or tier 2 or tier 3 but the foundational principle itself because it's that which is infusing. My proposition is every provision of this plan change.
10 What's your thoughts about that? Right? Wrong? Or could it be better expressed or something different?

A. I think it's right but it doesn't direct any specific content in this case.

Q. No.

A. I guess the way I put it a moment ago, it means that whatever the plan is and the court lands on the drafting and the content of this plan change, it has to circle back and make sure that Te Mana o te wai is there and in any decisions that are made. Just kind of the first time we've been in this position exactly. I mean this is the new NPS.
15

Q. I think this is first time for this plan change but it's not first time for the Court because we've dealt with something similar in Southland and there the council in partnership with Ngai Tahu, the Court's decision was, had written into the provisions of the plan change, if you like with Te Mana o te wai infused in each and every provision so it was brought into account in the drafting and if that wasn't obvious and evidently it wasn't obvious to most parties then an interpretation section was inserted to make that clear.
20
25

A. Right.

Q. Whether that's the correct position here, I don't know because it's a different NPS but it may well be so that's really what I was seeking guidance about. In Southland it was important I think to have that interpretation section so that you just didn't get the objectives which we're bring into account Te Mana o te wai and ki uta ki tai into account under Southland. You just didn't get them being balanced out as two of 18 objectives and then their sense and sensibility lost in the great myriads of
30

objectives that are there. So that was that plan change but this is a new NPS and it seemed to me that again the thinking of Te Mana o te wai as a foundational principle was infusing all freshwater decisions and I thought that because of clause 1.3 of the NPS and in particular there is a sub paragraph 2 which says Te Mana o te wai is relevant to all freshwater management not just to the specific aspects of freshwater management referred to in this NPS so that Te Mana o te wai was to be brought to bear in the decisions on the provisions and submissions. That is that on all of the provisions which are in contest at this hearing. The foundational principle is being brought to bear to find a result.

A. That is the new direction, of course of this NPS as opposed to the 2014 as amended in 2017 version. But I think it comes back to the same point. We have a limited plan change that's designed to do a limited role and I'm not sure about the Southland plan change but I'm thinking it was on a larger scale.

Q. It was. Yes.

A. So given the position particularly that Ngai Tahu is taking which is that there is a kind of a bottom line – I may not be paraphrasing particularly well from Mr Winchester in his case but essentially that there is a kind of bottom line for Te Mana o te wai. It does need to infuse. It does need to be there. It needs to be part of the thinking but the kind of full effect of the NPS and the full expression of Te Mana o te wai will come later.

Q. Yes, as I understand the Ngai Tahu case that is the case, yes.

A. Yes.

25 1225

MS DIXON CONTINUES OPENING SUBMISSION

Finally at paragraph 50, I make the point that matters for drinking water is a matter that's also recognised as the second priority. Mr Ensor has suggested that it is appropriate to provide an exemption to the 6 year duration limit for drinking water in PC7. And no doubt that will be, you know, part of the planners review of the drafting.

30

Turning to the national policy statement for renewable electricity generation which has been with us since 2011, The purpose of the NPS-REG is to recognise renewable electricity generation activities and the benefits of renewable electricity generation as matters of national significance under the
5 RMA.

I've set out the objective, the key point of the objective in this context anyway, is probably the second part: "such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that
10 meets or exceeds the New Zealand Government's national target for renewable electricity generation."

The NPS-REG is also supported by s 7(j) RMA that provides that particular regard shall be had to the benefits to be derived from the use and development
15 of renewable energy.

As discussed with Mr Pelsemaeker the NPS-REG may be given effect to in PC7 without locking in large takes by hydro generation because such takes are not due for re consenting in the life of this plan change. For example, the Clutha-
20 Mata-au scheme (which includes no deemed consents) is not due for re consenting until 2042. Clutha was completely re consented under the RMA post 2001, as it was required to be.

Ensuring that renewable electricity generation, even small scale, is not curtailed
25 is also important in helping to meet New Zealand's renewable electricity generation target, which is referred to in the objective and which is now 100 per cent by 2030 to assist with mitigating the effects of climate change.

In my submission, the ongoing replacement of those hydro consents that fall
30 due in the life of this plan change can be accommodated (particularly those that are non-consumptive) and so give effect to the NPS-REG, given the limited scope of this plan change. Further, the appropriate place to recognise a national policy statement, given it's importunate in the hierarchy of documents, is in the body of the plan change rather than in the schedule as has been mooted.

THE COURT: COMMISSIONER EDMONDS:

Q. So could I just ask you to expand out your paragraph 56, what is it that you're actually suggesting in terms of the plan change?

5 A. It will depend on how the planners land I think on how to do this, one way I understand that they're considering is simply to provide that, an exception so that the six year consent term doesn't apply to hydro consents and that was my position that doing that would not lock in large takes of hydro water, it would hold that position until in fact those large takes need to be consented. So it's how, the planners are looking at exactly how you frame it within that but the effect would be to allow longer term consents other than six years, particularly for non-consumptive takes. The drafting is down to the planners.

10 Q. Right and so would that have some effect on the work that's being done on the schedule in terms of expert conferencing, how would those two things then relate to each other?

15 A. I think the way the schedule was approached was to put in a kind of exemption and what I'm saying is that this should be incorporated into the body of the plan change as a position that allows for longer consents for renewable electricity generation, particularly non-consumptive.

20 Q. And so would that be for everything that was due to expire between now the mantic date, the deemed permits and anything subsequent to that –

A. It would have the effect, it would the effect of applying to those. The submission is based on the fact that this is a national policy statement and therefore it's like the NPS-FM, it must be given effect to and coming back to, this is my point with Mr de Pelsemaeker, we can provide for hydro in that way that the NPS requires without having significant environmental effects given what we know is likely to happen within the scale of this, the time scale of this plan change.

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30 Q. So the devils in the detail in terms of framing, is that what you're suggesting?

A. Well it's took me that I'm not a planner so I couldn't actually say exactly how you achieve that outcome, I don't think that it's particularly difficult, I think the real question is exactly, if you're going to accommodate

effectively allowing some of the deemed permits to be turned into resource consents, exactly how do you provide for it and do you put it in the schedule as some kind of an exemption or do you put it into the body of the plan change as a policy position that says: “This reflects the NPS”
 5 does that make sense?

THE COURT: JUDGE BORTHWICK

Q. Is your thinking also contingent on that hydro not then being used for consumptive purposes, so after the elec – you know, what’s been put through the turbines that it’s actually returned to the river somewhere as
 10 opposed to being used for irrigation and other purposes elsewhere?

A. Yes, when I say non-consumptive we, it is, what is non-consumptive in this plan change is determined by the definition of what is non-consumptive, in this plan change so –

Q. In this plan change.

15 A. Yes, and there are, I know that there is an argument about the extent to some of the, Trustpowers I think deemed permits could be determined to be non-consumptive and I wouldn’t go there, that’s their position but Council would have to determine in its view whether those met the definition or not and obviously from the point of view of the NPS, there is
 20 much less of an issue if we’re talking about water that is returned to the same waterway within a comparatively short time space than if the water was taken somewhere else and returned to a different waterbody which is why I say that the position is, is more straight forward for non-consumptive than it is for consumptive uses. But that in this situation it
 25 may be something that Council has to consider because again we come back to the start of this plan change and the scale of the takes that we are, that are impacted by the plan change.

Q. All right.

A. So it’s an assessment, in my view.

30 Q. Have you got witnesses out there (inaudible 12:33:05)?

A. No, wasn’t intending to, we haven’t called – Mr Ensor looks at the question of how the NPS REG can be accommodated in this plan change but it’s more at a drafting rather than a hydrological approach.

Q. I think the planning witnesses are attending the hydro conference together with other technical witnesses.

A. Sorry, hydro, yes, yes, yes. It may be appropriate for Mr Ensor to attend the hydrogeneration conference with that in mind.

5 Q. If you have an interest and the witness has taken a view or your client has taken a view, it's not presumptive takes that some accommodation may be had under this plan change, has a view on what non-consumption means also, and I think there's some differences of opinion there, that it may well be that your witness should be there. I don't know, I mean I
10 don't know if you've got a legitimate interest and this and –

A. Yes. I'll talk to Mr Ensor about that over the lunch break.

Q. Okay.

MS DIXON'S SUBMISSION CONTINUES

So turning to some of the opposition to the plan change and some of the
15 suggestions that have been made about ways to deal with the issues that the plan change chooses to address, probably go through these reasonably quickly. The first is the proposal that the same outcomes can be achieved by way of s 128 review and this has come particularly I think from the Otago water resource users group.

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Section 128 of the RMA allows consent authorities to review the conditions of consent where there is a provision for review in a consent or where there is a need to align consent conditions with the levels, flows, rates or standard set
25 by a regional rule. It does not provide ORC with the authority to cancel consents and the process is costly. Also, ORC's ability to impose conditions to safeguard the health of freshwater bodies is constrained by the requirement to consider the financial viability of the activity under s 131 of the RMA.

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30 The Minister submits that a s 128 review is not a viable alternative to PC7 and it would not provide for short duration consents that the Minister is supporting.

Turning to the permitted activity framework which has also been suggested as an alternative. Some submitters have suggested allowing existing water uses to continue as permitted activities until the new plan becomes operative. Mr De Pelsemaeker addresses this and concludes that a permitted activity framework is not appropriate and he sets that out in his evidence in chief at paragraph 243. The cost of activity monitoring is typically borne by the community, It is unclear whether all water takes exercised under a permitted activity rule will achieve the purpose of the RMA, as the effects of these takes would be more difficult to control under a permitted activity regime; It is uncertain whether all existing conditions on resource consents to take and use water can be provided for and the Holders of a current water permit would lose the priority provided under section 124C of the RMA over persons who are not existing holders of resource consents, when applying for a new resource consent under the framework.

So the Minister does not support a permitted activity framework and for the reasons advanced by the Director-General of Conservation the Minister would be concerned about the environmental implications of the loss of priority and I'm leaving that to my friend on my left here to explore with you a little more thoroughly.

So applying the NPS 2020 as a s 104 assessment has also been mooted which of course would mean applying the NPS in the context of consent applications. The NPSFM is not primarily a consenting tool. It is not appropriate in my submission that an instrument at the apex of the planning hierarchy becomes simply a matter to be had regard to along with other consenting tools and documents. The status of any national policy statement in regard to plan making has already been discussed.

Has been a suggestion floating about that relying on 127 is a way to deal with these issues rather than PC7 but in my submission that's an inadequate solution. Water permit holders can request a change or cancellation of a consent condition under s 127 of the RMA but the effects which are to be considered are the effects of the change of conditions, not the effects of the consent already granted and it doesn't address consent duration.

And perhaps just one point I'd add in here having looked quickly at Mr Winchester's submissions at the end of last week that there is a suggestion that we've already talked a little about s 124 but s 124 could almost be deliberately applied and allowed to carry on. Mr Winchester's submission at paragraph 50 last week was that s 124 is not for the purpose of putting an application on hold for an indefinite period while existing rights are exercised without further scrutiny or regulation and in my submission that must be right.

10 So turning to the Minister's position. We've talked about the intent being a narrow plan change to hold the line et cetera. And as I discussed with Mr de Pelsemaeker last week really the framework was intended to be a carrot and stick approach. He confirmed that. the controlled activity rule would act like the carrot and it was created to provide applicants with certainty and to be an easy gateway, the quid pro quo for which was a short term consent (six years). 15 On the other hand, for those who wished to pursue a longer term consent, the bar was set high following that logic, the Minister submitted that the non-complying rule should, in fact, be a prohibited activity rule which certainly would've set the bar very high.

20

The Minister has retreated from that position and now seeks a tougher non-complying rule that provides for "true exceptions". I will come back to that in a moment.

25 So just dealing with the difficulties which the framework has shown us as it's started to be applied. Mr Ensor discusses the fact that the controlled activity rule has not, in fact, operated as a carrot or incentive to date. In part that is because while the effect of s 86B(3) RMA gives the notified controlled activity rule legal effect, the existing restricted discretionary activity rule tends to be the applicable one and the operative Water Plan also continues to have legal effect. 30

So the matters of discretion are set out in Rule 12.1.4.8 of the operative Water Plan covers a broad range of matters including competing demands for water, minimum flows and effects on groundwater and Regionally Significant Wetlands

which is likely to require a comprehensive assessment of effects on the environment to accompany any resource consent applications; not dissimilar to the level of assessment that's necessary for an application for resource consent under the PC7 non-complying Rule.

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Mr Maw and I took this from his submissions is suggesting that Council is likely to process these applications more as controlled activity than restricted discretionary consents discussing the weighting that Council will apply to the two plans. What is important I think is the point of view of the applicant, if application must be lodged effectively for a restricted discretionary activity, it may as well be for a non-complying activity with the hope of a longer consent term. An early decision, making the controlled activity rule operative, would overcome this issue.

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I floated that idea last week with Mr de Pelsemaeker and I think he was thinking about it and I have quoted the idea also with my friends around the room. Everybody can see that it's somehow or rather we could land a position for the controlled activity rule and it were possible to make an early decision on that rule that made it operative then that would take away some of this issue, the disincentive to use that controlled activity rule the applicants are experiencing. There are legal questions around doing that particularly depending on how early council might be asking the Court to make that rule operative and whether it was done by way of an interim decision, whether it could be subsequently amended. Everybody is thinking about it I think and I don't intend to address the Court on exactly how it might be done this morning but really rather to put the idea out there and if the Court is minded to look at the possibility of an early decision on the controlled activity rule, if we could get to a landing on it then that might be something that we need to address you on further, everybody at some point.

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THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. How does that controlled activity rule apply without prejudice to parties position and there's a lot of parties that say "reject the plan change" so there's that so the Court would have to go through the whole hearing to

get to the other end and having those submissions but if the primary relief is “reject the plan change”, how does that submission apply to that so the Court would have to be both deciding those submissions and get itself into a position to reject those submissions but that there has to be obtained change 7 part of which includes a controlled activity rule.

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A. Yes.

Q. So when you say your friends are thinking about this and does that include OWRUG whose primary position remains “reject the plan change”?

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A. No, this is conversation we haven’t had with OWRUG. You’re raising the very issues that are taxing us. We have thought about what it would require and effectively it would require the Court to make a decision that there will be a –

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Q. That’s the first decision.

A. – controlled activity rule. The question I think that is on everybody’s mind is, if you were to make an early interim decision that effectively made a rule called a controlled activity operative and especially if you were to do it before you have heard from all the parties, what is the ability to walk back from that and perhaps to tweak it, you know, to make changes to it later in the hearing and there’s been a little bit of sort of looking at case law to see whether, in the circumstances in which an interim decision is not a final decision and that’s what I was thinking, if we wanted to pursue we would need to look a lot more closely.

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Q. You would, I mean, just issues of fundamental acts is to justice, natural justice, then (inaudible 12:45:52), you know, how could the Court possibly make a decision without, it can make interim decisions for sure but how could it possibly make a decision even on an interim basis without having heard from the parties to this proceeding so I think that, I can’t, right now, I can’t see my way around that.

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A. Perhaps the point would be that it would be an early decision after you have heard from all the parties, might not be a decision that addresses the entire plan change but makes that rule operative ahead of the rest of the plan change, but on the basis of having heard from everybody.

- Q. On the basis of having heard from everybody and then the second element to that is, okay to what extent would parties be prepared to engage in a policy framework in a controlled activity rule that – a policy framework that results in a controlled activity rule without knowing, therefore what happens in the rest of the plan change, for example
- 5 Mr Page said that might be considering some merits approach under this plan change, well that would be policy – you know, some additional policy presumably and moving in a different sort of (inaudible 12:47:09) moving in a different sort of space for a merits assessment.
- 10 A. I (inaudible 12:47:14) talk to my friends on my right here they're all looking at me very dubiously but it's not necessarily that both couldn't be accommodated I would've thought, the point about the controlled activity rule is that if it operates as everybody would really quite like it to, you know, it's very straight forward, its just down to the planners, you know,
- 15 it's certain, it's almost like a: "I tick that box, I tick that box, I tick that box" then it may be that the other rules can flow from that and the parties can agree on what the controlled activity rule would look like. As I say, I'm raising this really in the context of the fact that it's such a, the existence of the restriction discretionary rule in the background in this plan change
- 20 is, from what I can see from the evidence that was filed yesterday, from the Council really is proving to be an impediment.
- Q. I understand that the evidence – I understand that evidence and I understand the timing issue as well and I guess what the Regional Council's case is now is that the matters of discretion in the controlled
- 25 activity rule have confounded the plan change somewhat because instead of becoming being process it's become process plus environmental so then again, that starts to look like your quite a large effort if you like in terms of getting the evidence right such that you've got a consentable proposal for the Council to consider. I don't know, we'll
- 30 have to see, I'm not sure what you want us to do at the moment, is that just flagging it and you might come back to it later on in the hearing?
- A. Yes, I think at the moment it's making the submission that the only way that, in my view, we can resolve this problem, this aspect of the controlled activity rule lies through killing of the irrelevant to old plan change, I'm not

suggesting to your Honour that you necessarily do that at this stage, I'm just putting the issue out there as one that the Court might like to think about how it could address as well. And this is one way, that is one way.

5 Q. All right well I'm not quite sure that I'm going to spend too much time pondering how I'm going to get to a controlled activity rule without actually determining the plan change. Now I don't see that it is the Court's role to step into this breach if, you know, here, rather that it's for counsel to raise the issue and to address the law, especially around the administrative aspects of the law and to place the Court in a position where it could be addressing this.

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A. The last thing I would want to do, your Honour. It may be that when the planners and counsel and so on meet, some kind of clarity around the controlled activity rule starts to emerge and –

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Q. So we have a planners conference which has been proposed for, I've forgotten what dates now, April is it? April, that conference was (inaudible 12:50:52) the schedules and as I've said this morning it's always been the concern of the Court that parties would go off in expert conference schedules when there are the inputs and (inaudible 12:51:03) are all at large. I don't know to what extent that really does impact the schedules, but it is a concern. We haven't actually yet allowed for time for conferencing and I think you're talking about mediation of the party's positions.

20

A. Yes.

25

Q. If you're talking about, you know, conferencing around the planning framework, you know the objectives and policies and rules, you need to be telling me this soon, talking about meditation around the same you need to be telling me this soon so we can schedule that in.

A. I was more thinking about the informal conferencing that you had –

30

Q. Always.

A. – suggested and supported and really thinking that we should be talking more.

Q. Absolutely.

A. And it may be that in fact we reach the point where that can then be turned into formal conferencing which will take us to the final stage.

Q. Yes, yes.

5 A. Just one last point on that your Honour, the last thing I would want my submission to be interpreted as meaning is that parties are in any way disadvantaged or not viewed fairly, obviously that would not be the Minister's position in this. It's simply looking at whether or not there is some way through this that would actually be something that all the parties would be comfortable with and which that the Court could then act on, find a way to resolve this particular problem that's arisen.

10 Q. And I, I suppose that would be on the basis that some permit holders, not all permit holders by any means, but some permit holders might've found a controlled activity rule which just simply turns over the existing consent subject to determination of actual usage highly attractive than having to bother to go down putting the case together, both under the operative plan and plan change 7 which does require quite a substantive body of evidence, presently under both plans. So it may have been highly attractive to some folk to have just rolled them over and sat on their existing rights for the next six years, is that what you're saying?

20 A. Yes.

Q. Okay.

A. And that probably leads me to the point that's made in paragraph 69 that it's how onerous the controlled activity rule had become, it think it became a lot less onerous last night, we get to entirely digest where Mr de Pelsemaeker has gone with his proposal but the point is that the more conditions it becomes the more difficult it is for the applicant.

MS DIXON'S SUBMISSION CONTINUES:

30 So at 70, the submission that I had made before that this rule needs to be certain, simple and involve the least amount of discretion or need for assessment on the consenting officer's part. And there was some discussion last week about if consenting officers are going to get into testing what might mean efficiency, looking at whether or not it's possible to move from races to spray irrigation or whatever, that is going to tie the plan change down.

Obviously it makes it difficult to process, or process consents rather. And I have said at paragraph 70 that Mr Ensor's evidence provides a track changed version but he may well want to update that in the light of everything else that's happened.

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So turning to the non-complying rule which requires a and use of surface water to "have no more than minor effects", I think by and large a number of parties think that that rule is not sufficiently stringent, Mr Ensor analyses it and again we may have moved beyond that point as the number of consents being sought and granted under this category demonstrates the problem with the non-complying rule and Ms Gilroy's evidence at paragraph 33 for example she talks about the fact that since PC7 was notified the majority of applications have been for 35 years. That's the problem. We're still back in that space, 35 years aren't being granted, I think it's fair to say but it's still the way in which this is operating.

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It should just come back to the controlled activity rule. Just one last point on that. I have noticed that the controlled activity rule that Mr de Pelsemaecker's putting up and I think the non-complying rule would certainly become truncated and streamlined and so on. We're getting our heads around exactly what the non-complying rule proposed yesterday actually means but at the moment, there is a slight concern that Mr Ensor and I were discussing last night that in fact it has gone too far perhaps in terms of not providing for exceptions, not providing for circumstances that might require something else and on that I am aware that this is very much an interim position. I had a quick look last night but a matter that I think we need to address, the planners need to address is that one of the principles that the Minister identified in his recommendation and which was reflected back to him from council under recommendation 3 was consideration of potential impacts on existing water abstractors so there has to be the ability in my submission in this non-complying rule to recognise the true exceptions, to recognise the impacts on water abstractors that you are in that level of effect. So the non-complying rule, we're thinking, must allow for something more than six years. It doesn't mean 35 years but there are situations and that's why the non-complying rule is there that allow for longer

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than six years in the right circumstances and that appears to be reflected in the position that the Minister and the Council took when all this began.

THE COURT: JUDGE BORTHWICK

5 Q. So in this instance we've got a policy which does actually look the Minister's submission, original submission but put a full stop as exactly. Put a full stop on the third policy is exactly where Mr de Pelsemaeker has put his full stop.

A. Yes.

10 Q. So the policy at the moment, I think from memory, says something about avoiding granting more than six years. It leaves open the possibility because you can apply as a non-complying activity. That consent applications will be made for greater than six years provided that and I would've thought it was open to the consents authority to grant longer than six year permits subject to the meeting of the second test in s 104
15 about effects.

A. Yes.

Q. So if the effects are no more than minor, whatever the wording is under that test, there is a possibility that I didn't see necessarily that the amended policy now forecloses on that but you're not so sure?

20 A. That was the question actually that Mr Ensor asked last night when we were looking at it. How does this work? What does that actually mean? And I'm simply making the submission that – and the Minister has moved away from the prohibited activity rule which would have that effect that doesn't want to foreclose that entirely recognising there will be
25 circumstances.

Q. Are you talking about applications which will meet one of the threshold tests for s 104D and in particular the threshold test pertaining to effects? Or are you talking about something else? And that's of course the difficulty with trying to imagine what that application might be is that you
30 can't and then something else or you think you do and something else comes through.

A. That's exactly right. That is the problem. We've tried to actually envisage what the circumstances will be. Maybe it's a question of drafting actually

and maybe when the planners get together everyone can understand exactly how that operates. At the moment, on the face of it, it looks like it could potentially more like a prohibited activity rule but as I say, that's on the basis of a quick look last night and I'm really making the point that the Minister's submission a rule that operates like a prohibited activity has kind of swung too far the other way.

Q. No, I saw that there and I was reading the submission from the Minister today and yesterday. The council now looks to have gone in the direction of the Minister's submission as to the wording of the policy and it may well be that Minister might have felt that where he put the full stop and deleting the balance of the words from the policy was a step too far as well. It could be just a drafting but may be important to understand from the regional council how it is that that policy is intended to implement to give effect to the objective so again to understand what are the four corners. I know from practical experience. So trying to imagine what that non-complying activity might look like is impossible. It's fraught with risk so it is better to have a clear statement of outcome with policies as to how that is to be achieved.

A. And if we are to hear from Mr de Pelsemaeker this afternoon, that may be something that he can clarify for us. Your Honour, I think I can stop there. I've set out the basic things that the Minister is now seeking by way of relief and the fact that we're calling two witnesses, probably one today and I think Mr Ensor more likely tomorrow. I think that was the outcome.

Q. I think that so will hear from your policy planner today and I think that we were then going to go back to the ORC's witnesses, is that what we're doing? No. We will hear from DOC first.

MS WILLIAMS TO THE COURT: JUDGE BORTHWICK

A. In terms of my opening, your Honour, I actually am quite comfortable and relaxed about when that happens.

Q. As your persons (inaudible 13:02:33).

A. The difficulty is Dr Dunn.

Q. Okay.

A. So if we're going to hear from the ORC witnesses today then and I have to say this is (inaudible 13:02:41) cup your Honour, I have not put this to anybody else. I wondered then whether we potentially could sit for an hour tomorrow morning to just make sure we got through Dr Dunn. That's just an option I'm putting out there. That would still mean that the planners would have time to work but just as I say, I've got this constraint with Dr Dunn. I need to get his evidence through.

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Q. Okay. So in terms of the parties case who do they really need to hear from next? Do they really need to hear from Mr de Pelsemaeker? And they do need to hear from the other witnesses but it's not critical that they go next. Would that be fair?

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MR MAW:

A. Yes, I think that to be the case.

15 **THE COURT: JUDGE BORTHWICK TO MS WILLIAMS**

Q. So that might still leave you a little exposed.

A. Yes, your Honour. So I guess I'm in your hands as to whether you're prepared to hear the Director General's witness without having heard the opening.

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Q. Okay. Rather not but when does your witness have to leave by tomorrow morning?

A. He needs to be gone by I think – he's handed me his schedule (inaudible 13:03:54).

Q. That's his tickets.

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A. His ticket. He needs to be at the airport by 2.40 so he needs to leave Dunedin by 2 o'clock.

Q. So I would think that we've got sufficient time to hear from your witness next, Ms Dixon then to hear from the ORC's planner then to move to your case in the morning. We will hear your submission and hear your witness.

30

Does that sound like a fair enough plan? Anybody got any concerns with that? I've got to get the DOC witness on and out.

MS IRVING TO THE COURT: JUDGE BORTHWICK

A. Our only constraint is catching up with our clients tomorrow morning.

Q. Yes, you do need to and I would like you to do that.

A. So probably I think we would prefer to deal with –

5 Q. Because we had actually booked in half a day off.

A. So 9 o'clock tomorrow morning is slightly challenging for us.

Q. No, no, fair enough. You've got a lot of people that will be in the room. So maybe we will hear from your Minister's witness next and we will start the DOC case and we will just have to go with the ORC case the following day in the afternoon.

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A. We can perhaps run in slightly late this evening if the court were able to accommodate that to hear from Dr Dunn.

Q. We will get to Dr Dunn I would've hoped but yes. Ms Dixon.

15 **MS DIXON TO THE COURT: JUDGE BORTHWICK**

A. The question as to sequence whether we hear from Dr Dunn before Mr de Pelsemaeker, is it?

Q. I don't think (inaudible 13:05:30) getting Mr de Pelsemaeker on.

20 **MR MAW TO THE COURT: JUDGE BORTHWICK**

A. Depends on how many questions for Dr Dunn and we need to deal with that constraint.

Q. We don't have any.

A. We need to hear from them this afternoon.

25 Q. Yes. Alright. We will see how we go. May be sitting late to get the region's planner on. Is that okay?

A. Yes, Thank you, your Honour.

Q. So we will hear your witness next then we will move to the DOC case so we can get the submissions in and the DOC witness on and we will interpose that with the planning witness for ORC, may be sitting late, just depends on how we go.

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A. Thank you, your Honour.

Q. Alright. Everyone happy with that. Very good. We will take tomorrow morning off because we said that and you've planned around that and we should.

COURT ADJOURNS: 1.06 PM

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COURT RESUMES: 2.18 PM

THE COURT: JUDGE BORTHWICK

Right, so I think we're with your first witness.

MR DIXON CALLS

5 KEITA SARAH KOHERE (AFFIRMED)

Q. Do you confirm that your name is Keita Sarah Kohere?

A. Yes.

Q. And that you are the director of the sustainable land use division at the Ministry for the Environment?

10 A. Yes, I am.

Q. And that you have provided a statement of evidence dated 5th of February 2021?

A. Yes, I have.

Q. That you confirm that you hold the qualifications, whakapapa affiliations and your role as outlined in paragraphs 8 to 10 of your evidence?

15 A. Yes, I do.

Q. Are there any corrections that you need to make to your evidence?

A. Yes, there are. First is on page 2 paragraph 8 I think it was an autocorrect so where reference is Waimate, that should be Waimakariri.

20 Q. So which paragraph?

A. Paragraph 8 on page 2 where I reference Waimate, that should be Waimakariri and Greytown should be Greymouth.

Q. Are there any other corrections?

A. Yes, on page 10, paragraph 52 where I've referred to four territorial
25 authorities, that should be five.

THE COURT: JUDGE BORTHWICK

Q. Five relevant territorial authorities?

A. Yes.

EXAMINATION CONTINUES: MS DIXON

Q. Subject to those corrections, do you confirm that your evidence is true and correct to the best of your knowledge and belief?

A. Yes.

5 Q. You've prepared a summary at the beginning of your evidence, will you either read it or speak to it for the Court, then the Court will ask you some questions followed by cross-examination.

10 A. I'm happy to read through the summary although noting the conversations this morning, perhaps paragraph 5 and things have moved into perhaps a different direction, so as a record I'm happy to read that. Kia ora tatou, in 2018 the Government announced its programme to restore and protect New Zealand's freshwater which includes an objective to reverse past damage and bring New Zealand's freshwater resources, waterways and ecosystems to a healthy state within a generation. The national policy
15 statement for freshwater management 2020 is a key part of this programme. NPS FM 2020 strengthens and clarifies Te Mana o te Wai by providing direction on how it should be applied when managing freshwater and imposes a hierarchy of obligations that means prioritising the health and wellbeing of water first. The 2019 scout and investigation
20 found the current ORC planning framework was not fit for purpose and a new regional policy statement and regional plan needed to be developed to appropriately manage the expected deemed permit replacement applications. Following the investigation, the Minister for the Environment wrote to Otago Regional Council recommending both a new freshwater
25 plan and an interim planning and consenting framework. The Ministry for the Environment on behalf of the Minister has submitted in support of plan change 7 to the regional plan water for Otago PC4, PC7 but has concerns about the rigour of the notified non-complying pathway provided to grant consent for longer than six years. The Minister seeks to ensure NPS FM
30 2020 is given effect not just on paper in the new plan but more importantly given effect in practice by addressing overallocation and bringing waterways to a healthy state within a generation. This will not be possible if significant volumes of water are locked up in existing consents until 2035 and beyond. As earlier referenced, number 5, as currently drafting,

noting the evidence that was loaded last night, the non-complying pathway is not sufficiently rigorous and provides for an outcome that does not give effect to the NPS FM 2020 or the objective of plan change 7. I support an amended non-complying pathway that includes a test that will limit the ability for consents to be granted for more than six years except in the most exceptional circumstances. This will allow for a timely implementation of NPS FM 2020 that can consider much of the water held under current deemed permits.

Q. Thank you. No questions for us so we are with ORC.

10 **CROSS-EXAMINATION: MR MAW**

Q. Thank you your Honour. Good afternoon.

A. Kia ora.

1425

Q. Just one question from me and it relates to paragraphs 4 and 45 of your evidence in chief and perhaps I can take you to paragraph 45 where you've dealt with the issue in the body of your evidence. This relates to the NPS2020 and the desire to restore ecosystems to a healthy state within a generation. Now the word generation has been interpreted differently in different contexts and this National Policy Statement doesn't in and of itself provide further guidance or direction. Can you describe to the court what your understanding of the use of the word generation in this National Policy Statement to mean? What period of time are we talking about?

20 **THE COURT: JUDGE BORTHWICK**

Q. First also the clause that the generation is actually referenced perhaps so I know exactly what you're looking at. What clause references the word generation in the NPS2020?

A. Your Honour, I can't seem to locate the actual clause. However the objective around when we're talking future state and future generations are interpret in transit between RMA and the policies being now and in the future.

Q. Is there something in the NPS that says you've got to sort it within a generation?

CROSS-EXAMINATION CONTINUES: MR MAW

5 Q. Reference is picked up in the framework clause 1.3 and if I can take you to the six principles. It's in paragraph 4. Do you have the NPS in front of you there, 4(b) talks about present and future generations?

A. And also in paragraph E as well.

THE COURT: JUDGE BORTHWICK

10 Q. So is your evidence that present and future generations means you've got to – I'm not sure whether you have to do all of these things but anyway you have to do something in relation to water within the generation, return it back to a healthy state within a generation.

A. That's right. There's been many public statements made by the Minister around that wording "within a generation."

15 Q. Within a generation, it might have been. I'm not sure what the status of the statements are. So I would not have interpreted that wording on its face as being within a generation. What do you think a generation is? Ngai Tahu's got a particular view on what a generation is.

20 A. I wouldn't like to put a number on it. I think again the principle around intergenerational restoration is where the generational conversation happens so I would go around children and children's children.

Q. So intergenerational so not within a single generation, like your generation or my generation.

25 A. And that I guess would go where you're starting the counting of yours or my generation so perhaps you may be a different generation to mine, with respect. So again, not a timeframe, we're looking for intergenerational change consistent with overarching Resource Management Act objectives around intergenerational responsibility so I wouldn't want to put a timeframe on it however there is an understanding from the Minister
30 that change will take time, it's not an immediate, it's not going to be we write an NPS and then tomorrow it will be enacted, there's a recognition

that some of these changes will take time but then also we need to make some immediate changes if required.

1430

CROSS-EXAMINATION CONTINUES: MR MAW

5 Q. So as you read and as you understand the NPS and when I think about the long-term visions for freshwater, is it your understanding that those long-term visions again need to be given effect to or implemented within a generation as you understand that to mean?

10 A. The vision I think the process as determined by the NPS for, to give effect to Te Mana o Te Wai, the process that councils will inevitably go through with with their constituents and mana whenua will clarify what that vision is and should be as opposed to me dictating now what that would be.

15 Q. So when we think about long-term visions for freshwater, the NPS does provide some assistance, if I could take you to clause 3.3 and there we see in sub-clause 2 that the long-term visions may be set at an FMU part FMU or catchment level and we see that they must set goals that are ambitious but reasonable and perhaps importantly for this line of questionings: "Identify a timeframe to achieve those goals that is both ambitious and reasonable for example 30 years after the commencement date." So is it that language that equates to your understanding of what a generation might look like, so that's the length of time we're looking at in terms of the chains that this national policy statement is seeking to achieve?

20

25 A. Yes obviously subject to the stakeholders that councils as authors of plans need to develop with their constituents so for example Otago's long-term vision may be 30 years whereas you may have Canterbury who develop a vision that may be 100, for example.

30 Q. So thinking about that, is it your evidence that the NPS doesn't itself set the timeframe by which the achievements are to be made and improvements?

A. Again, going back to the – and I'm sure there's a legal argument around these numbers and where we go with that but the process with that each region will inevitably go through to identify and land on a vision for the

region and it's freshwater management should provide some clarity once you've got your plans ready.

CROSS-EXAMINATION: MR WINCHESTER

Q. Tēnā koe Ms Kohere.

5 A. Kia ora.

Q. I represent Nga Tahu Ki Murihiku, Kai Tahu Ki Otago and Ngā Rūnanga or Nga Tahi. I just want to pick up on something that my learned friend Mr Maw asked of you and the NPS seems to be flexible enough to deal with different situations because if I can draw your attention to clause 10 3.2.0 at page 22, that deals with more immediate action doesn't it, in response to degradation, I'll just let you read that.

1435

A. Can you repeat the question again, please?

15 Q. Well, in certain circumstances, it directs much more direct and swift action and clause 3.20 seems to be an example of that in terms of dealing with identified degradation and so this sort of halting of degradation or perhaps reversal of that must happen as soon as practicable so that could be within a generation potentially, depending on how you identify that.

20 A. Yes and I think the words "taking action to halt or reverse" is particularly significant to that question.

25 Q. Yes, all right thank you. Now, I want to ask you a more general question about NPS implementation and there's been a suggestion by some parties to the hearing that the NPS can be effectively implemented through considering and potentially granting a set of resource consents for effective catchments throughout Otago. Are you aware of that area that's been advanced?

A. I have read that, yes.

30 Q. And part of that theory that's been advanced is that there is a sufficient level of scientific information about some of the catchments in terms of their ecology, in terms of their hydrology and I guess you could water related science and that that of itself is sufficient to inform the setting of limits for the purposes of the NPS. Do you have a perspective on that?

A. The perspective I can add to that is through the Freshwater Implementation Group and the Freshwater Implementation Directors' Group that is – that has been directed by the Minister is that we work with councils and sector groups to work through implementation. We are
5 about six months through the development of that process and my take from that is that there's a lot of work through to go through, sorry, to support councils to implement that. I have not heard that approach from the sector that we work with, that that could be achieved that way.

Q. So I guess another way of approaching the same issue, is it your
10 understanding of the NPS that it requires a range of inputs and for a range of stakeholders to be involved in the process in order to feed in to all of the information and then set the ultimate limits whether they be scientific or otherwise?

A. Yes, so obviously the Ministry's got a role in providing guidelines to
15 support some of those conversations given the wide range of stakeholders. So yes, the process does enable those wider conversations to happen.

Q. And based on your understanding of the NPS and its various clauses, is
20 that in fact directed and anticipated by the NPS that there is, I guess, a multi input approach which goes wider than just science?

A. Yes, that's actively how I understand most councils will do that.

Q. Thank you. Now, you have talked about Te Mana o te Wai and about its
25 importance, in terms of what it means in individual circumstances, would you agree with the proposition that Te Mana o te Wai won't mean the same thing to all people and that it might be considered and defined differently, say, from one takiwā to another between different iwi and hapu?

1440

A. I think the framework allows for that difference whether it's directing it to
30 be that specific or it is to be consistent across the board. I think the process enables for that the regional differences you're likely to have around what giving effect to Te Mana o te wai means through each region.

Q. Thank you and finally I want to ask you some questions around your
paragraphs 51 and 52 and specific provisions for municipal drinking water

and you talk earlier in your evidence about the need for true exceptions to be provided for. Is my understanding of your evidence that municipal drinking water supplies would be a true exception from in terms of the way you look at it?

5 A. I'm not sure I'm that absolute yet given there's some planning conferencing around how you might identify absolute exceptions at this point. However, the three waters reform as well is actually part of the government's freshwater programme so I think considering the evidence on behalf of the territorial authorities and the reform that's coming, those
10 factors need to be considered together as opposed to – I can actually say that that's an absolute exception so I think there's a technical planning conferencing that needs to happen to determine what that is, what's their extent.

Q. But this is your evidence and I suspect either the Ministry or the Minister's
15 policy position so in terms of your view and the Ministry's position that specific provisions should be made for municipal drinking water, is it your view that it's a true exception that needs to be specifically provided for in this framework?

A. Again, around defining true exceptions I will leave that to planning experts
20 however it is clear in the hierarchy that it is a priority and the term (inaudible 14:42:55) amongst those territorial authorities who would be responsible for providing that order, the clarity over how long they need it for, how much is required et cetera, is detail that could be worked through.

Q. Okay. So in terms of that exercise that you've just referred to presumably
25 you wouldn't want to have a situation where provision of municipal drinking waters and supplies as a second order priority had an impact on health and wellbeing of waterbodies as a first order priority.

A. My evidence doesn't say that. So there is provision for that but obviously
30 you've got to weigh it up with the hierarchy to the wellbeing of the waterbody.

Q. Well, I guess what I'm saying is if you make specific provision for a second order priority which actually singles it out, doesn't that run the risk that it might prevail over the first order priority which is ensuring that the health and wellbeing of waterbodies is provided for?

A. I think that goes to our legal submissions that gave a timeframe around 35 down to 15. My evidence references longer than six years so I think it's the combination in there and then over time making sure that that you're giving effect to Te Mana o te Wai is the intent.

5 1445

Q. Thank you. Just want to draw your attention to some specific words in your paragraph 52 and in the second sentence and I know you're not necessarily across the planning detail but you've said that the qualified exemption to provide the pathway, this is necessary to give effect to the NPS-FM 2020 and Te Mana o Te Wai's second priority on the hierarchy. Is it your understanding that in this plan change that the Regional Council has actually substantively giving effect to the NPS-FM?

10

A. I think it's procedural, as we know I guess through the submissions we know the longer term response to giving effect to the NPS-FM will come through the wider plan change.

15

THE COURT: JUDGE BORTHWICK

Q. So what do you mean procedural?

A. This plan change, so –

Q. Is procedural?

20

A. Yes.

Q. So it's not substantive and I think counsel's questions was that this looks like a substantive response, was that were you were going with this?

MR WINCHESTER:

Well that's what it says on it's face Ma'am.

25 **THE COURT: JUDGE BORTHWICK**

Q. I know its what it says too so, that's what you say?

A. Okay.

Q. Well I don't know, do you say that, I think all Mr Winchester wants to do is trying to understand it.

CROSS-EXAMINATION CONTINUES: MR WINCHESTER

Q. I'm just trying to understand what's intended.

A. Yes, but for the, well given the evidence provided by territorial authorities and again, it lands a lot on how long that would be granted for and the
5 detail around is municipal and that can be varied as I understand it, whether you can accurately say that that is or not. So on the face of it, yes but obviously subject to the detail that planners will work through.

Q. Right, thank you for that clarification.

CROSS-EXAMINATION: MR WELSH

10 Q. Good afternoon.

A. Kia ora.

Q. I act for Trustpower generator in this region and throughout the country and so I have some questions around some of the focus on or lack of focus on the renewable electricity generation NPS and in that regard, your
15 statement of evidence doesn't refer to the NPS REG does it?

A. No.

Q. Sorry, I can't hear you?

A. No.

Q. In terms of the NPS freshwater management itself, policy 4 of the NPS
20 states that freshwater is managed as part of New Zealand's integrated response to climate change, doesn't it?

THE COURT: JUDGE BORTHWICK

That's on page, pretty well in the beginning, page 9 so it's actually the policy is under clause 2.2 and it's policy 4.

25 CROSS-EXAMINATION CONTINUES: MR WELSH

Q. So that's correct isn't it, that's what policy 4 says?

A. That's right.

Q. Yes and in a day where I woke up listening to the news that New Zealand has imported the most coal since 2006, would you also accept that
30 hydrogeneration is important in the context of the nation's response to climate change?

A. Yes.

Q. And in respect of policy 15 or similarly and that's on the following page, page 10, that states that communities are enabled to provide for their social, economic and cultural wellbeing in a way that's consistent with the

5 NPS, is that correct?

1450

A. that's right.

Q. and you would accept that electricity generation is important in the context of wellbeing?

10 A. Yes.

Q. Now in your evidence at, I think it is, paragraph 52, Mr Winchester was just questioning you on, you state that water takes for drinking water are a second order priority under the NPS objective? That would be on page 9, the second order, correct?

15 A. Correct.

Q. And you consider that providing a pathway for the taking of water for municipal drinking supply for durations of more than six years is appropriate?

A. Yes.

20 Q. Yes. In fact, you go so far as to say it's necessary, don't you?

A. Yes.

Q. Now with the person with oversight of the NPS FM, I assume you have read the section 32 analysis that was prepared for the NPS on freshwater?

25 A. Yes.

Q. And I want to provide a document to you. I asked Mr De Pelsemaeker about it last week and I'm not going to push my luck by asking questions without putting the document in front of you for a second time, so if I may provide just an excerpt of that.

30 **THE COURT: JUDGE BORTHWICK**

What is it?

MR WELSH:

It's the MFE, it's the MFE's own publication, section 32 evaluation on the NPS.

THE COURT: JUDGE BORTHWICK

On the NPS?

5 **MR WELSH:**

Yes. I just don't want to ask a question without having put it in front of the witness, Ma'am.

WITNESS REFERRED TO S32 ANALYSIS

10 **CROSS-EXAMINATION CONTINUES: MR WELSH**

Q. And could you please confirm that this document is entitled *Section 32 Evaluation Ministry for the Environment*?

A. Yes.

Q. And on the second page, the date of issue is 22 July 2020?

15 A. Yes.

Q. And it appears to be an excerpt of that larger document, is that correct?

A. Yes.

Q. And if you could turn to the final page of that excerpt which is numbered page 46. The authors of the section 32 report state that policy 4, which is what we've just been through, "contributes to achieving the objective 2.11(b)", and that's the health needs of people and (c) which is the ability of people and communities provide for their social, economic and cultural wellbeing by preserving hydroelectricity flexibility which will secure renewable electricity generation which is important for meeting the health needs of people, clause (b), as well as enabling communities to provide for their social, cultural and economic wellbeing now and into the future, clause (c) says that, doesn't it?

20

25

A. Yes, it does.

Q. And so I suppose my question at least in terms of the author's view of this document, hydroelectricity as seen as both a tier 2 and a tier 3 objective

30

—

A. Bear with me for a moment. Yes.

Q. And would you agree with those authors?

5 A. I think while the timing with what is known when you're drafting a document like this and then when we're into the rigour of actually implementing it, obviously with lessons along the way, some things can change so if I had a big read with that, I would have documented that in much the same way I had with drinking water.

Q. I missed the last bit, if you had agreed with that?

10 A. If I had agreed with that then I would have documented it in February. I mean, there was enough insight since the drafting of section 32 to September when it became actioned and then the drafting of this in February and as we know, even more time since February there are positions and things moving since then.

15 Q. So is it fair to say although the authors of the section 32 report found hydroelectricity to be a tier 2 and tier 3, you disagree with that?

A. I think this goes to my earlier comments around true exceptions and planning advice could inform that. I don't believe I'm in that position right now without that planning advice to accurately land on yes, it's a tier 2.

20 Q. Yes. And you haven't qualified yourself as an expert in these proceedings?

A. That's right.

Q. So I don't think I will take that any further, thank you Ma'am.

CROSS-EXAMINATION: MR PAGE

25 Q. Thank you, I'm going to ask you some questions by referencing the documents that are in volume 5 of the common bundle. I don't think it's on the desk in front of you, perhaps Madam Registrar will find it. Volume 5, tabs 12 to 23.

A. Can you repeat that again, please sorry?

30 Q. So if you've got the bundle in front of you, can you turn to tab 12(c) and with luck you will find the Minister's recommendation to the Otago Regional Council.

A. I did have that.

Q. You did? Well I'm sorry to put you to the trouble of finding it again. So it's page 1478 of the common bundle that I'm asking you to look at because there we find the Minister's third recommendation and his reasons. Do you have that?

5 A. Yes, I do.

Q. Now, just for context, there has been a certain amount of discussion in the courtroom since we began about whether this plan change is really a purely procedural tool or whether it also has some environmental imperatives that go with it. Do you understand that?

10 A. Yes.

Q. And when you look at the recommendation itself on page common bundle 1478 and the paragraph that follows, can you tell me your view about what the Minister's intention was, was it procedural or was it procedural plus environmental gains?

15 A. I think I've already referenced in an earlier answer that I thought was procedural.

Q. Okay, staying in the same bundle then, can I get you to look at tab 12(a) and there you will have the Minister's referral direction to the Environment Court, do you have that?

20 A. Yes, I do.

Q. Now, if we look at the subparagraph (c) and I'll read it so we all know where we are: "the plan change affects or is likely to affect areas of national significance noting that Otago freshwater catchments provide a habitat for a suite of nationally important non-migratory galaxiids taxes",
25 is that it? Is it your understanding that the plan change wasn't intending to do something about that habitat for galaxiids species. What was the point of mentioning it?

1500

30 A. Again this is probably where the expert conferencing can clarify around what the legal position is. So where we reference fish passage through the NPS that is where I consider the plan change was heading at that point.

THE COURT: JUDGE BORTHWICK

I think it's a fair question my Mr Page. He's not waiting for your answer. He wants to know what you think before you go into an expert conference so he's trying to pin you down and it's actually not unreasonable because other
 5 witnesses have also been pinned in the same way, what was your thinking? So that everybody understands what are the different points of views prior to getting in an conference because we don't have time to allow that to unfold.

CROSS-EXAMINATION CONTINUES: MR PAGE

A. So going back to your earlier question around environmental effects and
 10 obviously you're in a room with experts who can test the extent of that so where possible to provide for environmental protection along the way I suspect knowing that you've got a wider plan change coming in 2023. Wouldn't it be counter to the intent.

Q. Well, that is the question. What is the intent?

15 A. And exactly the experts can contribute to that so where there is the option to include it that doesn't hold up the procedural nature of the plan change then wouldn't you include it.

Q. Presumably you're familiar with Mr Ensor's evidence?

A. Yes.

20 Q. Mr Ensor –

A. Can I qualify that to the level of technical planning evidence.

Q. – yes, but you will have studied the controlled activity pathway that he supports.

A. Yes.

25 Q. And that is effectively a pathway that enables existing permit holders to, for want of a better description, roll over their permits for six years and carry on, right?

A. That's right.

30 Q. Do you agree with me that there is nothing concerned with improving the lot of galaxiids in that pathway?

A. Sorry say it again?

Q. There's nothing in Mr Ensor's controlled activity pathway concerned with improving the lot of galaxiids species.

A. And I have referenced in earlier responses as well the over regeneration so there is a step changes towards that change. Again, if there is an opportunity for that right now, then again conferencing perhaps may find a pathway forward for that.

5 Q. But if Mr Ensor's non-controlled pathway doesn't deal with the question of risk to galaxiids species, is it your understanding that the Minister's intention was that there would be a consenting pathway that enabled those kinds of critical threatened species habitat issues to be addressed?

A. Yes.

10 Q. Yes?

A. Yes.

THE COURT: JUDGE BORTHWICK

Q. Why do you say that?

15 A. Again it's the (inaudible 15:04:14) and I guess it may be because I'm at a policy level around the intent looking at the bigger picture where we're heading with this NPS. The Minister directed an interim plan change and if there's an opportunity to deliver on that journey towards the ultimate change over a generation then where you can provide some kind of relief or where it affects the fish passage then you would enable it.

20 Q. Over a generation?

1505

A. Over a generation.

Q. For this plan change, it's only six –

A. Yes.

25 Q. – well, hopefully six years before we get another plan, that's not really a generation is it?

A. Well the intent of the plan in six years, the new one that will be notified in 2023, should lead you on the path towards that change.

30 Q. Yes. The other way of looking at this, because where counsel's question goes and Mr Page correct me if I'm wrong, is that if there ought to be an opportunity to have merits based resource consent applications for periods longer than six years at a wide scale in Otago you should take

that opportunity up because this sub provision talks about galaxiids so I don't know whether you, if that is where you're going, merits based –

MR PAGE:

Yes Ma'am,

5 THE COURT: JUDGE BORTHWICK

Q. So now, so do you know what he's getting at there, he's saying, what he's saying is that instead of consents being rolled over for six years subject to the actual take and may be subject to efficiency, I don't know what people would land on there, he is saying that if there's an opportunity to improve the environment for galaxiids, applicants should be able to put forward their application on that basis for consents up to and including 35 years. You've just agreed with him.

A. No so not up to the 35 years –

Q. What do you think you're agreeing to?

15 A. To the, again our legal submissions talked about –

Q. No, no what are you agreeing to, because this is your evidence.

A. So, no not for 35 years, sorry that wasn't clear.

Q. Okay, all right.

A. In that line of questioning.

20 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So I'm trying to put so that the witnesses understand your theory of the case and I don't think this witness does, you know, I'm trying to put it as you would have it because you want to secure Mr Page the opportunity to have a merits based assessment for resource consents that would see them granted for a period up to 35 years, that's correct isn't it?

25 A. Well –

Q. Subject to being able to achieve good things for galaxiids.

THE COURT: COMMISSIONER EDMONDS

Only galaxiids?

THE WITNESS:

And that is definitely not the position of the Minister for 35 years.

THE COURT: JUDGE BORTHWICK

5 Q. I don't care what the Minister thinks, it's actually what you're, it's your evidence now so you now have to bring it to your evidence.

A. Yes so I'm consistent with our legal submissions around maximum of 15 years.

Q. Okay.

CROSS-EXAMINATION CONTINUES: MR PAGE

10 Q. So the yes answer to my last question was predicated on a term expiring in 2035, is that –

THE COURT: JUDGE BORTHWICK

So 15 years.

CROSS-EXAMINATION CONTINUES: MR PAGE

15 Q. All right, can you tell me how you get to 15 years?

A. There is the, I'm relying on our legal submissions.

Q. Yes but you're the policy planner.

A. Yes.

20 Q. There was a discussion between you and Mr Maw about what a generation is and I really don't know quite where you landed on that but least 15 years is a number we understand right, what I want to know is why your support for a consenting pathway is predicated on a 15 year term?

25 A. So again and thank you for taking me down a path, there is a range of consents we are talking about here, my evidence references it, between six and 15 years. So the six initially was the preferred position because it was an interim plan change, give the Council some time to develop the full plan change and where the region is going in terms of it's freshwater management.

30 Q. Yes, good, now –

A. So I support our legal submissions shifting that to allow some flexibility to some of those consent holders, whether its merit based is another conversation that I believe is between planning evidence and legal evidence.

5 Q. All right but you say that there's an opportunity to have a consenting pathway until 2035. Now I understand the maths behind how we get to six years, relative to the land and water regional plan becoming operative, that kind of makes some sense to me. What I don't know is why the year 2035 holds some kind of magic. Is there something around the Minister's
10 intentions around implementing the NPS that we're not being told here that 2035 has some significance?

1510

A. No, there isn't a Minister's intention around 2035, rather it's been responding to proposed dates and that has been accepted.

15 Q. So you're simply reacting to what was publicly notified and the non-complying pathway had 2035 as the cut off period and you're simply saying the Minister's okay with that?

A. Can you say that again now that I'm cautious around your line of questioning?

20 Q. So I'm not trying to trick you, I promise, your support for the 2035 cut off for resource consents, is that simply a reflection –

A. A maximum.

Q. Yes but is that simply a reflection of what was publicly notified by the Regional Council which had 2035 as the endpoint for the non-complying
25 activity status?

A. There's been I think an acknowledgement around the practicality of some of them as opposed to a five year one, so the municipal consents for six years may not be practicable hence why you need the exceptional conversation with the planning experts.

30 Q. And does it follow that if there were, for example, some kind of significant infrastructure change required to protect galaxiid habitat then that might be a similar kind of reason why a longer term consent might be appropriate?

A. Perhaps. Without a detailed example, it's hard to tell.

THE COURT: JUDGE BORTHWICK

Ms Irving?

MS IRVING:

I have no questions.

5 QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. So just one point of clarification and if you don't know, you should say so, okay?

A. Yes.

10 Q. So just looking at that document 12(a) which is the ministerial direction to the Environment Court and again on subparagraph (c) and where it is noted: "in the plan change effects it is likely to affect areas of national significance", what did you understand that part of subparagraph (c) to be talking about? Where is the focus?

A. I'm not sure, sorry.

15 Q. So you're not entirely sure what the Minister means when he says the plan change affects areas of national significance?

A. Yes, I'd need to get some clarification and I'm happy to table that if required.

Q. Ms Dixon, have you got any re-examination?

20 MS DIXON:

No questions.

THE COURT: JUDGE BORTHWICK

All right, well thank you very much for your evidence.

WITNESS EXCUSED

25

THE COURT: JUDGE BORTHWICK

Okay, so I think that brings us through to you, Ms Williams. Actually, before we do, what are we meant to do with this, Mr Welsh? You handed it up. It's not in the common bundle, is it?

5 MR WELSH:

No, it's not in the common bundle and I haven't thought of including at the time in the common bundle so I was just wondering if we assign it an exhibit number?

THE COURT: COMMISSIONER EDMONDS

(inaudible: 15:14:14)

10 MR WELSH:

Yes, well I may very well put it to the other MFE witness.

THE COURT: COMMISSIONER EDMONDS

Might be helpful to give it an exhibit number so it's not lost in our evidence.

MR WELSH:

15 Sorry Ma'am, I know it is a bit messy.

THE COURT: JUDGE BORTHWICK

It is a bit messy, that's why we have common bundle but we will call it Exhibit Trustpower 1 which is an extract from section 32 evaluation report. That's on the proposed NPS freshwater management 2020.

20

EXHIBIT TRUSTPOWER 1 PRODUCED – EXTRACT FROM S32 EVALUATION REPORT 2020**THE COURT: JUDGE BORTHWICK**

25 That's good and why I thought there might be more than one generator is that that report also talks about Pioneer, Trustpower and is it Contact being in the room for Otago or is that not quite right?

MR WELSH:

No, I don't think the report does, I the Minister's directions for the (inaudible: 15:15:20)

THE COURT: JUDGE BORTHWICK

5 Somebody does.

MR WELSH:

So that definitely does, I just don't have that in front of me to give you the reference and what part of its paragraph but that's where you get those three generators.

10 **THE COURT: JUDGE BORTHWICK**

So there are three generators thought?

MR WELSH:

Yes, Ma'am. I understand from Ms Dixon who has an intimate familiarity with the Clutha scheme that that doesn't operate on any deemed permits. I would
15 say that given the submission of Pioneer that it does but they have taken no active role in these proceedings throughout and Trustpower does in terms of those small –

THE COURT: JUDGE BORTHWICK

And it's contact with the Clutha scheme, is it?

20 **MR WELSH:**

Correct.

THE COURT: JUDGE BORTHWICK

I'm with you, all right. Do we have your submissions?

MS WILLIAMS:

25 (inaudible: 15:16:15). And I'll also hand up at this time, your Honour – I do refer that *Re Auckland Regional Council* case that I (inaudible: 15:16:29)

THE COURT: JUDGE BORTHWICK

Okay Ms Williams, we're in your hands.

MS WILLIAMS:

Thank you, your Honour. Your Honour, I have taken a slightly untraditional
5 route to the writing of these submissions.

THE COURT: JUDGE BORTHWICK

That's all right, everybody else has taken a non-linear approach to this case.

MS WILLIAMS OPENING SUBMISSION:

Indeed and so I've actually started with Te Mana o te Wai and my reason for
10 starting with Te Mana o te Wai is because as your Honour said the other day,
this is a fundamental concept which infuses all matters in relation to freshwater
management and so I have started with setting out clauses 1 and 2 of section
1.3 of the national policy statement for freshwater management 2020 and then
I've carried on to set out the hierarchy of obligations at 1.3 clause 5 and then
15 noted that again, those hierarchy of obligations are reiterated at objective 2.1
but this is in the context of how freshwater is to be managed as part of all natural
and physical resources and so I've set that out there as well, your Honour.

So Te Mana o te Wai and the hierarchy of obligations must be relevant to these
20 proceedings in my submission. They seek to at least hold the line and not
further detract from the mauri of Te Wai in waterbodies and this is of course
also relevant to the land, the whenua, in the Otago Region.

However, in relation to the national policy statement, other than that
25 fundamental concept of Te Mana o te Wai and some limited provisions which
we've already discussed this morning and I'm going to discuss again later, I do
submit that the current proceedings are not intended to give effect to the
national policy statement. There are a number of additional steps to be
completed especially relating to the roles of tangata whenua encompassed in
30 Te Mana o te Wai and it is not reasonably practicable for those to be completed
at this time.

Moving onto the Otago Region and this plan change, the Region poses unique challenges for the management of its freshwater resources. There's a missing full stop, I apologise. This includes the pending expiry of, as we've heard, a large number of deemed permits and it appears that it has grown from 200 other consents to a great deal more when I look at Ms Gilroy's evidence by the end of 2025.

So those and other challenges are described in Professor Skelton's investigation and resulting report that identified deficiencies in the Council's planning framework and the resulting management of the Region's freshwater resources.

1520

In response to that, the Minister for the Environment made recommendations to the Council. They have in response again in part and again we've identified that this is recommendation 3 initiated this plan change and then the Council then requested the Minister to call in PC7 to the Environment Court, which of course is a request that the Minister accepted.

20

So as stated by Mr Maw for the Council, C7 is intended to: "... allow for an efficient and timely transition to a new land and freshwater management regime..." Again, as stated above it's not intended to fully implement the current National Policy Statement prior versions. Its purpose is to provide a short breathing space for the new NPSFM compliant planning framework to be put in place while not exacerbating effects on the environment in the interim.

I draw to your attention that the rector-General of Conservation Tumuaki Ahurei has statutory responsibility to manage freshwater fisheries. This is along side Fish and Game and to advocate the conservation of aquatic life and freshwater fisheries generally.

So the rector-General submitted on PC7 as notified, generally supportive of the intention behind the plan change and seeking to clarify and improve aspects of the plan change to achieve its intended purpose.

- 5 I now move to talking about the endemic freshwater fisheries and in particular non-diadromous galaxias taxa and we've already been referring to this clause in the Minister's direction which is clause C. This is tab 12A CB1472 which we have just been talking about.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

10 Q. So are you able to assist me on what is meant by areas of national significance? What is an area of national significance?

A. So in my submission, your Honour, that's where the evidence of Dr Allibone and Dr Dunn is relevant to the Court because they describe not just that Otago has a very diverse freshwater fauna including taonga species of importance to Ngā Rūnanga. But it also has these remarkable suite of endemic, non-diadromous galaxias and I do want to just spend a little time on this, your Honour because endemic and I've included a definition which I've got off the internet so it's what it is. Endemic, I'm using it as an adjective to mean native and restricted to a certain place and that is really important here because actually what these non-diadromous galaxias fish do is they express the geography, the long-term climactic impact, all of those things of the waterbodies and the surrounding land and surrounding whenua so we have in the lexicon now of the RMA planning framework the term biogeographic river capture and that refers to –

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20

25

Q. Where do they?

A. We do.

Q. When was that popped in?

A. That is in the Kawerau water conservation order which is relevant to this proceeding and that's because the Nevis amendment to the Kawerau water conversation order recognise specifically the scientific attribute of that waterbody and that's because once upon a time, the Nevis river flowed south into the Mataura catchment. At some point over time

30

geological forces occurred. The Nevis turned around essentially, began to flow north and that separation and isolation of the galaxias in the Nevis has led to the separation of the Nevis galaxias and the Gollum galaxias which is what you find mostly in Southland.

5 Q. I have come across the Gollum galaxias.

A. Yes, you have come across the Gollum galaxias and now you understand the genetic lineage and the same is true, your Honour for the various other different non-diadromous galaxiids throughout the Otago region. They actually are an expression of the land and of the water and how the separation has occurred. So they embody in many respects the history of the place.

10

1525

Q. And I understand that but my question about what is meant by “areas” of national significance, I know that these little fish, you know, may be threatened or worse but is that what’s meant by an area of national significance, that I don’t understand that phrase.

15

A. So this is where we are getting into that evidence of Dr Allibone and also Dr Dunn which is talking about the distribution and the sub populations and locations of the sub populations of these fish.

20 Q. So your submission is that the Minister, when he refers to areas of areas of national significance he means the distribution of threatened species, that is what he’s talking about?

A. Yes your Honour, in my submission that’s the only way in which that comment can be interpreted.

25 Q. And that’s really what I was after so can I make a note on that. All right, with that in mind that the Minister is referring to the distribution of threatened galaxiids, is the Minister, I think, is the Minister also saying therefore this plan change must deal with the threat to this fish species by having an environmental outcome or is that, does that necessarily follow or is this Minister saying the plan change encompasses areas where threatened species are and therefore something, but he doesn’t go as far as saying “and therefore” right in protection or some measure for the galaxiids.

30

A. Your Honour I don't know that it is going that far but I think it is a factor that must be borne in mind and if the Minister was wanting to direct a plan change which was indeed to enhance galaxias habitat it needed to say that and it doesn't, it doesn't go that far so that's, and that's not necessarily what the Director General is seeking however what, in my submission, the plan change must keep in mind and look to achieve and I address this further as well your Honour, is that there is no additional harm, there is no additional degradation and that's the issue and that's, I do feel like I talk about little fish a lot in Otago but that is the issue, is that they are not just at risk, they are threatened, they are precious, they are significantly – yes, there are major concerns about those species and for example and again this is in I think Dr Dunn's evidence, the Clutha flathead galaxias is classified as nationally critical because the expectation is that more than 70% will be gone within the next 10 years so that's the reason it has that threat classification because there is an expectation that there will be ongoing loss. And it's to, to minimise the extent of the ongoing loss is, I guess, what the Director General is seeking here.

Q. All right, understood.
20 1530

MS WILLIAMS:

Moving to paragraph 13, maybe somewhat repetitive your Honour, I apologise. The national significance of the non-diadromous Galaxias species arises because of their endemism. Not only are these species of freshwater fish not found anywhere-else in the World, most of these species are not even found in other regions of Aotearoa New Zealand. They all come within the super category of 'Threatened' that brings them within the Threatened species compulsory value and I note that your Honour but I also note that because that's a matter which is part of a substantive implementation of the NPS I don't take that any further.

However, this is at makes this an issue of national significance. The submission seeks to ensure that, while in the interim we are 'holding the line' and not further

degrading the mauri of te Wai for Otago's water bodies and freshwater ecosystems, we do not lose sight of these special and remarkable freshwater fish and their habitat needs. This is relevant to Council's stated intention to avoid exacerbating the effects on the environment until the new planning regime is in place.

So moving to legal matters relevant to your consideration. Again, Mr Maw has helpfully set up relevant legal requirements for consideration of regional plans from Part 5 of the Act and I adopt those submissions and do not propose to further address those.

Similarly in relation to s 8 dealing with Te Tiriti o Waitangi, I also adopt the legal submissions of Mr Maw and I note that the further statutory processes which the plan change is intended to facilitate will provide a much greater opportunity for persons making decisions on Otago's freshwater resources in the future to take account of the principles of Te Tiriti, as those will have been amplified by the full implementation of the NPS.

major issue in the Otago region, is the current existence and pending expiry of deemed permits. And I'm now turning to the priority conditions of some of these deemed permits.

COURT ADJOURNS: 3.32 PM

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COURT RESUMES: 3.54 PM**MR MAW:**

I've spoken with my friends about timing and how we're tracking today and it's
 5 looking highly unlikely that we will get to Mr de Pelsemaeker and that doesn't
 cause any issues so unless the Court's keen to hear from him tonight he's best
 perhaps left for the afternoon tomorrow.

THE COURT: JUDGE BORTHWICK

Afternoon tomorrow and we will finish with the DOC witness tonight?

10

MR MAW:

We will finish with DOC and Dr Dunn, yes.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT:

Q. That's fine. Now, one of the things because I lose control just as soon as
 15 I ask questions about planning conferences and dates then nobody
 comes back to me. So what was the outcome in terms of planners
 meeting and the April date. I think you had 7,8th and 9th and the answer
 was? Are they all available?

A. I'm in the process of confirming that your Honour and making sure that
 20 we are capturing all parties with planning witnesses for that.

Q. You see I've got a minute out. I just do because there are more people
 in the room than just us. So when are we going to have that nailed?

A. So I have someone working on that in the office at the moment, your
 Honour, in terms of liaising with parties and I can follow that up and the
 25 view is trying to get that nailed down today depending on availability of
 those who need to be contacted.

Q. Or we will just make a date so if I don't hear by 5, we will just nominate
 dates and people can just stick with it and also what's happening with that
 schedule? That is the agreed data set and scenarios.

30 A. Yes, the experts have been working on that today and I understand that
 the experts for Landpro and OWRUG are considering the responses
 being provided by the Otago Regional Council witnesses and they've

advised that they will be reviewing that overnight and coming back to the regional council about that tomorrow morning so that OWRUG and Landpro have an opportunity to discuss that together. So that's the latest I've heard.

5 Q. So again in terms of the release of the court's minute directing conferencing it shouldn't go out tonight. It should go out sometime tomorrow. You can see the difficulty. Every time we ask a question there's no response because people are conferring and I'm sorry to put pressure on you but there's pressure all the way through this hearing now.

10 A. And I understand that your Honour and I do apologise I hadn't appreciated in terms of the scenarios that you needed those by –

Q. By Friday because that's what I directed and ideally I'd be releasing minutes but like you we're also involved in a hearing so now I'm multitasking across various things.

15 A. Yes, I acknowledge that your Honour.

Q. So don't release a minute until 9.30 tomorrow because we will have an agreed scenario?

A. Depending on the views of the experts who are reviewing the material that they have at the moment, I can't speak for them as to whether they will have an agreed position by that time tomorrow. We can certainly advise them that they do need to reach an agreed position by that time tomorrow for the Court to issue a minute.

Q. And if they can't then what?

A. In my view, there can still be directions as to the conferencing with a follow up.

25 Q. I'll tell you what. I will do something but it's more likely to get Ross Dunlop in the room and start talking to any witness who can't agree on the matter directly rather than taking up your time, my time on this matter. Because the worst result will be that the witnesses can't agree on any sensible data set nor scenarios but they're all of them positioning or jockeying for positions.

30 A. Sorry, your Honour, my understanding the experts are working constructively together and it's just a matter of ensuring that they're working with the right scenarios and that they're representative and how

they approach that in terms of the three different methods and how they practically run in terms of doing that prior to the conferencing so they're working together constructively. That's what I've seen from correspondence today.

- 5 Q. So since we have you both in the house also we're going to have a response from at least OWRUG by 8.30 so it can be fed to counsel by 9 so Ms Mehlhopt can update the court.

MS IRVING:

- 10 I'll just probably mirror what Ms Mehlhopt was saying that that experts are conferring directly and as I understand it they're just resolving some differences on a couple of extra scenarios that help demonstrate the complexity of some of the types of issues that we contend with. So I'm not expecting that to take a long time. I think (inaudible 15:59:46) talking to each other today so they're
15 progressing.

THE COURT: JUDGE BORTHWICK TO MS IRVING

- Q. So the question was will they be finished overnight such that you can communicate to Ms Mehlhopt that there is agreement that Landpro, OWRUG and ORC and possibly (inaudible: 16:00:06) for this as to those
20 scenarios.

1600

- A. I believe that's the last correspondence I've got in my inbox is that we'll get a report back overnight.
- Q. And you'll communicate that to Ms Mehlhopt by 8.30 so she can do
25 something – update us by 9.00.
- A. (inaudible: 16:00:23)
- Q. All right, all counsel are to have a clear idea as to what is to happen next as there is no agreement. My suggestion is we will just simply let Mr Dunlop deal with that.
- 30 A. And your Honour in terms of (inaudible: 16:00:40)'s response, I can confirm that they have confirmed Mr McTavish's attendance at that conferencing?
- Q. Which one?

A. At the primary sector conference.

Q. I thought he would be, okay. Well I will hold off issuing any minute until we hear from you at 9 o'clock tomorrow. Right, back to you, Ms Williams.

MS WILLIAMS:

5 Thank you, your Honour. So I'm starting again at paragraph 18 on page 6. So current deemed permits may have priorities whereby the permit holders holding the permits where they were granted earlier in time can require upstream permit holders whose permits were originally granted later in time to cease taking their full allocation to ensure sufficient water passes downstream to the higher
10 priority take point and there was some discussion in the evidence about wet years and dry years and really, these are important in dry flow conditions. They are similar in my submission to a residual flow condition on a resource consent. The effect of a higher priority applying in a catchment is that lower priority takes upstream must ensure that sufficient flow passes them by to meet the
15 requirements of the downstream and higher priority take. Of course, with the residual flow, that's because there is a need to preserve the instream values downstream of the take. This is actually about allowing sufficient water to continue past to a downstream higher priority take.

THE COURT: JUDGE BORTHWICK

20 I do understand that, what I don't understand is how that then gets implemented; ORC says: "well, it just gets picked up", hopefully it will get picked up in the actual record that people have been exercising those rights but they're rights, as I understand it, as between consent holders.

MS WILLIAMS:

25 I'm coming on to address that your Honour but I just wanted to make the point that whilst there perhaps was a different purpose, because they are in many respects similar to a residual take, they do preserve the habitat downstream from the lower priority take.

THE COURT: JUDGE BORTHWICK

30 Well maybe. Where's the evidence there of any exercise?

MS WILLIAMS:

And that your Honour as I say is not something that I have particular evidence of and it might be something that you need to explore but certainly that is –

THE COURT: JUDGE BORTHWICK

5 I'm not entering the arena. So you needed to have evidence about are they being exercised? And so you need to be in the arena asking the questions.

MS WILLIAMS:

Yes. We might have to come back to that, your Honour. Moving onto paragraph 20, another way of looking at the use of priorities is as a condition
10 requiring cessation of take, either in part or in full and again this is to ensure that sufficient flow carries on past a lower priority take to meet those requirements of the higher priority take downstream.

So the RMA, your Honour, under its transitional provisions extended mining
15 privileges under sections 413 to 417 for a 30 year period and in particular, section 413(2) continued the application of relevant sections of the Water and Soil Amendment Act 1971 and I set that out there at paragraph 21.

So carrying on at 22, your Honour, it is sections 11, which is retention of right
20 of priority, 13, exercise of priority and 14, obligations of holders of current mining privileges of the Water and Soil Conservation Amendment Act which apply under section 413 as conditions of deemed permits and which have the effect of maintaining existing priorities and I have attached those provisions, your Honour, in appendix A of my submissions which is on page 14.

25 1605

In response to the Minister's recommendations, the Council listed key principles to inform the development of what has now become PC7. The principles included at item c: Consideration of potential impacts on existing water
30 abstractors, and existing priorities in deemed permits. So that is a matter which is part of the mandate for the plan change, your Honour.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. So the point of consideration being the potential impacts on existing water abstractors and consideration of the existing priorities. That consideration doesn't direct an outcome though, did it?

5 A. It doesn't direct an outcome, your Honour but it certainly directs that that is a matter to be considered as part of the plan change.

Q. What does that mean? That you have to include it in the plan change or is that a matter to be considered by the regional council when drafting its plan change?

10 A. In my submission, your Honour was a matter that the council mandate for drafting the plan change requires consideration of existing priorities which is a matter which needed to be somehow accounted for within the plan change.

15 Q. Why do you say that? At that point time was the Minister directing that there had to be accounting for the priorities or consideration was to be given to whether there should be accounting for the priorities?

A. This is the council response to the Minister's recommendation, your Honour. So this is council coming back.

Q. Council saying it.

20 A. Yes.

Q. Need to take the submissions just a little bit more slowly.

A. Apologies, your Honour.

Q. So the council is coming back and saying, "well, we've got to give consideration to existing priorities."

25 A. Yes, your Honour.

Q. Does that mean say therefore an outcome in the plan change?

30 A. I think that this is where I'm getting to your Honour is that yes, in my view they did need to actually account for that and this is where – and I can't quite call where I get to this but the priorities if they're being exercised do have hydrology impacts. We're very clear on that. they are maintaining potentially habitat and following the precautionary principle, your Honour. There is a need to continue those to avoid exacerbating current environmental situation. This is the way I understand what council are trying to do. They are wanting to maintain the status quo. They're

wanting to hold the line. If we allow priorities to expire there are potentially adverse impacts which will not hold the line and which will exacerbate adverse effects on environment.

5 Q. So your response to ORC's case as it presently stands which is that it already has considered and accounted for priorities by wishing to impose conditions limiting takes to actual usage which should include the trace of the priorities is inadequate because of what?

A. It's inadequate because it doesn't account for when the water is taken.

Q. Because it doesn't account for when the water is taken?

10 **THE COURT: COMMISSIONER EDMONDS**

Q. Whether it could be taken (inaudible 16:09:36) it ought to be whilst taken is a matter of fact.

A. Yes. Thank you Commissioner.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

15 Q. And when it could be taken coinciding with the dry period. Is that what the issue is?

A. Yes, your Honour and whether it should be taken and this issue is that – and that's why I've compared it with the analogy of residual flow or take cessation condition because those are existing tools which council uses on its resource consents and I'm really not understanding why there is a difficulty in priorities which are very similar to those being carried forward.

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1610

Q. Absence of evidence as to their exercise?

A. I come to that next your Honour.

25

MS WILLIAMS CONTINUES OPENNING SUBMISSION:

So your Honour at paragraph 24, I am a little perplexed by Mr de Pelsemaeker's evidence that the Council has a lack of understanding about priorities and the degree to which they are being exercised.

30

section 413(2) states, where priority conditions applied on deemed permits immediately prior to the RMA coming into force on 1 October 1991, these

provisions were continued and included as conditions of deemed permits. Section 14(1)(h) of the Water and Soil Conservation Amendment Act provides the power for Council as the consent authority to obtain information from permit holders about the exercise of priorities and I've set that provision out there your Honour.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Did they?

A. That I guess is my point, your Honour. It's certainly within council's power to require that information. I'm not sure it's for the Director General to tell council what it needs to do but in my submission it should have considered this and it certainly has the power to require that information.

Q. So in terms of your relief, can you just remind me how that point is picked up in terms of any relief?

A. The relief talks about banding and to be honest and I'm going to say this further down as well we're abandoning the banding suggestion because it's a bad suggestion. It was an idea that we've come up with but it would require a lot of work, it would require council to spend a lot of time with deemed permit holders and the Director General and its own records to do that work and maybe we might have been able to do that if we were in June 2020. We are now in March 2021. We don't have the time so this is why I'm moving to an alternative relief your Honour which is actually – yes.

Q. Alright. Good.

A. This is where I'm getting to your Honour. There is a very helpful Memorandum of 1 March 2021 which the council has filed in court. It was in response to the court's direction seeking examples of deemed permits and there we have your Honour annexures D and E, examples of permits which have existing priorities. So I have set out there in the balance of paragraphs 26 your Honour the relevant portions of the permit stating how the priority applies.

Q. So we know that as a matter of record, at least we hope as a matter of record that you would be able to look up every deemed permit and hopefully find these provisions in them.

THE COURT: COMMISSIONER EDMONDS

(inaudible 16:13:35) consents those deemed permits that might be referred to still exist because there may have been a process that's overtaken all this it means that they're no longer live.

5 THE COURT: JUDGE BORTHWICK

Q. But in theory, for those that are continuing to exist we know there is a record as to what those priorities are but in practice this is exactly the thing you need to explore with witnesses to come. Are they actually exercised that way? So if I'm an irrigation company with priority and there
 10 are other large entities like irrigation companies on the same body. It may well be that in furtherance of that condition it's been interpreted in a particular way as between irrigation companies which may not actually look like – it may be effective in terms of what this condition is but may be quite complex in terms of those private arrangements as between permit
 15 holders particularly large permit holders on any one waterbody is how I image it could all go so is that not picked up? That notion perhaps in Mr de Pelsemaeker's evidence where he starts to talk about - this may or may not be what he had in mind at, say attachment 1 of his evidence dealing in this case with the controlled activity rule at the top of page 5
 20 and he's talking about existing consent conditions – maybe existing consent conditions concerning operating procedures administered through relevant order allocation committees that may be it, but you'd have to, I guess the proposition I'm putting to you, is there a possibility that there are private arrangements as between individuals holding
 25 deemed permits on these water catchment which, while giving effect – yes, which give effect to those priorities in a way which is not visible to this Council?

1615

A. I can't answer obviously in respect of (inaudible 16:16:31) arrangements
 30 your Honour, water allocation committees there is a specific provision in the operative plan for the establishment for that, that's something that they then are a body which is visible to the Council and I guess that would be why that provision has then gone through into the proposed matters of

control that Mr de Pelsemaecker has suggested for that controlled activity. Some of the, because priorities operate within a catchment, there is certainly the various catchment groups which have been setting themselves up and it may be that they are able to assist the Council where priorities matter and with taking that forward and I guess again your Honour, my point here is that these are existing conditions in existing permits and so they are visible, whilst the degree to which they are exercised may be less visible there is no difficulty in taking those conditions forward into replacement permits.

5

10 Q. You're, what are your underlying assumptions?

A. So partly my assumptions your Honour are that that they are being exercised and that they are effecting the hydrology of what otherwise would be in waterbodies and thereby freshwater ecosystem and so that if they are not continued that there is a risk in terms of the environment that we will, because, in some respects we used to talk about, obviously these came about originally because of a gold rush in Otago, what we now have is a bit of a water rush in Otago, there is a certain balance, if I put it that way, which is maintained by the existing priorities where they're being exercised and to take away that factor, in my submission, has the potential to lead to and aggravate by leaving to another potential water rush where people upstream who have lower priorities suddenly go: "I can take whenever I like."

15

20

Q. Second assumption is that the priorities will be exercised in a way which is advantageous for threatened species and that may not always be the case, particularly where those priorities are private arrangements between individuals for other purposes.

25

A. And look I think that's a risk unfortunately your Honour, that we have to run and that's, in my view again, what the longer-term planning processes which are going to actually assess the vision for catchments, the objectives and the values. That's actually part of that longer-term process going forwards because to try and identify where they are detrimental, if they're detrimental they're already detrimental. It's making sure that we don't change and have an unintended adverse environmental effect.

30

1620

Q. And your proposed relief is what in terms of capturing the hydrological conditions with no change to the hydrological conditions?

5 A. So my proposed relief is actually that the existing – and that was why I thought it was useful that we had these examples attached to the memorandum, would be to actually repeat those conditions as taken cessation conditions in replacement permits for controlled activities.

Q. As taken cessation conditions.

A. (inaudible 16:20:52). Because they amount to the same thing. Different purpose but they do amount to the same thing.

10 Q. And your witness is giving evidence that they amount to the same thing?

A. I have to say your Honour because my witness has written his evidence in relation to the notified plan change and the Director General's submission, no, he has not discussed this but that's something which he can discuss in supplementary evidence once he's had the opportunity to consider the supplementary evidence of Mr de Pelsemaecker.

15 Q. Which witness are we referring to here?

A. Mr Brass.

Q. He's not your hydrologist though, is he?

A. No.

20 Q. Your hydrologist is going to have to talk to this.

A. I don't have a hydrology witness, your Honour.

Q. You've just got a fish expert.

A. Yes. Although he does have some hydrology expertise?

Q. No, he's shaking his head.

25 A. He's not a qualified hydrologist.

Q. If this takes a 35 year consent to get you to where you want to be then what?

30 A. I have to say your Honour that I do consider a 35 year consent would be too long. A 35 year consent – I'm here speaking for the little fish but that is not the only important thing in concept in Te Mana o te wai. There are a lot of other matters as well. I'm speaking for the little fish and the continuation of this for a six year period is part of the controlled activity. My submission would be that the further processes then allow for

consideration of not just little fish but all those other really important values that need to be accounted for in NPS compliant plan framework.

Q. Fortuitously Ms Dicey also wants priorities so we can explore with Ms Dicey what did she mean and does she also see it the same way that it's a residual flow or cessation condition, does she see it the same way.

A. Yes, I'm going to cross-examination Ms Dicey.

MS WILLIAMS CONTINUES OPENNING SUBMISSION:

Moving onto fish passage your Honour, paragraph 28, so there are three matters which we've already talked about today in section 3 Implementation of the NPSFM which are required to be included in regional plans without following a Schedule 1 process and that includes clause 3.26(1) which is the fish passage clause and I've set that out there and I've noted at 29 that this potentially does pose a difficulty or PC7, which intends to insert a standalone chapter into the regional plan and in my submission this could be overcome by assuming that just as the discharge permitted activity rules in Chapter 12 will apply to controlled activities in this chapter these NPS policies must be relevant and provide policy support to the methods of control on activities required by PC7.

20

I might add your Honour that whilst those policies may not yet be formally be within the operative plan I was in a hearing for a resource consent in August last year where the question of the application of the NPS to natural inland wetlands was a live issue and where the commissioner deliberately chose to close the hearing on the 4th of September so that he could have regard to policy 322(1) in addressing that and that was for this council. So this council certainly is prepared to act on and implement those policies even if they're not formally within the operative plan.

25
1625

30 THE COURT: COMMISSIONER EDMONDS

Q. Can I just ask a question here? So if there were no methods of control that related to this matter would you still be making the same argument because after all this is an objective but you still need to the rule hook, don't you to apply this policy?

A. Well, exactly Commissioner and in my submission that drives the need for fish passage to be a matter of control, a matter of discretion.

Q. Okay so that's what you're wanting.

A. Yes.

5 Q. I just wanted to be clear about that in the light of the amendments that are now going to be in front of us.

MS WILLIAMS CONTINUES OPENING SUBMISSION:

I now move on to just talking briefly about the Freshwater Fisheries Regulations
10 1983. They deal with maintenance of fish passage in Part 6. The relevance of
the Regulations and their purpose compared with that of the RMA was
considered in declaratory proceedings brought before His Honour Judge
Whiting in 2002, where His Honour stated and I've set out there essentially his
Honour's conclusion about the purpose of the regulations and consideration of
15 fish passage under the RMA.

At 31, the issue was live in that case because there was a challenge to the
extent of Council's powers to manage fish passage, as part of consents sought
under sections 13 and 14 of the Act given the existence of the Regulations. The
20 Court made the declaration sought that fish passage is within the jurisdiction of
consent authorities, finding the two statutory instruments have different
purposes and are not inconsistent with each other.

The Director-General makes decisions under the Regulations. It is only where
25 some existing and any new structures impede fish passage that an
authorisation from the Director-General is required.

is highlights the importance of Council's role as a consent authority to ensure
fish passage is maintained unless there is good reason and in my submission
30 there is good reason expressed in clause 3.26(1) of the NPS to depart from that
starting point that fish passage should be maintained. It is only where there is
a departure and fish passage actually is impeded that the Director-General
becomes involved under the Regulations.

THE COURT: JUDGE BORTHWICK

Q. What does that mean it's only where there is a departure?

A. So the departure I'm talking about is from the requirement to maintain fish passage. Your Honour, I might skip over the next three paragraphs.

5 Q. Not sure about what you're actually saying here. Director General gets involved at paragraph 32, for some existing and new structures which impede fish passage. If that is to be the case then you'll need authorisation from the Director General so you've lost me. What is the issue here? I think you're saying the Director General's powers are not
10 broad enough as may be required to ensure that there is fish passage.

A. Essentially your Honour, the Director General only can deal with existing structures. The Director General can't deal with a structure which is proposed to be built and that's where councils have the ability as consenting authorities considering structures in beds of streambeds,
15 lakebeds et cetera, to manage that aspect. If you end up with a structure which does impede fish passage, that's the point when the Director General has to consider it and, you know, decide whether to authorises it or whether you actually need to go back and take some remedial action.

1630

20 Q. Now what's that to do with this plan change though?

A. It isn't your Honour, it was simply that you, I did mention the issue of fish passage and the regulations the other day and I just was covering it for completeness your Honour.

Q. Okay that's, that's probably not helpful and as much as the, what's the
25 job of the court in relation to fish passage, what are you asking the court to do?

A. So in relation to fish passage the job of the court your Honour, in my submission, is to assist the consent authority in terms of the plan change to maintain fish passage as the new policy which is read into the plan
30 directs under the NPS and this is because there is a significant resource management issue around fish passage and lack of fish passage and so that's, this is where, your Honour, it's relevant.

Q. And that is because, because what, that there are deemed permits and existing permits out there that have no conditions pertaining to fish passage and they really ought?

5 A. Yes and so and again your Honour, it's ensuring that existing conditions are maintained so that again it's about where the current take would allow fish passage that that conditions, where the current take doesn't allow fish passage and that has as in part an environmental effect protection of galaxias habitat that that is continued.

10 Q. So where it doesn't allow, okay. Right okay so we've got, we've got a resource consent which has a condition as to fish passage say one which is allowing fish passage or alternatively one which is blocking fish passage as the case may be, those conditions get rolled over in the new consent, don't they?

A. They should be rolled over into the new consent, your Honour, yes.

15 Q. And so if that is the case then that's probably not the case that the Director General's addressing, the Director General's addressing some other case –

A. Yes.

Q. – where there's no condition.

20 A. Yes and so that, your right your Honour, and so that would be in the circumstance of the existing deemed permits and it's simply to allow council to impose again as matters of control or matters of discretion, conditions which maintain the existing fish passage situation whatever it might be.

25 Q. Maintain the existing fish passage situation, where they are – okay. so give me a hypothetical, you've got a deemed permit, there's no condition on the permit as to do with fish passage but, but what, but nevertheless –

30 A. So nevertheless the way the point is take is actually effectively resulting in a de-watering of a passage of natural waterbody because it's all being diverted into a water race. Down stream in that waterbody we have trout which predate on non-diadromous galaxiid species, upstream we have Clutha roundheads, sorry –

Q. Something.

A. Otago, central Otago roundhead galaxias, I'm mixing my fish up, and they are managing to persist in that upstream habitat because the trout do not have anyway or egress up there. If there is a change in the way that water is taken such that we now have a new flow going down what was
5 precisely a de-water stretch allowing trout and other species to come up, that's a threat to the fish.

Q. So then the fish passage isn't necessarily about putting in ladders or putting in blocks.

A. No.

10 Q. It's about maintaining the current hydrological flow?

A. Yes.

Q. Okay and that's all it's about?

A. Yes.

Q. So its not about putting in hard infrastructure into the river?

15 A. No, that would require obviously additional conditions and that's not the point of this plan change, so it's actually about maintaining the existing environment.

THE COURT: COMMISSIONER EDMONDS

Q. So it might also be about not taking out barriers that there currently are
20 that mean that salmonids can't get to the galaxias, would that be right?

1635

MS WILLIAMS CONTINUES OPENNING SUBMISSION:

Yes Absolutely. So moving to the Director General's submission and relief and
25 I have to say your Honour that I'm perhaps in a similar position to my friend, Mr Page and that the court proceedings have moved on but I have instructions and I have not had the opportunity to really refresh those instructions so I'm just alerting you to that so talking to the controlled activity at 37.

30 The Director-General accepts the 'juicy carrot' option of the controlled activity is a means to provide for the replacement of permits in the short-term. He does seek additional matters of control to ensure that these replacement permits do

not result in worse environmental outcomes – especially as these relate to threatened non-diadromous galaxias and their habitats.

5 The Director-General also sought and continues to seek the retention of priorities for deemed permits where these are currently being exercised as their lapsing could adversely impact current hydrological conditions. The specific relief sought proposed the addition of flow triggers and banding. I accept that this proposed relief is cumbersome and would likely defeat the intended purpose of PC7 to provide an efficient and timely transition for short term
10 permits.

The specific relief as I've indicated before which was proposed was addition of flow triggers and banding and I do accept that that proposed relief is cumbersome and would likely defeat the intended purpose of PC7 to provide
15 an efficient and timely transition so I'm not pursuing that relief. However, I submit as set out above an alternative way to continue to apply priorities in replacement consents is to use cessation of take and/ or residual flow conditions and where these deemed permits have been substituted under the RMA, Council has the information available for it to apply conditions of this
20 nature.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Your planning has or has not their mind to that?

A. He has now, your Honour. I don't know – I can't actually recall whether he did in his evidence. No.

25 Q. So a bit like everybody else. I think it is absolutely critical for the court and only fair to all parties that if there is a change of position in the planning evidence particularly in the relief that it is documented because I must have very little imagination but I can't imagine how you're going to get from a deemed permit condition to a cessation condition so that's my
30 lack of imagination. I need to see it in writing.

A. Yes, your Honour.

Q. Everybody is in the same boat so I said to Mr Page it's really important that he come back on Wednesday as to whether or not his client has

changed the position and therefore timing as to any supplementary evidence but it's actually key for everybody who's changing their position now.

5 A. Yes, your Honour. The only difficulty I have is that, of course, Mr Brass is due in Marlborough on Wednesday so the evidence might be available but Mr Brass won't be.

Q. (inaudible 16:38:34), isn't she?

A. Yes.

Q. is she being alerted to what the restrictions are or timing issues here?

10 A. I'm sorry, your Honour. I'm not counsel on that matter so I just don't know.

Q. She should be so that there is an opportunity to see whether or not that conference can be re-arranged to allow your witness little bit more time to prepare.

15 A. Yes, your Honour. Can you convey that to counsel for the Director General?

20 A. I can certainly pass that on, your Honour. Your Honour, at 40, the Director General has also raised the question whether existing Schedule 2A minimum flows should apply and his relief suggest that they should apply to replacement permits under the controlled activity rule and I'm not going to take that any further at this time but that's certainly the relief that was sought, your Honour.

Q. And you're continuing with that or don't know yet?

25 A. That's what the relief sought and I've certainly explored that in cross-examination with both Mr de Pelsemaeker and Dr Allibone and the concern really is to avoid, as I say at 43, further degradation of the environment and it may be that those are sufficiently addressed through the Schedule. I'm just not sure about that.

1640

30 Q. I don't recall whether your witness is talking about the Schedule plus the allocation block as well because they worked together.

A. We only sought the minimum flows, your Honour. We didn't seek the application of the allocation block. I think the thinking behind seeking the minimum flows was that it was a base line for some kind of environmental

consideration based on the information that was available when they were set.

Q. You're not sure where you've got to this? I'm just saying that because Fish and Game's hydrologist has quite detailed evidence about how those two things together. Without an allocation block you're going to take flows down and hold them at a flat line potentially during the dry months.

A. Yes, I suppose the alternative proposition is that if there isn't minimum flow then they can dip below what the minimum flow might have been so. So it's something which is causing us some difficulty in which we're having to reflect upon and I don't have an updated response as yet on that.

THE COURT: COMMISSIONER EDMONDS TO MS WILLIAMS

Q. No answer on that yet is that what you're saying?

A. No.

MS WILLIAMS CONTINUES OPENING SUBMISSION:

Moving to paragraph 44, as I have stated the Plan change cannot lose sight of the threatened non-diadromous galaxias freshwater fish and their habitats. Where they persist in the Otago region, these fish are part of the freshwater ecosystems and water bodies whose health and well-being must be prioritised under Te Mana o te Wai.

As accepted by Mr de Pelsemaeker, matters of control are discretionary. If they are not included, then there is no ability for the Council to impose conditions to manage these important matters and ensure PC7 is indeed 'holding the line' and avoiding further degradation of the environment.

And in my submission not including matters of control for non-diadromous galaxias will result in PC7 failing, even on its limited terms, to give effect to Te Mana o te Wai.

Over the page, your Honour, I'm now dealing with the new restricted discretionary activity which, of course, is not a matter on which the

Director General submitted because it wasn't in the notified plan change and I've noted that this is Mr de Pelsemaeker's response to submissions seeking a path where consent holders have already made financial commitments to expand irrigation and move to more efficient use of existing allocation and I'm really going to reserve the position of the Director General on this additional pathway. I am unclear about the extent of the problem that this solution proposes to address.

While Mr de Pelsemaeker's evidence assumes there will be an environmental gain, presumably this is because of a shift from existing inefficient water distribution infrastructure to more efficient infrastructure, this is not certain or guaranteed. In some cases, the existing inefficient water distribution infrastructure may be supporting significant instream values including for non-diadromous galaxias

15

The proposed matters of discretion do not allow for consideration of such matters. Further, as applications under this Rule would not be notified, including to the Director-General, there is no ability for the Department, Te Papa Atawhai to potentially engage with applicants where known sub-populations of non-diadromous galaxias could be impacted.

20

If a restricted discretionary activity is included in PC7, it is submitted that the matters of discretion should allow for consideration of instream values including protection of known significant habitat of non-diadromous galaxias. This would allow for appropriate conditions to be imposed to avoid any degradation of the environment in the interim.

25

Lastly your Honour the non-complying activity. The submission supported the idea of a non-complying activity policy and rule to allow for genuine exceptions when a term longer than six years, and up to 2035, could be considered. The submission considered that the plan change as notified lacked sufficient detail and sought to address this.

30

In the latest, 14 March version of PC7 the limitation that consents granted under this rule would expire by the end of 2035 has been removed. Instead the revised wording would “avoid granting” replacement consents for a duration of more than six years.

5

It is unclear what the effect of removing the previous explicit expiry date of 31 December 2035 for the non-complying activity will mean. This is a change which will need to be considered further by the Director-General’s planning witness.

10 1645

And lastly your Honour, the Director General is calling two witness, Dr Nicholas Dunn and Mr Murray Brass and in relation to Mr Brass’ written evidence I do note that as this primarily relates to the notified version of plan change, I alert the Court to the likely need to provide supplementary evidence to address the most recently revised version of PC7 annexed to Mr de Pelsemaeker’s supplementary evidence of 14 March 2021.

15

THE COURT: COMMISSIONER BUNTING TO MS WILLIAMS

Q. (inaudible 16:45:57) submission related to the notified plan change not to the one we’ve just received overnight so this could have quite a...

20

A. No, and this is somewhat of the difficulty, your Honour. The Director General actually submitted in time for the council notified version of plan change 7 back in 4 May 2020 and yes, it was re-notified by the Environmental Protection Authority. I don’t think we chose to submit again at that point. We did do a further submission on some other parties’ submission when that process opened but we were all dealing with that original March 2020 notified version.

25

MS WILLIAMS CALLS**NICHOLAS REX DUNN (AIFFRIMED)**

Q. Dr Dunn, is your full name Nicholas Rex Dunn?

A. It is.

5 Q. Are you a Freshwater science advisor in the aquatic unit of the biodiversity and engagement group of the Department of Conservation, Te papa Atawhai?

A. I am.

Q. Do you have any corrections that you'd like to make to this evidence?

10 A. No, there might be one or two commas or full stops missing but nothing substantive.

Q. You have set out at paragraphs 3-14 of your evidence your qualifications and previous experience.

A. Yes, I have.

15 Q. Do you now confirm and produce this evidence to the Court?

A. Yes, I do.

Q. Because your evidence came under the 20 page limit, you don't have an executive summary in your evidence and I wasn't going to lead one so I now lead you to the questions of the Court.

20 **QUESTIONS FROM THE COURT – NIL**

CROSS-EXAMINATION: MR MAW

Q. Good afternoon. My first line of questioning relates to fish passage and I'm a little unclear just based on the legal submissions whether fish passage were still being pursued as a matter of control with respect to
 25 the controlled activity rule. My understanding that that issue is going to be addressed at some point later this week so I just wanted to explore with you some questions on the basis that fish passage remains as a matter of control in the controlled activity rule. So when you think about matter of control dealing with fish passage, how would you go about
 30 assessing that matter of control? What type of ecological information would need to be furnished with respect to fish passage?

1650

A. I just point out that I'm neither a planner nor a fish passage expert so there are more qualified people within the Department that could answer that question but I couldn't.

5 Q. So you have no expertise from an ecological perspective on what types of assessment might be necessary to assess a matter of control relating to fish passage?

A. No, I don't.

10 Q. We'll move onto another topic if you have no expertise on that issue. Perhaps it I can take you to your evidence in chief and paragraph 60 and here you're providing some evidence in relation to the application of a minimum flow according to Schedule 2A of the water plan in circumstances or situations where no minimum flow currently exists on a permit. Are you familiar with the catchments set out in Schedule 2A?

A. I have a rudimentary understanding, yes.

15 Q. In relation to your level of understanding, is there much cross over between those catchments and the catchments dominated by deemed permits?

A. I haven't undertaken that analysis specifically, no.

20 Q. Have you undertaken any analysis in relation to whether there are in fact minimum flows on deemed permits being renewed? Do you have any understanding of the mixture of permits?

A. No, I don't.

25 Q. Do you have any ecological understanding in relation to the impact that imposing those minimum flows would have on ecological values within the Schedule 2A catchments?

A. No, but my understanding is that they were set on the best information at hand at the time. That may have changed in the time period since they were proposed.

30 Q. So you in this brief of evidence haven't analysed the effect of imposing those minimum flows on the Schedule 2A catchment from an ecological perspective?

A. No, I haven't. I've relied on the analysis undertaken at the time by the ecological experts who were involved.

Q. Did you review those analysis in preparation for writing of your evidence?

A. No, I haven't.

Q. I want to take you now to paragraph 62 of your evidence and in your first sentence there you respond to a paragraph in Mr Wilson's evidence in relation to instantaneous rates of take and you then go on to provide your opinion in relation to the potential for instantaneous rates of take to increase for some consents. When you were writing that paragraph what is it that you had in mind in relation to the potential for increase of instantaneous rates of take, compared to what?

A. The way I approached that paragraph was that you might be taking a volume of water over a specific time and you could average that across that time or you could take that entire volume during the shorter period of time depending on the restrictions of your infrastructure of course. So there is a potential that if you took to the maximum of your infrastructure over a short period of time you could essentially dewater a reach of stream and so we want to avoid any further adverse effect.

1655

Q. What do you mean by "we" in that context?

A. Well New Zealand Inc on the effect of an adverse effect on non-diadromous galaxiid habitats.

20 **THE COURT: JUDGE BORTHWICK**

Q. New Zealand who?

A. Inc.

Q. Inc?

A. Yes. New Zealand as a whole, they're our fish so that's why I talk about "we".

CROSS-EXAMINATION CONTINUES: MR MAW

Q. When you read Mr Wilson's evidence and you've referred to specifically to his paragraph 58, did you understand Mr Wilson to be referring to instantaneous rates of take calculated under the water plan 95th percentile methodology or something else?

THE COURT: JUDGE BORTHWICK

If you need to refer to his evidence you should say so.

CROSS-EXAMINATION CONTINUES: MR MAW

- Q. Do you have Mr Wilson's evidence with you?
- 5 A. Yes –
- Q. It can be made available.
- A. Yes, I do I just need to find it. Mr Leslie is referring to the 95th percentile so I took it as the 95th percentile, yes.

THE COURT: JUDGE BORTHWICK

- 10 Q. You mean Mr Wilson?
- A. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

- Q. So what Mr Wilson was referring to in his paragraph was the difference between the proposed schedule method 10A and the 95th percentile method currently being used under the current water plan.
- 15 A. Yes I see the (inaudible 16:57:15), yes, sorry, my mistake.
- Q. So when you say in your paragraph 62: "as indicated by Mr Wilson the instantaneous rate of take may increase for some consents" what Mr Wilson's actually saying is that when using the proposed methodology
- 20 in plan change 7 compared to the 95th percentile methodology used under the water plan there may be a higher instantaneous rate of take?
- A. Under plan change 7.
- Q. Yes.
- A. So that could lead to an adverse effect.
- 25 Q. That could lead to an adverse effect to compared to the, a permit being renewed under the operative water plan and a limit if it was imposed equating to the 95th percentile.

THE COURT: JUDGE BORTHWICK

If you don't understand the question you should counsel to rephrase.

CROSS-EXAMINATION CONTINUES: MR MAW

A. Yes, could you, yes thank you, could you please rephrase?

5 Q. I'll put it this way, plan change 7 does not allow for an increase in the instantaneous rate of take above the current consented or permitted rate of take does it?

A. Yes I think so.

Q. So you do think it does allow that?

A. No, I think you're correct in what you just said, sorry I've been up since half past four.

10 Q. It's all right, I'll make sure I don't ask any questions with double negatives. So I'm trying to understand what your concern in paragraph 62 is addressing and I wanted to make sure you had correctly understood what Mr Wilson was actually saying in his paragraph because it appears to me in terms of how you have referenced his paragraph in your first sentence
15 that there may have been a misunderstanding about what it was that Mr Wilson was saying.

A. It would appear that that could be the case, yes. I guess the overall intent is that we don't want an instantaneous rate of take which causes a detrimental effect of stream environment.

20 Q. Perhaps I could put it to you this way, provided the instantaneous rate of take does not increase that which has been authorised and has been excused historically, the concerns you raise in your paragraph 62 would be addressed?

1700

25 A. Yes.

Q. I want to move on now to the issues you've addressed in your paragraph 63 and you acknowledge that – well, do you have any working knowledge of hydrology within the Otago region?

A. No.

30 Q. Do you have any knowledge in relation to the current priority system that attaches to deemed permits?

A. I have an understanding of what they are but I don't know any specific examples that I could provide you of how they operate.

- Q. So you have no knowledge of whether they have been exercised and if so to what extent?
- A. No and again, it's trying to ensure that there's no change or alteration to the hydrological environment from current to which may cause an adverse effect.
- 5 Q. And you pick up that theme midway through your paragraph 63 where you note that it may be advisable to retain the current priority system or some system that mimics the current priority system that operates on deemed permits, so is that what you're trying to pick up –
- 10 A. Yes.
- Q. – in that part of the paragraph?
- A. Yes.
- Q. Now do you have a working knowledge or an understanding, even at a conceptual level of the proposed method that's been put forward with respect to plan change 7?
- 15 A. The method for?
- Q. The method for calculating historic use, so method in schedule 10A.4.
- A. No that's a hydrology area which is outside my area of expertise.
- Q. If that method was seeking to reflect the historic use of water and that historic use of water – or the methodology was picking up on the exercise of priorities as it's been happening, is that what you're picking up on when you say: “some other system that mimics the current priority system”?
- 20 A. I'm not a planner so I couldn't put forward an alternative planning instrument, no.
- 25 Q. But from your perspective the key point is reflecting the historic manner in which these water permits have been exercised and ensuring that that continues for this short-term period?
- A. On, yes, on the understanding that in the short-term period, that there is again an understanding of the hydrology of those catchments.
- 30 Q. Thank you.

CROSS-EXAMINATION: MR WINCHESTER – NIL

CROSS-EXAMINATION: MS IRVING

- Q. Dr Dunn, just while I'm organising the microphone, can I can ask you to get a copy of Dr Allibone's rebuttal or reply evidence please. Can I ask you please to turn to page 8 of Mr Allibone's reply brief and specifically looking at paragraph 24. I'll just give you a moment perhaps to read that paragraph and refamiliarize yourself with it.
- 5
- A. Yes.
- 1705
- Q. Would you consider the point that Dr Allibone makes about there being a limited risk of extinction to the population of galaxiids at Totara creek to be one of general application to all galaxiid population within the Otago region?
- 10
- A. I don't. It's one example. It's not a generalisation. Dr Allibone has provided an example from a single stream which I don't consider to be able to be generalised across Otago.
- 15
- Q. I understand your concern or you wanting to ensure that the risks posed to galaxiids species by plan change 7 are not exacerbated that we essentially hold the line.
- A. Yes.
- 20
- Q. I will take you to paragraph 35 of your evidence please. In that paragraph you refer to using consent conditions and other management interventions to protect and reduce risk of species extinction.
- A. Yes.
- Q. And you have been involved in consent renewal processes where those sorts of methods have been employed?
- 25
- A. Yes.
- Q. Such as the Kyeburn catchment as an example?
- A. Not the Kyeburn, no.
- Q. You were not involved in the Kyeburn?
- 30
- A. No, I wasn't.
- Q. Perhaps Laheys Creek would be an example with the galaxiid management plan?
- A. My involvement in Laheys Creek was one site visit in February 2017. I wasn't involved in any other part of that process.

Q. When applicants are looking to renew their permits would you be interested in opportunities for resource consent conditions that would enable management interventions to support galaxiid populations?

5 A. Yes, the intent of bettering the habitat of species should be considered in the first instant, yes.

Q. If bettering the habitat of galaxiids species also required resource consents of a term exceeding six years, would you support that?

10 A. I think looking at consent conditions we would have to – I'm sort of thinking further to may be an FMU style approach of understanding catchment objectives and what needs to be achieved in various parts of a catchment or sub-catchment within that so you don't want to be in a situation where consents are granted which may be inconsistent with an objective which is written under an NPS compliant plan.

15 Q. Even if the granting of that consent was to protect the habit of galaxiids?
1710

20 A. I can see where you're going, we'd need, if those consents are granted but then become inconsistent with objectives which are developed under an NPS compliant plan that could pose a problem on my understand from a planning perspective. So while I would support any consent which helped to maintain or better the galaxias habitat that needs to be viewed in that context, that they shouldn't that we can't set things up with a inconsistent in a short-term. So stepping back and understanding what we're trying to achieve before those consents have conditions put on them would be advisable.

25 Q. Going back to the issue or I think Mr Maw's questions around fish passage, I understand you say, you don't have expertise in fish passage per say but I wonder if you can help me, when we're discussing fish passage, I understand that to me movement up and down the waterway.

A. Yes.

30 Q. As distinct from fish screening which requires infrastructure to prevent fish from moving into in takes, is my understanding correct?

A. On the whole I would agree with that, yes.

Q. And so the issue for the department is in ensuring that fish passage, whether that's provided or not provided by an individual take that

circumstances are kept as they are, that the renewals of the permits whether for six years or some other number or six years on the controlled activity rule, that that circumstance remains the same?

5 A. Yes and in that period as work towards the NPS compliant plan there would be an increase in knowledge of those habitats.

Q. Yes.

A. Yes and management interventions needed or not, yes.

Q. Okay.

RE-EXAMINATION: MS WILLIAMS – NIL

10 **QUESTIONS FROM THE COURT: JUDGE BORTHWICK – NIL**

QUESTIONS FROM THE COURT COMMISSIONER EDMONDS – NIL

QUESTIONS FROM THE COURT COMMISSIONER BUNTING – NIL

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

Q. So that is us for today, half day break tomorrow, parties coming back to talk about – no, I said parties coming back, Ms Mehlhopt only to come back at 9 o'clock to front the court on the – unless everyone else wants
5 to be there but perhaps by email as to the arrangements of expert conferencing.

MS MEHLHOPT:

Yes your Honour and I have been in touch with Mr Wilson and Mr Leslie this afternoon and in terms of getting a response back from Landpro and OWRUG
10 they made need a little more time than half an hour just to, there's some things that they may need to work through in terms of that scenario so a window of an hour rather than half an hour from that response would be useful for them.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT

Q. Okay and so you're thinking if they hear back from OWRUG and Landpro,
15 8.30 tomorrow morning that they will need a further hour to think about whatever it is that's being raised and then will be able to communicate to the Court whether there is an agreed scenario and dataset.

A. That is my understand your Honour.

1715

20 Q. And if there isn't then I think the process will be for Commissioner – Mr Dunlop to do what Mr Dunlop does, so see whether or not we can't get people on the same page and he can report back to me. Also, you'll let me know whether the dates from the planning conference in April are suitable. So that's about 9.30, 10? Yes.

25 A. I have asked for a response from parties today.

THE COURT: JUDGE BORTHWICK

Anything else we need to address? So going into tomorrow, who are we going to hear?

30

MR MAW:

We move onto Mr De Pelsemaeker in terms of introducing the next iteration of changes to the plan change and then I would suggest we'll hear from Ms Gilroy, Ms King and Mr Wilson. Now, in terms of other witness – or witness
5 unavailability, Mr Brass, I think, has some issues. It may well be that we can hear from Mr De Pelsemaeker and then hear from Mr Brass before calling the other witness if that assists.

THE COURT: JUDGE BORTHWICK

I don't know, I mean, Mr Brass sounds like he's got to do some quiet reflection
10 in relation to your evidence and it sounds like there would be change – he has been reflecting and there would be a change anyway, regardless of where he stands in relation to –

MS WILLIAMS:

Of course Mr Brass is an independent expert and he can certainly come to his
15 own view. My difficulty is that as counsel and advocate for the Director-General I have a certain position which the Director-General put forward in the submission which I am at this point still bound to at large.

THE COURT: JUDGE BORTHWICK

Yes. Okay, I think what you're saying is that Mr Brass may come to a different
20 position and that's fine and then the question then comes, has that been raised in any submission? That's not your submission, then any other submission?

MS WILLIAMS:

Your Honour, I don't believe Mr Brass will be going outside what is within the scope of the other submissions. There may be an issue in terms of whether it's
25 within the scope of the matters on which the Director-General further submitted and I would need to look at the submissions that Mr De Pelsemaeker has reference in his supplementary evidence to see to what extent the Director-General as a position has scoped to, to change.

THE COURT: JUDGE BORTHWICK

So this is obviously the thing that the Court doesn't ordinarily concern itself with but in the ordinary case, you would be leading evidence that would be within the scope of your submission but this is a court process, so is it open to you to
5 say: "well, things have moved on and my planner is going to (inaudible: 17:18:19) of say the Minister of Environment's submission who said x and support that now as an outcome", is that available to the Court or do you sort of get hoisted by your original submission. I actually don't know.

MS WILLIAMS:

10 I'll let Mr Maw have a go first.

MR MAW:

My preliminary view is the scope does exist for that approach to be taken but in terms of the utility of cross-examining Mr Brass in relation to a position which is potentially no longer being advanced by, for example, either the Minister or the
15 Director-General of Conservation or the Minister for the Environment.

THE COURT: JUDGE BORTHWICK

Not much.

MR MAW:

Yes, not much and I'm just thinking through from a timing perspective. If parties
20 are to file the relief that they are now seeking on Wednesday morning of this week, it strikes me that hearing from Mr Brass and any other planning witness after that time would be a more efficient use of time because I simply won't be exploring matters that aren't being pursued by parties.

THE COURT: JUDGE BORTHWICK

25 No and I would think it would also be the case of Ms McIntyre too. Maybe not be the case for the others.

MR WINCHESTER:

Excuse me, Ma'am, I will be meeting with Ms McIntyre tomorrow and it may be helpful if she can prepare an updated version of relief. Obviously she reflected on some matters she was questioned on Friday.

5 1720

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Do you have a view as to whether Ms McIntyre has to find herself within the original scope of Ngai Tahu's submission, I mean I'm assuming that Mr de Pelsemaeker, he can go: "well look I like a bit of the MFE's and I like a bit of DoC's and I like a bit" you know, if that's where he's going then that would be fine because he can find the scope there but what's the case in terms of an individual party?

10

A. My submission Ma'am is that the witness, provided they appreciate the range of scope available looking at all matters in the round, is entitled to make a recommendation along the same lines that Mr de Pelsemaeker would so I don't say that an independent expert is bound to only provide an opinion within the bounds of the relief advanced by the party that engaged them.

15

Q. So they can quite sensibly go well actually, no okay I understand –

20

A. And indeed an example of that Ma'am is the reflection that Ms McIntyre gave to the Court on Friday, that she was inclined to the view I think of Mr Farrell in terms of did it better solve the problem that she was looking at.

Q. Okay.

25

A. And she may reflect on that again given what, or indeed would no doubt reflect on that given what Mr de Pelsemaeker has now produced.

Q. Okay, thank you that's really helpful.

MS WILLIAMS:

And for the Director General your Honour I think that where we are looking at is potentially a pulling back from the original submission so I am not expecting that what Mr Brass would say would out of scope because the Director General submitted on the entirety of the plan change except the schedule so in my view,

30

anything frankly within the parameters of the plan change accepting the schedule is within scope for the Director General to seek and amend his relief on and for Mr Brass as a planning witness to reach a view on.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

5 Q. So I guess the question will be if the Director General – the question that I was putting to you is if the Director General, accepting that has made a submission of the whole PC7 but not the schedule so the schedules beyond the scope of the Director General’s interest but beyond that can look for any relief?

10 A. Well as I – I don’t think we would go so far as to say that we would adopt the proposed permitted activity as suggested in the relief of OWRUG.

Q. Well I know that you perhaps wouldn’t but could you, I mean that’s really what I’m driving at, what –

A. So –

15 Q. – you haven’t made a submission.

A. Yes, so in my submission or my thinking your Honour, because it’s thinking it’s not necessarily a legal submission so I want to be clear, is that the notified plan change dealt with and objective, some policies, a controlled activity rule, a non-complying activity rule and the Director
20 General submitted on those matters so we now have an additional restricted discretionary activity which has been proposed, I don’t understand there to be a great deal of change in terms of the objective and policies, it’s just something else which has come in. I certainly consider that the Director General has scope and Mr Brass has scope to
25 speak to and take a view on that new restricted discretionary activity which has been proposed by Council. In terms of the permitted activity, the only way which has come out of OWRUG’s submission, the only way in which in my submission the Director General will be able to take a view on that was if the Director General had further submitted, one way or the
30 other on OWRUG’s submission seeking that permitted activity and I don’t believe the Director General did.

Q. So if there’s a matter of theory, you thought that was a good idea, you don’t think you could lead evidence because it would be beyond your –

A. It would be beyond the scope of the submission which the Director General made on the plan change.

Q. Okay and that is because you didn't make a further submission on the OWRUG matter so there some limitations?

5 A. Yes your Honour so we're certainly limited to the matters within the Director General's original submission, the matters which Council puts before us and the matters on which the Director General further submitted and where there a matters of relief sought in other submissions that the Director General did not submit on, further submit on those would be
10 beyond the scope of matters which the Director General can comment on. Now Mr Brass, as an independent planning witness certainly can still comment on those but that would be a position that he would be taking not one for the Director General.

1725

15 Q. Does anyone have a different view to that expressed by counsel this far? Because if you have you should really let me know. Seem to me that perhaps Mr Page, you have most advantageous position because you said reject so anything less than reject.

20 **MR PAGE:**

(inaudible 17:25:14) say anything. We probably will.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. That's what I'm worried about.

A. No, I'm being silly. No.

25 Q. That would be true though because you're out there reject so anything less than reject.

A. The situation I see is it's not something the Court need to worry about too much because you're not constrained other than by the entire envelop that all of the parties have presented whether it's open to any of my
30 friends to advance their cases and consistent to their client's submission is a different matter and if somebody wishes to raise an objection about that, well, that's the way it's dealt with but I don't think you need to be

concerned about it at the moment because your jurisdiction is the outside boundary of all of the submissions.

5 Q. What would be helpful to the Court I think when planners are coming back having considered all the evidence today, if they're proposing an amended relief that they do signal what is the scope for that, where is that to be found either in their own submissions and other submission that they had an interest in and always be mindful of s 32 as well so they're just not populated by good ideas but we're landing it in the context of s 32, an analysis as to the extent as is required.

10 A. I mean my concern about Wednesday morning is more along the lines of an unexpected tactical flow path that leaves the court constrained in its jurisdiction in a way it isn't currently by limiting the relief that a party seeks. So rule of unintended consequences is rife in first instance hearings, I'm sorry to say this. Slightly messy beasts, messier than the courts used to dealing with I suspect.

15 Q. I know because the court has the product of those unintended consequences in the appeals before it so we're alert to that. I guess the message which is being drilled and instilled in us is to make sure that there is scope on this submission. That's critical. Has to be that way because if there's not that it's a good idea 293 applies so obviously scope is very much in focus and because it has to be that way as a matter of fairness to folk out there in the community. So we're adjourned to 2'o clock. 1 o'clock. How long do you need for your morning meetings?

25 **MS WILLIAMS:**

I'm not sure your Honour that we have actually quite settled the question of when Mr Brass would give evidence and whether it should be tomorrow or perhaps delayed.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

30 Q. We will delay him. I'd far rather see where he gets to after a period of quiet reflection on the hearing today and the same with the Director.

A. At this point I can do a counsel's memorandum by Wednesday morning. I think it would be potentially a stretch too far to expect supplementary evidence by that time.

5 Q. So we know what we're doing tomorrow so that's good and Wednesday, we've got Ms McIntyre back down for Nga Runanga but I think you're probably in the same position. It's a bit too early or perhaps Wednesday we just go with Fish and Game's opening submission and ecological flow evidence which are the witnesses Hayes and Trotter, if they're available. Anybody? Nobody? Okay.

10 A. My suggestion is that Mr Brass would be available on Friday and that should work and we also still have Mr Ensor for Minister and I imagine that Ms Dixon would like to get him before the court.

15 Q. So we've got planning witnesses to come, Mr Brass, Mr Ensor, Ms McIntyre and potentially Mr Farrell where I'm not sure whether anything that has been said to date impacts on his opinion as well. Can you confer and advise when it is that supplementary briefs of evidence are likely to be available in response to the evidence to be led tomorrow by the regional council and in response to any matters which have been addressed in the hearing thus far, but if convenient it would be great to
20 hear it on Friday if witnesses are available?

1730

MS DIXON:

It would be helpful if we update the Court when we come back tomorrow. (inaudible 17:30:08) afternoon as to where the witnesses have got to and
25 whether we're looking at memorandum of counsel or how quickly they can put together a planning brief or whatever.

THE COURT: JUDGE BORTHWICK

So what time are we starting tomorrow?

MR MAW:

30 Someone suggested 1.30.

MR WINCHESTER:

It says lunch at 12.45, Ma'am. It doesn't say what time we start. It just says lunch at 12.45.

THE COURT: JUDGE BORTHWICK

5 It does. How odd. It doesn't matter what time we start really. How about we just make 1.30 start tomorrow. That's convenient and we will run through your witnesses. Counsel can update me at 1.30 as to what the status of play is. We need to get written directions out also so that Ms Baker-Galloway knows what's going on.

10 MR MAW:

Yes, I'm not sure whether anyone was reporting back to her. Somebody's at the back so message will get back.

THE COURT: JUDGE BORTHWICK

15 We will send something by email tonight as well. All parties advising as to the council's case to be called tomorrow, supplementary evidence. All parties to confirm on the time that they might require to file supplementary evidence so I'm imagining Landpro will be responding et cetera.

COURT ADJOURNS: 5.32 PM

20

COURT RESUMES ON TUESDAY 16 MARCH AT 1.38 PM**MS BAKER-GALLOWAY:**

Your Honour I'll just introduce you to Ms Giles who'll be appearing with me for Fish and Game from this point on.

5 THE COURT: JUDGE BORTHWICK

Hello, okay so – sorry –

MR ZWAAN:

I'll introduce myself, may it please the Court, I'm Mr Zwaan here for Forest and Bird in absence of Mr Anderson.

10 THE COURT: JUDGE BORTHWICK

Great, so what's your name, who are you?

MR ZWAAN:

Rick Zwaan.

THE COURT: JUDGE BORTHWICK TO MR ZWAAN

15 Q. And how do you spell your last name?

A. Z-W-A-A-N.

Q. Z-W-A-A-N?

A. Yep.

THE COURT: JUDGE BORTHWICK

20 Mr Zwaan, all right, actually very good that you're both here, have a seat. Anybody else who wants to be, any other party who wants to be introduced? No, okay. I mean obviously, imperfect process, thinking about it overnight we were obviously hoping that we would get to the ORC's new, supplementary evidence today, I don't think that's the perfect process. Didn't know whether,
25 do example, Forest and Bird and Fish and Game would actually even be here because I thought you were caught up in the High Court on Lindis so you may not have been here and may not, even if you were going to be here, may not

have been ready for cross-examination so thinking about it this morning it's actually not fair just simply to go with what people in the room have to say because there's not many parties, very, very few of the parties who are actually here. So it's not just those folk who are represented by counsel or by advocates

5 but actually anybody who wants to have an opportunity to file evidence in response to supplementary evidence by the Regional Council and anybody, any party who may wish to cross-examine so I thought, thinking about it, an imperfect process so we're just trying to push more time into the schedule and that'll have a knock on effect but it is what it is. It's good that the Regional

10 Council is reflecting as all parties are reflecting on their cases is exactly what the Court would expect but, you know, saying that the changes are substantial, it is helpful to get those changes out at this point in time with the Council taking care to establish that there is scope for those changes and to, you know, carefully put it's case as to the merits of those changes, it's good to get that out

15 early for the obvious reason that many parties will want to reflect on that, as to how that informs or impacts their own position, whether it does, whether it doesn't. But it's also good to fit some time, adequate time in for everybody. So hence the minute this morning and lots of people have responded which is fantastic, no doubt assisted by Mr Cooper who's been working the phones since

20 early this morning and he, what has he done, he has phone at least those parties who have filed evidence and in particular planning evidence to ascertain their position, to alert them as to what was happening and to the Court's interest in whether they would want to cross-examination or alternatively would want to file supplementary evidence so he's been very successful, you know, there's

25 been some parties that he's missed but he's also managed to make contact with many of the parties. But you know what I'm saying, that's not everybody, we're got a huge number of persons who are formally parties to this proceeding so they also have to have an opportunity to be heard, hence the staggered times, 1 o'clock to talk to those parties with counsel in the room or

30 representatives in the room and 2.30 hopefully to pick up on everybody else. So, what were we hoping, if it is a fair an appropriate process we were hoping to get to the ORC's evidence no earlier than Thursday, that'll allow people time to prepare evidence in reply if they wish but then to consider, reflect and consider on their own case and whether there are any changes as a

consequence to that but also to prepare for cross-examination if they wish and all that takes time and it's best not to be done in a pressure cooker. So that was what my thinking was, if we could get to ORC in the morning that would be sufficient time to hear from the planning witnesses if they are A) available B) prepared and C) counsel are also ready, that's for Ngai Tahu, Director General and the Minister and again, you're responding to ORC's supplementary evidence, I think the indications are all three may be filing further evidence. The planners from all three have not been cross-examination by any other party so there's impacts there as well and so my hope is that we'd get to it Thursday afternoon or Friday but actually that might be unrealistic and it may be that the best course is simply to adjourn to allow everybody time to consider their positions. So am – not indefinitely Ms Baker-Galloway, so it is what it is and with I think with the natural justice and fairness being the Court's primary concerns here around the process or interposing this evidence from the ORC, what are everybody's thoughts?

1345

MR WINCHESTER:

Ma'am I'll lead off first of all with an apology that memorandum has not been filed as directed on behalf of Ngā Rūnanga about Ms McIntyre's evidence. I had rather anticipated I might be able to just record the position in front of the Court but a short supplementary statement will be filed so Ms McIntyre has reflected on the regional council's changes particularly those of Mr de Pelsemaeker and will have some further refinements based on that. That statement of evidence can be filed tomorrow morning given we may have some additional time this afternoon and that will essentially be a replacement set of provisions compared to what's in Ms McIntyre's evidence in chief so recognising that the case is moving on. The underlying reasoning will be essentially based on the rationale in the evidence in chief so will need only need short further explanation. From a fairness and procedural point of view certainly understand the Court's position and concerns and given that the breadth of parties involved there is a risk of particularly those later parties being heard in Cromwell essentially missing the boat and is important for a first instance process to have inclusiveness so certainly have no objection to what the Court

proposes and should it be considered that a further adjournment is sensible in advance of hearing from Ms McIntyre, Mr Ensor and Mr Brass I think. Certainly we wouldn't take position one way or the other by the Court's decision on that.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

5 Q. So you think Cromwell parties that is later in parties who are at the moment scheduled for Cromwell hearing could still miss the boat under this proposition?

A. No, I don't think so Ma'am. The burden of becoming a party to a case lies with each party to maintain an interest and keep a tab on things
10 provided they're being updated which I understand they are then there is a responsibility on each of those parties to manage their case and their interest. It does however occur to me that in terms of where we are at it's a reasonably pivotal moment in terms of some of the major parties, particularly those with expert witnesses having to re-evaluate their cases
15 and possibly reconfigure them in some instances possibly significantly and the flow on impact that has on unrepresented parties will need to be carefully considered by those parties to the extent they may have been – not being disparaging but riding on the coattails of a –

Q. Of others, yes.

20 A. – represented party.

Q. Yes, I understand that and that's there. So everybody would've got an email overnight about at least indicating, particularly those parties who are filing planning evidence, do you want file supplementary briefs? That I think will take into account all of those parties in Cromwell who are at
25 least calling evidence perhaps with one or two minor exceptions – I'm not saying that Southern Lakes is necessarily minor but I'm just thinking about all those parties that have called evidence, not just parties but the called planning evidence so it's obviously where the major burden will come but all parties calling evidence whether they wish to have time to file supplementary. Now, we know that there's going to be a large number of
30 parties that are not putting in written evidence because they haven't put in a written evidence (unclear 13:49:47) going to speak to their submission or some form of speaking to or being sworn in without any

written evidence but were the directions overnight too tight is what I'm saying because it was particularly focused on planning evidence. Those that had filed planning evidence.

5 A. Well, Ma'am. They were tight but I certainly could have complied and I apologise for not doing so.

Q. No, not in terms of timing but in terms of the focus on planning only.

10 A. Well, no, I don't think so Ma'am because the foundation evidence and the factual evidence that's been filed is before the Court and the evidence that is being sought from the regional council is adding to that factual base as to whether any party disagrees with that. They're entitled to so. I don't wish to necessarily speak for other parties but from my perspective it appears that the case is appropriately starting to have quite a strong planning focus which is quite appropriate in terms of the wording of the plan change and its appropriateness as a mechanism respecting entirely
15 the fact that some parties may still maintain the position that plan change 7 is unnecessary. But it's fine to maintain that position but you may as well express a view on how it can be approved if the Court is inclined to approve it. So I don't have a concern with the breadth of the direction made by the Court because I think the mechanics of the plan change is –
20 I detect is where the Court's interest lies at the moment. Certainly the stage we're at we may broaden out back again into technical evidence and indeed some factual evidence and inevitably that's what will happen in Cromwell but at the moment there's a strong focus on the planning stuff and in terms of Friday subject to fairness issues my submission is that it would be convenient and efficient to hear from the planning witnesses
25 from Nga Runanga, the Direct General and the Minister if possible because – well certainly from Court's perspective and from those parties represented in court it's a strong block of planners so we're all able to focus on those issues in a convenient manner and probably from a questioning cross-examination point of view there's likely efficiencies as well I would've thought.

30

Q. With your evidence, updated brief from Ms McIntyre to come in tomorrow you're thinking?

A. Yes, Ma'am. It will be very brief because we have already heard some preliminary thoughts from Ms McIntyre and essentially now that Mr de Pelsemaeker has done a quite significant revision of his recommendations it will focus on the merits of those.

5 Q. Alright. Thank you very much, Mr Winchester. Ms Dixon.

MS DIXON:

A. Just picking up from where Mr Winchester finished really, the question around timing of supplementary brief from the Minister's planning witness
10 who is Mr Ensor. My first response to your direction of last night was actually to seek a longer interval for preparing the evidence on the basis that unlike Mr Winchester's witness Mr Ensor hasn't been heard at all and his brief of evidence was filed at the beginning of February and things have moved quite a lot since then so he's anticipating that his
15 supplementary brief would also have to at least to some extent pick up on issues that were still alive from his February brief. We were thinking that that might require a little bit of time. We also had a look at the hearing schedule. When I say "we" I mean that there's been some conferring this morning with counsel for the Director General and Mr Welsh for
20 Trustpower just simply around this question of timing. If we're looking at the schedule and thinking, if these witnesses actually can't be heard until possibly well into your time in Cromwell then they should be given longer – they might as well have longer to prepare the evidence on the basis that there's not point in hurrying it. Your second direction changed our
25 thinking around that a little bit because obviously there was the possibility or the likelihood that those witnesses would be heard this week in conjunction with Council's planning witnesses.

1355

Q. I'd have to say, I've no fixed view on this, I'm trying to do what is fair not
30 only to people in the room but bringing with us people who are not in the room.

A. And which brings me back to Mr Winchester really his point that and I agree that there are, this is a collection of planning witnesses who have a substantial position to put and from everybody's point of view probably

the sooner you hear from the complete range of those planning experts the better so I understand the thinking about later this week. On that basis Mr Brass and Mr Ensor are not here, they are back in their offices or hotel rooms or whatever beavering away, in fact right now on a supplementary brief. So my suggestion was that it would probably take until Thursday and that was in the memorandum that I filed this morning, simply so that Mr Ensor can in fact review where he was on the 5th of February, respond to Mr de Pelsemaecker's 14th of March PC7 version which is clearly the most important thing but make sure that he picks up on anything that he needs to from his earlier brief and if they, they meaning Mr Brass and Mr Ensor, are to be heard on Friday or Thursday, probably Thursday about 5 pm we thought was the latest, that their evidence would need to be available to the Court and to the parties. But how that exactly works with the other parties I'm not sure.

15 Q. Yes and that's the other question, it's fine to have the evidence in by 5 pm but will everybody be ready for cross-examination.

A. Exactly, and we did have a quick discussion with Mr Maw about that this morning and he'd no doubt want to comment on that himself but we were kind of trying to work around what people thought was the minimum about of time they'd need to prepare for cross-examination but that doesn't of course take into account the Court's capacity or the time you have to read in advance as well.

Q. Okay, all right, thank you. Ms Williams?

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

25 A. Yes your Honour, for the Director General in a similar position to Ms Dixon and Mr Winchester and I certainly do agree your Honour that there is a utility to the Court because Ngā Rūnanga, the Minister and the Director Gornall have already opened, we've presented our cases based on the notified version I think it would be of assistance to the Court to be able to hear the position on the revised version and hear the planning witnesses together so there is a utility in getting that before the Court now. In relation to the other parties your Honour, I do accept that potentially what might need to happen if these witnesses are called this week is that maybe that

they have to be excused and at some point have to come back so that other parties have an opportunity to cross-examine, that might be the way to manage that. In terms of those other parties catching up with where we've got to, what I also note your Honour is that the Cromwell hearing is set down I think from the middle of April so there is time for those parties to have a chance to actually look at the transcript, look at the evidence, the additional evidence that will have been filed, reflect on that and then come to a view on what their positions may be at that point.

5

Q. Right, rather than at 2.30 today.

10

A. Yes.

Q. And that's fair enough too. Okay.

A. And in fairness to those other parties your Honour, it has been moving very quickly and that provides that opportunity to them and I am aware that we had, I think there is some time available in May and it may be that at this point, tentatively that could be available for cross-examination.

15

1400

Q. Yes now would you want to start your witnesses only to have them to come back or would you want to start and finish and if you're thinking maybe your witness comes back in May then, well then they may need to come back in May anyway about that schedule which has gone off for expert conferencing so then what, is it the case of a further supplementary brief of evidence once we know the outputs of the, scheduling output of the expert conferencing together with and at the same time that is, with the response to the ORC's case or do you envisage filing two briefs of evidence, one addressing the ORC's case and how that might've impacted the planes, impacted, you know, impacted on the planners thinking in terms of the provisions but not the schedule and then writing a second one. So you know the expert conferencing and it's timing is another additional thing to be factored into account.

20

25

A. And it may be your Honour that if that then results in a further iteration of Mr de Pelsemaeker's plan change 7 –

30

Q. And it might.

A. And it might, then that could indeed be what needs to happen your Honour, is that there is a second brief of supplementary evidence that

would need to be filed at that point to address those factors and which would then be at a point where because those witnesses would be back before the Court they would be available cross-examination.

5 Q. I always thought that witnesses would have to come back before the court if you had expert conferencing, in April I think said, initially scheduled it in May or whenever it was then scheduled –

A. Yes.

10 Q. – just simply to respond to the outputs of the conference and that's what the final week actually allows, it actually allows quite a bit of time for pulling people back in, responding to the expert conferencing and final say by the regional council, so you know, is another way of tackling it to say, to call the regions witnesses this week or at an appropriate time when everybody who is, everyone's been given an opportunity to indicate whether they wish to cross-examine and then we hold off filing further

15 evidence until we're in a position to file further evidence once we've got the outputs from the expert conference. In words you just do it once at the end of the hearing or is that also unsatisfactory?

A. I suppose your Hour I'm in, I'm, I do think that there is a utility in responding to the version which we now have before the court –

20 Q. Yes, and giving that off.

A. – and that waiting for, I think it would be three weeks, for that additional conferencing to be completed and then responding, that is actually potentially unfair to again those Cromwell parties because they only get actually the time after the conferencing and that additional evidence is

25 filed to consider and respond and reflect, this way the have seen a starting point if I put it that way of what the response to the 14 March version of the plan change might be, they understand that there may be some changes to that depending on the outcome of the further planning conference but at least they know where these parties, so I'm talking hopefully I'm talking certainty for the director general and possibly also for

30 Ngā Rūnanga and the Minister but they at least know what they, where they thinking has moved to, where the positions have moved to.

Q. And do you think we need to hear from your witnesses before the final week or could we have you filing and then being examined in the final week.

5 A. That's really for you your Honour, I would've thought as to how that's best going to –

Q. Again it's just that –

A. – assist you.

10 Q. Well it's again its that, it's just a process question, if we have it in writing how your responses have been informed and possibly changed then everybody has that in writing then we can wait for the schedule to come free and again have either a joint witness statement from planners which is the ideal outcome as everybody signs a joint witness statement, that becomes the evidence on behalf of everybody but if not then planners then providing a (inaudible 14:04:02) supplementary on the schedule and then leaving it to the final week for cross-examination so it's a question of
15 how many, yes. You're relaxed?

20 A. I'm in the Court's hands on that, your Honour, you know with difficulty Mr Brass could be back here on Friday and if that's the way you want to manage this (inaudible 14:04:22) then certainty that can happen, if we want to get the evidence in but actually not get to cross-examination on it until a later point and after the planning conference both on the schedule and I think there was potentially also going to be further planning conferencing as well, then that makes sense too.

Q. Okay, both ways make sense.

25 A. Yes.

Q. All right. Thank you, Ms Baker-Galloway.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

A. So just to clarify yesterday it wasn't the Lindis –

Q. I thought it was.

30 A. The Lindis week, 1,2,3 and myself won't around in the week of the 19th.

Q. I was wondering why they were still here, they're amazing.

A. So the 19th of April of is when we're all tied up in the High Court unless we settle.

1405

Q. Some other. Just putting it out there.

A. Yes, stilled locked. But I was in the High Court in Wellington yesterday for something else.

5 Q. But not that.

A. But not that one.

Q. Alright. I got it.

A. So Fish and Game we're comfortable to proceed on Thursday as you've proposed if everyone else is and I know you haven't heard from everybody yet but I think it's a good use of the court and everybody's time to proceed and the adjournment will then be used very well so it would be an efficient cross-examination rather than a bit of a scrambled one that might have been today's so I think that was a good call and similarly, happy to also cross-examination the three witnesses from the (unclear
10 14:05:56) Ngai Tahu planning witness and the Minister's and the Director General's witnesses on Friday if we get to them. The issue for Fish and Game is as we were scheduled to open this week.

15

Q. Don't think that's happening.

A. Well, I know it's not happening but Dr Hayes flew down this morning.

20

Q. Okay.

A. And he's here and if it was possible and again you will hear from everyone on this suggestion to also hear from Dr Hayes this week and what I'm suggesting is I don't even need to open for Dr Hayes' evidence to be considered because the context that it will be relevant to Fish and Game's case hasn't materially changed. We are – in terms of the table that Dr
25 Hayes recommended with the minimum flow and allocation hydrological alteration thresholds that is still a part of Fish and Game's case in that we say it sets a precautionary bottom line threshold, no more than minor threshold.

25

30 Q. So that hasn't fallen away if I could put it that way as a consequence of Mr de Pelsemaeker's evidence.

A. I will be as transparent as I can. We do see a lot of really good changes in Mr de Pelsemaeker's evidence, particularly in that policy but we're still seeing – there is an additional place somewhere in the plan change

framework for that precautionary no more than minor threshold to be put in. That's the work that we will be doing between now and submitting Mr Farrell's supplementary by end of Monday. So it could be that Dr Hayes is called tomorrow if everyone agrees and the Court considers it useful and that that would be an efficient use of Dr Hayes' time and everything that goes into getting a witness down from another town. Otherwise in terms of availability as with everyone else I'm sure we get to a point where there is more juggling going on in calling people out of order and so on and so forth.

5

10 Q. Dr Hayes' accepted. Don't think we're going to get to your case this week.

A. Correct.

Q. It's pretty certain.

A. Yes.

Q. Alright so.

15

A. On the same page there. So everyone else we can sort of deal with. There might be a bit of massaging but because he's flown down from Nelson and he is here, Ma'am my strong preference is that we do hear from him from because his place in our case hasn't actually changed materially.

20

Q. So you could be ready. I guess what you're saying is, "Look, if we were to hear from the Minister, Director General and Ngai Tahu, you could be ready Friday. If they were to file their evidence Thursday." Is really what you're saying?

A. Ready to cross? Yes. Happy to prepare for that on that basis. Yes.

25

Q. Okay. Any thoughts on whether they should file in response to the ORC's new case and or amended case and then file again once we get the schedules through and then just hear from them once and once only in the last week.

A. Probably for Ms McIntyre because we have heard partly from her.

30

Possibly that makes sense but I don't know if Ngai Tahu's got an interest in the schedule. No. See Fish and Game doesn't have an active interest in the schedule either but we haven't heard at all from Mr Ensor and Mr Brass on the whole thing. Not been heard on Te Mana o te wai and NPS, all those other NPS-REG which is still I think pretty live issue so there's a

lot of other substantive issues as well as the content of the plan change and the schedule that probably more appropriate to hear from them on now while those issues are live, dealing with them on a quite a dynamic basis.

5 Q. Then do we hear from them next week instead of OWRUG as I've suggested? Obviously we've got to speak to Mr Page about that. OWRUG has a large case and has got all of its witnesses ready for next week which is why I suggested that we just sort of keep that pace in tact and let it run next week.

10 A. Instead of on Friday?

Q. Yes.

A. I guess I've got no strong view whether it's Friday or next week. I think that was the gist of it which was mainly a plea to consider hearing Dr Hayes tomorrow.

15 Q. Okay. Thank you.

A. Thank you, Ma'am.

Q. Forest and bird.

MR ZWAAN TO THE COURT: JUDGE BORTHWICK

20 A. Thank you. We are pretty happy with what the Court has proposed this morning. We're reasonably happy in terms of hearing from the rest of the planning evidence on Thursday and Friday from the regional council, Minister and Director General and Nga Runanga and would be interested in cross-examining Mr de Pelsemaecker as well.

25 Q. Were you always down to cross-examination Nga Runanga, Minister and Director General? And you'd be happy to proceed on Friday if those witnesses were called on Friday?

A. Yes.

30 Q. Are you going to be doing it or are you committing Peter Anderson to doing it?

A. I've talked to Peter Anderson about it and he's happy for me to do it. He's going to help send some questions and stuff through.

Q. I got you. You're going to be doing it.

A. Yes, if that's alright.

Q. Yes.

A. And so we're happy to be re-scheduled to whenever to present our case after OWRUG, I think that makes sense.

Q. Sorry, can you say that again?

5 A. We're happy with what the Court proposed in terms of being schedules later and hearing OWRUG's case next week and I think it's helpful to hear the planning evidence this week otherwise I think it will end up in a perpetual revisions of the plans so I think it's more useful to get a clear picture of where everyone's at sooner.

10 Q. Okay. Thank you. Mr Page.

MR PAGE TO THE COURT: JUDGE BORTHWICK

A. Thank you. I'm happy to accommodate cross-examining the planning witness on Friday or any other day this week that suits the court but also
15 perfectly comfortable with the idea that we don't do that until we return to Dunedin in May. So from OWRUG's point of view there's no magic in doing it on Friday. Also happy to accommodate Dr Hayes this week whether that's tomorrow or any other day. Understand he's down from Nelson and would like to be able to release him. We would also like to
20 hear and have the chance to have tested his evidence about the thresholds before we open our case too. That's reasonably important to my clients.

Q. Okay. Understood.

A. In terms of when OWRUG should present its case we wish to proceed on
25 Tuesday. Mr Hickey's evidence we wish to take on Tuesday and so opening and having Mr Hickey done on Tuesday is important to OWRUG.

Q. I think having Mr McIndoe also on Tuesday important to the Court because the Court didn't quite understand some aspects of his evidence and we really didn't want to go into an expert conference without having
30 teased it out or clarified what his evidence was.

A. Yes. So hopefully we can deal with all that on Tuesday. The other thing which of course OWRUG is to do is file a memorandum tomorrow about its position. We spent all morning on Zoom this morning with the vagaries of rural broadband which is always exciting and so I'm expecting to have

a memorandum for the court by 9 am tomorrow. What I am also anticipating is asking Ms Dicey to file a sample set of provisions by the end of this week that reflects the change in position.

1415

5 Q. Yes, so when you say 'by the end of this week' what day are you proposing, again bearing in mind that other parties with an interest are, want to get their heads around it and cross-examination and it may also be relevant to inform their understanding of your case which I know is to come 9.30 tomorrow as well as through Ms Dicey's evidence, yes.

10 A. Well I have to say that I've asked Ms Dicey via email when she could have those provisions prepared for filing and I don't have an answer yet but of course it makes sense that that happened before we opened our case so that everybody knows where we're going but hopefully with some direction it should be apparent from what we file tomorrow morning.

15 Q. Okay and so quite apart from what Ms Dicey may do relative to any change in direction if there is change in direction from OWRUG, is it, she will be filing in response to Gilroy, King and de Pelsemaeker?

A. Well I don't think Ms Dicey will be filing in response to the evidence from Ms Gilroy or Ms King.

20 Q. Okay.

A. She may wish to anchor what she says about provisions that OWRUG are proposing by reference to what Mr de Pelsemaeker has said, so it's limited to a response to that I think.

25 Q. Okay so, no that's okay I've just misunderstood something that's come to me so cross-examination I think would be true, Gilroy, King and de Pelsemaeker.

A. Yes.

30 Q. But that you're anticipating filing a response to Mr de Pelsemaeker's evidence only by Ms Dicey or by any witness together with perhaps a change of position?

A. Yes.

Q. Or a reflection on the existing position.

A. Yes.

Q. All right and you're proposing to have that done by?

A. Well we need to have that with the court on Friday afternoon, otherwise nobody knows what's happening.

5 Q. Does it, okay and your reflection back tomorrow, would that be sufficient to inform other parties as to your purpose in cross-examination, where are we going with the cross-examination and I mean that's critical, quite a, you know, they understand the relevance of the questions.

10 A. Yes so my task is to assimilate a good deal of feedback that I got this morning into something that's intelligible by the Court and that's no small task, nor is the authority line to actually get that filed so I understand what you want and why you need it and it's my job to get that done by tonight or tomorrow.

Q. Okay so whenever you, wherever you land it should be sufficient in the absence of evidence if that's coming in on Friday such that the line of cross-examination is understood by the Court and by the other parties.

15 A. So the intention is to explain in the memorandum tomorrow the kind of provisions that OWRUG say should be incorporated into plan change 7, but what we won't have by tomorrow morning is sample provisions for the Court to see.

20 Q. Okay, all right, well I can certainly understand why that might be the best you can do tomorrow because you've got a wide body of people that you're talking to and I do understand that as well. Okay. All right, so evidence your evidence from, any further evidence in response to Mr de Pelsemaeker should be in by 3 pm on Friday.

THE COURT: JUDGE BORTHWICK TO MR WELSH

25 Q. Mr Welsh.

A. Thank you, Ma'am, in respect of that direction does that apply to all parties or just for OWRUG to respond?

30 Q. I'm going, it definitely applies to OWRUG because OWRUG's calling its case next week so there has to be some framework for understanding the new, the redirect on OWRUG's case next week.

A. No thank you I just thought I should clarify because I had suggested a date of filing Ms Stiles evidence on the Monday –

1420

Q. On Monday, yes we need to think about that. That would be on the basis I guess, like you, Fish and game, Wise, we're not going to get to your hearing this week so –

5 A. And it doesn't make sense to start and to be put in the same position as DoC and MFE are in terms of having part of our case and then not Ms Styles and then catching up so we're a discrete section so –

Q. You are discrete.

A. – it makes sense.

10 Q. All right so what we have noted from you though is that cross-examination on Mr de Pelsemaeker's brief and then answer to supplementary evidence was yes and you're proposing it by Monday the 22nd of March and then the question becomes when do we, when do you and everybody else that was scheduled for this week open your cases and that needs to be thought about.

15 A. Yes Ma'am and I also, I haven't given any notice or I didn't give any notice to cross-examine Ms McIntyre and at least I could make that decision on a somewhat informed basis by reading her evidence in chief but of course I haven't read her supplementary because it hasn't been filed.

Q. No.

20 A. So I would just ask for some latitude that if that was necessary, I think it would be fair to the parties if they hadn't given notice to cross-examine but they wish to do so on that supplementary that there'd be some latitude shown to that party.

25 Q. That is fair and that's why we're raising the issues both overnight and this morning.

A. In respect of Ms Styles evidence it's likely to be relatively confined, one of the upsides of not being provided for in the amended changes by Mr de Pelsemaeker is that I don't have a lot to argue in our existing relief, will largely stand and it will focus around principally the policy in respect
30 of the non-complying gateway.

Q. All right, well I'm going to take an adjournment because I want to also see whether we've got any responses but it might be too early yet from anybody else who is a party but is not represented and again it may well have been that the time frames allowed for that are too tight, especially if

5 we've got farmers not checking their emails because you know they're doing farming things and so we have to think about when we're able to, whether that of itself is too tight but we need to think about that and I haven't forgotten you Ms Irving, though I did, anyway, it's not obvious, territorial authorities.

THE COURT: JUDGE BORTHWICK TO MS IRVING

10 A. (inaudible 14:22:48) dealing with the evidence and cross-examination, we, well the territorial authorities are likely to want to file supplementary planning evidence but I think that would be best if that could come following the evidence from Ngā Rūnanga, the Ministry and the Department so that Mr Twose can essentially cover off any new matters that might come up from that evidence and given that the territorial authorities are not to be heard until the Cromwell leg of the hearing, I don't – I thought perhaps there wasn't any great need to rush Mr Twose to
15 prepare any supplementary evidence.

Q. Okay and so you noted you also want to cross-examine the Regional Council's policy planner so –

A. Yes, that is in many ways a place holder at the moment but we're seeing how the other questions go but I'd like to reserve the ability to do that.

20 Q. Fair enough, okay so we'll take an adjournment so we can check to see what responses we did get no, sorry, did I ignore you? All right, sorry about that Mr Maw.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. Having perhaps been the source or the cause of the –

25 Q. You're the elephant in the room.

1425

A. Yes, I've been reflecting quietly here in terms of the position of my friends in terms of challenges from a timing perspective but it's been helpful to hear from them before I can confirm the position on the part of the Council, insofar as the Council witness is appearing on Thursday, they
30 are available and Thursday will work for them. I just note that Mr Wilson,

if he would slot in in the afternoon if we can accommodate that given the issues we've previously discussed with his availability this Thursday.

In terms of the utility of hearing from the three planning witnesses for the parties who have already opened their cases this Friday, I do see some utility in proceeding with that and testing the position that they reach in response to Mr de Pelsemaeker's latest iteration. In terms of where we're
5 at in in the hearing I do see a benefit in testing that evidence and really seeing where it's at at this point rather than waiting until the last week or two of the hearing following planning caucusing. I acknowledge that there might be a need to hear from those planners again following some joint witness conferencing but in terms of testing some of the positions that are
10 likely to be put forward, I do see some utility in doing that sooner rather than later. As to prejudice to other parties, I am conscious of that in terms of an interest others may have but in so far as there has been an interest expressed in those parties cases if one looks at the list of parties cross-examining, the list is not particularly extensive and we are still dealing
15 within scope changes to the planning documents so in a sense parties are on notice as to the range of positions that might be being put forward.

Q. That's good to hear. We need to reflect about that. It seemed to me to be provided that it was fair to people who are not in the courtroom today. It is a fair process to them to allow their region's case to continue on
20 Thursday with the cases. I think now running for the three planners now running on Friday morning, largely Friday morning bearing in mind that Friday is a truncated day that there were some advantage in that but it really is trying to be fair to everybody, particularly a large body of people in relation to whom there's been a lack of direct communication. It doesn't
25 matter that there is not much communication. We still have to communicate, at least do our best. So we're just going to take a short adjournment and find out what's happening at 2.30. If anything's happening at 2.30 for those who are not represented and here today and then reflect back. Where even 2.30 with sufficient time or should we have
30 allowed overnight when farmers get back to their emails as we were told at the PHC. So it may be that the best we can do today is just to attentive outcome. This is how we're proposing to run the case but if anyone's prejudiced they've got to tell us as opposed to doing nothing and it being – I would've thought a perfectly valid point from appeal to the High Court

if we're not allowing adequate for parties to come back and reflect their interest or record their interest and be heard and cross-examination if that's what they want to do.

5 A. I'm alive to the risk of that. This is much the council's risk as it is the court's risk in terms of this process and the output from.

10 Q. There still can be other processes built into this about recalling any witness that turned out to be required for cross-examination but that hadn't been signalled so it's not the end of the road but I'd rather have a fair and robust process than just simply burn people off because we haven't engaged appropriately or are engaging with people who are in front of us only.

COURT ADJOURNS: 2.29 PM

COURT RESUMES: 3.40 PM**THE COURT: JUDGE BORTHWICK**

So that was easier said than done so I'm sorry about the delay but I have to, that's an improved sound system I think, we just have to think about the rights and interests of persons who are not before the Court this afternoon and to think about what parties had said in relation to time requirements for cross-examination so this is where we've got to, I can hear any last comments about the same but we think this is workable. All parties will be given further time overnight to respond to the Court's minute, that's the minute of today, the ORC evidence minute dated the 16th of March and they're to indicate whether they wish to cross-examine any of the Regional Council's witnesses in respect of the further evidence and it is only in respect to the further evidence, if they haven't previously indicated then they've lost that opportunity. If they do but they're not available or if they're not actually ready by Thursday the 18th of March they are to indicate this to the Court and further directions will issue and that inevitably must include a recall of the Council's witnesses. For those parties who are ready now, the Court will hear the further evidence of ORC on Thursday the 18th of March and also the cross-examination. Following the ORC evidence and at the request of Fish and Game and OWRUG, the Court will hear from Dr Hayes. I note three hours cross-examination is anticipated. That being the case, there is insufficient time to hear from the planning witnesses for the Director General, Minister for the Environment and Ngā Rūnanga this week. These parties propose to file evidence on the 17th and 18th of March. It is possible that again that parties who did not previously wish to cross-examine the planning witnesses from these parties now may wish to do so. While these planning witnesses may (inaudible 15:42:16) in response to the ORC evidence, until the evidence is filed this can't be known and I note from the hearing schedules, the parties estimated about 8.5 hours of cross-examination in total for the three witnesses and this actually without the Court's questions so it's our view there's no realistic possibility of getting on to the planning witnesses. So the better course we think is to schedule the planning witnesses for the week commencing, the Tuesday the 23rd of March, that's with OWRUG's case to follow but not completed but then there was no realistic expectation of

completed it next week anyway. As previously indicated though, in particular the Court wants to hear from Mr McIndoe prior to the expert conferencing, it just wants to get a better understanding of Mr McIndoe's evidence. There were aspects of the evidence that the Court did not fully understand and in common
5 with our approach, we've taken the time to tease that out before putting witnesses into that expert conferencing. So that's where we've landed, I will make a direction that, to extend the time given at paragraph 9 of the minute dated the 16th of March until 9 am Wednesday the 17th of March, that means anybody who may wish to cross-examine the ORC's witnesses are to advise
10 the Court and indicate their availability on Thursday of this week. As proposed by the parties supplementary planning evidence is to be filed by 3 pm so just that's in keeping with the general request things be in by three so that the registry has time to upload it into the website and you know, hopefully same day but that's not always possible so supplementary planning evidence to be
15 filed by three, Ngā Rūnanga, Ngai Tahu Wednesday 17th of March, Minister for the Environment, Director General conservation Thursday 18th of March, OWRUG Friday the 19th of March, Trustpower, Fish and Game, Landpro 23rd of March, I know a couple of you said you could come in on Otago anniversary day but the 23rd will do because we're not going to be hearing your case that
20 week anyway. All other supplementary evidence including planning evidence in response to ORC's further evidence to be filed by the 26th of March. I've said including planning evidence because chances are that we've got someone, represented parties there, they're not planners but might very well have something to say about this. So we sort of broaden the category back out. I
25 think that's comprehensive, big change on the schedule but it's what it is. We're trying to minimise that but obviously some cases that we had thought we would hear this week, we're not going to hear this week and will be re-scheduled and Mr Cooper will be in contact with you about the same, bearing in mind that we're trying to (inaudible 15:45:37) Cromwell for unrepresented parties or persons who
30 are living in Cromwell there or thereabouts to minimise disruption in their lives. So we're trying to ringfence that time for them but there certainly may well be time available in the Cromwell slot to bring in some cases and there will be time available, I would've thought, in the Dunedin weeks to bring back other parties.

So that will be wise response and Fish and Game, Trustpower and others. So how does that sound?

MR PAGE TO THE COURT: JUDGE BORTHWICK

5 A. Before you rose, I alerted you to the fact we may need Mr Hickey on Tuesday for reasons which I can't explain here and now. I will know on Friday whether that's the case but I may need leave to interpose and into the case if that can't be otherwise dealt with.

10 Q. It's kind of a weird week next week because I'm not quite sure whether you're interposing on the Minister, the Director General and Nga Runanga or whether they're interposing on you so I'm sure there's flexibility. I assure there's flexibility but if we could know as soon as possible if there are some timing difficulties with Mr Hickey so that people know what they have to prepare for Tuesday.

15 A. Some of my friends are aware of the situation and I will alert others but I'm sure that we can sort it out.

20 Q. Okay. So no later than Friday if you know for sure. I think looking at the evidence for sure we needed Mr McIndoe to tease out some of his methodology so we had a better understanding of that so Mr Dunlop has an opportunity to hear the audio before going into that expert conferencing so he was seen as being very important. Dr Hickey generally important also in terms of understanding the case.

A. Yes, Thank you.

25 Q. Anything further we can or should be doing with a view to the interests of persons who are not already here we're looking to put into place for fairness process possible?

MR MAW TO THE COURT: JUDGE BORTHWICK

30 A. Nothing springs to mind in terms of what we've covered. I do have one other issue but let's finish this.

Q. Okay. Have we finished this? We will release a minute about this. What's your other issue?

A. Just flagging at the Court's request I had prepared some further legal submissions on this question of the objective and the policies from the

NPS that were to come down. I'm just flagging that perhaps the time to deliver those might be on Thursday morning prior to the witnesses for the council but I'm in the Court's hands as to when might be suitable for those submissions.

5 Q. Probably at the beginning of that. So remind me again what have you...?

A. So they're submissions on the relevance of clauses 3.22, 3.24 and 3.26 of the NPS and their relevance to plan change 7.

Q. Yes, that's really important because other parties may have, I understand, a different view. Alright. Very good. So we're adjourned until 9.30 on

10 Thursday morning.

COURT ADJOURNS: 3.49 PM

COURT RESUMES ON THURSSDAY 18 MARCH AT 9.34 AM**THE COURT: JUDGE BORTHWICK**

Good morning. Good to have a break yesterday and read that evidence quietly. Thank you very much for that evidence including Ms McIntyre's which has come
5 through and including the updated position from OWRUG. That was helpful as well. Unless anybody wants me to address anything I think we're in Mr Maw's hands.

MS WILLIAMS:

10 Your Honour, I did file an amended notice of cross-examination for OWRUG just in relation to Mr Hickey and I just wanted to draw your attention to that and formally seek leave.

THE COURT: JUDGE BORTHWICK

Saw that. You want to cross-examination Mr Hickey. That's fine and I have let
15 Mr Cooper know as well so I think that's all accommodated now in the schedule and I can well understand in terms of the theory of your case why that is actually important that you do so thank you.

MR ZWAAN:

20 Thank you, your Honour. I think we indicated on Tuesday that we are keen to cross-examination Mr de Pelsemaeker this morning but it got left off the timetable.

THE COURT: JUDGE BORTHWICK TO MR ZWAAN

Q. Did it?

25 A. Yes.

Q. Sorry.

A. We're still interested.

Q. Instantaneously Mr Cooper is sitting there smiling. You're back in there.

A. I gave him a heads up. We're still interested in doing that unless everyone
30 else comes up with what we want to ask.

Q. There's so much going on in a proceeding like that. It's actually quite helpful just to put that in writing even if it is an email or not a formal memorandum so that we've got eyes on it somewhere in the system. But you're on. There is a particular order to things which Mr Cooper knows and he will tell you when you're on quite literally.

5

A. Great.

Q. So confer with him in terms of the impact on the schedule. Thank you.

A. Thank you.

10 **MR MAW:**

As signalled on Tuesday, I have some legal submissions so I'll hand those up. The Court's invited counsel to make legal submissions on the implications of clause 1.7 of the NPS and its relevance to plan change 7. Clause 1.7 requires certain changes to be made to regional policy statements and regional plans without using a process in schedule 1 of the Act. I've set out in paragraph 2, clause 1.7 and I've set out s 55 of the Act as well.

15

So I say importantly s 55 draws a distinction between a plan and a proposed plan amongst other things. A proposed plan includes a change to a plan proposed by a local authority that has been notified under clause 5 of schedule 1. I've picked up there the definition from s 43AAC.

20

THE COURT: JUDGE BORTHWICK

Sorry, I shouldn't laugh but we've got to the point that this looks like the Income Tax Act.

25

MR MAW:

Yes, it is looking a little that way. The way struggle with letters and not the numbers on sections perhaps gives us an indication as to the need for some refreshment to the legislation. So I say it anticipates, this is s 55, that there may be a range of documents that might be the subject of a direction under s 55(2A) in that any such direction will prescribe the document or documents to be changed. Section 55(2D) deals with the timeframes within which changes much be made in relation to the changes required by clause 1.7. The relevant

30

section is s 2D(a). That is the local authority must make the amendments as soon as practicable. The word practicable is not defined in the NPS so I have set out some relevant dictionary definitions below and you will see there that there is some consistency in terms of those definitions.

5

And then the final requirement is that the local authority must give public notice of the amendments within five working days after making them.

10 So I then address fish passage and I deal with that first because that requires the text to be inserted as an objective and I've set out the relevant clause. The key observations I make are that the requirement is expressed as an objective. It must be included in a regional plan and I've footnoted there the definition of a regional plan as meaning an operative plan and therefore I submit that the clause does not require that the objective be inserted into a proposed plan or a
15 change to a plan. If that was the intention I submit that clause 3.261 would have included a proposed plan in the (spelling 09:40:21) after regional plan. Therefore the council is required to insert the text from clause 3.261 into a (unclear 09:40:38) original plan or plans as an objective without following the process in schedule 1 of the act as soon as is practicable and must then give
20 public notice within five working days of having done so and importantly in the context of plan change 7, the council is not required and I submit must not insert this objective into plan change 7 without following the schedule 1 process.

THE COURT: JUDGE BORTHWICK

25 Now, in relation to a fish passage or anything else, the other two provisions that you mention, I take it that the regional council has not given public notice as to the insertion of those provisions?

MR MAW:

30 That is correct and I come on to address what's happening with them further on in the submissions but yes, that is correct.

So I step through next clause 3.22 which deals with the policy to be inserted in relation to natural inland, wetlands and I've set that out in full. I've also set out clause 3.24 and the relevant part there in relation to rivers. So in relation to

those two clauses, I submit that the requirements are expressed as policies. Again, they must be included in an operative regional plan or plans and that the relevant clauses do not require that the policies be inserted into a proposed plan or a change to a plan. So therefore the council is required to insert the
 5 text from clauses 3.221 and 3.241 into its operative regional plan as policies without following the process in schedule 1 of the Act as soon as is practicable and again must give public notice within five working days.

Again, like the fish passage objective I submit that the council is not required to
 10 insert these policies into plan change 7 without following the schedule 1 process.

As to timing, as I set out in my paragraph 6, the council is required to make the amendments to its operative regional plan as soon as practicable. The council
 15 has not yet made these amendments to its operative planning framework but intends to do so in the very near future.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So not merely a matter to be held over for a future land and water plan.
 20 It will, as far as you understand the council's intentions, seek to amend its operative plan by bringing forward this objective and the two policies?

A. Yes. You see that and you will no doubt have seen that happening with other policies that had to be inserted previously. It is a little bit clunky about how they fit within an operative plan and council's have different
 25 ways of doing that and they put them in different places but they do get brought down and dropped in what is considered to be the most convenient place within the planning framework so that they're part of that operative planning framework.

Q. Can you give me an example of where it has been done by a regional
 30 council?

A. There were some examples in the Canterbury framework when the 2014 iteration of the NPSFM came to be it and those changes from recollection were inserted simply with a fresh page at the beginning of the planning.

It's my recollection. I've also seen plans in the Southland one. That's the one I have in mind where provisions were inserted at what looked like more obvious place to put it. I'm thinking for example of the policy and it might have been B6, one dealing with water quantity and that was put into the part of the plan that had some policies dealing with water quantity. But it's often dropped in and put into a shaded grey box or with a footnote saying this was inserted pursuant to whichever clause and whichever NPS without following the schedule 1 process and the plan simply gets updated at that point in time, typically resealed again.

5

10 Q. As matter of interest with Southland, are you talking about the proposed plan there or something else?

0945

A. I'm thinking more of the operative planning framework.

15 Q. And then the second question is this, it's all very well to insert an objective or a policy but did those Council's, as in the Canterbury example, then also go on to insert if it was an objective, underlying or responding policies and rules?

A. No.

Q. So how did that work?

20 A. It's clunky because you don't have the machinery to implement the policies, they become relevant considerations on discretionary and non-complying applications and depending on wording of the policy it may be relevant to a matter of control or discretion so it's picked up somewhat uncomfortably just depending on what the plan, the operative plan actually says so to give those an objective in policies full cover Council's often have to then go through a further planning process which then can pick up some machinery in terms of matters of control or discretion or further rules to deal with the issues.

25

30 Q. So to the extent that they can be picked up will be where you're looking for a discretionary, a fully discretionary or a non-complying activity and then they can at least be relevant in that context?

A. Yes and it also depends a little bit on the wording of the policy and my recollection was one of those 2014 policy's, may have even been the 2011 version was about discharges so it was an extra policy that had to

be considered in relation to all discharges so again it's a, it's dependant on the wording.

Q. And the other content of the plan?

A. Yes as to whether there's actually a hook for consideration.

5 Q. Okay, no that's really helpful thank you.

MR MAW'S SUBMISSION CONTINUES

So in terms of the relevance to plan change 7 it's submitted that the Council was not required to insert the fish passage objective and the wetlands policy or the rivers policy into plan change 7 and that is because it's a proposed change
10 to a planning document. However I do on to say that the obligations under the NPSFM are ongoing. As such, once Plan Change 7 is made operative, the Council will have to insert those provisions into it, or include cross-references from the operative plan with respect to them, in it. The reason that will need to occur is because Chapter 10A is drafted as a standalone code, and does not
15 reference any of the other objectives and policies in the Regional Plan: Water.

If (and when) that occurs, the fish passage objective, and the wetlands and rivers policies will be relevant matters when considering an application for a non-complying activity, and I make that submission based on the 14 March
20 version of Plan Change 7 because there aren't any matters of control or discretion that are picking up those policies and the objective. They will not be relevant considerations with respect to the proposed controlled activity or the proposed restricted discretionary activity, assuming they stay in that form so they will in time come down but they're not a relevant matter for this court to
25 implement.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. No I know what you're saying –

A. So those are my submissions on that.

Q. No that's helpful, any comment about Doc submissions on this point or
30 do you want to leave that for you reply?

A. I think I might, my friend, my recollection was that my friend's submission was that they come down and they come down straight away, I may have

misheard that bit insofar as that was her submissions I'd take a different view for the reasons that I've outlined in these submissions but I appreciate I've probably had a little more time to pick through the definitions than my friend may have had.

5 Q. All right, okay so we'll leave that for your reply?

A. Yes.

Q. Because I think this issue is going to fish passage, is going be –

A. Precisely.

Q. – truly important for a number of parties.

10 A. Yes, I –

Q. Thank you very much, that was really helpful.

A. Well we move now to the supplementary evidence that was filed by the Council on Sunday of last week and the first witness will call – or have recalled is Mr de Pelsemaeker.

15 Q. Yes, and we were going to hear the questions of cross-examination, we didn't want to clear the pitch by hearing from us first on that so we'll go straight to questions of cross-examination and I just have to check with my colleagues whether they had anything for Mr Wilson because I don't –

20 A. Okay.

Q. – we might just, because I don't think anybody else does –

A. No my understanding, Mr Welsh was probably the only one who might and I don't think he did have any.

Q. He wouldn't dare.

25 0950

MR WELSH:

I was just going to say we might end up with a supplementary, supplementary brief from Mr Wilson if I did Ma'am so no, I don't have any need. I've explained how the confusion arose and I don't need to put that back to Mr Wilson at all

30 Ma'am.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. We have no questions for Mr Wilson so how do you want to deal with his brief?

A. If that could be admitted consent –

5 Q. Yes.

A. – we won't need to have him recalled to swear so if there's no objection to that?

Q. No objections to that so we'll admit Mr Wilson's supplementary evidence, which is the one I haven't got exactly with me, what date is it?

10 A. It's dated the 14th of March.

Q. And supplementary evidence dated the 14th of March will be admitted be consent with the Court to read and place what weight it decides is appropriate on the same.

A. As your Honour pleases.

15 **MR MAW RE-CALLS**

TOM WILLY DE PELSEMAEKER (RE-AFFIRMED)

MR MAW

Now your Honour I had considered whether it might of assistance to lead Mr de Pelsemaeker through his supplementary evidence but given that parties
20 have actually had a little more time to consider it I'm happy to proceed straight to questions unless the Court would be better assisted by –

THE COURT: JUDGE BORTHWICK

No, I don't think we would. We've already, we read it as I said we're actually grateful to have that break as well in the proceedings to consider the same so
25 we're happy to move straight on.

EXAMINATION: MR MAW

Q. Do you confirm that your full name is Tom Willy de Pelsemaeker?

A. I do.

Q. And you've set out your qualifications and experience in a statement of
30 evidence-in-chief dated 7 December 2020?

A. I have.

Q. And you've prepared some supplementary evidence dated 14 March 2021?

A. That is correct.

5 Q. Any corrections that you wish to make to that statement?

A. Not to the statement itself however I would like to make a correction to the appendices, if you go to appendix 1 and 2 where I refer to policy 10A2.3 the amended policy reads: "Irrespective of any other policies in this plan concerning consent duration, resource consents that replace deemed permits or resource consents that replace water permits to take and or use surface water including ground water considered the surface water under policy 6.4.1A, a, b and c of this plan where those water permits expire prior to the 31st of December 2025 for duration of no more than six years" the no should be deleted in the last line and that is both
10
15 in appendix 1 and 2.

THE COURT: JUDGE BORTHWICK

Q. I don't have a no and you avoided saying 'avoid granting' so, which I did have so all right, I'll just see if its in the other one. "For a duration of no more than six years" –

20 A. Yes.

Q. – you want to say, okay so I thought the word 'no' came after that.

A. Sorry.

Q. So for a duration of, what?

A. More than six years.

25 Q. More than six years, all right. and you can confirm that the second line of the policy in both iterations of your appendices 1 and 2, the second line contains the word 'avoid granting' so: "Irrespective of any other policies in this plan concerning consent duration avoid granting" is how it reads?

A. That is correct, my apologies for that.

30 0955

Q. I didn't hear it. Maybe you've said it.

A. No, I didn't.

Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. Subject to those correct, do you confirm that your supplementary evidence is true and correct to the best of your knowledge and belief?

A. I do.

5 Q. In relation to your supplementary evidence, there were a number of paragraphs where the wording notes that the council proposes some amendments. Are you able to confirm that where you've used those words that is your opinion in relation to the changes being recommended?

A. Yes, that is my opinion.

10 **CROSS-EXAMINATION: MS LENNON**

Q. Good morning, Mr de Pelsemaeker.

A. Good morning.

15 Q. I have a couple of quick questions for you in relation to Ms McIntyre's supplementary statement which was filed yesterday. Have you got that in front of you?

A. I do now.

Q. So you'll see at paragraph 7 that Ms McIntyre has recommended one amendment to your updated provisions. She's included some additional words at the front end of policy 10A.2.3. Have you got that?

20 A. Yes, I have.

Q. Do you accept these amendments?

25 A. I've given this some consideration yesterday and overnight and I do not have an issue with those amendments. I do think that it might be worthwhile to – cause essentially the proposed amendment reflects what is in the objective to a certain degree and it might be worthwhile aligning the wording of the objective and the proposed amendment bit more with each other but otherwise I don't have an issue with it.

CROSS-EXAMINATION: MS DIXON

Q. Good morning, Mr de Pelsemaeker.

30 A. Good morning.

Q. I just want to start by walking through with you the way in which the new non-complying policy and rule will work.

A. Yes.

5 Q. Partly to ensure that we all understand it and also because I want to query you about it as well. So let's start with my understanding of what will happen when an application is filed that is for a period of more than six years. It will need to be under the non-complying rule as a non-complying category?

A. That is correct because it does not meet entry condition I or the first entry condition of the controlled activity rule.

10 Q. So that will bring an application under policy 10A3.2 and the consent application will be processed as non-complying activity, now to go through a non-complying activity gateway, there are two gateways that are offered under section 104(d) of the RMA, aren't there?

A. That is correct.

15 Q. So you must either be the effects of the activity must be minor adverse effects or the application can't be contrary to the policies and objectives?

A. That is correct.

20 Q. So in this particular case, any applicant is going to have to rely on getting through the minor adverse effects gateway, aren't they because they policy is in fact going to prevent going through the gateway regarding policies and objectives?

1000

25 A. That is one way, if you want to go through the gateway of policy – sorry, under section 104(d)(1)(b), it would be very hard but my understanding as well is that under that test you need to consider the objectives and the policies together as a whole, it would be very hard because you would be contrary to the policies that restrict duration, thought about it hard and discussed it as well with people in the consents team, it would be, the only exception where I think people would get through is where they clearly meet the objective and where it actually facilitates a quick transition or more quickly transition towards the implementation of a freshwater regime but I admit that the restriction on the consent duration policy now is a very big hurdle.

30

Q. Can we put the objective to one side for a moment because I would like to come back that?

A. Yes.

Q. Let's just stick with the policy which as you've clarified this morning, effectively it reads avoid granting for a duration of more than six years?

A. That is correct.

5 Q. Take out all the stuff in between that clarify what it relates to, so avoid granting for a duration of more than six years and we know, I think we're all now very familiar with the case law that's followed from (inaudible 10:01:39) that avoid basically means you can't do something.

A. Yes.

10 Q. So you described it as a half policy, I'd say that effectively that gateway is closed because of the way this policy has now been framed, would you accept that?

A. I find it very hard to imagine an example where people would get through, I accept that, yes.

15 Q. I agree. So to get through the gateway I think we're by and large agreed that you would need to have an application with minor adverse effects. So let's imagine the activity has made it through that particular gateway and now the application comes to be assessed under section 104(1)(b)(vi) do I need to put the, do we need to go to the Act to look at that but it's essentially the provision in that particular section, part
20 of section 104 that requires you to go back and look at the policies again.

A. The policies but my understanding is as well you take into account other planning, higher order planning documents such as the RPS and the – can have regard to those NPSs as well.

25 Q. True but the particular provision that I'm looking at, (vi) refers to the relevant provisions in the plan and the relevant provisions of the plan in this case again take us back to the objective and –

A. Correct.

30 Q. – the policies. So the point that I would put to you is that in fact this application is going to fail this particular test again because of the wording of this policy: "avoid granting for more than six years" do you agree with that?

A. The intent is definitely to reduce the opportunities for people to apply for longer term consent under the original proposed non-complying rule, the

discussions and the questioning last week in court as well as some of the evidence presented showed that actually rather than it being an exemption it's becoming a bit of a target so that's the intent behind it, it's to get as many people, give as many consents or grant as many consents as possible for a six year term.

5

Q. I understand that and I appreciate that your revised approach to the non-complying rule is in response to the questioning and the submissions that you've heard and I appreciate that, I'm just trying at this stage to understand exactly what this will mean the way the law has been revised and my suggestion to you is that in fact because of the combination of the way in which the tests under section 104(d) work and then the assessment that's required under section 104(1)(b)(vi) no activity in fact is going to get a consent for more than six years under this plan change.

10

A. That is possible.

15 1005

Q. I think it's more than possible. That's the effect of a very strong policy that's been drafted. My point to you is really that what that means is that there are no true exceptions that have now been provided for, are there?

A. Yes.

20

Q. And there is no provision for matters that are recognised by the national policy statements that we've earlier discussed, the NPS-REG or specifically for drinking water.

A. That is correct.

Q. We have agreed earlier, I think that the national policy statements must give be given affect to in a regional plan.

25

A. That is correct.

Q. Let's come back to the question of the objective that you raised just a moment ago because we've discussed how the policy's definitely been strengthened, very much strengthened and you refer to the fact that a decision maker would also look back to the objective in PC7. So let's have a look at the objective in PC7. With the changes that have been made, essentially it's still the same, isn't it? transition towards the long-term sustainable management of freshwater in the Otago region by establishing (inaudible 10:06:37). What I wanted to put to you is that this

30

doesn't provide any guidance to a decision maker. It's simply a process, a procedural objective.

A. It points towards outcome, a procedural outcome.

5 Q. But that outcomes just a transition, it's not actually an outcome in terms of something that this transition is desgi- is intended to achieve, would that be fair?

A. Perhaps, yes.

10 Q. And I just want to put to you a couple of decisions which have commented, resource consent decisions, which have in fact commented on – your Honour I can just pass them to the witness if that would be –

THE COURT: JUDGE BORTHWICK

Are these resource consents from Otago?

MS DIXON:

15 Yes, the decisions I've just given Mr de Pelsemaeker are decisions made by Otago Regional Council applying the objective and the provisions of PC7 so they're resource consent decisions. I'm actually suggesting to Mr Ensor as part of the supplementary brief that he's filing later today, that he attaches them to his evidence so we can get them into the court that way rather than making them exhibits or something at this point.

20 **THE COURT: JUDGE BORTHWICK TO WITNESS**

Q. Do, are you familiar with those two decisions?

A. I'm not familiar with those.

Q. Okay so how do you want to go with this, how do you want to proceed, do you want to give him time to read and come back to the question?

25 **CROSS-EXAMINATION CONTINUES: MS DIXON:**

Q. Probably I only need to take you to one paragraph which is actually only one line in the decision. The two decisions that I've just given Mr de Pelsemaeker are Rockburn Wines Limited.

A. Yes.

30 Q. And the second one is Pisa Holdings and others?

A. Mhmm.

THE COURT: COMMISSIONER BUNTING

To they have a date?

CROSS-EXAMINATION CONTINUES: MS DIXON

5 Q. 6th of October 2020 for Rockburn Wines and Mr de Pelsemaeker would you mind telling me what the decision is for the other one because my muddle in front of me I've mislaid my own copy of that decision.

A. They're both 6th of October.

Q. Both the same day?

10 A. Yes.

1010

Q. Well let's just deal with Rockburn Wines, first off if I could take you to paragraph 97 of the Rockburn Wines decision.

A. Mhm.

15 Q. It's a really narrow point I was making. Can you please read paragraph 97 to the court?

A. "PPC 7 objective 10A11 is procedural only."

Q. So the point that I was making is that in fact the way the objective is framed at the moment is not actually providing decision makers with any particular assistance in terms of the way in which they're applying the objective in the course of actually making a decision. This is a decision maker making that observation in the context of a decision from Rockburn Wines. Do you accept that's what's happening?

20

A. Yes.

25 Q. I suppose just to close the loop, in essentials, the objective as notified and as now proposed has not changed in that respect because, of course, it was the notified objective that the decision maker was applying? That's correct?

A. That's correct.

30 Q. The final point that I wanted to discuss with you, Mr de Pelsemaeker is this slightly vexed questions of the deemed priorities.

A. Yep.

Q. There's been a lot of discussion in the court about galaxiids.

A. Mhm.

Q. And I'm sure when we hear the case from Fish and Game there will be more in the context of trout and galaxiids and how they interrelate in the particular waterways and so on. We need to start from an assumption that the priorities are currently being exercised and I understand that that is a question that is out there but let's assume for the moment that the priorities are being exercised and observed. I presume it would be your understanding that the deemed priorities do have a role in shielding the galaxiid populations because galaxiids thrive where trout don't and the different flow patterns under the deemed permits and the priorities associated with those have at least in some circumstances created the ecological circumstances, to use a very layman's kind of approach to it, that have allowed these ecological hotspots where the trout can't get at the galaxiids. Is that your understanding of the scientific evidence (inaudible 10:13:18)?

A. I accept that, yes.

Q. Now, we've talked quite a lot earlier on and there's been some discussion in the court about the resolutions that were passed at the extraordinary council meeting of the 27th of November 2019 which you have quoted in your supplementary evidence again. One of which was the existing priorities in the deemed permits. That's at paragraph 5C.

A. Yes.

Q. You've talked about the extra meeting at paragraph 5, set out again principles that the plan change was to follow and at C one of those is existing priorities in deemed permits. Yes?

A. Yes, that's correct.

Q. Really just want to say to you – would you accept that given the point you've accepted about the relationship between the deemed permits and, to some extent at least, the protection of the galaxiids? Would you accept that that's the point of connection between the principles that council identified and as I discussed in my submissions or reflected back to the Minister and then the Minister's direction for calling that was also being

looked at earlier in the hearing in terms of matters of national significance, regional significance et cetera, where the galaxiids are identified.

1015

A. These are assumptions?

5 Q. Yes, it's all based on that assumption (inaudible 10:15:17)

A. It is assumptions, I was not party to any of those discussions that might've led to using that terminology.

Q. It's a point of connection.

A. It could be, it could well be. The point around priorities is still very much
10 alive here in the court and also we've been thinking about it as well, we
have looked at the number of deemed permits and as you will see as well
in the annexes that we've provided to the court there are a number of
examples where the priorities are either stated as a note but then in other
examples the priorities on the deemed permit are stated as a condition
15 so there is, at some point in time when the mining privileges were
converted into deemed permits there is some inconsistency as to how
those priorities were carried over into the deemed permits. One of the
things I mentioned before where a priority system is in place to a degree
it will be reflected in the limits (inaudible 10:16:18) schedule but also with
20 the amended or the recommended amendments that we've provided to
the court on Sunday, we now have a new proposed matter of control C
which states: "Any other conditions on the existing permit to be replaced
where those matters are not otherwise addressed by the entry of
conditions of the (inaudible 10:17:21) or matters of discretion" Sorry,
25 that's for the controlled, that's for the restricted discretionary activity but
we also have a matter of control for the controlled activity rule that
expresses the same, again matter of control C: "Any other conditions on
the expiring permit to be replaced where those matters are not otherwise
addressed by the entry condition of this rule or matter of control" so where
30 priorities are put as a condition on a deemed permit, this allows you to
carry it over. So it is another tool in the tool box to continue priorities as
a condition on the replacement consent in cases where they are currently
a condition and where they would be exercised.

Q. Thank you that's very helpful and I'm sure that my friend on my left to you will want to explore the actual operation of that with you.

A. Yeah.

5 Q. My point really was just to make, to say that it's around the galaxiids and scientist evidence that we've heard of the galaxiids that we can connect the matter of significance that the Minister identified and the direction to call in and the way in which Council was anticipating that deemed priorities might be dealt with so it's a much narrower point.

10 A. Yes, I know sorry I might've gone a bit further but I guess what I was saying is still very much alive and we're trying to explore how we can deal with it but as you heard as well, there is a lot of uncertainty and rumours to, where are they still be overserved.

Q. I appreciate that, thank you Mr de Pelsemaeker.

A. Thank you.

15 Q. Thank you, your Honour.

1020

CROSS-EXAMINATION: MS WILLIAMS

20 Q. Mr de Pelsemaeker, I'm going to start with the objective, so this is the revised objective that you have, I noted with interest your answer to my friend Ms Lennon before when commenting on Ms McIntyre's supplementary brief. Ms McIntyre had suggested some changes to the policy and you stated and answered to Ms Lennon that you thought that perhaps that also should be carried up into objective?

25 A. Both kind of point towards the same outcome but they use a slightly different terminology. The objective points towards a long-term sustainable management framework whereas from recollection the amendment proposed by Ms McIntyre specifically refers to an NPSFM compliant regime.

Q. Yes, it does.

30 A. Yep.

Q. The objective is framed currently it just says transition towards but this particular plan change itself is not the transition. It's something you've used in your answers words like facilitating and enabling and would it not

be better to start the objective with something like that enabling the transition toward or facilitating the transition toward because that's actually what this plan change is doing, isn't it?

A. It is. Correct.

5 Q. And you accept that perhaps enabling or facilitating something like that would be clearer about the purpose of this objective?

A. I accept it, yes.

10 Q. You will have heard Mr Maw's legal submissions this morning on the NPSFM and the fish passage objective and the rivers and natural wetlands policies. As I understood Mr Maw, the effect of his submissions is that they're not matters that the Court needs to consider now but they're matters that will need to, once plan change 7 is operative, be implemented and given effect to within the plan change and with some questions about how that is done but they will be there. Given that that is the case, I understand from Mr Maw's submissions that they would only apply to the non-complying activity, is that what you understood?

15 Q. Correct. So they would not apply to the controlled activity or the restricted discretionary activity?

A. Correct.

20 Q. An objective is something that is seeking an outcome. The national policy statement, fish passage it is expressed as an objective. So that's essentially something quite important to be thinking about, isn't it?

A. Yes.

25 Q. And it may be that even within a six year period, it would still be relevant and appropriate to allow a matter of control to manage fish passage knowing that there's going to be an objective to support that to come?

30 A. With controlled activity rule – with a re-draft actually of the proposed plan change it was intended to kind of bring it back towards the procedural outcome especially with a controlled activity rule providing for a cost effective process. The fish passage including that as a matter of control or a matter of discretion in the proposed rule framework, after hearing the evidence of Mr Dunn as well, I was not very clear as to what the implications of that would be in terms of achieving that outcome. Also as Mr Maw was explaining as well the NPSFM does not require us to do it

immediately, it's as soon as practicable. That doesn't mean that Council should drag it's tail but given that it's a transitional framework it might be more appropriate in my opinion to leave fish passage as a requirement out of the controlled activity rule.

5 1025

Q. And this is in part based on your expectation that because this would roll over existing provisions, existing takes that the fish passage, whatever the current situation is will be maintained?

10 A. Yes and if there is a certain condition on a consent, again this can be carried over.

15 Q. Yes. I was interested to see in your supplementary evidence and I'm sorry I've just go to find the right...at para 23 and 24, that you would: "In relation to minimum flows, residual flows or take cessation conditions" that those are now coming out as a matter of control and I'm just talking to the controlled activity rule and that, and then you go on to say that you don't proposed to include existing priorities as a matter of control where they are not currently a condition but as I understood the decision that you've just had with Ms Dixon, where priorities are currently a condition, your new matter of control C would allow for that condition –

20 A. It does.

Q. – to be carried over.

A. Yes.

Q. And I think you would accept that a exercise of a priority is very similar to a take cessation condition?

25 A. Could be, yes.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

30 Q. Good morning. So I'm, probably just to keep the theme on the fish passage matter of control which in the control, in the D draft is now struck out and again just looking explicitly at clause 3.2(6) of the NPSFM, I just, I think Ms Williams got you there but I just wanted to be clear that your opinion, if the 14 March drafting of the matters of control and discretion excludes fish passage –

A. Correct.

Q. – but rolls over all of the existing operational requirements of the deemed permits.

A. Yes or if it's a consent and it would have an existing condition relating to fish passage, it would be, it could be rolled over as well.

5 Q. So in that scenario, the status quo of fish passage is maintained isn't it, whatever the status quo –

A. Against –

Q. – of fish passage.

A. – against the initial original consent, yes, correct.

10 Q. So in that sense, it is consistent with provision 3.2(6) which requires that fish passage is maintained or improved, they're alternatives aren't they?

A. Maintained and it's consistent –

Q. Yes they are maintained.

A. – that it's maintained, yes.

15 1030

Q. So there's not a requirement in provision 3.2(6) to improve fish passage as an absolute?

A. I'd have to look at it again sorry.

20 Q. By all means have a look, so if you can get the NPS, I'll let you get it and have a read.

A. Sorry I'm getting lost in my paperwork. Yes, I've got the relevant provision, yes.

25 Q. Great so I'll put the question again, the 14 March controlled and restricted discretionary rules will maintain the current status of the fish passage, won't they?

A. That is correct.

Q. And that is consistent with policy 3.2(6)(1) of the NPS, isn't it?

A. Correct.

30 Q. And if a consent is considered under the non-complying framework, Council, the decision maker, will have the ability in that context to consider whether there needs to be improvement of fish passage for any reasons?

A. That is correct.

Q. Including protection of fish species from other species that might predate or compete?

- 5 A. That is correct. My understanding is that under the non-complying activity rule if you pass the gateways you can consider the NPSFM and therefore this objective and also as Mr Maw pointed out we've committed to inserting it into initially the operative water plan and then either through cross-referencing or stating the objective explicitly into plan change 7.
- Q. Cool, and so by taking the fish passage matter of control out of those controlled and restricted discretionary rules, it's removing another area of potential cost for applicants and Council, isn't it?
- A. Correct.
- 10 Q. In terms of the technical assessments it might be required to improve fish passage?
- A. Correct.
- Q. And it's removing uncertainty for applicants for the same reasons?
- A. Correct.
- 15 Q. And it's bringing that rule more and more back to that purely procedural roll over of the status quo, isn't it?
- A. Correct.
- Q. Now I'd like to jump up to the entry points of the controlled activity rule, entry point conditions. And would like to focus primarily or initially on condition iii where we've, you're still retaining, proposing to retain the entry point but the maximum area irrigated not be increased?
- 20 A. Correct.
- Q. And what I'm actually wanting to test is how, the, what you view as the necessity and the reasons for keeping that as an entry point and it's all on the same theme of fine tuning this rule to it's pure, you know, base procedural requirements. So is one of the reasons for keeping the irrigation entry point in these rules a concern in respect of additional investment in infrastructure –I'll ask it one step at a time, additional investment in infrastructure, is that one of the concerns that leaves this entry point there?
- 25 A. It's one of the concerns, yes.
- Q. And is another reason the increased or possible increased dependence on maximum abstraction being continued to be used?
- 30 A. Sorry can you explain it a little bit?

1035

Q. I'll try rephrase that. Based on what you know about the importance of reliability of supply when an irrigated area is increased and all the investment and infrastructure requires that high level of security of supply and reliability, is one of the reasons this rule precludes that is because it's then again harder for an abstractor to adapt to a less reliability of supply and less water?

A. That is correct. I'm not an expert in irrigation but my understanding is expansions often entail a change in irrigation practice and more efficient systems are also more dependent on higher reliability of supply.

Q. Is a third reason of holding the line in terms of irrigated area anything to do with water quality and leaching of nutrients or not?

A. The potential for that to exist, yes.

Q. So if an irrigator chose to proceed down the non-complying rule primarily because they've breached this one entry point.

A. Mhm.

Q. They wanted to increase their area of irrigation. At the moment, in terms of getting any direction in the policies about the implications of that specific breach, would you look at policy 10A21?

A. Yes, you would look at that, yes.

Q. And obviously 10A23 also?

A. Yes.

Q. Moving onto entry point IV in the controlled activity rule which if I put it in my terms is effectively removal of unused paper allocation.

A. Correct.

Q. And actually what I want to do is compare that as an explicit entry point with Mr Ensor's drafting of this rule for the Minister so if you can find Mr Ensor's evidence in chief and I accept it may be changing. I'm not sure but at least I want to understand what you think of that comparison.

30 THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So we're looking at controlled activity rule 10A3.1.1IV and Ensor on...

A. (ii) is Mr Ensor's equivalent I think. That's what I'm trying to compare it with.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. So Mr Ensor has sort of consolidated if you like the entry points that might be an inelegant way of putting it into II. When you read his wording of that the proposed take is the direct replacement or otherwise reduces the volume of water taken of a deemed permit...Is your interpretation of that as an entry point that it doesn't explicitly require the surrendering of the unused paper allocation?

5

1040

A. That's correct.

10 Q. Do you agree that it's important for this plan change to achieve its objective to be explicit and be very certain about that?

A. That's correct. That's one of the principles behind the plan change and it's mechanism that's already in the plan and I believe I actually stated that in my evidence in reply as well that proposal of Mr Ensor, while I kind of agree with the general intent but it would have the effect that you wouldn't eliminate paper allocation.

15

Q. If you've got Mr Farrell's evidence handy or if you haven't that's probably okay. So if you go to his appendix and look at controlled activity rule and then also the non-complying rule in terms of the clauses B on both of those rules, he's highlighted with a comment box at the terminology, the wording when describing – "currently authorised" is the wording used in the controlled rule or "that is a replacement take" is the wording used in the non-complying rule. Is there any magic in the different drafting there or when we get to a mop up with those two clauses B it'd be consistent?

20

25 A. There is no material difference. So when it comes to further refining the drafting I think there is an opportunity to kind of align that better. My initial response was that the controlled activity – the wording in the controlled activity rule is probably more concise.

30

Q. My final questions are about the non-complying policy 10A23 and as you will be aware part of Fish and Games case is that it would be of assistance to have a direction in the policies as to what more than minor is and whilst Fish and Game is supportive of your re-drafting because it's even clearer and more directive, if an applicant goes down the alternative gateway through s 104D(1)(a) I think and still has to assess itself under the no

more than minor test, do you think it would be of assistance if there's a separate policy direction in the plan that informs that assessment under the alternative non-complying gateway?

1045

5 A. We, I think we discussed it previously as well last week I have a little bit of concerns about it, I had some concerns about the wording, there was a little bit of unclarity in the wording but also there is, there are a few other risks. Firstly, the thresholds proposed, they reflect to a degree of hydrological alteration and they think it to ecological values as well, I think
10 there's, used to species of conservation concerns but actually there one, there's only two aspects that you would consider when you look at what are appropriate flow regimes and there might be others that are not included in that. The other concern is that it could work in two ways and in a lot of areas in Otago, simply works as a prohibition almost because
15 you wouldn't pass the test because the thresholds are so stringent, in others –

Q. But isn't that intent?

A. No, no that's not the intent but in other – sorry, the intent of?

Q. Of making it as difficult as possible to get a consent that's not a six year
20 consent in the controlled activity framework?

A. That is the intent of the controlled activity, yes. But in other areas where there is allocation available potentially it could become a target as well and we still want to keep people to a six year consent so hence my reluctance for those two reasons, really.

25 Q. And the other possible benefit, I know you're not agreeing with me but I'm going to put to you the other proposition as well, the other benefit of having a clear direction as to what is considered more than minor on the face of it is that that would also inform the decision about whether or not an application needed to be publicly notified, do you think that would be
30 helpful?

A. It would probably assist consent officers in making that assessment, yes.

CROSS-EXAMINATION: MR ZWAAN

Q. Thank you. So I guess we've established this morning that the whole intent of this is to limit consent duration to no more than six years, is that correct.?

5 A. That's correct, yes.

Q. Thank you and do you think it's accurate to describe the rules that you've set out as reasonably permissible, it's not a necessarily a high bar for applicants to go through either the controlled activity or the restricted discretionary?

10 A. The controlled activity and the restricted discretionary activity pathway are definitely more lenient than the non-complying one.

Q. Yes, because essentially existing users would just need to be able to demonstrate their existing use through that methodology or some other way if they can't demonstrate it through that methodology and essentially the applications would be approved, that's my understanding of –

15 A. That is a large part of it but they also need to show, they also need to meet the other entry conditions relating to existing conditions in their application around minimum flows so that needs to be included in their application as well as no increase in irrigation area.

20 Q. Sure but in terms of preparing these applications it's not a comprehensive assessment that's required for it, is it?

A. No and that's deliberate.

Q. That's deliberate, yes. And that would be regardless of what they intend to use that water for. This is agnostic to end use if it's irrigation, hydro, community takes, isn't it?

25 1050

A. Correct.

Q. Do you think six years is a reasonable amount of time for someone to prepare a more comprehensive application for potentially more stringent NPS compliant consent?

30 A. In a way, I believe that because a lot of the language in the current plan repeats what's in the RMA, for example, around efficiency as well, wording of those policies are very vague. There are no clear standards. I would actually anticipate that under the new land and water plan more

certainty is provided and it would make it easier to prepare an application under that plan compared to under the current plan.

Q. And we've talked this morning about the non-complying is a very large stick, isn't it? It's quite difficult for people to meet that test if they wanted a consent duration longer than six years.

A. Correct.

Q. Can you think of an example of where an application may want to go down this path?

A. An example where an application would want to go down the path or where we would grant the consent?

Q. I think both. I was going to come to the second but you can cover both if you want.

A. I think quite a few people will probably look – I'm speculating now, but will probably look at exploring the non-complying pathway option to achieve a longer term consent. As I said before, I really struggle to find an example where we would grant a longer term consent.

Q. Do you think it's on the applicants for the council to have put in place this plan, this option that has a very low bar of success and people can significant effort into an application to try and overcome these tests which, as we've established, is a very high bar?

THE COURT: JUDGE BORTHWICK TO MR ZWAAN

Q. Which test is the high bar? Which one is the low bar?

A. Sorry, the non-complying pathway.

Q. The non-complying pathway.

A. Yes.

Q. Okay.

CROSS-EXAMINATION CONTINUES: MR ZWAAN

A. Could you repeat that?

Q. We've established that non-complying pathway is a high bar and part of the purpose for this plan change is to lessen the burden on applicants and the council and other parties in processing these consents and I guess retaining that non-complying pathway presents an option that

applicants may want to choose and may put significant effort into the applications but from what you're saying it's a very minimal chance of success so I guess I'm just wondering is that a fair proposition to still enable that?

5 A. Well, I think the wording in the policy is not sufficiently clear and it should act as a deterrent for people to explore that avenue and instead just focus on controlled activity rule.

Q. Do you think it would be much clearer for applicants and everyone involved if that was more simply just a prohibited activity rule?

10 1055

A. As I said, there might be situations where you would allow for slightly longer timeframe if it serves the overall objective of moving more quickly towards a long-term sustainable management regime. I've tried to think of some examples. For example, if somebody has a resource consent currently that runs until 2040, he wants to change some of the perimeters within that resource consent or wants to move to a different kind of use, there you could potentially consider longer term because if you wouldn't allow for that consent it might actually result in that activity or that water take only coming in at a later date, if you understand what I'm saying.

15

20 Q. I understand what you're saying, in that situation there's nothing that would prevent that, this hypothetical applicant going for the controlled activity or the other pathways for an interim six year consent, is there, and that's not a large burden if they wanted to to do that and then they could submit a longer term consent once the new plans in place.

25 A. Yeah but to answer your question I think perhaps, I believe that the non-complying pathway now is sufficiently strengthened but there might be situations where people get through the gateways and get actually slightly longer term consents so prohibited activity might be a step too far in that regard.

30 Q. Okay. Just in terms of the hydroelectricity question that's come up a few times, is your understanding of – sorry, first of all, this plan change 7 is largely to do with water allocation isn't it?

A. Correct.

Q. Is your understanding of the NPS renewable energy that it doesn't specifically talk about water allocation, it's more to do with the broader benefits of renewable energy generation, broadly?

A. Correct but it does mention allocation I believe in the preamble.

5 Q. Okay.

A. And specifically it, the preamble kind of explains the relationship I guess between the NPS renewable energy generation and management of allocation and prioritisation of freshwater under other documents of national guidance.

10 Q. But it's still your opinion that there isn't, that this would be a more coherent plan change if it was, if it didn't put in place any exemptions?

A. Correct.

Q. That renewable energy or any other use should be treated the same as use of water. And in your understanding and we've established that this isn't a NPS compliant plan change is it?

15

A. It doesn't give full effect—

Q. Doesn't give full effect to the NPS.

A. No.

Q. And the – so do you think the hierarchy of the hierarchy in the NPS is relevant to this plan change?

20

THE COURT: COMMISSIONER EDMONDS

Sorry which NPS

CROSS-EXAMINATION CONTINUES: MR ZWAAN

Q. Sorry the NPS freshwater, the new, in terms of the Te Mana o Te Wai hierarchy of, we've had it suggested that renewable energy should be treated as a second order of, or it's debated whether it's a second order or third order or first order, do you think that has much bearing in terms of the decisions that would be made under this plan as it's now focussed?

25

A. Are you talking about consent decision making or are you talking about decision making on the plan change?

30

Q. I'm talking about consent decision making under the your now revised version of the plan change.

A. Under the non-complying activity pathway, like I said before, the NPSFM can have, can be given regard to by consent officers, yes.

Q. Okay, cool.

COURT ADJOURNS: 10.59 AM

5

COURT RESUMES: 11.23 AM

THE COURT: JUDGE BORTHWICK

We are with Mr Welsh.

CROSS-EXAMINATION: MR WELSH

- 5 Q. I have a relatively confined set of questions for you, Ms Dixon has already traversed some of the matters that I would have otherwise done so one of the advantages of being at the back of the room is the hard work sometimes is already done for me. But I just want to pick up on an answer that you gave in response to a question, the final set of questions from
- 10 Forest and Bird and that related around plan change 7 being described as a water allocation plan and I want to look in that respect to the, the set of principles that you have included at paragraph 5 of your supplementary evidence and you set out those principles based upon the, for want of a better word, mandate from the ORC and principle B is water allocation
- 15 should be based on water use, not pay per allocation, that's correct?
- A. Personally, I would say water take as well but yes, generally.
- Q. Yes that's the principle that you've relied upon?
- A. That's the principle, yes.
- Q. And we see that roll over I suppose in the controlled activity matters of discretion in 10A(3)(1)(1) now A which relates to the historic use, it's a
- 20 matter of roll over?
- A. Correct.
- Q. And the plan change does not deal with allocation between various parties through that discretionary – that matter of discretion we're
- 25 essentially just rolling over the historic use of an applicant, or a permit holder I should say, aren't we?
- A. Correct, yep.
- Q. And it would be more fair, or would it be fair to describe plan change 7 in its current form under your recommendations, is essentially a framework
- 30 and duration plan change. Framework for applying for consents, vis-a-vis controlled or non-complying in a duration that applies to each?
- A. Yes.

Q. Now coming back to the, your principles, from looking at those five principles, would it be fair to say that the focus of plan change 7 is on the replacement of deemed permits and those permits that expire prior to 2025?

5 A. The plan change goes a little bit beyond that –

Q. Yes it does, yes.

A. – because it also applies – and as I explained last week as well, I asked myself the question would this framework make sense in the absence of deemed permits and my response to that was yes it would because you
10 still have new applications that you've got to deal with and knowing that there is a new plan coming, it wouldn't make sense to also restrict the term for that so I think it goes both to deemed permits, other permits that are expiring as well as new permits.

Q. Yes, it most definitely has a policy direction on new permits and I suppose
15 when we, as I did when you were giving your evidence last week, step back to the Skelton report, the genesis or this, the focus on that is on deemed permits and much of this hearing has been on deemed permits and that I suppose is the unique nature of the consenting framework within Otago which most of the deemed permits within the country are
20 within the Otago region. But when one comes to other applications that will be filed during the life of plan change 7, there's nothing particularly unique about Otago, is there, in a planning framework sense?

A. I think there, the deemed permits have shaped the environment within other water takes are taking place as well so –

25 Q. I suppose, if I put it this way, the Regional Council must respond to the new NPS but –

A. Correct.

Q. – that's like all existing regional plans will need to respond to those new policy directions, won't they?

30 A. That is correct.

Q. Yes. Now the remaining of my questions Ms Dixon has covered but I just feel almost duty bound just to raise with you the matter of the change to the policy, the non-complying policy, the scope of which you have assigned to Trustpower by the insertion of the words “avoid granting” now,

I assume that you, in assigning that scope to the Trustpower submission looked at the Trustpower submission?

A. I have not had a chance since re-drafting it to look at the Trustpower submission specifically but I have read the Trustpower submission as well as the evidence, not so long ago.

Q. Well when you read the Trustpower submission and relied upon the Trustpower submission for the change to the language of avoiding granting, which is the language you've assigned to the Trustpower, you would've seen would you not that the submission of Trustpower was actually avoid granting and that it inserted the words "for irrigation purposes" –

1130

A. Correct.

Q. – as opposed to avoiding granting –

A. I remember that.

Q. – full stop. Is that correct?

A. That is correct, I think from memory.

Q. Yes and would you accept that not including "for the purposes of irrigation permits" it's quite a different, the effect of slicing and dicing that relief is quite different?

A. That is correct. I believe however that there are other submissions that give a scope to make the change.

Q. Yes, that's not for me at this stage to explore with you, I just wanted to clarify that the Trustpower submission has been sliced and diced somewhat.

CROSS-EXAMINATION: MR PAGE

Q. I want to take you to paragraph 16 of your supplementary evidence where you describe the change in language for the non-complying policy and my friends have asked you lots of questions about the effect of the change in language but my question is directed towards your intention. I'm intrigued by the way that your paragraph 16 is drafted because the second sentence says it has become clear through questions that there are difficulties associated with the application of clause A policy 10A.2.3

and that it acts as a barrier for an applicant seeking to get through either of the gateways of section 104(D). Was it your intention then to remove that barrier so that there is a gateway through section 104(D) through the policy framework or was it your intention to shut the gate entirely through the change in the wording which is the flavour I got from questions from particularly Ms Dixon?

5

A. It was my intention to close the gate more.

Q. Okay and the next sentence of paragraph 16 says other parties – well the next two sentences: “Other parties also consider that non-complying activity pathway require strengthening the proposed amendments to policy A.2.3 seek to achieve that.” So do I take from your last answer that you’re not simply trying to accommodate the views of other parties, it’s actually your drafting intention to close that gate?

10

A. Yep.

15

Q. All right, can come now to your appendix 1 which contains the modifications that you are suggesting in your evidence. Now I want to come to page iv of your appendix 1 with the roman numerals being the bottom left corner of the page, do you see that?

A. (no audible answer 1:34:18)

20

Q. So we’re four pages in, first page is the front sheet, second page notes for the reader –

A. Yep.

Q. – third page is the introduction and then there’s the fourth page which contains the words at the top: “Insert the following text as two new paragraphs at the end of the section entitled how to use the regional plan water”?

25

A. Yes.

1135

Q. Well now I'm intrigued with the first paragraph: “Applications for water permits to replace deemed permits or to replace water permits that expire before 2025 will be assessed in accordance with the objective policies and rules set out in chapter 10(A) of this regional plan water.” Now I had understood from my friends’ submissions this morning that the restricted discretionary and non- complying applications also fall to be assessed

30

under the objectives and policies of the operative plan, was that your understanding too?

THE COURT: JUDGE BORTHWICK

Who's question was that, I didn't actually hear that answer so who's question
5 was that. When you say your friends, you've got quite a few of them so who
are you talking about?

MR PAGE:

Sorry, so Mr Maw's submission this morning to the Court –

THE COURT: JUDGE BORTHWICK TO MR PAGE

10 Q. Mr Maw's submission, can you take me to the relevant paragraph, I just
want to see whether Mr Maw made that submission.

A. Paragraph 22, Ma'am.

Q. Okay and I want to read that. And perhaps paragraph 21 and 22 I think
would be relevant.

15 A. Yes. So I understood the thrust of the Council's submissions to the Court
is that plan change 7 is a self-contained code in relation to controlled
activities but objectives and policies of the operative plan are relevant to
restricted discretionary and non-complying activities.

Q. With that in mind can I, the witness is to read paragraphs 21 and 22, the
20 Court will do so too and we'll come back to you if you're about to bounce
up and say no, that's not what you're intending.

UNIDENTIFIED MALE SPEAKER:

Your Honour I might object to that.

THE COURT: JUDGE BORTHWICK

25 You object to that, well let me read it and we'll see whether or not that in fact
was their interpretation of what you say. I can't see it, I can't see what you're
saying from paragraphs 21 and 22, I cannot see that this Regional Council is
saying that for a, is it an RDA or a non-complying activity that the provisions of
the operative water plan remain relevant. Now if that's your proposition as to

what is being said, I'm going to just refer that back to Mr Maw otherwise some mischief would be done.

MR PAGE:

Yes well if you would, if I've misunderstood I apologise.

5 **MR MAW:**

Yes that has been misunderstood, the submission was a submission that in relation to the policies and the objective that the NPS requires to be brought down into the operative framework, when plan change 7 is made operative, if plan change 7 reaches that point, then the Council will either insert the objective and the two policies directly into chapter 10(A) or it could include a cross-reference to that objective and the two policies in terms of where they have been inserted into the operative plan. The submission was not, I was saying that the objectives and policies in totality of the regional plan water will be considered in relation to applications under chapter 10(A).

15 **THE COURT: JUDGE BORTHWICK**

Q. That was my understanding, does that clarify matters?

MR PAGE

Slightly, there remains a drafting issue then to pursue with the witness in the light of that.

20 **CROSS-EXAMINATION CONTINUES: MR PAGE**

Q. Can you come to policy 10(A).2.1 in your appendix 1, do you have that?

A. Yes, I do.

Q. And do you see that the first line of policy 10(A).2.1 reads: "irrespective of any other policies in this plan, avoid granting resource consents." See that, and is the drafting intention of those words that plan change 7 is a self-contained code for the granting of controlled activity consents?

A. Yes, it was.

Q. Can we now then come to policy 10(A).2.2, do you have that?

A. Yes.

Q. And the first line reads: “Irrespective of any other policies in this plan concerning consent duration” you see that, and do you see the difference in the words from –

A. Yes.

5 Q. – 10(A).2.1 and do you agree, we see the same thing in the first line of policy 10(A).2.3: “irrespective if any other policies in this plan concerning consent duration” see that?

1140

A. I see it.

10 Q. So we have different drafting about which policies are, well, the term irrespective effectively means only apply this policy, doesn’t it?

A. Correct.

Q. But in 10.A.2.1, we’ve got any other policies and in the, in 2.2 and 2.3, we’re only excluding other policies as to duration, aren’t we?

15 A. Correct.

Q. So do we take it from 10(A).2.2 and 10(A).2.3 that other objectives and policies of the plan remain relevant?

A. With regard to 10(A).2.2, if you read this in conjunction with what’s on page (inaudible 11:41:51) other provisions within the plan remain (inaudible 11:41:57) for policy 10(A).3.

20

Q. So you’re saying – but didn’t you agree with my friend Ms Dixon that when considering the policy gateway under section 104(D) or perhaps your answer was under section 104(1)(B), that the consent authority would be considering the objectives and policies of the plan in the round?

25 A. That is where that (inaudible 11:43:03).

Q. Okay –

THE COURT: JUDGE BORTHWICK

Your question is, well the question that immediately arises is which plan, is this the plan in the round the whole of the operative or is it the plan as in this new chapter, and that would be a fair question because I think I heard the answer thinking, he means this new chapter, but maybe he doesn’t.

30

MR PAGE:

Well I –

THE COURT: JUDGE BORTHWICK

And that's where you're going isn't it?

5 **MR PAGE:**

Yes, no exactly.

THE COURT: JUDGE BORTHWICK TO THE WITNESS

10 Q. Okay so, so you're through the gateway, got a non-complying activity, you're through, well I don't know, through a gateway just suppose, which plan, is it, when you come to assess it under section 104 is it the operative plan together with this new chapter or is it this new chapter?

15 A. Well it brings me back to the operative plan but it is part of the operative which means that you have to look at this policy, when it comes to the placement consents for lack of a better term, the operative plan tells you to ignore the other objectives in the plan, does that make sense?

Q. I think you mean this chapter.

A. Sorry?

20 Q. I think, it, you're through the gateway, you're looking at an application under section 104 of the Act and now having regard to the objectives and policies of the plan is your answer that this is a self-contained chapter so the objectives and policies are only those in this chapter or is it this chapter and the whole of the operative plan?

A. No it's the first one.

Q. It's just this chapter?

25 A. It's just this chapter, it brings you back to the water plan where the water plan is quite clear, once this has been made operative, that you have to ignore the other policies.

Q. Just this chapter, okay.

A. And objectives.

30 1145

CROSS-EXAMINATION CONTINUES: MR PAGE

- Q. Well then why do we have a difference in drafting in the first lines of policies 10(A).2.1, 10(A).2.2 and 10(A).2.3, why does 2.2 and 2.3 only refer to irrespective of any other policies in this plan concerning consent duration?
- 5 A. In my opinion you could take out concerning consent duration.
- Q. Right.

THE COURT: JUDGE BORTHWICK

- Q. For both?
- 10 A. No for 10(A).2.3.
- Q. 2.3?
- A. Yep.
- Q. And why you don't take it out for 10(A).2.2 is because?
- A. It is a new application and I think I said it before, when it comes to new applications you read policy 10(A).2.2 in conjunction with what's on iv which has that you look at the other chapters as well but consider the policy guiding consent duration in chapter 10(A).
- 15 Q. Instead of the policy ending .18 or .19 or –
- A. 6419, yes.
- 20 Q. 6419. And then what were you going to say in relation to 10(A).2.3, you said you could remove some words I think –
- A. You could actually relate and removed under policy 10(A).2.3 the words “concerning consent duration”.

CROSS-EXAMINATION CONTINUES: MR PAGE

- 25 Q. So if that is right, staying with 10(A).2.3, and the only relevant policies are the ones within plan change 7, how then do the fish passage, wetlands and river policies become relevant to a non-complying activity?
- A. That is something that we have to draft in there and make special provision for it.
- 30 Q. Into, but I thought the Council's position was that they're not going to be brought into plan change 7, they're only going to be brought into the operative plan?

A. Only –

THE COURT: JUDGE BORTHWICK

I (inaudible 11:48:23) that's not that the Council's position, Mr Maw you can put your position a third time if you like.

5 MR MAW:

So the position is that the objective relating to fish passage and the policies relating to wetlands and rivers will be brought down into plan change 7 when that plan change is – if and when that plan change is made operative and any consequential adjustments that might be necessary to be made to facilitate that will be made at that time without using a schedule 1 process.

10

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. The objective of plan change 7 at 10(A).1.1 is the same for replacement of deemed permits and for new permits, isn't it, it's to manage them until a new land and water regional plan is operative?

15 A. Correct.

Q. If we come to policy 10(A).2.2, the status of new permits is determined by the operative regional plan water, the application status I mean?

A. It's for new permits for, yes. Previously not consented or, yep.

Q.

20 1150

Q. And for non-schedule 2(A) catchments, the status would be restricted discretionary if the new applications within the primary allocation cap or discretionary if it's above it, right?

A. Correct.

25 Q. And for schedule 2(A) catchments, for primary allocation it's restricted discretionary but over the cap it would be prohibited, is that right?

A. Correct.

Q. The Clutha main stem is a non-schedule 2(A) catchment, right?

A. Correct.

Q. So for somebody wishing to apply for a new permit from the Clutha under clause 10(A).2, would that be a restricted discretionary or fully discretionary?

5 A. I have to look at the plan because the Clutha is kind of an outlier in the plan because the framework does not apply to the Clutha.

Q. Yes.

THE COURT: JUDGE BORTHWICK

10 Q. Do you want to have a look at the plan, I'm quite interested in this line of questioning and how it applies to – I think you've got five or six water bodies sitting outside your minimum flow regimes, correct?

A. Outside the allocation regime?

Q. Yes.

A. Yes.

15 Q. One of which is Clutha but I think there's some lakes and other rivers as well.

A. They're all part of the Clutha system, but you're correct, yes.

Q. Could you look at the plan because I am interested to see how this all works, if you like.

A. Yep.

20 Q. And Ms Harlow will assist you obtaining a copy.

WITNESS GIVEN COPY OF THE MAP

A. Thank you.

Q. So you're starting provision is policy?

25 A. Well this is something that may want to check with one of the consents officers as well but I look at basically policy 641 and that is on page 613 and basically when you, the policy says to enable the taking of surface water by defined allocation quantities and provision for water body levels and flows except when the taking is under i) the taking is from Lake Dunstan, (inaudible 11:55:28) Roxborough, Wanaka or Wakatipu or
30 the main stem of the Clutha Mata-Au, (inaudible 11:55:33) rivers. And then when you go to the explanation, the third paragraph says basically this chapter does not apply, chapter 6, the allocation quantities and minimum flows set in chapter 6 do not apply to surface water takes from

Lake Dunstan, (inaudible 11:55:57), Roxborough, Wanaka, Wakatipu or the main stem of the Clutha River Mata-Au and (inaudible 11:56:02). Because of that, it's my understanding that we don't have a primary allocation so to speak, primary allocation block or limit from the Clutha and therefore any application to take water would be a discretionary activity.

Q. Which rule?

A. Under rule 12.1.5.

CROSS-EXAMINATION CONTINUES: MR PAGE

10 Q. Mr de Pelsemaeker can you have a look at rule 12.1.4.6?

A. Yes.

Q. It's page 1211 of the plan or common bundle page 181, can you see that?

A. Mhmm.

15 Q. Does that rule apply to new takes for primary allocation from non-schedule 2(A) catchments?

A. Correct.

Q. And is the activity status restricted discretionary?

A. Correct.

20 Q. And coming back to policy 10(A).2.2, the policies to grant such new permits for not more than six years, so this is plan change 7 policy 10(A).2.2?

A. Correct.

25 Q. But for applications for new permits for longer than six years, the activity status remains the same which is that required by the regional plan water?

A. For new takes?

Q. Yes.

A. Yes, correct.

30 Q. Okay. And you're satisfied that that implements plan change 7 objective 10(A).1.1?

A. Yes.

Q. So I want you to suppose the scenario where we have existing permits to take water from the Clutha which are sought to be replaced for more than

six years, that's a non-complying activity and the Council's intention is that that gateway be firmly closed, correct?

1200

A. For when consents supplied for for more than six years, correct.

5 Q. But if the next door neighbour makes precisely the same application for a new take for more than six dyears, it's restricted discretionary?

A. Correct but, sorry, my understanding is that because the Clutha is outside of chapter 6, you do not take primary allocation from the Clutha, it would be a fully discretionary activity.

10 Q. All right.

A. But, yeah.

Q. But let's suppose that you're right about that for the purposes of this line of questioning, we still have a position where one person taking water from the Clutha under an existing permit that falls to be replaced under plan change 7, that is non-complying if it's for more than six years?

15

A. That is correct.

Q. But where it's not replacing an existing permit, it's an entirely new take that's discretionary?

A. That is correct.

20 Q. And both outcomes you say implement objective 10(A).1.1 of plan change 7?

A. Yes.

Q. All right, I'm going to move now to your paragraph 24 of your supplementary evidence where you deal with priorities. Now in your second sentence you say: "There are difficulties in including express reference to existing priority and new permits as they are not currently a condition of consent and are not enforceable by the Council." Is that your understanding or is that advice that you've received?

25

A. That is advice that I received.

30 Q. Would your opinion change about the utility of priorities if in fact priorities were legally deemed to be a condition of deemed permits by section 413(2) of the Resource Management Act, it's out in my friend Ms Williams' opening submissions.

A. I would reconsider it, yes.

Q. You would, okay. Because whether or not conditions of resource consent are enforced by the Council, they might still have utility in that permit holders might enforce them directly against each other, mightn't they?

A. Yes.

5 Q. And so even if the Council doesn't find them useful to protect permit holders' rights, permit holders as between them might see utility in being able to enforce the priorities, you agree?

A. My understanding is, it's a civil matter, yeah.

Q. What do you mean by that?

10 A. It can be subject to agreements between water users.

Q. But do you understand that any person may seek an enforcement order to enforce a condition?

A. Sorry I'm not familiar with that aspect.

15 Q. You're not aware of that, okay. This, the last sentence of your paragraph 24, you say that: "to the extent that existing priorities have been exercised in the last five years this will be reflected in the actual use calculated in schedule 10(A).4 so in practice the status quo will continue" can you explain to me how that works?

1205

20 A. When consent holders or deemed permit holders operate in a system where priority is still being exercised water users with a lower priority have to yield to water users with higher priority. That means that the volumes that they can take will be restricted by how much they have to let go past their take in order to provide a surety to higher priority users. That will be
25 reflected in the volumes calculated to some degree, will be reflected in the volumes calculated on the schedule.

Q. Okay so in the long run, you think it should work out all right because you're restricted by what you've taken in the past?

A. Yes.

30 Q. Is that the thinking. But that doesn't tell you, does it, what, as between permit holders are entitled to take between them on any particular day, does it?

A. Could you repeat that sorry?

Q. Well, let's suppose your propositions right, is that a downstream lower priority permit holder – or sorry, not necessarily downstream, a lower priority permit holder's take history is influenced by their priority. So they will have a limited seasonal volume that they can take based on their history?

5

A. Yes.

Q. But it doesn't tell you relative to permit holders how much they might take on any given day, does it?

A. No it does not.

10

Q. No and that's the value of the priority scheme isn't it, it enables permit holders to know by how much water's in the river and how much water higher priorities takes what is available to them on any given day?

A. Yes

15

Q. So in that respect, the status quo isn't continued, is it, if you take away the priorities out of the permit regime?

A. Not entirely.

Q. Okay.

A. But, yeah.

CROSS-EXAMINATION: MS IRVING – NIL

20

THE COURT: COMMISSIONER EDMONDS

Q. Now I wonder whether you have available to you the evidence of Ms King, do you have that?

A. I do, I had it somewhere.

THE COURT: JUDGE BORTHWICK

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Actually I should've sorry (inaudible 12:09:04) re-examination before mudding with our own questions so before we get to our questions, any re-examination?

RE-EXAMINATION: MR MAW

30

Q. Just one question if I might, you were asked a series of questions by various of my friends in relation to the non-complying activity pathway and you were invited to provide some examples of when that might occur, I'm

interested to understand what might happen to an application lodged for a resource consent for a six year period of time where there is no data record available and that data record is available for reasons other than those which would gain entry into the restricted discretionary pathway?

5 A. You would default to the non-complying activity rule.

1210

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. So I asked you about Ms King's evidence. Is that there somewhere or does someone need to help you with that?

10 A. Yes, I have it.

Q. Perhaps you could turn up page 13, paragraph 64 at the top of that page.

A. Yes.

Q. So I have a series of questions in relation to your restricted discretionary activity status and your entry condition C. So you might want to have that in front of you as well. That's on page 6 of the provisions in attachment 1.

15 A. Yes.

Q. So you have that in front of you and you might recall in the context of the schedule during this hearing, there's been quite a lot of reference to entry conditions needing to be objectively ascertainable. Do you recall that phrase being used so that is very clear on its face whether you're in or out and that's not down to the council or the applicant to basically make the call on that?

20 A. Yes.

Q. So I'm just looking at your proposition for an entry condition in C and I'm also looking at what Ms King said about that in 54 and I might read it out because I'm not conscious that not everyone in the room always has these things. It's not very long what she says. This matter allows council the discretion to consider whether the information provided demonstrates technical issues. In my opinion I can foresee some interpretation challenges associated with the following words; demonstrate, technical issue and resolve as between applicants and council. Now, you haven't

30

amended at all what you had in your supplementary evidence. It's the same, isn't it?

A. Yes. Could you refer me to the appendix? Which provision in the appendix?

5 Q. It's C in the restricted discretionary activity. So it's in black not in red. In terms of the annotated version of what you put up in your supplementary so you haven't amended it at all.

A. I have not amended, no.

Q. So did you have a look at the points that Ms King made?

10 A. Yes.

Q. And consider them?

A. I did. But I can onus is now more on the applicant to demonstrate it and for council to make an assessment whether that's appropriate as opposed to council setting out how the applicant needs to provide that information or to what standard.

15

Q. So you think that's the word demonstrate that you're speaking to the word demonstrated? Am I right about that?

A. Yes.

Q. So the question about technical issue, wouldn't the council want to be clear on what a technical issue was?

20

A. It's probably a question that can be better answered by Mr Wilson but it is hard for council to foresee the nature of the technical issues so there's always going to be some degree of discretion that you need to apply because it might be difficult to list specifically all the technical issues that could give rise to the circumstance where you have a gap in the water take data.

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1215

Q. So I guess my question comes back to here. You are saying and repeating that council has to have the discretion on these matters and I guess just to take the final step, we have also a test of all reasonably practical steps have been taken to resolve the technical issues. Now, what do you understand by "all reasonably practical steps"? Is this an objectively ascertainable matter?

30

A. I acknowledge that perhaps it would be better if it was stated more clearly but I'm not an expert in assessing what the adequacy of water quality data.

Q. Quantity data I think you mean.

5 A. Sorry, water quantity data. It's definitely something that I would be happy to take up with Mr Wilson but I need some expert input on that in order to see if it would be feasible to provide more clarity and how it can be achieved.

10 Q. Ms King might have some thoughts about that too in the light of my question. So if that was something that the council felt it needed some discretion over shouldn't it appear in the matters of discretion?

A. Well, because it is included in the application, my understanding is council can consider it because it is part of the application.

THE COURT: JUDGE BORTHWICK

15 Q. There is another way of framing that rather than having the words appearing in the entry point subparagraph C, that words or more certain words are actually put into the matters of discretion.

A. Yes, that is something that we could consider but as I explained, I don't have technical skill to define those words or identify those words.

20 Q. I mean I can you need to work with your technical people which is why this opportunity is being given to council to come back to us and it's been very helpful but the point being made by the Commissioner is that the entry point itself involves quite a degree of discretion.

A. I agree with that, yes.

25 Q. Is that valid for a rule such as this or should those matters of discretion (inaudible 12:18:57) framed differently, be taken out and put into the matters that the council will restrict its discretion in relation to. I think that's the proposition or one of them.

THE COURT: COMMISSIONER EDMONDS

30 Well, it is but it may also need an entry condition but a rather different looking one.

THE COURT: JUDGE BORTHWICK

If the entry condition isn't that simply a complete set of water metering data is not available.

THE COURT: COMMISSIONER EDMONDS

- 5 Which available is much easier thing to test. It's either available or it's not.
1220

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

- 10 Q. So I was just unclear about your answers earlier in the day in terms of the priorities question and you said that there was a difference in terms of priorities that were in conditions and priorities that were in notes and I didn't understand what you meant by that, I mean I have looked at the examples that we were provided with and you did refer to those but you said that you'd been given advice and you might be working off that but it
- 15 would be helpful to understand actually what you meant and even to have an example.
- A. So the advice – initially I got advised that it was not a condition and not enforceable by Council but when I looked at deemed permits I saw that there were some inconsistency in some deemed permits that were issued
- 20 in replacement of the mining privilege, the priorities were included as a condition which means, my understanding, that the consent holder needs to exercise that permit in accordance with that condition. In other deemed permits it is not included as a condition but rather as a note which my understanding has no legal standing or is not something that a water user
- 25 needs to comply with.
- Q. Well there's quite a lot of case law that says that sometimes notes are the same as conditions but I guess that's more of a point for the lawyers, you're just operating on advice.
- A. My understanding is also that Council does not enforce it anyhow.
- 30 Q. No but you've been cross-examined on enforcement action that the users might be able to take as between themselves and you said that was outside your field of expertise.

A. That is correct.

Q. So I just had one last question and that was relating to two matters, we can just take the controlled activity rule perhaps as an entry point for my question. So if we look at an entry, the entry condition V, so there we
5 have the requirement to have any existing residual flow, minimum flow or take cessation condition, whichever is applicable, rolled over and included in the application for resource consent. So I'm just wondering what your understanding by a take cessation condition might be?

A. My understanding is it could apply to quite a few situations where the
10 taking is restricted by a condition and one of the conditions might be that the taking is restricted when other takes from that waterbody are operating, that could be a take cessation condition. Earlier the argument was made that perhaps priorities as well could act as a take cessation condition when they are stated on a deemed permit, I can't accept that
15 that would be the case.

THE COURT: JUDGE BORTHWICK

Q. You kind of or can't?

A. I accept that this would be the case.

Q. You can, okay.

20 1225

Q. And the difference between the residual flow and a minimum flow, perhaps the residual flow first.

A. Minimum flows apply usually it's basically one limit that applies to all that consent it takes on a water body. Residual flows are specific to one take.
25 They can be set as conditions on consents at the same time so you could have a minimum flow condition which requires you to stop taking when the flow at a certain point in the catchment reaches a certain level. A residual flow is often formulated in a sense that you need to let a certain volume of water going past your take or a certain point near your take.

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

Q. So I want to turn now to the matters over which controls reserved and the new (c) so if you turn over the page I think you'll find that.

5 A. Yes.

Q. And I think you were asked some questions about that. So we have there "any other conditions" and then we have the qualifier where those matters are not otherwise addressed by the entry conditions of this rule or matters of control so we look first at the first part of that qualifier not otherwise addressed by the entry conditions of this rule, how would you see that applying in the future in relation to those entry conditions that you've just gone through.

10

A. So if the entry condition is met then that – if the condition on an existing consent relates to any of the entry conditions in (i) till (vii) but in reality that will be primarily (v) or if it is not addressed by any of the matters of control stated before the next matter of control (c) then it would be caught by this catch all matter of control. It is just there to ensure that any other conditions are carried over.

15

Q. So you go back to the conditions that were in the original permit?

20

A. Correct yes.

Q. And you just make sure nothings been missed out.

A. That is correct.

Q. Is that the intention?

A. It is a catch all yes.

25

Q. So what kinds of things can you think of that might fall into that category having had a look at a few of these permits and of course we have been provided with some permits in evidence that might expire soon.

A. It might be that it's a condition relating to a certain intake, intake structure and – as I said before it could be something that relates to fish (inaudible 12:29:23) that's already on an existing consent, we could carry it over. Any, yeah, any environmental conditions.

30

Q. So something that might for example relate to galaxiids.

A. Yes.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. I didn't quite understand why you say and because I didn't have a chance to read it, why you said that takes are from water bodies that don't have a primary allocation are a discretionary activity and I think you gave us the rule 12.1.4.5. maybe I took that down wrong but I haven't had a chance to read it so if you could go through that rule and point out to me if that is the correct rule, why it is discretionary.

5

1230

A. Well, that's my understanding from reading the plan is that the Clutha – chapter 6 basically sets up the entire allocation framework and it allocates primary allocation, supplementary allocation blocks to certain waterbodies. The Clutha has not been given a primary allocation.

10

Q. I accept it. So jumping into the rules, I now want to take water and use from the Clutha, what rule applies?

15

A. I believe, again, it might be worthwhile checking with consents officers.

Q. We will.

A. But in my understanding is 12.1.5.1.

Q. Five point one. I'm looking in the wrong place. So have taken it down wrong but you're not. I think you're saying double check with your consents team but you think it's discretionary under that provision because it's not otherwise provided for in the rules which are referred to it.

20

A. It was discussed previously when preparing evidence as well because there were requests to

25

MR PAGE:

I'm sorry, Ma'am. It might be a misapprehension. The rule I put to the witness is 12.1.4.6

THE COURT: JUDGE BORTHWICK

30

I know you put a different rule but I wanted to know the rule that he was referring to because then you had that discussion whether it was RDA or discretionary and why did it matter because I understand (inaudible 12:32:06).

MR PAGE:

That's right.

QUESTIONS FROM THE COURT CONTINUES: JUDGE BORTHWICK

- 5 Q. So your understanding is 12.1.5.1 applications to take and use water out of the waterbodies which do not have a primary allocation are discretionary.
- A. That's correct and that's also the case for example non consumptive takes. My understanding with these fall also within this category because they're not really part of an allocation because they're non consumptive.
- 10 Q. And then there was a line of questioning where if an applicant for a new water take from one of those bodies which otherwise did not have a primary allocation could come along to the council and seek to take and use for a period greater than six years, and that would remain a discretionary activity under the rule that you've just given us, 12.1.5.1 or potentially an RDA rule under the rule given by Mr Page and you said
- 15 yes, if also greater than six years?
- A. Correct.
- Q. Correct?
- A. If it was not previously authorised.
- 20 Q. Not previously authorised. It's brand new.
- A. Then the rules of the current water plan would still apply but the consent duration stated in policy 10A22 would apply.
- Q. So then the strength of direction is to be found in the words "only grant resource consents"?
- 25 A. Yes.
- Q. I have read your evidence and I think the evidence of the other council witnesses which are hard to follow that the strength of direction only grant in policy 10A2.3 has not been very directive at all and applicants have sailed in wanting longer grants and indeed have been granted longer
- 30 grants than simply a six year duration, correct?
- A. Correct. Yes.
- Q. With that in mind, is the strength of direction in policy 10A2.2 sufficiently directive or sufficient weighty such that the policy will be implemented in

the way that you intend which is what I understand is new permits, six years?

1235

5 A. It might, you're raising a very good point because the two policies 10(A).2.2 and 10(A).2.3 are almost now, as proposed mirror images of each other so it would be worthwhile strengthening the policy in 10(A).2.2 as well and align it with 10(A).2.3.

10 Q. If you do not do that is – well I'm just wondering whether for, and this actually might be a question for the consents team rather than yourself, but wouldn't an existing consent holder on one of those whose taking and using water from one of those waterbodies which are outstanding outside the primary allocation now, simply apply for a new application for resource consent surrendering their old one, which new application for resource consent could extend the area of irrigation, increase the take and so on and so forth and could potentially do so for years, longer than six years because of the lack of weight?

15

A. That is a risk in catchments where no allocation limit applies and it would also be a risk in catchments where you have an allocation limit but where the current allocation has not been, is below the limit still. The reality is that in the catchments where we know there's a considerable demand for water there's no primary allocation available in most catchments.

20

Q. And then there's several catchments where there was no primary allocation anyway for certain waterbodies because they stood outside of it, correct?

25 A. That is correct.

Q. Okay and so your evidence is you made – well what is your evidence for new applications, that is not applications seeking to replace an existing application or deemed permit, what was the outcome for new applications for –

30 A. Not previously consented?

Q. Not previously consented.

A. The outcome was just to put a limit on the consent duration, also because newer applications would typically, you don't have the issue of, or the risk of paper allocation as well.

- Q. Okay. All right, I said yes the day before, complete lack of imagine as to what, how a priority condition could be compared to a cessation condition and how that might be able to be worked so you've again agreed that a priority could be likened to a cessation condition and so I want to understand more about cessation conditions. Are you familiar in the circumstances where they're applied?
- 5
- A. Priorities?
- Q. Cessation conditions.
- A. I gave an example previously to Commissioner Edmonds and I am familiar with some applications where this is the case, yes. Where you can only operate or where you can only exercise a consent if another take ceases or vice versa and there are quite a few of those.
- 10
- Q. There's quite a few of those so two or more people can't be taking water – the condition might be framed as you cannot take water when there are other people exercising their consent.
- 15
- A. Or another example could be where you have a maximum rate of take and if another consent in the vicinity is turned on so to speak or is being exercised, the combined rate of those two takes is restricted as well to a certain volume. It's quite common.
- 20
- Q. What would be, in the second example, what's the point of that as you understand it?
- 1240
- A. It's hard to kind of look into the minds of people that are issued permits long time ago but in recent times that would be to allow a degree of flexibility but at the same time avoid detrimental environmental impacts.
- 25
- Q. So from what you've described and again I do lack imagination and perhaps it's knowledge, what you've described, it looks like cessation conditions are a means to manage cumulative effects of multiple takes and use of water at least in terms of the draw down on an aqua fill or a draw down on the surface flow of a river. Would that be fair that's what they're doing?
- 30
- A. That's what they will do.

- Q. So those cessation conditions are going to flows or levels in surface waterbodies or ground waterbodies. It's mechanism to manage that specifically?
- A. Yes, that's how they would be used nowadays.
- 5 Q. Because presumably and this is the greatest option indeed but if you're not managing flows and levels, if you're changing flows it is to manage the degree of change with some knowledge if you exceed that change then you will have a consequential effect which is adverse and which you would otherwise wish to avoid. That's the mechanism?
- 10 A. Yep.
- Q. And in addition to what you were saying and what I said before, in some cases it might also – the cessation conditions are also there to protect downstream users as well, could be it. Is that like a (inaudible 12:42:01)?
- A. That again is like a priority perhaps.
- 15 Q. So I understand generally that the priorities are established on the first come first serve basis, correct?
- A. Correct.
- Q. So that in any one waterbody there is not the successive priorities are not managed or allocated in a linear fashion from the top of the catchment to the mouth of the river?
- 20 A. In some cases where I'm familiar with there are few catchments that I've been working on that is actually the case. The highest priority would be at the bottom of the catchment or the lowest take, the most downstream take. But my knowledge –
- 25 Q. Is that always the case?
- A. – I cannot confirm.
- Q. Because region hasn't done an audit of the priorities?
- A. Correct. Not to my knowledge.
- Q. So if the priorities, for example, were not ordered in a linear fashion, such that the highest priority is at the mouth of the river – is that what you said?
- 30 Q. Lowest point in the catchment, mouth of the river?
- A. Lowest point of take.
- Q. What does that mean?

- A. To give you an example that could draw in up for example is a river that goes naturally dry so the lowest point of take there is located above the drying ridge. So not at the bottom of the catchment but otherwise they kind of lose surety of supply but in that case, my understanding is that the deemed permits with highest priority are the furthest downstream. My understanding is well, it might be worthwhile checking with OWRUG later on is that in the Manuherikia it's the same. That the take from Manuherikia irrigation company which is the furthest downstream has the highest priority.
- 5
- 10 Q. Assuming that is correct for every waterbody and every catchment which is a big assumption because region hasn't audited deemed permits to establish this. How would a cessation condition work if it were to be in place of a priority? How would it be made to work?
- 1245
- 15 A. It could be a table basically with the consents and their order in the priority.
- Q. Would that table need to be in –
- A. As a condition.
- Q. – the plan change – as a condition?
- 20 A. As a condition but again, I said before it's hard to know where the priorities are being exercised and sometimes and now I'm, this is an assumption but where deemed permit holders within a catchment have not come in at the same time and where some deemed permit holder in the middle of the pack so to speak has come in and applied for new consent that system might be uprooted as well so, it's very complex.
- 25
- Q. But in your view for cessation – for priorities to be included as cessation conditions, is that, can that be effective on anything other than a whole catchment approach, is my question or if now whole of catchment, whole of waterbody or if not that then something else?
- 30 A. It does seem that way, that, you know, it, there needs to be a critical mass in terms of deemed permit holders being held to a priority system in order for it to work. It's a bit similar to a minimum flow, a minimum flow as well acts almost like in the same way, if not all the consent holders have a minimum flow condition on their consent then it might not be effective.

Q. Okay, couple more questions.

THE COURT: COMMISSIONER EDMONDS

5 Q. I guess this is something that's just dawned on me and it's probably pretty obvious, it's just 10(A).3 rules, when you were taking us to chapter 12 for the rules, it's in your page 3 of the provisions, at the top of the page note 1 in italics.

A. Yep.

10 Q. So note one is what you're relying on in terms of the statements made about the chapter 12 rules, not this plan change applying to new activities, in other words, not the deemed ones or the ones that are going to run out in 2025 or whatever year it was, is that right?

A. Correct, yes.

15 Q. Right, thank you. That's helpful, I'd overlooked that and so when Mr Page was asking you questions about (inaudible 12:49:51) V in terms of the text that two new paragraph at the end of the section entitled: "How to use the regional plan water"?

1250

A. Yes.

20 Q. So these are the – this is the only place where you have the directions as to what assessment matters are relevant in terms of the plan provisions.

A. Correct.

Q. Is that right?

A. Yes within plan change 7 yes.

25 Q. But is this what the plan does generally because it just says two new paragraphs so I assume that was the structure and architecture of the plan is it for everything or has this just been added because the PC7, I mean this approach only taken to PC7 in terms of this text.

A. Yes, correct. Yes. You're referring to the section – the additions to the section "how to use the regional".

30 Q. Yes.

A. Yes. Its yeah its quite unique in a sense that the other chapters in the plan are not stand alone chapters, they should be read in conjunction so this is the only provision in that regard.

Q. Well I guess I've found it a little unusual in that normally you have this kind of this its embedded in the actual provisions rather than in a how to use the plan. So I'm just pondering that.

A. Yes.

5 Q. So might it be better if it was actually embedded.

A. It could provide more clarity if it was repeated perhaps at the start of chapter 10 as well or –

10 Q. I just thought it might – you've got something in here in chapter 10 actually on the rules but you don't have anything in relation to the objectives and policies referred to do you.

A. Yeah.

Q. Or even the rules actually, all of the rules. Anyway I just think that's a structural and clarity matter.

A. I agree with you.

15 **QUESTIONS FROM THE COURT CONTINUES: JUDGE BORTHWICK**

20 Q. So you were asked questions about whether the non-complying policy or whether rather policy 10A, where is 10A 2.3 is meant to be a – and the amendments that you have recommended is meant to be a narrow gate or a closed gate, closed or shut gate. In both propositions when Mr Page has been talking to you he's moved from narrow to in fact gate being closed and I think you answer yes narrow, yes closed. That's how I picked it up, is it narrow or has the gate closed. Is the purpose of, you know, your amendments to shut the gate or to narrow the opening way?

25 A. If it was really to shut the gate I guess we would have gone down the prohibited activity pathway but that's a high threshold. You must be certain that there is no, you know, I don't recall the exact wording but there is certain test and you must be certain that there's no inconceivable situation or you cannot concede a situation where a longer term consent might be required. I wasn't that confident that we were in that position so,
30 therefore, I think a very very tight non-complying activity rule is more appropriate and if it serves the bigger purpose of plan change 7 which is to enable that quick transition you could actually consider a slightly longer duration.

- Q. And there was something else that was put to you I've just got to find it. I have forgotten who by but somebody put to you for a non-complying activity would you still consider – would you consider the policies 10A 2.1, 2.2 and 2.3 and your answer was yes for a non-complying activity. How would that assist if you've got – it's not really non-complying because the – its not really non-complying because the duration exceeds six years, it would be non-complying because the duration exceeds six years. How would any of those policies assist in terms of assessing a non-complying activity aside from the fact that policy – applications greater than six years are not anticipated.
- 5
- 10 A. You mean the policies in plan change 7.
- Q. Yes.
- A. Yes. Well the policies themselves to letter one provides direction only on duration and policy, the first one, policy 10A 2.1 provides direction around circumstances in which you could grant consent.
- 15
- Q. So 10A 2.1 is relevant in terms of the circumstances apart from duration that you could grant consent.
- A. I do believe so. The policies also provide –
- Q. How would that help me a decision maker.
- 20 A. Because if you're a non – well if you're a non-complying activity strictly speaking for example the schedule does not apply. This policy does give guidance as to, you know, how much we can allocate as well. Its brings you back to the requirement to match historic use, sorry to match allocation in a new consent with historic use. In the absence of the schedule that is a very useful tool.
- 25

QUESTIONS ARISING: MR MAW

- Q. I have two questions arising and I thought best do it now so the witness could be released. Do you still have the operative plan in front of you?
- A. Yes.
- 30 Q. There was discussion as to the activity status that would apply in respect of the take of water from the Clutha Mata-Au and if I can take you to page 12-7 of the plan common bundle 177 and there you will see a note within a rectangular box on that page.

A. Yes.

Q. And the second part of that note would appear to apply to takes from the main stem of the Clutha-Mata Au and at the end of the note there's a reference as to which rules would apply.

5 A. Correct.

Q. And is it the effect of that note that drags you down into the discretionary activity classification?

A. Correct yes for takes of the Clutha yes.

10 Q. The second topic relates to the entry condition for the restricted discretionary activity rule and some suggestions were identified as to how the issue over potential subjectivity and the entry condition in respect of water permit data might be resolved by either removing it as an entry condition or having a short entry condition, would care need to be taken when considering such a change that the purpose of the restricted
15 discretionary activity is only to provide a pathway where there was a data gap because of a technical reason, its now where there's a data gap for other reasons.

A. That's correct yeah.

Q. So that would need to be picked up in any re-drafted entry condition?

20 A. Yes.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

COURT ADJOURNS: 1.01 PM

25

COURT RESUMES: 2.05 PM**MR MAW CALLS****JOANNA YVONNE GILROY (AFFIRMED)**

- 5 Q. You confirm that your full name is Joanna Yvonne Gilroy?
- A. Yes.
- Q. You are the manager of consents at the Otago Regional Council?
- A. Yes.
- 10 Q. You've set out your qualifications and experience in a statement of evidence dated 13 March 2021?
- A. Yes.
- Q. Are there any corrections that you wish to make to that statement of evidence?
- A. No, thank you.
- 15 Q. Do you confirm that your evidence is true and correct to the best of your knowledge and belief?

CROSS-EXAMINATION: MS LENNON

- Q. Good afternoon, Ms Gilroy.
- A. Good afternoon.
- 20 Q. I'd like to take you to paragraphs 25 to 28 of your statement if I could. I wanted to ask you a few questions about your teams ability to consider and process applications as a group. So it's been proposed by some parties that PC7 could be declined on the basis it undermines the collective and collaborative approach undertaken by water users when
- 25 they lodge a single application. So the idea proposed is that users lodge their application as a single application present a catchment wide solution to water management in that application and it has also been suggested that this approach is NPSFM compliant. So I wanted to explore couple of issues related to this with you. The first is that applications are not always
- 30 grouped, are they?
- A. That's correct.

Q. So in your experience, I think you've stated that the Manuherikia catchment and the Strath Taieri catchment for those there has been grouped applications but for the others has there been?

5 A. There has been for some but the Strath Taieri and the Manuherikia are the main examples where they have albeit come in at different times they're proceeding through the process as a group application.

Q. But for in relation to other catchments, the applications are not always grouped?

A. No.

10 Q. The other issue is that if an application is grouped are they being lodged on a FMU basis?

A. No, they're not.

Q. Do you know why that might be?

A. No, I do not.

15 **CROSS-EXAMINATION: MS WILLIAMS**

Q. Good afternoon Ms Gilroy. I wanted to get you to look at your appendix 1. You have 12 pages of evidence and then it's the next page.

A. Thank you.

THE COURT: COMMISSIONER BUNTING

20 Which one is it?

MS WILLIAMS:

Appendix 1. It's titled "Technical guidance note 1. Deemed water permits replacement applications."

25 **THE COURT: COMMISSIONER BUNTING**

Thank you.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. So this is a guidance note which I understand is available on the website for applicants currently?

30 A. That's correct.

Q. It's a guidance note so it sets out what the expectations for council are around what applicants will need to understand and the information that they will need to provide to the council in support of applications for replacement permits.

5 1410

A. That's correct and it sits alongside our consent application form as well.

Q. Thank you for that clarification. I did want to, just looking through this and perhaps at the bottom of the page here the guidance assists with: "Understand primary supplementary allocation, determining points of
10 take, assessing rules and requirements when taking from races, reservoirs, dams, making sure you have surety of supply, determining if you might also require a water permit and land use permit support for storage and damming, understanding how (inaudible 14:10:39) will be considered, assessing historic water use, assessing efficiency of water,
15 assessing residual flows and understanding what is the existing environment." So that's quite a lengthy list there and would it be fair to say that that's as much as anything else the information which is required under the current plan?

A. So this guide is intended to be for both plans, including our operative and
20 proposed plan change 7.

Q. But for applicants at the moment of course they are going to be processed under both –

A. Yes they are.

Q. – the operative plan and plan change 7?

25 A. Correct.

Q. Whilst we do have the bullet point fourth from the bottom: "Assessing historic water use" we don't however have anything in the guidance note about exercise of priorities, do we?

A. No we do not.

30 Q. Is there anything in your application about exercise of priorities?

A. I am unsure of that, I haven't got that application form in front of me.

Q. All right. And so this is not information which the Council has been asking applicants to think about and provide is it?

A. Based off the information in front of me, no.

Q. I'd now like to just move to, I'm not quite sure what appendix they are but essentially your maps. These are referred to at paragraph 24 of your evidence on page 6 and so map 1.1 includes current applications underway, map 1.2 shows all current deemed permits and in fact all permits essentially that expire before the 31st of December and then – sorry that was map 1.2 and then map 2 shows all consents in the schedule 2A catchments. So this is information that Council currently has before it?

A. That's correct.

10 Q. I'm not sure if you are aware of Dr Allibone's evidence?

A. No I am not.

Q. Well in Dr Allibone's evidence he also had a series of maps in his evidence showing that where the locations of particular species of galaxiids were known to be in the Otago region, do you accept that?

15 **THE COURT: JUDGE BORTHWICK**

Do you want witness to be shown those maps, might be quite helpful also the court to have that evidence in mind.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

20 Q. His evidence in chief, that's the evidence dated 7 December 2020 and if I refer you to example to, perhaps if we look for example at page 21, figure 8 and what that figure shows with pink is dusky galaxias records and the blue dots are water abstraction locations. So do you see those?

A. Yes that is what I see on the map.

25 Q. And then on the next following page, top of page 22, we have a similar figure 9 for the distribution of Eldens galaxias?

A. Yes that's what I see.

1415

30 Q. And again the green dots are the Eldens galaxias, the blue dots are the water abstraction locations and perhaps if we move to page 24, that's red dots this time. They show Taieri flathead records, blue dots are water abstraction locations and similarly page 26, pink dots distribution of Clutha fathead galaxiids, blue dots water abstraction locations. So that's

all information which is in Dr Allibone's evidence and which I presume is available to the council. Do you accept that?

A. Yes, I do.

5 Q. And it would be a relatively straightforward exercise for that information about the location of galaxiid species to then be overlaid with the information in the maps attached in your evidence to match up locations of galaxiid populations and water take locations.

10 A. Not being an expert in the creation of maps, I wouldn't know the ease or speed of that but on the face of it I'd say that the two sets could be overlaid somehow.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. Ms Gilroy, if I could take you to paragraph 36 of your evidence please.

A. Yes.

15 Q. And the first sentence you confirm that there's been 11 consents granted for six years since PC7 was notified. Can you recall what ultimate activity status they were processed as?

A. No, I cannot. I do know that some were as non-complying activities because – and then some will have been the balance of the activity status as set out in our other plan.

20 Q. For those 11, you've said the processing costs generally range from \$2,500 to \$5,000. Is there any distribution with the non-complying ones generally a bit more costly to process? Was there any pattern in that distribution?

25 A. Yes, they tend to be more pricey, using that word but some of them even with that non-complying status have been at the lower end because they have been for a reduce number of permits so the cost is not just for a water permit. There could have been other consents in that bundle as well.

30 Q. And then when you say all other decisions have been made by independent decision makers at hearings, so the 11, were they determined without the need for a hearing on a non-notified basis?

A. That's correct.

Q. And the ones that have proceeded to a hearing, you might say it's somewhere else and I apologise if you have, how many approximately went down the hearing route or are going down the hearing route?

5 A. I don't have that information to hand so it would be my best guess through counting in my head so I won't provide that at the moment.

Q. Is that best guess helpful for us to just get a feeling for the volume?

A. I'm just trying to think. May be five or six but I would have to confirm that for the court.

10 Q. Okay. That's fine and for those that have had their decisions issued, what would be the range of costs for those who had to go through the hearing process?

A. Minimum of \$20,000.

Q. Is there an upper limit?

15 A. I do know that there have been over the \$50,000 but I'm struggling to recall the upper limit of that number.

Q. Were any of those declined?

A. No, none have been declined that I am aware of.

20 Q. For the 11 consents that were granted for the six years, can you recall whether any of those imposed conditions that required an improvement of environmental outcomes?

A. From memory, some of those did have conditions around fish screens and residual flows so those things were added as conditions bearing in mind that we're currently still operating under our operative plan as well as our proposed plan.

25 1420

Q. Yes and same question for the ones that have gone to the Independent Hearing Commissioners can you recall whether many of those arrived with conditions that required environmental improvements?

A. Yes they would be in the same situation.

30 Q. Do you have much familiarity with the consents that have come – been lodge with council, a proportion of those that are in schedule 2A catchments versus those that are outside of schedule 2A catchments.

A. No I do not only beyond what has been mapped on those three maps that are attached to my evidence.

Q. Of the applications that are within schedule 2A catchments are you aware of any applications where the abstraction is currently being undertaken in breach of or inconsistent with the schedule 2A limits.

A. Not that I am aware of but that doesn't mean that situation is not applying.

5 Q. And sorry just changing topic really going onto your paragraph 5 sorry your page 5 and there's a sub paragraph (f) and (g) which talks about staff attending a fortnightly meeting with the stakeholder group to understand their issues with consent applications and your setting up regular meetings with the consultants as well who prepare these applications so obviously there's a lot of resource both in the community, 10 in the stakeholder groups and at counsel that goes into ensuring as smooth a process possible for the consent applications, do you agree that if applications were being processed purely under the controlled activity route all of that resource in these sorts of meetings wouldn't be required.

15 A. Certainly the resource from counsel would be reduced in terms of needing to attend those meetings and provide that extra clarity yes.

Q. And the – given that the controlled activity rule won't notify affected – any affected parties there's also actually no participation for those stakeholders either is there.

20 A. Correct that is how it is currently drafted.

CROSS-EXAMINATION: MR PAGE

Q. Ms Gilroy I need your help to understand who to read the maps appended to your evidence and referred to at your paragraph 24. So as I understand the second of the maps which I think you call map 1.2.

25 A. That's correct.

Q. Those are deemed permits and resource consents expiring before December 2025. This map does it also include permits for which replacement consents have been granted but haven't yet commenced?

A. So that is in relation to map 1.2.

30 Q. Yes.

A. Sorry what was the question again.

Q. Well map 1.2 is described as including all current deemed permits and resource consents expiring before 31 December 2025. What I'm also

wanting to know is whether what is shown on the map includes permits that have actually been the subject of replacement decisions but the replacement consents haven't commenced yet.

A. No I don't think it does.

5 Q. Can you see on map 1.2 where the Lindis catchment is?

A. No I cannot, it has the FMU and rohe on it on 1.2.

Q. Well perhaps if we go to map 2 which is the third in your series can you see the State Highway network where its shown as 8A. Can you see the orange line that's State Highway 8A and you can see where it travels to the north west through the Lindis Pass and into the Waitaki catchment? Can you see where that is?

10

A. So just to clarify that's to – 8A is to the right of the Luggate catchment.

Q. Correct.

A. Yes.

15 Q. You're in the right place and you can see the State Highway heading north west out of Otago, can you see that?

A. Yes I do see that.

Q. Do you recognise that being the location of the Lindis catchment?

A. That is my understanding of where the Lindis is located.

20 Q. Now is there a reason why that's not shown as a schedule 2A catchment?

A. On this map, no I am not sure why that would be not there if it is a schedule 2A catchment. I would have to understand why that wasn't put through to the map.

Q. Well schedule 2A has now been amended to include the Lindis catchment hasn't it?

25

A. I would have to have a look at the plan to confirm that but yes it is my understanding.

Q. Because if you look at map 1.2 and compare the location that we've just identified on map 2 as where the Lindis is you can see there's a bunch of consents which are shown as current consents. Can you see –

30

A. Yes I can see that.

Q. – where the area is?

A. Yes.

Q. Are those the consents that have already been the subject of replacement permits granted by the Environment Court?

A. I would have to understand the RM numbers associated with those dots to confirm it but if they are those dots in that location then yes.

5 Q. So again if we go back to map 2 you can see what is shown as the Luggate as being a schedule 2A catchment don't you?

A. Yes that is shown on the map.

Q. And there are what appears to be two permits which are shown as current consents in that catchment with red dots.

10 A. Yes that is what the map shows.

Q. And you know that all of the Luggate catchment permits have been replaced.

A. I cannot confirm that now, I don't know that.

Q. You're not aware.

15 A. I do not know that for certain no sorry.

Q. Is there any way we can know from map 1.2 which of the dots shown on that map have already been the subject of decisions to replace those permits but nevertheless the underlying – the permits remain current until the 1st of October 2021?

20 A. If that is recorded in our database then we would be able to provide that information.

Q. But you can't help us from the face of map 1.2 which ones have already been replaced?

A. No.

25 Q. In your paragraph 36 I think its implicit but can you – are you clear that the costs that you refer to line 3 of range between two and a half to \$5,000 is simply the Regional Council's consent processing costs invoiced to the permit holders?

A. Yes that is correct.

30 Q. Has any enquiry been made by the Regional Council about what the cost to permit holders of preparing applications is ranged between?

A. No it has not.

1430

RE-EXAMINATION: MR MAW

Q. Picking up on my friend's last question. Is there any reason why the council would enquire as to the applicant's own costs preparing an application for resource consent?

5 A. No, there isn't that I'm aware of. No.

Q. Thank you.

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

10 Q. Page 6, you've got table 2 with consents expiring over the next five years. So just following up on Mr Page's question. So you haven't done any work in terms of those numbers to ascertain what number of these may in fact have replacement consents that don't kick in until later this year?

15 A. No, not as part of this exercise. We have broken it down into the types so is it a water? Is it a discharge or is it a land use that's coming in? But we haven't got any further than that.

Q. So that 821 may be quite a lot higher?

A. No, it is just 821 but it's the break down of the different types, yes.

Q. Right, no, no, but what I mean is that some of those 821 might fall away on the basis that they already have replacement consents –

20 A. Yes, they could.

Q. – if you did the analysis on that of your database.

A. Yes.

Q. Does your database allow that level of interrogation?

A. I'm not sure of that ability to do that with our database.

25 Q. And you haven't got any field so that...?

A. I do not, sorry.

30 Q. Okay. That's question 1. So just looking at what you've said about your guidance material and you've given us technical guidance note 1 and then you refer to a few other things such as the deemed permit webpage and the video and things like that as well as referring to outline consent conditions. So you haven't given us an appendix with those. Is that a different document that relates to all consents potentially or what?

- A. No, those conditions relate to water takes and they are on our website but they can be provided to the Court if you'd like those.

THE COURT: COMMISSIONER EDMONDS

I was keen to see those. Can we ask for that?

5 THE COURT: JUDGE BORTHWICK

Do you want supplementary information?

THE COURT: COMMISSIONER EDMONDS

I think it's just enough probably to file.

THE COURT: JUDGE BORTHWICK

- 10 Anybody have any objection to a further supplementary brief attaching? What did you want to see?

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

- 15 Q. It's outline consent conditions is how's it's described in your paragraph 46. So is there a better description of that?

A. No, they are the – I guess that the skeleton of consent conditions and an officer would use as the starting point for placing them on a water permit and we have made them available to the public and the consultants to use to try and streamline the process where possible.

20 THE COURT: JUDGE BORTHWICK

So I think the proposal was that document come in as part the common bundle unless there is an objection to the Court receiving that document. If that could be filed overnight that would be good and I can send out a direction as to anybody objecting to receipt of that as part of the common bundle.

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

Q. So I guess the question I had related to – you’ve referred here to this other document that we’re going to get but where we look at technical guidance note 1, I notice on page 10 of 11 there is a reference to residual flows. Then it goes on to discuss what kinds of conditions might be appropriate in certain circumstances but I’m really looking at the second paragraph which refers to these matrix approaches, examples below and it may be that where you provide the information on conditions it becomes a little bit clearer but I’m wondering what the basis of the matrix approach that you’ve provided here is.

1435

A. So not a matter that I can speak to directly. I would be taking advice from my technical experts and it also may be a matter that Ms King in her capacity as a processing officer can speak to.

Q. Okay, thank you, that was all my questions.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. I had a question also about your appendix 1 which is the technical guidance note 1 and it is on the second page of that note under the sub title: “primary and supplementary allocation” and first paragraph second sentence: “Deemed permit are often considered to be water taken as primary allocation.” And I was just seeking clarification about what does “often considered to be water as primary allocation” mean when some catchments there is no primary allocation, as in the case of Clutha, other catchments there may well be a primary allocation or an allocation block anyway in the second schedule which has already been exceeded so I’m just trying to get a handle on that language and meaning.

A. Yes, we, the intent was to provide that technical type information in as user friendly language as possible and perhaps in doing so we have missed out some of those situations that you have just outlined there, the key with our guidance material is that we’re trying to get it to hit a number of audiences and not be overwhelming for those that are interacting with

it so yes, there is some uncertainty there with the language but that is from us trying to be as helpful as possible.

Q. Understood. I haven't got a sense and I think you're the right person but if you're not we'll ask your consents officer, I haven't got a sense, in relation to those catchments which are outside schedule 2A in which are not one of those catchments to which otherwise primary allocation doesn't apply, whether the Council is implementing its policies concerning minimum flows, I think its minimum flows and allocation blocks and I'll get the policies in front of me, can you direct me to the policy that applies to: "establish minimum flows but for catchments outside of schedule 2A"?

A. That I'll have to defer to Ms King on that in terms of the specifics of that but I would understand it's in chapter 6.

Q. But you don't know anything more than that?

A. No I do not sorry, not off the top of my head.

Q. And do you know whether or no those policies are being administered now?

A. If they apply to that application then we would be considering them as we are assessing it under both plans.

Q. All right I found it I think it's 642. Just for the record in case the paperwork becomes split up, the appendices becomes split up, I can't find I can't find on your maps a title 1.1, 1.2 or 1.3.

1440

A. Yes.

Q. Could you direct me to map 1.1 by reference to other material on that map?

A. Apologies I have just taken them off my evidence and unstapled them and shuffled the order so I will just –

Q. I think that is what I am scared of doing as well when I get back to the office and then it will be lost.

A. So map 2 is the one that has current consents in schedule 2A catchments so that has the blue and the red dots on it and has the Luggate catchment at the top. And then map 1.1 is the one with the purple, green and blue dots.

Q. And is that called current applications.

A. Yes in FMU and rohe.

Q. In FUM and rohe.

A. Yes.

Q. And map 1.2 is entitled current consents in FMU and rohe.

5 A. That is correct.

Q. And the significance of all three maps is that they're dealing with water bodies within schedule 2A is that why they're here.

A. Yes and to show where the current applications are and the scale of the workload and the spread of the workload across Otago.

10 Q. But to be clear there are deemed permits together with existing resource consents to be replaced before 2025 outside of those water bodies which are captured in schedule 2A.

A. Yes that was the response to the question earlier.

Q. That's correct.

15 A. Yes.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

Q. If I may just on the technical guidance note I suppose my interest is at page 8. Have you got a copy there?

A. Yes I do.

20 Q. And its historic water use and you've got included there the methodology to analyse the data and there's applications lodged prior to plan change 7 and there's a methodology there and the top of the next page lodge once its operative a different approach. A couple of questions. Presumably from reading the evidence it would seem that there can be
25 quite significant differences of opinion between the applicants technical expert and those people in the council such as Mr Leslie and Mr Wilson. Are you aware of that?

A. Yes there can be differences of opinions, the intent with the method is to narrow that and to provide a clear pathway for the assessment of that
30 data.

Q. I think Mr Leslie said he gives you – he does his analysis –

A. He does yes.

Q. – he gives you a report or something but it seemed as if it's then – you take it from that point.

A. Yes we do.

5 Q. So how do you decide based on the information he gives you what to adopt in terms of the consent that you put together.

A. So I will speak in part to this, Ms King will be able to provide how that is done within the processing of the application but we do take that data and present it to the applicant and gain an understanding of where that sits but where we have prepared something ourselves we do prefer where possible to use our own assessment of that but we do give the applicant a chance to comment on that.

10 Q. And do you have some sort of fairly, you know, vigorous discussions with the applicant on this matter.

A. My understanding from staff and for things that have been escalated to me then yes some discussions can be vigorous. There is nothing wrong with a bit of healthy debate but sometimes it can lengthen the time it does take us to process an application.

15 Q. But eventually you make the decision.

A. Yes.

20 Q. And is that decision appealed at times.

A. Of the ones that have gone to a consent hearing some are subject to appeal to the Environment Court, others have not been appealed. The ones done under staff delegation have not been appealed.

25 Q. And the appeals have been based, the ones that you said come to the Environment Court, is it on this particular issue or are there a range of issues.

A. A range of issues some of which are consent term and then also the allocation of water.

30 Q. So I'm sure if you're aware the experts on this matter are meeting in a conference next week or the week after whenever. When they have come up with their finding and hopefully once its resolved will you then be looking to modify this document?

- A. Yes absolutely – once anything is changed and has gone through the formal process and we have a decision then we will to change all of our guidance material to reflect the framework that we are operating under.
- 5 Q. Yes so at the top of page 9 it talks about the methodology in schedule in schedule 10A 4 and then it says “or equivalent”. Do you understand what “or equivalent” means?
- A. Again I – what we – I think what we were trying to say there is if schedule 10A 4 is changed or adopted that it would be the equivalent of 10A 4 we would use in that future place and time if that was coming through a decision version of plan change 7.
- 10 Q. So this is the sort of work in progress if you like as to plan change 7.
- A. That is correct yes.
- Q. I had just I think one or two other questions. On this page – sorry para 365 which you’ve been asked a couple of questions about and its that last sentence “all other decisions on deemed permits have been made by independent decision makers”, how do you determine which ones go to an independent decision maker.
- 15 A. So it relates to staff delegation that we have. So if an application has been limited, notified and submitters want to be heard then staff do not have delegation for that and it goes to an independent decision maker or councillors acting as decision makers.
- 20 Q. And do you have any feel, you know, this paper you’ve put together this evidence was on your resourcing to handle this big workload. You haven't actually commented on the availability of independent decision makers and what – have you done any assessment on what proportion of those might be required?
- 25 A. Yes initially we did and we are looking at going out and doing a gender process to test the market for availability. We are watching the freshwater planning process because are aware that freshwater commissioners may be taken up for that work so yes we are aware of that and it is talking to my colleagues at other Regional Councils, you know, you need to be able to find decision makers who can handle this type of work.
- 30 Q. Do you anticipate a resource constraint there to do that?

A. No I do not but we want to ensure we have sufficient contracts in place to enable us to do that work and that is the work that we need to do.

Q. I was more concerned about the resourcing capability to do these independent hearings because perhaps you'll be competing with a lot of

5 others for the same people.

QUESTIONS FROM THE COURT COMMISSIONER EDMONDS– NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

MR MAW CALLS**ALEXANDRA LUCY KING (AFFIRMED)**

Q. Do you confirm that your full name is Alexandra Lucy King?

A. I do.

5 Q. You are a Team Leader Consents Coastal Otago at Otago Regional Council?

A. Yes.

Q. And you've prepared a statement of evidence dated 14 March 2021.

A. Yes.

10 Q. And you've set out your qualifications and experience in paragraphs 3 to 5 of that statement?

A. Yes.

Q. Are there any corrections you wish to make?

A. No thank you.

15 Q. Do you confirm that your statement of evidence is true and correct to the best of your knowledge and belief?

A. Yes.

Q. Can you remain for questions from my friends or from the court?

1450

20 **CROSS-EXAMINATION: MS LENNON**

Q. Good afternoon Ms King.

A. Hello.

Q. I'd like to start please by taking you to paragraphs 49 and 50 of your evidence. So here you have discussed the matters of control that
 25 Mr de Pelsemaeker has recommended and the first two I understand apply also in respect of the restricted discretionary activity, so I want to discuss specifically B, that you'll see there which is the volume and rate of water taken, dammed, discharged or diverted and the timing and frequency of the take or damming or diverting or discharge. I am
 30 particularly interested in this because we act for Kai Tahu and they're concerns from the current framework, amongst other things, stem from some short comings for the consideration of their values. On your

interpretation, you've said specifically that matter B: "Enables consideration of Kai Tahu values" would you agree with that?

A. Yes, in my opinion it does.

5 Q. Yes. The question I put to you is are you aware of the last chance decision?

A. Yes, I was the processing officer.

Q. Are you aware of what a very experience commissioner had to say in relation to similar matters of discretion in relation to rule 12.1.4.8?

A. Yes.

10 Q. So I put to you that that commissioner essentially stated that those matters didn't allow regard to be had to Kai Tahu values, would you agree with that?

A. From my understanding of reading that decision, yes.

15 Q. Thank you. And you could see if there was any room for differences in interpretation, for example your opinion differs to that of the commissioner. It's not desirable to be having an argument about this matter on a case by case basis?

A. No it's not desirable.

CROSS-EXAMINATION: MS DIXON

20 Q. I have only one questions Ms King, in your evidence you've worked your way through the two versions of Mr de Pelsemaecker's amendments to the (inaudible 14:53:41) of PC7?

A. Yes.

25 Q. The 4th of March version and then later on in your evidence you talk about the 14th of March version, my questions simply this, I take it from the comments and analysis of the 4th of March and the 14th of March version that you're more comfortable with the 14th of March version than the 4th of March version, is that correct?

30 A. Yes I think what I'm saying is that there is potentially broader matters to consider under the 4th of March version than the 14th of March version. So it'd be more streamlined under the 14th of March is probably what I would say.

Q. Thank you.

CROSS-EXAMINATION: MS WILLIAMS

Q. Ms King, good afternoon.

A. Good afternoon.

5 Q. You set out at paragraph 11 and following the steps that are taken when assessing an application for consent under both plan change 7 and the operative plan and you've referred to a specific section 88 checklist?

A. Yes.

Q. That's in paragraph 11?

A. I have.

10 Q. And you've also stated that the applicant submits an assessment of environmental effects which is audited et cetera. And I just wondered whether in any of that information you would normally expect to see information from an applicant about who has a deemed permit that has current priorities applying information about the exercise of their priority?

15 A. From my experience it hasn't been something that's been coming through in consent applications, I have got an application that I am processing currently which I do know from attending a site visit that they are doing, going to exercise the priority outside of a consenting framework but it usually doesn't come through in an application as to how they are
20 undertaking the priority system.

Q. I'm not sure if your aware of there are substitute permits and some of those have been provided as exemplars for the court and those contain either as a note or as conditions existing priorities from deemed permits, have you seen something like that before?

25 A. I haven't seen these specific examples but I have seen deemed permits with conditions and notes.

Q. And so you know what I'm talking about when I say that some have notes, some have them expressed as conditions.

A. Yes.

30 Q. Yes and so that's information which is before you as a processing officer?

A. Not always in the application but if you do go back and look at the deemed permit then that information is available.

- Q. And it would be relatively straight forward top tweak the checklist to say: “and we would like to see a copy of the current deemed permit” wouldn’t it?
- A. Yes.
- 5 Q. And that would then mean that there was information which was before you as the processing officer?
- A. Yes and from how I process an application I always have a look at the deemed permit.
- 10 Q. I’m interested that you’ve told us that your currently processing one where someone does expect to exercise a priority –
- A. Yes.
- Q. – and do you understand that to be something that they are doing currently?
- A. Yes, from my understanding I do.
- 15 Q. And that’s something that, It’s been referred to as a civil enforcement matter, is that the way you have approached that?
- A. Yes, it is.
- Q. But you also understand that it can be considered a condition on the existing deemed permit?
- 20 A. Yes.
- Q. And that would be something that would be relatively straight forward under the streamlined 14 March version, to roll over, I’m using all these terms, as an existing consent condition onto a new replacement consent?
- A. I think I probably have two answers here, yes in terms of it rolling over as
- 25 a consent condition to a new permit however that’s dependent on the fact that everyone in that priority system within that waterbody would be applying at the same time or if, yeah it gets a bit tricky when, I can think of a couple of examples where share holders of one consent have applied separately and I’m not quite sure how the priority would then be added in
- 30 those situations. So it is quite case by case.
- Q. But you have the information to assess that case by case, don’t you?
- A. Yes.

THE COURT: JUDGE BORTHWICK

Q. Just before we move to Mr Page, on that one example where you happen to know that the applicants for resource consent is exercising the priority, has that come through on their application for a replacement permit or is this sort of anecdotal, you know its happening in the background but they're not saying can you please put that on as a condition?

5

A. From memory of the application, I don't think it says can you please put this on as a consent condition, I definitely know that it is a, well they have approached it as a civil matter. The person probably best to answer that question is Ms Dicey as she is the consultant for that application.

10

Q. Okay, what's the name of the applicant so we can?

A. It's the Pig Burn catchment.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. Ms King, paragraph 3 of your evidence, in your qualifications you've also got a master of science in hydrology?

15

A. Yes.

Q. And in your role at Regional Council do you get to use that expertise also or does that, do you still get separate advice from other hydrologists?

A. Separate advice.

20 1500

Q. I want to put to you Mr Farrell's evidence and Fish and Game proposed change to the non-complying policy. If Ms King could be assisted with that. So if you can turn to Mr Farrell's appendix.

A. Appendix 1?

25

Q. Yes, appendix 1 and to policy 10A23.

A. Yes.

Q. You see there a new table that's proposed that specifies minimum residual flows and allocation rates as percentages of mean annual low flows?

30

A. Yes.

Q. So if an application came for you to process that and you had assessed whether or not that application would cause either the minimum residual flow as a percentage of MALF or the allocation as a percentage of MALF,

the regional council would have the information on which to make that assessment, wouldn't it?

A. That's under the assumption we have agreement between ourselves and the applicant on MALF.

5 Q. Were you present for Mr Henderson's evidence the start of the first week? For the regional council?

A. No, I wasn't.

10 Q. Has there ever been an example where there's been a material disagreement on what the naturalised MALF is for a waterbody in your experience?

A. I feel like yes but I cannot think of any examples off the top of my head.

15 Q. That's fine. I won't push you on that one. Going back to your evidence now thanks. Just looking at your paragraph 23 and you're referencing 4 March version and some broadened scope of the control rule and you said based in your experience the additional matters would result in more applicants applying under the non-complying pathway. In your experience, is that because less applicants would be able to comply with the entry point conditions or is it they would look at the matters of control and choose to go down the non-complying route?

20 A. Which paragraph is that again?

Q. Twenty three.

A. I think it would possibly be an inability to meet the controlled conditions would then result in the non-complying pathway specifically the irrigation area and the method 10A4.

25 Q. Based on what you've seen what scale of irrigation area increase applicants seeking to have approved or that are seeking to implement that's causing that breach?

30 A. It ranges. I guess it could be something like 100 hectares or it could be one paddock. It depends on the applicants' scale of farming operation I would assume. So it kind of can be both ends.

Q. But you have seen significant increases as part of proposals?

A. Yes.

1505

- Q. Now, your paragraph 33 please and you make a statement: “There is a general feeling that the PC 7 method of calculating instantaneous rate is easier to understand than the previous water plan method applied using percentiles”. I was just wondering if you could expand on that to help the rest – to help us understand, you know the basis of that general feeling.
- 5 A. Okay so I think it would probably start with the fact that there is now a method in PC 7 which tells everyone what our method of undertaking the historic use calculations is. I think it’s a lot easier to understand, percentiles are quite confusing to a lot of people and explaining them as a processing officer to applicants is sometimes quite complicated so I think the new way of calculating the instantaneous rate is as I say easier to understand.
- 10 Q. And that – by what you’ve just said for all concerned including the applicant what you’re trying to help through the process.
- 15 A. I can’t speak on behalf of an applicant personally but from a processing officer explaining it to an applicant and the responses I have had from applicants I would say yes.
- Q. And then from your paragraph 47 you set out how you could approach assessing each of the matters of control. Now obviously that’s technically a hypothetical set of scenarios because there are no pure controlled activities yet because of the operation of the operative rule as well.
- 20 A. Yes.
- Q. But putting that aside you would have had experience with at least some of these matters of control cast in an RD context.
- 25 A. Yes a lot of them are very similar to the current restricted discretionary – matters of discretion under 12148.
- Q. Are there any that you actually haven’t had direct experience processing as a matter of control or discretion or are they all actually covered off.
- A. I don’t think so.
- 30 Q. No good.
- A. Sorry to be not clear, no I don’t think so.
- Q. And finally of the deemed permits that you’ve either processed or, you know, considered in enough detail have you seen anywhere the abstractors – sorry when those deemed permits are in a schedule 2A

catchment have you seen anywhere they are not currently complying with or being consistent with the schedule 2A minimum flow.

A. Just to clarify is this where they have a minimum flow condition on their consent.

5 Q. No its where they for whatever reason whether is an operational reason or a doing the right thing reason, are they actually complying with the 2A minimum flow even though they're not required in their deemed permit.

A. Yes I have seen some cases where consent – not consent officers sorry applicants who don't have the condition on consent are complying with minimum flows.

10

Q. Have you seen any that aren't in that same situation?

A. Yes.

Q. Can you give us a feeling for how many do, are there lots that don't, is it a small outlying group?

15 A. Is this based on applications I have looked at?

Q. That you have personal knowledge of.

A. I would have to probably be making a number up which I don't think would be overly helpful.

Q. No that's fine, don't make a number up that's absolutely fine.

20 **CROSS-EXAMINATION: MR PAGE**

Q. Ms King do you have a copy of Ms Gilroy's evidence.

A. Yes.

Q. You do excellent. I want to ask you questions about what's shown on map 2 which is the third map in the series attached to Ms Gilroy's evidence. It's got a heading at the bottom "current consents in schedule 2A catchments".

25

A. Yes.

Q. And it has a series of red and blue dots showing permit locations.

A. Yes.

30 Q. You have that. Now you were the co-author of the section 42A report for the replacement of the Luggate consents weren't you?

A. Yes.

Q. And can you see where the Luggate catchment is shown on that map 2.

A. Yes.

Q. And can you confirm that the consents in the Luggate catchment have been the subject of a decision to grant replacement permits?

A. Yes.

5 Q. And those replacement permits are all subject to a minimum flow condition.

A. Yes.

10 Q. Now I wonder if you can remember and if you can't just tell me, you will recall that there was a group of upstream permits authorising take from a weir in the Luggate catchment weren't there?

A. Criffel yes.

Q. That's Criffel Weir yes and there was a downstream permit that was below the weir for Lake McKay Station.

A. Yes.

15 Q. And do you recall that the downstream Lake McKay Station permit had a higher priority than the upstream Criffel permits?

A. I can't recall sorry.

20 Q. Do you recall whether the Lake McKay Station priority effectively provided for a minimum flow through the stretch of the catchment between the weir of the Lake McKay Station permit that Criffel was obliged to let pass?

A. I know that Criffel had a residual flow I'm not sure if that anything to do with the priority unfortunately.

Q. Moving now from the Luggate catchment, can you see on map 2 the Taieri catchment upstream of Paerau.

25 A. Yes.

Q. And where the word Paerau is on the plan you can see that there's a blue shape which is Loganburn Reservoir, do you recognise that?

A. Yes.

30 Q. And are you aware that the Loganburn Reservoir is the storage facility for the Maniatoto Irrigation Company scheme.

A. Yes.

Q. Are you familiar at all with the Maniatoto Irrigation Company consents?

A. No, potentially.

Q. Potentially, sorry the question was a little too general to be helpful. Are you aware that the Maniatoto consents contain minimum flow conditions and you can see that by the blue dot on Loganburn Reservoir?

A. Yes.

5 Q. And are you aware that MIC is required to pass water or release water from the reservoir to maintain minimum flows at the Paerau Weir and Waipiata? If you're not aware just say so.

A. Thank you no I'm not aware.

CROSS-EXAMINATION: MS IRVING

10 Q. Now Ms King perhaps just for your benefit I will be asking you some questions as counsel for the territorial authorities in relation to community water supplies.

A. Okay thank you.

15 Q. Now I'd like to talk to you specifically about how you might assess applications for community water supplies under plan change 7 and in particular how an application may work through the controlled activity rule. So if we could perhaps start by looking at appendix 2 to Mr de Pelsemaeker's supplementary evidence which is the amended version of plan change 7 dated 14 March.

20 A. Yes.

Q. And if I could ask you have a look at the matters of control. The community or the evidence filed on behalf of the territorial authorities discusses the need for the community supply permits to include rates and volumes that enable growth within the communities that those water supplies provide water for and the evidence of Mr Heller demonstrates how the operation of the schedule for plan change 7 would reduce the volume of water that those permits could provide and, therefore, unable to provide for the growth within those communities.

1515

30 Q. So want talk through the implications of particularly the entry condition around use. Perhaps I will pose it to you as a hypothetical. If one of the counsels makes an application to replace its deemed permit and it needs

to seek more water than it has used historically to provide for growth within its community can it meet the controlled activity conditions?

A. No.

Q. So what would be the activity status of the application in that case?

5 A. If it cannot meet based on wanting more water than used historically it would be non-complying.

Q. If we think about the assessments required for a non-complying resource consent application, the application would have to pass through the s 104D gateway?

10 A. Yes.

Q. And there would be a – I guess a question of whether the effects of that increase were more than minor or not but I'd like to talk to you more about the policy gateway. Looking at the policies in Mr de Pelsemaeker's amended version, would you consider it likely that an application for more water than had been used historically would pass through the s 104D gateway policy test?

15

A. No, I don't think it would pass 10A21C.

Q. The evidence of the territorial authorities has also been that in order to provide for their infrastructure planning obligations they need water permits that are of a longer term than six years and so if one of their applications sought a term longer than six years can you see a pathway for them through the s 104D policy gateway?

20

A. No.

Q. Another hypothetical. If one of those territorial authorities had been able to establish that the effects of their increased water take were no more than minor and so pass through the first s 104D gateway, how would you assess that application in terms of s 104(1)(b) with respect to the provisions of the regional plan assuming that plan change 7 as set out in Mr de Pelsemaeker's appendix 2 was operative?

25

30 A. So are you asking what my policy considerations would be?

Q. Yes.

A. So I would obviously assess the plan change 7 policies and then I would also look to assess policies within the RPS and above.

Q. What do you think – so if we start with the policies in the regional plan.

A. The operative regional plan or the PC7?

Q. The PC7 will become part of the plan.

A. Yes.

5 Q. Would you only be considering the policies in what would then be chapter 10A, objectives and policies?

A. From my understanding that it's a stand-alone chapter. Yes.

1520

10 Q. And so where the consent or the application has effects that are no more than minor but you're looking at it under 104(1)(B) what conclusion are you likely to reach in relation to the policies in this plan?

A. In terms of what?

Q. Well you're assessing the application against the policies under 104(1)(B).

A. Yes.

15 Q. So what are you likely to conclude?

A. Is this based on the fact that the applicants applying for more water and a longer term?

Q. Correct.

A. Then it would be contrary to policies.

20 Q. So your next step then would be to look up the, I suppose hierarchy to the RPS or the partially operative RPS and the NPS?

A. Yes.

Q. And have you considered what you would do in relation to those documents?

25 A. In terms of policy assessment?

Q. Yes.

A. I haven't been this situation before personally so I couldn't comment on what I would do.

Q. Okay.

30 **RE-EXAMINATION: MR MAW – NIL**

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

- 5 Q. I just need to ask one question and you answered, well you volunteered an example with the Pig Burn catchment in terms of the, some priorities that appear to have been agreed between an applicant and some other water users, I wasn't clear whether they were also applicants or whether they were current permit holders.
- A. So the applicant, the applications come in as a whole catchment for the Pig Burn and so they're all permit holder current deemed permit holders in the catchment with priorities on those permits.
- 10 Q. Right so the other thing I wasn't clear about because you suggested that they weren't asking for conditions that reflected those priorities but you said that they were going to continue adhering to the priorities so one might think of that perhaps as being a side agreement in some way outside of Council's purview, was that how it was described?
- 15 A. Yes, from my understanding it was an outside agreement between the applicants.
- Q. Right so these whole catchment applications, presumably the new applications, if granted or some of them presumably might expire even without being replaced, those priorities would fall away wouldn't they if there weren't conditions that replicated those new consents, new replacement consents?
- 20 A. Sorry I'm not quite sure I understand the question.
- Q. Well you have a set of deemed permits and other consents –
- A. Yes.
- 25 Q. And so they have a whole set of things that might go with them, such as a priority that are on the deemed permits, those deemed permits are going to fall away on the 1st of October, aren't they –
- A. Yes.
- Q. – so at that point don't all the priorities that are stated in them, go away too unless you've got a condition on a replacement consent or as I thought you might be indicating the people who're applying have got some side agreements in terms of how they intend to operate?
- 30

A. Yes, yes so if they aren't on the consent conditions that are granted for Pig Burn takes, they would fall away unless they have a side agreement like I think that they do.

1525

5 Q. Right so the side agreement they've told you about it.

A. Yes.

Q. And why have they told you about it?

A. It was a discussion on the site visit and the priority discussion came up. I'm not quite sure why they told me but I think it was just an explanation of how the catchment works and that they will continue to operate in the same way going forward.

10

Q. So if you're operating in the same way, that's just something to do with them so if they decided that they wanted to change their side agreement or have exceptions or do things differently, that's nothing to do with the council?

15

A. No.

Q. No. Even though the environmental consequences of that might be quite different potentially?

20

A. They're proposing residual flows from certain takes and that we have had experts look at the residual flows and have made comments on what the environmental effect of the takes with those residual flows (inaudible 15:26:12).

Q. Okay. So what you're saying that there are some conditions that they still have to operate within in terms of their side agreements.

25

A. Yes.

Q. Is that what you're saying?

A. Yes.

Q. So the next question I have related to the appendix to Ms Gilroy's evidence. I was looking at page 10 of 11, residual flows.

30

A. Which page sorry?

Q. It's the attachment and it's page 10.

A. Yes.

Q. So here we've got reference to the council's matrix approach so is this what you're currently applying when you're thinking about a residual flow conditions requirement for and nature of?

5 A. That would be coming from a technical expert such as an ecologist or hydrologist.

Q. And are there other such guidance for example on cessation of takes? Is there any guidance on that that you look at in a similar kind of way?

10 A. In terms of minimum flows, there is the schedule 2A which outlines what the schedule 2A minimum flows would be but no such guidance on when to apply a cessation.

Q. Outside of minimum flow?

A. Yes.

COURT ADJOURNS: 3.28 PM

15

COURT RESUMES: 3.52 PM

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER EDMONDS

- 5 Q. I was just thinking about notification decisions. And I wondered whether you were involved in advice on matter or decision making on that.
- A. Did you say noca?
- Q. Notification decisions.
- A. Yes.
- 10 Q. Should this be limited notified or publicly notified or whatever? Were you involved with that aspect?
- A. Yes, so I'd make a recommendation decision panel.
- 15 Q. Right fine so following up on this question of priorities in terms of particularly of these deemed permits, the old mining privileges. Ones that had the priorities on them whether you call them notes or conditions or whatever. When you're thinking about notification do you go and have a look at those and think about people upstream or downstream depending on which way it all goes and how might be affected and whether they should be notified? Do you look at that?
- A. In terms of an effect on a user because their priority is higher.
- 20 Q. Yes.
- A. No, I haven't done that.
- Q. So you don't do that. You disregard that. It's not a factor you put in your notification, recommendation.
- A. No.
- 25 Q. No. I think I will leave it at that because I don't think you could really tell me what there might be in the mind of – perhaps I could ask this question. So some of these applications that come in, do they have above water uses in the vicinity or in the(inaudible 15:53:57), do they give their written approval to what the other people's applications say?
- 30 A. So commonly there are affected parties taking that would be downstream users of a proposed take and it is case by case where the downstream user would give written approval. Quite commonly, applications are

limited notified because the applicants aren't able to get written approval from downstream matters.

Q. But you do look for that, yes.

A. Yes.

5 Q. What about the upstream ones?

1555

A. No. Not commonly. That may be a consideration. There was the (inaudible 15:54:54) Mr Page mentioned earlier. That was a case where we did have to consider upstream users because they had, it came down to a priority of who had applied first rather than a deemed permit priority. In that case we had to look at the up-stream user but it's not commonly something that we do consider

10

Q. Right, well thank you, you were helpful with that.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

15 Q. So in summary I understand that for those applicants who had deemed permits how have to date sought to replace those consents as water permits, then the Council's itself is not considering as a relevant matter the relevant priorities as between the applicant and anybody else within the same waterbody?

20 A. No.

Q. And are those applicants for replacement consents or deemed permits asking that those conditions which have attached or notes that have attached to the deemed permit be imposed on the new water permit, if granted?

25 A. Not from any that I've processed or I'm aware of.

Q. Okay and are you aware of any water permit which has been granted subject to a condition which has effectively or has rolled over a priority?

A. Not that I know of.

Q. Okay. Are you aware of resource consent applications which have been lodged since PC7 was notified?

30

A. Yes.

Q. Are you aware of whether or not the applicants for resource consent currently under the offer to plan change and together with PC7 are

seeking to include a condition on their proposed replacement consent, where those applications are full consents, whether an existing permit – only in relation to deemed permit, whether they are proposing to include that as a condition of consent, you know the rolling over of the relative priority?

5

A. Not that I'm aware of.

Q. Okay.

THE COURT: COMMISSIONER EDMONDS

10

Q. Sorry I did have a question that I had forgotten about, is it all right if I ask it now? I was just trying to understand in terms of those matters in terms of the entry conditions for the controlled activity and so we have the residual flows, minimum flows and then we also have that cessation of take matter, sorry do you have that there, I don't, I should look it up too. Perhaps if we look, so we're looking at the most recent version of rule 10(A)3.1?

15

A. Yes.

Q. And we're looking at, sorry I'm looking at the roman ones aren't one so where have I got to – yes so we're looking at five, any existing residual flows so are you, are you clear about what a residual flow is, nothing to do with priorities, is that –

20

A. No yes, I wouldn't think there would be any residual flows specific to priority.

Q. And minimum flows, similarly?

A. Yes.

25

Q. So it's the take cessation I guess is the big question –

A. Yes.

Q. – so how, can you tell me what you think that is and how that might differed from priorities?

30

A. I actually think I briefly talk about this in my paragraph 54 of my evidence as I'm not sure whether, I'm unclear as to whether the cessations, whether there's an intention that they are priority.

Q. Oh I'd underlined that, so I did notice it on the way through but I've forgotten about it, I apologise for that. So you're unclear about that?

A. Yes.

Q. And how do you think you might get clarity?

1600

5 A. I would have to go and look at the deemed permit, it would give discretion I think on what I personally, my opinion would be in that situation whether it would be classed as a cessation or not and that's why I'm unclear. It's the wording in there. I would have to go and have a look at the deemed permits to see how the priority is worded within that deemed permit.

10 Q. So think there might be a possibility that something would come out of one of these deemed permits that you would put in that category.

A. Yes.

Q. But you're not sure without having some examples in front of you.

A. Yes.

THE COURT: JUDGE BORTHWICK

15 Q. So you're not sure that the current operative plan is being administered in that way?

A. From my understand of the operative plan, I don't think they're including any deemed permit priorities into new permits.

20 Q. So this is a replacement permits for a deemed permit. Is your understanding that the operative plan is not being interpreted and applied to impose a cessation conditions that which was formally a priority on a deemed permit?

A. Yes, no, I don't think it is

25 Q. I just had a bunch of random question where I'm just trying to make sure that I understand how you would interpret and apply plan change as proposed be amended by Mr de Pelsemaeker on 14 March so I was going to ask you to turn to appendix 1 and the first question concerns policies 10A22 and 10A23. So in hose two policies we see a slight language shift in 10A22, it says "irrespective of any other policies in this plan concerning consent durations I only grant resource consents for the take and use" whereas in 10A2.3 it says "irrespective of any other policies in this plan concerning consent duration". Mr de Pelsemaeker suggested perhaps
30 deleting the last three words regardless irrespective of any other policies

in this plan avoid granting resource consents. So that's the language shift, "only grant" in policy 10A.22 becomes "avoid granting" in 10A.23. How would you as a consents officer interpret and apply the phrase "only grant" as opposed to "avoid granting". Is there a difference in that language? And if there is a difference what is the difference?

5

A. In my opinion, there is no difference. I think the words "only grant" are as stringent as "avoid".

Q. I think it probably comes back in your controlled as well as your RDA conditions and it doesn't really matter which one. So for the controlled activity rule the council reserves control over the following matters. I think it's matter number B: "An existing condition concerning operating procedures administered through a water allocation committee" what are the water allocation committee? What is a water allocation committee, is that a certain thing, a certain and knowable thing because there was some debate in the evidence was to whether it was?

10

15

1605

A. I know that there is one catchment group that has been adopted by council with is the Kakanui. From memory that's the only one I know of. It is somewhat unclear to me whether this means any water allocation committee which applicants have come together within a catchment and decided on their own water allocation between them and that could potentially relate to priorities or whether it is only for the Kakanui which has been adopted by Council.

20

Q. In any event the matter of control relates to any existing consent conditions concerning the operating procedures. Are you aware of any consents which have conditions concerning the operating procedures that are administered by a water allocation committee?

25

A. Not that I can think of.

Q. What about the Kakanui?

30

A. I haven't specifically processed any consents in the Kakanui so I'm unsure.

Q. What's this getting at, this particular provision? I'm mean why is it there, what's the utility of it?

- A. I would have to assume that the reason it is there is to ensure that anything that's being undertaken currently gets moved forward into any new – so its existing conditions on any permits now so in my opinion that would mean that anything that's happening in those conditions would be then put on or have – Council then has the ability to put them onto the new permits.
- 5 Q. Is that picked up in (c) just as you've expressed it.
- A. In (c), which one's (c).
- Q. Just down below from (b) on –
- 10 A. There sorry. So any other conditions on the expiring permit.
- Q. That provision.
- A. Yeah I would think it would actually be picked up in that one.
- Q. I just wanted to ask you about policy 6.4.2 in the operative plan.
- A. Yes. I don't have it in front of me but I do know it --
- 15 Q. We can put in front if you wish.
- A. That might be helpful yes thank you.
- Q. It would be helpful okay.
- A. Did you say 6.4.2.
- Q. 6.4.2 yes.
- 20 A. Perfect.
- Q. So it's a really general question and it concerns those catchments which are outside a schedule 2A catchment and here is a policy that talks about the allocation limit for catchments outside of a 2A catchment and obviously those water bodies that are not otherwise – no that might not be right, I will just stick with the first question. Is the Council administering this policy so I want a resource consent to take and use water, I am not in schedule 2A? Is the Council then administering the balance of the policy in 6.4.2 in terms of establishing the primary allocation limit?
- 25 A. Yes.
- 30 Q. so am I right in thinking that the particular problem for those catchments that are within schedule 2A is the challenge faced by the high number relative to other catchments the high number of deemed permits within those catchments?
- A. Yes I think that is an issue with schedule 2A catchments.

- Q. And because those deemed permits – because of the presence of deemed permits the Council has not sought to implement the schedule 2A minimum flow or allocation limits is that correct.
- 5 A. Yes it comes down to the limit that's set in schedule 2A as primary allocation is trumped by 6.4.2(b) in a lot of schedule 2A catchments which is the consenting maximum and quite commonly that's due to deemed permits being granted quite a long time ago.
- Q. And were they sort of blown out –
- A. Yeah so its blown out allocation
- 10 Q. – you know, volumes and rates.
- A. Yes.
- Q. And do you have any sense whether deemed permits if they were to be brought back onto rates of taken volumes that did actually reflect their usage, their actual usage in the manner proposed by the Regional
- 15 Council whether the allocation and – the allocation limits would be exceeded or not within the schedule 2 water bodies.
- A. I think the –
- Q. Would they – where there is an exceedance already would that remain and exceedance albeit a different scale.
- 20 A. Yes I would probably specifically point to the Taieri as an example. I know in schedule 2A the primary allocation is around 4,000 litres a second and what is currently consented is somewhere around 24,000 and I don't think that 20,000 worth of paper allocation will be pulled back.
- Q. Right.
- 25 A. But I think it will definitely be less than 24,000 but I don't know if it will go all the way to 4,000.
- Q. And I don't have a sense of this but since those – in the case of Taieri since the minimum flows and allocation limits were introduced into schedule 2A – well no at the time of the introduction was it already
- 30 exceeded in terms of the primary allocation?
- A. I'm not quite sure of the date when it was implemented but majority of – because 6.4.2(b) 1.3 sorry to be very specific has a date of February 1998.
- Q. Yes.

A. And deemed permits are commonly granted early 1900s. I would assume that it would have already been exceeded when it was put in the plan.

1615

5 Q. Right and when put in the plan had new takes been granted, that's not replacement takes or re-consenting deemed takes but new takes –

A. Within –

Q. – for, within the Taieri catchment or any other catchment which at the moment, within schedule 2A looks, the allocation limits look to be exceeded.

10 A. That would be a prohibited activity.

Q. Pardon?

A. That would be a prohibited activity.

15 Q. So on that basis any exceedances are likely to be from activities not recent, as in the last 30 years but quite, well not recent really the last 20 years apparently but historic?

A. Yes.

Q. Okay.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

20 Q. Mine a bit less challenging. I just wanted to ask you about the challenge you said you're facing in the (inaudible 16:16:14) at the moment.

A. Yes.

Q. And one you've mentioned is the historic interpretation of historic data, can you just say a little but more about that please?

25 A. Yes. So this stems from policy 642(A) within the current operative plan which sets out that we are unable to grant from within primary allocation no more water than has currently been taken under its existing consents in the last five years. In terms of that policy there's no method to go alongside it and there is different interpretations by Council and quite commonly applicants on how to calculate what the historic use of that last
30 five years is and sometimes we can't come to an agreement on the method that should be applied to the dataset.

Q. Sometimes, does it happen a lot or...?

A. Yes, very commonly.

Q. So how do you decided in the end, is it your decision is it or...?

5 A. It, yeah it comes down to a processing officers discretion in terms of the amount of communication you have with an applicant. In my opinion, I think it is better to come to some sort of agreement prior to making any recommendation to a decision panel so that does take quite a lot of time and money and it means that because there's no method, we have to be quite, we have the ability to be subjective and have the discretion to change the method that we use.

Q. So are you looking forward to schedule 4(A) – 10(A).4?

10 A. Yes, very much so.

Q. If that can resolved between the experts?

A. Yes.

Q. That would certainly assist your work?

A. Yes.

15 Q. Okay. And the second one was the weight issue you've talked about in your evidence, how much weight are you giving to plan change 7 in your current work, current assessments?

A. It does come down to, I'm not sure if I specifically talked about this –

Q. You set out a series of factors you consider in your evidence.

20 A. Yes. So we step through those, that list and as the plan change is progressing we give more weight to it as it moves through the planning process. One of the major drivers in giving more weight to plan change 7 than policies within the operative plan is how directive they are.

Q. How directive, sorry?

25 A. What was that, sorry?

Q. I didn't quite hear what you said.

A. They're quite directive.

Q. Yes.

30 A. Specifically in terms of consent duration. The current policy within the operative order plan 6419 sets out certain criteria to assess or help you asses what a specific duration is whereas the plan change 7 policies direct a specific number which is obviously more directive than the conditions within that policy in the operative plan.

Q. So where are you at at the moment?

A. In terms of term I give more weight to the plan change 7 policies than I would do to the operative plan.

1620

5 Q. Is that based on the notified version of the plan or what version of the plan change are you...?

A. It's based on the notified version.

Q. Okay. So getting those resolved will be helpful for your work.

A. Yes.

QUESTIONS ARISING – NIL

10 **WITNESS RELEASED**

MR MAW:

That concludes the supplementary evidence that the Council was to call today.

THE COURT: JUDGE BORTHWICK

It has occurred to us that there are some legal issues rolling around (inaudible
5 16:20:56) and we haven't set down and tried to scope what those issues are
and different parties will have different views on those issues. But this is
something that we very much are seeking submission on. Inevitably, Mr Maw,
you're going to have to respond because you're the council. For those parties
who are proposing at least that there be conditions pertaining to those priorities
10 then we need to have a sense as to what sort of condition would that be? Firstly,
what is the status if you like of those conditions now being only deemed
conditions on a deemed permit. They're merely instruments which were
otherwise not qualifying as a valid resource consent condition under the test of
validity generally for conditions or under s 108 and 108aa I think. So where
15 they are included now, are they included by way of deeming provision or are
they indeed valid conditions of a resource consent? Now where it is proposed
there is a rule in the plan, something about these priorities. Then again, looking
at the validity of any such rule and how that might be applied to subsequent
condition of a resource consent. So s 108aa is going to be very important there
20 because for a condition of a resource consent to be valid amongst other
matters, it has to be addressing the effect on the environment, well, evidently
this plan is not doing that even though there may be a side benefit of the
exercise (inaudible 16:23:21) exercise of those priorities but I don't understand
in any measure but may be Ms Dicey or another witness of Mr Page's group
25 will say otherwise but I don't understand them to be benefiting the environment.
I understand them to be benefiting ability of water users to take and use water
so the restriction is as between the water uses and maintaining their reliability
and supply so it's not a benefit for the environment although there may be a
benefit but that is incidental but not its purpose. For (inaudible 16:24:09) like
30 an environmental benefit but is this what this plan change is doing and has a
director general's planning witness propose an objective and policies which
would be sufficient to secure that environmental benefit? If it is as I suspect it
has been historically simply to allow abstractors to maintain their reliability and

supply. Well, that's a different issue but can you impose a rule in a plan for that particular purpose? Is that what is being proposed by your client, Mr Page? I don't know because I think Ms Dicey just simply says slap, priorities and it's like what? That doesn't look like good drafting to me, is that, you know what is that about, your client will have quite a different take or, yes your client would have quite a different view as to those priorities, not neces – and I don't think that that would necessarily be to benefit the environment but would be quite understandably to ensure reliability of supplies between you know, different consent holders up and down the river or waterbody. So what is this rule that is being proposed, we need to be quite clear about, open eyed about what it is that's being proposed and the validity of any condition which might then come down on a subsequent consent in terms of the test ability in section 108 and 108(aa). Because I'm not minded to set (inaudible 16:26:00) up for a failure. You know and I haven't yet, I've yet to hear a clear pathway through this. So I'm just putting it out there that I expect counsel to be addressing this in their legal submissions and you know, if you have to come back and I suspect Ms Williams if you want to pursue it you will have to come back and talk about the validity of those rules, relative to (inaudible 16:26:29) objectives and policies and the sort of conditions which could be imposed, Mr Page you will definitely have to do that for your client because I can see it in Mr Dicey's evidence. Mr Maw you'll just have to do it because, you know, you're last, you'll have to do it in your reply. I'm not sure how many other people are interested in this though, Director General, Mr Page, who else would be interested in this in terms of relief? Mr de Pelsemaeker can go through and say who else was on the submitters were looking for that. So I'll leave that with you and Ms Williams to think about it further, I know that you've got your planner to come and we've played around with cessation and conditions today and what that might look like, doesn't seem to be applied thus far for that particular purpose, how would that look like in practice, because it's easy to say a cessation condition, you know, priority but is that how they're normally applied and again, is it an environmental benefit which is most certainly would be that that's where the Director General would have it or is it a benefit as between obstructers. How could it be implemented, nobody's looking for it we're just telling it itself because a lot of the applications are in and no one's looking for it. So it's undertesting

that that's a feature of this case, not so much from your client's point of view because your clients not actually applying for anything. So if you need to come back on that before opening, before leading your final witness – well you need to think about how to come back in that and when to come back on that. I
5 certainly think it's a huge issue for your client.

MS WILLIAMS:

I have to say your Honour, I think that that's probably something that I want to take some time over and I'd prefer to come back on that in May, if that's all right?

10 **THE COURT: JUDGE BORTHWICK TO MS WILLIAMS**

Q. In may?

A. Yes.

Q. Okay well that's possible you just need to think about that and then say, and then ask for the direction.

15 A. Yes, thank you.

Q. But I'm thinking Mr Page you can come back next week because you're opening next week, mind you you might've thought no, we'll do away with those, that word priority in our relief.

MR PAGE:

20 Well I'm happy to discuss why OWRUG's interested in the issue with you now.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. No, no, I'd actually rather hear it in your submission and I need to be landing it in the law. What is it in law, the priorities which have been carried over on a deemed permit and a deemed condition, is it merely, is
25 that, does that make it a valid resource consent condition or does it make it some other creature, you need to be thinking about it and therefore what has it become? Is it the same thing or something different when your client says, or when Ms Dicey says: "Bring 'em over"? Now I imagine her relief, I suppose reading your note from yesterday, well that's all going to
30 change and I don't know whether she just includes the word and thinks

that it's all going to happen. I would've thought it was quite uncertain, the implementation of just including that word priorities so your submission has to be set in a context of wherever Ms Dicey goes I guess.

1630

5 A. Yes.

Q. But it has to be on the law, you know whether you're looking for a proper understanding of what this thing is. These priorities. Are they merely a civil mechanism or are they a mechanism for a resource management purpose and if they come into this plan then what is their purpose, again what resource management purpose is it? Are they valid? What sort of consent conditions would spit out of it or spin out of it?

10

A. Although both the director general and OWRUG's case suggest to the court that those priorities should be carried over, they are for quite different reasons.

15 Q. Yes, that's what I think. I think they're for quite different reasons. Yes.

A. And I suppose at the end of the day both parties are simply seeking to avoid non-intended consequence of the plan change.

Q. Well, yes. We're yet to hear about it from you as to what your unintended consequence might be but I understand from the director general what theirs is but yours will need elaborating.

20

A. Yes. We can certainly do that when we open.

Q. Okay. Alright. Thank you. We will just check with Mr de Pelsemaeker whether anybody else is wanting this creature in.

25 **MR MAW:**

Made a note of that.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Now, Ms Baker-Galloway, do you want to open now?

A. I am happy to.

30 Q. You are?

A. But only if you are happy. I could just lull you all to sleep until 5 o'clock. Because they're 13 pages of legal submissions so they're not super long. So if you want. I'm in your hands.

Q. You're happy too and you're fresh.

A. I'm quite fresh.

Q. And you have the audience with you now.

A. I'm definitely not going to be claiming to being fresh but.

5 Q. It's alright. So now we're looking for a lift at the end of the day.

A. Unfortunately they are not that funny. Those are for the court. They're single sided.

10 OPENING SUBMISSION FOR FISH & GAME READ BY MS BAKER-GALLOWAY

The Otago Fish and Game Council and the Central South Island Fish and Game Councils which are just referred to as Fish and Game from now on, are the statutory manager of sports fish and game bird resources within the Otago and Central South Island Fish and Game regions. They hold functions and responsibilities set out in the Conservation Act 1987. Those functions include managing, maintaining and enhancing sports fish and game resources in the recreational interests of anglers and hunters; representing the interests and aspirations of anglers and hunters in the statutory planning process; and advocating the interests of the Councils, including their interests in habitats.

20

I also note that angling is very popular in New Zealand, and the demographic Fish and Game represents when carrying out its statutory functions is significant. There was the Sport and Recreation New Zealand survey in 2013/2014 that reported that 19.5% of respondents had been fishing in the past month and that does include marine fishing also. The survey found fishing had a higher rate of participation than rugby, tramping, football, cricket and basketball for men; and that fishing had a higher participation rate than netball, tennis, snow sports and tramping for women.

30

Otago license sales have exceeded 10,000 licenses in the past two decades and in the last decade has increased to over 20,000 licenses across all categories. Participation rates estimated from the National Angling Survey between 1994 and 2015 show that total freshwater fishing

effort in the Otago Fish and Game region ranged from 180,860 to 215,430 angler-days over the fishing season.

1635

- 5 This is an update if you like of Fish and Game's position what I come onto in the section, on the next page but generally Fish and Game entered this process seeking the following outcomes that PC7 develop an interim framework to manage all surface water abstraction consents, including surface water connected ground water which
- 10 a) Prevents frustration of the implementation of Central Government guidance, we're all familiar with that,
- b) prevents further over allocation, commences phasing out over allocation and holds the line in terms of the degraded state of water bodies associated with overallocation; and
- 15 c) ensures that only limited consents for short terms are able to be granted for the short period of its operation,

Fish and Game is generally supportive of the ORC's focus in the hearing to date on ensuring the PC7 provisions work in the most effective and efficient way possible. Efficiency and certainty are key concerns for Fish and Game. It is hoped the Court is live to the very real human/resourcing issues at play for all participants in the plan change. Simply put, there will not be able to be meaningful participation and a robust assessment of effects if the bulk of applications seek to lock in long term consents –meaning many decisions will not be informed by the information brought to bear by important would-be submitters, evidence may not be contested and tested, and resulting outcomes may not benefit from that "environmental" oversight.

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25

So in terms of the updated provisions, the 14 March version, Fish and Game's updated position on the provisions is as follows"

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- a) In terms of controlled rule 10A.3.1.1, support generally for the 14 March version, in particular;

- 5
- i. Fish and Game no longer seeks that compliance with Schedule 2A minimum flows be added as a entry point condition point;
 - ii. Fish and Game no longer supports inclusion of fish passage as a matter of control, on the basis that the state of fish passage in the context of the controlled activity rule will simply be maintained for a further 6 years;
 - iii. Fish and Game continues to support the entry point condition requiring that irrigated area not increase;
 - 10 iv. Fish and Game continues to support the entry point condition requiring that paper allocation fall away;
- b) The basis for the above position is acceptance that for the controlled rule to have any prospect of being attractive, it has to function as primarily a rule that rolls over the status quo, and not a rule that
- 15 still enables, on a case by case basis, the exercise of discretion and detailed assessments that might result in imposition of conditions requiring improved environmental outcomes.
- c) It is a significant concession to give away the opportunity for environmental improvements to be required on this short-term basis.
- 20 However the bigger picture gains arising from the NPS-FM are considered to outweigh that short term opportunity. It is also hoped that abstractors will continue, as they have done in the past to voluntarily continue to review their operations and reduce their effects on the water bodies. And I also just wanted to note, I've actually
- 25 moved on from my juicy carrot metaphor of last week because I think that was actually, let's, it's not even probably for the – I was trying to put myself in abstractors shoes and I wouldn't look at that as a, something I would want to run towards with open arms, it's still, I completely acknowledge that it's still an administrative, stressful,
- 30 costly step in their business operations so it's not like it's a, it's not a good thing it's just a less, it's got less disincentives associated with it than the other option so I just sort of wanted to acknowledge that it was probably being a bit glib last week when I threw that metaphor in there and I just wanted to retract that.

In terms of the proposed restricted discretionary pathway 10.3.1.A for rollover consents that do not have the requisite complete set of water metering data, Fish and Game generally supports the proposed rule, subject to finalising any drafting amendments.

Fish and Game can see the benefits of the revised policy that would then apply to non-complying applications that have opted not to take the 6 year rollover opportunity.

10

However, Fish and Game consider there is also still a place, in the context of the policy direction for non-complying takes, for direction as to what degree of change, both minimum flow and allocation, constitutes a more than minor effect. This is still relevant both to the application of the non-complying gateway test in section 104D(1) (a) as well as potentially to whether an application must be publicly notified in accordance with section 95A (8)(b). In this regard Fish and Game will be providing a redraft that does not change the ORC's 14 March "avoid" intent, so we're not going to touch those words, but that still includes the table of minimum flow and allocation threshold's based on Dr Hayes' recommendations. Based on Dr Hayes' experience, expertise, and numerous cited national and international reports and papers, the thresholds set a presumptive standard on the basis it is likely there will be adverse effects overtime if cumulative abstraction from a river exceeds those thresholds.

1640

25

Fish and Game is currently not in a position to support any exclusions to the non-complying directive. In respect of Trustpower's position for example, the deemed permits that Fish and Game are aware of currently remove/divert all the water from four tributaries to Lake Mahingerangi and this is proposed to be continued based on the consent applications currently lodged. The term sought is until 2038. Attached are relevant extracts from the consent applications currently with ORC that Fish and Game could access. And I've just attached for reference the relevant extract for the consent applications currently with ORC that Fish and Game has been provided that confirm that

basically all of the water will continue to be removed from those, those streams and just highlighted relevant bits in yellow there.

5 Fish and Game is not supportive of new consents locking in that level of abstraction until 2038. Instead Fish and Game consider that by providing for a short term rollover of permits for hydro generation, there will be sufficient provision for renewable energy in the context of the Otago Region. On expiry of that short term the LWP should then subsequently have identified the values and outcomes/objectives for FMUs, and whatever targets over time are determined to be appropriate. Fish and Game's preference is that the rolled over consents for those diversions/takes, as an example, be then re-considered in light of that forward looking framework –not simply locked in till the expiry of the Waipori Scheme consents in 2038.

15 Fish and Game's position is based upon its experience at the coal face, when undertaking its statutory functions in respect of consents issued under the operative Otago Regional Plan:Water (RPW). Fish and Game has observed:

- 20 a) allocation being granted based on historic use, rather than consideration of environmental, cultural or social needs;
- b) uncertainty about the definition of over-allocation at the individual and cumulative scale and an absence of a reliable mechanism to phaseout over-allocation –as the sinking lid policies do not identify a target allocation, despite the ability to set allocation limits in Schedule 2 and via a default method in RPW Policy 6.4.2(a), nor set a timeframe for allocations to be reduced;
- 25 c) "paper water" (meaning water that is granted on a permit but has never been used) being considered a beneficial reduction in allocation when it has never been used and therefore its surrender has no beneficial impact on the environment;
- 30 d) little or no consideration of ki uta ki tai, Te Mana o te Wai, mauri, or hauora;
- e) restricted ability to consider cumulative effects, such as a limited interpretation of the connection between waterbodies, ground

water interactions through time or the cumulative contributions of many small streams to the wider catchment;

f) minimal bottom line limits for water quantity in small streams;

5 g) poor guidance on setting limits on supplementary takes in tributaries;

h) high levels of uncertainty for Fish and Game around the accuracy or completeness of information supporting applications and consent decisions;

i) notification decisions regularly excluding public participation;

10 j) potentially unreasonable expectations that review conditions will be enough to enable the surrender of primary and supplementary allocation once consents are issued, should it be necessary to phase out over-allocation in future and I address this later as well;

k) limited considerations when setting consent duration;

15 l) uncertainty in the RPW around the environmental baseline to use when considering adverse effects and I address this also;

m) due to the complexity created by the above, a significant resource burden on parties involved

20 Fish and Game's experience is that consents issued under the operative planning framework do not present acceptable long-term outcomes, and it is submitted there is nothing looking forwards that materially changes the risk that more consents will be issued on that basis, as there has been national direction present throughout. Merely "having regard" to that national direction to date, has resulted in the types of outcomes summarised above. Primary allocations are often set at levels several times exceeding the amount of water available in low flows, with residual flows often set at levels slightly higher than historically observed. In many cases, streams are still partially or fully abstracted until they are dry or severely depleted such that the habitat and ecosystems are severely compromised. The consent terms issued to date have predominately been long, 25-35 years in many cases. In other words, Fish and Game's position is founded in recent experience, not hypotheticals.

25

30

While there may be some permit holders in a position to apply with well prepared applications based on some science, there is no certainty that as a whole applications will be prepared and considered in a manner that is consistent with the paradigm shift in respect of water, that comes through in the NPS-FM 2020, given the track record to date.

5 1645

So in terms of key legal issues and key legal tests, Counsel for ORC set out the legal framework, key legal tests and issues for determination in opening and Fish and Game agrees that those are the relevant legal considerations and issues requiring determination and agrees largely with ORC's position as set out, with particular emphasis on the below points and a couple of supplementaries. The legal submissions of Ngā Rūnanga are also supported and not unduly replicated here.

10

15 So on the efficacy of s 104 and what it does in respect of the NPSFM. As we are all familiar with now, the consents issued under a plan that does not give effect to the NPSFM must only "have regard" to the NPSFM. If the NPSFM is not articulated in the plan there is no local implementation to inform the granting of consent. This is particularly an issue given the integrated approach that underpins Te Mana o te Wai, as well as the detailed identification of values, environmental outcomes/objectives, limits and targets. Assessing consents on a case by case basis cannot be done in a way which is consistent with an integrated approach to freshwater management. It will pre-empt the region and FMU wide identification of the values, outcomes/objectives, limits and targets required to restore Te Mana o te Wai over time.

20

25

In terms of whether s 128 is of any assistance. We agree with the legal submissions for Ngā Rūnanga on this point. I submit that there is a material difference between the ability under section 128 to meaningfully address overallocation and the requirement under section 104 (2A) to have regard to the value of investment of an existing consent holder. I think Mr Page put that to a witness. I can't remember which one. Once a plan is in place that implements the NPS-FM 2020, the section 128 review is still limited. By

30

comparison, an application affected by 124 through the s 104 route would be entirely assessed on its merits, in accordance with the comprehensive planning framework – and the value of investment under s 104(2)A would just be one of the relevant matters to assess in that light.

5 THE COURT: JUDGE BORTHWICK

Q. Can you pause there a second?

A. Should I try re-explain myself? Because it was really hard to write that paragraph and it still doesn't make that much sense.

Q. Could you explain it differently?

10 A. Yes, I will explain it differently. So looking forward, let's imagine the land and water plan is in place. On the one hand we've got a long-term consent which term expires in three decades and it's found to be now in the land and water plan context in the overallocated catchment and the land and water plan sets a target to reduce overallocation and let's
15 assume it's material reduction and let's then assume we've got one consent holder who has got their consent for three decades and an applicant whose six year old over permit, consent has just expired or is about to expire. In my submission those two abstractors or consent holders would not be considered the same even though they're under the
20 same planning framework and trying to reduce the same overallocation collectively. The consent holder who managed to obtain a long-term consent could only be reviewed under s 128. The applicant who is applying because the six year roll over expired will be assessed under s 104 and the ability to effect meaningful change in those two options in my
25 submission will be quite different.

Q. And why is that? I mean I understand what you're saying in relation to – I guess it's 128 and 131 versus 104 and I think it's subsection (2)(a) and the value of the infrastructure being brought into account so you've got the two scenarios, both scenarios bring that to account.

30 1650

A. They bring it to account.

Q. Why is that different, because I think the inference from Mr Page was: "Well that's no different"

A. Yes that's right but it, because the 128 consent can't fundamentally undermine what was consented.

Q. I see.

5 A. And it has to regard to the viability of the activity and it can't effectively unauthorize what's been authorised.

Q. Whereas the application under section 104 even if it is via the 124 route, but regardless you've got to actually decline it.

10 A. You could decline it or give them half of what they've been taking, still having had regard, you have regard to the value of the investment obviously but the outcome could still be quite different to the 128 review process.

15 Q. And yes, I agree under 128 you are not invalidate the resource consent and under 104 you could decline the resource consent, the approach to looking at the value of the investment though, is that different or pretty much the same sort of, you know, pretty much the same sort of weighting?

A. I think it is different, it's different. Different as to weighting.

Q. Okay, so tell me a bit about that, if you were the decision maker why would that be different in your mind?

20 A. Well, under, once the land and water plan is in place the limits and targets that are going to be relevant to that consent will have been set with the priorities, with the first priority being the, restoring the health and wellbeing of the freshwater so there isn't a balancing now of environmental restoration and value of investment in the same way that it used to be done when there wasn't that guidance. There isn't that type of trade off, even though I know we're not meant to say trade off, but it's much less, there's much ability to argue that there's a trade-off and a balancing required. there will be, I mean.

25 Q. And so under an application for consent under section 104, when you come to have a look at the value of the investment, current level of investment, that is, would be a matter given more weight, the same weight, less weight than the three priorities of the NPS as brought down into an operative plan?

30 A. I would assume it would be given less weight.

Q. And your assumption, reason for your assumption?

A. Because of just how directive objective 2.1 is in the NPS as the value of that investment would fall under the third priority limb.

5 Q. I see. Third priority, limb of the NPS as brought down or articulated in the future land and water plan. I'm with you now, I can understand that paragraph, thank you.

A. Thanks.

Q. These are complex ideas to encapsulate so no, I'm grateful for that.

MS BAKER-GALLOWAY'S SUBMISSION CONTINUES

10 Thank you , and in paragraph 18 I do query whether there is actually a genuine belief that a section 128 review can be just as effective in requiring changes to give effect to the land and water plan, the implements the NPS 2020, were that the case, wouldn't the uncertainty in terms of ability to invest and move forward with confidence knowing that the land and water plan is coming, be similar to
15 those concerns being expressed in respect of the six year consent term.

Then I touch briefly on these three clauses to be brought down from the NPS and our focus was on provision 3.26 in respect of fish passage. In terms of the direction that 3.261 that the fish passage objective be included in the regional
20 plan water, it is understood that wherever this objective is going to be inserted, as Mr Maw explained, it will apply to the regional plan as a whole including operative PC7.

1655

25 I've just set the provision out there and in my submission, the rolling over the status quo, that should read, for 6 years, is consistent with maintaining the status quo of fish passage. If a consent is sought on a non-complying basis all effects will be relevant, including whether there needs to be measures put in place to protect certain fish species from predation or competition. So PC 7, as
30 supported by Fish and Game, will not frustrate the fish passage objective.

On the same basis the two policies required to be included in the RPW to

prevent loss of extents of natural wetlands and rivers similarly when included in the regional plan as soon as possible apply to the regional plan as a whole as well as chapter 10A. PC7 does not frustrate these policies – the controlled roll-over of existing takes will not authorise any additional reduction in extent of wetlands or rivers. The non-complying assessment of any other applications will consider all effects.

And I touch on activity status because there seems to be little bit of confusion about this. So it's a bit (unclear 16:56:19) but I've put it in there. So while consents applied for currently under the proposed controlled rule also need consent under the operative plan for a more stringent status, once PC7 is operative, that more stringent status will fall away. So in respect of section 88A, the following citations are of assistance in explain this. So I've set out the quote there from *Pierau v Auckland Regional Council* which is the case which brought into play the role of s 88 as a shield not a straitjacket and then that approach was confirmed by the High Court in *Kawau Island*. So I will just leave you to read those extracts.

So whether consents have already been applied for, or are applied for up to 3 months before the expiry of consents (ie 1 July) because ORC obviously still has a discretion to accept s 124 applications up to three months before the expiry of consents. So it's not just 1 April that is a drop dead date. There are still another three months there. Those consents if they do apply under the controlled activity rule, once PC7 is operative that activity status will apply and not the more stringent status. So on this basis, the earlier the controlled activity rule is operative, the better, in terms of providing an "easy" and efficient option for consent and permit holders, that takes the pressure off and removes the uncertainty of an otherwise restricted discretionary or discretionary status.

The NPS Renewable energy. There has been some focus on the preamble of the NPS-REG to support an argument that the NPS-REG not apply to this plan change because it is not the statement that it does not apply to allocation and prioritisation. So my submission if there is some sort of exception for hydrogeneration that allows longer term consents to be issued to replace

existing consents and permits, that is effectively a choice that allocates that water to hydro for that longer period of time, rather leaving it available to be allocated to another use, or for restoration of the health and wellbeing of a water body. So I am saying it is an allocation between users. That's how I'm looking at that.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. The preamble? That's how you look at it? Is that right?

A. Yes, that's how I look at it.

Q. We will continue with this tomorrow so we will end at paragraph 31. So I'm just making a note. The preamble pertains to the allocation as between users.

MS BAKER-GALLOWAY'S SUBMISSION CONTINUES:

So it is submitted that providing for the rollover of consents and permits for hydro for 6 years is still consistent. If you do determine, you have to give effect to the NPS-REG despite that allocation point. It does provide for continuation of hydrogeneration on the same basis as it operates currently for at least the next 6 years, after which time, the interplay between the NPS-FM 2020 and the NPS-REG will ideally be in place in the new plan and the replacement of those 6 year consents can properly be considered in that context.

Irrespective of the NPS-REG, the regional policy statement also applies and it is assumed to have given effect to the NPS-REG. The relevant provisions from the RPS are set out below, and it is submitted PC7, with no exception for renewable energy, would give effect to those provisions of the RPS, by rolling over existing permits and consents on the same basis.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So six year consent is giving effect to the objective 4.3 and policy 4.3.3, is that your submission?

A. Yes.

Q. I think we will call it a day and come back tomorrow for the final instalment.
Thank you very much.

A. Thank you, Ma'am.

Q. It's been a long day so it's probably good for us to actually break and
5 resume fresh tomorrow. Thank you for that.

COURT ADJOURNS: 5.01 PM

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COURT RESUMES ON FRIDAY 19 MARCH AT 9.35 AM**THE COURT: JUDGE BORTHWICK**

Good morning, anything arising overnight? No, very good. So just a couple of housekeeping things before we finish with your submissions

5 Ms Baker Galloway but the first question is in fact a question for you, we were just having a look at the schedule for next week and we can see Ben Farrell's name interspersed with OWRUG and I'm thinking why, shouldn't your planner be called after the full case or Fish and Game?

MS BAKER-GALLOWAY

10 Ideally yes.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So this isn't by your design, you're quite happy for him to be slotted, pushed back?

A. Yes, well yes, that's right. So the issue that Mr Farrell's got is his whānau

15 has the cultural harvest titi islands block where he's on another island so we're trying to work around that the best way we can and one option is try and squeeze him in next week, another option is squeeze him in the week of 12 April in Cromwell.

Q. Sorry?

20 A. The 12 April week in Cromwell which I know you're trying to keep safe as well but it's, for the Cromwell people.

Q. Yes and try and keep it safe for the Cromwell people but how do we look in terms of that week? Well, the only other option because I think it's all but inevitable that we're back on the last hearing week for Dunedin

25 because you know ORC will have a reply is to pop him in there.

A. Right at the end.

Q. Yes right at the end.

A. Which is which week in May?

Q. That is the 24th?

30 A. Yes he's back by then.

Q. He's back?

A. Yes.

Q. That's what I thought, the season would've finished. All right so I think we might pop Mr Farrell there, it just makes more sense for us to have his evidence following all of the other related evidence and probably easier for OWRUG or Territorial Authorities which ever it is not to have him interspersed with their case so that's good. Then other housekeeping things, we released a detailed minute on Wednesday on the 16th of March, allowing people to file supplementary evidence then so certain people to file supplementary evidence and so everybody did and then indicating all other, you know, everybody has an opportunity to but that's to come in on the 26th of March and it's because we're going to be hearing that evidence in Cromwell. What we didn't do is indicate, now whether any folk would like to cross any – folk in addition would like to cross-examine both in relation to Trustpower, Fish and Game and Landpro that otherwise hadn't actually given a cross-examination notice and also cross-examine any other supplementary evidence to be filed by 26 March, we just need to square that off, just a bit of housekeeping and we'll probably release a minute about that on Monday, just inviting people. I thought the minute looked packed enough as it was on Tuesday without losing the whole world, you know, by adding in further directions so that'll come on Monday, just making sure that everybody who is interested has a chance to respond if they haven't already given an indication that they wish to cross-examine so that's a job for Monday. Anything else in terms of tidying up, housekeeping, et cetera that we need to do bearing in mind we haven't got a lot of people here who are interested in this? Right, so we're all up to date okay good. So we're with you now.

MS BAKER-GALLOWAY'S SUBMISSION CONTINUES

Thank you Ma'am, so I was up to paragraph 31 I think. So this on the relevant baseline question which Mr Page introduced last week in cross-examination.

30 If the final form of PC7 contains a non-complying pathway, or even some sort of discretionary pathway, it is relevant when considering the ability for those pathways to provide for appropriate outcomes, to consider how effects will be considered, and against what baseline effects will be assessed.

This is a live issue that is currently the subject of an appeal to the High Court by Fish and Game, against Judge Jackson's decision on Plan Change 5A which set minimum flows and allocation limits for the Lindis

5 catchment, in Otago.

0940

THE COURT: JUDGE BORTHWICK

Q. Before you move on, because there is a lot of things happening in this room the salience of which I suspect you understand more quickly than
10 the court will necessarily understand and may be that these, these things are important because they're being raised in Lindis which I have no involved in whatsoever so what is the base line? How is that raised? I haven't been alert to it in other words. You are because I think you probably have a wider knowledge of things happening in Otago but I
15 haven't heard it.

A. Okay so well, Lindis was quite complicated because it was a hearing of two things. It was plan change 5a but it was also the integrated set of consents to replace all the deemed permits which it was agreed to be direct referred to the Environment Court so it would catch up so we had
20 same set of evidence addressing both decisions but one decision was issued for the plan change and then nine were issued for the consents. It was the same question that's going to be faced when the land water plan comes into place to what level does the river get restored from its current unallocated state? So the Lindis is one of these rivers that at least
25 two reaches where it's called loosing reach so the water naturally travels up underground to certain extent but that combined with certain levels of abstraction actually left no water on the surface. So the question was how much restoration of surface water flow does there need to be? From what points do you assess effects compared to what would've ben there
30 naturally, compared to what's happening currently and between those two extremes? So that was one of the contested issues throughout the hearing. In terms of the legal argument, should we just be looking at what the scale of improvement is from the status quo which is obviously

relevant, it's not irrelevant. So do we look at current overallocated state or what's the level of improvement from that? That's a relevant assessment to get a handle on that magnitude of change but do we also look at were there no consents in place what will this river look like and what's the scale of effects compared to that baseline?

5

Q. So this is Ngati Rangi. No consents in place. If you also assume no consents in place then what's the question?

A. What are the effects of the proposed level of abstraction compared to that naturalised state?

10

Q. In that debate, particularly in the context of Ngati Rangi, is the question simply one in terms of naturalised state then looking at effects with or without abstraction? Or is the question more complex than that because a) speaking for myself here and I haven't thought about Ngati Rangi but I would've thought that's highly theoretical. That even if you return all the

15

water to the river that you would ever get back to a natural state, in other words the environment has changed. That's not to change irrevocably changed but it has changed and the state of evidence is a product not only of your taking of water but your use of water and all of the other activities that are associated with that use so didn't seem to me – I've only

20

read Ngati Rangi once and that was in the context of the day's hearing over a cup of coffee – Ngati Rangi wasn't responding to the changed environment. It wasn't actually testing the presence of other activities which are also changing the environment and producing effects, so it was highly theoretical but maybe that's how things are done down here. That

25

you simply have a model that looks at a naturalised state of environment and then tests the removal of water relative to the physical habitat which is produced by – regardless of everything else which is also happening within that physical habitat.

0945

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A. That's right, so it's all, I mean, fundamentally what it comes down to is water permits and other permits are all for finite terms, these permits that we're talking about so in terms of what is the existing receiving environment, you can't assume they get renewed on the same basis. Now there are other things exactly as you're just saying around – that are

relevant to the river and it's integration with land and it's source to see flow and so on, there are other elements that don't have a finite term that are in place, they're permitted, they're legal, they'll endure forever or they're consented and there's no term that requires their remediation and removal at any point so that, they're permanent, you know, you don't imagine that they've gone away so we're not imagining a prehistoric river, we're imagining a river with a flows back into it with everything else that's otherwise lawful and permanent in place.

5

Q. Well you see even that's a bit bizarre isn't it, if you imagine the river with it's flows restored that's so highly theoretical it's impossible because you wouldn't be undertaking those other land use activities without actually abstraction at the same time so I mean it's like, that's daft.

10

A. But I guess it's a matter of trying to anchor a rational comparative point and like I say, it's not the only relevant comparison but because we're status quo and it is important to understand the degree of improvement but you might not have read ahead –

15

Q. I haven't.

A. – but where I get to is with this new, this next iteration or Te Mana o Te Wai and however Otago is going to end up articulating that in terms of the mauri of the waterbodies and the mana of them and the more water you take away from it the more that's reduced, that's my very basic summary of it, I think that, in my submission would also need a meaningful understanding of where would that water have been without abstraction, where would that mauri, what life would that river have supported were it still 100% full.

20

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Q. And does that also factor in questions around and therefore if there (inaudible 09:47:27) in the river and the land use activities were not taking place.

A. Yes possibly, I haven't thought about even that level of complexity.

30

Q. Yes because it is complex but it's in fact extraordinarily complex so yes, we did hear, I heard Ngā Rūnanga and anyway about the base line, yes tell me what you want to say about the base line, so there is a live issue as to what is your base line environment?

A. Well yes I think it's a live issue for everybody because when we're talking about the effectiveness of the non-complying pathway, for example and the alternative limit of no more than minor effects, well no more than minor compared to what, we all, I think need to answer that question because otherwise there'll be arguments about it down the track.

5

Q. And hence your thresholds.

A. Yes.

Q. Which is one way of looking at it.

A. So we've got our thresholds which are no more than – which are based on naturalised MALF so no more than minor compared to what the MALF would be, based on the based of other information because otherwise if you don't use something like that, no more than minor compared, from what starting point.

10

Q. From take to take, from mountain to sea, from yes and I understand the issue. Not sure that the language of the Act serves us well though, no more than minor effects, what does that even mean and how then are you meant to calculate that or know that when over the duration of a plan the effects may not be manifest within the environment because they're cumulative and they vary across space and time. All right, anyway that's something to think about though.

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A. Yes, a good hard problem for us all.

MS BAKER-GALLOWAY'S SUBMISSION CONTINUES

So back to a sort of super quick summary of what – so the High Court are hearing this in mid-April if we don't settle, like I keep saying.

25

Fish and Game are appealing on the basis that Environment Court applied the wrong legal test at paragraphs [120, 169, 201-207 and 478] in that it rejected the naturalised flow as being the appropriate environmental baseline (i.e. the starting point for effects assessment), instead finding that the current degraded state of the Lindis River (status quo) was the relevant environmental baseline to assess effects on trout (and presumably other introduced species) and not the flow that would be in the Lindis were the consents and permits in the catchment not exercised (ie naturalised flow).

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0950

The Lindis appeal is in the context of the relevant baseline of effects for determining plan provisions. However in the context of PC7, we are considering what the appropriate baseline will be when consent applications are considered
 5 on a case by case basis (whether discretionary or non complying), and in respect of all species and the freshwater ecosystem generally.

In Fish and Game's submission the correct "existing environment " for future activities in respect of expiring water permits is as confirmed in the High Court
 10 in Ngati Rangī . In that case Collins J considered " when assessing the possible effects on the environment of the proposed consents, was [the decision maker] required to have regard to the existing scheme or the effects on the environment by assessing the environment prior to the construction of the scheme. Is that
 (unclear 09:50:51) hydroscheme? The Court confirmed that in the context of
 15 water permits that follow the expiry of existing permits, the existing permits of limited duration are not to be considered as part of the "receiving environment", rejecting the idea that expiring takes could be construed as being part of the existing environment of the river and noting that in that case the expired 100
 year old water take permit was "not permanent and do not carry existing use
 20 right protections". In dismiss the idea that the expiring water permit should form part of the "existing environment" the High Court observed: Applying the approach [...] to the circumstances of this case would cut across the sustainable management objectives of the Act. The effect of not following the approach adopted by the Environment Court in Port Gore Marine Farms when assessing
 25 the environmental impacts of a proposed consent is to lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained thereby preventing adverse effects from being avoided or mitigated.

THE COURT: JUDGE BORTHWICK

Just pause there. I want to re-read that.

30

MS BAKER-GALLOWAYS CONTINUES OPENING SUBMISSION:

If you go back to read Ngati Rangī again, what the court did in leading up to that paragraph, there was conflicting environment court caselaw. Port Gore case

was about marine farms and Port Gore said we're assessing, imagining these marine farms aren't there anymore because they've got finite terms but then there's a line of caselaw that says the other but High Court preferred Port Gore.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY.

5 Q. What was the line of case saying the other?

A. I can't remember. Like I say, it's in the paragraphs leading up to paragraph 63.

Q. Okay.

10 **MS BAKER-GALLOWAYS CONTINUES OPENING SUBMISSION:**

So this approach is consistent with the High Court ruling in Speargrass Holdings noting that "the concept of the environment must ... reflect reality". The High Court held, where a "consented activity was likely to be terminated or removed, that activity could sensibly be ignored as part of the existing environment. Then

15 the Environment Court in Sampson and Others v Waikato described the rationale for the differing approach to the existing environment in relation to land use consents which include existing land use consents as part of the existing environment. We are also conscious of the distinction between land use consents, which are granted in perpetuity, and water consents, which are
20 granted for a defined term and not necessarily renewed. In relation to the latter, the existing environment must be determined as the environment that might exist if the existing activity to which the water consents relate, were discontinued.

25 So Fish and Game submits that Ngati Rangī and the direction it applies to the appropriate existing environment in respect of the expiry of old water permits is clearly applicable to how effects should be assessed if a discretionary or non-complying consent is applied for under PC7—and the assessment as to whether or not effects are more than minor, including cumulative effects, is on that Basis.

30

The Environment Court's Lindis decision appeared to agree with the Ngati Rangī position on the relevant baseline for all species except for introduced

species and that's for context to show that there was still an application of the Ngati Rangi principle but on a –

THE COURT: JUDGE BORTHWICK

But just not the trap.

5

MS BAKER-GALLOWAYS CONTINUES OPENING SUBMISSION:

Just for indigenous species so that's obviously another part of the appeal to the High Court that you probably don't need to worry about. But I will let you read those two paragraphs.

10 0955

And then paragraph 40 Plans by virtue of their definition need to be forward-looking. In the context of replacing plans, the Planning Tribunal in *Leith v Auckland City Council*, noted "In preparing a district plan under the new regime, the respondent was required to start with a clean sheet, and to focus on the purpose stated in section 5." This was reinforced in the context of the NPS-FW-2011 by the Environment Court in *Ngati Kahungunu Iwi Inc v The Hawkes Bay Regional Council* noting in respect of water quality provisions in the Regional Plan "having a sub-optimal present is not an excuse for failing to strive for an optimal (or at least closer to optimal future)."

In summary, as far as it relates to this Court's consideration of PC7, it is submitted that when considering the application of any policy direction to the assessment of discretionary or non complying consents, it is to be on the basis that any effects assessment will be against the environment as it would be absent the exercise of existing permits of finite duration. It is also difficult to conceive of how the relevant base line could be otherwise in the context of the national direction in terms of *Te Mana o te Wai*, and the first priority that must be given to the health and wellbeing of water bodies and freshwater ecosystems. It is submitted the reference point needs to be as close as possible to what the river's original healthy and complete state was, and all of the life it originally supported when its mauri was unaffected. Without that

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reference point it is submitted an assessment cannot be made as to attainment of Te Mana o te Wai.

5 Fish and Game's statutory functions lead it to look at all 3 of the priorities of Te Mana o te Wai in the NPS-FM 2020 Objective 2.1. The first priority is obviously relevant –as the attainment of clean and strongly flowing rivers that support abundant and diverse ecosystems are clearly within Fish and Game's statutory mandate. Similarly priorities 2 and 3 are both relevant to anglers and angling.

10 And the second, well you're familiar with the second The recent Southland Land and Water Regional Plan Environment Court decisions have made significant progress interpreting the local significance (in Southland) of Te Mana o te Wai in a statutory planning context. The quotes below from the Southland Land and Water Regional Plan First Interim Decision demonstrate the
15 importance of the concept, albeit in the context of the NPS-FM 2017.

The recognition of Te Mana o te Wai is a paradigm shift. Although it has been slow to be introduced to Otago, it must now be a central consideration in water allocation, alongside ki uta ki tai and the protection of the mauri and hauora
20 of waterbodies. Fish and Game considers it would be inappropriate, ineffective and inefficient for the implementation and local interpretation of Te Mana o te Wai to be left to an ad-hoc planning by consent approach.

The articulation of the 3 priorities of Te Mana o te Wai is at an early stage, as
25 appended to Ms McIntyre's' evidence which we looked at last week.

Even just this early draft, yet to be inputted into by the wider community and tested, gives an indication of how the final version for Otago will likely be fundamentally different to the status quo approach –not just at this high
30 level, but then in the subsequent recognition of the various values that are important, the freshwater outcomes/objectives for each water body and the appropriate limits and targets to achieve those outcomes/objectives. The first priority at least from Fish and Game's perspective, is clearly heading to restoration of rivers that are restored to flows that support healthy, abundant

resilient ecosystems first and foremost. The second priority focuses on the health of people as it will be articulated by the Otago community, and potentially those primary contacts people have with water in a way that is both safe, and provides for people's wellbeing.

5

At the risk of being repetitive, but by way of conclusion, given Fish and Game's, and others' experiences leading up to this point, there seems to be no possibility that consents issued on a case by case basis could somehow predict the outcome of the LWP and properly implement and not otherwise frustrate the ability to achieve Te Mana o te Wai and Objective 2.1 of the NPS-FM 2020.

10

THE COURT: JUDGE BORTHWICK

No questions from me so we're able to move through to your witness.

MS BAKER-GALLOWAY CALLS**JOHN WILLIAMS HAYES (AFFIRMED)**

Q. So do you confirm your full name is John William Hayes?

1000

5 A. I do.

Q. And you've prepared a brief of evidence dated 5 February 2021 and a summary dated 18 March 2021 for the purpose of this hearing?

A. I have.

10 Q. And you have the experience and expertise as set out in page 3 and 4 of your February brief?

A. I do.

Q. And subject to corrections, do you confirm that the evidence is true and correct to the best of your knowledge and belief?

A. Yes I confirm.

15 Q. And where you express your opinion you hold that opinion based on your experience and expertise?

A. I do.

20 Q. So can you just take us through the corrections that you'd like everyone to note and just make sure everyone keeps track of the pages that you're up to.

A. Okay, on page 14 paragraph 59, last line the word "places" should be inserted between "galaxiids" and "short term".

THE COURT: JUDGE BORTHWICK

Q. So that's paragraph 59?

25 A. Yes, paragraph 59.

Q. Can you just tell me what the paragraph commences with, the first five words?

A. So the paragraph begins: "The justification of imposing low flows".

30 Q. Okay and we're looking at the last line so: "migratory galaxiids and their invertebrate food supplies" is my last line?

A. Yes so it should read: "migratory galaxiids places short term expediency"

Q. Migratory galaxiids?

A. Sorry, non-migratory galaxiids.

MS BAKER-GALLOWAY:

So it's just the second line of the paragraph.

THE COURT: JUDGE BORTHWICK

Q. "Places short term"?

5 A. Yes, that's right.

Q. "short term, what else?"

MS BAKER-GALLOWAY:

10 No, no Ma'am, I think you're looking at the wrong sentence. It's the second line of the paragraph which on all our copies is the last line of the page but maybe your pages are printed out differently.

THE COURT: JUDGE BORTHWICK

Q. Yes it could've been printed differently. So you just read out the paragraph and then pause and say this is where you want the change to go, so starting with: "The justification".

15 A. Okay: "The justification of imposing low flows to control trout to benefit non-migratory galaxiids" insert "places" "short term results."

Q. Okay.

EXAMINATION CONTINUES: MS BAKER-GALLOWAY

20 A. Then, it's my page 23 and paragraph 87, there's a subsection D in the list there of bullet points and in the second line of D there's a D in parenthesis, that should be C. And then on page 29 paragraph 111, in the first sentence, third line so I'll read the whole line here, so it's: "Methods offering greater certainty in determining effects the higher" and then it says the greater, so delete "the greater".

25 THE COURT: COMMISSIONER EDMUNDS

Q. What paragraph was this now?

A. 111.

Q. 111, okay which line?

A. So find the third line and the end of it.

Q. Right and so instead of – just repeat it for me, now I found it.

A. So it should read: “Methods offering greater certainty in determining effects the higher” and then delete “the greater”.

1005

5 Q. Thank you.

A. And then in the same paragraph, fourth line from the bottom of that paragraph, it says “flow change” just delete flow so it should read “on percentage change and flow” not “percentage flow change and flow”.

10 Then on page 31, at the top of that page there should be a table 2. And on the second line of the caption, insert a per cent sign after as so it should read “as per cent of mean annual low flow”. On page 33, paragraph 122, fifth line from bottom, there is a minor thing here. Figure 3 should be in parenthesis and I think finally page 41, paragraph 147, second line from the bottom of that paragraph, trout has been misspelled
15 so tout fisheries should be trout fisheries. A bit pedantic but.

THE COURT: JUDGE BORTHWICK

As I said to another witness, my eyes self-correct, auto correct so that's quite a handy skill. Either that or I can't spot a spelling mistake.

MS BAKER-GALLOWAY

20 Thank you Dr Hayes. If you could now read out your summary please.

SUMMARY OF EVIDENCE READ:

Variability is a feature of most river flow regimes, with flows varying in magnitude and over different time scales. Assessments of the effects of flow alteration on fish and other aquatic life need to be framed within an
25 understanding of key ecologically important components of variable flow regimes.

30 Resulting environmental flow regimes should be designed to maintain key elements of flow variability to maintain a rivers' physical and ecological processes and sufficient baseflow to maintain high levels of instream habitat and life supporting capacity.

Minimum flows and allocation limits, working in conjunction, are the policy levers for environmental flow management.

5 Now, this is section on Values-and risk-based framework for guiding environmental flow limits setting.

In recognition of the continuous nature of relationships between flow and habitat and ecological attributes, and the high uncertainty in quantitatively predicting responses of fish and other life, a values and risk-based framework has commonly been applied in assessing minimum flow and allocation options. The lower the minimum flow, and / or greater the allocation rate, the greater is the risk that life - supporting capacity, ecosystem health, mahika kai and fishery amenity will be adversely affected. And the more important an instream value the less reduction in flow or modelled habitat and other ecological attributes is acceptable.

1010

When there is no information from hydraulic-habitat modelling or research on ecological-flow responses, minimum flow and allocation limits are usually based on percentage flow alteration—often referenced to the MALF, which is recognised as an ecologically relevant flow statistic.

Under the section of defining more than minor effects of flow alteration.

25 I provide below default minimum flow and allocation limits for regional water plans, based on the values and risk-based framework. The limits are intended for the test of “more than minor effects” on life-supporting capacity, ecosystem health, mahika kai and fisheries amenity. The limits set a presumptive standard on the basis it is likely there will be adverse effects over time if abstraction from a river exceeds those limits. The limits are based on percentage of MALF, but the minimum flow limits could also be applied to flow-related habitat and/or ecological flow relationships where these have been determined. The limits are also summarised in the table below.

Minimum flows (or residual flows) less than 90% of 7-day MALF, and flow allocations of more than 20 % of MALF potentially have more than minor effects on life-supporting capacity, ecosystem health, mahika kai and fisheries amenity in rivers with mean flow less than 5 m³/s.

5

Minimum flows (or residual flows) less than 80% of 7-day MALF, and flow allocations of more than 30 % of MALF potentially have more than minor effects on life-supporting capacity, ecosystem health, mahika kai and fisheries amenity in rivers with mean flow greater than 5 m³/s.

10

If MALF estimates can be made for the permanently flowing reaches of intermittent streams then the minimum flow (or residual flow) and allocation rate limits I have recommended for small rivers (< 5 m³/s) could be applied to avoid more than minor instream effects (i.e. minimum flow 90% of 7-day MALF, allocation rate 20% of MALF).

15

Decreasing the minimum flow limit to 80% of the MALF could be considered for permanently flowing reaches of intermittent streams that support intrinsic values with no threatened indigenous species, and do not provide significant spawning and juvenile rearing habitat for regionally or nationally important salmonid fisheries downstream. Also, the allocation rate could be increased to 25% of instantaneous flow to take account of the lower instream values.

20

When MALF estimates cannot be made for intermittent streams, a pragmatic test of more than minor instream effects could be based on instantaneous flow. Cumulative abstraction that alters instantaneous flow at point of take by more than 15% is likely to have more than minor effects in streams that support threatened indigenous species, or significant spawning and juvenile rearing habitat for regionally or nationally important salmonid fisheries downstream. In streams that do not support such values, abstraction that alters instantaneous flow at point of take by more than 20% is likely to have more than minor instream effects.

25

30

Information from hydraulic-habitat modelling, when available, can contribute to more robust ecological flow assessments and increase the precision of minimum flow limits for protecting instream habitat.

- 5 In these cases, minimum flows (or residual flows) that retain less than 90% and 80% of habitat available at the 7-day MALF are likely to have more than minor effects on invertebrates and the most flow-demanding fish in rivers with mean flow less than and greater than 5 m³/s, respectively.
- 10 An allocation rate that causes flow to be flat-lined at a low minimum flow (e.g. < 80% of MALF in small rivers) for weeks to months is likely to have more than minor adverse effects on fish growth and survival.

1015

- 15 There is section now on Justifying low flows to maintain rare and endangered non-migratory galaxiids which I see as short-term solution that constrains long term productivity and resilience of populations.

20 The justification of imposing low flows to control trout to benefit non-migratory galaxiids in Otago streams places short term expediency before the long-term vision of Te Mana O Te Wai. This potentially comes at a cost to the habitat of non-migratory galaxiids and their invertebrate food.

25 There is a difference between a short term solution to a critical problem, such as above, and a long term solution that includes restoration of the health and wellbeing of the water body and freshwater ecosystem. The long-term conservation goal for these non-migratory galaxiid populations should be removal of trout from habitats that are critical for preservation of galaxiids, limiting invasion and reinvasion by trout with barriers, and restoration of flows

30 to restore habitat and the productive capacity and resilience of the galaxiid populations and other components of a healthy ecosystem. That summaries the text that I've just read out. Is it worthy me going through the table? Probably not.

MS BAKER-GALLOWAY:

Probably not. I think probably through questioning people would draw out from you what they need to understand from that table unless it would be helpful for the Court for Dr Hayes to do that.

5 THE COURT: JUDGE BORTHWICK

No. We've all studied the table. The Court's only got minor questions by way of clarification. I don't need to ask right now. I can wait for cross-examination. Commissioner, do you want to any questions now?

THE COURT: COMMISSIONER EDMONDS

10 No, I'm happy to wait for cross-examination. Thank you.

THE COURT: JUDGE BORTHWICK

We will go straight to cross-examination. Thank you for your summary, Dr Hayes and ORC for cross-examination.

CROSS-EXAMINATION: MR MAW

15 Q. Good morning.

A. Good morning.

Q. I do have some questions about the table so perhaps we'll start there. In terms of the version of the table that might be most readily available. I'm using the one in your statement of evidence in chief on the 1 page summary on page 7. There is one slight difference between this version
20 of the table and the version of the table appended to Mr Farrell's evidence and that difference relates to the abstraction from permanently flowing reaches of intermittent streams and there is an additional reference to schedule 1A catchments that he's inserted. Now, I'm not planning on
25 asking you questions about that just at the moment so I'm happy to work off this version but that's the only difference that I see looking at the two tables. Are you aware of any other differences as between what you've recommended and that which Mr Farrell has recommended?

A. In Mr Farrell's table, I thought I saw yesterday that he might have
30 excluded the significant spawning and juvenile rearing habitat for

regionally or nationally important salmonid fisheries downstream but someone needs to clarify that.

THE COURT: JUDGE BORTHWICK TO DR HAYES

5 Q. Just pause there a second. Do you think he's excluding what's in your summary table at page 7 of your evidence in chief or significant spawning and juvenile rearing habitat?

A. I thought I saw that yesterday but I'm not sure.

Q. I just want to double check that.

10 **MR MAW:**

It seems to be replaced with schedule.

THE COURT: TO MS BAKER-GALLOWAY

Q. You can clarify.

15 A. So schedule 1A in the water plan contains – if we look at it we will see exactly what it is – it does list the important spawning sites, trout habitat sites so that's why instead of Dr Hayes' narrative description we've used the actual schedule in the water plan that records in context of the water plan where those important habitats are.

Q. Does this witness agree that's where they are?

20 A. I think you can put that to this witness and he will tell you whether or not he knows, yes.

1020

CROSS-EXAMINATION CONTINUES: MR MAW

25 Q. I will pick that up now then, do you understand that the schedule 1A list, the waterbodies listed in that schedule pick up the areas that you're intending to cover, the wording of the table as you've put forward?

A. I can't say for sure, I haven't looked at it in enough detail recently to know that.

30 Q. Okay. Right I want to start with the minimum residual flow row so the middle row in the table and I want to start with the minimum flow for abstraction from surface waterbodies with a mean flow less than or equal

to five cumecs. And there you recommend that the minimum or the residual flow should be: “minimum flows (or residual flows) less than 90% of 7-day MALF” now I want to be really clear that I understand precisely what it is that you mean in this box here because one way of reading this table might say that the minimum flow or a minimum residual flow is any flow less than 90% of the seven day MALF so it could be anywhere in that range, is that what you mean –

5

A. No, I know it’s somewhat confusing, I see the point you’re making. What I was referring to here was that minimum flows less than 90% of MALF could have more than minor effects, so another way of looking at it would be to say that the minimum should be no less than 90% of MALF.

10

Q. That would avoid the ambiguity in the way in which these boxes have been expressed and what I’m trying to understand is the practical effect or including these thresholds in a policy and how that might be interpreted when it comes to implementation so you’d accept there’s a need for real clarity as to how these thresholds are being expressed, if they are to be read as limits in that context?

15

A. Yes, I do and the reason why I used the language in my evidence here was because I as counting it terms of the test of more than minor so, but yes I agree, in a plan you’d want to be much more specific in specifying a minimum as 90% of the MALF and no less than that.

20

Q. And presumably that same logic will apply for the way in which the thresholds have been expressed throughout that table?

A. That’s correct.

25

Q. Staying with the waterbodies with a flow less than, a mean flow less than or equal to five cumecs, there you say that the threshold should be set at 90% of the seven day MALF?

THE COURT: JUDGE BORTHWICK

So where abouts are you again?

30

MR MAW:

So the minimum residual flow, the middle row and the first box, or the second box on that row.

THE COURT: JUDGE BORTHWICK

Okay so the middle row and second box so minimum flows or residual flows, 80% of seven day MALF?

CROSS-EXAMINATION CONTINUES: MR MAW

- 5 Q. First box, we'll call that one the first box otherwise all of us will get confused. So I want to understand what's required to calculate the seven day MALF for a tributary where there's no historic data so a tributary of a river where there's no flow recorder. So how do you go about that calculation?
- 10 A. Well I'm not a hydrologist so that's who you should direct the question to, I saw in Roddy Henderson's evidence, he talked about things like that and one method of doing that is modelling MALF but he said that that has a large uncertainty, a high degree of error to it so the questions best directed to a hydrologist.
- 15 Q. So when you've put your thresholds together you have assumed that they will be capable of being calculated in all of the circumstances or situations where this table might be applied?
- A. Yes that's correct except for the intermittent streams that I talk about where MALF can't be calculated and then I give an alternative of applying
- 20 the rules, limits to instantaneous box.
- 1025
- Q. We'll come to that box in due course but this table is predicated on an assumption that these figures can be calculated.
- A. That's correct.
- 25 Q. Have you made any enquiries yourself as to the practicalities of calculating these thresholds in the Otago region?
- A. Not directly but I have been party to meetings where Roddie and other hydrologists have been talking and I know that it's a considerable challenge.
- 30 Q. Is that fair to say there's quite some work to be done in this based on your understanding?
- A. That's what I understand.

Q. In terms of calculating a 7-day MALF do you need to be able to calculate a mean annual low flow as well? Is the 7-day MALF a function of mean annual low flow?

5 A. So 7-day MALF is a version of MALF. There can also be one day MALFs as well so my understanding with 7-day MALF is that for every year of the flow record you look at the seven consecutive days that have the lowest flows in that year. You do that for all your years and you average those flows across the whole record.

10 Q. So with the record you'd be able to calculate both the 7-day MALF and the mean annual low flow MALF? It's the same data set used to produce the different thresholds?

15 A. Well, the mean annual low flow and the 7-day MALF they are the same things so if I understand your question correctly we're talking about the same thing except that one version of the MALF is a 7-day MALF, there's another version. You could have it based on one day, three days, five days or whatever. They usually concentrate on the 7-day MALF.

20 Q. I want to stay with the abstraction of water from surface bodies with the mean flow of less than or equal to 5 m³/s so I want to down the table to the allocation rate and here you've recommended a threshold of flow allocations of more than 20 per cent of 7-day MALF. Now just so I've understood that correctly. What you mean there is that an allocation rate of more than 20 per cent would equate to a more than minor effect.

A. That's correct.

25 Q. So you say the allocation block should equate to a size of 20 per cent of the mean annual low flow.

A. That's correct.

Q. I've understood that correctly?

A. That's correct.

30 Q. When I look at this table I don't understand whether the allocation rate is supposed to reflect a accumulate allocation rate or a accumulate allocation block from a waterbody or whether this is a case by case basis. So if consent applicant number 1 comes along and calculates the size of an allocation block and then lodges an application for the entirety of that allocation block, does that mean that there is no allocation available for

consent applicant number 2? Or what is that that you have in mind here?
Is that the cumulative block size?

A. It's the cumulative block, yep.

Q. Where in your table does it reflect that that is the case?

5 A. I don't think it does in here. But I do say in the text somewhere I think something about cumulative allocation. Certainly to clarify that table where I use the word allocation it should be very clear I'm meaning cumulative allocation, the total allocation.

10 Q. When you're referring to the total allocation, are you referring to the total allocation from a tributary or from a tributary in a main stem or from all waterbodies within a catchment?

1030

15 A. That really depends on the Regional Council and where they choose to monitor their flows or have a point in a catchment where they are setting their allocation rate and minimum flow. What I intend for how these rules should be used is that the level of protection provided by the minimum flow and allocation rate rule applies right up through the catchment above there so that – and I say this in my evidence where you would not want abstraction to be occurring up stream that for example in extreme case would dry the river up but then still achieve down stream at the point of measurement of monitoring the rules that I've got here.

20

Q. So where is it based on reading this table how is it that the Council knows where to measure these things from?

25 A. That's up to the Council not me and that's where all the difficulties of hydrology come in and monitoring the flow.

30 Q. In your experience, looking at these thresholds, isn't the way that they're incorporated into a regional plan taking it that one step further where the flow monitoring sites are identified and there's a further level of information as to how those thresholds would be applied? In your experience, when these types of thresholds are reflected in a regional plan, doesn't a regional plan one step further and identify the flow sites against which thresholds would be assessed?

A. That's correct, that's what should happen.

- Q. Now you've recommended the importance in, I think it's in your paragraph 49 which is perhaps, the importance of both having a minimum flow and an allocation limit being met and in your table you've reflected that by having a row for each of those parameters. I'd like to understand now I'm going to move two boxes to the right so the abstraction from the permanently flowing reaches of intermittent streams and we're going to start with the column containing threatened indigenous species, box three in the middle row and then I'm going to ask some questions about the, box three in the bottom row. And in fact I'm going to start with box three in the bottom row there and you have an either/either method for calculating the allocation rate. So we've talked about some of the difficulties with the way in which the 20% is expressed, I'd like to understand a little more about the 15% of instantaneous flow at point of take if MALF estimates cannot be made. So you'd accept that its simply not going to be possible to estimate MALF in all locations in Otago?
- 5
- 10
- 15
- A. Yes, I agree with that.
- Q. And in relation to that difficulty, you recommend a threshold of 15% of the instantaneous flow at the point of take might be the appropriate threshold?
- 20
- A. Yes, I do, yes.
- Q. Now let's say you have 10 applicants stacked up on a tributary, does each of those applicants take 85% of the instantaneous flow, is that what you're intending that box to mean?
- A. No I'm not, I'm not intending that and I acknowledge the difficult of implementing a rule like this. I think the ideal scenario again would be to have some point in that stream, downstream where that rule is applied and that level of protection is maintained all the way up.
- 25
- Q. So again, dependant on identification of a flow recorder site against which these degrees of change can be assessed?
- 30
- 1035
- A. Yes, so the other way of might be doing it is if they can understand the hydrology sufficiently. Mainly the way that flow changes up the streams so it should increase as you go downstream but you can have losing and gaining reaches but if that was understood well enough then it could be

possible. It may be possible to portion the takes among users such that this rule would not be broken.

Q. So that would require a more nuanced allocation framework to achieve that outcome.

5 A. Yes.

Q. You wouldn't be able to achieve that on a consent by consent basis, would you?

A. No, you couldn't.

10 Q. And the same would apply in relation to the box, if we jump on box to the right where you've recommended the threshold of 20 per cent of the instantaneous flow point at the take of MALF.

A. That's correct.

THE COURT: JUDGE BORTHWICK

Is that box 4?

15

MR MAW:

Yes.

THE COURT: JUDGE BORTHWICK

Box 4 of the last line?

20

DR HAYES:

Yes, that's correct.

CROSS-EXAMINATION CONTINUES: MR MAW

25 Q. I want to understand conceptually the basis on which this table is put forward and please tell me if this is drawing outside of your area of expertise and I will pick these questions up with another witness but you understand that this table is being put forward in order to provide thresholds as to when an abstraction from a waterway might have more than minor adverse effect. Is that your understanding?

30 A. The accumulative abstraction yes, of all the takes in the managed (inaudible 10:37:20) stream yes.

Q. I understand from our previous questions that it's the accumulative impact and I understand now the difficulties with the consent by consent basis but the table, the purpose it's seeking to serve is providing the threshold for what is more than minor adverse effect.

5 A. That's correct.

Q. Is it fair to reflect that by saying that the table serves as a proxy for more than minor adverse effects?

A. On instream life, yes.

10 Q. You've relied heavily in putting forward these thresholds on the proposed national environmental standard on ecological flows and water levels.

A. I have.

Q. My understand is that you're a co-author of that document.

A. I was the co-author of the support document on methods for the drafting, yes.

15 Q. When you think about an environmental flow, the thresholds that you've recommended are dealing with the ecological component of environmental flow.

A. That's correct.

Q. And the ecological component is not the only component, is it?

20 A. That's correct. It isn't.

Q. And that's reflected in the proposed NES?

A. That's correct.

Q. Do you have a copy of the proposed NES with you?

25 A. I've got the sections from the draft guidelines for the selection of methods but sorry I don't have the other one which

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1040 pb

30 A. ..from the draft guidelines for the selection of methods but I, sorry I don't have the other one which gives the actual limits, sorry.

Q. It's not in the bundle, I have some copies to hand up, I have made an electronic copy available to bring it up onto the screen because our printer

ran out of toner inconveniently last night so I'm sorry to my friends. Do you recognise this document?

A. Yes.

5 Q. And this is the proposed national environmental standards on ecological flows and water levels?

A. Yes.

Q. Do you now produce that as exhibit Fish and Game 1?

A. Yes.

10 **EXHIBIT FISH AND GAME 1 PRODUCED – PROPOSED NATIONAL ENVIRONMENTAL STANDARDS ON ECOLOGICAL FLOWS AND WATER LEVELS DISCUSSION DOCUMENT**

15 Q. So I want to take you to page 7 of the document, you will see there a heading defining the key concepts, that's going to be page 17 of the electronic, section 2.2 and you'll see there that the proposed NES seeks to define some key concepts and there you'll see that the way in which environmental flows and water levels, and that phrase has been used in this document as to: "provide for a given set of values which are established through a regional plan or other statutory process". And that paragraph goes on to recognise that: "environmental flows and water levels may provide for ecological, tangata whenua, cultural, amenity, recreational, landscape, natural character and other values associated with water."

20

A. That's correct.

25 Q. So when we think about an environmental flow regime, the ecological considerations are but a subset of the matters that would need to be considered when establishing an environmental flow regime?

A. That's correct as you could include cultural blues, you could include recreational values, they were not covered by the ecological flow standards.

30 Q. And so the thresholds that you've put forward aren't addressing those values?

A. Not specifically but they do encompass some of those values but not directly.

- Q. So if we turn over the page you will see this concept expressed in what I think is a Venn diagram where there's an intersectional in relation to some of the values but with respect to values they can extend beyond the flows that might be necessary to sustain an ecological value?
- 5 A. That's a very good point, I agree.
- Q. And this document reflects that challenge and acknowledges what it is seeking to achieve when you move through to section 2.3 on page 9, you'll see at the bottom of that page some bullet points?
- A. Page what again?
- 10 Q. Page 9.
- A. Yes, I see.
- Q. And there you will see expressed is three distinct elements, the requirements for setting of environmental flows and water levels and the first bullet point picks up on the ecological needs of freshwater systems.
- 15 1045
- A. Yes.
- Q. The second bullet point then picks up on those other values.
- A. Yes.
- Q. And the third point picks up on natural and development values attributed to a waterbody by Maori and the wider community.
- 20 A. Yes.
- Q. And importantly the last sentence on that page recognises that this proposed NES is only dealing with the first of those bullet points.
- A. That's correct.
- 25 Q. Do you accept that additional flows or higher water levels above the thresholds that you have recommended might be required to sustain some of those other values?
- A. Yes, and a very good example is canoeing.
- Q. And cultural values may require more water to be left in a waterbody?
- 30 A. May well do, yes.
- Q. And that's expressly recognised in this NES in section 2.2 so if we go back to page 7, the last sentence on that page.
- A. Yes, I agree.

Q. So when we think about the table that has been recommended as a proxy for no more than minor effects, do you accept that it's only really dealing with a subset of the potential adverse effects that might occur in relation to the take of water?

5 A. Yes, I agree.

Q. So significant care would need to be taken when allocating water in accordance with these thresholds not to preclude the ability for providing for those other values into the future.

A. Yes, I agree. It's a very good point.

10 Q. So the thresholds that you recommend should not be seen as the thresholds that represent the acceptable or appropriate level of allocation for the abstraction of water into the future in Otago?

A. Yeah, I agree.

15 Q. I want to discuss with you now part of your evidence where you dealt with the issue of justifying low flows to maintain rare and endangered non-migratory galaxiids and this is how you phrased a short-term solution that constrains long-term productivity and resilience of populations. In your evidence you recognise that a function of increasing flows might be that access for predatory introduced species such as trout may have an adverse impact on those species to be protected. Is it fair to say that increasing flows will need to take place hand in hand with measures to ensure that effective barriers are in place for trout and salmonid species?

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A. Yes that approach is essential.

25 Q. And plan change 7 doesn't deal with that does it, it doesn't contain a mechanism to both increase flows and ensure that those barriers are in place?

A. I haven't seen anything like that, I can't say for sure that it's not in there.

30 Q. And so again real care would need to be taken by doing one of those two elements in the absence of the other?

A. Yes, definitely.

CROSS-EXAMINATION: MS LENNON – NIL

CROSS-EXAMINATION: MR ZWAAN

Q. So your evidence, I just want to pick up on the point that Mr Maw was making around the non-migratory galaxiids. So in your understanding, how long have trout been around in the Otago region, would it be for more than 100 years?

5

A. Well with salmon and trout active in 19- of 1867, I think it had just immediately precluded the introduction of trout to the Otago area so yes.

Q. And over that type would have there been times where streams which may, for part of the year have dry reaches have flows through them which meant that those dry reaches didn't exist?

10

A. Sorry?

Q. Sorry, I'll reframe that question. So we understand that there are some streams that have dry reaches at least for part of the year that mean that non-migratory galaxiids have a zone where they don't have trout breaching them but in your understanding of how rivers work, at some point over the last 100 years there would've been times where those flows through those streams mean that aren't those dry reaches?

15

A. That's correct, yes, with storms and variable weather patterns there wouldn't be a stream channel there if water did not flow through it at some point.

20

Q. And it's feasible that those flows would have enabled species like trout to travel up or down those reaches?

A. That's correct.

Q. And is it feasible to say that those events may occur on a reasonably regular basis?

25

A. Yes, channel forming floods in most rivers occur like, on average once a year or once every two years so relatively frequently you'd expect flood flows to go down through channels like that.

Q. Right so I guess I'm just trying to get to the premise of this, this assumption that you covered off in paragraph 14 – 15 of your summary, that imposing these low flows protects these non-migratory galaxiids. In your understanding of freshwater ecology could there be other reasons why these non-migratory galaxiids have survived for such a long period of time in these reaches other than just the protection from dry reaches?

30

- A. Well they, for any fish there has to be the appropriate habitat for them, they have, most of them have to have some sort of cover to hid from predators, that can be from the riparian vegetation over hanging streams and/or hiding in the among the rocks on the bottom so they need those prerequisites in order to be there. Diversity of habitats would give populations of non-migratory galaxiids more resilience so they have deep and fast areas, when you have braided channels for example, flows sufficient to maintain the braiding and seepage channels given them refuge in shallow water braids to have refuge from bigger predators including introduced trout and eels so yes, it's not just the presence of trout that places pressure on those fish but make no mistake trout are major pressure and implicated in the demise of non-migratory galaxiid populations and they're retreating to refuge areas.
- 5
- 10
- 1055
- 15 Q. In terms of the ability to implement your suggested table are you aware that there are rivers where there is sufficient data currently where you could calculate your proposed level of MALFs?
- A. There are some rivers in Otago where that can be done now where there are flow records in main stems particularly but I don't know enough about hydrological network of recording in Otago to know how extensively they could apply rules such as I've represented through Otago.
- 20
- Q. Would six years be a sufficient period of time to gather additional data for the areas where we may not have it currently?
- A. Certainly I think from what I understand there are priority areas already where the demands for water is high and the council is putting a lot of effort into so you have to triage the problem and put your effort into the most critical areas. I think that's what's going on. It may be in six years' time – I'm guessing here but it might be that some streams in Otago still don't have sufficient hydrological understanding to implement these rules
- 25
- 30 but I would hope that in six years' time they would be very close to implementing something like this in all of the major catchments or the main stems and some of the major tributaries that receive most abstraction pressure.

Q. In your opinion, do you think it would be helpful for the regional council to focus on investing in that recording to enable a better understanding of this over the next period of six years?

5 A. I hope they would do that. My understanding is that they are but you'd need to ask the council staff that.

COURT ADJOURNS: 10.58 AM

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COURT RESUMES: 11.32 AM**MR WELSH:**

I thought it might make some sense given the longer indication for cross-
 5 examination if Ms Irvine went first in this instance. I'm sorry to play around with
 your schedule because we've been doing well today. I just thought it might
 mean that the number of questions that I put are reduced are even further.

CROSS-EXAMINATION: MS IRVING

10 Q. Dr Hayes, I just would like to start by going back to some of the questions
 that my friend Mr Maw asked you, in particular, the manner in which you
 described the calculation of MALF and I understood your answer to be
 that you'd take the recorded flow data, look for the seven days of low flow
 and average them across the years of data available.

A. That's correct.

15 Q. So in Otago that is going to be a calculation of the observed 7-day MALF,
 isn't it?

A. That's correct.

Q. It isn't going to be a calculation of the naturalised 7-day MALF.

A. No, that wouldn't be.

20 Q. Can I take you please to paragraphs 24 to 27 of your evidence in chief?
 At those paragraphs you talk about the interaction of minimum flows and
 allocation limits.

A. Yes.

25 Q. Now those mechanisms are not the only levers we have to pull in relation
 to managing flows and waterways, are they?

A. Could you give me an example of what you're thinking of?

Q. Flows would be influenced by the pattern of use within the catchment
 we're looking at such as the types of water use where the water might be
 extracted from within the catchment? Do you agree with that?

30 A. All that's affecting the flow, yes, sure.

Q. Whether there are water sharing or rationing regimes in place would
 reflect things like flow variability as well, you'd agree?

A. Yes, that's correct.

Q. And you'd also agree that volume constraints on abstraction would have an influence on flow variability as well?

A. Yes.

5 Q. Can I take you please to paragraph 31 of your evidence? In this paragraph, you comment that ecological responses are not binary?

A. That's correct.

Q. And so no single value would result in minor adverse effects or not, would it? It could be a range of values.

A. It's fuzzy, yes.

10 Q. If we go to paragraph 37 of your evidence, you say that the level of flow retention or habitat retention will be responsive to the values that you're seeking to protect or manage. Is that a fair summary?

A. Can you state that again please?

15 Q. That the level of flow retention and so on would be responsive to the values that you're seeking to protect or manage.

THE COURT: JUDGE BORTHWICK

Q. Just pause a second. I just need to re-read the paragraph. If that's not a correct summary you should just say so.

CROSS-EXAMINATION CONTINUES: MS IRVING

20 A. It's paraphrasing what I'm saying. So just to clarify depending on the importance of an instream value that will effect the degree of protection that you would apply may affect your minimum flow limit. It may also affect your allocation limit.

25 Q. So somewhat of a contradiction isn't it that you're promoting a one size fits all threshold in relation to what effects may be minor or not?

A. Except you've got to count the sum value. That's the reason.

Q. We'll talk about that more.

A. Okay.

30 Q. I'd like to move on to – I suppose your discussion of the proposed thresholds and I think you agreed with my friend, Mr Maw that you have relied quite heavily on the proposed NES and guiding your analysis in

your evidence. There are other documents which we will come to but the NES was one of them.

A. That's correct.

5 Q. And I'd like to discuss that a bit more in detail. You have in front of you still a copy of the proposed national environmental standard the discussion document?

A. Yeah.

10 Q. If I could take you please to s 1.2 which is on page 2 of the document? And at the bottom of that page it talks about the preferred options for addressing the problems that had been identified and there's two bullet points at the bottom of the page. Do you see those?

A. Yes, I do.

15 Q. The preferred option is a combination of setting interim limits on alterations and flows and secondly providing a process for selecting the appropriate technical methods for evaluating ecological flow component of environmental flows.

A. That's correct.

20 Q. Do you understand that in Otago there have been some environmental limits set in the plan?

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A. Yes.

Q. And so you would agree that in Otago, any interim limits that would have been set under this EDS would only apply insofar as Otago didn't have its own?

25 **THE COURT: JUDGE BORTHWICK TO MS IRVING**

Q. Just pause there a second, so can you just – I want to take a note of the question before I have the answer so in Otago any interim limits –

A. Any interim limits wouldn't apply insofar as Otago had set its own.

Q. And where do you get that from here?

30 A. I'll come to that your Honour.

THE COURT: JUDGE BORTHWICK

Q. Probably is a planning question. Is this something that you know from this document I mean, you're a co-author so you may or not know.

5 A. My understanding from the document is that the limits that, the proposed limits in here would apply to those rivers in which limits had not already been sent, set by regional plan.

CROSS-EXAMINATION CONTINUES: MS IRVING

10 Q. Yes that's my understanding too. If we turn to page 3 of the document, the first paragraph and the final sentence, the authors make it clear don't they that the determination of appropriate limits remains a Regional Council decision, keeping in mind any national policy direction given through a national policy statement?

A. Yes, that's correct.

15 Q. I'd like to go please to section 2.3 of the document which is at page 9. If you refer to the fifth paragraph, it's also recorded that environmental flows and water levels have been set through resource consent processes, doesn't it?

A. Yes.

20 Q. If we turn over to page 10 please, section 2.4 which talks about the implementation of environmental flows. Paragraph 4 notes that: "The complexity of environmental flows and water levels should match the existing knowledge and physical characteristics of the resource" and in particular the final sentence comments that where there is the possibility of storage or capacity to take water at high flows that we need to apply a more complex regime to the setting of environmental flows and water levels, doesn't it?

25

A. That's correct.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Relevance?

30 A. I'll be carrying on with this line of questioning your Honour –

Q. I know, I want to know the relevance of this line of questioning.

1145

5 A. Yes, yes and what will become apparent as I continue is that the mechanism that was set out in this document is in part about the method for assessing how we set environmental flows and limits that the standards that Mr Hayes has relied on were not intended to be used as de facto limits. They were intended to be used as a signal to determine how complex your analysis needs to be when setting your environmental flows and limits.

10 Q. I'm not sure that I understand that but then how could I understand that unless I read the entire document? Then what weight would I place on this document anyway. It's only a discussion paper.

A. The document is but it is the source of the standards that or at least in part the source of standards that Mr Hayes through into his evidence so I think –

15 Q. That's understood but you need to get to your point more quickly and in a direct route and still don't know where you're going. So where are you going with this apart from undermining the threshold which is completely a legitimate line of cross-examination. I mean Mr Maw has already challenged that but on different grounds. Where are you going? That is to say that I really did not understand your relevant statement so what is the relevance?

20

A. Perhaps I will cut to the chase a little quicker through my questions and I hope that will become apparent.

Q. Yes.

CROSS-EXAMINATION CONTINUES: MS IRVING

25 Q. So if we go to paragraph 110 of your evidence, Dr Hayes, you say tables 1 and 2 which I take to be tables 1 and 2 in your evidence provide helpful guidance for setting flows.

A. Yes. Indeed.

30 Q. Am I correct that those tables 1 and 2 are tables from the draft guidelines or selection of methods to determine ecological flows?

A. Yes, they are.

Q. And that was the report that you assisted in the preparation of that's referred to in the proposed NES document.

A. That's correct. And I also took account of the other aspect of NES and that was the limits that they proposed for interim solutions for situations where there wasn't enough information yet to apply methods and so it was a stop gap measure until I do that.

5 Q. So if we can go please to appendix 4 of the proposed environmental standard. In particular page 54 where it sets out the recommendations for rivers.

A. Yes.

10 Q. And the recommendation was that it is proposed that the approach to selecting technical methods to determine the ecosystem and flow requirements of rivers is based initially on risk, on the deleterious effects on instream habitat cording to fish species present and natural mean stream flow and there we see table A41 which is reproduced in your evidence, isn't it?

15 A. Yes, that's correct.

Q. So is my understanding correct that this table essentially identifies the proportion of main flow and an analysis of the risk that an alternation and mean flow would present to the various categories of fish species in the table?

20 1150

A. Yes that's correct.

Q. And if we turn over the page to page 55 of the document, it's table A42 which you have also reproduced in your evidence?

A. That's correct.

25 Q. And again this discusses or identifies the relationship between hydrological alteration and risk for a range of, or for species?

A. Yes that's correct.

30 Q. The first paragraph on page 55 says that once you have, well basically paraphrasing but once you've determined the degree of hydrological alteration then you turn to table 3 which lists the technical methods that should be used to assess ecological flow requirements?

A. That's correct.

Q. So where we have a high degree of hydrological alteration and a high degree of significance in terms of instream values, this report indicates

that we should be undertaking a comprehensive analysis of the proposed environmental flows?

A. Yes, correct.

5 Q. I'd like to contextualise what is a high degree of hydrological alteration. Would you agree that where we are considering a catchment that contains dams and storage that that will often result in a high degree of hydrological alteration?

A. Yes.

10 Q. In catchments where there has historically been water abstraction and conveyance methods that that would also be a high level of hydrological alteration?

A. Yes.

Q. Do you have Mr Hickey's evidence available to you?

A. Sorry, I don't here, I've got it electronically.

15 **THE COURT: JUDGE BORTHWICK TO MS IRVING**

Q. Are you going to run through all of the situations which have a high degree of hydrological alteration or is your proposal just those two?

A. Well perhaps I'll put that to the witness your Honour.

20 Q. Well, and he may or may not be the correct witness because he's not a hydrologist but you can ask him.

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. Are there other things other than dams or abstraction and conveyance systems that would affect hydrological alteration?

25 A. I cant think of any at the moment but it's usually dams and major diversions.

THE COURT: JUDGE BORTHWICK

Q. Sorry the answer is, if you're damming, if you're diverting, that impacts the hydrological flow to a high degree?

A. It alters the flow, it can alter the flow to a large degree, yes so it's high.

30 Q. And what about if you're taking ground water resources from a connected which is from a aquafer connected to a surface water body -

A. Sure if they –

Q. – that can do it?

A. – if they were large abstractions.

5 Q. And what if you're actually taking just straight from the waterbody that could do it to from the surface water body?

A. Yes you'd have to have very large pumps to do that but yes.

Q. Are there any circumstances that you're aware or would you differ to a hydrologist on that?

A. I'd differ to a hydrologist, I can't think of any others.

10 **MS IRVING**

If we can get Mathew Hickey's evidence in chief please Madam Registrar. If you could turn to page 13 please.

1155

THE COURT: JUDGE BORTHWICK TO MS IRVING

15 Q. Just one moment. Page 13 what paragraph?

A. It is paragraph 37 and the table 2 which follows it.

20 Q. Okay. Just let me (inaudible 11:56:23). I'm not sure where you're going to go with this. Looking at the context paragraph 37 and the table that follows which is immediately preceding paragraph 36 I would've thought this witness has already put doubt on his perspective as to the statement which is contained at paragraph 36 in terms of the knowledge of surface water flows. So to be fair, you would need to ask him questions about that before you move on to 37 otherwise you're just simply going to be asking him to accept the underlying proposition that is that you have good
25 knowledge about surface water flows and/or connected ground water flows. This witness said that is not his understanding. This witness is not a hydrologist.

30 A. What I'm wanting to discuss with Dr Hayes, your Honour is that the data that is available within catchments identified by Mr Hickey at his table 2 would enable most if not all of the methods to be applied in relation to highly altered catchments with high values.

Q. Which methods?

A. In table A43 of the draft NES which we just have been looking at.

Q. So is your question assuming that Mr Hickey is correct and those records are valuable and assuming the records contain relevant data and facts which are pertinent to the matters listed in table 4.3 then you could apply the methods in table 4.3 from the NES. Is that your question?

5

A. Yes, and that is in fact what has been done.

1200

Q. Well I don't know whether that's been done or not, how would I know that?

A. Well I think it'll come out of the evidence that OWRUG is presenting your Honour.

10

Q. You mean in terms of it's got an application for resource consent?

A. Correct.

Q. Well look I read your evidence and I haven't got those applications before me do I?

15

A. Not currently no.

Q. No not currently. So anyway for three catchments and there are only three catchments, I don't know whether they are the FMU catchments or something smaller than the FMU catchments but for Manuherikia, Cardrona and Arrow, what's your question?

20

A. My point your Honour is that the draft NES standards, it was not as simple as simply putting in place interim limits.

Q. In the manner which has been proposed –

A. Correct.

Q. – well I think Mr Maw secured that through his own line of cross-examination.

25

A. Right well we'll move on shall we.

Q. Well it's over to you but I'm just not sure where this is going. I can't test the veracity, the merits based veracity of any application for a resource consent which is not before the Court can I?

30

A. No I understand that and I'm not asking you to do that.

Q. Okay.

A. Shall I move on?

Q. It's over to you, as I said I'm not sure, I am not sure how this line of cross-examination addresses the plan change which is the only thing in front of

us. I am sure how Mr Maw's line of cross-examination, I am sure I have an idea of where that goes but I am not sure where yours goes –

A. Okay.

5 Q. – except that you may be then using it as a foundation to say applications for resource consent have been filed on the basis of table 4.3 of the draft NES, is that correct, that's what you're going to be submitting, therefore we (inaudible 12:01:57) applications be decided.

A. No that's probably not what I'm going to be submitting.

Q. So where are you going with this?

10 A. The point is that the interim standards were not intended to apply to highly altered catchments –

Q. For what sorry?

A. For highly altered catchments where there was a lot of complexity.

15 Q. Why didn't you put that, that's a good question. So the simple thresholds, I'm not sure that they are simple but anyway the thresholds recommended by this witness are not meant to apply to highly altered catchments and I suppose you've first got to establish with this witness that Manuherikia, it seems you're interested in this, Manuherikia, Cardrona and Arrow are highly altered catchments, why are they highly altered catchments and is it not the case that the thresholds are not to apply their but the NES was
20 recommending a different assessment methodology.

A. Yes.

25 Q. And he might agree with all of that and then Mr Maw comes in and says: "That's only part of the equation, you should've been also looking at natural character and cultural values and all of those other values."

A. Yes and I think we agree on that, that the standards were really relating to one aspect.

Q. One aspect of many.

A. Environmental flows, yes.

30 Q. So we can, so if you want to pursue the proposition that the thresholds not applying, should not be applied in isolation perhaps to highly altered catchments and I think you can, you can certainly do that and that would be helpful but then to set it in, well we're doing this on a resource

consents, which are not before us, I think that's a step too far because the Court's not going to be drawn into your resource consent –

A. No.

Q. – it's not asked to make a decision about it. It's not even before us.

5 A. No and I'm not –

Q. It's actually not inviting you to take on the matter, it's not –

A. We've got the message you've got enough paperwork –

Q. – the applications are not before us.

A. – as it is.

10 Q. Pardon?

A. We've got the message you've got enough paperwork as it is.

Q. Yes, thousands and thousands of pages but anyway I do think that point is valid, a simple application of the thresholds when more is needed or, you know, or recommended in the draft, I think it's a perfectly valid point
15 to make.

A. Yes.

Q. Or point to pursue, you make it after you've pursued it.

CROSS-EXAMINATION CONTINUES: MS IRVING

A. So perhaps we'll discuss that point in the context of the Manuherikia
20 because I think you are familiar with that catchment aren't you?

Q. Yes, somewhat familiar.

A. So the Manuherikia possess some of the features that we've talked about in terms of hydrological alteration. We have false dam for example. Correct?

25 1205

A. Yes, highly complicated, complex hydrology.

Q. Yes. And in that context, you would agree that the proposed standards would've anticipated that the full suite of assessments identified in table 4.3 which is the bottom right-hand box would be undertaken to
30 assess the environmental flows and water levels in that catchment.

A. Probably not the full suite because some of them are awfully expensive. So you have to have some balance between the budget that you have and trying to improve the precision and accuracy of effects assessment.

Q. It's my understanding that in relation to Manuherikia catchment that Fish and Game have attempted to assist with some of this and I think you have done bioenergetics modelling, haven't you?

5 A. I haven't done bioenergetics modelling. I know there are some existing habitat modelling exercises we've done, flow related habitat or hydraulic habitat modelling and I've been involved in additional piece of work which is to examine the relationship between invertebrate drift and flow and that's an example of an ecological flow relationship which until recently we hadn't had at our disposal to apply these effects assessments.

10 **THE COURT: JUDGE BORTHWICK TO MS IRVING**

Q. Are you moving off to a different topic?

A. Yes.

15 Q. I was going to say don't you want to round that off? That line of questioning then to ask, therefore the simple thresholds apply. The NES doesn't anticipate the simple threshold table is the only solution applied to a highly complex or to a catchment with high degree of hydrological alteration but that there are greater range of methods to be considered so you want to close it out.

A. Should I just let the witness answer your question?

20 Q. I think you should so we just close it out.

A. I'm sure I can't put that any better.

MS IRVING TO THE WITNESS:

Q. So would you like to respond to that?

A. If you could summarise that again for me. I got lost.

25 **THE COURT: JUDGE BORTHWICK**

30 Q. In your evidence you have a table, which is reported at page 7 of the evidence in chief in supply the default minimum flow and hydrological limits and you've given us explanation as to why that you recommend them but the question is table A43 from the draft NES strongly suggests that when you're in a catchment which has a high degree of hydrological

alteration that there are more methods that are brought to bear than a simple table describing MALF. Would that be fair?

- 5 A. That's correct. Yes, those rules and the guidance in NES do two things. First of all, the limits in the NES provide an interim solution for streams where you don't have enough information to assess the effects to flow alteration. It's number 1. Number 2, there is guidance in the NES to ramp up the scale of effort in understanding the effects of alteration that greater the degree of hydrological alteration and the greater the importance of instream that is and the limits also those default – if you can call them
- 10 default limits or the standards sorry in the NES and the table that I've provided provide another thing and that is that they give you some full warning of what the likelihood is of effect size as the hydrological alteration increases so essentially the limits are saying if you proceed beyond these, there's an increase in chance of more than minor effects
- 15 or adverse effects. They give you some reference point then to say hey, we should be worried, we should now if you want to allocate water you need to get out an apply more complex methods and the likelihood is that the higher the degree of hydrological alteration is, the more likely you are to find more than minor effects.

20 1210

- Q. So the limits that you proposed would apply to complex hydrological – complex and altered waterbodies like Manuherikia, Arrow and the other one, Cardrona, they would still apply but I think you were saying as a marker for risk and where greater effort then is required on a consent by
- 25 consent basis to exam what are the risks and to have a better a) to have a better understanding of the hydrological flows and also the instream habitat but b) then to examine the risks more closely and it's at that point that the method in table A4 comes into play.

- A. Yes those increasingly complex methods would still being pulled out, yes.

30 Q. So okay no I understand that, thank you that's helpful.

CROSS-EXAMINATION CONTINUES: MS IRVING

- Q. Just before I move on, I just want to just pick up on the proposed interim limits in the draft NES, so I'm going to ask you please just to turn to firstly

page 26 of that document which just shows us at section 5.1.3 the proposed interim limits for rivers and streams and it points to there being a minimum flow and an allocation limit and then if we go over the page to page 27, we have two sets of limits which mimic in some ways, or you have mimicked in your table for rivers and streams with flows less than or equal to five cumecs, it's the proposed minimum flow of 90% of MALF as calculated by the Council and an allocation limit of whichever is the greater, 30% of MALF or the total allocation from the catchment on the date that the NES came into force. And then a similar set of provisions for rivers and streams greater than five cumecs and those are slightly different aren't they from the numbers presented in your table?

A. Yes they are.

Q. Right I'd like to –

THE COURT: JUDGE BORTHWICK TO MS IRVING

15 Q. Relevance, so you established that the numbers are different from the table versus the NES?

A. Yes.

Q. What's the relevance of that, where you going to go with that?

A. Well I'm just pointing out the reproduction in Dr Hayes evidence is not a complete reflection of what was included in the draft NES provisions.

20 Q. Accepting that it's so, what's the significance of that?

A. Well I think that it demonstrates that his standards are quite a lot more stringent.

25 Q. Right, that's where you need to go next, so I'll go there'll differ so what and the importance to you is that they're more stringent, you need to now follow that so that actually that's, you know you can put that to the witness, see what he has to say about that and then make some – and ask him why they should be so, if there's a reason or not and then make a submission about it but the fact that they are different and you don't close it out and again, in cross-examination it's problematic for the Court coming back to the point that you're making. There may be a very good reason why they're different. There may not so you need to again close out that line of questioning. Don't just leave it hanging there to be closed

30

out on a submission because it's unsatisfactory. So now we know they are different.

1215

CROSS-EXAMINATION CONTINUES: MS IRVING

5 Q. So Dr Hayes, can you explain why you have promoted a different threshold than supported in the NES?

A. Those limits that I proposed in that table are the blend of the NES draft standards and also advice from the presumptive standard of Richter et al 2012. So there's been increasing knowledge since the draft standards
10 were written and the presumptive standard of Richter's 2012 that takes count of some knowledge from some international sources which are more conservative. That's where that 20 per cent allocation came from.

Q. The presumptive standard that you refer to in the Richter article is equally
15 qualified, isn't it in that I believe they say that the presumptive standard shouldn't be applied where detailed scientific assessments –

MS BAKER-GALLOWAY

It needs to be put to witness what was actually said in this article.

THE COURT: JUDGE BORTHWICK

I think that's fair.

20

MS IRVING:

I've got the article.

THE COURT: JUDGE BORTHWICK

Have you got copies of it?

25

THE WITNESS

Morgan's got my copy so can he give it to me?

THE COURT: JUDGE BORTHWICK

I take it that you're familiar with this article?

THE WITNESS:

I am.

THE COURT: JUDGE BORTHWICK

That's good. I'm not but which page do you want to refer him to?

5 CROSS-EXAMINATION CONTINUES: MS IRVING

Q. I'm looking at the first page, particularly the abstract and the final sentence of that says "Our presumptive standard is intended for application only where detailed scientific assessments of environmental flow needs cannot be undertaken in the near term" doesn't it?

10 A. Yes, it does say that.

Q. So in many ways that takes us full circle, that we should be going back, I suppose to table A43 and undertaking a full analysis particularly where we have increasing complexity.

A. Yes, that's correct.

15 THE COURT: JUDGE BORTHWICK

Q. Is that subject to having passed – if you like your thresholds, your screening thresholds which – that might be wrong for me to relate them but your thresholds at page 7 if you're caught by one of those thresholds indicating an increased risk of adverse effect then you move to that table.

20 Is that what your evidence is?

A. Yes, and the same or you could use the draft environmental flow standard to do that as well. But the degree of hydraulic alteration guides you into what sort of effort you put into to assess the effects and then the next question is whatever is being done, whatever information you have got, what's the adequacy of those data and models to be able to then assess effects with some reasonable confidence.

25

1220

Q. So I'm going to put a proposition to you, Manuherikia the main water stem there, would that not pass the limits which are set out in your table?

30 A. It, the degree of hydrological alteration would exceed but we go into the, I think moderate to high level of hydrological alteration which would point

you in the direction of wanting to apply hydraulic habitat modelling methods, perhaps assess the effects on some ecological flow relationship that is being done.

5 Q. Another way of asking the question is if Manuherikia or Cardrona or Arrow did not or exceeded the limits which are set out in your table then you would expect, if they were to be brought down on this plan change you would simply expect an applicant for a resource consent to start to apply the methods that are set out in the NES table A.3.4.

A. Yes that's correct.

10 Q. So that's a consenting issue.

A. Yes.

Q. Understood how you meant to understanding your evidence.

A. Yes I agree.

CROSS-EXAMINATION CONTINUES: MS IRVING

15 Q. I'd like to move on if we may and to talk about particularly your evidence in relation to low flows in galaxiid habitats. So if we could go to table 1 at page 30 in your – so I understood that you believe that the longer term goal for galaxiid management should be the restoration of flows, is that correct?

20 A. Yes and ideally you would first want to know what sort of flows those species require.

Q. In your mind what is long-term?

A. Decades I guess and the reason I say that is because I'm aware of how long it takes to get the information that you need to manage these things well, fish populations.

25 Q. Would you agree that in the catchments where we have these threatened non-migratory galaxiids in Otago that their habitat is critical habitat?

A. Yes, because they're in refuges and they don't have very many other places to go, yes.

30 Q. And would you agree that we should be protecting that critical habitat?

A. Yes.

Q. And you would agree, I think you have agreed with questions from one of my friends earlier that trout are a significant risk to galaxiids if they were to get into that refuge habitat?

A. To Otago non-migratory galaxiids, yes.

5 Q. And so you would agree that we should be doing what we can to ensure that trout remain excluded from that critical habitat?

A. Yes, I agree.

10 Q. Now you have recommended in your evidence the thresholds for minimum flows and allocation limits. Have you undertaken any assessment of whether those levels would or could enable trout to gain access to the critical galaxiid habitat in Otago?

A. I have not.

1225

15 Q. Have you undertaken any investigation into how much habitat trout would need to be removed from as a result of the imposition of those flows?

A. No.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Just tell me what was that question again? Have you undertaken an assessment?

20 A. Of the habitat that trout would need to be removed from –

Q. Removed from?

A. Yes, if minimum flows and allocation limits suggested by Dr Hayes were applied.

25 Q. Is that on the assumption and those flow provide access to predate on the non-migratory galaxiids?

A. Yes.

Q. So that's where you have the full question and with that in mind answer is?

30 **THE WITNESS:**

No, I haven't done such an assessment.

THE COURT:

Okay, no, okay.

CROSS-EXAMINATION CONTINUES: MS IRVING

5 Q. So I presume you also haven't undertaken an investigation into the feasibility of that removal?

A. No, I haven't.

Q. Have you considered what monitoring would be required to determine if and when trout were encroaching on that critical habitat?

A. No, but it would be considerable.

10 Q. Any consideration as to who would undertake that monitoring?

A. I assume the responsibility would fall to DOC and maybe the regional council.

Q. And you're aware of whether they're intending on doing that work?

A. No, I'm not aware.

15 Q. So I put it to you that the minimum flows and allocation limits that you promote also present the risk of more than minor adverse effects on critical habitat of galaxiids.

A. Yes, if effort was not put into monitoring a change in the distribution of trout and effort was not put into installing and maintain barriers to prevent
20 the incursion into the critical areas that those galaxiids are living in.

Q. Does that issue point to the need again for us to undertake more detailed analysis of the appropriate minimum flows and allocation limits in various catchments?

A. Yah, it points to more effort needing to be spent on the ecology
25 understanding the fish themselves where they're having move around and how flow influences that.

MR WELSH:

30 Bear with me, your Honour. I've been crossing out as we've been going but I'll not to canvas old ground.

CROSS-EXAMINATION: MR WELSH

Q. Dr Hayes, you confirmed to my friend, Mr Maw that your table 3 essentially acts as a proxy for determining whether effects minor or greater or more than minor didn't you?

5 A. Yes, I did.

Q. And do you understand that your client is seeking to apply the application of that table through plan change 7 changes to all non-complying activities?

10 A. I'm not entirely sure on that. I knew that there was interest in applying the table in the plan.

Q. Yes, the relief sought or recommended by Mr Farrell is to insert your table with some amendments as Mr Maw pointed out into a policy for non-complying activities and as far as I can read it would apply to all non-complying activities. Does that accord with your advice from
15 Mr Farrell or are you unaware of that?

A. I'm a bit fuzzy on that so I'm not entirely clear.

1230

Q. And essentially that if an applicant didn't meet those thresholds then the way the policy would work as you understand it would be that they would
20 be unable to establish that they could pass through the first gateway of a non-complying activity, do you understand that?

A. Yes okay, I understand that.

Q. Yes and I think you were in court yesterday?

A. Yes, that's right.

25 Q. And so you may have heard Ms King, the processing officer for Otago Regional Council who confirmed for the Court that she didn't consider an application could pass the second gateway of the 104D test in terms of not being contrary to the objectives and policies of plan change 7, did you hear her say that?

30 A. I wasn't entirely paying attention, I was doing some other work at the back of the Court sorry and I'm not a policy planner.

Q. No, but essentially if that, if my recollection of Ms King's advice or evidence is correct, then an applicant would be faced with a stark choice,

either accept a six year term or accept your thresholds as a non-complying activity, would you accept that?

A. Yes I think that's my understanding.

5 Q. And because of the relief that your client has sought in that your table would apply to all non-complying activities or applications that takes into account or it doesn't take into account I should say, individuals characteristics of a particular stream or river would it, if it applies to all of them?

A. No that's correct, it is, there's variations streams like that, yes.

10 Q. And I think as you confirmed to my friend Ms Irving, it could in itself generate significant adverse effects or more than minor adverse effects I think she put to you, providing for this flow?

A. In the context, the non-migratory galaxiids yes.

15 Q. Yes, thank you in that context. And again there's simply no room for a case by case assessment in the context of the non-migratory galaxiids with the relief that your client has sought for a non-complying activity?

UNIDENTIFIED FEMALE SPEAKER:

That's definitely a planning question.

THE COURT: JUDGE BORTHWICK

20 Q. Yes I think that's right as, well you would have – yes, this witness has said he's not a policy planner which would be fair enough. And so it's not fair putting to him where Mr Farrell has got to in his documentation the application of the threshold test under section 104D, I understand exactly where you're going but you know, the really interesting questions so this

25 is actually, I'm not ignoring the cross-examination from Mr Maw and the other values because exactly that was really important. But is this table to be understood if you like as a screen, it's actually pointing to risk about which if, are being tripped up on those allocations, on those limits there is now a risk which then you need to be assessing in your resource

30 consent application and in accordance with, I think he said any standard, the table 4.3 so it's just a screening method which kicks you out and says you need to do something more because you've actually, at now at a

threshold of effect, that's as I understand might be the purpose of this thing, would that be right?

A. Yes.

5 Q. Broadly speaking, if you hit one of the limits that's now pointing to a risk that there will be more than minor adverse effects, correct?

A. Yes and it clearly shows that if you're not reaching those limits, if you're under those then there's the opportunity to allocate water.

Q. That's right but above that then you need to be undertaking quite a comprehensive review of information.

10 A. That's correct.

Q. Yes in accordance with, amongst other things I guess table A4.3 of the draft NES discussion document.

A. Yes.

15 Q. So that's how I understand how it works, whether it sorts of been put into a policy or rule that way I think is questionable and certainly something for Mr Farrell –

MR WELSH:

Well that's, I'll follow that up with Mr Farrell, yes Ma'am.

THE COURT: JUDGE BORTHWICK

20 - for all of the reasons that your intimating.

1235

THE COURT: JUDGE BORTHWICK TO MR WELSH

25 A. Yes but my read of the policy is it acts beyond a screening threshold, it directs the decision maker that they will have before them an effect or an application that will generate more than minor effects if you don't meet that which is kind of beyond screening. It's more of a binary decision.

30 Q. I absolutely agree with you so then the real questions are – which is what I was putting to Ms Irving. What is the purpose of this threshold? How does this witness see the threshold? As a screening device or as a bell if you hit it something much more needs to be done and which I think the

evidence will be Manuherikia does it on its resource consent application or is it something else?

A. Yes and I think the witness has said he's fuzzy on the application of this so I'm not going to pursue that any further.

5 Q. But I think it's valid to pursue what is the point in recommending it and then valid to pursue with Mr Farrell did he understand that correctly? Is that how it's actually been picked up in his draft?

A. Yes.

10 Q. Because I think there are enough now on the record to show that there is a tension there.

A. Yes, very much. Maybe I will pick that up at conclusion. I will see what notes I've got left and then come back, Ma'am.

CROSS-EXAMINATION CONTINUES: MR WELSH

15 Q. Is it your understanding that your table would only apply in respect of applications subject to plan change 7?

A. You mean?

Q. If it were accepted by the court it would only apply to non-complying applications that are subject to the plan change 7 provisions.

20 A. If you're asking do I see limits like that being applied beyond six years like into the future and we see some value in that.

Q. That wasn't quite my question because we're not dealing with the new regional plan. We're dealing with plan change 7. You understand that?

A. Yes, so right.

25 Q. And that your recommendation for table 3 has been picked up by Mr Farrell for insertion into a policy provision in plan change 7.

A. Okay.

Q. So you'd accept that the table will only have application to non-complying activities under plan change 7.

A. Okay then. That's my understanding.

30 Q. So you could have the situation where an upstream permit holder who is subject to plan change 7 wishes to comply with your threshold table and ensure in so doing ensure that the minimum and residual flows are met. Right?

A. Yes.

Q. But there could be a new down stream taker of water from the same stream who is not subject or not a deemed permit holder, who is not subject to plan change 7 in the context of their take application who could then take that water from the stream without any reference to your table.

5

A. Yes.

Q. Now, for some of these deemed permits, they're quite historic and some would date back to the 1860s. is that your understanding?

A. Yes.

10

Q. I think one of my clients, the Beaumont dates back to 1868 and it doesn't have or it hasn't operated with your thresholds for minimum and residual flow so would you accept that applying those would represent – I suppose it's the very purpose of your table a material hydrological change downstream of the abstraction point?

15

A. It could well do. Yes.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Sorry, lost thread. Are you saying applying those to persons who are not applicants for either a new take or replacement take including deemed permit or where are you going? Is this like a review condition or something now?

20

A. No, my previous question just related to the fact that the table or those limits would only apply to non-complying deemed permit holders and that someone downstream could take water from the same waterbody without having to meet those thresholds at all. Because they're outside plan change 7.

25

Q. Yes, if you're an existing take and you're not applying for a renewal, absolutely.

1240

A. Yes and so, sorry, I didn't foreshadow my next, the next question I had moved on. It was just a standalone question, the previous one. So now I'm –

30

Q. What was the purpose of it?

A. – just asking if you apply those limits, that would represent a material change to the hydrology down –

Q. How?

A. – stream of the abstraction –

5 Q. Yes, how?

A. – by meeting it –

10 Q. If you apply them to an applicant to renew the water, for a new water take or renewal of a permit, regardless of what ilk that is, if you apply that depends of how you apply, whether it says a screening method which is what this witness's evidence is or as some – or to apply it in terms of somehow requiring that to be the flow in the river, (inaudible 12:10:45).

15 A. Well I think an applicant would have no choice but to comply with them, with those thresholds because the, well to get through the gateway you would have to do that to be a non-complying activity, you would have to, I think the evidence has been Mr de Pelsemaeker couldn't think of an example and Ms King was more definitive saying there is no examples of getting through the second gateway and this policy if it was applied would –

20 Q. I think that's a policy question, again, because my sense of it is this witness's evidence about this table is as a, he's proposed this table as a threshold beyond which there is a, at risk of an adverse effect to the in stream ecology and you're nodding and that's correct?

THE WITNESS:

Yes, that is.

25 **THE COURT: JUDGE BORTHWICK TO MR WELSH**

30 Q. That then warrants an applicant for resource consent to go through quite a rigorous method under the draft NES or some other method to demonstrate notwithstanding the risk, we've managed the risk, how do we manage the risk, I don't know that that would be for the applicant to demonstrate.

A. I wasn't putting –

Q. It's not being picked up that way necessarily by Mr Farrell but we can understand why Mr Farrell has not picked it up that way when we come to him.

5 A. Sorry for the confusion, I wasn't actually putting what you and I were discussing –

Q. So what are you putting?

A. – as a question to this witness.

10 Q. So the question for the witness is if everybody complies with those minimum flows and the allocation limits, that would be a dramatic change to the environment?

A. Yes that's where I was heading and then that would represent an opportunity for trout to move, migrate upstream and I think the, to the habitat of the galaxiids and I think Mr Maw had covered that.

Q. And Ms Irving has also covered that.

15 A. And then Ms Irving covered that so I was going to skip over that and then I was going to get to barriers.

Q. Barriers, okay.

CROSS-EXAMINATION CONTINUES: MR WELSH

20 Q. At paragraph 106 Dr Hayes, you advocate for limiting the invasion and reinvasion by trout by physical or electric barriers, don't you?

A. Yes I do.

Q. And is the use of your words limiting and reinvasion some sort of condolment that trout may make their way upstream into the habitat of the galaxiids?

25 A. Yes.

Q. Now are you aware or has Mr Farrell explained to you that there is no rule proposed by your client requiring a barrier to be provided under plan change 7?

A. I answered a question before that I was uncertain about that so, yeah.

30 Q. And did you or Mr Farrell or anyone at Fish and Game investigate the consent requirements for installing instream barriers in the beds of rivers or streams?

A. I've been involved in no such discussion.

Q. Okay, I'll save that for Mr Farrell. So Mr Farrell hasn't explained to you at least that one would need a discretionary resource consent to install such a barrier as you propose?

5 A. No he hasn't explained, I've been in no discussion like that with Mr Farrell or anybody.

Q. And in terms of the importance that you place upon barriers, are you acting on the assumption that a barrier would be practicable and effective in all instances in all streams?

10 A. I recognise that the introduction, installation and maintenance of barriers to prevent fish getting past that point is a formidable task –

Q. It's a what sorry task?

A. It's a formidable.

Q. Formidable, yes.

15 A. It's like, maybe that's overstating it, it's a challenging task so it's not to be underestimated.

Q. Yes and it's a formidable cost?

A. It would be expensive, yes.

1245

20 Q. It would generate its own set of adverse effects potentially too, wouldn't it? There would be effects on natural character.

A. Yes, likely.

Q. Yes and there would be effects on for example the upstream non-migratory population of galaxiids in so far as no further biological diversity could move upstream to support those galaxiids, could it?

25 A. Yeah, except that if you've got what we call source populations so if you've protected a population of non-migratory galaxiids upstream then they will spill over to get over the barrier or get around the barrier, they will go downstream as well. Some will get out.

30 Q. Yes but none would go up, would they? That would not an effective barrier.

A. No, that's true.

Q. Who would have the costs of maintaining these barriers? Who would that fall upon?

A. I don't know.

Q. And no doubt you'd agree that maintenances are very important because if there were a hole in the barrier as a result of flood flows or something that would present an opportunity for trout to invade the upstream habitat, wouldn't it?

5 A. Yes, that's correct.

Q. And have you turned your mind to some of the practical difficulties where these barriers might be in remote locations where inspections during the middle of winter may not be practicable?

A. I agree entirely. That's why I said it's a challenging task.

10 Q. You would no doubt agree that there would be some locations that a barrier is simply not practicable.

A. Especially where you have a very highly variable flows and a stream that in which the banks were moving around so it's hard to anchor a barrier. If you had very hard banks like bedrock you've got more chance for doing that.

15

Q. I think you answered to a question from Ms Irving that you see the obligation to remove trout from a catchment or a stream falling upon the department or the regional council. Is that right recollection?

A. That's my first stab at that question. I haven't given sufficient thought to that and the statutory requirements of the various agencies as to who would be compelled to be involved.

20

Q. You haven't given any examples in your evidence where such trout removal in a catchment has been successful in the short or the long-term, have you?

25 A. No, I haven't done that.

RE-EXAMINATION: MS BAKER-GALLOWAY – NIL

QUESTIONS FROM THE COURT – NIL

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

Okay, so that's us.

MS BAKER-GALLOWAY:

- 5 Yes, that's us. That's all we had scheduled. I don't think even if we could fit in another witness I don't think my friends are prepared which is fair enough so.

THE COURT: JUDGE BORTHWICK

- Okay, so that's us until 9.30 next Tuesday. As I've indicated we need to release another minute about giving people more time for cross-examination in terms
 10 of any supplementary evidence yet to come including certain witnesses or parties we've named. Thing that we're still troubled by is this creature called priorities. What sort of creature could this be? How is one to regard it? A valid resource consent condition or a deemed condition which might put it into a different category of being altogether and then of course, anyway we've talked
 15 about that yesterday. One of the things that we do need to pin down though is who apart from OWRUG and the Director has an interest in bringing forward the priorities and we thought Mr de Pelsemaeker should know that.

1250

MR MAW:

- 20 Mr de Pelsemaeker has been looking at that, I'm not sure what the outcome of his analysis is but –

THE COURT: JUDGE BORTHWICK TO MR MAW

- Q. What's a reasonable timeframe in terms of asking that to come back with a response to that because it think we would then want to say look, people
 25 who are interested in this topic we're going to be asking for legal submissions, some of them will know that some people have lawyers but not all of them will but you know. So what's a reasonable timeframe?
- A. I can just go and quickly ask if that would...by Tuesday morning sounds.
- Q. Yes I assume that it's going to be relatively easy to insofar as you have a
 30 schedule which already picks up on where the submissions are going but

does the schedule, you know, the point is the submission and further submission does that go spit out if you like the priority?

5 A. I suspect that's the unknown, I mean I was thinking how we might go about that task, we'll do a word search for a priority amongst the submissions and just see where priority or priorities appears and that is a task that can be done reasonably swiftly I would have thought but then there may be some further nuance in relation to how parties have referred to priorities.

Q. Yes, don't use that word but use something else.

10 A. Yes in terms of existing flow regime, for example.

Q. Okay, well no that's fine. If you need more time you are to indicate that, I've indicated that I do wish to hear further from the Director General and I've also indicated to Mr Page, you know, that we do need to get a proper understanding of the status of those priorities now and what is proposed going into the future. I haven't articulated legal issues though and that's something that some thought has to be given to that, is that something that you can confer on with at least counsel who are represented who have an interest in priorities?

15 A. Yes I think that's something that we could do and it's certainly exercising my mind in terms of the, what I think is the legal question underpinning this in terms of are the current priorities to be seen as valid conditions of a resource consent.

Q. That's where I think it starts, you know, the paper trail.

20 A. I'll confer with my friends and see whether we can drill down and identify what the legal issues are and then there's at least a framework within which each of us will address those issues.

25 Q. That would be really helpful rather than everybody addressing something slightly different on the same topic. Mr Page?

MR PAGE:

30 Can I tease it out just a little bit further just so I understand your thinking so that my friend and I can have sensible conversations, not that we don't but if the starting point of the issue seems to be section 4.13.2 and so it seems to me that by statutes they are conditions of deemed permits, as I understood the

exchange with you the other day, seemed to me that the question was focussed on can they nevertheless be transferred to RMA permits notwithstanding that they are lawfully part of deemed permits.

THE COURT: JUDGE BORTHWICK TO MR PAGE

5 Q. I think that's the second part of the question, the first part of the question is starting in that section, sorry I'm just trying to dial it up, 4.13 subsection 2.

A. And the part of that subsection that deals priorities is the reference to section 11 of the Water and Soil Conservation Act which is the part of that
10 Act that carries over the priorities into the Water and Soil Conservation regime from the old mining privilege regime.

1255

Q. So the starting point, I think you're right but I mean that's for you to work
15 out with your friends but it seems to be 4.13.2. So every deemed permit resulting from a mining privilege shall be deemed to include, to two deems as a conditions of a permit. The provisions of the water and conservation act so that's your starting point. The fact that you've got a deemed permit which is also then further deeming is conditions of a permit those provisions. Is your starting point that it is a valid resource management
20 condition made for the purposes of the statute or made for an entirely different purpose or different statute, from there I would've thought the question seems to be in accordance with general usage. Are these civil rights or interests? Now, the priorities give rise to civil rights or interests notwithstanding that they're concluded on a deemed permit as a deemed
25 condition. That is how you are to regard them or are they to be properly regarded as a condition on a resource consent will be the deemed permit which is therefore a valid resource management reason, I don't know. But when you get to 1 October, what then happens? Do they expire in total or are they able to be picked up somehow by a rule in the plan? I
30 say rule in the plan because it's s 108AA either because there is a (inaudible 12:56:37) plan or because they are dealing with something to do with that these effects on the environment so can they be lawfully picked up? In other words, by a mechanism which is addressing

something which is validly being addressed in the Resource Management Act. If they are what is being picked up is it what I think your client will say, well it's regulating rights as between extractors so the impact of abstraction on one and other or is it because it's also regulating an effect on the environment as a consequence of that abstraction. I don't know.

5

A. I think it seems to be the difficulty lies in the absence of a further deeming from the deemed permits into the new permits. Is there lawful authority to carry them over?

Q. I don't know. You see I don't know whether it's lawful authority to carry it over or whether there could simply be a rule. So ignore the history. Assume the history was never there anyway. This is how abstractors have been taking water. There is this history. Therefore there needs to be a rule in a plan so you could start again and say, actually we'd be looking at this as a mechanism.

10

15 A. And then the test arises to whether there is a resource management purpose that underlies that.

Q. Yes, that's right and as between abstractors there may be as for an effect on the environment there may be and a combination of both there may be. I would not have thought it satisfactory for a rule in the plan that says, yes, just bring forward priorities. What on earth does that mean and how would that be implemented by a regional council when an application comes in? So this is really testing. The fact that you say the words does not make it so. Has to be capable of being implemented somehow and I don't think I'm struggling from the evidence that I've seen to understand how that would be so.

20

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THE COURT: COMMISSIONER EDMONDS

Legal framework that an example ought to illustrate the point might be helpful and it may not be the one's that have already been supplied to us. There may be better examples.

30

1300

THE COURT: JUDGE BORTHWICK

Yes, in terms of deemed permits. That was really helpful because I've never seen one of those things. But the fact that everybody in the Manuherikia can or will is important but what about the other catchments, the other 139? How

5 is this thing going to be implemented and suppose the point that Mr Welsh was making was – it might actually be exactly the point but what if there is existing – no that won't happen. It's okay. We're either on or off as of 1 October. I understand the evidence and again I've signalled that you've got a witness to come but I don't think it's Ms Dicey necessarily, are there resource consents

10 which are former deemed permits which have been rolled over into a water permit like in relation to which have been replaced by a water permit which no longer had these things attaching to them, the answer from the Regional Council was "yes" as far as the witness King was concerned yesterday in every instance when they've been replaced, they don't have those conditions

15 attached so on earth do we do with the space if it's not important to farmers now?

THE COURT: JUDGE BORTHWICK TO MR WELSH

A. Well I can explain the answer to that –

Q. Well I need the evidence on that. So this is complex, this is potentially

20 complex, potentially the answer of the Court would be no party has put up a case for how this is to be included so I'm going to ignore it.

A. Well, I mean the Court actually has a recently live example of exactly the situation with the Lindis permit renewals decision which I'm not subject to challenged, happily, because priorities and how they worked in the

25 catchment was a live issue there because the bed race was, Commissioner Edmonds will remember it had the highest propriety was the last part of the catchment and so what was proposed by the applicant in that case was a water sharing regime that required each permit holder to be part of and a methodology to be established to ensure that the

30 minimum flows could be met by all parties. And the reason for that is because the applicants anticipated that the priority regime would disappear on the 1st of October 2021 and there simply had to be an alternative regime to manage access to the water as between permit

holders to replace that and that's the consistent approach that the Regional Council has taken, is that you need to replace one method with another.

5 Q. Well if you are right, Ms King wasn't aware of it and because I put that question to her and she just seemed, she actually answered in the negative "no ones looking for the priorities and consents aren't being granted with priorities".

10 A. No Ms King was absolutely right, with respect but she wasn't asked and didn't explain was given that nobody is seeking to re-establish the priority regime or carrying them over, what has the Regional Council been doing to address that using alternative methods.

15 Q. Now if you knew that that was an important follow on question from the Court's question, you should've asked it. Again to round out what the evidence is so that the Court's not left with one party saying: "This is the regime" without actually the Regional Council asking it.

A. Well with respect I misunderstood the breadth of where your questions were going, I had thought that you were looking for a confined point which is that are the priorities being carried over and the witness answered correctly and I didn't see any need to intervene.

20 Q. Well actually that would be incorrect because they are being carried over but in a different way is what your submission is and through a different mechanism, correct?

25 A. Well I submit not quite because priorities are by their nature first come, first serve. Water sharing agreements are the antithesis of that and so the purposes and this is in some ways similar but the method is an entirely the inverse of the priority scheme and so I still think Ms King's answer to the question was fair – I mean this is something that particularly Ms McKeague, Ms Dicey and Mr Hickey are dealing with everyday and –

30 Q. But I think and I have thought I'd been at pains to say this all the way along, you need to be putting your case to the Regional Council and any other relevant witness so that they can understand what your framework is and what your thinking is and it may, and I think ultimately you'll say well that goes to a consenting sort of outcome. It hasn't been tested with these witnesses and so that, you know, that's what's disturbed me about

not knowing where your theory of a case is and putting the theory to the witnesses in a way which is complete so that they can respond to that because they might very well of said “yeah, you’re right” and so something else is required.

5 1305

A. Well in a funny way the question of priorities is very much a side wind for OWRUG because OWRUG’s central case is that we should be moving out of the deemed permit regime and into a replacement substantive RMA consents, that’s our point number one. The relevance of the priorities is only that if we are not to do it and the Court is minded to preserve the status quo, what is the status quo and how would you do that absent the priority regime carrying over and that’s how it becomes important.

10

Q. And Mr de Pelsemaeker and you know might challenge, I don’t think you have challenged as he’s given a response to that and the Court needs to think about that in terms of the priorities if you like being reflected or echoed back in terms of the flow meter data.

15

A. Yes but your first point for Council to assist you with this, can you and –

Q. Well yes, first point is what are these things under section 4.13.2, are they presently a valid resource management condition or a condition posed for a different purpose altogether at the starting point but regardless of that can they be something replacing them be brought forward as a mechanism and probably a rule in this plan or not. And of course your case is not because you know you’ve got the trace and the flow meter data.

20

25 A. Anyway, I thought it was useful to raise that.

MR WELSH:

And Ma'am because I don’t address you or schedule to address you for another two months and so I have some time to give it some more thought, for the Trustpower mining privileges they’re rather different as well because they are by statute not subject to any loss of priority rather than through the conditions that may appear on the individual permits and that’s through the Dunedin City Corporation and Powering Act which is still –

30

THE COURT: JUDGE BORTHWICK

Q. That's front of mind, not. I didn't –

A. No but it's still on the statute books.

Q. So you can't lose your priority, is that what you're saying?

5 A. Well yes. Well interestingly the section goes on and says that the consent – the privileges are granted in perpetuity as well so, I've got some thinking to do but I just thought I should raise that rather than say it in two months and you say: "Well Mr Welsh why didn't you say something about that at the time?" so.

10 Q. No you're right to flag it, the situation's different again for your client, yes. Is it just your client or anything hydrogenator?

A. No it's a specific act that was for the, basically the collection of the various mining privileges for the establishment of the Waipori scheme and it protected those for hydroelectric purposes.

15 Q. Okay. Anyway, getting back to that direction, I do think you need to confer with at least those parties that are legally represented with an interest in those priorities, you know, you'll come back to me separately I suspect in relation to Trustpower because it's got its own mechanism under a different act evidentially but you know those matters, those primary sector
20 deemed permits and parties with an interest in that, if they have counsel appointed to confer over the legal issues that arise and how that might be framed as issues for the Court to determine. When would you like to do that, you can't really answer the question until you know who's actually got an interest in this thing.

25 **MR MAW:**

Yes and I'm conscious that my friend has to open us a case on Tuesday so I think you're on the schedule for Tuesday and it may not be before Tuesday.

THE COURT: JUDGE BORTHWICK

It's okay we might direct further submissions from Mr Page.

30

MR MAW:

That's perhaps a sensible way forward, I would've thought by Friday next week but there's a reporting date for some other things, the 26th, that could be a date we could work towards.

5 THE COURT: JUDGE BORTHWICK

Okay, 26th, fair enough. Very good, well we'll leave it at that I think. Ms Baker-Galloway, nothing you'd like to raise, no all good so we'll leave it at that and again, back here at 9.30 on Tuesday with your case initially and we'll divert into other planners.

10 COURT ADJOURNS: 1.10 PM

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COURT RESUMES ON TUESDAY 23 MARCH 2021 AT 9.34 AM**THE COURT: JUDGE BORTHWICK**

Good morning, I'll do a quick check through to see if there's anything arising over the weekend. I understand Ms Ford is here. Who are you here for? I've
5 forgotten, sorry.

MS FORD:

Your Honour and Commissioners, here for Horticulture New Zealand.

THE COURT: JUDGE BORTHWICK

And you're cross-examining this morning?

10 **MS FORD:**

No, your Honour, we're here as a presence for court with Mr McIndoe being a joint witness for us as well.

THE COURT: JUDGE BORTHWICK

That's fine, very good. I understand that Mr McIndoe hasn't arrived because of
15 restrictions at the airport, that's correct?

MS FORD:

Yes.

THE COURT: JUDGE BORTHWICK

So we're proposing to take his evidence by way of AVL but won't do so until
20 after lunch when we've ensured that we've checked the connection with Mr McIndoe and that he is able to beam into us at that point. That means we're going to be rising at 12 o'clock, I've been told to rise at 12 o'clock for those arrangements to be made. Is 1 o'clock okay for a restart or do you need slightly longer?

25 **MS FORD:**

One o'clock should be fine.

THE COURT: JUDGE BORTHWICK

Any difficulties with that? Okay, thank you. Now, lots of evidence came through over the weekend and Ms Williams saw the evidence from your witness, your witness is I think attached either to his evidence with the last page of his
5 evidence some further changes? Now, I don't know whether there are changes to his original evidence, I mean, I read his evidence but I don't recollect whether there are changes to his original evidence or just changes in fact to Mr de Pelsemaeker's evidence which otherwise he accepts. I guess the point being is actually more very important that any tracked changes be to the entire
10 document otherwise we're going to lose the thread and I just don't want to – re-read and re-read.

MS WILLIAMS:

Thank you your Honour, look, as Mr Brass says, I think in his evidence, that was actually prepared whilst he was away at the Marlborough mediation so he
15 didn't have access to the full suite of things. What perhaps I could ask him to prepare – because I believe it was to the 14 March version, so if I ask Mr Brass to bring that along and attach that as an appendix when he gives his evidence, would that assist the Court? Like, a full version of the plan changed with his changes.

20 THE COURT: JUDGE BORTHWICK

Yes and this time can he do it in portrait, not in landscape? That would be quite helpful. Okay, so keep in mind that those changes are changes to – changes he recommends to Mr de Pelsemaeker's 14th of March version and if he could bring them along, that would be excellent, thank you, that was the only thing
25 arising?

MS WILLIAMS:

I'll arrange for that.

THE COURT: JUDGE BORTHWICK

Mr Page, your witness, Ms Dicey, so she's also produced a brief of evidence
30 and she's produced an attachment, the attachment refers to a schedule but

there's no text for the schedule, my guess is – or I might be wrong, does she want to bring across from her original brief of evidence and I guess across from the original submissions, changes to the schedule because if she does, they need to be in this plan change not in some other plan change unless it's her
5 evidence that they ought to be in some other plan change – some other plan rather. So what's the story there because I've only got a page about a schedule, I haven't got any of the other changes that I know that she was recommending?

MR PAGE:

Well, my recollection is that the controlled activity pathway that Ms Dicey's
10 evidence addresses doesn't deal with the schedule because the schedule is only relevant insofar as the controlled activity process deals with sinking lid on paper allocation.

THE COURT: JUDGE BORTHWICK

Okay so if there's no controlled activity rule, there is no schedule?

15 **MR PAGE:**

Correct.

THE COURT: JUDGE BORTHWICK

So why would she be amending this sometime to the schedule unless there's some other stuff in the schedule that is relevant? That's what I've got confused
20 because I see that the title page to the schedule is there and she amends it as a minor amendment.

MR PAGE:

Yes, I don't know the answer to that off the top of my head but I can take instructions about that and report but I do know from the evidence that she's
25 effectively said: "well if there's going to be a controlled activity pathway, let it be Mr Rensor's version of it." And so then the question of interrogating the take data to identify take use doesn't arise.

THE COURT: JUDGE BORTHWICK

Okay so I understand that the changes which are now proposed by Ms Dicey are changes to this PC7 and major new policy which will result in a fully discretionary activity rule. That being the case, I think what you've just told me
5 is if there's no controlled activity rule, there is no need for a schedule?

MR PAGE:

Sorry, in relation to the controlled activity rule, that's correct, but the discretionary activity rule Ms Dicey has drafted does refer to the schedule so it continues to be relevant because under the discretionary activity rule, it's
10 anticipated that paper allocation, unused allocation would be removed.

THE COURT: JUDGE BORTHWICK

Okay, so there is a schedule then?

MR PAGE:

Yes.

15 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Okay cool, where is it? That was the only point of the question is that it should be there so – yes.

0940

A. Well I, the thinking was that the schedule would be resolved through the
20 caucusing process and so we didn't see value in Ms Dicey offering evidence about what the schedule might contain at this point –

Q. Yes I don't disagree –

A. – where that's going to be the subject of caucusing.

Q. – with you about that but I guess the important thing for the court is that it
25 have contained, you know complete set of provisions now tracking through with the different versions of the evidence.

A. Yes.

Q. So in the same way, you know, as I said to Ms Williams, actually your
30 witness has to reproduce the version of the document together with his further recommendations that he supports. It's not for the Court to be

constantly working backwards and forwards across the evidence to go where are we at with this, so even though I agree, I understand that it is a matter for expert conferencing, the content of the schedule itself it's important for us that we're all on the same page as of Tuesday morning.

5 A. Yes.

Q. Understanding the page may or may not be rewritten as a consequence of expert conferencing so the direction for both the Director General and your client will be to file by tomorrow morning 9 am a complete set of provisions which represent the witnesses' recommendations as of at least today, understood?

10

A. Yes well that should be fairly straight forward –

Q. It should be really straight forward, thank you. All right, on things that need to be done, I think we're awaiting from ORC an update to the common bundle to bring into the common bundle I think changes to the operative plan which might pertain to plan change 6 or plan change 6 AA or something –

15

MR MAW:

6A, yes.

THE COURT: JUDGE BORTHWICK TO MR MAW

20 Q. Those changes aren't in our documents and need to be so I suspect it's not many pages at all but and probably the most convenient thing is to direct by 9 am tomorrow morning that we have copies of those pages, with everybody's agreement so we can just replacement the text that we've got in our common bundle.

25 A. We do have copies of those available so we'll provide those to the register during the course of the day and provide an updated electronic bundle which has those replacement pages in it.

Q. Good.

A. And there was another matter outstanding in relation to the question you asked for Mr de Pelsemaeker to clarify which submitters had raised the issue of priorities, now that analysis has been completed, we're in the court's hands as to how you would like that information put forward, either

30

through a further supplementary brief of evidence containing the analysis or I could attach it to a memorandum of counsel but it's more in the nature of an assessment from a planner which tends towards a supplementary statement.

5 Q. Well you could put it through supplementary statement and then if no party takes any objection to the same or wishes to examine, well in saying that maybe I ought to be taking by consent. I think from our point of view knowing who has made the submission then knowing who is legally represented and who the Court will call upon to ask questions or direct
10 make submissions is really important. Now, over the weekend, over Monday I was meant to have issued directions just confirming the matters that we're talking about and confirming a couple of other matters in terms of providing people the opportunity to cross-examine will get to do so, I think Trustpower on the Trustpower case, Fish and Game, Trustpower's
15 further evidence, Fish and Game's further evidence and there was one other party plus anybody else who's going to be calling further evidence in response to Regional Council and I apologise for that, didn't get to it yesterday, was way (inaudible 09:44:17) matters but we'll get to it.

A. Very good.

20 Q. All right so your, if you could give those updated papers to Ms Harlow and she can update our folders and when do you think your brief will be in?

A. Tomorrow morning, so –

Q. Tomorrow morning, yes 9 o'clock, that's fine and then we'll circulate and ask if anyone wishes to ask any questions about that. All right, that was
25 it from me overnight, anything from anyone else, no all right so I think we're going to be turning to you Mr Page for your submissions.

0945

MR PAGE:

May it please the Court. I have provided Madam Registrar with four hardcopies
30 of my opening and I've also given the Court hardcopies of four of the cases that I mentioned in my submissions. I haven't provided a hardcopy of all of them at this – but can do. My impression is that the Court has more than enough paperwork and if I'm not actually going to take you to the decision then the utility

of having a hardcopy to hand immediately is perhaps diminished but we can deal with that as we come.

5 So, if I may start at my first paragraph then, Otago water resources users group is an unincorporated body of water permit holders in Otago. Its members extend from the Upper Clutha through the Alexandra Basin and include the Cardrona, Arrow, Bannockburn, Pisa Area, Teviot, Manuherikia and Taieri Catchments. OWRUG's members include all of the irrigation companies in the Manuherikia Catchment, the four Manuherikia valley irrigation companies are
10 also the owners of the Falls Dam Company.

It has been said many times by the Minister that deemed permit holders have had 30 years to prepare themselves for the expiry of their permits in October 2021. The Court may be invited to infer that the permit holders are unprepared
15 for the change that awaits them. OWRUG is here to tell the Court that its members have spent much of the last decade preparing for this day and they are ready to go. It is disappointing that having got to this point, that they are ready to commit to replacing their deemed permits with RMA permits that the Otago Regional Council may be heard to say that it isn't ready. It too has had
20 30 years to prepare for this process.

These submissions do not traverse ground already covered by counsel for the other parties where there is little disagreement. These submissions focus on the key matters for OWRUG and respond to some matters raised in
25 submissions by other counsel.

Section 67(3) of the Act requires the change to the regional plan water must give effect to the NPS FM 2020. OWRUG accepts that for PC7 that obligation extends only insofar as it is within the scope of the plan change to do so.
30

That being said, OWRUG's position is that Plan Change 7 has the effect of delaying the implementation of the NPS FM 2020 in several critical respects, and that is contrary to the express requirement of section 67(3)(a) of the Act. It is submitted that the Court does not have jurisdiction to confirm Plan Change 7

if it accepts that Plan Change 7 has the effect of delaying or putting off something that should be done to give effect to the NPS FM 2020 during the 6 year + period that PC7 intends to operate.

5 The Environment Court’s description of the NPS FM 2020 in *Minister of Conservation et al v Northland Regional Council* [2021] NZEnvC 001 is adopted. At paragraphs [23]-[32] the Environment Court tracks the way in which the NPS FM 2020 picks up and advances the concept of Te Mana o Te Wai from the NPS FM 2014.

10

The Environment Court recognised the primacy given to the health and wellbeing of water bodies and freshwater ecosystems in the NPS FM 2020. The Court observed, (and OWRUG adopts) the finding that: “we consider that the Regional Council cannot derogate from the mandatory requirements of superior documents and the primacy of the health and wellbeing of water bodies and freshwater ecosystems.”

15

OWRUG recognises that other parties consider that the operative Regional Plan Water has deficiencies. OWRUG does not agree with much of the criticism, but what matters is whether the solution to the perceived problem derogates from Te Mana o Te Wai in a way that is impermissible under section 67(3) of the Act.

20

The case for the ORC is that a temporary holding pattern is necessary to enable a replacement land and water regional plan (LWRP) to give effect to the NPS FM 2020, and thereafter for resource consent decisions to be made under that Plan. That is a superficially attractive proposition. But what is overlooked is what may be lost in the meantime.

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It is submitted that the Regional Council’s case fails to give an adequate attention to firstly:

(a) CI 4.1(1): Every Local Authority must give effect to the NPSFM 2020 “as soon as reasonably practicable”. Plan making is but one function under the NPSFM 2020. Deciding resource consents is another function.

5

(b) Section 104(1)(b) of the Act, which requires a consent authority to have regard to the NPS FM 2020. The “have regard to” requirement is described by Mr de Pelsemaeker as insufficient because it is non-directive. That proposition appears to ignore the fact that “have regard to” is the same formula that will apply in relation to the LWRP plan, whenever that might be available. It is submitted that the alleged deficiency is overcome by the position with respect to the relative weight to be given to the statutory documents based on their relative ages. This is a position that is already being advanced by the ORC with respect to resource consents being decided now in light of the NPS FM 2020 and PC7.

10

15

(c) The Act specifically provides for review powers to impose limits on resource use under section 128(1)(b) and for that to be done at an integrated way pursuant to section 128(2A). Parliament has made specific provision for that method to be deployed to address the need to comply with resource use limits, it is not for the ORC to say it is too expensive or contentious to be bothered with.

20

(d) That despite the complaints of some parties, a number of resource consents have been granted that have had direct regard to the NPSFM 2014 and found that long term consents in the circumstances of those cases, give effect to the NPS FM in the specific factual context of those cases. The most prominent of those cases is the Environment Court’s decisions to replace the deemed permits in the Lindis Catchment.

25

30

(e) For so long as the deemed permits are not replaced by RMA permits that impose minimum flows and residual flows in the various catchments, there remains a risk to indigenous biodiversity in the

waterways that will not be effectively managed. Ngai Tahu may say that it accepts that risk and Mr Ellison was explicit about that when asked questions by the Court, but the Court is required to apply section 6(c) of the Act and Tier 1 of Te Mana o te Wai dispassionately, putting the needs of indigenous fauna first, despite Ngai Tahu's views.

(f) The 'roll over' process promoted by the Council also risks missing opportunities for steps to be taken to phase out over-allocation in contravention of the obligation to begin implementing the NPSFM2020 as soon as reasonably practicable.

All the policy making in the world will not save the non-migratory galaxiids of Otago if the permits held to take water are not designed to protect them. It is the Otago Regional Council's position, or so it seems, that doing nothing to that end in Otago for at least six years is an acceptable outcome. OWRUG does not agree with that proposition, because they say that we can and must do better.

OWRUGs position is succinctly summarised in the evidence of Mr M J Hickey at paragraphs [61] to [83]. Mr Hickey says at paragraph [74] and I won't read that to the Court.

THE COURT: JUDGE BORTHWICK

If we could re-read it, thank you.

MR PAGE'S OPENING SUBMISSION CONTINUES

Well then what is the content of the obligation to give effect to the NPSFM 2020?

The obligation to recognise the primacy of Te Mana o Te Wai and to give effect to it is a substantive obligation in relation to all decisions affecting fresh water and my submission is including this plan change.

The importance of this is to understand that the Court must be satisfied that resource consents granted pursuant to Plan Change 7 will themselves give effect to the NPS FM 2020 in the short term, just as the plan change is intended to enable the NPS FM 2020 to be achieved in the long term.

5 0955

This is where OWRUG departs from the Otago Regional Council. OWRUGs case is that the first obligation in giving effect to the NPS FM 2020 is to allocate flows to the needs of the river under the first priority of Te Mana o Te Wai. That is achieved (at least in part) by establishing minimum and residual flows that apply to each take of water.

OWRUG is perfectly aware that giving effect to the NPS FM 2020 for each application in each waterway is a painstaking, complex, and expensive process. It is ill-suited to short term permits. The best solution is to address the NPS FM 2020 in the context of full information where all matters can be addressed comprehensively.

The consequence of OWRUGs position is that there is no simple and easy consenting pathway to deal with the short term between now and the notification of the LWRP in December 2023. It may well be that Professor Skelton was alive to that difficulty when he recommended to the Minister a legislative change to deal with the term of deemed permits rather than heap upon an over-stretched regional council yet another resource consent process when it is least capable of dealing with it.

Much of the Part 3 process in the NPS FM 2020 anticipates a methodical building process. Firstly, identification of Te Mana o te Waitlisted, secondly, building Long Term Visions for FMUs, identifying the values for FMUs, setting environmental outcomes, identifying attribute baselines, setting attribute targets and setting, limits, rules and action plans to achieve environmental outcomes.

All of that seems a logical sequence, but it is not a complete understanding of the NPS' requirements. Some things are urgent and do not wait for the NOF process to be followed.

- 5 It is submitted that the NPS FM 2020 requires that the ORC moves swiftly to address some considerations as soon as reasonably practicable; firstly under clause 3.11, part 3 processes are non-exhaustive, and do not limit the general obligation to give effect to the objectives and policies of the NPS. That means "giving effect to" is not subservient to the NOF process- the obligation exists
10 now and applies to resource consent decisions.

THE COURT: JUDGE BORTHWICK

- Just pause there, I'm going to want to have that provision in front of me otherwise I won't be following what you're saying and I'd like to follow what you're saying and I do wish to track through also when you're making
15 submissions in relation to specific provisions so that I can understand what you're saying.

MR PAGE:

- Yes, and so in the next half dozen paragraphs, I address specific provisions of the NPS so we'll move to them one by one. So in my paragraph 21(b) the next
20 clause I refer to is 3.17(3)(a) and you'll find that on common bundle page 685. My submission is that All resource consents for taking water must identify flows and levels at which taking is no-longer allowed. That obligation exists now. This is of course exactly what OWRUG's members have been doing but exactly what PC7 does not do. This clause calls into question the fundamental premise of
25 PC7 (hold the line-do nothing).
1000

THE COURT: JUDGE BORTHWICK TO MR PAGE

- Q. Can you just assist me in identifying where in the NPS or maybe it's another instrument, planning instrument that the obligation exists now as
30 directed?

A. Well if you can take you to the language of clause 3.17.(3), what you will see is that the obligation is to identify flows and levels at which under paragraph, sub paragraph (a) taking is no longer allowed.

Q. Okay, just let me re-read that.

5 A. And so what I want the Court of observe is the difference in the language between that clause 3 and the language in clause 3.17(1) which speaks specifically of environmental flows and environmental flows are things which are set under clause 3.16.

10 Q. Just pause there a second. So what's the language shift or difference in language?

A. Well if we look at, maybe the easiest thing to do is to start with clause 3.16 and observe the process for setting environmental flows and levels for each FMU and what we can see from 3.16(2), they must achieve environmental outcomes for the values relating to the FMU and all the relevant long-term visions. So the (inaudible 10:02:42) of environmental levels is part of that NOF process which builds on the visions for each FMU and is intended to implement or achieve environmental outcomes which again is part of that NOF setting process. So we know that that hasn't occurred yet, that process and we know that that can't occur yet

20 so, but when we look at – go down to clause 3.17(1) picks up the same language as clause 3.16 in order to meet environmental flows and levels, every Regional Council – and it sets out four matters that are obligatory. So it's apparent that clause 3.17(1) builds on 3.16 but when you look at subclause 3, it doesn't use the environmental flows terminology from

25 clause 3.16 and 3.17(1). It stands alone in my submission, it simply says where a Regional Council – sorry: "Where a regional plan or any resource consents allows the taking, damming, diversion or discharge of water the plan or resource consent must identify the flows and levels which allow the taking, damming or diversion will be restricted and no longer allowed or a discharge will be require." The discharge, in my submission relates

30 to damming consents. So what my proposition is is that if you compare the language of clause 3.17(3) with 3.17.(1), clause 3.17.(3) has an interim effect to require the setting of flows and levels at which taking

must stop despite the fact that nonrental flows and levels haven't been yet set under clause 3.16.

Q. Just pause there a second, I'm making a note of that.

1005

5 THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. Where it refers to: "imposing conditions on resource consents", would you suggest that might also be part of an interim possibility in addition to your three or would you not read it that way in relation to these provisions?

A. No Commissioner, my submission is that clause 3.17(1) deals with a
 10 situation where environmental flows and levels have been set under
 clause 3.16 whereas clause 3.17(3) is not contingent upon environmental
 flows and limits having being set under clause 3.16 and so it's effectively
 an interim position that consents that are granted to take water pending
 flows and limits being set under clause 3.16 are nevertheless required to
 15 have flows and levels identified at which taking must stop.

THE COURT: JUDGE BORTHWICK

With that in mind I wish to read 3.17 again.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. So your point is that in reading (d) you need to read from the top and take
 20 a (inaudible: 10:07:22) of the ands is that –

A. Well clause 3.17(1) starts with the words: "in order to meet environmental
 flows and level." And then (a) to (d) follow from that proposition. Clause
 3.17(3) does not begin with that proposition, it simply requires a resource
 consent that allows taking amongst other things to identify flows and
 25 levels of which taking must stop.

THE COURT: JUDGE BORTHWICK

Carry on. I don't want you to carry onto subparagraph (c), I want you to finish
 and then we'll think about what you're saying in the context of what's actually
 written, so sorry I shouldn't have interrupted.

MR PAGE:

No, no. So the relevance of all of this is if it is the case that 3.17(3) applies to consents granted under plan change 7, then it is inconsistent with the idea that a simple rollover process is available to the Court and therefore permissible
5 under section 67(3).

THE COURT: JUDGE BORTHWICK

So your submission stands or falls if you like on interpreting flows and levels as being something other than environment flows and levels dealt with in paragraph or clause rather 3.17(1) and 3.16. So flows and levels are not
10 environmental flows and levels in clauses 3.16 and 3.17(1) correct?

MR PAGE:

That's correct because of the difference in the language and the fact that clause 3.17 starts with the words: "in order to meet environmental flows and levels and clause 3.17(3) does not.

15 1010

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So is it your case that in every case now the regional council obligation under this NPS and in particular clause 3.17(3) the obligation now is on the council to be imposing flows and levels. Correct? What are flows and
20 levels? What is the nature of the obligation?

A. OWRUG's view is that flows and levels are referable to minimum flows and residual flows which control the limits under which water can be taken.

Q. Is it also OWRUG's view that flows and levels incorporates or includes
25 the allocation blocks or allocation limits as may be provided in schedule 2A of the water plan or as may be provided by any policy or rule of the water plan?

A. No, my submission is flows and levels are referable to the state of the
30 waterbody that the resource consent relates to rather than allocation blocks.

Q. Is it OWRUG's view or your submission that minimum flows can be imposed without also the imposition of allocation blocks or limits as may be provided for under schedule 2A or the water plan?

5 A. Yes, clause 3.17(3) does not require allocation limits to be imposed to comply with it. It relates to limits to be set on a resource consent.

Q. So that I can ensure that I've heard you correctly, it is OWRUG's view that minimum flows and I think to be fair, you said residual flows, may be imposed under clause 3.17(3) but not allocation blocks or limits as may be provided for by the water plan either under schedule 2A or any other policy or rule, correct?

10 A. My submission is limited to what s 3.17(3) is requiring. My submission is that is requiring flows or levels in relation to the waterbody from which water is taken to be set. It is not requiring allocation blocks to be set for each waterbody as part of that exercise. Allocation blocks maybe under other provisions required but are not required by this clause of the NPS.

15 Q. Is it OWRUG's case that allocation blocks or limits as may be provided for by the water plan are required as a policy or rule in plan change 7?

A. No, allocation blocks are required under the operative plan but not under plan change 7.

20 Q. So is it OWRUG's case that all that is required under plan change 7 is the imposition of minimum flows or residual flows? And I think from Ms Dicey's evidence cessation conditions as well.

25 A. Yes, well you see Ms Dicey's evidence promotes a discretionary pathway in which is a whole lot of complex matters that would need to be addressed.

Q. Understood but I'm trying to tease out what your submission is or what your client's instructions are.

1015

30 A. Well my submission is that the NPS, through clause 3.17.3 requires flows and levels to be set on resource consents and that identified a point at which taking is no longer allowed. Now that's, in my submission, not a reference to allocation blocks because allocation blocks in OWRUG's view is about the distribution of water between interests rather than dealing with the circumstances of the waterbody itself.

Q. Okay, so it is – do I understand correctly that in your submission or in OWRUG’s view that allocation blocks or limits are not correlated with minimum flows, residual flows or cessation conditions to, for addressing any effect in the environment that there only, firstly, what’s your view on that?

5

A. My submission is that allocation blocks are there to ensure that – well, the purpose of them is to identify the amount of water that can be taken from a waterbody but they function to serve tier 2 and tier 3 functions under the hierarchy in Te Mana o Te Wai. My submission is that the levels and flows referred to in clause 3.17.(3) are there to serve a tier 1 function. So although allocation blocks are set at the time that minimum flows for catchments are set they are there to serve difference purposes, so your Honour is correct that they are correlated because the level at which a minimum flow is set effects the reliability of the water that can be taken and therefore the efficiency with which it can be used which goes on to influence what the allocation block might be. So in answer to your question are they correlated, yes they are. Do they serve the same purpose, in my submission no they don’t.

10

15

Q. All right. Subparagraph C.

20 **MR PAGE’S SUBMISSION CONTINUES:**

I now come to clause 3.12. Cl 3.12(1)(c): In order to achieve target attribute states, a Regional Council may impose conditions on resource consents. That includes the power to impose section 128 review conditions to bring activities into compliance with target attribute states. And so it anticipates that consents might be granted now, and modified later to achieve attribute target states.

25

THE COURT: JUDGE BORTHWICK TO MR PAGE

Just let us read this provision. And so is the purpose of paragraph 21(c) in your submission on clause 3.12.1.c of the NPS simply that this is the imposition of a condition to achieve a target attribute state may take place prior to the identification of those attribute states in accordance with the process set out by the NPS?

30

1020

MR PAGE:

My submission is that there are two possibilities, either once a target attribute state has been set, a condition may directly control the exercise of a permit to achieve the target attribute state or a condition may be imposed enabling the
 5 consents to be reviewed once a target attribute state has been set to then enable that attribute state to be achieved.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. I notice there's a similar provision in (1), (2) and (3) relating to different appendices, you've selected (1)(c) rather than (2)(c) or (3)(c).

10 A. I've seized on (c) as the example but it would apply equally to the other party.

Q. I just wondered why you're doing the identified one but that's your example.

A. Yes.

15 Q. But there are other examples that your argument would correctly apply to?

A. Yes, that's correct, Commissioner.

MR PAGE:

Coming now to (d) and I draw attention to clause 3.19 requiring the Regional
 20 Council to assess trends and attribute states and if a deteriorating trend is more likely than not and the Court will remember the evidence from Ngai Tahu earlier in the hearing that in their view that's likely to be the case, then clause 3.20 applies.

THE COURT: JUDGE BORTHWICK

25 Okay, I just want to read that for myself. And you'll address whether or not clause 3.20 the NPS can apply now ahead of the general processes described in the NPS in relation to the attribute states or independent of the processes described in NPS for attribute states?

MR PAGE:

Well, that's determined by the definitions of degraded and degrading and so I accept that in both cases they refer to target attribute states.

THE COURT: JUDGE BORTHWICK

- 5 Yes and what do we know about target attribute states and the work completed by the Regional Council under this NPS?

MR PAGE:

- 10 Well, at the present time, the Council hasn't set target attribute states but it is measuring water quality by reference to the attribute states in appendix 2A and that was the effect of Dr Snelder's evidence. So the submission is that if the Council is detecting through its monitoring network that attributes are deteriorating then it is not sufficient simply to do nothing for six years, the Council ought to be putting in place measures to halt that degrading trend.

THE COURT: JUDGE BORTHWICK

- 15 Is it your submission that clause 3.20 of the NPS applies now ahead of the Regional Council setting target attribute states?

MR PAGE:

- 20 Well, I can't go as far as to say that that's a mandatory obligation because the clause 3.21 refers to must but OWRUG's view is that clause 4.1 of the NPS requires implementation of the NPS as soon as reasonably practicable and so the submission is that it's contrary to the concept of Te Mana o te Wai to observe a degradation or a degraded water body and then decides to do nothing about it when there are reasonable practicable options to halt or reverse that trend.

- 25 1030

THE COURT: JUDGE BORTHWICK TO MR PAGE

- Q. Just so I check my understanding of your submission in relation to clause 3.20, I understood you to say and you correct me if I'm wrong that 3.20 is not a mandatory obligation where the regional council has not set target

attribute states but that there is an obligation under clause 4.11 to give effect to the national policy statement as soon as reasonably practicable and that includes halting the degradation or degrading trend in waterbody. So it's a general submission Sentencing Act to what is required now in relation to Te Mana o te wai. Have I understood that correctly?

5

A. Yes, where there are reasonably practicable options available to the regional council to do that.

Q. How does your client define degraded or degrading?

10

A. Well, I don't have a definition for you but for example if a waterway is being run dry on account of take of water where that is not a natural characteristic of the waterbody then it's hard to imagine on any basis that that isn't a degraded waterbody.

Q. That is one example. Does your client define degraded or degrading in relation to appendix 2A of the NPS and in particular the attributes required limits on resource use both in terms of the attribute band and description and numeric attribute state?

15

A. Where a waterbody is below any national bottom line in appendix 2A, my submission that is by its nature degraded because my understanding is that it isn't permissible to set a target attribute state that's below the national bottom line.

20

Q. And where the waterbody is above the national bottom line is that degraded or degrading and are you calling evidence on that point?

A. No, I'm not.

Q. No and what is your submission on that point where the waterbody is above a national bottom line may that waterbody also be degrading or degraded relative to the attribute band and numeric attribute state?

25

A. The answer to that is perhaps not as helpful as it might be because all I can say about that is it might be but it depends on each particular waterbody.

30

Q. Is it your submission that for the purpose of ascertaining whether something is degraded or degrading the attribute bands and numeric attribute states as set out in appendix 2A are relevant in any resource consent application?

A. Yes.

Q. Is it also your submission that the consent authority would not need to reach for the commonly accepted meaning of those terms when considering what is proposed by OWRUG in its relief but instead is to reach for the NPS and in particular appendix 2A?

5 1035

A. Well, where a target attribute state hasn't been set, in my submission, it's competent for the Regional Council in analysing water data in relation to a water body to reach a finding of fact as to whether there is a degrading trend and it may use the attribute bands in appendix 2A to assist in coming to a view about that.

10

Q. Are also the attributes in appendix 2B of the NPS relevant when the Council considers whether as a matter of fact the waterbody is degraded or degrading? Page 50 of the NPS.

A. Thank you. Yes.

15 Q. Answer yes, 2B and 2A are relevant?

A. Yes.

Q. To a regional council when considering whether a waterbody is degraded or degrading? All right, paragraph (f) I think.

MR PAGE:

20 Clause 3.24 requires certain provisions in relation to the loss of river extent and values to be incorporated into its regional plans. No timeframe is given, but the obligation is as "soon as reasonably practicable.". Plainly it does not wait for the NOF process.

25 So really, this is the essence of OWRUG's case. It may seem ironic that farmers should be opposing PC7 on this basis. But the Court needs to remember that farmers have devoted significant time, energy and investment over the last decade in preparing themselves for replacement permit applications. They have invested heavily in hydrological and ecological research to understand the
30 nature and behaviour of the various catchments and put together integrated applications that are responsive to the values that have been identified. They hold the knowledge necessary for setting minimum and residual flows to protect habitat and freshwater ecosystems.

1040

Permit holders cannot, and do not, pretend to speak for Manawhenua values, only they can do that for themselves. Tangata Whenua engagement obligations properly sit with the Regional Council representing the Crown as a Treaty partner. That takes time. Time that threatened species may not have. Despite that, applications have sought to identify known values, such as mahika kai and ensure that mahika kai species are provided for to the extent possible so that when wider issues (such as fish passage through the Clutha main stem) are resolved there will be good habitat available for mahika kai species to enjoy.

Farmers recognise that others may consider that different minimum and residual flows or allocation limits might be warranted compared to those which farmers might advance in their Applications. The answer to that is twofold. Flow limit setting is a contestable process and each party and interest group must bring their values, research, and evidence to the subject. Farmers recognise that they may not get what they want and secondly limit setting is an iterative process. No regional plan is set in stone and reviews of plan limits are liable to occur at any time. Farmers know that section 128(1)(b) of the Act enables regional councils to review conditions of permits to impose new limits.

So what OWRUG is saying to the court is that setting flow limits and levels through resource consent process pursuant to the applications that have been prepared is not perfect. It is not a complete expression of Te Mana o te wai but it is better than doing nothing and the NOF process will take its course and may require new limits to be imposed in due course and what OWRUG says is that's a better expression of what the NPS anticipates than a period of hiatus in which no gain is made to the quality or quantity of a new river in the meantime.

I want to turn now to the s 24A recommendation. The mandatory considerations for the Court under section 66 and 67 do not include a recommendation by the Minister. The fact that a recommendation is on foot does not change the obligation of the Otago Regional Council to test its response to the Ministers recommendation under section 32 of the Act, or for the Environment Court to

do the same on this direct referral. It is submitted that this is both deliberate and necessary.

5 The Minister is not constrained as to the scope of his recommendation powers nor the matters that he has to consider in making a recommendation. Therefore the role of the Council and the Environment Court in determining submissions on this plan change is an important quality control mechanism to ensure that a Minister's recommendation is not implemented without it having been carefully evaluated to ensure it serves the purpose of the Act.

10

This reveals something of a hole in the Otago Regional Council's evidence. The Minister's recommendation to provide for an interim planning regime to effectively put the consents process on hold (although, ironically, requiring even more resource consent applications to be made) has not been critically
15 evaluated by the Otago Regional Council in its section 32 report supporting the notification for Plan Change 7. The Council's approach seems genuinely to be 'well if that is what the Minister recommends, then that is what we must do'. There is a certain political expediency to that, but it is not what the law requires.

20 The Minister in referring Plan Change 7 to the Environment Court for decision has set out his reasons for referral which address why the plan change is a proposal of national significance as required by section 142(3).

The Environment Court is obliged to 'have regard' to the Minister's reasons.
25 The Court is further required to step into the shoes of the local authority and Regional Council. Section 66(1)(c) of the Act requires Regional Council to complete plan changes in accordance with ministerial direction under section 25A, but not a recommendation under section 24A. Paragraph 30 is a repetition, Ma'am, that can be struck out.

30 1045

Paragraph 31; the Regional Council's obligation in responding to the Minister's recommendation are also unchanged compared with any step it might take of its own initiative. Specifically, the ORC (and now the Court) must still satisfy

itself as to the matters set out in section 66, 67, and 32(1)(a). A recommendation offers no free pass around the Act's requirements.

5 If the Court were to find that Plan Change 7 is consistent with the Minister's recommendation, but inconsistent with the requirements of the Act, then Plan Change 7 cannot be approved.

10 PC7 as notified, and the evidence of both the ORC and the Ministry for the Environment, proposes two levels of activity status under PC7: controlled activity and non-complying activity.

Various planning witnesses suggest amendments to the policy and rule framework but the basic structure remains the same.

15 In the Environment Court's decision of *Cabra Rural Developments Ltd v Auckland Council*, the Court at [50] considered that the status of an activity and by relation to the risk of adverse effects. It is submitted, and I wish those words to be added, and that's a submission rather than a summary of the Court's finding, it is submitted that where the risk can be managed by standards in a
20 Plan the appropriate activity status is permitted not controlled.

The Council proposes to manage the risk of adverse effects which it is currently unable to quantify, through the rules and the 6-year permit term.

25 The Council intends to incentivise short term permits through the controlled activity status. However, the actual transaction costs perversely incentivise applications through the non-complying rule which has the added attraction of at least the potential for a longer term. OWRUG submits that controlled activity status is not the most appropriate status for the "easy route". The reason for
30 this is not so much the certainty of outcome, but rather the question of where the cost of the consent process should properly lie.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Are you going to tease out that last sentence?

A. Yes. The Regional Council is entitled to and does charge for the processing of controlled activity resource consent applications so there is a cost to an applicant both in terms of obtaining expert advice in preparing the application but also in the Council's cost in receiving it and processing and issuing a new consent. The counterfactual from OWRUG's submission is permitted activity status in which deemed permit holders are enabled to continue to exercise – effectively exercise their permits under a permitted activity rule. So there is no transaction cost to permit holders under that regime.

5
10 Q. Just have to read that – this paragraph with that in mind. Sorry, what's the (inaudible: 10:49:29) of that last sentence? I understand what you're saying and there is evidence on PC7 incentivising applications through the non-complying route.

A. Yes.

15 Q. So I understand that. Your submission, PC7 – no, OWRUG submits controlled activity status is not the most appropriate status for the easy route, so the most appropriate status for the easy route, are you saying that's permitted because then there would be no transaction costs or in other words, costs associated with ORC processing and administering the resource consent, is that your submission –

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A. Yes, that's –

Q. – or is are you saying –

A. – the submission. So this –

25 Q. So that's it?

A. – referable back to my cross-examination of Mr de Pelsemaeker on his paragraph 44 where he sets out the issues which have given rise to the need for plan change 7 in the Council's view and what is apparent from his description of the issues is that they are all issues that pertain to the Regional Council's performance or the imposition of new national direction. They've got nothing to do with whether permit holders have caused a situation themselves which gives rise for the need to plan change 7. So bluntly, permit holders say: "Well if this is your fault ORC,

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why are we paying?” and that’s the reason for promoting a permitted activity rule.

MR PAGE:

Now, that’s OWRUG’s position, the Court’s will have observed that Ms Dicey
 5 has accepted that if there is to be a easy consenting pathway then Mr Ensor’s
 version or some approximation of it is an acceptable route in her planning
 opinion and Ms Gilgroy gave evidence about what she thought the likely
 processing cost of a six year controlled activity consent might be. Now permit
 holders aren’t going to die on the ditch over a few thousand dollars but the cost
 10 to permit holders to date for consent hearings has been many tens of thousands
 of dollars and sometimes many hundreds of thousands of dollars and that’s
 what sticks in their (inaudible 10:52:08).

THE COURT: JUDGE BORTHWICK

Q. Just to be clear, consent holders have been billed by the Regional Council
 15 for it’s costs in the vicinity of tens if not hundreds of thousands of dollars
 or consent holders have incurred tens if not hundreds of thousands of
 dollars in relation to consents –

A. Both.

Q. – both questions pertain to obtaining consent under, after PC7 was
 20 notified.

A. Both.

Q. Both, okay so the, okay, both.

MR PAGE:

So if we effectively have as Mr Ensor suggests a rubber stamp process where
 25 you get the controlled activity consent back again then the argument about it
 becomes uneconomic, I’m spending more of my clients money standing here
 talking to you about it than it would cost them to go through that process. So
 on an economically rational basis, that’s an acceptable outcome but certainly
 as it was notified and even as it currently sits in Mr de Pelsemaeker’s evidence,
 30 it’s likely to be very expensive and my clients say: “Well that’s not fair, it’s not
 our fault, if we can exercise permitted activity status then so much the better.”

Having said that, there is one upside from the controlled activity status which is that you get to exercise a consent under section 124 at the end of it's term whereas the permitted activity status doesn't have an equivalent. So there are some benefits.

5 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. For the record, is your client still seeking a permitted activity status under the water plan or not?

A. That relief is still alive Ma'am.

Q. All right, so I'll need to make this really clear and I haven't done so already, forgive me, I need to know what is the relief your client is pursuing. I understood that your client was still pursuing a reject and I do understand the reasons for that. I had thought your client had let go or was no longer pursuing the relief under the water plan, that is the operative water plan now plainly that is not correct, if it is still seeking all resource consents for deemed permits and replacement permits are permitted. You need to be clear where you're going with your case.

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A. No, the relief in relation to the operative plan has been withdrawn.

Q. Okay. So what relief are you seeking because I haven't picked up and obviously I haven't read it in enough detail if it's there so Ms Dicey will forgive me. I hadn't picked up that your client is also a permitted activity rule under plan change 7.

A. To be fair, Ms Dicey's evidence is her response to what has been filed particularly Mr de Pelsemaeker's supplementary evidence and she presents what she says is an appropriate solution.

Q. Which is a discretionary activity rule.

A. And coupled with the controlled.

Q. Yes.

A. Well, in fact it's three. It's the controlled activity pathway akin to Mr Ensor's version, a discretionary pathway for permits up to the year 2041 and non-complying be on year 2041.

Q. I can see that in her evidence. In your written submissions now, as opposed to what you're telling the Court viva voce are you saying that your client seeks a permitted activity rule under plan change 7?

5 A. My client's preference is for a permitted activity rule for the transaction cost reason but the controlled activity rule proposed by Ms Dicey is an acceptable solution.

Q. For the purposes of a determination by this court, is it your expectation or requirement that the Court determine whether or not there should be a permitted activity rule?

10 A. As matters currently stand, Ma'am, the answer to that is yes.

Q. Thank you. Now, is there any other matter that the Court must determine in relation to relief being sought by your client but which is not relief reflected in Ms Dicey's evidence?

A. No.

15 Q. Alright. Is it your submission that the permitted activity rule is a rule that applies to deemed permits, the replacement of deemed permits, the replacement of any existing water permit? They are the first two categories.

20 A. The permitted activity rule would apply to all of the permits that the controlled activity rule does so the scope doesn't change, simply their status.

25 Q. So whatever the scope of the controlled activity rule – I think in Mr Ensor's evidence possibly now in Ms Dicey's evidence – whatever that scope of that rule, those activities are to be permitted is your submission. That is the relief sought by your client.

A. Yes.

Q. And the reason for that is one pertaining to cost and the investment up to date made by applicant's for resource consent and seeking replacement by consents under both plan change 7 together with the water plan.

30 A. Yes.

Q. It would make that submission seeking a permitted activity rule – I think you mentioned this – acknowledging that those persons who are permitted no longer have advantage of s 124 of the

Resource Management Act in terms of holding their priority valid to any other user which may come along seeking water permits.

A. It is acknowledged that s 124 doesn't apply to permitted activities.

5 Q. The primary relief for OWRUG is that all water takes are permitted in this region. All deemed permits and replacements permits are permitted in this region. That's its relief.

A. Yes, within the bounds of plan change 7 proceeding forward that is the one book end of the scope of relief for OWRUG.

10 Q. Okay, it's not a negotiation. I just need to know what your relief is. That's all. Alright. Understood.

A. Yes.

Q. That takes us to 11 o'clock so did you finish that paragraph 38 or are you just about to start 38?

15 A. I've just paraphrased 38 in my discussion with the Court so 39 would be where we begin I think.

COURT ADJOURNS: 11.02 AM

COURT RESUMES: 11.25 AM**THE COURT: JUDGE BORTHWICK**

We have some more questions before we move off to a different topic or paragraph.

5 THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. To be clear in terms of the permitted activity discussion that you were having with the Judge, what you were suggesting was the original proposition I think in Ms Dicey's brief of evidence, her permitted activity rule, is that what it is you're suggesting?

10 A. Yes.

Q. So I just need a minute to find that.

A. I think it was page 78 of Ms Dicey's evidence.

Q. I'll just turn that one up. So just before we turn to how this might be addressed, I was just trying to remind myself in the break about certificates of compliance and how they work, so is the taking of water and damming and things, is that part of the certificate of compliance process to the standard requirements were a certificate of compliance relate to that?

A. If a certificate were sought.

20 Q. If a certificate were sought?

A. Yes.

THE COURT: JUDGE BORTHWICK

Perhaps another way is can you see the certificate of compliance in relation to taking use, damming and diversion permit or permits?

25 MR PAGE:

Well, if there were a permitted activity rule that authorised it, then the answer to that would be yes.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. Yes, so that's mine, so then the next question is what if the Plan gets changed and you require a consent to do what you otherwise have been doing as a permitted activity under your certificate of compliance, what happens then?

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A. If a rule was introduced that required a consent to be sought then the existing permitted activity could be exercised under section 20A of the Act which contains transitional provisions for dealing with when an activity ceases to be permitted, it requires a consent.

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Q. So I think there might be six month time period in there.

A. That's right.

Q. But I guess my question relates to the transitional arrangement and when does it kick in? Does it kick in from the time of notification or does that rule need to be operative?

15

A. My recollection is, is when it's operative, Commissioner. Yes, my understanding of how section 20A works is that the activity can continue until the new rule is operative and then we've got six months from the date that it's operative to apply for a consent under the rule. So if the land and water regional plan contains a rule which says that a consent is required for a given activity, once that rule – and assuming that there's overlap between the duration of the permitted activity rule then we've got six months from the date that that's operative to reapply.

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Q. And that doesn't give you any priority in terms of – well you are in the queue for water, or does it?

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A. I don't know the answer to that.

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THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Well, when can you come back to us about that so the proposition is that if all replacement and deemed water permits are permitted under the plan change, if there is a new land and water plan those activities which require – rule in that require those same activities to obtain resource consent then any relative priorities which might exist as between consent holders now is lost. That's the proposition. When can you come back about that?

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A. I can come back to you in the morning.

Q. After lunch?

A. Yes.

Q. Good.

5 THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. I just wanted to understand how this permitted activity regime that is in Ms Dicey's evidence might work. So is this proposition to be administered in a way where individual consent holders does come into the regional council with their application for a certificate of compliance and the regional council then just goes down these conditions and works out whether which one is met in order that it can then issue this certificate of compliance?

A. I have not anticipated that applicants would be seeking certificates of compliance. They're simply entitled to rely on the scope of the rule to exercise rights under the rule.

Q. I guess where I'm leading to is how workable is some of what is in here. For example, there's been quite a lot of discussion, hasn't there about things like – I'm looking at three existing requirement, condition or priority status applying to the exercise of a permit under this rule shall continue to be legally binding for example.

A. Yes.

Q. How might you see that being administered?

A. Well, simply that the terms on which the permit is currently held are effectively standards in the plan that a person exercising the activity has to comply with. So the purpose of the exercise was to create a mirror image from the current permit terms and express those as standards for permitted activities.

Q. And I see in V, it is indicating that there is a minimum flow limit that would need to be met as well so if the regional council made minimum flow limits operative after (inaudible 11:34:04) certificate of compliance had been issued presumably you would have to go and apply for another certificate of compliance to show that you were according with that, would you?

A. Remembering that there are already regulations that require the reporting of takes and so the data already exists for the regional council to investigate and monitor whether a minimum flow limit is being complied with from the monitoring regulations so it wasn't anticipated that there would be a need to apply for a fresh certificate of compliance if a minimum flow were implemented. It's simply the case that those exercising permitted activities would be required to comply with it as a standard to which the permitted activity is subject to.

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10 Q. So you're imagining that the certificate of compliance there might just repeat (v) for example to show that things – if the regime changes then you're still subject to operative minimum flows?

A. Well, again, we weren't anticipating that certificates would be sought in any event, so my understanding of the *Canterbury Gun Club* case is that a certificate of compliance doesn't protect you from a subsequent legal obligation that comes to pass. So it's simply operation of law that a minimum flow which pertains to a catchment would bind rights exercised under the proposed rule.

15

Q. Just looking at (2), the permitted activity water take, the water's only to be used for the purposed authorised in the permit. Now, is it clear in a lot of these permits what the purpose authorised actually is?

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A. Not in some permits, no, Commissioner, no, it isn't but there are ranges of permits where the purpose is clear such as where water is to be used for the purpose of hydrogeneration or alternatively where the permit specifies that it's for irrigation purposes. So there will be cases where it is abundantly clear that the permit authorises only a particular use but particularly a lot of the elder permits, Commissioner, I accept but that's not going to be apparent.

25

Q. So then how would you apply (2) in that situation where the permit's silent on it?

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A. Well, in my submission (2) wouldn't affect the exercise of permitted activity if no permits are stated on the permit but only where it is.

Q. Right and the only one I think I hadn't mentioned is (1)(v) which is referring us to methods.

A. So that's been overtaken by withdrawing the relief that seeks change to the divisions of the operative plan. So we should read that as a reference to the 10(a)(4) schedule rather than schedules in the operative plan.

Q. Thank you, that does help with clarifying that.

5 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. In the new land and water plan, if the plan does find that there has been overallocation, what is the overallocation of one or more attributes in relation to a waterbody where the taking of water is permitted for those persons who are presently exercising deemed permits and replacing permits. The proposition now is that there is bound to be overallocation and secondly, that there is a rule introduced under the Land and Water Plan requiring resource consent be sought – requiring permits to take and use water to do so by resource consent, what is the situation in relation to those waterbodies that there is overallocation, can persons who propose to take water as a permitted activity and seek resource consent where that – sorry, where that waterbody is overallocated? Can they do that or does the NPS preclude that?

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A. I don't know whether the NPS precludes that, my submission is that if a rule in the land and water regional plan precludes the granting of resource consents to take water in catchments that have a particular difficulty, for example they don't meet a national bottom line then the preclusion operates by (inaudible 11:40:28) land and water regional plan.

Q. Okay, well –

A. So what we're anticipating is that the land and water regional plan will do two things, it would introduce a sweet of rules to manage consents going forward but it would also revoke plan change 7 at the same times that there would be a, otherwise you've got two sets of rules applying at once.

Q. If it is, well, also job for over lunch then, I want to know what is the, what does the NPS have to say about resource consents for the taking, using, damming or diversion of water from waterbodies which are determined under the NPS processes for FMUs to be over allocated, can those, can

a resource consent nonetheless be sought. So I want to know what the NPS says about it.

A. Okay.

5 Q. Because I am concerned without having to check myself, I am concerned that if all current water holders, their activities are fully permitted and subsequently it is found that there is over allocation that rather than taking advantages of any grandfathering provisions which could apply under the NPS to bring the waterbodies back into a full state of health, whatever that means for the community, they will not be able to take advance of
10 grandfathering, they simply will not be able to take water and that's the effect of the NPS, that's the proposition that I'm putting to you.

A. I understand the proposition –

Q. And if that is correct, I just would like to know whether that's correct because that just seems a remarkable risky proposition for your client.

15 A. Well I confess that I have not turned my mind to that circumstance and if it transpires that we accept that a permitted activity rule loses the potential for granting consents under the land and water regional plan compared to a similar controlled activity rule, then we'll deal with that with the scope of our relief.

20 Q. You'll need to deal with it rapidly so come back to us after lunch, now if that, if you need more time let us know.

A. Yes.

Q. It's not the Court's purpose to take away relief from your client but we need to understand the cost and benefit to the region in proceeding in the way that your client wishes to proceed by making all deemed and existing water permits permitted because we think there are costs and benefits and we think they are risks. And so we wish to understand the implications of proceeding in that way. Now, Ms Dicey does not support
25 a permitted activity so to whom in your witness team are we to direct our questions or indeed counsel are to direct their questions about the permitted activity rule because there's been an amount of evidence given
30 by other parties in relation to the same, raising issues about the same.

A. Well I mean, Ms Dicey will be able to answer questions about the costs and benefits of the rule that were included in her original evidence or

some approximation of it but you're right to observe that she now accepts Ms Ensor's version of the controlled activity rules is an acceptable outcome. So, we'll reflect on issues that you've raised about the potential concerns of re-consenting under the NPS over lunch time and report to the Court then.

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Q. I'd be grateful for that, the Court in raising the question and I'd have to say again, is not because the Court has a definitive view but the Court is concerned to understand the footing that OWRUG advances it's case and so we do so in relation to permitted activities to understand ourselves what the implications are if there is a rule introduced for permitted activities what the long term implications or short term implications are. We did so in relation to the scope of evidence again, not to miss – not to direct OWRUG into any direction but again to understand that with accepting that reject the plan change is within scope. If there were difficulties with the balance of OWRUG's case then there were some significant risks to OWRUG in proceeding on that footing and as a matter of fairness we are raising these issues which you can rebut and we'll move on with that in mind or reflect and change your position and again, whatever you have to say will move on but you understand the risks, the risks are – there are risks, we suspect there's risks in permitted activities and we wish to hear more from OWRUG about that. We suspect that they are risks in terms of our scope because if OWRUG is without scope, OWRUG, except for the rejection submission is without relief. But if there's no scope then I have no jurisdiction and that is why we are raising these issues.

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A. And I understand the points that you're making and I think it's fair to signal that in advancing the permitted activity status, OWRUG had not understood that that would be disadvantageous when re-consenting under the land and water regional plan and if on further reflection we find that it is, then we'll deal with it.

30

Q. Well, it's a matter for you, you're entitled to pursue the permitted activity status and we will think about that as part of the relief which is in the mix of relief amongst all of the parties. Whether it is disadvantageous to

OWRUG per se is only one consideration. It may well be disadvantageous to the region in general if OWRUG's swathe of farmers are unable to undertake the current farming activities because they find themselves outside of the allocation limit in the action plans and so forth under the NPS. So again, that's something that we need to consider; is there a risk of that or not?

A. Yes, we'll reflect on that over lunch and report this afternoon. Now, I think we've probably dealt with paragraphs 39, 40 and 41.

Q. We'll just quickly read it for ourselves. All right.

10 **MR PAGE:**

I want to turn now to the non-complying pathway. The drafting now proposed by Mr Pelsemaeker removes the difficulty created for the policy gateway which included the no more than minor formulation but it has created a new problem by establishing an avoid threshold for consents longer than six years. Mr De Pelsemaeker confirms that the proposed new drafting was to effectively close the door on there being scope to grant consents for more than six years. The reason why it is submitted that the no more than minor test is problematic is understandable when one asks what the environment is being evaluated against the application. Here is where the High Court's decision in *Ngati Rangī* becomes problematic for applicants. *Ngati Rangī* is clear that the comparison environment under section 104(1)(a) is the environment absolutely exercised with the permits that are at issue and so when an application such as Manuherikia Catchment Group, environment against the no more than minor test applies is one absent any irrigation and catchment whatsoever. Nor does it include water stored in dams. It is most unlikely that any application can pass the "no more than minor" test when compared with notional naturalised flows.

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There is also the logical problem that farms and the communities that support farms would not exist under a naturalised flow regime either. So, the intellectual exercise of imagining a world absent the permits being renewed has its limitations.

It is difficult to see what policy imperative is served by the section 104D jurisdictional barrier. There is nothing in the NPS FM2020 that signals that applications to take water should not be decided upon their merits.

- 5 Nor is there anything in the Minister's recommendation. The Minister described the problem in this way. It may assist to have the Minister's recommendation open because I'm going to refer to it. It is volume 5, tab 12C.

THE COURT: JUDGE BORTHWICK

Just slow your pace just a little bit.

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MR PAGE CONTINUES OPENNING SUBMISSION:

- So we're on common bundle page 1478. If we go back to 1477, you will see that the Minister discusses Professor Skelton's recommendations and then under the heading "Urgent need for an interim planning framework" in that discussion about the need for the planning framework goes over from 1477 to 15 1478. What I want to draw the Court's attention to is the fourth paragraph where the Minister says "In my view, long terms for these new consents would be unwise, as they would lock in unsustainable water use, inhibiting the council from effectively implementing the outcomes of its new Regional Policy Statement and Land and Water Regional Plan." And as a consequence then 20 he made his recommendation which is the sub paragraph 3, to prepare a plan by 31 March that will provide an adequate interim – I don't need to read it to the Court. It's there.

- 25 It is only in the following paragraph – that is the one immediately following recommendation number 3, that the notion of "a maximum term of five years" is suggested, as "an interim measure until sustainable allocation rules are in place".

- 30 It is submitted that the ORC has lost sight of the problem. What the Minister was concerned about was "unsustainable water use". That term can only be understood by reference to the NPS FM2020. There is nothing in the Minister's recommendation or my submissions his reasons to suggest an intention to

close off all merits-based assessments of water permit applications, at all. That the door might be left open for applications that address the requirements of the NPS FM2020 directly (and thus in my submission cannot be described as “unsustainable”) is evident from the Minister’s policy witness, Ms Kohere.

5 THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. You’ve got a problem. Footnote 17.

A. Yes. I can’t find Ms Kohere’s evidence in the transcript at all.

Q. Alright. I haven’t been looking at the transcript. My confession. There is enough to read without reading the transcript but I will. All of the transcript
10 is missing from Ms Kohere or just some bits of it?

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A. Ms Korhere’s evidence isn't in the index or isn't there at all.

Q. I’ll follow up and investigate.

MR PAGE:

15 OWRUG submits that if a form of Plan Change 7 is to be approved it should include a fully discretionary activity pathway to enable applications that respond to important NPSFM 2020 considerations and to be decided on their merits. The reasons for this are that: applicants can be assured that their permit replacement application will be considered on its merits rather than fail as a
20 result of the jurisdictional barrier. And secondly, the matters that are relevant are not limited and so that addresses concerns raised by Ngai Tahu in relation to the operative regime and you'll recall the *Last Chance* decision referred to by Mr Ellison and in my friend’s submissions.

THE COURT: JUDGE BORTHWICK TO MR PAGE

25 Q. Just pause there a second. So your first line paragraph: “the matters that are no limited”, you mean not limited in a way that a controlled activity rule is or something else?

A. No, not limited – I’ll rewind, the Court will remember Mr Winchester’s submissions in Mr Ellison’s evidence that *Last Chance* was a decision of
30 an independent commissioner which suggested that the restricted

discretion under the operative plan didn't adequately include cultural matters.

Q. Well, it included consideration of cultural matters.

A. Yes.

5 Q. Yes, it's not (inaudible: 11:57:01) or adequate. Didn't the decision maker find that they could not be considered as a matter of discretion?

MR PAGE:

No, in my submission that's a too bold a reading of the *Last Chance* submission because the Commissioner did then go on to address the issue but under the
 10 rubric of ecological and river values concerned from the (inaudible: 11:57:32) species. So he approached mauri from a habitat lens rather than directly through a cultural lens but in any event, if the rule was wholly discretionary then questions of scope and relevance don't apply. Thirdly, this is my (c) at the top of page 14, the activity status carries no presumption in favour of either grant
 15 or decline and fourthly, we now know that by June 2021, we will have a proposed RPS that includes provisions to describe how the management of freshwater in the region will give effect to Te Mana o te Waitlisted. Applications heard after that notification date (which in my submission will be the vast majority) will be measured against the new Proposed RPS. And the relevance
 20 of that to which I come. The rebuttal evidence of Mr De Pelsemaeker alerts the Court to the counsel's attention to notify a proposed regional policy statement by June 2021. Evidently, the Regional Council has given a commitment to the Minister to do so. This creates a difficulty for the Court. The proposed Regional Policy Statement is a mandatory relevant matter under section 66 of the Act
 25 unless the Court contemplates issuing its decision on plan change 7 before June then the Court will be faced with the prospect of having a proposed Regional Policy Statement that it must have regard to but no party to a witness has presented in the evidence about it or had the opportunity to make submissions in relation to it. The proposed Regional Policy Statement will
 30 record the long term vision for each FMU22 and describe how the management of freshwater will give effect to Te Mana o Te Wai. It is submitted that the Council's evidence about the lack of knowledge of the various Rohe within the FMUs required to guide the granting of resource consents seems implausible

when the Council itself has done sufficient work to formulate long term visions for FMUs and describe how freshwater management within the FMUs will give effect to Te Mana o te Wai.

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The real problem here is one of timing. The ORC is simply a couple of months away from being able to share that information with the Court. That is unfortunate because the Minister's second recommendation was that the Proposed RPS be publicly notified by November 2020. Had the ORC complied with that recommendation the Court would have had the benefit of the proposed RPS and be able to evaluate the parties' positions on PC7 against it.

10

OWRUG records that it regards itself as prejudiced by the Council's delay in notifying the Proposed RPS. Its case for a substantive consenting pathway would be better understood when the Council's timeframes for implementing long-term visions for freshwater are known.

15

And I just record that Full Council meetings are currently scheduled for 26 May and 23 June 2021 and presumably the RPS will be adopted at one of those met their notification deadlines.

20

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. If the council does notify, resolves to notify the RPS and notified the RPS the proposed, what are your submissions in relation to prejudice?

25

A. Well if the Court is then able to have regard to the RPS once it's been adopted for notification then the prejudice falls away.

Q. What's the process that entails?

A. I'm sorry?

Q. What would of the process that would entail. It wouldn't be me Googling the RPS I don't think so it must be something else.

30

A. No, no well in my submission it's encumbered upon the Regional Council to alert the Court when a mandatory relevant matter arises that is new and the Court hasn't received evidence about. So if and when that happens, my submission that it's the duty of the Regional Council to

advise the court about that and then the principles of natural justice follow about what the Court then does with it, which is the parties will need to be heard.

- 5 Q. All right, I will be making directions that the ORC respond – and invite any other parties that have a differing with to either yourself or the ORC, to do likewise as to the status and relevance of the, any proposed RPS should it be notified prior to the Court releasing it's decision and the steps as much as you can, as much as you might know them, at this stage steps to be taken to overcome any prejudice of any party. But in as much as 10 it's not going to be notified this week I think we can say that for a direction by the end of the week, ORC to come back and then I'll open it up to other parties for the same or different view as to yourself, Mr Page.

MR PAGE:

I want to come now to the relevance of evidence on galaxias.

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The Court might have been surprised to receive such voluminous evidence about Galaxias species in Otago in the context of a plan change of such limited scope as Plan Change 7 is intended to be.

- 20 It is submitted that the significance of the Galaxias evidence is to highlight that the law of unintended consequences applies to this plan change as it does any other regulatory instrument. It is submitted the Court needs to have confidence that it understands the consequences for critical endangered species of any decision that it makes under Plan Change 7. The evidence shows that the 25 Court can have no confidence that it can predict an outcome for Galaxias under a short-term permit regime.

What we know from the evidence is this:

- 30 (a) That a significant threat to Galaxia species in Otago's rivers is trout.
 (b) Under current flow regimes, galaxias species are present in habitat that trout cannot reach.
 (c) Maintenance of flow regimes that keep trout out of galaxias habitats is currently critical to their survival.

- (d) Changes to flow regimes under short term permits potentially puts galaxias species at risk of predation from trout.

THE COURT: JUDGE BORTHWICK

Now I hate to stop you here because you're mid subject matter but I think I was
5 told to rise at 12 so we could do some testing on the AVL so we are going to
take an adjournment, should I let you finish, we're just going to be coming into
the testing time required for that AVL link with your witness so we'll rise and
back here at 1 o'clock and is back here 1o'clock with Mr McIndoe or, we're
going to test Mr McIndoe, see if he's, you know, we can successfully establish
10 the link. Do you want to finish your submission first and then bring him on and
I'm only asking you this because I know that Mr Hickey also has some time
constraints about which I know nothing other than evidently he does.

MR PAGE

Yes, well those time constraints aren't today so he'll be with us for the day and
15 certainly and I think even tomorrow – not tomato, no he's off at conferencing
tomorrow apparently so it would be ideal to take him to today and frankly I don't
mind if we park my submission where they are because the evidence is more
important.

THE COURT: JUDGE BORTHWICK

20 Does anyone have any problems with Mr Page parking his submissions for the
time being and calling his witnesses?

MR MAW:

Only in relation to the planning witness, so it would be of use to see where the
submissions go prior to hearing Ms Dicey but the technical witnesses can come
25 now.

THE COURT: JUDGE BORTHWICK

Completely, yes no it would. But I guess we can read ahead, at least. Okay
well it is what it is, said Donald Trump and criticized by Michelle Obama for
actually uttering that comment so I shouldn't really say that but it is the process,

we've got to interpose Mr McIndoe to get him on, we'd like to hear from him before he goes into conferencing tomorrow. So I'm sorry about that Mr Page but I'm very grateful that we can park you for the time being whilst we hear from your witnesses and then come back as soon as we can which will be in short order.

5

COURT ADJOURNS: 12.07 PM

MS IRVING CALLS**IAN MCINDOE (AFFIRMED)**

Q. Good afternoon, Mr McIndoe.

A. Good afternoon.

5 Q. Now I would just like you to confirm please that your name is Ian McIndoe?

A. Yes, it is.

Q. And you are the principal water resources engineer and managing director at Aqualinc Research Limited?

10 A. Yes, I am.

Q. You have prepared a brief of evidence on behalf of the Otago Water Resource Users Group and Horticulture New Zealand which is dated the 5th of February 2021?

A. Yes, I did.

15 Q. Do you have any changes or amendments that you wish to make to that brief of evidence?

A. No, I don't.

Q. Can you please confirm then that the brief of evidence is true and correct to the best of your knowledge and belief?

20 A. Yes, I confirm that.

Q. Now, can I ask you please to read your summary of the evidence and then you will no doubt have some questions from friends and then the Court.

25 A. Okay. This is my summary of evidence, my interpretation is the key outcome that ORC want as a result of implementing schedule 10A.4 is to reduce the amount of water allocated for irrigation or pending consent renewals. The justification for reducing water allocation includes reducing the risk of both further environmental degradation and unforeseen economic hardship for water users. Schedule 10A.4 proposes to use five years of metred water use data for determining peak or instantaneous take breaks, daily volumes, monthly volumes and season volumes. By
30 analysing irrigation demand data for 42 years I've found that the five year data will significantly underrepresent irrigation demand volumes relative to the longer recall. This could cause significant water shortfalls and

cause economic hardship for future use especially if 2015 to 19 data is used. Flow rate is a primary determinant of the environmental status of rivers and streams. Schedule 10A.4 proposes to essentially keep instantaneous take and daily volume to the rate of take historically taken which means that the impact will be similar to that already occurring. Schedule 10A.4 will significantly reduce monthly allocations which could cause economic hardship for growers as frequently as one year in two. The environmental benefit of reducing monthly allocations will be marginal at best. Schedule 10A.4 will cause seasonal water shortfalls of varying degrees. It will have the greatest impact on crops and low rainfall areas like Alexandra and on a lower PAW soils. While this has the potential to cause economic hardship, especially for growers of high value horticultural crops, it will have little or no benefit to flows and rivers and streams. Use of historical metre data (inaudible: 13:14:15) has filled the province. Data availability and quality is variable and in some cases, unreliable. Significant data process and filtering is required and in some situations, the analysis will not be able to be completed. My recommendation is to not use water metre data but instead use the Aqualink guidelines that ORC had previously been using to determine reasonable use flow and volume allocations. Protection of flows and streams and rivers shall be separately addressed through implementation with the appropriate controls on the take such as minimum flows and allocation blocks.

Q. Thank you, Mr McIndoe.

25 **THE COURT:**

Good afternoon Mr McIndoe, I don't think we've seen each other for 12 years, it's a long time. Mr McIndoe and I used to work for many permit applicants, I guess, in Canterbury before I went to the bench but anyway, it's been a long time. I haven't got the correct schedule with me, but ORC.

30 **CROSS-EXAMINATION: MR MAW**

Q. Thank you, your Honour, and good afternoon. I have some questions for you, Mr McIndoe in relation to those parts of your evidence that don't

relate to the use of schedule 10A.4, questions in relation to the application of that schedule have been held for present purposes to enable the expert witness conferencing to take place so it may well be there are some questions after that conferencing has finished. So I just want to flag that,

5 I'm not going to be heading down the rabbit hole of the comparative differences between schedule 10A.4 and the different versions put forward by different parties but what I do want to start with this afternoon is to make sure that I've understood the Aqualinc guidelines correctly. Now, I think I can see sitting on the desk in front of you a copy of the

10 Aqualink guidelines and those guidelines are in the common bundle and can be found at tab 23 for those in the courtroom, volume 5, CB1460. Now so as not to confuse the witness, when I'm referring to pages within this document, I will refer to the page number of the document itself if everybody has the document available. So in terms of the Aqualinc

15 guidelines, have I understood correctly that these guidelines are a tool to calculate a reasonable and efficient use of water for different crop or pasture types?

A. Yes and different crop and pasture types on different soils in different climate zones, that's correct.

20 Q. So when an assessment is done using the guidelines, what information does the person running the tool need to input into the model if I can refer to it as a model?

A. Yes, location they need to know obviously where the site is, crop type, what crops are being grown, soil properties, PAW, and there are maps

25 available to determine that, so yeah, crop soil. The reasonable use guidelines are based on the assumption that the infrastructure is reasonably efficient, so 80% efficient, I think those are the key things, soils, crop, climate and location.

Q. Now I do have some questions about the type of irrigation use, so after

30 that particular criteria for now, and we will come back to that, I'd like to understand whether the area of – whether the irrigable area is inputted into the model?

1320

A. It's not put into – well, this is not a model, you're looking up tables here so it's presenting the data on the basis of the water use per hectare. So to determine the water use you multiple that number by the hectares.

5 Q. Right so it's scalable in terms of its, the output for the model is scalable depending on the hectarage used but to my –

A. Yes.

Q. – question perhaps another way around, one of the inputs is not the amount of irrigable area?

10 A. No not if you're looking up the guidelines, no, but to determine the reasonable we use total, yes you definitely need that.

THE COURT: JUDGE BORTHWICK

Q. Sorry can you repeat that again, your answer?

15 A. Yes what I'm saying is that to look up the guidelines to determine reasonable use but presented on the basis of millimetres per hectare or cubic metres per seasons per hectare, to determine the flow rate (inaudible 13:21:08) you need for a particular property, you have to multiply those numbers by the hectares.

CROSS-EXAMINATION CONTINUES: MR MAW

20 Q. So I want to understand the flow rate component as well so if I've understood correctly, flow rate is not used as an input metric but rather that's soemthing which is calculated as an output, is that, if I understood that correctly?

25 A. Yes well if you look at the guidelines you'll see that different flow rates or different – and this was actually in my, described in my evidence but people present flow rates in different ways and so quite commonly you will see the water requirement for a property pre hectare expressed in millimetres per day for example so if you're pasture in Alexandra, that number may well be 5milimetres per day applied over whatever hectares you have. To turn that into a flow rate, you divide by 8.64 and you'll end up with .6 or .58 litres per second per hectare and when you multiply that
30 number but the area you get the flow rate in litres per second.

Q. So in terms of understanding what the limiting factors might be in terms of the output from the guidelines, do you accept that one limiting factor might be the flow rate available to a permit holder?

5 A. That is not, I hear what you're saying, you know, that that's an important factor when you're considering the consent but in terms of the water needs of the crop, no, the reasonable use numbers are independent of the supply.

Q. And they are independent then in terms of the area to be irrigated as well, it doesn't trouble itself with those two parameters?

10 A. Well they're two separate issues, the supply of the water, the reliability and supply is just that, okay, how much waters available, what we're talking about and what the guidelines are giving you is the water demand by the crop independent of how much waters available. So to turn the guidelines into a flow rate, as I said, you multiply the appropriate number
15 by the hectares.

Q. And so the guidelines in and of themselves can't be used to set a flow rate or to establish and irrigable area?

A. The irrigable area, depends which direction you're coming from, the irrigable area is decided by the farmer. Now if that farmer has a restriction
20 on the amount of flow that he can take and that's not an issue for the guidelines, then he can determine using the guideline figure how many hectares he can irrigate with that flow rate.

Q. And so in some circumstances there will be insufficient flow rate available to irrigate the entire area?

25 A. Absolutely, yes.

Q. Or a different way to look at it is with a particular flow rate there may only be sufficient flow to irrigate a reduced area?

A. That's correct.

Q.

30 1325

Q. Now I mentioned that I circled back to the efficiency of application, now as I understand the guidelines, they assume efficient irrigation infrastructure?

A. They do.

Q. And that's picked up and there are some different parameters used for different crops within the guidelines?

A. That's correct.

Q. And so if I take you to those guidelines by way of example on page 13.

5 A. Yes, I have that.

Q. You'll see there in relation to pasture on the last paragraph of the page the coefficient of uniformity of 70% is used which is representative of typical spray irrigation systems.

A. That's correct.

10 Q. And then as we track through the guidelines in relation to viticulture on page 14, a 90% threshold is used and that's reflective of the drip irrigation systems presumably?

A. Yes, that's right.

Q. And cherries and apricots on page 15.

15 A. Yes, I have that.

Q. 80% there.

A. Yes, correct.

THE COURT: JUDGE BORTHWICK

Where are you reading 80%? Which paragraph?

20 **MR MAW:**

You'll see a table in the middle of the page, second paragraph underneath of that: "therefore a CU of 80% was used", last sentence.

THE COURT: JUDGE BORTHWICK

25 And also on the preceding page, the 90% reference, is that a reference from the third to the digit appearing, the third paragraph from the bottom or something else?

MR MAW:

Six up from the bottom.

THE COURT: JUDGE BORTHWICK

“A CU of 90% was used.” And CU meaning what?

MR MAW:

Coefficient of uniformity.

5 THE COURT: JUDGE BORTHWICK

Q. Is that correct, Mr McIndoe?

A. Yes, it is.

CROSS-EXAMINATION CONTINUES: MR MAW

10 Q. And then to complete the exercise with respect of vegetables on page 17,
two paragraphs above the yellow table, I see you have 80% used.

A. Yes, I can't see it but I'll believe you – yes, I do see it.

Q. So by comparison, what would the CU be with respect to border dyke
irrigation systems?

15 A. We don't normally apply CU to border dyke systems at all. I'm wondering
if you're confusing CU with application efficiency here. Very different. So
CU, coefficient of uniformity or more strictly (inaudible: 13:28:26)
uniformity coefficient is a metre of how uniformly an irrigation system
applies water and it's typically applied to sprinkler systems. I haven't
actually heard of it being applied to border dyke systems at all. We would
20 use a different factor.

Q. So I will approach the questions perhaps slightly differently, in relation to
these guidelines, these guidelines are predicated on the efficient use of
water using efficient irrigation systems?

A. They are.

25 Q. So in relation to the use of a deemed permit for a border dyke irrigation
system, the way that these guidelines would work is that they would
calculate the instantaneous flow rate and the subsequent daily, monthly
and annual volumes on the basis that an efficient irrigation infrastructure
was being used?

30 A. Yes, so if you were using these guidelines, that's what you would get.

Q. And so if these guidelines were the only source of calculating those particular parameters, with respect to a consent applicant who is intending to continue to use a border dyke irrigation system, they would be allocated significantly less water than they would be currently using, using that inefficient infrastructure?

5

1330

A. Yes but I wouldn't recommend then if they were applying to continue the border dyke irrigation. These are guidelines and we often get situations or we have in the past where new information of different information comes up and then that is used to present the application for the consent. These are guidelines.

10

Q. I understand and I'm just trying to make sure I've understood there their boundaries, if they are to be picked up in a planning regime you'd accept it's important that we all understand precisely what these guidelines can and can't do?

15

A. Yes, yes I do, I agree. I think that, if I may just add something, there's one other factor that you need to take into account when using the guidelines and that is that they're applied to individual crops or individual farms and when you're talking about irrigation schemes as might be the case for a lot of the border dyke schemes, then the raw numbers on the farm basis need to be amalgamated and adjusted for things like distribution, efficiency and those other factors that come into it.

20

Q. And in your experience, is that a costly exercise to undertake?

A. To do what?

25

Q. To amalgamate those uses from say an irrigation scheme and run the calculation through the Aqualinc guidelines?

A. It's fairly straight forward, how expensive it is, no, I don't know. But I'd imagine on a per farm basis it wouldn't be any more expensive than applying it to an individual farm.

30

Q. I want to understand the guidelines in the context of reliability of supply, so as I read the guidelines they are agnostic in terms of reliability of supply, they simply don't address or take into account the question of whether water is actually available, have I understood that correctly?

A. That's 100% correct.

Q. So when you look at the outputs from the guidelines and you look at historic use, the guidelines are not taking into account actual availability of water or reliability of supply?

5 A. No, they're not, no and I'm very aware in Otago there are a number of water supplies that are not reliability okay so the actual take will be, that'll be reflected in the water metre records but that doesn't mean to say that the reasonable use is lower, it just means that the water's not available.

Q. So you could have quite disparate figures in terms of reasonable use compared with historic use and the difference is reliability of supply?

10 A. That's one factor but reasonable use is not the same as historic use. And, so just to take that one step further, if you're using these guidelines they're giving you allocation numbers or in other words based on crop order demand, reasonable use, for nine out of 10 years. Actual take varies year by year and some years you don't take much at all because it's been wet
15 and some years you take every drop you can get so you can see that the reasonable use guidelines are not the same as actual use.

Q. So they're achieving two different outcomes, is that, does that capture your sentiment?

20 A. I'm not sure what you mean by two outcomes, what are the two outcomes you're talking about?

Q. Well, reflecting historic use reflects water that's actually been taken whereas these guidelines are used to calculate the reasonable amount of water necessary to sustain crops nine years out of 10?

A. Exactly right, yes.

25 Q. And so if allocation decisions were made purely using these guidelines, that would result in a different allocation compared to allocating based on historic use?

1335

A. Definitely.

30 Q. I want to ask you a question about allocation blocks of water and it may well be this is outside of your area of expertise so feel free to park this to another witness but is your understanding that one of the purposes of having an allocation block in respect of the abstraction of water from a river is to ensure that the river is not flatlined at a minimum flow?

A. No, that's not right.

Q. What do you understand the purpose of having an allocation block size to be?

5 A. To ensure – I'm maybe straying a little bit here so just bear with me, to ensure that the amount of water taken from that resource in total is not going to detrimentally effect the flows in the stream. I don't see the link between an allocation block and flatlining at all.

THE COURT: JUDGE BORTHWICK

10 Q. Sorry your answer was to ensure that the water taken from – you said resource or stream in total will not detrimentally affect the flows, is that right?

A. Yes, the flow's required to sustain it.

CROSS-EXAMINATION CONTINUES: MR MAW

15 Q. I'm not sure I quite follow the logic there, so let's assume there's no allocation block size and there's simply a minimum flow applied to each permit.

A. Yes.

Q. If each of those permits are being exercised concurrently then a river might be held at its minimum flow?

20 A. Very difficult to do. You need a whole lot of things in train before you can do that and the reason, just to expand a little bit, this is obviously a key issue, the streams themselves, the flows vary day by day. The demand is varying day by day but irrigation schemes in general operate at fixed flows, okay? So, if you wanted to flatline a river, it's got nothing to do with
25 allocation blocks, it means – let's have some examples; say the river had a minimum flow of 100 litres per second an allocation block of 100 litres per second, so if the flow was 200 litres per second regardless of how many users there were, 100 litres per second could be taken, right? 200 minus 100 gives you the minimum flow of 100 litres per second. If the
30 flow in the river was 150 litres per second, you then to flatline the river have to take 50 litres per second but the thing is, the flows in the river are changing constantly, the irrigation system tends to be taking fixed flows

and it's very, very difficult to do that, it's nothing to do with allocation blocks, it's to do with having their infrastructure that allows you to draw the flow down to a minimum flow and I have really seen that impact.

5 Q. When you think about situations that might have that effect, do you accept that dams might have that effect?

A. Dams are one of the things that you can use to enable you to do that, yes but again, you have to separate the irrigation system operation from the tape.

10 Q. You mentioned that allocation blocks do serve a purpose of, and I might paraphrase you incorrectly or poorly to ensure effects on the environment do not occur, can you explain what you had in mind?

1340

15 A. I didn't say do not occur, I said that was acceptable. Using this example again, if the flow was 200 litres per second and you had an allocation block of 100 litres per second then that 100 litres per second could be taken, right? If the flow was 400 litres per second in the stream and the allocation block was still 100 litres per second, if you took that 100 the flow would be 300 litres per second in the stream. So you can see how if you're taking a fixed allocation block, what's remaining depends on what the flow in the stream is on that day, it varies. But what we're saying –

20 well, the people that make that decision and it's not me to make that decision as to how big an allocation block is but what we're saying is that it creates some variability in the flow as the flow in the stream changes.

25 Q. Which is perhaps another way of saying that the allocation block ensures the river's not flatlined.

A. Which is opposite to what you started with.

Q. Well –

THE COURT: JUDGE BORTHWICK

30 Q. Well what about the proposition, if the flow in the river is 200 litres per second but the allocation block is 125 litres per second, is there the potential for water to be held at the minimum flow during periods in the irrigation season – during the warmer months of the irrigation season or indeed hot months or very warm months during the irrigation season?

A. In that case, if the flow in the stream – sorry ,the allocation block was 125 and the flow was 200 and a minimum flow of 100, were they the numbers you're using?

Q. Yes.

5 A. Then obviously the people can't take 125 otherwise they would exceed the minimum flow but to take the 100 which is what they're allowed to take, they have to have the infrastructure in place that allows them to do that and what I'm saying is that you need quite a lot of things in train to make that happen.

10 Q. So your proposition there is if the 100 litres per second and the block is 125 the obstructers could not take all of their water because that water is not available without breaching the minimum flow, correct?

A. Correct, yes.

15 Q. And so then there would need to be a response by obstructers where they started to reduce their taking or cease their taking, correct?

A. Yes.

Q. But the proposition is could they reduce or cease their taking but at levels which holds the flow at minimum flow of 100 litres per second over an extended period of time.

20 A. That's right and you've got to bear in mind that rivers don't sit on the same minimum flow the day after day after day, they vary.

Q. But is that the case that rivers vary or is it the case that there can be in the climate record which you had examined extended periods of weather induced or climate induced low flows?

25 A. Definitely there are extended periods of low flow but if the river has a minimum flow then the chances are it's below the minimum flow for taking anyhow.

30 Q. Which I think gets back to your proposition that you can hold the flow to – if the allocation block exceeds the minimum flow, you can hold the flows to minimum flow, correct?

A. Yes.

Q. And that's the proposition that you're trying to make?

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Yes, that is the proposition and I want to take that one step further now, so what happens in the absence of an allocation block?

5 A. Then they should have a minimum flow. The same logic applies. For example, say you have no allocation block and on this example we're talking about with the minimum of 500, let's assume there's 500 litres per second of consented takes which is quite an extreme number for this case, okay, then for everyone to take – well, for the user to take the total of 500, the flow would need to be 600 in the stream, correct? So, 10 whenever it was below 600, someone has to cut back. And I said it's very difficult to do that perfectly. I will give you an example; let's assume in this case there's a pivot that's taken water from a stream so it's pumped from the stream at 100 litres per second but then there's only 50 litres per second available because the flows dropping, what does a person do? 15 He can't change the pivot flow to 50 litres per second because tomorrow it might be 40, next day it might be back to 60. So you can see the difficulty of putting in a system to actually in theory reduce the stream down to the minimum flow on a daily basis, it's actually difficult.

THE COURT: JUDGE BORTHWICK

20 Q. So what is difficult to do?

A. To change the rate of take to be able to take the difference between the flow on that day and the minimum flow because the flow's varying everyday and irrigation system flows tend to be fixed.

CROSS-EXAMINATION CONTINUES: MR MAW

25 Q. In your experience, is irrigation infrastructure setup in a way that allows water to be taken at the minimum flow point?

A. You mean to be able to take whatever flow's available to reduce it back to minimum flow?

Q. Yes.

30 A. Really, I'm not saying it isn't but I'd say really.

Q. Isn't that precisely how takes of water into irrigation races do occur where there's a minimum flow, the intake race is set to take any water above that minimum flow level?

A. In some cases but it's very site specific, that one.

5 Q. Do you have a working knowledge of the intake structures in the Otago Region?

A. I have some, yes, I've done quite a bit of work in Otago over the years.

Q. Let's pick the Manuherikia catchment, do you have an understanding of irrigation intake infrastructure?

10 A. It's been a few years since I've seen it but I have seen it.

Q. And in relation to the infrastructure you have seen, is that setup in a way that takes water above the minimum flow if there is even a minimum flow in place?

A. I think you'll find again that it won't be exact. They can try to but if you
15 look at, for example, I'm just trying to remember some of the Manuherikia takes, they're manual and they're often flows over wares so the flow varies according to the flow in the stream or the head above the intake if you like and it's quite proportional but again it doesn't – I think you'll find it doesn't reduce it down exactly to the minimum flow.

20 Q. You accept that having an allocation block in place reduces the likelihood of a river being reduced down to its minimum flow for extended periods?

A. No, it doesn't. I said that at the beginning; it doesn't.

Q. I want to take you to paragraph 50 in your evidence in chief.

A. Okay.

25 Q. And you'll see there that you opined that the method proposed by the Regional Council will leave users water short in the years when they need water the most.

A. Yes.

30 Q. Do you accept that those years will coincide with the years that the river might need the water the most?

1350

A. Generally I'd have to say yes.

Q. I want to take you to your paragraph 82 and here you provide some evidence about growers realising the increases in their efficiency of a

change towards pressurised systems and there you observe that growers have been able to spread a permitted amount of water over a greater area.

A. Yes, correct.

5 Q. And then you note that this has resulted in a much improved water use efficiency than was possible under original methods?

A. Yes, I – that’s right.

Q. And is that reflective of your observations that when efficiencies occur then increases in irrigation area follow?

10 A. They can, obviously it depends on the farm and whether they’ve got additional area that they want to irrigate.

Q. But assuming the lands available then yes?

A. They could if they wished.

15 Q. So in your experience, efficiency gains are being realised by those taking and using the water as a commodity?

A. I really don’t want to comment on whether it’s a commodity or not because that’s an issue for individual farmers. It’s an input to a system.

Q. So in your experience that input into a system, the efficiency gains being realised by an expansion where land is available?

20 A. They could’ve done that, yes.

Q. Now at your paragraph 84 you touch on one of the consequences of converting to high value crops and the need for high reliability of water supply?

A. Yes, that’s correct.

25 Q. And you observe that in some instances that reliability of supply has been increased by the use of storage dams?

A. Yes, that’s right.

Q. And then you note that it’s critical that water can be taken to refill storage for these systems?

30 A. Yes.

Q. Critical for who?

A. Critical for the farmer to provide high reliability.

Q. So that’s putting the needs of the farmer ahead of the needs of a river?

A. No it depends on what the minimum flows and allocation blocks are in place for the river.

MS BAKER-GALLOWAY:

Q. Sorry I'm just looking for a reference arising from Mr Maw's questions.

5 No, actually, Ma'am. On reflection having looked at what I was looking for I've got no questions.

1355

CROSS-EXAMINATION: MS BAKER-GALLOWAY – NIL

THE COURT: JUDGE BORTHWICK

10 We did have Forest and Bird for cross-examination for no representative is present. Ms Williams do you have any questions? You don't. Anybody else? Nobody else. Any re-examination? Court's questions now, Mr McIndoe.

CROSS-EXAMINATION: MS WILLIAMS – NIL

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

15 Q. I just have one or two questions of clarification, Mc McIndoe. In the schemes that you're involved with, obviously border dyke sort of started the process donkey's years ago and over time there's been progressive introduction of other more efficient uses of irrigation. What's the status now in terms of the farms that you're involved with? Is border dyke
20 irrigation still used quite a lot or is it gradually reducing or do you have any idea of that?

A. Just a little history. The irrigation in Otago predated border dyke irrigation. It was actually what we call wild flood but I get my head in my hands when I mention that. It's really contour irrigation and gradually over time they
25 introduced border dyke irrigation to improve the efficiency of watering and now a lot of those border dykes have been removed. Probably the biggest single area of border dyke irrigation in Otago in recent years is the lower Waitaki irrigation scheme and my understanding at the moment it's under 50 per cent border dyke irrigated and that's probably the biggest

remaining area of border dyke in New Zealand so gradually the border dykes are disappearing.

Q. But it's pretty significant proportion.

5 A. In terms of total irrigation New Zealand no, not significant but in Otago probably more significant than any other region in New Zealand.

Q. Alright. In your evidence you've talked about reviewing data from the last 42 years or something like that. How do you take account of the change in type of irrigation that may have taken place over that time?

10 A. We haven't. All of those calculations they're based on using a reasonably efficient irrigation systems. So some of the old border dykes wouldn't reach the standard that were fused in the guidelines or in my calculations.

Q. So your calculations, what degree of reliability can they be given to those using them to assess current applications and assignments of water and so on?

15 A. They're very good. They're very robust but I think your question is probably relating to what do we do with the border dykes so if they were reapplying for water then what I strongly suggest they do is put forward their own case but it could be Otago Regional Council decide to implement the guidelines and that would in some respects constrain what they can do with the border dykes.

20 Q. Okay. Thank you for that. You're going to participate in the expert conferencing.

A. Yes.

25 Q. About the methods schedule 10A4 or whatever it might be, do you have a degree of confidence that you can come to some understanding with the other experts on what schedule 10A4 might look like?

1400

30 A. Yes, I do. The thing I still don't understand is why Otago Regional Council went down the path they did, that's the bit that's missing in my mind at the moment. Given they were using the guidelines, given that a number of external consultants in Otago were using the guidelines, I don't understand why they went back to using (inaudible: 14:00:28) the records. I guess we'll find out tomorrow.

- Q. Isn't there a technical guidance document where water meter records are used, there's a technical guidance document we were provided a copy with, are you familiar with the Council's –
- A. Yes, that's the how but that's not the why.
- 5 Q. Can you just expand please?
- A. Those guidelines tell you how to apply their methodology, they don't tell you why they introduce that methodology in the first place.
- Q. Have you been involved in application for consenting where that methodology is used?
- 10 A. Sorry, the water metre data?
- Q. Yes.
- A. No, never. I was actually quite shocked when I realised the extent to what it was being implemented.
- Q. But you have some hope that if you meet you can come to some understanding of or agreement of what a method might be that could be
- 15 –
- A. Yes, I am hopeful.
- Q. And the other thing I noticed in your evidence was that Aqualinc needed to be upgraded, is that the case?
- 20 A. It doesn't need to be but I recommend that it is just to include the data from the latest years.
- Q. I didn't hear the last bit.
- A. I recommend that it be updated because it doesn't use climate data from the most recent years.
- 25 Q. Just the last few years, five years. That's the reason you looked to update.
- A. Yes, it's really just an extension to what's there now.
- Q. Is Aqualinc used anywhere else in the country?
- A. Just about all over the country.
- 30 Q. Is that right?
- A. Yes.
- Q. So you are involved then with many regional councils all over and its application?

A. Yes, that's correct. Can I just explain, for Otago, they specifically asked us to develop these guidelines, other Regional Councils have done the same but the ones in general, we actually developed a website where people can just go onto it and download the data for their locations and many Regional Councils use that.

5

Q. Exclusively or in combination with other methods?

A. The ones that use it tend to use it exclusively, there are one or two councils that use different methods, for example, Bay of Plenty Regional Council uses a method that was developed out of Plant and Food in Palmerston North but generally what we call the Irricult guidelines are used very, very widely around New Zealand.

10

Q. As a sole method or are there other –

A. Regional councils tend to use one method and for most regional councils it's the Irricult method or the Aqualinc method.

15

Q. Are there other methods – like yours is – is it a proprietary method or is it something that you've developed for Otago Council and then it's been adopted elsewhere?

A. No, it wasn't originally developed at the Otago Regional Council, the methodology is based on an FAO United Nations well published and peer reviewed methodology, so it's not secret science or anything like that, it has been well-published and so there's nothing to stop other people developing systems that apply the same methodology but it's just that we did that, in fact, my colleague John Bright developed the original method as part of his PhD research and then we've just used it for so many years and made it available through Irrigation New Zealand to the country. So the Otago one, it's got some specific things in it, for example, vegetables and cherries and those sort of things that they specifically asked us to address.

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Q. So coming back to an answer to an earlier question, do you have an understanding why under plan change 7 is this schedule 10A.4 method being suggested as opposed to Aqualinc or is it in conjunction with Aqualinc? It's not mentioned in the schedule at all.

- A. No, Aqualinc is not mentioned so I'm assuming that if the plan change was implemented then it would be based on the ORC method and as to why, as I said, I don't know. I'm hoping to find out tomorrow.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

5 QUESTIONS FROM THE COURT: JUDGE BORTHWICK

- Q. Mr McIndoe, I confess I have not read your guidelines because there's thousands of pages of documentation before the Court but I understand – at least I believe I understand, correct me if I'm wrong, from your written evidence and also your brief of evidence that the guidelines when applied will produce what is required in terms of meeting the reasonable demands for the particular farming entity, that farming entity is described by the inputs into the guidelines which you have noted such as location, crop type, soil properties, PAW and so forth. So what is the reasonable demand relative to the inputs into the guidelines and what is also inefficient demand relative to the same inputs, is that right?

A. That's exactly right.

- Q. So this is saying the output from the Aqualinc method is not saying anything about therefore whether water is available and in fact, the assumption is water is unrestricted and will always be available, correct?

20 A. Yes, 100% reliability, that's the assumption.

- Q. But I think in answer to questions either from myself or Mr Maw, you have acknowledged that there will be either as a result of weather patterns or as a result of patterns in abstraction overlaying the natural environment times when water is in fact not 100% available to meet the reasonable nor efficient demands for the particular farming enterprise, is that correct?

25 A. That's exactly right, yes.

- Q. And I think you also said that the outputs from the Aqualinc guideline method say nothing about the area to be irrigated that say another calculation which a farmer must undertake, correct?

30 A. Very simple calculation, yes.

Q. And so just so I understand the math, you take the outputs from the Aqualinc guidelines, multiply that by the area to be irrigated to come up with an expression of rate of take and volumes or is it some other math?

5 A. No, it's basically that but we just have to watch the units but it's essentially taking the output from the guidelines, multiplying it by the area to give a flow rate for the volumes, that's correct.

Q. Flow rate volumes or not volumes, just flow rate?

A. Volumes as well.

10 Q. So if the Regional Council is concerned about the environmental effects, this is in addition to effects on other abstractions, but the effect on the environment as a consequence of abstraction, the Aqualinc guideline by itself is not going to be saying anything about that.

A. It doesn't say anything about that, that to me is a separate issue.

15 Q. And that separate issue is dealt with in Otago? How is it currently dealt with that you're aware of?

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20 A. Well in situations like takes from the Clutha River it's not an issue but if you look at the smaller rivers, some of them and again, I didn't know how many but I think this information's been presented to the Court since but have minimum flows and allocation blocks and flow sharing and all those things that you need to protect the rivers, dams.

25 Q. Okay, with that in mind is it your advice to this court that if we proceed with plan change 7, bearing in mind that many submitters want to plan change rejected altogether but assuming that the Court proceeds in some fashion with plan change 7 that the sole basis for regulating the take and use of water is not confined to the guideline outputs from the Aqualinc methodology?

30 A. That's right but just keep in mind that apply the Otago method will give you rates of take of flow that are very similar to what is taken now, historically.

Q. When you say the Otago rate and method, are you referring to Aqualinc guidelines or are you referring to something else?

A. I'm referring to the use of the water metre data to determine the allocations.

Q. And that being the method that is proposed by the Regional Council?

A. That's right. So it will give very similar flow rates to what's been taken historically but it's going to cut back peoples volumes. Now flow rates is the direct impact on the environment of flows, not volumes and I said that in my evidence. So you've got a method being applied by the Regional Council or proposed to be applied by the Regional Council it's actually not going to make that much difference to the flow rates taken but it is going to impact on the volumes and that will hurt the users but it will have no benefit to the environment.

10 Q. And just to round that off, I thought I heard you say that the Aqualinc, the flow rate which is derived from the Aqualinc output is similar or very similar to the flow rate derived from the ORC methodology in the PC7 schedule?

A. It could be different, the biggest problem I have is not the flow rates, it's the annual volumes.

15 Q. No understood and my questions actually not about the volumes, it's about the flow rate.

A. Okay.

20 Q. So the flow rate derived from the PC7 schedule and derived from the application of the Aqualinc method are similar or very similar is your evidence?

A. No, there's quite a lot of variability based on the comparisons that we've seen, no what I'm saying is similar, is that if you apply the ORC proposed method the flow rate you'll get will, the daily flow rate of take that you'll get will be similar to what's been historically taken.

25 Q. As similar to what sorry?

A. That's what I was saying.

Q. Sorry, it was a bit fuzzy.

A. Historic –

30 Q. So it's the daily flow rate under the Aqualinc method is similar to the ORC proposed method in the schedule?

A. No, I didn't say that.

Q. Okay sorry, I am misunderstanding what it is that you're saying, if you could just take it a little bit more slowly because also the audios not 100% clear so can you say it again, what is similar?

5 A. Okay, if you apply the proposed ORC method to determine the daily flows which is part of their methodology you will get flows that are similar to the flows that they've been taking historically because it's based on water meter data and they're taking the maximum daily flows, adjusted by cleaning up the data and things like that. So those two are similar, so and the point I was making is flow rate has the biggest impact on the environment but they're not changing it really. The difference between the flow rates from the Aqualinc guidelines and the ORC method which is similar to historic takes, some cases are seen to be similar. Some cases are quite different and that will come down to how the regional take was set up, the infrastructure, the method of irrigation and things like that.

15 1415

Q. So if it is a purpose of the ORC for deemed permits in particular but possibly also to some extent water permits for replacement, if it is a purpose to impose on applications to replace them a reasonable and efficient rate of take and volumes, how would you go about that exercise?

20 A. I want to apply the Aqualinc guidelines first and then I would look at the actual situation of the consent applicant and just see if there are differences and why. So for example, if a person was a single irrigator we will talk about here. With border dyke irrigating, he may require a much higher flow rate for a short time compared to what the Aqualinc guideline says which are based on 24 hour per day flow rates. So really (inaudible 14:16:37) a comparison and try and align them together so that

25 –
Q. So you'd start with the Aqualinc guidelines and then you'd look to the actual circumstances of the abstractor or the irrigator.

30 A. Yes, I would.

Q. And then you would align them.

A. I would try and understand if there were differences why there were differences and then try and align them.

Q. So let's the example of border diking which is efficiency I would imagine would be less than 80 per cent assumption in the Aqualinc guidelines, is that correct?

A. In many cases, yes, it's correct.

5 Q. In many cases, alright. So then your outputs for a border dyke operation would not align with the demand by the border dyke, correct?

A. That's correct.

Q. So then how would you align the two?

A. There's two choices generally. One you'd adjust the border dyke systems so it is aligned through changes to infrastructure and that is what we're seeing happening for example in the lower Waitaki scheme or you put forward a special case through the consent application process to support what's being done.

10

Q. What does a special case look like?

15 A. It's getting more and more difficult to justify it to be honest. What some regional councils are doing with this and I think Canterbury and for example how it's applied to (inaudible 14:18:36) scheme is that they're giving the border dyke irrigators the annual volume that would apply to spray irrigation. Now, what that does is that if they are using a lot of water they use up their allocation by February or March instead of having enough order to take it through to April or May so there is a penalty. So as I said to your fellow Commissioner, a lot of the border dykes have been converted to spray and there's some good reasons for that. So it's getting harder to justify border dyke irrigation but in a situation where the environmental effects are minor it may well be allowed to continue.

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Q. That's your special case?

A. Yes, it could be, yes.

Q. Because otherwise this scenario you've just put to the court just then was that you'd simply allocate to border dyke operation that annual volume of water which would be required for a spray irrigator. I presume assuming 80 per cent efficiency, correct?

30

A. That's right and that's why they could run out of water before the season ended.

Q. Yes, that would be even more so should the irrigator be wild flooding or contour flooding as you've described them.

A. Hard to know. That's so variable in its performance. I wouldn't really like to comment on that.

5 Q. Do you know any wild flooding that achieves 80 per cent efficiency?

A. I don't know that it's ever been measured.

Q. Okay.

A. I think to be fair the old time is when they were diverting water with their shovels probably actually made very good use of that original water. I
10 wouldn't be surprised if they did achieve 80 per cent when I think about it but it was really labour intensive.

COURT ADJOURNS: 2.22 PM

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COURT RESUMES: 2.41 PM**QUESTIONS FROM THE COURT CONTINUES: JUDGE BORTHWICK**

5 Q. So Mr McIndoe, what we're puzzling as between ourselves, what is the purpose of the Aqualinc guideline and any limitations of the Aqualinc guidelines, these are the outcomes being sought under plan change 7 by any party and so our exchange is actually being quite helpful, as I understand it, the Aqualinc guidelines are produced for the input, for the particular flow on type reduce outputs which reflect the reasonable and efficient demand upon it's for that farm in relation to water, that's all it does, it's assuming that there's 100% reliability of water supply which you've agreed with me may not be – is an assumption which is a rebuttable assumption in some years and it is saying nothing in terms of the area of land to be irrigated, indeed, the area of land to be irrigated, you said, really was a matter for the farmer and indeed the determination of the rate of take is a function of those outputs and area of land to be irrigated and I think finally you said to me the Aqualinc guidelines are also saying nothing about those measures which need to be taken to provide in some way for the environment including those matters which are listed as compulsory matters under the NPS such as (inaudible: 14:43:29) 10 threatened species (inaudible: 14:43:32) would that be a fair summary of what it does and what it does not do?

15 A. Yes, that's right.

20 Q. You also said in your evidence and to me, well at least perhaps in questions from the court that the schedule proposed by the ORC indeed does mimic as a pretty good mimic of the historic actual use of water but that the schedule outputs don't reflect what the Aqualinc guidelines would say is a reasonable use or a reasonable demand or efficient demand for water, correct?

25 A. Yeah, I'm mostly concerned about the volume.

30 Q. Okay. Now in your evidence you have gone for a 48 year record of – I think you call it climate record or weather record, there's not much way you can express it, climate date of 48 years, can you tell me why you picked 48 years?

A. Because climate data was made electronic in 1972 and that's when most of those records are available.

Q. And where have you taken your record from?

5 A. It would have been from probably – well, the available climate stations, they could be Metservice climate stations or they could be through the NIWA network but they're official climate stations.

Q. And those climate stations, where are their locations?

A. I think I put them in my evidence. One was Alexandra, in paragraph 38.

10 Q. So paragraph 38. So the weather station is at Alexandra, Windsor and Palmerston?

A. That's correct.

Q. And is it your evidence that that is representative of all of Otago or just those areas in Otago?

15 A. Well, mainly those areas but we tried to choose three locations that were different. I'm not going to represent the whole of Otago here, I'm just trying to select some examples that we can look at to then compare the results with and see how it comes out. So Alexandra for example is a low rainfall area and Windsor is slightly higher and Palmerston is a wetter more coastal region.

20 Q. And that 48 period, that would include periods where there has been a global weather oscillation?

A. Yes.

Q. Such as El Niño, the southern oscillation or the Pacific decadal oscillation?

25 A. All those things.

Q. And those weather oscillations also include periods of low rainfall input in Otago?

30 A. Yeah, wet years, dry years, in between years, a whole range and this is the point of my evidence that I'm saying that the 2015 to 2019 seasons don't represent that sort of range.

Q. And the point being, the 2015, 2019 are not representative of those weather oscillations and the impact on those?

A. Particularly in the drier years.

Q. In the dry years?

A. Yes. Five years of record is too short to give you that range.

Q. Now just getting back to what ORC wants to achieve particularly in relation to its deemed permits and putting in place a range of conditions which limit the abstractor either to actual use – like limit the abstractor to the actual record of take and use either by rates, take or volume and we've heard your concerns particularly in relation to volume.

A. Yes.

Q. That being said, in your experience, is it difficult for applicants for water permits to calculate now the actual area of land that is currently under irrigation?

A. I would expect farmers would have quite a good idea of that. We'd have to remember that a lot of the takes in Otago have been schemes.

Q. Tell me about that.

A. And so the scheme operators will have a pretty good idea about what the total area is in their schemes which actually leads me onto something important and that is that the Aqualinc guidelines apply to individual properties but to convert that data into data for schemes, it requires an amalgamation of the individual property data plus an adjustment for distribution losses because it's a scheme plus other inputs, for example, for detection or fruit cooling or stock or whatever. There's a very good example of that put forward by Landpro in the memorandum I think 20th of March –

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Q. Is that for Mr Dunlop's purposes for expert conferencing?

A. Yes.

Q. We probably should leave that for Mr Dunlop rather than take me through that. So adjustments for losses in scheme and adjustment for other reasons such, well I mean the obvious one would be stock water.

A. Yes, yes so –

Q. Or I guess human, will maybe stock water, human water, okay.

A. So the guidelines could be what you need on individual farms but for a scheme the whole thing needs to be amalgamated together to give a flow rate and volume or whatever for the scheme and the methodology behind that is well established.

Q. Do the guidelines say how to do that?

A. No the guidelines don't but people like Landpro and Aqualinc even, you know, we're got methodologies for doing that.

5 Q. So if it is a purpose of the Regional Council in trying to understand what water is, either what water is actually being used or what is a reasonable demand and efficient allocation of water relative to the area currently under irrigation, then the Aqualinc guidelines and together with information either from a consent holder or the scheme operators in relation to the area under irrigation can be readily provided, would that be right?

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A. Yes, that's correct, yes, it's not difficult and it has been done already for a number of schemes.

Q. I don't know whether you can answer this question but are there some instances for those folk that deemed permits where they don't have water metering data?

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A. I understand –

Q. Or water meter installed at least, so not talking about technological glitches but water metres installed.

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A. Yes I don't know how many don't have water meters installed, I know they're supposed to.

Q. Yes.

A. But that's something that ORC I'm sure could tell you.

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Q. And just to turn to one particular paragraph of your evidence, paragraph 28, last sentence you say: "However I stress annual volume limits applied to individual consents are not a substitute for properly considered flow based allocation limits applied to rivers and streams if environmental protection is the goal." Assuming, Mr McIndoe that environmental protection is the goal, at least to achieve the outcomes for compulsory values under the NPS, then what is required to achieve that goal in your view?

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A. Minimum flows and allocation blocks, flow sharing and all those things that protect the water resource, not annual volumes of resource consents.

Q. And you say that because?

A. Because putting an annual volume limit on a resource consent has pretty much no impact on the flows in the rivers and streams.

5 Q. And again because why, when the water is approaching or is at minimum flow, does that annual volume – does the rate of take not itself constrain, no, you tell me why you say that, in drying weather.

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A. Well, annual volumes. Say for example, the stream gets close to its minimum flow but you've only used up half of your annual volume, you can still take water.

10 Q. I see.

A. The annual volume is there to encourage efficient use of the water, not a control on the impact on a stream. So taking water from a river, for whatever; stop water or frost protection has an impact on it but if you have the appropriate minimum flows and allocation blocks and flow sharing and whatever rules you put in place, then what the river is seeing is stuff to do with flows, that's the flows that have the environmental impact, not something to do with the volume on a piece of paper.

15 Q. All right. And then the final question from me was in relation to your paragraphs 40 to 43, I didn't really get it – 40 to 44, I didn't really understand what you were trying to say about percentiles and can you just take me through it because – because I wasn't sure, I wasn't sure how to read the subsequent tables, so maybe start at paragraph 40, zero percentile.

20 A. People have been using percentiles in their evidence, I'm not the only one.

25 Q. No, no, people use percentiles for different reasons and I suspect your percentile how you use percentiles are not the same with Mr Wilson's use of percentiles. I might be wrong but I didn't think so.

A. So what I'm talking about is percentiles relating to meeting irrigation demand and then (inaudible: 14:57:09)

30 Q. Sorry, I didn't catch all of that. So percentiles to meet irrigation demand and then I didn't get what you said.

A. So I've calculated the irrigation demand for these different crops using the eight years of record and then summed them up for each year. So if I

looked at those 48 numbers, if we're talking about annual volumes for example then the zero percentile would be the minimum value in that table. So in every year that value is equal or exceeded.

Q. If you're at a zero percentile, that means an every year what?

5 A. Every year the demand would be equal to that or exceed that.

Q. Every year would be equal to or exceeding what though? What value?

A. The lowest value in the record. Remember we've got 48 numbers, one for each season, if we look through and we pick the lowest number, that's the zero percentile.

10 Q. So if you turn to the tables where this applies or might be applied, can you show me a record for the zero percentile?

A. No, there are none.

Q. Okay, well have you got – paragraph number 42, you're talking about a 50th percentile there, can you show me a record where that percentile applies?

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A. Well, there's some close to 50th percentile.

Q. Tell me which ones or give me an example.

A. In table 1, 0.55% Maniatoto 54%.

Q. Okay.

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A. So they're close.

Q. Okay so how am I meant to read this, so I've got your sentence: "percentile of 50% means the volume of water needed for irrigation will exceed this value 50% of the time and be lower than this value 50% of the time", what's the value?

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A. Whatever the – where's the 50% stuff here?

Q. Well, look at north.

A. I haven't given you the value.

Q. You haven't given us the value?

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A. – Not in that one. But the way to read the tables is we're looking for 90%. In other words, meeting the demand nine years out of 10. So if you look at tables and you see any numbers that are less than 90 % then the amount of water that would be available and this is based on these years of record that the Otago Regional Council is using, if they're less than

90% then the water that's going to be available won't meet the demand in those dry years and none of them are 90%.

Q. Where the calculation for reasonable and efficient use is over the 48 climate years, correct?

5 A. Yes, that's right. That's correct.

Q. It would include periods of dry years, particularly those years responding to global oscillations, correct?

A. That's correct.

10 Q. Have you been asked to comment on the methodology Ms Dicey has set out to identify rates and volumes in her evidence in chief? Then she was proposing to put it in the water plan now she's proposing – I understand to put it into this plan change but regardless of where it slots, were you asked to comment on that?

A. No.

15 Q. Have you seen it?

A. Yes.

Q. Have you got any comments to make?

20 A. If it's the one I'm thinking of then it's the same methodology essentially that has been put forward in this memorandum we're going to discuss tomorrow.

Q. We've got another memorandum to come, do we?

A. No, the memorandum was put out on Saturday, on the 20th.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Ms Irving's just going to pop up and say something.

25 A. Yes, so in preparation for the conference, there's been a memorandum produced and just to clarify OWRUG and Landpro have essentially agreed that their methods are the same so the Landpro method has essentially been adopted by OWRUG for the purposes of the conferencing moving forward.

30 Q. Is that only for the conference or by way of relief?

A. By way of relief. In essence, the two methods are the same articulated in slightly different terms so to try minimise the work for the conference

and streamline it we've agreed that the Landpro method would simply be adopted.

THE COURT: JUDGE BORTHWICK

Okay. So that's good so I won't ask you any questions because it's going to
5 come up in the expert conference and it appears now that the methodology
OWRUG had put forward in Mr Dicey's evidence is not being pursued as
advised by Ms Irving so that's helpful. Now, anyone any questions arising as a
consequence of the Court's questions? Alright. Mr McIndoe you've got to get
10 onto a plane and get down here for your expert conferencing. That's been really
helpful. I really appreciate your time ahead of that conference as well. Thank
you very much.

WITNESS EXCUSED

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MR PAGE CALLS**MATTHEW AARON HICKEY (SWORN)**

Q. Is your full name Matthew Aaron Hickey?

A. Yes, it is.

5 Q. And do you have the qualifications and experience set out in paragraphs 1-13 of your brief of evidence?

A. Yes, I do.

Q. And do you confirm that that brief of evidence is true and correct to your knowledge and belief?

10 A. Yes, I do.

Q. Now, on page 2 of your evidence, Mr Hickey, you have prepared a summary running to some eight bullet points, do you wish to read that?

A. I can but I can take it as read.

Q. Does it assist the Court if he reads the summary, Ma'am?

15 **THE COURT: JUDGE BORTHWICK**

It would.

EXAMINATION CONTINUES: MR PAGE

Q. Mr Hickey, if you wouldn't mind reading the summary on page 2 of your evidence and then I have some supplementary questions to ask you arising from what we've just been hearing from Mr McIndoe.

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A. Yes. ORC claims that it has unreliable data and insufficient knowledge to implement the NPS FM 2020 immediately. The evidence from ORC and OWRUG technical experts does not support this. The evidence of Mr De Pelsemaeker paints a bleak picture of ORC's current data and knowledge and this does not seem plausible based on the evidence of Messrs Henderson, Olsen, Allibone and myself. The time between now, which is now March 2021 and notification in December 2023 of the new land and water regional plan does not give ORC time to rectify the data issues identified by Mr De Pelsemaeker. ORC's proposed approach to acquiring the technical information required the sensitive and high value catchment such as the Otago Lakes is unlikely to be appropriate because it does not prioritise ecological risk. Contrary to Mr De Pelsemaeker's

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view, the evidence from both ORC and OWRUG's expert suggest in relation to the main catchments covered by plan change 7 where deemed permits dominate, there is sufficient data and knowledge to implement the NPS FM 20 without the delay offered by PC7. The key tool to managing the effects of an abstraction on the compulsory values of the NPS FM 2020, indigenous ecosystems, threatened fish and the (inaudible: 15:08:01) species are available under the operative regional plan water and not plan change 7. The process for assessing applications under the operative regional plan has in my experience resulted in good ecological outcomes and indirect contradiction to the NPS FM delaying proper ecological assessments or water takes for at least the next six years may result in further losses of non-migratory galaxiids populations.

Q. Thank you. Now, Mr McIndoe was asked questions about the risk of flatlining in catchments in Otago relative to allocation block sizes, do you recall that evidence – those questions?

A. Yes.

Q. To your knowledge, are hydrographs available for the catchments for which deemed permits currently exist?

A. For the majority or for many of them, yes.

Q. And if those hydrographs were studied, would they demonstrate whether flatlining is occurring in those catchments under the status quo arrangements?

A. It would demonstrate that at times there is low flows and that there is a high degree of variability in flows.

Q. Do you have any comment to make about whether is a connection between the setting of allocation blocks and the risk of flatlining river flows in a catchment?

A. In general I agree with the comments by Mr McIndoe. My experience is not really around the size of the allocation block but how that water used and a distribution within a catchment of how that water is taken and when that drives the result in flow regime.

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Q. Have you got any observations to make about using the Manuherikia catchment as an example?

A. I probably wouldn't use the Manuherikia. There is no minimum flows and most of the permits extract water from tributaries and there is no residual flows on those takes either. So it's probably not ideal.

5 Q. I want to come now to questions about irrigation methods and Mr McIndoe was asked questions about the relative efficiency of spray versus surface flow types of irrigation and Mr McIndoe's observation was that spray methods are gradually replacing surface flow methods of irrigation in Otago. Do you agree with that?

A. Yes.

10 Q. Why would a farmer continue to be using surface flow irrigation methods instead of spray?

A. The two obvious reasons that I encounter firstly non being sure of the outcome of going through the consent process and this kind of process. So there's been a lack of willingness to invest in that infrastructure and they want to wait and see in some cases and the other cases around reliability of supply. So generally now, where we see overland flow used it's where reliability of supply is much lower than what's required for spray irrigation so on the shoulder seasons often, say spring into may be early summer, there would still be some flood irrigation or border dyke irrigation
15 but where the reliability of supply is adequate, generally people have moved to spray such as K-line or centre pivots.
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Q. Can you explain why reliability of supply is more important for spray irrigation methods than surface flow methods?

A. So spray methods rely on putting a little bit of water on over the whole season, just keeping soil moisture at a certain level whereas with border dyke systems they often have – or flooded systems – they rely on putting a lot of water on at once when it's there and they're not coming back around and putting any water on sometimes for months or so later so they're quite different approaches.
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30 Q. Compared to example of Canterbury irrigation schemes, do you have observations to make about reliability of irrigation supply in Otago?

A. In my limited experience with Canterbury and Otago we generally have less reliability than a lot of the schemes in Canterbury.

Q. Lastly, Mr McIndoe made comments about the irrigation intake infrastructure making it difficult to rapidly respond to river levels which would enable rivers to be held at minimum flow. Have you got any comment to make from your familiarity with irrigation infrastructure in Otago?

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A. Obviously it's different across the whole region, different infrastructure but in principle I agree with what he's saying. It's very hard. I have not seen it being done where a catchment can specifically hold a flow for weeks or months at a certain flow by managing their irrigation infrastructure. I have not seen that happen in Otago.

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Q. If that were happening in Otago would that be apparent from the hydrograph records that the regional council keep?

A. Yes but you would have to be careful that what you were looking at wasn't a result of just lack of rain given central Otago is arid. It's not uncommon to have no rain for three months during the summer which, of course, will result in low flows which are essentially – I guess what people will try to say it's flat line so you would have to be able to differentiate the environmental background that flow regimes is responding to as well.

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1515

20 Q. But if you were comparing those hydrographs with irrigation take data for a catchment do you think that an analysis is possible?

A. Yes.

CROSS-EXAMINATION: MR MAW

25 Q. I want to start at the end of your evidence, not the beginning so if I can take you to your paragraph 120. At the very end of your very last sentence you note that “when the science basis for achieving Te Mana o te wai through permit renewals that exists now”, when you say “science basis” what do you mean in this context?

A. So I mean having the hydrology and ecological ability to make decisions based on providing for ecosystems now.

30

Q. So when you think about setting an environmental flow regime, do you accept that the ecological flow is just one component of an environmental flow regime?

- A. I accept that is a component but it has some form of compulsory attribute to it under the NPS so it's given a bit more weight now than I guess historically had been.
- Q. But it's not given exclusive for full weight? It doesn't trump other values?
- 5 A. No, but you wouldn't set a flow for the other values that didn't provide for the ecological outcome.
- Q. So is that your opinion that an ecological flow would provide for all other values?
- A. No, but I think you can set a flow for other values that didn't necessarily provide for ecological values but it would be more likely that you would go some way to providing the other values if you at least had the ecological values sorted.
- 10 Q. So you might go somewhat but not all the way to provide for other values?
- A. No, not in all cases, no.
- 15 Q. When you think of those other values what is it that you have in mind?
- A. I guess recreation potentially, some values like kayaking or something at higher flows, yeah, that kind of thing.
- Q. What about cultural values?
- A. Yes, there potentially is cultural values that are different to ecological.
- 20 Q. You might need higher flows to protect cultural values?
- A. That's possible.
- Q. Do you have any understanding or familiarity with the concept of cultural indicators of health?
- A. Yes.
- 25 Q. Can you describe for the Court some examples of cultural indicators of health?
- A. So the way the river looks I guess is one of the fundamentals with (inaudible 15:18:49) and things like that, how it sounds, those sorts of things.
- 30 Q. And the way in which those values might be protected may require flows higher than ecological flows to remain in a river system?
- A. Potentially yes.

Q. So when you say that the science basis for achieving Te Mana o te wai exists now, is it perhaps better to say that the science basis for some of the values exists now?

5 A. I think that's fair comment and I should've said that for achieving that ecological component of Te Mana o te Wai now.

1520

Q. Is it your understanding that under the NPSFM 2020 that there is a process that the Council needs to go with respect to understanding all of the compulsory values?

10 A. Not sure about the compulsory values. As in the threatened fish mahinga kai and ecosystem?

Q. Yes, in fact we'll go back a step. The community needs to go through a process to identify the values that are important to it.

A. Yes, I understand that, yes.

15 Q. And the NPS requires significant engagement with Tangata Whenua in relation to understanding cultural values?

A. Yes.

Q. And that work is underway in the Otago Region as far as you're aware?

A. I think so.

20 Q. But it's not yet complete?

A. I don't know how far through that one is, no.

Q. So when you refer to the – I want to take you to your paragraph 105 and here you say that in your experience, limit setting under permit renewals and NPS FM 2020 is effectively the same exercise and requires the same data. You then go onto note that each waterbody is different and has different values. Now when you think about the process that the community needs to go through to identify the values that are important to it, how is it that that can occur through the lens of a one off resource consent application?

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30 A. I think I may not have written that well. What I was suggesting that the data that you're going to require to get through the NPS FM 2020 or what's required by 2023 and what's been used or put forward in say the Manuherikia Group application will have to be the same data. We don't have time to really get any other data and that when you're assessing

whether you're meeting some of those meetings, you're running through the same common assessment.

Q. Do you accept that that relates to the ecological and hydrological considerations?

5 A. Yes.

Q. And so when we think about cultural values and recreational values, that work's yet to be done, isn't it?

A. I think it's been done in the Manuherikia so there's – pretty sure there's cultural assessment been done and a recreational assessment being done.
10

Q. Is your understanding that PC7 applies just to the Manuherikia catchment or across the Otago Region?

A. Across the catchments and if we've got deemed permits and consents coming up, yes. So I was just using the Manuherikia as an example that I know of where that information is available.
15

Q. But that information hasn't been captured in the way that the NPS FM 2020 now requires it to be captured, has it?

A. Not sure what you mean by that.

Q. So the process under the NPS FM and tell me whether this is straying into planning territory, but you have given evidence in relation to the NPS FM, so in relation to the values that need to be identified and recorded as long term visions in a regional policy statement, that process hasn't completed yet, has it?
20

A. Not that I know of.

Q. And so all of the information that's necessary across the Otago Region in terms of understanding the values isn't yet complete, is it?
25

A. With the data collection? I'm not sure what –

Q. Let's approach it in this way, let's assume all of the science, the technical science is complete. That's not enough though, is it? There still needs to be an assessment in relation to cultural values across the region and there would need to be an assessment in relation to recreational values?
30

A. Yes.

Q. And values touching on amenity?

A. Yes.

Q. And natural character?

A. Yes.

Q. And so in relation to those values, given that they haven't yet been articulated and identified?

5 A. Through the RPS you mean?

Q. Yes or through a regional plan.

A. No.

Q. So how was it that a consent applicant understands how to approach those values?

10 A. I guess from the perspective that I've approached this is that we've been expected to give regard to the NPS through the Regional Council asking us to for our consent applications. So in my mind, we've tried to do that and I acknowledge it won't be the full approach that you're talking about but it has been expectation that we at least try in lodging those consents.

15 Q. So it is difficult when the community hasn't yet established the values that it considers are important and need to be protected?

A. No – well, yes it is difficult what you say but I don't believe that means we shouldn't try to at least try and prove things that we know are not as good as they should be and that's, I guess, the approach we take but I
20 acknowledge what you're saying.

Q. I want to take you to your table 2 on page 13 and here you've listed the data available in relation to the deemed permit catchments and information available. Can you clarify; does this table relate to what in fact is there, it's in relation to the Manuherikia, Cardrona and Arrow catchments, and in your table is there any data available in relation to
25 cultural considerations or cultural values?

A. In my table?

Q. Yes.

A. No.

30 Q. Recreational values?

A. No.

Q. Natural character?

A. No.

Q. And amenity?

A. No.

Q. I want to discuss with you now the relevance of allocation blocks and allocation of water. So when you think about, for example, the suite of applications that have been lodged in relation to the Manuherikia catchment, you're familiar with those applications?

5

A. Yes.

Q. You've had a hand in drafting them I understand?

A. Yes.

Q. So in terms of that process, you've identified a block of water or an allocation of water that is available for extraction?

10

A. Yes.

Q. And in terms of the applications lodged, they seek to abstract the entirety of that allocation that's been identified?

A. In what way?

15

Q. In the sense that you accept that the applications have been framed from what I'll describe as ecological minimum flow conditions?

1530

A. Yes.

Q. And then all over water above that is sought by way of application for the various uses in the catchment?

20

A. Yes.

Q. So when you think about those applications, let's assume that they are all granted for the duration that's being sought and can you confirm the duration that has been sought for those applications?

25

A. I think it was 35 years but I'm not 100% sure.

Q. So 35 years and let's assume that water is allocated out so that those applications are granted for the 35 year period, when you think about the Council's role and you accept that the Council has a role in terms of determining an allocation regime?

30

A. Yes.

Q. And water can be allocated to a range of uses, can't it?

A. Yes.

Q. So water could be allocated for agricultural purposes?

A. Yes.

- Q. Could be allocated for cultural purposes?
- A. Potentially yes.
- Q. Hydroelectricity generation?
- A. Yes.
- 5 Q. Community takes?
- A. Yes.
- Q. So the effect of allocating out all the water available in the Manuherikia for 35 years for these applications would deprive the Council of the opportunity to consider whether allocations should be made for those other uses, wouldn't it?
- 10 A. It would depend. It would depend on the allocation block in the new land and water regional plan.
- Q. But if all the waters been allocated out to these uses there wouldn't be any left, would there?
- 15 A. Well I don't know because I don't know what that block is so, yeah, it's, if you assume that there's no possible way of increasing the allocation block going forward then yes, you're right but I don't know if that's...
- Q. So you don't know whether the water that's being sought in these applications is the full extent of the allocation block available?
- 20 A. Well at the moment there's further allocation available for high flow harvesting do there potentially is still allocation available.
- Q. Potentially only at those high flow levels?
- A. Depending on what those levels get set at, yes.
- Q. I want to take you to paragraph 61 of your evidence and in this section you address the NPS-FM and Te Mana o Te Wai?
- 25 A. Yes.
- Q. Now having read your qualifications and experience, am I correct in understanding that you don't have any planning qualifications?
- A. Yes.
- 30 Q. So when I read your evidence in relation to the interpretation of Te Mana o Te Wai, that's coming from your experience as a hydrologist and/or ecologist?
- A. I think to be clear, the way I've written this is to try explain the approach that I've taken from an ecology perspective and trying to give regard to

the NPS-FM. So trying to set out like the logic of why we're putting in a residual flow, what the specific values are that we're trying to address with that so that it can be tested.

5 Q. So what you've done is you've picked out objective 2.1(1)(a) of the NPS-FM so the first matter in the hierarchy and as you read that part of the objective do you understand that or is your interpretation that that relates to ecological aspects of health of a river?

A. I've used ecological component as that's my expertise in interpreting that part of the objective.

10 Q. Do you accept that that is one component of the assessment?

A. Yes.

1535

15 Q. And the NPSFM recognises that, doesn't it, in terms of the approaches to implementing the national policy statement in clause 3.2 where it addresses Te Mana o te wai?

A. I don't have that clause in front of me, sorry.

THE COURT: JUDGE BORTHWICK

We can provide you a copy. Which clause are you referring to?

20 **MR MAW:**

Three point two.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Page 11 of the NPS. There you will see subparagraph 2(d) the very last one on the page.

25 A. Yes.

Q. That recognises that there is a need to enable the application of a diversity of systems of values and knowledge such as Maturanga Māori to the management of freshwater.

A. Yes.

30 Q. So when we look at the objective and we look at subparagraph (a), first the health and wellbeing of waterbodies and freshwater ecosystems,

there is more to it than simply looking at the ecological component, isn't there?

A. Yes.

Q. Are you familiar with the concept of ki uta ki tai?

5 A. Broadly yes.

Q. So just your understanding of the concept at a broad scale?

A. I'd have to refer to the definitions in the NPS. I don't have a working knowledge.

Q. Do you accept that it recognises the interconnectedness of resources?

10 A. Yes.

Q. And the need to take an integrated approach to the management of resources?

A. Yes.

15 Q. Do you accept that there is a connection between land use and water quality?

A. Yes.

Q. And the connection therefore between the use to which irrigation water is put and potential effects on water quality?

A. Yes.

20 Q. And taking a holistic view it's important to understand both the components that deal with water quality and quantity?

A. Yes.

25 Q. In terms of your understanding of the Otago region, do you accept that there is limited information available at the present time in relation to the current land use pattern?

A. No.

Q. Is it your evidence that there is complete knowledge of the land uses that are currently taking place?

30 A. Well, I'd say we would never have complete knowledge because land use can change quite rapidly but there is good knowledge of different land uses and where they occur in the region.

Q. Do you accept that when it comes to allocating water, it is important to understand the pattern of land use?

A. Potentially yes.

Q. And it's important to understand that pattern of land use because of potential effects on water quality?

A. Yes.

5 Q. And based on your experience the current planning framework in Otago is ill-equipped to consider the effects of land use on water quality?

A. Well, it's all basically been delayed, hasn't it, yes.

1540

THE COURT: JUDGE BORTHWICK

10 We're going to take an adjournment. Take a 15 minute break and then get back to it with you, Ms Lennon. I think your questions after the afternoon adjournment.

MS LENNON:

I've got no questions, your Honour.

15 **THE COURT: JUDGE BORTHWICK**

Who's up next? I had you, Ms Williams.

COURT ADJOURNS: 3.41 PM

COURT RESUMES: 4.02 PM**CROSS-EXAMINATION: MS WILLIAMS**

- 5 Q. At paragraph 96 of your evidence in chief, if you just quickly refer to that. In that paragraph you mention a particular deemed permit which has a higher priority under the deemed permit regime giving it a high reliability of supply. Do I take it from that paragraph that you have an understanding of the deemed permit priority regime?
- A. Yes.
- 10 Q. And then just sticking with the Manuherikia over at paragraph 107 of your evidence, you refer there to more than 100 permits being due for replacement by October so all those permits are deemed permits?
- A. I'd say the majority, over 90 per cent.
- 15 Q. So we're talking at least 90 deemed permits and again to your knowledge do many of those have priorities conditions in them?
- A. They will all be somewhere in the priority list. They may be well down the priority or at the top. It just depends for each one.
- Q. In the Manuherikia catchment, it is quite a complicated catchment. We've heard evidence about that.
- A. Yes.
- 20 Q. There's lots of tributaries and sub-catchments and races taking water from one sub-catchment to another sub-catchment.
- A. And from the Taieri to the Manuherikia and from the Manuherikia to the Taieri and stuff like that.
- 25 Q. So thinking about this in terms of priorities on deemed permits, do you have knowledge of people continuing to exercise priorities?
- A. Yes.
- Q. What would be an example where a priority is still being exercised? Can you think of a sub-catchment where that would apply?
- A. In anywhere in Otago or?
- 30 Q. Because we're talking about the Manuherikia because we've established that you have lots of knowledge of the Manuherikia, in that catchment?
- A. Yes, there's priorities being exercised in both Thomsons and Lauder Creek. They continue to operate their priority.

Q. So Thomsons Creek and Lauder Creek?

A. Yes.

THE COURT: COMMISSIONER EDMONDS TO MS WILLIAMS

Q. What was that second one again?

5 A. Lauder. So that's L-A-U-D-E-R.

Q. I know what it is. Thank you.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. Are you aware of populations of non-diadromous galaxiids in either of those catchments?

10 A. Both yes.

Q. And are you aware of whether the exercise of priorities affects those populations of non-diadromous galaxiids?

A. It's a two pronged thing actually in my view. It's both priorities but also how water is used so with a lot of the water use in Manuherikia still being
15 – well until recently flood irrigation and border dyke irrigation they would have quite a bit of return flow to streams or encourage groundwater seepage back to those streams and in those locations is where galaxiids tend to be.

Q. So when you're talking about return would that be perhaps by wash?

20 A. It could be by wash and just overland flow returning to the stream and also because with flood irrigation you put so much water on it goes through the ground it ends up coming back in, like almost like a spring down the cistern.

Q. So in some respects it's almost a form of an aqua fill recharge almost.

25 A. Yes.

Q. You've told us in your qualifications that you have ecology qualifications?

A. Yes.

Q. In your expert opinion do you consider that these practices are assisting the habitat of non-diadromous galaxiids in those catchments?

30 A. I have serious concerns that some of those practices have changed in the last two to three years which has changed the hydrology, which is putting those populations at serious risk, yes.

Q. Because we're in the Manuherikia we'd be talking about Central Otago roundhead.

A. Yes.

5 Q. If we have a controlled activity which allows for the priorities to be continued to be exercised would that enable the persistence of those populations?

10 A. Not necessarily. My concern is that over the last decade, we've had a plan that has explicitly asked for efficiency upgrades and consent holders have been given the message from the regional council that if it's not efficient use it won't be granted. The plan expects that. It is also expected that on renewals with that efficient use, there would be residual and minimum flows applied to protect instream values. These catchments have had the change to efficient use, especially in Thomsons Creek which is drying up those streams that are so important for galaxiids but there
15 will be no residual flows in those catchments under the controlled activity rule to provide for the values that are there.

THE COURT: JUDGE BORTHWICK

Q. So just to be clear, I understand the last answer to pertain to two different time periods. We need to be clear for the record.

20 A. Yes.

Q. I understood you to say that these catchments are now responding to change in a way that either in the response to provisions within the water plan or alternatively administration of the water plan demanding improvement in efficiencies with current irrigation abstraction so that was
25 one time period. Is that correct? The other time period being this plan change. So two time periods were bound up in that answer. Could you just clarify that? This is critical.

1610

30 A. So right up until say about 2010, we had a lot of border dyke and flood irrigation in the Manuherikia and a lot of Central Otago. The water plan explicitly requires that allocation is not just actual use but efficient use which is based on those Aqualinc guidelines which is spray irrigation. People have been through the messaging from the Regional Council for

the last decade, there have been shifting from those inefficient methods to spray and most rapidly probably since about 2015 in anticipation for consent renewals to show that they're efficient, they're using their water efficiently and that kind of thing. Up until say recently those streams that I mentioned like Thompsons Creek and Lauder Creek which have these galaxias species have always flowed in Summer because of returns from those inefficient methods. From 2018 those creeks dried up for the first time that we know of in at least 30 years so those populations, recently we – or this, a month ago we did surveys in Thompsons Creek where Doc had previously identified eight subpopulations of galaxias recently, we've lost two of those from the monitoring that we've done and they're in those areas that historically gained flow from those irrigation methods so I, with those changes I don't think we've seen the full extend of the loss of those flows in those lower streams and I think over the next four or five years it'll become more and more apparent in the flow record, especially if there's no controls on residual flows.

Q. Why do you think there's no controls on residual flows, is that under the water plan PC7 or this plan – or both?

A. Well there's no conditions to roll over under the controlled activity to keep flows under that plan change 7 unless there's an existing minimum residual flow condition. In the applications that we've made we proposed residual minimum flows on all takes to provide especially for non-migratory galaxiids under the operative plan.

Q. Understood. Thank you.

25 **CROSS-EXAMINATION CONTINUES: MS WILLIAMS**

Q. Looking at paragraph 110 of your evidence and in that paragraph you're discussing the applications in the Manuherikia catchment is that right?

A. Yes.

Q. And in that paragraph you refer to having sharing regimes prioritising flows for the health of the waterways?

A. Yeah so should I explain how, why we do that and how we do –

THE COURT: JUDGE BORTHWICK

Yes can I just, I'm really interested in this answer, I just want to reread the paragraph myself, sorry but you keep your thoughts in mind because I'm very interested in it. Okay, and your question and the answer?

5 CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. So my question is, you talk there about having a sharing or, you actually say there would be no sharing regime but presumably the contra of that is that there could be sharing regimes prioritising flows for the health of the waterways.

10 A. Yes.

Q. I'd like you to expand a little bit further on what you mean by that.

A. So this probably goes to your point about priorities, every catchment that we go into in Central Otago has a flow regime and that flow regime has either been delivered by the priorities, delivered by some other sharing regime where they don't operate to priorities anymore because there's a benefit or a regime that has no priorities at all and they don't bother. So and then we look at the values and where they are in relation to that flow regime so often we do what we call longitudinal flows down a stream which in these modified streams which the values of especially non-migratory galaxiids are very specific to the actual hydrology at that point so we try to understand that. Then we come in and go: "right, we know that we're shifting into different irrigation, we know this flow regime is not going to go forward, we also know the priorities aren't going to go forward", so we work out an ecological flow wherever there's a good flow to try provide for those values and then on top of that we initiate a new sharing regime with those water users that prioritises that residual flow for the values. So in the case of Thompson's Creek and Lauder Creek and Shadow Creek, we've done habitat modelling and we have, because of our compulsory values status under the NPS we have applied the logic that 100% or optimum flow for those species will be the residual flow in that tributary rather than drying it up and in that way we're trying to say that we will minimise the effect on the threatened fish habitat, the compulsory value due to abstraction and we've had to work for a number

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of years to get agreement with those water users that that's the outcome we will try to achieve through the consent renewal process.

1615

THE COURT: COMMISSIONER BUNTING

- 5 Q. Can I just ask, who do you mean by “we”?
 A. Our team, our technical team and our planning team.
 Q. For the Council or for somebody else?
 A. For the Manuherikia Catchment Group.
 Q. Thank you.

10 **CROSS-EXAMINATION CONTINUES: MS WILLIAMS**

- Q. Just to catch your – I think your answer is to Commissioner Bunting’s question, this is work that you have been doing to include in the applications that have gone forward to Council, is that right?
 A. Yes, so the Manuherikia Catchment Group is the overarching group that
 15 represents over 600 water users in the catchment. They have employed myself to run their technical programme and my role is to bring in technical expertise to do hydrology, ecology, water quality, we work with a planning team, a team of experts or multiple planning teams to deliver – to try deliver an approach that is far superior to what's happening at the
 20 moment.
 Q. And down at paragraph 114 you really get to your conclusion on this aspect, don't you?
 A. Yes.
 Q. And that’s where you talk about how the implementation of residual and
 25 minimum flows are prioritising the ecological values or share agreements are in place to manage how the water that’s over and above those for the environmental outcomes is distributed and that perhaps comes to Mr Maw’s point when he was discussing that with you earlier but certainly the intention is that those water sharing agreements do provide for, at the
 30 very least, the environmental outcome, is that correct?
 A. The aim – we try to do the best we can with what we can. We know that we don't have the Council that’s got the NPS and what's expected in front

of us but we know we have an obligation that if we know something's bad then we fix it so that's what we've tried to do and this doesn't take weeks; we've been working on this for years. It's very difficult, some of these discussions.

5 Q. I just quickly want to cover off with you, you've mentioned a few times compulsory values of the NPS 2020, do you still have that with you?

A. Yes.

Q. If you could just go to page 36 of the NPS. I'm not quite sure what the common bundle page is.

10 **THE COURT: JUDGE BORTHWICK**

You've got the NPS and what are you looking at?

MS WILLIAMS:

Yes, so I'm looking at page 36 of the NPS. I'm sorry, your Honour, I'm not sure what the common bundle page is.

15 **THE COURT: JUDGE BORTHWICK**

you've got the –

MS WILLIAMS:

700 apparently.

THE COURT: JUDGE BORTHWICK

20 Q. Have you got the document in front of you?

A. Yes, I have.

Q. Great.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

25 Q. And just to clarify, so when you're talking about the compulsory values, you're meaning these compulsory values in appendix 1A of the NPS?

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A. Yes, so we've tried to address ecosystem how threatened species and Mahinga Kai species and human contact where we can, where we know

irrigation run off or bad practice is affecting e coli. We're specifically targeting fixing that but ecosystem helps obviously with the ecological modelling that we've done, the threatened species is clear. Central Otago roundheads in the lower part and species Clutha flatheads in other parts of the catchment and from mahinga kai we've tried to target tuna habitat in our recommendations.

CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. I'm just going to pick on theme from Ms Williams in respect of the state of knowledge about what's happened recently and then the preceding 15 years about non-migratory galaxiids and you've referred a lot to the Thomsons Creek scenario. I now understand not just in relation to the consent applications but there is also this exemplar catchment grant, if you like and I understand you've had some involvement in that. Perhaps could you give us a rundown of what that was and what's been approved by central government in that regard?

A. It was mid last year, MFE called for projects to improve water quality and ecological outcomes so on behalf of MCG I put an application in to the ministry for Thomsons Creek specifically because of this problem for galaxiids and water quality so I was part of that project myself and regional council staff, some consultants, Fish and Game and DOC have all worked doing surveys throughout the catchment to identify where these populations are and are now working on how to implement barriers to stop trout or perch getting into those populations and further removing that. But we've also got a constructive wetland likely to go in what we call this loose channel which is the major tributary of Thomsons Creek where historically most of the flood irrigation occurred and that used to bring a lot of settlement DRP and E.coli down Thomsons Creek and into the mainstem of the Manuherikia. So I've been working on that with NIWA and some engineers around constructing a wetland that will put water through it and hopefully clean up some of that water quality issue for Thomsons Creek but also for contact recreation and stuff in the mainstem.

Q. So that's a community initiative. That's separate from the consenting process, isn't it?

A. Yes, that came about from some work that Beef and Lamb had contracted myself and Dr Olsen to do around water quality and why water quality was so poor and how to fix that. So we went in, took about two samples to work out why it was so poor and then we instigated an approach to fix that. MCG support that and Thomsons Creek sub-catchment group are part of that and now MFE is effectively taking over through the exemplar catchment process.

5

Q. How does that relationship between MFE and the community team that you've referred to – do you get given resource to spend on research and works on the ground?

10

A. The initial grant was for half a million dollars to do wetlands, culverts, fencing and willow removal and surveys and design the wetlands and stuff like that so we have a catchment coordinator who links between MFE and myself and the rest of the stakeholders that had been working on that.

15

Q. Just going back to that galaxiid research, have you got a timeframe for when you're aiming to have answers or action plans? What is the end game for that part of the workstream?

A. I'm hoping that Mr (inaudible 16:24:36) got to do some work there on Saturday to finish on the mainstem of Thomsons Creek where the galaxiids population runs out and then it's a matter of putting the proposal to the Minister and if the Minister pushes go then we will do that but we already have two or three small populations where we know all we need is a perched culvert to keep other species out but we've still got to get resource consent from the Council to do that and we still need the resource consents to build the wetland so who knows how long that will take but that's, the plan is running fast, faster than anything I've seen for a long time to actually so something about water quality or species interactions I guess.

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1625

Q. Okay and just going back to that water quality point and if you can't tell me that's fine I'm not trying to put you on the spot but you said it was pretty obvious what the source was of a particular degraded site, was that related to an activity that was permitted under the plan or one that wasn't perhaps being done quite in accordance with the rules?

30

A. Well given I'm in an Environment Court, do I really want to throw some people under the bus but –

Q. No I don't want you to do, i was just, you might recall there was –

THE COURT: JUDGE BORTHWICK

5 Sanitise what you're going to say next.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. – yes sanitise as much as you need to.

A. The activities that were taking place would be prosecutable under the regional the plan would not meet the NPS guidelines. The, some of that
10 other stuff would've been captured under plan change 6A if it was operative now.

Q. Right.

A. And hadn't been postponed.

Q. Right, that's what I was more interested in was that integration, that land
15 and water integration.

A. So you didn't need a degree in freshwater science to know what was going wrong.

Q. Right, thank you. And that was really interesting how you explained when
20 the change from border dyke and flood irrigation changed what's, or there's at least a correlation between that change in practice and flows that are being overserved in the important streams for non-migratory galaxiids. Did, when in those situations where you made those observations, when the farms were changing to the more efficient infrastructure presumably they were still taking a similar amount of water
25 but irrigating a larger area with it?

A. Not necessarily.

Q. But in some cases that would've been the case if there was no flow back?

A. I'm sure there are some cases where expansion has occurred but in other cases people down grade because of the reliability so you might have a
30 big volume of water but it's not necessarily reliable so you end up coming down, doing that really well, say with a permit rather than doing twice as much just throwing it on so yeah, there I shifts both ways so I

acknowledge that it can go like you say but, and the return flow thing is evident across a few catchments where those methods were used and even in the lower Manuherikia now what used to come back and bump up the flows at the bottom by Alexandra has meant now it's not happening so there's more water being released from storage accommodate that transition and it makes it really hard to know what status quo is, like when people in here are saying: "Status quos going to be all right and in six to 10 years' time it'll be the same we'll pick the pieces up then" I don't think they actually know what they're talking about to be honest.

5
10
Q. So even the status quo is actually dynamic, isn't it?

A. Yes.

Q. Right. Were you, this is Mr Zwaan from Forest and Bird asked me to ask me to ask a couple of questions so were you here when he was asking Dr Hayes questions about –

15
A. No I wasn't, sorry.

Q. So he put to Dr Hayes that, you know over the, in this issue of trout access and predation, put to Dr Hayes that you know trout have been here for 100 years and over that time there will be weather patterns and floods and periods of higher flow where trout access up stream or down stream to the populations of non-migratory galaxiids would be possible from time to time, have you got a view on that proposition?

20
25
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A. I guess it depends on timing, like (inaudible 16:29:32) are actually looking to move when those flows occurred and from what my experience tends to be that it's not necessarily if there's trout in there or not, it's how strong that trout population is so if they're, every year they're getting knocked back so there's only four or five trout then the galaxiids can survive and it doesn't matter but when you can, when you get a population, say you've got 100 trout in that zone then eventually they will dominate and take over. So these really tough flow regimes that have historically occurred basically crop the trout population as they can't handle the high temperatures of the low dissolved oxygen and they get knocked over, well the majority do, allowing these galaxiids to persist. So it's more than just

can they get there, it's can they actually survive there and then grow to a size where they're going to actually impact on that population.

1630

5 Q. And the other thing that Dr Hayes said is it also depends on if the habitat gives the galaxiids refuge to hide from the trout even if they are there like small side grades or boulders or vegetation – riparian vegetation. Is that not a factor that helps the galaxiids not be predated upon?

10 A. I would say it's more habitat that the trout don't like so we often find galaxiids in braded ripple open habitat because trout don't like to be in there in those little streams. Trout tend to prefer deeper pools and so you can end up with a wee bit of separation and as flows drop, you often end up with more ripple kind of habitat than pools. So it favours them in that way. So it's not necessarily that they can hide, it's just that they don't crossover as much and then you're providing very little habitat that trout prefer compared to what galaxiids can survive on.

15 Q. Just moving onto hydrology and you've got a series of paragraphs where you're – this is obviously – I'll ask you the question; your understanding of the state of hydrological data that we've got to work with in Otago, that's not just based on your recent work with consent applicants in it, that's based on your long time with the Regional Council as well?

20 A. Yes, as well.

Q. So your paragraph from paragraph 22 onwards basically leading up to your table 2 to go with your paragraph 37 –

A. Sorry, what was the first paragraph?

25 Q. 22 you say that there is significant amounts of reliable data across multiple aspects and obviously you can see that some don't have much data at all?

A. Yes.

30 Q. Then at 31 you agree with Mr Henderson that where there is gaps, it can be supplemented with modelling. Then at 35 you again confirm there will be adequate hydrological data available and then at your 37 you show three examples of three catchments we're all familiar with of the existing information that is available for those catchments and one of those lines as you'll is a line that Fish and Game has been interested in for their case

which is whether or naturalised flow records are available in order to determine what naturalised (inaudible: 16:33:35) flow is.

A. Yep.

5 Q. So you're of the view and similar to the Regional Council that there is sufficient information available to make that determination of what naturalised MALF is?

A. As good as we can, yeah.

Q. Good enough for the job?

A. Yep.

10 Q. Then at your paragraph 41 you've summarised what you've appended which is the information requirement technical guide from the Regional Council and at (a) that also makes it clear that the Regional Council's expectation is the naturalised flows, the part of the information package that an applicant provides?

15 A. Yes, I think – I can't think of an application that I've prepared that we haven't tried to do naturalised with observed and then have that discussion.

Q. So in terms of – you'll be familiar with the table that Dr Hayes recommends in terms of minimum flow and allocation expresses a percentage of mean annual low flow?

20

A. Yes.

Q. Perhaps we could get Dr Hayes evidence for Mr Hickey?

WITNESS REFERRED TO EVIDENCE OF DR HAYES

25 Q. If you go to page 7 of Dr Hayes' evidence and as you will probably realise in part, Dr Hayes based this in part on some of the recommendations in the draft national environmental standard.

A. Yes, it looks familiar.

Q. Yes, it look a bit familiar because you were involved in that process as well, weren't you? You were one of the members of the working group.

30 A. Yeah and then I reviewed it as well.

Q. One of the tables we got taken through last week in that draft document is the relationship of degree of hydrological alteration and total abstraction expressed as a per cent of MALF. So you're familiar with this concept.

A. Yes.

- 5 Q. So looking at the allocation rate row, which is the row that corresponds to the work that was done for the draft NES with 20 per cent, 30 per cent, 15 per cent or 10 per cent of MALF is the abstraction. Do you agree that's either a medium or high degree of hydrological alteration in accordance with the thresholds set in the draft NES?
- A. Yes.
- Q. That was recommended to be the trigger for different level of comprehensive assessment of effects depending on the degree of hydrological alteration.
- 10 A. And the values.
- Q. And the values, that's right.
- A. So they're like a gateway or a screening kind of process to – if you were to exceed this you have to do more work to assess your effects properly.
- Q. And based on your experience involved in that draft NES, do you still see that conceptually as an appropriate trigger for that gateway or that screening decision point?
- 15 A. Yeah, where we can we try to apply that so some of – in most cases under plan change 7 you would fail this screening process, almost every catchment actually based on probably the allocation rate as a per cent –
- 20 I'm not sure what MALF he's used whether it's observed or naturalised but he doesn't say.
- Q. He doesn't say. I can clarify that it is meant to be naturalised.
- A. I think what this would mean is that every consent that's under plan change 7 would require more information. It doesn't actually screen anything out. It just says you're all going down this pathway of lots of work and lots of assessment.
- 25 Q. I was going to put Dr Hayes summary to you as well, Mr Hickey but perhaps I will read out the sentence from Dr Hayes' paragraph 6. The way he puts it is that "those limits put a presumptive standard on the basis that it is likely there will be adverse effects over time if abstraction from a river exceeds those limits." So do you agree with that as summing up how those standards?
- 30 A. Where is that sorry?

Q. That's in his summary, paragraph 6. Because it is important to understand your view on this statement as well, Mr Hickey. The third sentence "the limits set a presumptive standard on the basis that it is likely there will be adverse effects over time if abstraction from a river exceeds those limits." So do you agree with that statement?

5

A. I think it's a wee bit too presumptive like I can think of ways that you would manage with more allocation or a different flow. It may not necessarily have severe effects.

Q. I guess you'd get there with further assessments though, wouldn't you?

10

A. Yes, conceptually if that's your benchmark for doing more work to keep beyond those numbers, that's fine. That's often how we look at things for a quick assessment of a MALF in a flow and the valleys and you automatically know if you're in a high risk or a low risk category.

Q. Now just turning to your paragraph 65 and your second sentence. You say "In most cases reducing water allocation for irrigation will not improve outcome for the compulsory values under the NPS and in some cases may make things worse for some threatened indigenous species without other interventions."

15

A. Yes.

20

Q. Now your qualification "without other interventions" is that just in relation to the threatened species point?

A. Yes.

Q. So let's put that aside and I just wanted to look at the other compulsory values of the NPS which I think you were just looking at with Ms Williams.

25 **THE COURT: JUDGE BORTHWICK**

Can I just read this paragraph again before you ask him the question? Right. Got it.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. So the first compulsory value is the ecosystem health and is it your position that if there is less water taken from the river that's not going to improve ecosystem health?

30

A. Depends when it's taken and it depends on what your measure is of ecosystem health and whether it's the water being taken that's creating the degraded attribute or whether it's something else so for example, upper Manuherikia has didymo causes an issue with purifying attribute and also against the I attribute. If you assume that leaving more water in is going to improve those two attribute outcomes it won't because you've still got didymo. So it's not always as simple as more water is better for an ecosystem outcome.

5

Q. No but that's quite different to saying there will be no improvement, isn't it if there is more water?

10

A. Well, maybe I've gone a wee bit too far in that but what I'm trying to say really is that don't assume all the time that taking allocation away is going to materially improve the outcome you expect to see. You need to understand. Especially in modified systems with introduced fish, introduced didymo, damming and all that kind of stuff. It becomes quite hard to drive home what the actual problem is.

15

Q. Is that a better explanation if we look at the second compulsory value human contact, what you're saying is don't assume just because there's more water in the river you can go swimming there because it might still be contaminated?

20

1645

A. Yes, there is still an effluent discharge from a town upstream. Probably doesn't matter if you put more water back.

Q. Okay. I understand that statement now. In your paragraph 63 and what I want to move onto look at now is the relevance of the Te Mana o te wai priorities. The three priorities and the difference reference points from which we need to assess those to understand how they're going to be achieved and already you've quite helpfully educated probably most of us that there is no such thing as one status quo as a reference point. That could be a dynamic reference point so that's something we've learnt for starters but what you will be aware of is that there is also the reference point of the naturalised state being another relevant reference point.

25

30

A. Do we want to do this again?

Q. Well, just a little bit. If you think about the first priority of Te Mana o te wai and protecting the health and wellbeing of freshwater ecosystems to properly assess that don't we need to understand to the extent we can what the original state of the health and wellbeing of a waterbody was?

5 A. I think it's useful to know so I agree. It's good to know that and then you can work out the deviation from that if there's any, how much it was.

Q. See, that was easy.

A. Yeah. If we stop there it would be good.

RE-EXAMINATION: MR PAGE

10 Q. Ms Baker-Galloway asked you about Dr Hayes evidence and concerning observed or naturalised MALF, were you in court when Dr Hayes gave his evidence?

A. No.

15 Q. In answer to questions I think from Mr Maw or it might have been from the Court, I can't remember but in any case, he explained that you calculate a seven day MALF by looking at flow records for the river and in each season finding the seven days with the least flow, the lowest flow and then you average that over the course of the record. Does that ring any bells to you as a method for calculating seven day MALF?

20 A. Yes, so you sum them and then average them over that term of record.

Q. If you follow that method, is that observed MALF or naturalised MALF?

A. It depends where your flow recorder is so if you're at the bottom of the Manuherikia it would be observed MALF. If you were in the headwaters of Taieri in Canadian Flat it would be a natural MALF.

25 Q. So if we apply Dr Hayes' method to his table 3 on page 43 of his evidence which is the one taken from the draft national environmental standard. Do you have Dr Hayes' evidence available?

A. Yes, I've got it.

Q. Do you remember that table from the draft NES?

30 A. I feel like it's different.

Q. In any case and if you don't know the answer to this question just say so. Do you know whether he's talking about observed or naturalised MALF in any of those references in the table?

A. No, that's why I asked the question because normally you would say observed seven day MALF or naturalised seven day MALF.

Q. I see. Lastly on that table, do the thresholds change that are referred to the values that are given there take account of whether there is storage
5 in the catchment?

1650

A. I don't know. I'm not sure if he's talking about run of the river allocation or storage allocation.

Q. So for a catchment where there is a large body of storage, let's say for
10 example the Taieri with the Loganburn reservoir at its head, is it possible that observed MALF might actually be higher than naturalised MALF higher in the catchment?

A. When there's augmentation from storage, yes, there is potential for that. Yes.

15 Q. So if naturalised MALF was the only metric where you're seeking to understand the significance of change in a flow regime you might miss the benefits of flow augmentation from storage.

A. Yes, potentially.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

20 Q. Just for my benefit, could you define observed MALF? How do you define it?

A. So effectively it's the same process of taking the lowest seven days of each year, average flow over that seven days and then doing it for every year of the record and summing those and then averaging them over the
25 full record but observed MALF is what we consider has been affected by taking is not what would occur if there was no taking upstream of that flow site and it's often the most challenging part of what we do is try to naturalise a flow statistic especially where you've got very complex water use and taking.

30 Q. So Mr Page asked you observed MALF is what you would expect to see at the bottom of the catchment and you said yes because flow in the river would be the consequence of all taking of surface and connected groundwater.

A. Yes.

Q. And that's your output is what you actually see.

A. Exactly, that's the outcome.

5 Q. And you can calculate that as an observed MALF whereas the naturalised flows, I'm not quite sure whether he – he might have been talking Manuherikia but I don't suppose it matters actually. The naturalised MALF is something that we're using somewhere other than at the bottom of the catchment and he might have said top, he might have said middle but I wasn't quite sure but anyway, I was just wanting your definition of
10 naturalised MALF. It's not observed MALF.

A. No, so my definition of naturalised would be adding in back the water that was taken out to get the naturalised MALF.

Q. I figure that you are a witness that probably knows heaps about priorities of who your firm represents.

15 A. I've had a bit of experience with priorities.

Q. I was really interested in your evidence that changes to hydrological flows which I would include surface water and connected groundwater are a consequence at least over the last 10 years of improvements in irrigation efficiency because improvements in irrigation efficiency has seen
20 reduced overland flow to surface waterbody and reduced recharge to groundwater, correct?

A. Yes, exactly.

1655

Q. And that change in a flow has altered the physical habitat which otherwise
25 was being provided through abstraction patterns prior to any significant change in irrigation methods or infrastructure in response to efficiency, correct?

A. Yes.

Q. I think you were asked but I may have picked it up wrong, whether those
30 changes in hydrological flows in the last 10 years were as a consequence of anything to do with priorities, I think you were asked that and I think you said no, do you recall something about that?

A. Yeah so, listening to a lot of the evidence and reading a lot of the evidence it's, there is the assumption that priorities have driven the flow regime to

maintain indigenous fish or threatened fish and in some cases this is true but in my experience it's actually the water use that came from water takes that often drives where those fish are because of the inefficient use and the inefficiency of it in the returns as you pointed out so it's kind of a

5 horses for courses some, catchments it will be the overriding priorities and the way they run it, other catchments it'll be the return flows and when we've done quite a few catchments and assessments you learn pretty quickly not to assume what's on paper is what you're going to get in the reality of Central Otago, if that makes sense.

10 Q. Sure, okay. And so then a question for several parties but not necessarily your parties is an important question of how those priorities are to be reflected in the provisions of the plan and consequently any resource consent and I think your answer is that for some catchments those priorities may be a controlling factor in hydrological flow and related

15 physical habitat but in other catchments, it is not a controlling factor or the controlling factor but that there are other controlling factors to do with the use of water, I think that's what you said.

A. I think the way I would, if I assume the value is there because of the status quo –

20 Q. The value being like –

A. Non-migratory galaxiids. Then I would want to know what that flow regime is specifically at that point, I would not just assume that because on paper those deemed permits have a priority that that is what's driven that outcome so when people say: "we're happy with the status quo and it's going to be fine for the next six to 10 years so therefore we can live

25 with it" I would challenge that, have they even defined what that status quo is and have they actually tested it against the provisions of what they're proposing for the outcome. It would be dangerous to just assume that status quo is what I think it is or what it says here in paper must be

30 happening out there.

Q. And so therefore it's a rebuttable presumption that the replication of priorities are indeed resulting in a benefit to the environment and including in particular the galaxiids?

A. Yes I wouldn't assume that, no.

Q. You wouldn't assume that, it can be rebutted, it may be the case but it may not be the case?

A. Yes.

1700

5 Q. All right, okay. Just pulling back a lot to understand priorities. In your experience are applicants for resource consents applying to either for a new permit or for a replacement permit and saying "Please can I have a condition that acknowledges my existing priorities?" so that must be because they're deemed permits so a better question is probably for
10 replacement consents for deemed permits. Do they go in and say, "Please can I have my priority back?"

A. No

Q. Why don't they do that?

A. Because they worked within the catchment or the sub-catchment and
15 negotiate a sharing regime which then gives them a collective buy in to the environmental flow allows you to manage the recession of flows. In central Otago in my experience the most important thing it does is give certainty over what will happen if we get into a dry event that you're fighting and scraping. You know how you're going to have to manage
20 your property because it will get dry in central. So once they have that certainty then they can – the loss of reliability or security from implementing the environmental flow is often then put into a longer term plan of putting in storage to volume that you would've had access when you dry the river up is then taken at higher flows and put into storage a
25 lot of the time on farmer's storage so it gives an ability to adapt to that if you've got that security and that's what the sharing regimes do.

Q. Is everyone who has a deemed permit in every catchment on a flow
30 sharing agreement or is it the case and again you can only speak from your experience that of those persons who hold deemed permits, the majority or 50 per cent or only some of them are on flow sharing agreement so I'm trying to get a sense of how ubiquitous, how universal are these flow sharing agreements particularly to catchments dominated by deemed permits?

A. So at the Taieri catchment voluntary shares that sharing agreement we've been – myself and Susan Mckeeg who's given evidence are contracted by those water users to roster them so that they don't fight with each other. It's easier for us to call them off than them to call each other off.

5 Q. You roster deemed permit holders. I will come back to that but anyway Taieri.

A. Manuherikia already have a sharing regime but we have formalised that through the consent application so the whole catchment will work together to deliver both sub-catchment and mainstem flows in their application.
 10 Linders catchment full on sharing regime, Luggate Creek catchment sharing regime, Cadrona I'd expect they're already awarded group and work together that they haven't gone right through the process but they will water share. It's more common than not in my view. For the non deemed permit catchment like the Kakanui which is part of the plan
 15 change 7, they've had formal water sharing for at least 20 years with (inaudible 17:03:58) and they're endorsed by council. Almost every catchment, or sub-catchment we work with we do a sharing regime whether it's between two people or 600. You have to when you're dealing with the allocation levels we're dealing with and delivering a flow to give
 20 at the bottom of the catchment.

Q. Now, you said you and another person are – I'm not sure whether you were rostered to stop squabbles or fights from breaking out but again that's interesting so far as your role in the Taieri catchment flow sharing, you know, supporting the flow sharing arrangements there with a view to
 25 the flow sharing arrangements specifically being for a purpose for delivering flow to abstractors for their use on farm is its primary purpose as opposed to delivering or ensuring flows remain in the river for some other environmental outcome and again, I'm trying to get a sense as to what this thing is –

30 1705

A. So the primary purpose is to not breach minimum flow.

Q. So primary purpose not to breach the minimum flow?

A. Yep. And then secondary purpose is to share the available water over and above that and reduce conflict. And the Taieri's a good example of

my status quo logic. At the moment we have deemed permits that don't have to adhere to that minimum flow at all and if you assume that's the status quo because that's what the permit says and they have priority you'll be wrong because they have been operating at least four or five years voluntary. Outside of the deemed permit what it says they can do to ensure they don't breach the minimum flow. So actually knowing each river and each catchment, what's actually happening is very important.

5

Q. All right, so the primary purpose is to ensure that resource consent holders don't breach a minimum flow and secondary purpose to ensure that water users are – all abstractors have a share of the water above the minimum flow and thirdly to reduce conflict as between extractors, have I captured that correctly?

10

A. Yeah I think that's the, yeah.

THE COURT: COMMISSIONER EDMONDS

15

Q. And it was only minimum flows, it's not residual flows?

A. No, this –

Q. And it's not cessation of takes?

A. Some, so the Taieri is really around the minimum flows in catchments, in the Manuherikia on some of the tributaries we will be instigating sharing to provide for those tributary values as well as the main stem so depending on the catchment and the scale of the taking, the sharing regimes can be at the catchment scale or a sub catchment scale or they can build right through to the whole lot and yeah, the take cessation stuff I don't really take much notice of those to tell you the truth, there's not that many, I kind of, I think they're, when they're referred to they're around this consent must stop for that consent, is that, we're normally just dealing with residual and minimum flows, you just stop and leave that water in the river and that, I don't see those take and cessation consents having much environmental benefit at all.

20

25

30

Q. (inaudible 17:08:08)

A. Yeah, residuals and minimum flows, definitely.

Q. (inaudible 17:08:14) tributaries and the side streams and things, is that right?

A. Sorry, I –

Q. Is that what you're telling me –

A. I didn't quite –

5 Q. – the residual flows often in relation to the tributaries in the side, smaller streams and things.

A. well minimum flows tend to be on the main stems and the residual flows tend to be on the tributaries, most of the deemed permits in Otago are on tributaries so, and most of the high value, compulsory values are in the tributaries so you get the biggest bang for your buck is protecting those tributaries.

10

Q. So when you were talking about minimum flows were you also meaning to wrap into that residual flows –

A. Well when I was –

Q. – when you were answering the primary purpose?

15 A. Yes, that definitively. Yes, sorry, I missed that and that was the paragraph that Mr Page used in his opening submission where he referred to my evidence was around, you've got to get some water in these creeks if you're going to look after these values because at the moment they're getting dewatered, all the waters coming out, there is no requirement to leave water in them.

20

THE COURT: JUDGE BORTHWICK

Q. And I don't want to get side tracked but I understood your evidence to be that the dewatering is a consequence of efficiency gains with irrigation?

A. There's two, one consequence is they take all the water because there is no cessation or no residual flow or minimum flow condition to prevent it and that's most of them, 90 plus percent of them.

25

1710

Q. No minimum flow, no residual flow.

A. Nothing at all.

30 Q. And that's 90 per cent of what?

A. Of the deemed permit. At least probably 90 per cent. In Thomsons Creek what can happen is the deemed permit at the top which has higher priority takes everything, dewateres the stream goes out the races, they use the

5 water and then that water comes back in further down the catchment where these galaxiids are but now that return water is not coming back like it was and will probably reduce more over the next five years but they're still taking all the water out at the top as well and that won't change under what's proposed.

THE COURT: COMMISSIONER BUNTING

Q. Is everyone in on the schemes?

A. Yes.

Q. No outliers?

10 A. Not that I know of.

THE COURT: JUDGE BORTHWICK

Q. You said two causes for dewatering. One is that for 90 per cent of the deemed permits there is no minimum or residual flow so there is particularly in the upper part of the catchment or mainstem but more particularly (unclear 17:11:30). There is no restriction on their take relative to minimum flow or trip.

A. No.

Q. Understand that that water if you like was delivered back to the catchment lower down by a surface water recharge or groundwater recharge to the connected groundwater system.

A. Yes.

Q. To a connected surface water system but that's not happening so much now because of the improvement in efficiencies so those are the two related things?

25 A. Yes, they are the two primary reasons.

Q. For those catchments where there is a large number of deemed permits without residual or minimum flows or catchments where the minimum flow regime at least under Schedule 2 of the plan is not applied nevertheless there may be flow sharing agreements as I understand your evidence.

30 A. Yes.

Q. And the purpose of the flow sharing agreements in those catchments, what is it?

A. If we step back three or four years in Otago we know October 2021 was coming so we've been trialling flow sharing and residual flows and streams leading up to this point so we would put together a flow regime and a sharing regime but often we would get pushback from the water users that they wouldn't work or that it wasn't viable so we would test them. So some of the flows that people have seen in the last two years and they may think that's what the status quo is not. They're actually well beyond what the premise status quo would deliver so.

5

Q. So just expand on that when you say some people might think that's a status quo but it's not. Are you talking about farmers here?

10

A. Stakeholders, farmers or just general public, ORC so for instance the Manuherikia, the Dunstan Creek, biggest tributary we have been trialling at the bottom of the creek to not dry it up and if you think that that is what you'd get out of no residual flows and priority systems, it wouldn't be what they would see. So they might have this perception that it's going to be okay for the next six years because that's what we've seen it like for the last two but it's not necessarily what's going to happen.

15

Q. But again returning back to the purpose of the flow sharing regime, particularly in catchments with no minimum flows or residual flows what is its purpose or does it depend on the catchment what its purpose is?

20

1715

A. Well generally it's to provide for ecological values as so far as we can determine and general the first priorities the compulsory values under the NPSFM.

25

Q. So it's generally not to regulate access to water?

A. No.

Q. It's between water users?

A. No, it's about providing for the ecological outcome for that stream and then over and above that we manage the access to the water for the users. So we don't set a flow to deliver water to a user as such or anything like that but we expect co-operative approach to deliver the outcome for that tributary or river.

30

Q. Now these flow sharing agreements, have you cited them?

A. Yes.

Q. To enter into a flow sharing agreement what do you have to do, what do you have to, do you, is it signing a piece of paper, is it giving up money, what is it, what sort of agreement is this thing, what creature is this thing?

A. Well it generally involves a lot of lawyers.

5 Q. Right.

A. So our legal agreements fully –

Q. So it's a binding agreement as between everybody, all parties to that agreement?

10 A. Yes and often it'll go along with a company or a group and they will fund, you know, they share the costs of those things, they share costs for the compliance and the monitoring and all that kind of stuff so they become quite formal groups and the sharing agreement is often the basis of that group, but yes, they're very explicit about how much water you will get, your obligations to the environment or to the flow that you have to manage
15 to.

THE COURT: COMMISSIONER EDMONDS

Q. And do they explicitly make it clear that the parties involved aren't going to basically rely or try and exercise their priorities?

A. They often –

20 Q. Is that a part of it?

A. – fundamentally give up their priorities to implement this new regime. There's very, I can't think of any that I've dealt with where priorities have remained.

THE COURT: JUDGE BORTHWICK

25 Q. Because it would be inconsistent with the outcomes for the schemes or anyone individual that are higher priority to maintain that higher priority against lower priority individuals.

A. Exactly and you might not be able to deliver the environmental outcome that's necessary if that priority was to stay where it is. So the
30 environment, priority one gets to take everything, no one else gets to stay, environment or anything so effectively you're saying priority one is now

environment and priority one shifts to priority two but everyone's at priority two now. It's quite a different approach.

THE COURT: COMMISSIONER EDMONDS

5 Q. So when these agreements are signed there's no notification to the Regional Council or anything like that –

A. No.

Q. – these priorities are now basically –

A. Well the new parameters –

Q. – in terms of their legal status.

10 A. Yes the new permits that come with this new regime don't have priorities on them so they've become RMA consents with no priorities.

Q. That's the new consents but you've talked a lot about these voluntary arrangements –

A. So these –

15 Q. – that you have.

A. So these are all on the premise that they will go on, that'll be the new regime as part of the new consent so at the moment –

Q. So at that time the new consent rolls around priorities are gone, is that –

A. Yes because at the moment –

20 Q. – how it works?

A. – if a deemed permit stuffs up and takes all the water out by accident, Council can't touch them but after they've got the new permit they can't afford to have a mistake anymore so it's a good time to trial something because there's low risk of getting prosecuted or making a blunder and it getting held over you so that's what's been happening the last few years.

25

THE COURT: JUDGE BORTHWICK

Q. Okay so is it your evidence that recent consenting decisions by the ORC have recognised and imposed somehow as a condition of consent, flow sharing arrangements or agreements?

30 A. Some have, definitely the Lindis thing had flow sharing on it imposed.

1720

Q. How does that work, like you know, how does that work where – I mean the Lindis was a large group application for a big catchment but how does it, it can only work if you're got all members I guess of the flow sharing arrangement or agreement before the Council.

5 A. Most of the groups we, we don't do very many individual consents –

Q. No.

A. So we do mostly groups so we do it all in that group. I mean, yeah there is, it's pretty obvious there's some kind of, there's some social license now to abstracting water and irrigating and these guys aren't silly, they know that if they're going to breach minimum flows in the Taieri, everyone in Dunedin's going to have a crack at them so there's that kind of pressure to start working together and then they all live in the same community so there's a pressure not to do wrong by your neighbours in your local community so it all kind of builds with that and then once you've got it all in place those groups often expand into dealing with other issues around water quality or, it becomes a vehicle really to do more so in my view I'd be doing everything I can to encourage those sharing agreements, working together, resolving those things for future, kind of addressing other issues in catchments.

10

15

20 **THE COURT: COMMISSIONER EDMONDS**

Q. So what happens to if you have a different – do you want to go first – you're going to have a different timing situation.

A. Yes we –

Q. And so you can have a whole lot that are being dealt with now, in terms of things that need resource consent with the deemed permits and the ones that are due to expire soon and then you can have a whole lot of other ones that have been issued over the longer, much longer period of time and that aren't necessarily in the tent in terms of the process that your following, for example for the Manuherikia, for example. So how do you deal with those ones that are outside the tent, I guess the Regional Council could maybe review some of these things, could they?

25

30

A. Yes and the Taieri there's always been the expectation of a review once everyone's in the tent do the review, formalise the whole lot. So that is

5 expected, that's always been expected to happen but yes, some of it, some of it we just haven't had time to get to either like we've got so many deemed permits, so many catchments in now that we might, haven't been able to fully dedi – there's not enough people to do these regimes and work them out and I really don't want to have to do it all again in six years' time across 600 permits or whatever the number is now, I don't, it's tedious and time consuming and difficult.

THE COURT: JUDGE BORTHWICK

10 Q. Well that may be so, that it's tedious and time consuming and difficult. There's not the benefit of recognising that work effort today in this plan change now because that's where I'm interested, to learn why this has not been brought forward as a more appropriate tool than priorities or minimum flows and residual flows even where they are imposed. Is not the benefit of that approach now, taking that approach now, that your driving even over the short-term improvement in the environment, that is your halting degradation if not improving or reversing the trend towards those degrading values which Mr Page identifies are the attribute values in schedule 2 of the NPS?

15 A. I fundamentally think we should be making improvements where we can immediately, like –

20 Q. So then is it more sense, in your view to look at brining forward into this plan flow sharing agreements even as a matter of consideration, somehow, but to bring forward into this plan the flow sharing agreement than it is to bring forward the priorities?

25 A. That would make more sense to me for future proofing it, the only, a lot of this work is on, around security and being able to move forward and do these things and work together and it's encouraging that, that's the bit that I worry that a lot of the messaging through there's been changes that: "don't worry, don't expect to have any water, don't expect to be irrigating, don't expect anything", and it's hard to encourage someone to work into those groups and work on good environmental outcomes when the messaging is quite scary I guess.

30 1725

Q. I don't know who delivers those messages but really I'm just trying to understand whether from your perspective, and I think the answer to this is yes, that you would encourage consideration of those flow sharing arrangements or agreements prior – or in preference to priorities, correct?

5 A. Yes. I would prefer to have that going forward in the priorities on the premise that the sharing has been done to deliver the environmental outcome. There's not much point sharing if you're not leaving any water in the river.

THE COURT: COMMISSIONER BUNTING

10 Q. Isn't sharing operating now?

A. In some cases, yes, sharing but in some cases the flows haven't been put right forward or haven't been completely cemented.

THE COURT: JUDGE BORTHWICK

15 Q. Is that also on the premise that the sharing is delivering environmental outcomes which at least over the next six years will improve the baseline environment going into the new land and water plan, would that be a fair assumption that it will be delivered?

A. I think it's no brainer.

Q. It's a no brainer, you'd get deliverables over the next six years.

20 A. If you implement residual minimum flows and sharing you're going to improve the environment.

Q. And is it a no brainer that if you improve the environment over the next six years that that is a better place to start from when looking at the land and water plan to come?

25 A. Well, it follows doesn't it?

Q. Yes.

30 A. The only thing is around the implementation that's needed to make those flows happen and is six years going to be good enough to do that or do you need to be thinking a longer term but not 35 years based on what everyone's saying but knowing that you're going to be bringing like an iterative change process, there's an ability to do that and secure those gains, I don't know.

Q. That's a question for the Court is whether the consenting process drives the iterative change or does the plan to come under the NPS, the new plan, drive iterative change?

5 A. Or does the first iteration of the change come from the consent process and then you'll mop it up behind with the –

Q. Yes and that's a possibility that – that's a probability, something to be because your consents are expiring and I reckon people want water for it, some term at least. Well, any questions?

THE COURT: COMMISSIONER EDMONDS

10 Q. Yes, you were asked a question about water quality.

A. Yes.

Q. And you – I didn't fully comprehend your answer so I just wanted to be clearer about that, let me find it, you said that consideration was all delayed and I didn't know what you meant by that in terms of water
15 quality.

A. Where did I say that?

Q. I think you were being asked a question about ki uta ki tai in terms of the connections between land use and water quality and water quantity, so I had two questions, I wanted to understand what you meant by it will be delayed and then I wanted to follow up with a question to ask you about
20 all these applications that you're involved in on the catchment basis and the Manuherikia may be one example but there may be others and I was wanting to know whether as part of that you were factoring in water quality. So two questions.

25 1730

A. There was plan change 6A that was commonly referred to in Otago that brought in discharge limits for water quality that was supposed to become operative in March 2020 I think but they were then subject to a plan change which delays them till 2025 or 2026.

30 Q. 2026 actually. It's coming back to me I think we were taken through that by you, Ms Baker-Galloway. So that annotate the version of the plan that we actually had so thank you for reminding me about that so in relation to my second question then.

A. So those discharge limits because I helped development for the regional council and I worked there were timing – the timing was to be ahead of where we are right now because we knew in central Otago that a lot of the issue for water quality was irrigation wipe off water and so the theory was that if they know in 2020 before they get their new permit for irrigation that if they're failing those water quality limits then they would have to change their infrastructure and the way they're using water to stop that happening so that was the point of those discharge limits and the timing and specifically targeting the things that we know have impacts on water quality in central Otago. With regard to how we've addressed the water quality and Manuherikia is a good example, we're talking about converting spray to get rid of those overland flow issues and things like that, better management of that sort of stuff, increasing the flow left instreams rather than having wipe off water recharging the bottom of tributaries and running out into the river leaving high quality water from the top past takes to run through the creeks and contribute to the mainstem so get rid of that run off and leave better water and hopefully make improvements so Dr Olsen who I think will be presenting evidence will be able to be more specific around the water quality stuff. I've left him to deal with water quality in the catchments that we've dealt with but in principle we have tried to address water quality where we can as far as we can where we know that there is a hotspot or a problem.

THE COURT: JUDGE BORTHWICK

Any further examinations as a consequence of the Court's questions? So Thank you very much for your evidence. Very helpful responses I think in terms of understanding priorities and their relationships with flows. So I am grateful for your evidence.

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

I think that's us. Back here with you, Mr Page, 9.30 tomorrow to finish off those submissions. Very good. As you would have heard from this witness the court is very interested in what can be built around the flow sharing agreements as
5 another method of management rather than working in priorities.

MS DIXON:

Tomorrow morning, Mr Ensor is here.

THE COURT: JUDGE BORTHWICK TO MS DIXON

10 Q. We have to let Mr Page finish his case. He's only half way through it. then his witness took over.

A. Yes, I realised what's happened. We do have some availability issues though with Mr Ensor tomorrow morning. He's basically here for the morning and after that he has to be away.

15 Q. That's fine. Mr Page hasn't got too much to go. I'm going to let Mr Page finish actually. Mr Ensor will have to come back a different day. Mr Page should be able to finish his opening but thank you for letting me know. I don't have any particular order for tomorrow. Mr Ensor wants to go first. We're fine with it.

20 **COURT ADJOURNS: 5.35 PM**

COURT RESUMES ON WEDNESDAY 24 MARCH 2021 AT 9.48 AM**THE COURT: JUDGE BORTHWICK**

Sorry about the delay this morning, a misunderstanding between the registry and myself as to printing requirements. Anyway, any issues arising overnight?

- 5 No issues, very good. Ms Baker-Galloway, I see that Ian Farrell has filed the evidence but has not attached the full set of provisions to his evidence but has just simply attached the stuff that he wants –

MS BAKER-GALLOWAY:

Already onto that, Ma'am, so yes will be able to read it in one place for today.

10 THE COURT: JUDGE BORTHWICK

One place, that's all we need, okay, thank you. So that will be done by the end of the day?

MS BAKER-GALLOWAY:

Yes.

15 THE COURT: JUDGE BORTHWICK

Not that I've read it, it's just that I've seen the problem, so we're with you, Mr Page and I think you're at paragraph 60.

MR PAGE:

- 20 Yes, I am. And so we were on the topic of the galaxiids evidence and how that might be relevant to things you need to decide. The clash of evidence on galaxiids between Dr Allibone and Dr Dunn was unexpected. It seems that they both at least agree – what they at least agree on is that changes in flow regimes present a risk of trout incursion into galaxiids' habitat. This is where the evidence of Fish and Game and Dr Hayes and Mr Trotter for Fish of Game is
25 of interest.

Dr Hayes promotes a system whereby to set the flow changes expressed as percentages of the seven day mean annual low flow are used as triggers for

what is meant by no more than minor and I want to pause there and note the footnote and observe that as I put to Mr Hickey, the methodology for calculating a seven day MALF that Dr Hayes described to the Court is in fact the observed seven day MALF and isn't the naturalised seven day MALF that Fish and Game's legal submission seems to rely upon.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Pause there a second, I'm making a note. Okay, well I hadn't appreciated the salience of that line of cross-examination. I do remember the cross-examination, I just didn't understand what its importance was to any issue to this case so I will need to go back; this is the problem with not following cross-examination as its unfolding.

A. I understand and I want to just pause to develop that point a bit further because it's relevant to the Ngati Rangi test and because if it's correct that the Ngati Rangi approach is to be applied in assessing the section 104(d) gateway then that's the naturalised seven day MALF threshold that's relevant to that exercise whereas if the status quo environment is the comparator for the section 104(d) effects gateway then it would be more appropriate to use an observed seven day MALF threshold. So it's not a matter that can simply be glossed over because how the gateway works is fundamentally different.

Q. Well, I'll read the evidence if we need to recall the witness. If the evidence is not clear on its face as a consequence of your cross-examination, I will recall the witness to understand the basis of his evidence better because I didn't understand at the time where that cross-examination was going so let's hope that the transcript says what you are saying but I certainly understand its application to Ngati Rangi.

A. Well it may be that the Court might find that because the witness intended it to be effectively a screening exercise for more work to be done that you might come to the view that it's not appropriate to use it as a threshold for section 104(d) anyway. But if the Court is minded to apply it as the legal submissions for Fish and Game promote, that's when we need to drill down and understand exactly what it is that Dr Hayes was proposing.

Q. So if Fish and Game's case is that it's not merely a screening test where further work has to be done which was Dr Henderson's evidence when Ms Irving was putting to him questions around the draft – a discussion proposal for an EDS, that seemed to be the thrust of his evidence, he said to me also that he hadn't had contact with his planning witness to discuss how it's been picked up and applied in policy for this plan change. If it is something more than a rough screening and therefore entry into a non-complying pathway but more of a culling if I could put it that way on applications, yes, your submission is it would not be appropriate to colour Ms Basham because there's no real gateway, is that where you're getting at?

A. Correct, that's the proposition. I mean, Mr Hickey, in fairness, yesterday said that the thresholds have some utility in understanding the nature of the work that an applicant needs to but that's not Fish and Game's proposition. Fish and Game's proposition is that it's a proxy for what no more than minor means.

MS BAKER-GALLOWAY:

(inaudible: 09:55:33) about how Mr Farrell's redraft came out because it's right on this point but I'm happy to not interrupt.

20 THE COURT: JUDGE BORTHWICK

Would probably like to continue with this case and as I've indicated, I haven't actually read Mr Farrell's evidence but it is important for the Court to know each party's theory of their case so that the Court can understand the line of cross-examination and its salience to any case that has been pursued. So we'll endeavour to get to your evidence and to you after Mr Page has finished but only briefly so that we are understanding where things are at, yes.

MR PAGE:

Yes. I should say I haven't read Mr Farrell's evidence either so if I'm misrepresenting Fish and Game's case then I apologise.

THE COURT: JUDGE BORTHWICK

Well, it may well be that the case has moved so it's not a case of you misrepresenting anything, it's shifted because I think what you have said is probably right, it's more a culling, it's more not an actual gateway not unlike
5 what has been said about the non-complying policies attached to the non-complying activity as well, it's not actually a gateway for ORC.

MR PAGE:

Yes. So, if we come down to the middle of my paragraph 60, there is superficial attraction to Dr Hayes' proposal, however, as discussed with him during cross-
10 examination, his thresholds were not intended to apply as absolute but rather as a threshold for more detailed assessment of the proposed (inaudible: 09:57:20) regime. He also acknowledged that the application of the thresholds enable trout incursion into critical galaxiid habitat which would result in more than minor effects. The issue will be explored further with Mr Hickey and of
15 course, it has been now, and also Dr Olsen when he is called.

Of significance is Mr Trotter's evidence where he explains the interaction between trout and galaxiids. Mr Trotter points out that such interaction can be managed through the installation of trout barriers and waterways where
20 incursion presents a risk to existing galaxiids' habitat. The problem is that Mr Trotter, nor any other Fish and Game witness doesn't explain what the regulatory framework for installing trout barriers is. There is nothing in the controlled activity pathway that either requires or authorises the installation of trout barriers and waterways. It is a matter for DOC as the statutory manager
25 of indigenous freshwater species, Fish and Game as the statutory manager of salmonids and the Otago Regional Council as regulator to deal with between themselves. Mr Trotter's suggestion about how species interaction can be managed are useful and interesting but really have nothing to do with the short term permit mechanism or even the non-complying long term permit proposal
30 set out in Dr Hayes' evidence.

OWRUG submits that the question of habitat management and species interaction is inherently a waterway by waterway exercise that needs to be

tested against particular flow and allocation proposals. There is no one size fits all solution to habitat protection and enhancement. It can only feasibly occur during the consent assessment process. OWRUG says that the application process is the solution, and I should insert there too, the galaxiid problem, it's not the solution to all problems and that there should be an avenue for applicants to get on with dealing with it and now. It is only through applications that the residual flows can be set for each tributary and each point of take that enables a careful analysis of species interaction to be carried out relative to specific flow proposals.

10 **THE COURT: JUDGE BORTHWICK**

Can you just slow your pace down a little bit? And I just read that paragraph again. Mhm.

1000

MR PAGE:

15 The Kyeburn Catchment reconsenting project is a good example of what can be achieved directly with the Department of Conservation and Nga Runanga on galaxias habitat protection through the resource consent process. Similarly, in the Lindis permits reconsenting process the Court went to considerable lengths to devise methods to protect galaxiid habitat in the tributaries from trout incursion and that's described in the fifth interim permits decision at paragraphs 20 36 to 49. Detailed arrangements of that kind are not contemplated by the controlled activity pathway, or by the national objectives framework under the NPS FM 2020.

THE COURT: JUDGE BORTHWICK TO MR PAGE

25 Q. Can you expand on your last comment or by (inaudible 10:01:01) objectives framework, what do you mean by that?

A. Well the national objective framework deals with FMUs and the values of FMUs and the values of FMUs and so my submission is that the NOF process doesn't require the ORC to drill down to the level of each waterbody and each take permit to set attribute targets at each point.

30

Q. So it doesn't require ORC to drill down to the level of each waterbody and there was another each, what was that?

A. Yes and in what the residual flows are required to achieve attribute targets at each take point. Certainly attribute targets have to be set for FMUs but the point I'm trying to make here is that the NOF process is inherently at a higher level than a resource consent process which is much more site specific and one of the things that the court might take from Mr Hickey's evidence yesterday is how site specific the habitat issues are for Central Otago roundhead galaxiids.

10 Q. Paragraph 64.

MR PAGE:

It is implausible that the setting of residual flows and flow regime and habitat management mechanisms for each waterway in Otago will be achieved through the LWRP by December 2023. There is no evidence that the Council has devoted any resources to achieving that. It is, however, perfectly plausible that limits can be set for each waterway that is subject to replacement of deemed permits through the relevant consent process. Applicants know that they simply have to address the issue as a consequence of proposals to change flow regimes in each waterway.

20

Returning to the Manuherikia Catchment Group example, a complex suite of minimum and residual flows has been proposed for the whole Manuherikia Catchment to address precisely these issues and the application is already before the Otago Regional Council. It is difficult to see why such a proposal should not come forward and be evaluated through the resource consent process. It is a first step towards restoring te Mana o te Wai. And the language in my last sentence is deliberate, OWRUG does not say and it is a complete answer to Te Mana o Te Wai nor does OWRUG say that the consent process can properly deal with all matters that are germane to NPS. It's case is simply that setting the limits now is a better expression of the NPS than not setting limits.

30

1005

THE COURT: JUDGE BORTHWICK

Deemed permits.

MR PAGE CONTINUES OPENING SUBMISSION:

5 OWRUG's primary submission is that there would be no need to carry over priorities if OWRUG's relief (decline the plan change) is granted since OWRUG's position is that the transition from deemed permits to substantive RMA consents will adequately address water allocation issues as between existing permit holders.

10 **THE COURT: JUDGE BORTHWICK TO MR PAGE**

Q. That submission reject or decline the plan change will mean that OWRUG will pursue its application under the operative plan, correct?

A. Yes.

15 Q. And under the operative plan is it not in the same position where priorities mean something – quite what it means we are yet to hear from counsel but it means something? I'm not going to cut across your submissions because you already know that I want legal submissions on points of law.

A. Yes.

Q. Okay, anyway so.

20 A. So the operative plan doesn't contemplate carrying over deemed permit. Priorities in the re consenting of deemed permits and that's what Mr Hickey explained yesterday why the catchments have been moving to shared allocation regimes.

25 **MR PAGE:**

As discussed with the Court on Friday after noon (19 March), the applications being advanced by OWRUG's expert witness team promote flow sharing agreements as the means by which groups of permit holders manage internal water allocation issues between them, instead of carrying over historic mining
30 right priorities. The operative regional plan water anticipated a shift to a catchment-based "Water Management Group" model to regulate water rationing through the adoption of policies 6.4.12A – 6.4.13 in the operative plan. Council's "principal Reason for Adopting policy 6.4.13 which is the policy

concerning the approval of rationing regime says this: This policy is adopted to enable the fair sharing of water under low flow conditions, and to assist in delaying the wider suspension of takes.

THE COURT: JUDGE BORTHWICK

5 Q. Is this covered in your planning evidence or not?

A. No, I don't think so, Ma'am.

Q. It's not in the planning evidence so you're pointing us to provisions in the operative plan which may be relevant in terms of the administration of the operative plan and priorities, correct?

10 A. The purpose of pointing out the flow sharing regime provisions is to understand how the operative plan was moving away from priorities.

Q. Yes, anyway it's not in the planning evidence so I don't think I have read it. So I do wish to read it so as to understand what you're saying.

15 A. It's common bundle volume 1 in the common bundle page reference to 6.4.12A is 99. So the quote I've set out in my submissions is half way down common bundle page 101 under heading "Principle reasons for adopting policy 6.4.13.

20 Q. Alright. So these are policies 6.4.12A through to 6.4.13, policies addressing water rationing and your submission is these policies are to subsume and/or overtake priorities.

1010

A. Yes. And so what I'm – the reason for pointing these out to the Court is so that you understand the counterfactual; Plan Change 7 proposition being tested and whether priorities need to be carried over.

25 Q. Well your witness says they do so where is – responding to what your planning witness says?

A. Yes, well –

Q. Yes? She is still saying: "carry over priorities."

A. Yes, I understand that.

30 Q. So where are we going with this?

A. Well, I'm explaining to you why if the rejection of the plan change relief is adopted, what the counterfactual is which is the establishment of rationing

regimes under the operative regional plan water which was the phenomenon that Mr Hickey was discussing with the Court yesterday.

5 Q. Just pause there a second. So I take you to mean that if the plan change is rejected then holders of deemed permits – then the policies rather in the proposed plan as to water rationing would apply, subsume and overtake priorities.

A. Yes.

10 Q. But because – but that's not the case if the plan change is indeed approved by the Court in some form. If it is approved by the Court in some form then the policy for rationing obviously haven't come into Plan Change 7 so something else has to come into Plan Change 7, that something else is simply that priorities continue, is that what your case is?

15 A. In relation to the controlled activity rule, yes, that's correct. So that is one of the reasons why OWRUG promotes a discretionary pathway because that gives scope for water rationing regimes to come in.

20 Q. Just pause there a second, I'm making notes. You see, I thought, and I don't think it's an unreasonable thought, this would be all in the planning evidence especially when the Court raises the issues of why are priorities being carried over and there's no explanation in the planning evidence for that approach. This is an explanation for that approach.

25 A. The proposition for why priorities needed to be carried over was much more basic which is simply that if the plan change is to preserve the status quo then what are the elements of the status quo? Priority seems to be a part of that and so there's needs to be a mechanism to deal with it.

30 Q. Except that the evidence from your own witness yesterday was that water sharing agreements extinguish priorities. So it may well be as a matter of law, that is the contractual arrangements as between members of that group, there are no priorities remaining. I don't know but it's interesting that the mechanism is out there and it's interesting that that mechanism is of interest to the Court not only in the context of a discretionary activity rule which is where you say attaches or bites but also in the context of an alternative controlled activity rule.

A. But for the most part, the water rationing regimes that Mr Hickey was describing yesterday are voluntary ones. There's no regulatory requirement to have them.

5 Q. No, that makes them even a more intriguing animal to be dealing with which is that either in a plan or in the context of a resource consent that you could bring them forward but is that not what happened in *Lindis* and they were conditioned up on the Lindis permits?

10 A. Yes, they have been conditioned up on the Lindis permits but Mr Hickey's description of what's going on now is that catchments are effectively trialling what life looks like after 1 October 2021. Now, Plan Change 7 puts a fly in that ointment because what life looks like after 1 October 2021 is not what they were envisaging which is the transition to RMA consents that would have *Lindis* style legal obligations to adopt water rationing regimes. Plan Change 7 throws that out the window for six years
15 unless something can be brought into Plan Change 7 to enable catchments to move into the water sharing model for all of the benefits that Mr Hickey was explaining.

Q. I understand what your submission is.

MR PAGE:

20 Paragraph 68, the difference between such a regime, that is water sharing, and the system of deemed permits is stark. Deemed permits are prioritised in order of time which reflects their genesis as private property rights. Water rationing under an improved water management group is centred on fairness and managing low flows. They are polar opposites. OWRUG's members have been
25 preparing to transition towards low flow water sharing.

The *Lindis* permits decision is a case in point where the permits expressly require sharing agreements to be reached between permit holders to achieve defined objectives. The recent re consenting of the Kyeburn Catchment, again,
30 endorsed by the Environment Court by consent order is another example where that change in approach is used. The need to consider whether priorities may be carried over from deemed RMA permits issued under Plan Change 7 only arises because of the Regional Council's position that the status quo should be

preserved until consent decisions can be made under the land and water regional plan. If that position finds favour with the Court then the Court needs to know what the status quo is. The ORC's case does not attempt that analysis. It is the only party with the statutory duty and the power to collect the information.

The starting point for the lawfulness of the deemed priority conditions is section 4(13)(2) of the Act. Priority conditions are deemed to be conditions of a deemed permit through reference to section 11 of the Waters and Soil Conservation Act in section 4(13)(2). This matter is also addressed with respect, correctly in the legal submissions of counsel for the Director-General.

The next step then is whether deemed permit priority conditions are capable of being valid conditions on a resource consent issued under the Act. The test for validity is set out in section 108AA and the salient part is (1)(b), the condition is directly connected to one or both of the following in adverse effect of the activity on the environment or an applicable district or regional rule or national environmental standard.

OWRUG submits that there are two relevant effects of the activity on the environment that can satisfy 108AA(1)(b)(i). Firstly, an adverse effect on Te Mana o te Wai tier 1 values of the river where the higher priority permit is downstream of an upstream priority. Provision for downstream permits is the necessary function of a priority since it would otherwise be unnecessary if the higher priority right was upstream of the other takes, that is, there will be no need to specify priority in that latter circumstance since the upstream permit receives the water first anyway. Secondly, an effect on the environment where that environment includes other permit holders. Priority conditions serve an allocation function on a first come first served basis so that progressive granting of permits upstream of the previous permits does not have the effect of dewatering downstream permits.

It is worth remembering that the mining permit regime allocated mining privileges and property rights rather than statutory resource use rights.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Pause there a second. Have you got a section reference for that sentence? It's worth remembering because it seems to me to be of critical importance and I'd like to be able to trace it back into the legislation.

5 A. Not off the top of my head, Ma'am.

Q. Can you get back to me after lunch?

A. There's an earlier decision of the Environment Court sitting in this region, I think it's *Department of Conservation v Otago Regional Council* where the history of mining privileges in Otago is traversed by the Court and that's where their genesis as property rights is discussed. I think it's referred to in one of my friend's submission but perhaps its in the bundles somewhere but I'll find it.

1020

Q. Yes, by 1 pm I want to know the provenance of that statement, it could well be the, I think it's *Gold Reaching* case that you're referring to, is that right?

A. No it's a decision of the Environment Court when the operative regional plan water was before it and –

Q. Okay no I'm thinking of another case.

20 A. Yes.

Q. Well look I want to know the provenance of that statement because it's something that's troubling me, what is this creature of a priority, what's its nature, is its nature one of a private benefit as between permit holders or its nature one more property considered in terms of addressing resource, a valid resource management condition and regardless of that answer, it may well be that it's appropriate now to recognise something in relation to priorities, quite what that will do for the environment I don't know but I expect your witnesses will tell us quite what it'll do for your water sharing agreements, I don't either but whatever goes in has the potential now to cut across those water sharing agreements and that's what your proposal is, it must be what your proposal is because if it comes in it's no longer administered by water comities as between themselves.

30 A. Well –

Q. For understand, for purposes which I understand are to regulate the take and use as between abstractors but which might also now according to Mr Hickey have a secondary or a primary environmental benefit or outcome, I don't know that, I haven't see that but accepting that that is the case, if you insert priorities you will be cutting across the water sharing agreements. Now that might be a satisfactory outcome but being a betting person I bet you its not for farmers so we'll explore, you know, you have to think where does this go –

A. Well –

10 Q. And we'll explore it with your witnesses.

A. Yes, my submission is that it needed necessarily cut across water sharing agreements because priorities exist now and yet –

Q. That's right but they don't exist in a lineal agreement across the water catchment, do they, and they can, the highest priority in other words doesn't necessarily start at the top of the catchment it can be at the bottom of the catchment and priorities may shift up and down the catchment depending on their age.

A. Yes.

20 Q. Now you wouldn't need a flow sharing agreement if you are untroubled by the priorities or the priorities did indeed deliver to abstractors that which they were hoping to receive.

A. Yes, you'll call Mr Hickey yesterday said that the first function of a flow sharing agreement is to maintain a minimum flow. Now of course those minimum flows at the moment only exist on a voluntary basis in most of the catchments that with permits apply. So if as a consequence of plan change 7 there are no minimum flows brought in, the question arises about where there is a continuing function for water sharing if there's no minimum flow to be maintained. The farmers have all been anticipating that minimum flows are coming and that they're going to have to learn how to manage themselves in relation to the minimum flows and so the whole raise on (inaudible 10:23:45) of water sharing agreements is predicated on minimum flows being imposed. That is not, it seems to me, now contemplated by plan change 7.

Q. But what you asked the court to bring into plan change 7 are the existing priorities and the proposition, if you maintain that and the proposition which I'll explore with your witnesses is whether it cuts across –

A. Yes.

5 Q. – the priorities will cut across, their individual exercise will cut across the flow sharing agreement because if it comes into the plan change as something which should be validly recognised, you know in the plan change and by the Regional Council, now it'll be for the Regional Council to administer, not for a water committee to administer.

10 A. Yes.

Q. So that's the risk if you bring them in that you're cutting across the work which is out there to secure minimum flows and is out there to secure flows for all abstractors.

1025

15 A. Yes but remember that the OWRUG's position is that it should get on and reconsement the catchments that it's members are in. The issue of priorities only arises if the Court no. We'd simply want a roll over process for the next six years. That involves no substantive reconsementing and no imposition of minimum and residual flows. If that is the pathway which is purely procedural pathway for plan change 7 then OWRUG's position is, right, fair enough, if that's what you're going to do please don't throw out the priorities because that changes what the status quo legal regime looks like.

20

Q. Another pathway which the court is contemplating now because we have evidence from your own witness is whether or not the controlled activity pathway should as a matter of control look at flow sharing arrangements which have already been entered into for catchments. In other words, not to contemplate that this is mechanism only available under a discretionary activity but is also a mechanism which may be available as a matter of control under a controlled activity rule.

25

30

A. Yes.

Q. I know that's not the relief that your client wants because your client wants the opportunity to seek substantive consents for the next 20 years. I understand that but the court has in mind given the problems that

priorities may engender to existing flow arrangements that one of those matters of control, if the court is going to go down a controlled activity rule and no decision has been made but one of those matters of control are flow sharing arrangements.

5 A. Yes.

Q. They have been put into place as matters of policy and farmers are encouraged down this line.

A. I'm not able to assist you here and now about how that might look in the controlled regime but it's fair that you flagged it with us so our witnesses
10 can assist you with that thinking.

Q. One pm, you will come back and that midsentence. It's worth remembering priority mining permits allocated mining privileges as property rights. I'd rather suspect you're right but I want an authority for that.

15 A. Yes.

MR PAGE CONTINUES OPENING SUBMISSION:

The conversion from the property rights model to the statutory resource use right under the Resource Management Act 1991 was a deliberate policy change
20 brought about by the Act. Thus for the priority rights to have been continued in a resource management regime, it must have been the case that Parliament intended the protection of priorities to serve a resource allocation function as between existing rights holders, again on a first come, first served basis. Conditions on water permits commonly contain limits (residual flow
25 conditions) on the right to take water to avoid adversely affecting the ability of other resource users to take water. This is expressly recognised by the scope of the restricted discretionary activity rule in rule 12.1.4.8 (xvii).

THE COURT: JUDGE BORTHWICK

Just pause there a second.

30

MR PAGE:

Common bundle page 183.

1030

THE COURT: JUDGE BORTHWICK TO MR PAGE

- 5 Q. So there your submission is describing the RDA rule 12.1.4.8 and the matter of discretion at (xv) which reads: “whether the taking of water under water permits should be restricted to allow for the exercise of another water permit”?
- A. Yes.
- Q. Yes.
- 10 A. This explains why OWRUG is interested in the priority issue at all. If during the Plan Change 7 regime it is impermissible to grant consents that move from priority regimes to water sharing regimes then a means of allocating access to the resource permits – allocating access to the resource permit – that doesn’t make sense. It should be between permit users. Allocating resource between permit users is required otherwise chaos could reign.
- 15 Q. Just pause there a second. Yes, and that’s the matter that you and I have just been discussing, whether it is indeed impermissible.
- A. Yes.
- Q. To grant consents that move from priority regimes to water sharing regimes, that’s obviously a key issue before the Court.
- 20 A. That’s live, yes.
- Q. And do you say it’s impermissible? Well, it’s not in the plan change yet and that’s why we’re discussing it, yes.
- A. No, it’s within the Court’s power to ensure that that happens but it’s not part of the Regional Council’s proposal.
- 25 Q. All right.

MR PAGE:

This leads to the Regional Council’s point that they neither monitor nor administer priority conditions on deemed permits. Whilst OWRUG accepts that as a statement of fact, it is inconsistent with the Council’s duty to gather
30 information, monitor and keep records under section 35(2)(d).

Be that as it may, every permit holder has the right to apply to the Environment Court to enforce conditions of deemed permits, section 314(1)(b)(i) and section

316(1). Such enforcement action might be civil in the sense of being between private persons rather than the consent authority but it is nevertheless properly characterised as the enforcement of a public law statutory obligation rather than a civil obligation. There is no privity of contract or tortious obligation that would
 5 engage the jurisdiction of the High Court and its civil jurisdiction if that is what is meant by Mr De Pelsemaeker as it being a civil matter. It seems that what Mr De Pelsemaeker really meant was that the Council simply isn't interested. With respect to the witness, the Council is obliged to be interested.

10 Regardless, at a practical level, the existing priorities are things that – and I want to change the next line, rather than “have given rise”, I want to say: “have contributed to”, because Mr Hickey was clear that in some circumstances, priorities are really irrelevant but in others they may be quite important. So that should – are things that have contributed to what we now see as the status quo.
 15 So if the status quo is to be maintained then so must the priorities. At least I should say in some areas but of course, the Council isn't able to tell us which ones are which. But in any event, as an exercise of law, I submit there is no legal impediment to priorities being carried over into the controlled activity rule if the Court is minded to do so.

20 **THE COURT: JUDGE BORTHWICK TO MR PAGE**

Q. So as a matter of law there is no impediment?

A. To carrying over the priorities into the controlled activity rule if the Court is minded to do so and I'm not sure that Mr Maw and I are actually apart on that point.

25 Q. Yes?

MR PAGE:

I want to come to matters raised in submissions on behalf of other parties. Firstly, the question of derogation in the context of a consent review, counsel for Ngā Rūnanga submitted that the consent holders would resist material
 30 changes to takes or consented use on the basis of the non-derogation principle in *Aoraki Water Trust v Meridian Energy*.

In *Aoraki*, the question before the High Court was whether permits could be granted to take water where the water was already fully allocated. The Court in *Aoraki* recognised the difference between that situation and review under section 128 where it said at paragraph [55]: “at the risk of stating the obvious,
5 section 128 is concerned with a very different situation from the one under consideration.”

The High Court at [41] of *Aoraki* also considered a consent authority is entitled to deliberately erode the grant of a resource consent when it is acting pursuant
10 to specific statutory powers.

It is submitted that the High Court clearly differentiated between the facts of *Aoraki* and the statutory review process pursuant to section 128 of the Act. In light of this difference, it is difficult to see how the derogation principle would
15 assist consent holders to resist material changes.

Further, section 128(2)(a) inserted by the Resource Management Amendment Act 2020 supports this interpretation. It expressly provides the consent to be reviewed together, presumably in order to allow the consistently and efficiently
20 implement new limits across all effective consent holders.

Turning now to the efficacy of the section 128 review process, the High Court in *Minister of Conservation v Tasman District Council* considered sections 128 to 132 provided a comprehensive process for review and that included reducing
25 the scope of activity consented.

In *Genesis Power v Manawatu-Whanganui Regional Council*, the High Court rejected the unduly and restrictive view of the ambit of the powers given by the consent conditions review process of the Court below. The High Court found
30 that the consent condition review process to only be more limited than the consent process with respect to Council’s power to cancel.

The Council has express discretion to review consent conditions on notice and modify them when a minimum or maximum level or flow is set in an operative

rule or regional plan, national environmental standard or national planning standard.

5 The new land and water regional plan may set limits which the Council has empowered to implement through the review process. The council may undertake a review of all affected water permits together rather than considering them individually.

10 It is submitted that the consent review process has some significant advantages to the consent replacement process. Pursuant to section 128(2)(a) the Council may review a full catchment together at the same time allowing integrated implementation of new flow limits and/or rates. This approach would enable a more comprehensive consideration of cumulative effects relative to the consent process where the Council must simply respond to the filling of applications by
15 consent applicants. The point I'm making in that last sentence for the Court is that Council has no control over who applies for what and when, it simply deals with things as they come in and that is problematic from the point of view of coordinating the imposition of new limits in a catchment. By contrast, section 128 enables the Council to call in whole catchments at a time and that is in fact
20 what the ORC has been doing in other catchments before now.

1040

THE COURT: JUDGE BORTHWICK TO MR PAGE

25 Q. Is this ability not open to the Council through its preferred controlled activity route and the consenting of replacement consents for a period of six years, in other words, review after six years when the new land and when the new land and water plan is in place or review after 20 years when the land and water plan is in place or something else is in place after that. In other words, whichever route you take, a128 review is open.

A. A 128 review is open for certain.

30 Q. So what's the point you're making?

A. My point is that when the method of implementing limits is requiring applications to reapply for consent, the ORC cannot control the sequence

or order in which those applications are lodged or the order in which it makes decisions.

5 Q. You mean when the method of implementing limits, i.e. limits under new land and water plan, when that comes into being, ORC can't direct when those applications are to be filed?

10 A. Correct. For example, once plan change 7 is operative as these six year permit term comes up, applicants are entirely free to lodge their applications whenever they like. For example, in the Linders catchment, those applications were lodged years prior to the expiry of the permits. Other applicants might wait for the last day so you've got the whole case law around the sequence and timing of when applications have to be heard and determined over which the ORC has no control whatsoever. Yet as an authority initiating a review under s 128, it can call in every permit in the catchment and deal with them at the same time as an integrated whole.

15 Q. Are you going to address in your submission whether and to what extent the ORC under 128 can address overallocation where this is found in the future land and water plan in respect of the attributes which are described in the NPS?

20 A. There is an express power in s 128 to do that.

Q. Which power is that?

A. Section 128(1)(b)(i).

25 Q. Your submission is presumably if there is found to be overallocation then the permits can be reviewed in line of any rule that relates to maximum and minimum level of flow rates of use of water so that's one category or minimum standards of water quality that would be the second relevant category, correct?

A. Yes and this paragraph was introduced by Resource Management Amendment Act 2020.

30 Q. Alright. Thank you.

A. So my submission about that is that subsection of s 128 arrived on the statute books at the same time as the NPSFM-2020 was being promulgated. So we need to the NPS and that power as companion provisions.

Q. What is the minimum standard of water quality? Is that a term or a phrase which is defined by the Act or not?

A. Not that I'm aware of.

5 Q. How would you interpret that? Is that to be interpreted in relation to the national bottom lines or something other than the national bottom lines?

A. It's a reference to a rule and a plan rather than a provision of the NPS. So how the NPS environmental outcomes are expressed in the plan will be important so that we know whether they are a minimum standard of water quality. So I would have thought that if the national bottom lines are carried through as a rule into the regional plan they would certainly qualify. Just to postulate an example, suppose through the land and water regional plan the allocation block for a particular waterbody was a thousand litres a second, just for the simplicity of maths. If the allocation of that thousand litres per second was on a first come first serve basis then the regional council would have real difficulty addressing questions of equity if applications were allowed to come in one at a time in whatever sequence applicants chose and there will be nothing preventing the first applicant chewing up that allocation block whereas a whole of catchment review under s 128(2)(a) can deal with that allocation block at the same time with the whole of catchment so OWRUG's position is that far from Mr de Pelsemaeker's concerns about efficacy, there is in real terms major advantages to the s 128 review process being the way in which limits which appear in the land and water regional plan are implemented and the Court will remember that that's exactly how the operative regional plan water works because there is a policy framework addressing the implementation of minimum flows on a whole of catchment review.

20 Q. In terms of the importance or value of a s 128 review process that you're describing what is that predicated on? What's the underlying assumption here? All resource consents are granted and expire in the same broad period? Is that one assumption or all resource consents can be granted for many periods but are just simply reviewed at the same time? Is that the other assumption? There is an assumption which is unstated?

1050

A. In fact, the s 128 power overcomes the need to make any assumptions about that because the term of the permit is irrelevant to the council's power to review it.

5 Q. Again, why is this only available on a six year duration? Why is this not available to the council should short-term consents be issued via the controlled activity or potentially longer consents under the non-complying activity route? Why is this not available?

A. I mean the power is always available.

Q. It's always available.

10 A. Yes, but the underlying assumption and the council's case in favour of plan change 7 is that all consents should expire in six years' time so that the land and water regional plan can be implemented through the process of reapplication. OWRUG's case is that that's fundamentally misconceived. That the better way to implement the land and water regional plan is through whole of catchment reviews under s 128(2)A and if the Court accepts that that power is apt to achieve the outcome there is simply no need to cut off all re consenting on a six year timeframe.

15 Q. But as matters stand there is nothing preventing ORC from reviewing the whole catchment at the same time even if short-term consents are granted?

20 A. Correct.

Q. Correct. Understand (inaudible 10:53:35).

MR PAGE:

25 I want to come to the question of viability under s 131. Fish and Games submitted that the assessment of effects on review is fundamentally different to the assessment required for a replacement consent. With respect we disagree.

30 The Council's assessment in relation to the consent review process is bounded by section 131 which requires the Council to have regard to the matters in section 104, which of course includes 104(2)a which is the investment infrastructure and secondly whether the activity allowed by the consent will continue to be viable after the change.

In addition, the Council may have regard to the manner in which the consent has been used.

In *Davis v Gisborne District Council*, the case demonstrates the section 131
5 assessment in relation to a consent condition review process assessing noise effects caused by operation of a Gun Club. The viability analysis was conducted separately from the section 104 analysis in this decision.

1055

10 Viability was held not to turn on the financial capacity of the Gun Club to take mitigating steps where there was the option to avoid activities all together. Unlike section 104(2A) the value of investment was not the driving consideration, rather viability incorporated an assessment of the impact (including costs) of the changes on the ability to of the consent holder to
15 continue the activity while addressing the unreasonable noise effects.

Viability incorporates more than the value of investment made by the consent holder. Viability is a more prospective inquiry directed at the effect of the change on the ability of consent holder to continue the activity. Equally, the assessment
20 must not assume that the consent holder can continue to operate as they have done prior to review.

In *Davis* the Court was not swayed by the financial ability of the consent holder to respond to the reviewed conditions. The Court found that this was
25 subservient to the statutory obligations to avoid unreasonable noise and achieve the purpose of the Act.

It is therefore submitted that the concerns raised by Ngai Tahu, Fish and Game and the ORC as to the limited utility of section 128 reviews is unfounded. So I
30 offer *Davis* as an example where despite complaints about viability being advanced by the gun club in that case, the Court held: “Yes, we’ve had regard to that but it’s, the tail mustn’t wag the dog” the primary consideration was the section 16 duty in achieving the purpose of the Act.

And you can see the potential similarity here, if an irrigator says: “Well my investment in irrigation would be stranded or my, the viability of the farm after a limit is imposed might be imperilled” those are of course relevant considerations to have regard to but if fundamentally carrying on as they were is inconsistent with NPS then that’s a higher order consideration.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. The issue wouldn’t though be one of fundamentally inconsistent with the NPS, the issue would be one of fundamentally inconsistent with the future land and water plan, is that not so?

10 A. Yes –

Q. Because you’d be thinking, yes –

A. But if the implementation of the land and water plan is the expression of the NPS which is the expression –

Q. It should be, yes.

15 A. – of part 2, then it is difficult to escape an argument that achievement of new rules in a plan isn’t a higher order consideration. Effectively we’re saying that the ORCs being far too timid here about the extent of their powers under section 128.

Q. The propagation of that new plan, would that not also bring into account or should bring to account considerations as to the investment in infrastructure and viability of existing farm programmes when deciding whether and how to manage in the short medium then long-term those, the goals of the particular plan in relation to the compulsory values and discretionary values and outcomes for the same, in other words, the same issue arises in relation to the propagation of the plan and that’s where it is addressed so it’s not really under a new plan, whilst applicants might say under a 128, yes but that’s going to effect my viability, that question should’ve already had been considered by the decision maker in relation to the new plan, is that not so?

30 A. Yes, that’s so. It well, I’m not sure that those issues effect the environmental outcomes that are planned –

Q. If effects the timing and sequencing –

A. Yes.

Q. – of the environmental outcomes so instead of saying well you've got five years to get your nutrients under control and to lift the game above the national bottom line, just say hypothetically that's the issue, it might be 10 years because of the investment sunk already into the infrastructure.

5 1100

A. Yes, and that stepwise process is my understanding of the requirements that the NPS creates for the adoption of a new regional policy statement. The timeframes by which those targets are achieved is a matter that the RPS deals with and that will get picked up through the land and water regional plan.

10

Q. The RPS is dealing with the timeframes for the attainment of those compulsory values and other discretionary values.

A. No, it deals with the attainment of the long-term visions for the FMUs and how Te Mana o te wai is going to be achieved.

15 **COURT ADJOURNS: 11.01 AM**

COURT RESUMES: 11.27 AM**QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS**

- 5 Q. I just want to explore with you a little this controlled activity status and what in reality it might mean so say the controlled activity status became operative perhaps long procedural lines that's now being proposed, perhaps in some other form, probably doesn't matter for the purposes of my hypothetical question so if people decide that they want to say to the council, look, we might have applied for this way back when now we want this dealt with in terms of the controlled activities status, is that how you envisage – I'm going to come on to the consequences in terms of 124 of that course of action in the minute but I'm just trying to understand how you might see that being done.
- 10
- A. At the present time, of course the activity status under s 88 is fixed to the date of application and so if the controlled activity rule becomes operative and then the applicant decides that it wishes to follow that pathway, then the question arises what is the procedural step that the applicant has to take to signal that and have their application processed as a controlled activity? At the start of this hearing, I was of the view that there would need to be an application under the controlled activity lodged to enable that to happen, my friends, one of them – I can't remember which one has made submissions suggesting that that's not the legal position and if that's correct then I'm content to accept that there is no disadvantage in arguing about that. An election would have to be made somehow as to which route to follow and whether the application which is currently before the council meets the full schedule obligations of an applicant in relation to the change in status.
- 15
- 20
- 25
- Q. So an election would need to be made. Who would you see making that election then?
- A. It would have to be the applicant.
- 30 Q. It would have to be the applicant so that's what the applicant might do so the controlled activity mumbles along and it gets approved.
- A. Yes.

Q. So that effectively is involving the 124 continuation of exercise until a consent is granted, is it?

A. If the consent hasn't been granted prior to the expiry of the term of the consent being replaced, then yes, the applicant would be relying on s 124.

Q. So if they wanted to go on and bank their controlled activity but they also wanted to continue on with non-complying activity they wouldn't have the protection of 124 anymore although all the benefits that go with 124.

A. Yes, I think that's right.

10 **THE COURT: JUDGE BORTHWICK**

Q. What is right? I don't actually agree with this line of question. So what do you think is right?

A. As I understand, what the commissioner is putting to me so the applicant lodges a controlled activity application to be processed concurrent with the non-complying one. The control is granted. Can the applicant continue then to rely on the s 124, notwithstanding that they have a controlled activity consent in hand? My view would be no because what they're relying on in that interim period isn't 124 anymore, it's the controlled activity permit that's been granted because it's the replacement for the earlier consent. If the non-complying activity application is on foot it would fall to be decided on whatever the regime is at the time.

Q. As a new application?

A. As a new application so it's a substitution rather than a replacement if that makes sense.

25 Q. Yes, the new application for a non-complying activity would substitute the controlled activity which has been granted in the meantime but as a fresh, brand new application.

A. Yes.

THE COURT: COMMISSIONER EDMONDS

30 Q. So 124 wouldn't apply to it?

A. No, I don't think so.

Q. I just wanted to be clear about that, Mr Page.

- A. I have to say I'm dealing with this on the hoof because I've never contemplated that there would be two live applications on foot at the same time that the applicant would have to elect which path they were pursuing. Ms Irving has just raised with me, the way that the non-complying activity rule's currently framed, it is for a replacement of the permit that's expiring, not as a replacement for a controlled activity that's already been granted so I'm unclear that the non-complying activity pathway would still be available if you had a controlled activity consent in hand. That's to do with the way that the entry conditions have been drafted.

10 **THE COURT: JUDGE BORTHWICK**

You've heard plenty enough for me during the course of your submissions so than you for those and I think we're interposing another witness in your case.

MR PAGE:

- 15 Yes, I think we're hearing from Mr Ensor.

MS DIXON CALLS**TIMOTHY ALASTAIR DEANS ENSOR (AFFIRMED)**

Q. Mr Ensor, do you confirm that your full name is Timothy Alastair Deans Ensor?

5 A. I do.

Q. And you are a principal planner with Tonkin and Taylor limited?

A. Correct.

Q. You confirm you filed two briefs of evidence, a statement of evidence in chief dated 5 February 2021 and a supplementary statement of evidence dated the 18th of March 2021?

10

1135

A. That is correct.

Q. And will you confirm that you hold the qualifications and experience which is set out in paragraphs 7 to 9 of your evidence in chief?

15 A. I do.

Q. Are there any corrections that you need to make to either of your briefs of evidence?

A. No.

Q. Thank you. Do you confirm that your evidence is true and correct to the best of your knowledge and belief?

20

A. I do.

Q. Thank you. Mr Ensor you provided a single page summary at the beginning or a two page summary actually at the beginning of your evidence in chief and of course have since filed the supplementary statement so you can either read your summary to the Court of it you like, simply speak to the summary and to your supplementary statement if that would be more appropriate.

25

A. If it's helpful for the court I will talk to my summary, given that some matters have moved on but I can –

30 **THE COURT: JUDGE BORTHWICK**

Q. Given that the summary has moved on?

A. Given that I have a summary – sorry, that I have a supplementary brief of evidence as well.

Q. Well I'm quite happy that you talk, I guess the important thing is that you communicate quite clearly what are they key elements that you're wanting the Court to understand from your evidence.

MR ENSOR BEINGS READING SUMMARY:

5 So with reference to the summary in my evidence in chief, it's probably best if you start below paragraph 3, so 3.1 which is where the relief sought is described.

10 So in terms of the relief sought and in terms of matter I've explored in my evidence, this is still to achieve the objective of plan change 7 by strengthening the non-complying pathway, Further encouraging the use of the controlled activity consenting pathway, and preserve existing hydrology that will be impacted by the loss of deemed permit priority and just to add to that based on evidence heard yesterday, all that would not be provided for by a flow limit or
15 sharing regime.

THE COURT: JUDGE BORTHWICK

Q. So: "preserve the existing hydrology which will be impacted by loss of deemed permit priority" that would not otherwise be provided for by, through, or by or through – can you say that again?

20 A. By a flow limit or/and sharing regime.

Q. And I take it you mean deliberately flow limit is different from a flow sharing regime and you can come back to us later and say what's the difference?

A. Yes.

25 **MR ENSOR:**

And so in terms of solutions in strengthening the non-complying activity pathway I've proposed amendments to Policy 10A.2.3 to remove the 'minor' threshold and include elements of the NPSFM, particularly the first priority under Te Mana o te Wai. In order to preserve the current hydrology and
30 therefore ecosystem values, I have also proposed amendments to protect existing lawfully established water takes and once again in my evidence I've

discussed priority but flow limit and sharing arrangements could also play a role in this.

5 And the second part of this is Amendments to the controlled activity consent pathway and in terms of the philosophy put forward in my evidence in chief, it carries through to amendments that I've made in my supplementary evidence and that is that the controlled activity pathway provides a simpler and more cost and therefore efficient pathway than, or as efficient as it can be and in relation to early discussions by legal counsel for MFE, I've also suggested an
10 additional policy supporting controlled activity applications being processed as such, if that rule was made operative early but in my supplementary evidence I haven't carried that through so I've just let that sit.

THE COURT: JUDGE BORTHWICK

15 Q. Okay what haven't you carried through, are you –

A. The additional, the suggested additional policy that might support an immediately operative –

1140

Q. Oh that, yes.

20 A. – controlled, yes so that's satisfied.

Q. That's the 'let's go out hard and early on the controlled activity rule' whilst not taking into account that many people actually want this plan to be rejected.

A. Correct.

25 Q. And you're now, so you're not carrying that through, well that's simpler.

A. Yes.

MR ENSOR:

30 So in terms of, in terms of clarity around the relief sought in terms of specifics of drafting starting with the controlled activity and this is now just talking to my supplementary evidence and thoughts since yesterday. Mr de Pelsemaeker has made changes in his versions of PC7 attached to his supplementary evidence which focus attention on procedural rather than environmental

matters and following questioning of Mr de Pelsemaeker by the Court I see that just striking out the matters of control and referring to conditions of current consents being defining the matters of control has the potential to broaden out the matters that might be considered by the Council in a way that was
5 unintended. The intention is that, that Council's control is quite limited.

The other point raised was in relation to a shift from paper allocation to actual use or reasonable use and I've suggested that Mr de Pelsemaeker's change there to focus the matter of control on that historic use more deliberately is
10 useful, is a useful addition.

And there's just one other point that I'd like to discuss in relation to the controlled activity rule – sorry the matters of control in terms of Mr de Pelsemaeker's suggestions and that's in relation to his (b), matter of control B which was
15 previously matter of control (e) and that relates to conditions concerning operating procedures administered through water allocation committee and in my supplementary evidence, and I'll just find the reference to make sure at paragraph 30, I recognise that there is a number of informed potential, informal flow sharing arrangements out in Otago and we heard from Mr Hickey yesterday
20 about those and that the priority is not the only issue and that setting flow levels and sharing flows above those levels as part of the controlled activity rule may assist with preserving hydrology.

THE COURT: COMMISSIONER EDMONDS

Q. Sorry (inaudible 11:43:52) specific in relation to that are you going to go
25 on to that in a minute or not?

A. No I haven't got specific wording but I can discuss it in a little more detail now if you like.

THE COURT: JUDGE BORTHWICK

Q. I'm just getting to Mr de Pelsemaeker provisions so this is a controlled
30 activity rule you were talking to?

A. Correct, the matters of control.

Q. That matters of control and the matter of control?

A. (b) in relation to his 14 March –

Q. (b) so you referred to paragraph 30 of your evidence-

A. Which is where I discuss it.

Q. Which talks about matter (e) but it's (b)?

5 A. The footnote talks about (b) in the March 14 version, sorry I was trying to keep my mind straight on the version I was looking at which was the notified version.

Q. Okay so just read out, just read out what your matter (b) is that your addressing, can you read the text to me?

10 1145

A. I can: "any existing conditions concerning operating procedures administered through a water allocation committee that exists for the catchment."

Q. So what's your thinking on that?

15 A. I think there's an opportunity to expand this matter of control as I understand it. Water allocation committees are few and far between in Otago but as we heard yesterday there is potentially many informal, as in haven't been registered with the council in terms of an official committee flow sharing groups – and I guess my view is there is an opportunity to
20 recognise these informal arrangements in a more formal way through a matter of control and therefore a condition of consent. I guess there is a few things to consider, the flow sharing needs to occur above a flow level whether it be a residual flow or otherwise and that to maintain a simple controlled activity pathway bringing these currently informal flow sharing
25 arrangements forward would have to be on a voluntary basis by the applicant rather than required by the council because that would open up the matter of control considerably. It would require a level of work that wouldn't be consistent with a streamlined pathway.

Q. So it would open up the level of work required if it was compulsory
30 considerably because of what reason?

A. Because if the work hadn't been done already and I understand a lot of work has been done, but if the work had not been done then it would require a consent applicant to propose a minimum flow, consult with all users of water on the waterbody and form a flow sharing arrangement.

Q. We, of course, have not seen any of these flow sharing agreements and may be that some are formally documented and are now applying as between permit holders on certain catchments, sub-catchments, or certain waterbodies, mainstems and their tributaries, we don't know.

5 Maybe that they only apply contingent upon – will only apply on a voluntary basis and the continuation is contingent upon securing further resource consent or replacement consents on terms and conditions that are suitable to the consent holder and again we don't know. We're told these water flow sharing arrangements – an outcome and/or a primary or
10 principal outcome is that there is an environmental benefit. We don't know but that's what we're told. So if this is a matter which is volunteered by an applicant or group of applicants what sort of enquiry or work, if anything, is to be done by the regional council where it's conceivable that there will be variation across the various water sharing arrangements?
15 What's your thinking about that?

1150

A. If I understand your question, in terms of determining whether the flow level and arrangement is appropriate, I suspect that when looking at these, there needs to be a comparison of sort against the status quo and
20 we heard yesterday that the status quo may be somewhat dynamic so I think the information that would need to be presented would need to involve some level of baseline investigation as to what values are present and in recognising that this is probably not going to be the full suite of values anticipated through the NPSFM but possibly more focused on
25 ecological values so baseline by which a minimum flow and any flow sharing above that is ceased. In terms of looking at both priority and this flow sharing arrangement, in my view, it's to preserve as best we can, the status quo acknowledging that it might be dynamic while further work is done for the future water and land plan so it's holding the line but in a
30 slightly more adaptive way given that potentially disrupting what is there now in a way that doesn't account for some of these values that might exist could potentially have a more detrimental outcome and I acknowledge that there are some – I say potentially because there are some unknowns as to how much priority is playing a role versus other

mechanisms but my view is that we should probably try and account for both at this stage.

Q. So in so far as the present environment is a product of flow sharing arrangements or I'm not sure if it's an and/or, I suspect it's just an or
5 priorities so those two variables they are not to disrupt the environment through not enabling those mechanisms to be brought forward, at least on the voluntary basis is what you're recommending. So that (inaudible 11:53:22) environment to whatever mechanism is resulting in the current state of environment, be that a flow sharing agreement or be it priorities
10 or possibly something else who've not been told. Is that where you're going?

A. Yes, that's right.

Q. If under that it turns out that flow sharing agreement is not providing for roundhead galaxiids in central Otago then it is not providing for
15 roundhead galaxiids in central Otago if it turns out that that was never an outcome or a controlling factor in a particular flow sharing agreement because to do otherwise would then to start to broaden out the scope and work effort, if I could put it that way, of the controlled activity rule. Again, is that how you see it or is it something else?

20 A. Yes, it's going to be a fine balance either way between getting enough information that the flow sharing arrangement, for example, is actually going to make things worse rather than better as proposed.

Q. Is going to make it worse or not?

A. Or not going to keep it as close to the status quos.

25 Q. You've lost me. What are you saying there?

1155

A. It's a fine balance between determining or requiring a high level of information that may not otherwise be available relatively easily and missing out on the opportunity to maintain as close as possible to the
30 status quo will not disrupt the ecology to the point where instead of making incremental gains as anticipated, we're sliding backwards.

Q. We're slightly backwards on this process for the next six years?

A. For the next six years, yes, in the interim period we're dealing with the life of plan change 7 or anticipated life of.

- Q. Is part of the problem for all parties and then it follows for the Court that the current environment or the expression of the current environment is not well or is not known in relation to each mainstem waterbody and tributary, it may be an expression of flow sharing agreements but these
5 don't seem to have been in place for any length of time according to Mr Hickey yesterday, he said that they had only, there was a large volume of them being negotiated or being explored in the last three to four years so maybe the current environment is an expression of that, maybe it's an expression of the priorities interacting with other consent holders and
10 other waterbodies with very few priorities would be an expression of something else altogether wouldn't it?
- A. Yes I think that's right and in terms of the level of information, I certainly wouldn't expect, I don't anticipate that I've got a full handle on the amount of information that is, I mean, more information is coming to light in Mr
15 Hickey's questioning yesterday and hence the discussion or shift from just priorities to priorities and potential flow sharing arrangements being a contributing factor to this environment and I think the risk is that if we focus just on one or just on the other then we miss what we don't know. But I think you're right, it's a problem for everyone involved and the Court
20 than we have imperfect knowledge and are trying to make something as simple and streamlined as possible while dealing with that knowledge.
- Q. It's, it is possible that within any catchment or sub catchment there'll be some deemed permit holders that have held out and are not on those flow sharing agreements, agreed?
- 25 A. I suspect so.
- Q. So then, so then what, in terms of them then what would be the process for the Council processing their applications as a controlled activity rule which is what's, that's the context of the discussion at the moment, what
then?
- 30 A. I would suggest that the flow sharing arrangement only becomes an option if it's in place so you don't have any holdouts for example in catchment otherwise we need to think about what the status quo is being driven by and possibly is priority or.

- Q. Yes and that's the, that's the problematic thing isn't it, the flow sharing agreement may or may not include all deemed permit holders and it may or may not also include everybody else who is a consent holder whose consents are coming up for replacement or indeed who have got long-term consents. So it may include those people, it may not but if it doesn't, it doesn't therefore mean priorities because, you know, priorities will be imposed for those people are outside of the tent because the current environment may or may not be an expression of that priority, is that correct?
- 5
- 10 A. Well as I understand it the flow sharing agreements have been trialled I guess so there might be a relatively short-term expression and I don't know this but I would assume that if we were going to take that through into a controlled activity status and matter of control and formalise it, everyone would need to be in the tent for it to work. You can't have a
- 15 abstractor half way down the catchment that isn't playing the game and is taking out the water because the flow sharing agreement, the flow sharing will fall apart, so I think –
- 1200
- 20 Q. Well just say that that is in fact the proposition that the 90 per cent are in and the 10 per cent are out. What does the council do? Does the council just say, well, go with priorities? Does that in fact even need to go with priorities? If it goes with priorities is not the risk then that there will be a new expression within the environment? Priorities will result and change the environment and consequential change in levels of effect being seen
- 25 in the environment.
- A. If they haven't been exercised in that catchment and some other arrangement whether it be a temporary flow sharing trial as was discussed or something else then there is a risk because you will be shifting to something that hasn't occurred.
- 30 Q. So then how do you close off that risk?
- A. I mean in terms of the flow sharing part of it, I think, unless everyone's in the tent it won't apply and in terms of the priority I think we need to understand much better how much of a role priority might be playing in a catchment where there's been no discussion or informal flow sharing

arrangement. I think we're missing some information there possibly to make a hard and fast call.

Q. So that's something that the Court needs to know before making a decision or is that that information in terms of exercise of priorities or is that something that in terms of the information requirements for a resource consent application it has to be addressed?

A. I think probably the Court needs to understand the scope of that issue before making a decision because it will have implications for the drafting of the rule and whether to just include priority and flow sharing agreements ought to have another matter that deals with some in between and whether – I haven't given too much thought to that to be honest but whether there's another mechanism that allows us to address that risk in a way that's certain enough to accompany controlled activity rule.

Q. Well, the evidence is there is no evidence so then what are we to do? And the issue plays out in a forum where there is no evidence of any substantive sort by any party. So what are we to do?

A. I'm not really sure. I mean I think pushing it through to a resource consent process without some guidance around it is going to be problematic.

Q. Nevertheless this is the environment that the court works in all the time where there is an imperfect knowledge base so are you indicating that further thinking needs to be done by yourself over this?

A. I think so.

THE COURT: COMMISSIONER EDMONDS

Q. What I want to ask is similar question in relation to these water flow sharing agreements. Would we need to know more about what they are? How they might work? Where they might be working? What are the other implications? Is possible implication that more water would end up being taken various times than currently occurs? In terms of thinking about the holding a line in the status quo and what that might do? Is that something else the court needs to know about?

1205

A. Certainly it needs to put its mind to it as I understand from listening to Mr Hickey yesterday. The flow sharing agreements or the arrangements, the purpose of them is to try and maintain a, sort of a status quo as it were, maintain the values that have been identified from an ecological perspective through setting a flow limit and so in terms of whether additional water is taken or not there may be some fluctuations in how the water is taken but the purpose of the limit would be to try and maintain those values or hold the line on those values. Now, that's just from listening yesterday, I haven't delved into the details of these agreements and I'm not party to them but the Court certainly needs to put its mind to whether the flow arrangement on the face of it might be substandard as administered by the agreement.

Q. And is that something that you would need to think about to, look into?

A. I think to, to sure up a final approach to this as I said, I haven't given any thought to how it might be drafted and how it might fit together and it's really just been on thinking over the evening previously my thoughts had only really extended to priority. So I think further thought would be necessary to try and incorporate the potential pitfalls I suppose of a flow sharing arrangement in a rule.

Q. And further evidence to what Mr Hickey gave us yesterday.

A. Ideally the content on some of those and the aims and whether there is some certainty that can be provided to ultimately the Council at the end of the day that the flow sharing arrangement is, you know, what is the objective of it in terms of holding the line, to use the well overused term now.

THE COURT: JUDGE BORTHWICK

Q. Yes a line that's never really held so with –

A. That's right.

Q. – efficiency gains and so forth so –

A. A slightly dynamic line.

Q. I mean it's just, it's what it is. I suppose the key thing being what is the outcome of the flow sharing agreement without necessarily, you know if these things are in place largely without resulting in a destruction of those

agreements, I think the, what is not clear is what is the outcome and whether that outcome will indeed hold the line, whatever that means because I think it's a nonsense phrase where we see technological improvement which is permitted changing the environment in a way which is not visible to Regional Council. But so what are the, I suppose the key thing is you don't know what the outcomes are, we're being asked to accept that the outcomes will be an environmental benefit and assuming that is the case though it seems to me to be, it would not be appropriate for a controlled activity rule then to disrupt those outcomes, you know, if a certain galaxiid wasn't in the pot and should've been in the pot, or in the mix, you wouldn't be wanting to reopen that stuff up and widen it out for –

A. No, no. I mean I guess the purpose behind thinking about this more was that I recognise that priority was only one part of this.

15 Q. Well it is.

A. And –

Q. And it may not be the controlling factor, it may not even be a factor at all.

A. That's right. And so how best to pick up and I, as I've expressed I don't actually have the answer at the moment but how best to pull in what I heard to be potentially another reasonably significant contributing factor, potentially.

Q. Yes so it's another tool in the toolbox which has emerged through the course of the hearing. Is that tool, for that tool to be applied you would have to know what is the outcome of the tool, what it's objective, is that, there are likely to be multiple flow sharing agreements, many flow sharing agreements which are out there and so the inclusion or use of that flow sharing agreement or alternatively even priorities if flow sharing agreement doesn't exist, is that contingent on the outcome being whatever is meant by "hold the line"?

30 1210

A. I think ideally, I guess the other, this is slightly more pessimistic way to look at it is going backwards without anything in place, priorities are uplifted or they're not being exercised, you're not left with anything.

Q. Not left with what?

A. You're not left with anything, you're just left with a six year –

Q. Consent.

A. - consent with a rate of take on it.

5 Q. Well, in terms of the outcome, when looking at exercising that matter of control is that tied back to an outcome which outcome is the maintenance of the existing environment including environmental flows, is that what you're aiming at?

A. I think that's one way of sort of summing it up, exactly what that looks like is the other –

10 Q. That would have to be in a policy?

A. I think that would assist.

Q. That would assist?

A. Greatly.

15 Q. All right. Anything else or do you want to, because this is kind of hard, do you want to think about it and come back to and think about it some more because actually this is kind of hard, I think all parties recognise that.

A. Yes, I think is the answer to that.

Q. Yes, yes okay I can take that up with Ms Dixon later but anything else you want to say by way of summary which we've totally distracted you from?

20 A. No, that's my summary.

Q. Oh that was concise, thank you. Questions for cross-examination and we're actually starting with you Ms Lennon. No? we're starting with you Mr Maw, sorry.

CROSS-EXAMINATION: MR MAW

25 Q. Thank you. Good afternoon Mr Ensor.

A. Good afternoon.

30 Q. I'm going to be working through the, what I think is the latest iteration of provisions that are attached to your supplementary statement of evidence and I have some questions in relation to those suggestions. My first question just for clarification, can you just confirm the underlying document that you tracked your changes into with respect to your appendix (b)?

A. The notified version, I think.

Q. And just for ease of reference do you have Mr de Pelsemaeker's 14 March amendments to hand as well?

A. Which version?

Q. The 14 March so the latest iteration and it was the attachment 1 which
5 had his tracked changes to, I'm going to say the notified version.

A. I think that's to the 4th of March version.

Q. 4th of March version, let me just check. Yes sorry, amendments to the 4th
of March version.

A. Yes I have that at hand.

10 Q. Excellent. So I want to start with your suggested amendments to policy
10A2.1 and I'd like to understand the changes to sub paragraph (a) or
your suggestions to sub paragraph (a) starting with the first part of that
sentence: "the proposed take is the direct replacement or otherwise
15 reduces the volume of water" what is it that, those two things seem to be
two different things and I'm just wanting to understand what it is you are
trying to capture in relation to that paragraph?

1215

A. The intention of that is that the water taken is either, water is currently
20 taken or there is otherwise a reduction of that, there is no potential
increase.

Q. So are you trying to catch what had been expressed in sub-paragraph E
there which you have struck out, there is a reduction in the volume of
water allocated?

A. That's correct. I suspect that having looked at Mr de Pelsemaeker's
25 amendments and in light of discussion with the Court about the broadness
or otherwise that striking out the matters of control, what that might result
in, I have turned my mind to readjusting this policy in as much detail to
reflect those changes so certainly the intention is that replacement take
is aligned with those matters as outlined. So no increase in the water.

30 Q. So if you were to look at Mr de Pelsemaeker's wording, he is dealing with
those two concepts, so the first concept being that it is a direct
replacement. He deals with that in his sub-paragraph of A.

A. Correct.

Q. And then in relation to the second component he retains a sub-paragraph E that there is no increase in any actual volume of water taken.

A. Correct.

5 Q. So those are the two things that you're responding to here and you've jammed them together possibly to try and tidy up the drafting.

A. Yes.

Q. Do you accept that it may have an unintended consequence in terms of adding some confusion in terms of what is meant by the first part of that sentence in terms of mixing the two concepts?

10 A. Potentially and the fact that you've raised the question probably highlights that there is enough confusion that it could be split.

Q. If you were to split out the second part there so the otherwise reduces the volume of water taken, you will see that Mr de Pelsemaecker has shifted away from requiring a reduction to ensuring that there is no increase in the actual amount of water taken. Do you agree that the emphasis should be on not allowing an increase?

A. The reason I included the option for reduction is we shouldn't lock out the opportunity for a reduction but I accept that the focus also should be on not increasing but the door shouldn't be shut to a reduction.

20 Q. And when you read carefully Mr de Pelsemaecker's wording is no increase in the actual volume of water taken as opposed to no reduction from the paper allocation. So in a sense that improvement is captured.

A. There is an improvement in terms of from paper to actual, it doesn't specifically allow for anything beyond that if that was seen as desirable by someone, potentially unlikely but.

25 Q. Moving on but staying in your sub-paragraph A, you've crossed out the deemed permit or water permit that is being replaced is a valid permit and you have tried to capture in your wording immediately above that strike out that the permit needs to be effected by the provisions of s 124 to 30 124(c) of the RMA? When you undertook that exercise what were you seeking to achieve by removing reference to the valid permit?

1220

A. The intention was to wrap up this sort of valid permit consent and the fact that reference to section 124 was an expression of how the application

would be progressing so to make it clear that this was an application, this was a valid permit that was progressing through a pathway.

Q. Did you have in mind when you made that adjacent that the phrase “valid permit” had been defined within chapter 10A?

5 A. Not specifically, no.

Q. So if you pick up Mr de Pelsemaecker’s version and track through to page 10 there you’ll see a definition of valid permit. And there you’ll see that it’s a little broader in terms of picking up some situations beyond simply where section 124 is triggered.

10 A. Correct.

Q. Have you turned your mind to the, to those other situations or had you not, not actually seen the definition when you were striking out the reference to valid permit?

15 A. I understand this definition has come through in the 4th of March version and sort of back to my earlier point about this policy and perhaps not lining it up against the 4th of March version in considering it based on the notified version, I’d probably have to give it further consideration but certainly wouldn’t want to have an unintended consequence that one of those other matters ended up being critical.

20 Q. So you’re striking out of valid permit – you’re actually seeking to provide some further guidance in what you’d added in –

A. Correct.

Q. – because you just hadn’t appreciated there was a further definition providing that clarity?

25 A. Correct.

30 Q. I want to track down now to sub paragraph (b) so we’re still in policy 10A2.1 and there you’ve struck out that there is no increase in the area under irrigation if the abstractor border is used for irrigation. Now you mentioned a moment or two ago that you may need to make some further adjustments in like of the control activity rule as you now recommend, so I just want to understand that I’ve read your version of the controlled activity rule correctly, so my understanding of your version of the CA rule is that there is to be no increase in the area of land under irrigation and that’s picked up in your rule 10A3.1.1(iii)?

A. Correct.

Q. So that rule in the absence of any policy direction would be an orphaned rule without policy guidance?

A. Somewhat, yes.

5 Q. So isn't it better to keep that requirement in to the policy?

A. Yes I think, I think it would be.

Q. And moving on to paragraph (c) there's no increase in the instantaneous rate of abstraction, same logic applies?

A. I think it does, yep.

10 Q. And in relation to sub paragraph (d), the existing condition – existing flow conditions?

A. That could probably remain too unless, I mean in reality the intention was that that component might be, might be picked up by the wording of direct replacement but I could, going back to your point about some potential confusion there. I think we should avoid it if possible.

15

1225

Q. I want to move on now to understanding your evidence in relation to the controlled activity pathway and I want to start this exercise by looking at your evidence in chief. If I could take you to your paragraph 55 to start with. You're reflecting on the notified version of plan change 7 and you observe that there is a need to make either the controlled or the restricted discretionary pathway more attractive and entry to the non-complying activity rule needs to be more stringent.

20

A. Correct.

25 Q. And then in your evidence you go onto consider in a little more detail the non-complying activity rule and you consider that there needs to be some changes made in relation to recognising water takes for drinking water and water takes for hydroelectricity generation and you capture then in your paragraph 68 that the amendments that you proposed to policy 30 10A23 are necessary to implement the change in focus. I just want to make I've understood what you meant when you referred to a change in focus in that paragraph. Were you referring to the need to somehow accommodate drinking water and hydroelectricity generation but otherwise make the pathway more stringent or is it something else?

A. In relation to providing a pathway for drinking water and hydroelectricity generation as per the supplementary evidence and otherwise making it more stringent.

5 Q. So philosophically what you're trying to achieve with your drafting is pathway through the controlled activity rule to facilitate longer term consenting for drinking water and hydroelectricity. But otherwise making it more stringent for other activities.

A. Yes and the drafting provides access up to 35 years for drinking water or hydro and to 20-35 for others provided they meet the more stringent test.

10 Q. It's in relation to those others that wish to explore with you the implications of your drafting, because you've broadened the rule and policy to provide a pathway for others outside of those two categories, haven't you?

A. Not in terms of from the notified version where that was the minor test where there was no restriction on use. So I think it's the same activities
15 are open to try their luck.

1230

20 Q. I'd like to explore with then – so you've proposed some wording to policy 10A2.3 to address your change of focus and I want to start with you by making sure that I've understood how your drafting is intended to operate and I want to start with the chateau to the policy so that is around establishing that replacement permits should not be granted for more than six years and I'm paraphrasing there except in the circumstances that are outlined in the sub paragraphs that follow –

A. Correct.

25 Q. – so in a sense the exception to the rule of six year permits. And if we look at sub paragraph (a) if a consent applicant is seeking to renew a permit that has an existing residual flow, minimum flow or take cessation condition and it could be any of those three or one of those three?

A. If they have one of those three on their existing permit.

30 Q. So staying with that situation, sub paragraph (b) wouldn't apply or sub paragraph (b) would apply?

A. Sub paragraph (b), the intention is that sub paragraph would apply in a situation where an existing minimum flow has not been included on the permit but that one has been set elsewhere so...

Q. So sticking with sub paragraph (a) if the permit being replaced did have a minimum flow condition on it, sub paragraph (b) wouldn't apply?

A. Correct.

THE COURT: JUDGE BORTHWICK

5 If, sorry put that again, I'm following this closely so if –

EXAMINATION CONTINUES: MR MAW:

Q. If a permit did had a minimum flow then sub paragraph (b) wouldn't apply?

A. Correct.

Q. And sub paragraph (c) wouldn't apply either?

10 A. No because of their minimum flow in place.

Q. And sub paragraph (d) which is further down the page would apply so it's essentially a 15 year permit?

A. Correct.

15 Q. So when we think about that, the consequence is that for any consent holder who has a minimum flow on a permit can renew that permit for a 15 year period?

A. Correct.

Q. And that was what you were intending to achieve through your drafting?

20 A. The intention through the drafting was to, to make sure that values were protected somewhat through either a residual flow minimum flow or take cessation. I guess the challenge is that the minimum flow and I suspect this is where your question is heading is that minimum flow doesn't necessarily, may not necessarily be appropriate in a long-term. And that I guess, and long-term in this case being potentially 15 years, or to 2035.

25 Q. So when you were thinking about this did you or whose evidence have you relied upon in terms of the nature of the existing minimum flows and what it might mean for those to be rolled over for a 15 year period?

A. None because the intention would be that the minimum flows were potentially looked at in the light of the matters and see (i) through (v) –

30 Q. But those don't apply in this situation do they?

A. No, I acknowledge they don't.

Q. So I'm just trying to understand in the first instance what your intention was and whether your intentions have been reflected in the drafting, so is that you're of the opinion that the matters you've set out in sub-paragraph C ought to be considered in relation to every application for a non-complying activity?

5

1235

A. Yes, I think that's a fair summation and the drafting at this stage doesn't necessarily reflect that.

Q. Just want to track through then understanding your intention in relation to existing residual flow or a take cessation condition so staying with sub-paragraph A as well. Was that your intention that sub-paragraphs either B or C should also be considered in relation to applications where the underlying permit has either of those types of conditions?

10

A. I would say in terms of B, where existing minimum flows have been included in the schedule, the intention was that they would carry through to align on a waterbody that minimum flow requirements rather than setting minimum flows in what would otherwise be an ad hoc ways. If you've got existing permits with schedule 2A minimum flows on that consent, my intention was that other takes on that waterbody would align up.

15

20

Q. So let's stay with sub-paragraph B for a moment. So I've understood this correctly. There is no existing minimum flow but there has been one set in schedule 2A. That minimum flow would be applied on the replacement permit.

25

A. Correct.

Q. And that permit would apply then or be in place for 15 year period.

A. Correct.

Q. Were the matters in your sub-paragraph C to be considered in addition or was B intended to be stand alone?

30

A. It was intended to be stand alone for the reasons mentioned before to try and align minimum flows on a waterbody to avoid a mismatch I suppose.

Q. So the effect of that occurring would be the lock in place the flow regime set out in schedule 2A for a 15 year period?

A. It would already be locked in as I understand it if there's already taken with the 2A minimum flow on them to an extent. In terms of looking at future land and water plan approach, a holistic catchment wide or waterbody wide approach would need to somehow be taken presumably through a review.

5

Q. We will come back to reviews little later on but in relation to the schedule 2A limits, do you have any knowledge as to the basis on which those limits are set?

A. No, not in detail knowledge at all.

10

Q. So whose evidence are you relying on as to the appropriateness of those flows for the next 15 year period?

A. So my proposition is that where these flows are already in place that for the purposes of aligning the permits in that catchment, that the 2A minimum flows should be applied. So as opposed to what might be a specific environmental outcome being considered beyond what was considered at the time those were set.

15

Q. Might that not have the effect of depriving the council the ability to implement its new land and water plan in a timely fashion?

A. Where there are already permit holders with a minimum flow on their consent my view is that it wouldn't change things much. There's going to have to be a process by which to bring existing permit holders with minimum flows interlined and this would in the round be addressed at the some time.

20

1240

25 Q. I think I'm now a little bit confused about what you're sub paragraph (b) is relating to because it says here: "where an existing minimum flow has not been included on a consent being replaced." So are you talking about situations where permit holders do already have the schedule 2(a) limits or something else?

30

A. Not the permit holder making their application under this policy but other permit holders in the, on the waterbody who may have a minimum flow, a scheduled 2(a) minimum flow on their permit.

- Q. So in essence you're seeking to ensure that the schedule 2(a) flow regime is locked in place for that 15 year period of earlier if the Council undertakes the review?
- 5 A. Not ensuring to, it's to align the permits on a waterbody whereas I understand it some permits may have a schedule 2(a) minimum flow and some may not and it's to align those.
- Q. Might your purpose be equally achieved by having that as an option for a six year permit?
- 10 A. Potentially, given the, in light of the controlled activity, the intention of the controlled activity rule to be streamlined if the existing work had already been in this case. The minimum flows in schedule 2 then there's, it could be included under that regime without opening the control unnecessarily.
- Q. And that's notwithstanding whether the limits in schedule 2(a) are actually appropriate because –
- 15 A. That's right.
- Q. – you can't give us any further evidence on that. Right so if we, if an application gets through sub paragraph (b) then (c) doesn't apply, that was correct?
- A. Correct.
- 20 Q. So as I understand it, (c) is triggered where a 15 year permit is sought outside of a schedule 2(a) catchment?
- A. Correct.
- Q. And is it fair to say that what you've sought to capture in your sub paragraph (c) is the NPS-FM 2020?
- 25 A. Components of that, for sure with some guidance from the RPS direction on a couple of matters.
- Q. It's a difficult task to try and distil the NPS into a sub paragraph in a policy in a plan?
- A. I'd agree.
- 30 Q. But you've attempted to do so and I just want to tease out with you, just what you mean and how this might be applied in practice. So let's say we have one of these applications that has been lodged. Staying in the chateau of sub paragraph (c) there's a requirement to maintain a residual flow on the surface waterbody downstream of the abstraction that first

and foremost priorities the health and wellbeing of the waterbody and freshwater ecosystems. Now that's a very big task isn't?

A. I suspect so, yes.

5 Q. And that task is informed through, if you think about the NPS, the NPS has a whole lot of machinery in it to tease out what that actually means in a particular FMU?

A. Correct.

1245

10 Q. When you think about the health and wellbeing of a waterbody it's not just ecological considerations?

A. No, it's wider considerations.

Q. And the community has a significant role to play in terms of articulating the level at which or the way in which the wellbeing of a waterbody is to be recognised?

15 A. Through that NPSFM process, yes.

Q. There are some significant cultural implications and input required to understand that first priority?

A. Correct in the context of full implementation of the NPSFM.

Q. So how is that that an individual consent holder undertakes that task?

20 A. In my view this process described here is not attempting to put forward the full implementation of the NPSFM. It is as far as reasonably practicable in the context of interim plan change with a view that the part 3 machinery rolls on for the water and land plan that there is some level of regard as had to that priority in Te Mana o te wai and that when
25 advancing an application that the health and wellbeing of waterbodies and freshwater ecosystems isn't part for that future process but in part is at least a key consideration for an application under this policy.

Q. Isn't there a danger in picking and choosing part of the NPS in this situation where 15 year permits could well be granted in response?

30 A. Explain what you mean by picking and choosing?

Q. Your sub-paragraph C doesn't capture the full suite of requirements from the NPS?

A. No, but it focuses on a reasonably core component of the objective and picks up another matter.

Q. So might that not deprive the council from the opportunity to properly address all of the matters in the NPS and its new land and water plan and to implement it in a timely manner?

5 A. I think in any situation where there is going to be a resource consent granted for a duration beyond the new land water plan coming into force has that potential. The intention here is that if there is a true exception identified or a exception identified that has done a level of work acknowledging that it's not the part 3 process under the NPS but level of work that any implications of that are minimised.

10 Q. Isn't the better option to simply the NPS for consideration under s 104(1)(b) in the context of a non-complying activity?

A. I guess the challenge with that is the lack of guidance or certainty around its application at a consent level.

15 Q. That is exactly the problem that is presented by 15 year permits, isn't it? There needs to be some time to understand and to put in place the regime.

A. Sorry, say that again?

1250

20 Q. Isn't the effect of you picking and choosing some elements of the NPS and highlighting to people that they can get a 15 year permit if they do some of those things, essentially puts to one side the other elements of the NPS for that period of time?

25 A. I think what it does is it recognises that there are potentially situations where permits may need to be granted or it might be appropriate to grant them and provides more guidance around that process as opposed to just referring as a 104 matter. So granting any permits beyond the water and land plan, the vehicle for full implementation of the NPSFM does pose some level of risk. The intention is that the strengthening of the policy will mean that the number of permits in that category are relatively small.

30 Q. Might it in fact be the other way around in that applicants see this and say I can get a 15 year permit if I do those things and there's sufficient uncertainty what some of those things mean at the moment. That might make the pathway more attractive?

A. I don't think I completely agree. I think there is going to be a level of information required to accompany an application that meets those requirements. That will be a reasonable undertaking and probably not taken lightly.

5 Q. Do you accept that there is a risk that it could be seen that way?

A. I wouldn't like to answer for others but potentially.

Q. I want to drill down to sub-paragraph C(ii), enhances life supporting capacity of aquatic ecosystems. What's that in comparison to? So how much enhancement is required?

10 A. That would be an enhancement in relation to the status quo.

Q. So an applicant would just need to do a little bit better to tick that box?

A. Alongside the other matters, yes.

Q. Let's look at the next matter, enhancing natural character. So just a little bit better than the status quo.

15 A. Read on its own, yes.

Q. Then on to (iv), enhancing spiritual and cultural values just a little bit more?

A. Yes, (Inaudible 12:53:54).

20 Q. Isn't the danger here that without the community having established its long-term vision and values and the land and water plan articulating attribute states there is no understanding as to the level at which improvement or enhancement needs to get to under the NPS? So there is no frame of reference in the absence of that information.

25 A. Yes, the frame of reference I guess is the current environment to the most part.

30 Q. I want to move one line down to your (iv), and this is where you say "protects the ability of existing water abstractors and water abstractors affected by the provisions of s 124 to 124(c) of the RMA to undertake lawfully established activities." When I read that paragraph I understand that this policy is seeking to protect lawfully established activities. So what do you mean when you say the lawfully established activity? What is that driving to?

1255

A. It's a consented or permitted activities.

Q. So a deemed permit for example in this context would be the lawfully established activity?

A. Correct.

5 Q. In order to protect that activity might you see an applicant saying, “well to protect that I need to get given precisely what I’ve been given in the past and 15 years. Thank you very much.”

A. The intention of that clause is for it to apply to other existing lawfully established activities on a waterbody with the focus on preserving priority where it might assist in preserving hydrology.

10 Q. So there are some significant challenges associated with your drafting in terms of how you’ve tried to express that concept?

A. I think an insertion of ‘other’ after ‘of’ might help.

THE COURT: JUDGE BORTHWICK

Q. Insertion of other?

15 A. Of other. Ability of other existing abstractors.

Q. So this policy doesn’t apply to deemed permits or applications to replace existing permits. It applies to something else?

A. The intention is that it’s recognising that by taking into consideration impacts on other water uses by maintain priority essentially where that exists. That there may be a consequential benefit for maintaining hydrology and therefore any values associated with that regime. That is the intention.

20

Q. So without looking at the language could you say again how this policy is implementing an objective? Don’t even look at the language. Where are you going with this?

25

A. When residual flows are set that consideration is had for the role priority plays or may play in a waterbody. In terms of the hydrology and associated values that have adapted to that environment.

Q. So is this like the RDA matter of discretion that Mr Page referred to earlier, at least in part looking at the impact of a proposal on another water user?

30

A. Correct. With the express aim of preserving the hydrology status quo is if it exists through priority.

Q. I don't read that. In fact, we've actually got some grave concerns about what we see here in that provision for a whole host of reasons but I didn't get that out of there so that's useful. You can press into those grave concerns if you like if you have them. We have them.

5

MR MAW TO THE COURT: JUDGE BORTHWICK

A. I do have them but it strikes me that the witness has meant something quite different to what's been written on the page and I'm not sure whether it will actually assist me taking through the implications of precisely what the drafting this provision – the implications that might have.

10

Q. Well, it might not. If it is to do with looking at other users, the impact of a proposal on another abstractor and the impact of the same proposal on other ecosystem values then that drafting wouldn't get any – doesn't really reflect that.

15

A. I am conscious that it's 1 o'clock. I may just reflect on that and I know my friend's going to tell me we have some timing challenges with this witness potentially.

Q. No, he's catching a later plane.

A. There we go. I've issued a signal I've got little way to go.

20

Q. And I will allow an extension to your cross-examination. I think you were over your estimate but this is too important. The 124 concern that we've got, Commissioner, do you want to express it? It's a concern generally as to how s 124 applications are being used around the country to file for renewals and then put on hold because we've got the applications to renew existing consent, a bare proposal which oddly are receipted in by council rather than chopping somebody off and rejecting these application and then the process begins and information request after information request.

25

THE COURT: COMMISSIONER EDMONDS

30

(inaudible 13:01:24) further information request and on it goes and years later nothing is decided.

THE COURT: JUDGE BORTHWICK TO MR ENSOR

Q. So that's a general problem with the operation of 124 and we're looking at this going, "well that invites that sort of outcome." So for context, that is our concern. I don't know whether you've heard about it yourself.

5 A. Yeah, I mean it's probably a slightly cynical view but I'm sure it does happen in terms of being engineered that way.

Q. Cynical. Borne out of experience.

A. I mean I think – sorry I meant cynical approach to doing it but –

Q. We would be in a cynical approach, I agree with that.

10 A. – yes, but I can see why that might be a concern and inviting that arguably that application should not be...

Q. Be complete.

THE COURT: COMMISSIONER EDMONDS

15 Q. Placed in the queue and you build from there. While you continue exercising what you've already got.

A. Yes.

THE COURT: JUDGE BORTHWICK

20 So just to let you know that was our concern with this wording but I don't think that where Mr Ensor wishes to go is what's actually described in the provision anyway.

MR MAW:

No, that's the fundamental concern with testing the wording in this here at present. I may talk to my friend over lunch. Leave that with me.

25 **THE COURT: JUDGE BORTHWICK**

Leave that with you. I don't want to know.

MR MAW:

No.

THE COURT: JUDGE BORTHWICK

Okay. Very good. We will take an adjournment. Did you need to say something?

5 MS LENNON:

There is one more thing that I just wanted to alert you to. Mr Winchester is taking my place at some point this afternoon and then maybe a short interval when neither one of us are here. It should be relatively short though.

THE COURT: JUDGE BORTHWICK

10 Okay. Very good. So Mr Winchester is subbing. Alright. Thank you.

COURT ADJOURNS: 1.03 AM

15

COURT RESUMES: 2.06 PM**CROSS-EXAMINATION CONTINUES: MR MAW**

Q. Good afternoon.

A. Good afternoon.

5 Q. We'll pick up where we left off and that was at sub paragraph (v) of your policy 10A2.3 and there was a discussion before the lunch break in relation to the working that you've expressed for this policy and the intention that sits behind the wording and you acknowledged that there was a difference between those two things. So in terms of the wording
10 that you have on the page here, wouldn't we be better simply to delete that and replace it with what it is you precisely mean which as I understood it was maintain priorities amongst existing users?

A. Yes and I guess in light of the earlier discussion today it may be useful to include flow sharing in there as well, yes, so I guess just turning back to
15 paragraph 66 is where I guess I attempted to express what was meant there but it's probably by the bye given the fact that we've had the discussion as to the intent anyway.

Q. Right.

THE COURT: JUDGE BORTHWICK

20 Q. Can I just clarify that, I understood your answer to either myself to Mr Maw that what was intended was something not unlike the matter of discretion on the RDA role for water permits which is to manage the abstractive effect on other users, which is quite a different proposition to managing priorities.

25 A. Yes I might've misunderstood actually there.

Q. Okay so what is it, what's your outcome here?

A. The outcome here is that as best possible, priority is maintained through the recognition that if you have priority which is influencing the hydrology that by providing water for other users you are maintaining that hydrology.
30 I guess the most obvious example is if there's someone with high priority at the bottom of the catchment then other water users are required to

leave water in the river for them and therefore the water benefits for that reach. Probably the most extreme example.

Q. Yes but it could actually be a valid example to couldn't it, in Otago?

A. It could potentially be.

5 Q. Okay. So I've made a note of that and priority influencing hydrology, as it happens (inaudible 14:09:30) conversation we've been having in chambers for the last 10 minutes about what this all might be about and whether you need to pick it up in an objective as well actually, to make, to drive an outcome here. Anyway, won't come across your cross-examination we're still really interested in where you're going.

10

1410

CROSS-EXAMINATION CONTINUES: MR MAW

Q. All right so in light of what you are seeking to achieve in your (v), do you foresee any issues where there might be a conflict between what that sub paragraph is seeking to achieve and some of the other outcomes that are expressed in sub paragraph (c)?

15

A. Potentially and the, I guess the intent of the drafting was that it, that there was an overarching lens which is that prioritisation of health and water – health and wellbeing of the waterbody.

20

Q. Which brings us back to our challenges with understanding that phrase without having undertaken the full values assessment.

A. Yes I guess, reflecting on that, you mentioned consideration of that under 104(1)(b) and I guess my view is someone has to interpret it at this resource consent phase and I guess my experience with lodging resource consents and having Council's interpret the NPSFM at that 104 stage is quite uncertain, often. So while I recognise that that's one option, the intention was to provide more context at this point and therefore it may assist both the consent applicant and decision maker in that regard but I acknowledge that there, for fill implementation of the NPSFM there is a process that needs to occur still.

25

30

Q. Isn't the better outcome simply to have people getting six year permits not 15 year permits?

A. I think generally yes, the issue is that we may not and I personally don't understand where all potential exceptions might rise, really what I'm trying to do is acknowledge that there is the potential for activities legitimately to seek a longer term consent.

5 Q. So you're leaving the door ajar for activities that you don't understand?

A. Or haven't been identified, there's two specific activities that have been discussed at length and I'm relatively –

Q. We'll come to those.

A. – comfortable with those but, yes.

10 Q. Isn't there a danger in that approach though in terms of unforeseen consequences as to which activities might seek to take advantage of that pathway?

A. Not a danger in the activities but a danger that the potentially thresholds don't only let through those that are the exception that we are attempting to target you know, we've not looked at that. I think there are, there's a danger that there may be activities that are, that have, you know, very little effect for example that get caught up in this and could justifiably gain a consent for a longer duration or at least have access to it and the ability to move through that pathway.

20 Q. All right, we will move on to the second part of the policy, so you've recognised and you've set out in your evidence a need for a pathway for drinking water or hydroelectricity generation to be accommodated within the non-complying activity framework. I want to start first with the supply of drinking water and I want to understand what your basis is for seeking to elevate that in terms of consent duration.

25 A. Really that's tied back to the second order priority in the NPS objective where drinking water is actually specifically provided as an example of the type of activity contemplated there.

30 Q. So when you're thinking about providing for, providing a carve out for drinking water, just so I've understood how your drafting works in the first instance, there's no cap on consent term that could be sought?

A. No, for the matters under two there's an availability of up to 35 years, it's not capped.

1415

- Q. So in terms of the 35 year permit, in terms of drinking water, should that extent to water being used for rural and stock purposes?
- A. I've left it as drinking water as it's defined in the national planning standards definition. I think stock drinking water is, well it's not specifically spelled out as a second order priority and may not meet the health needs of people criteria.
- 5 Q. How about irrigation?
- A. No.
- Q. Watering sports fields and parks?
- 10 A. No that would sit more comfortably under (c) of the objective.
- Q. About dairy shed wash down?
- A. The same situation.
- Q. Commercial vehicle washing?
- A. The same situation.
- 15 Q. Water blasting?
- A. As above.
- Q. Commercial laundries?
- A. As above.
- Q. And manufacturing?
- 20 A. (c), under the (c) priority, third priority.
- Q. So you're not intending to capture those types of activities in terms of providing a pathway forward for drinking water?
- A. Not in terms of including that specific drinking water definition, no.
- Q. Have you read the evidence that has been filed by the territorial authorities?
- 25 A. I have, yes.
- Q. And in that evidence you will have read that the planning evidence of Mr Twose?
- A. I have, yes.
- 30 Q. And Mr Twose in his evidence referred to a memorandum prepared by somebody by the name of Ms East?
- A. I –
- Q. We're stretching your recollection?
- A. You are actually, yes.

Q. I wonder whether we might provide to you paragraph 49 of Mt Towse statement of evidence in chief, paragraph 49.

MR TOWES EVIDENCE IN CHIEF PROVIDED TO WITNESS

5 A. I have the paragraph, it's quite a long one, do you want me to read it first or –

Q. No you can perhaps cast your eyes over it and you'll see some familiar words and phrases from our discussion?

A. Yes, yes.

10 Q. And you'll see there that in reference to Ms Easts' memo Mr Twose states: "she states it is not financially or practically feasible to separate water supply solving for human consumption from water use for purposes that contribute to the social and economic wellbeing of a community in other ways." So do you understand if from having refreshed your memory in relation to Mr Twose's evidence that takes for community supply cover
15 a wide range of uses?

A. Community water supplies perhaps, drinking water supplies as per the definition not so much.

20 Q. So when you think about drinking water supplies and when you read this paragraph it becomes clear that drinking supplies are not a separate matter, they are included within the community supply, aren't they?

A. Look I'm not sure that that's the case in every case from reading that, I accept that it might be the case often or even more often than not. In terms of community supply and the matters that sit underneath it, my view is that it moves down the priority order and therefore, in my view, it
25 doesn't require the same recognition but there is a potential that community water supply may include drinking water and all the other matters that you've outlined.

1420

30 Q. So where those constituent users can't be separated out from a community supply, an application to replace a community supply should not be granted for longer than six years?

A. On the basis of my drafting and my rationale in relation to the NPSFM, that's correct.

- Q. Are you aware of any situations where there is a take solely and exclusively for drinking water supplies?
- A. I'm not sure, sorry.
- 5 Q. So if it transpires that there are in fact no takes exclusively for that purpose given the range of uses then providing a pathway for such uses would be superfluous?
- A. Likely, yes. If it's not confined to drinking water as defined then.
- 10 Q. Let's move onto hydroelectricity generation, so like drinking water, you have provided a pathway for, and correct me if I'm wrong, a 35 year permit for hydroelectricity generation?
- A. Correct.
- Q. And your reasoning for doing that is to give effect to the NPS for renewable electricity generation?
- A. Correct.
- 15 Q. When you read that NPS which I'm sure you have, you will have observed that it has a preamble?
- A. Correct.
- Q. In that preamble it expressly and explicitly notes that the NPS is not to be used for matters relating to priority?
- 20 A. Correct, yes from memory, yes.
- Q. And allocation?
- A. Yes, there is a discussion about allocation. I understand that there is some case law context around the application of that preamble. The deep details I don't have on hand but that's right.
- 25 Q. So when you think about priority, what do you understand the word priority to mean in that context?
- A. It's probably in relation to assigning water to a user ahead of others, I guess.
- Q. So when you think about the effect of granting a 35 year permit for hydroelectricity use, isn't that doing precisely that which you have described as being priority when the NPS explicitly says don't do that?
- 30 A. It probably depends on the context of an individual take in this regard where it sits amongst the catchment and I guess there is a bit of tension in the documentation that where there is an express provision for

renewable energy generation and to take it out of the context of any water at all is problematic. We'd just be talking about infrastructure in a river with no water involved and as I understand it that surely wasn't the intention of having that express provision.

- 5 Q. You've lost me half way through there, I'm afraid. So coming back to priority, do you accept that elevating hydroelectricity generation into its own category, perhaps with drinking water here is giving priority to that use compared to all other uses?

1425

- 10 A. In this situation, it's giving priority to a longer term duration rather than priority to (unclear 14:25:17) outright. It's giving an opportunity for that take to have a longer duration or the use of that water.

Q. So it's giving priority over other takes?

A. In terms of the length of the time it can continue.

- 15 Q. Once it has been allocated out it can't be subsequently taken back by the council and allocated to somebody else, can it?

A. No, but it would need to be considered in light of the other abstractions and permits on the waterbody.

Q. What do you mean by that?

- 20 A. So while the pathway would allow hydroelectricity generation abstraction to have a longer duration it would need to factor in other takes existing and then any future consenting process. It would also need to do the same. It gives a longer duration of take but it doesn't give it absolute priority over other existing permits.

- 25 Q. But once the water has been allocated, it does give it absolute priority over other future uses.

A. New future uses or replacements? What's your body referring to?

Q. Could it apply to each?

- 30 A. I think it would probably give priority to new and there would have to be a consideration of the overall allocation under whatever new regime pops out and presumably that would include the take we're taking about, the hydro take. So it would provide some level, I suppose of priority not absolute priority but some.

Q. And that's also in that context then providing an allocation to that use.

A. Yes, through that resource consent.

Q. And again that's precisely what the NPS says "Don't use it for this."

A. Look, I'd probably have to refresh my memory of the preamble.

Q. Yes. Tab 7, volume 3. CB815. Second to last paragraph.

5 A. On the face of it, I agree now there may be some context around that I'm missing as per the discussion about the case around allocation and the tension between freshwater policy statement and this one.

Q. So what is it that you understand the purpose of this NPS to be?

10 A. To recognise the importance of renewable energy generation in the context as it's provided and recognise the potential challenges with certain elements, operational challenges and the like and to provide some context for subservient policy direction.

Q. So when you think about plan change 7 as Mr de Pelsemaeker recommends it be amended to, that doesn't preclude deemed permits being renewed albeit for a six year period for the hydroelectricity generation?

15 A. No, it doesn't.

Q. So plan change 7 is providing for that use.

20 A. To an extent I guess my question is whether a six year duration is providing for that use in line with the policy direction anticipated recognising the challenges of operational constraints, consenting challenges and the like.

Q. In light of the passage in the preamble you've just read, this document is not about elevating the status of hydroelectricity above other users and giving it priority when it comes to consent duration, is it?

25 A. As discussed before, on the face of it.

1430

30 Q. Having made your recommendations in relation to hydroelectricity and the potential for a 35 year permit, I just want to test with you my understanding of your drafting and want to take you to the last paragraph on your page 2. So this policy 10A23(2)subparagraph B. The activity meets the requirements of policy 10A2.3.1A to C. Now we traversed in some detail those provisions this morning. Is it your intention that in relation to the renewal of the hydroelectricity permit that has a minimum flow applied to

it that minimum flow would be rolled over and 35 year permit will then issue.

A. The intention was that hydroelectricity activities that meet the requirements of that list would have access to a longer duration so I think my answer given this morning in relation to the minimum flows also applies to this. The intention was that the activities would be addressed in a very similar way but the main change would be duration available.

Q. So the applicant has to jump through the subset of NPSFM requirements that you have sought to capture in your subparagraph C?

10 A. Correct.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I think you started off doing a reset process through subparagraphs A through C and the witness has answered more broadly. If it was your intention to deal with A, deal with B, deal with C, I would find that of value.

15 A. Happy to step through that.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So let's go back to subparagraph A. So 10A2.3 and there was reference to any existing residual flow, minimum flow or take cessation condition included as a condition of consent. My recollection from the discussion this morning is that subparagraph A applies conjunctively with subparagraph B. We might have to step through it piece by piece. So let's look at an activity which simply has an existing residual flow condition but no minimum flow or no take cessation condition. So in relation to an application for consent in those circumstances paragraph A applies?

20 A. Yes.

Q. What about paragraph B?

A. That relates to minimum flows in schedule 2A so that doesn't apply.

THE COURT: JUDGE BORTHWICK

Q. It does not?

30 A. It does not unless is one, sorry. Where an existing residual flow exists the intention is that B doesn't apply. That applies only to where there is

no minimum flow but a minimum flow has been set through schedule 2A.
No minimum flow on the consent.

CROSS-EXAMINATION CONTINUES: MR MAW

5 Q. And likewise, paragraph C would not apply because an existing residual flow exists?

A. Yes, that's right. Yes.

10 Q. Going back to A, so we've stepped through now the existing residual flow and we've dealt with what happens in relation to a minimum flow this morning. If we move on to take cessation condition, do subparagraph B apply in that context?

A. B, no.

Q. Subparagraph C?

A. No, because of an existing one applies.

15 Q. So for a would be consent applicant for hydroelectricity generation seeking a 35 year permit, if their permit that they're replacing has an existing residual flow then it simply gets rolled over for 35 years?

A. That is potentially the case, yes.

THE COURT: JUDGE BORTHWICK

Q. Is that what you intended?

20 A. On reflection it's problematic.

1440

25 Q. Because all Council's trying to do is just figure out how you might operate these conditions and I wasn't quite sure whether you, why you were saying for example if there's an existing residual flow, so (a) applies but if there is a schedule, the minimum flows in schedule 2(a) but had yet to be carried down on a resource consent why wouldn't (b) apply, I thought that's what you were getting out and Council, Mr Maw's nodding away thinking that's what you, you know, so the proposition is you've got – and this might be hard, totally hypothetical and absolute there's no
30 relationship between anything that's currently happening but the proposition is if you've got a residual flow, (a) applies. If you're also in a catchment with, to which schedule 2(a) also applies and there are

minimum flows would not under your be a minimum flow also applied so you get your pick, you've already got tick for the residual, you pick up the minimum on the way through with the (b), (c) wouldn't apply.

A. (c) wouldn't apply.

5 Q. So I think all Mr Maw's trying to do is trying to figure out how you saw it operating and if it's not how it's meant to be operating you really need to tell us now so we can understand where'd you'd like to go.

A. Sure, no absolutely. So I think you have described it quite eloquently here. Thank you. But yes, where (a) applies where they is an existing residual flow minimum flow or take cessation condition this gets dragged through to the new consent. The minimum, under (b), the minimum flow where there isn't one on a consent but one exists within the catchment in terms of schedule 2(a) –

10

Q. It gets picked up.

15 A. That gets picked up, if you don't have any –

THE COURT: COMMISSIONER EDMONDS

Q. So what's (inaudible 14:42:07) conflict between the minimum flow under (a) and (b), what's intended then. So you've got the minimum flow on your existing and then there's a different one in 2(a).

20 A. Yes there's there would need to be some level of priority given to one or the other which that currently doesn't do.

Q. So what did you intend?

A. The intention was to align with schedule 2(a) minimum flows and a catchment if they exist, to have that consistency. Now thinking about in light of questioning earlier with the accuracy of the minimum flows it may be that you end up with an adjustment to hydrology because of that shift is detrimental rather than providing an improvement.

25

THE COURT: JUDGE BORTHWICK

Q. You'd have to know where you're going though wouldn't you in your parent policy?

30

A. Yes.

Q. Or this is the parent policy, or ideally the parent objective?

A. Yes, that's right, the parent objective. The, I guess the intention would be that the most restrictive or most beneficial of the two would prevail –

Q. So now we're looking –

A. – in terms of moving towards an outcome.

5 Q. Oaky, all right. That looks like an environmental plan but I understand what you're saying. Can I just ask one question, its all very well imposing minimum flows – minimum flows, what if schedule 2(a) also says there's a block, an allocation block so minimum flow together with allocation block. What do you do there, do you just ignore the block and if you do
10 what are the consequences and maybe you do ignore the block but you need to tell us because the, you know the, one of the things that the Court has to grapple with is whether flows and block operate in tandem and there's conflicting evidence on that.

A. If there was a block in place as well –

15 Q. Which I think there is for every schedule 2(a) minimum flows, is that not so?

MR MAW:

My recollection was there was a column with an allocation block size.

THE COURT: JUDGE BORTHWICK

20 Q. And actually also for if you're looking at, I might be wrong, if you're looking at minimum, if you're not in schedule 2(a) there's policy for calculation of minimum flows and allocation under the minimum flow, allocation – I need to look it up. Anyway let's take the simplest proposition. In Schedule 2A there is also allocation blocks or limits. Do they apply? And if they don't
25 whose evidence would you reply on to say they don't and should not?

1445

A. I think there's a risk that if you don't include it in the block that you end up with a priority conflict amongst the users potentially along with allocating water above and beyond the block. If the block's full then it's a significant
30 challenge to obviously add more water. There is an overallocation issue.

Q. If you don't include an allocation block or limit which is also provided for in Schedule 2, what are the consequences? Have you thought about that in terms of framing a policy?

A. Sorry, if you don't include?

5 Q. If the allocation block or limit is not also included same time as the minimum flow, what are the environmental outcomes and the significance of those? Have you thought about that in terms of the wording here?

A. I guess water is being managed only with a minimum flow in that catchment. It would have the consequence of bringing the flows towards the minimum flow potentially more quickly.

10

Q. And holding it there? I think is the evidence from Fish and Game.

A. And holding it there. Potentially.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So just to round out the Schedule 2A line of questioning, a permit granted to a hydroelectricity generator for 35 years complying with the minimum flow in Schedule 2A essentially locks in place that framework for a 35 year period, doesn't it?

15

A. Yes, it would.

Q. I want to move onto the controlled activity rule now. If I can take you to your page 4, subparagraph C. starts with "Any other conditions on expiring permits to be replaced". Now, you've left this condition in the controlled activity rule but you expressed some reservations about its inclusion both in your summary this morning and also in your supplementary evidence and I just want to understand those little bit further. My recollection was that you said that bringing down existing conditions might broaden the range of subjects that the council might then look into on a renewal. Have I recalled that correctly?

20

25

A. That was in relation to the drafting contained in my evidence in chief. Yes, there was a risk that by removing the matters of control and leaving them as I had stated it could be broadened out. Yes.

30

Q. I see so you're content that the drafting Mr de Pelsemaeker has put forward doesn't result in that – his wording addresses your concern.

A. Yes, with reference to the entry conditions which addresses irrigated area and the rates and volumes that covers, in my view, the key matters where things might get broadened out but does leave the door open to consider bespoke controls, for example, on the use of water that may not be irrigation for example.

5

Q. So my question you're content with the drafting addressing that concern?

A. I am.

Q. Now looking at the next difference between your framework and the framework that Mr de Pelsemaecker recommends. He, of course, has a restricted discretionary activity rule whereas your proposal does not have that rule. Do you understand why Mr de Pelsemaecker has a restricted discretionary activity rule?

10

1450

A. Yes, I do in relation to challenges with data in terms of understanding the water use as opposed to the paper allocation.

15

Q. So in relation to your framework where there is a data gap, the activity bounces into the non-complying rule, have I understood that correctly?

A. It does in terms of the provisions that I've outlined here. I haven't given the restricted discretionary activity rule and the matters around the method by which the existing use of water has been calculated. It wasn't something that the Ministry of Environment had submitted on and I hadn't given it a great deal of thought but I recognise it in the absence of another mechanism for picking up those activities, then non-complying pathway would be the only pathway available.

20

25 Q. So in your opinion, is non-complying activity status appropriate in those circumstances?

A. No, no, and I haven't looked at it, as I said, in great detail but it's really just a lack of data for a justifiable reason then non-complying status would seem unusually harsh.

30

Q. So you not having brought through Mr de Pelsemaecker's restricted discretionary activity, is not because you don't see merit in it. It's just simply not something that the Ministry had instructed you to turn your mind to or you had turned your mind to?

A. Correct.

CROSS-EXAMINATION: MS LENNON

Q. Good afternoon, Mr Ensor.

A. Good afternoon.

5 Q. I'm wondering if I could take you to paragraph 17 of your supplementary evidence. I was wondering if you could read aloud 17.2

A. Including hydro-electricity generation as an exemption has the potential to result in increased environmental costs. These may come about through adverse environmental effects occurring for a longer duration, and without the full benefit of controls that might be driven by a NPSFM
10 compliant plan. However, I understand that none of the large hydro-electricity generation water takes require renewal during the expected life of PC7, and the thresholds, and that's the thresholds in my policy proposed, go some way to addressing these potential costs.

15 Q. Thank you. So from reading this paragraph my implication you say that only large hydroelectricity schemes have environmental effects. Do you accept that?

A. No, what I was saying is that none of the large hydroelectricity generation water takes require renewal and so it is the other hydroelectricity generation related takes that would be likely to use this pathway and that
20 the policy and the thresholds provide some way of addressing those costs.

Q. So you do accept that there are smaller hydroelectricity schemes?

1455

25 A. I understand that there are, there are water permits relating to, not the main hydro scheme consents on the rivers subject to the plan change.

Q. Would you accept that smaller hydroelectricity schemes can also have environmental effects?

A. I'd accept that.

30 Q. You also discuss the exceptions you've provided for drinking water or takes for drinking water in your drafting with Mr Maw, from reading your evidence you haven't talked about any potential environmental effects if takes for drinking water, have you?

A. I know I don't think so.

Q. So would you accept that there may also be environmental effects for takes for drinking water or as you discussed with Mr Maw community supplies?

A. Yes, I accept there might be.

5 Q. There is one other topic that I wanted to ask you about and it's Te Mana o Te Wai. So if you could refer please to your paragraph 67 in your evidence-in-chief, so here you have referred to the second order priority under the objective of the NPSFM including water takes for drinking water and you've also referred to hydroelectricity generation as a third order
10 priority under the NPSFM, is that correct?

A. That's correct.

Q. And you have provided the exceptions for these activities in your drafting, is that correct?

A. Correct.

15 Q. I'm curious to understand how it is appropriate to grant exceptions for activities that fall under the third and second order priorities when we have not yet got a planning framework that gives effect to the first order priority. Do you accept that we do not yet have a planning regime that achieves the first order priority of Te Mana o Te Wai which is the health and
20 wellbeing of the waterbody?

A. I accept that the process envisaged under part 3 of the NPSFM hasn't occurred.

Q. So I suggest to you that there's actually, that there is no basis for your suggested exceptions because we don't yet have a planning regime that
25 fully achieves the first order priority which is the health and wellbeing of the waterbody.

A. I guess the challenge is that there are applications that are due for renewal and where, we need to address them in a way that gives effect to the NPSFM as far as is reasonably practical at this point in time, I accept that the full implementation process hasn't occurred but that the NPSFM
30 gives us some guidance, not a great deal, on what to do with applications in the interim and we're forced in some regards to take what we can from it and hence the inclusion of the sort of reference to the first order priority

in my policy 10A2.3 to at least attempt to elevate that through these consents processes that are occurring in the interim.

Q. I did hear your discussion with my friend Mr Maw on the shortcomings of that approach so I'll leave it there, thank you.

5 CROSS-EXAMINATION: MS BAKER-GALLOWAY

Q. Just going to change tack for a little bit and look at the objective of the plan change –

A. Yes.

1500

10 Q. – and you've said in several places in your evidence that you consider the objective of the plan change is accurately reflected as being just procedural, it's a procedural objective and hence you recommended no changes to it, is that correct?

15 A. I haven't recommended any changes to it, the minister for the environment hadn't submitted on the objective although I acknowledge that there are some, potentially some challenges with it being just procedural if used in a certain way.

20 Q. And even just looking at the theme of your proposed changes to the policies and the rules, if I can sum those up, you're looking at ways to ensure that there's not just no further environmental degradation but that in some instances there may be required to be environmental improvements?

A. Yes, ideally where they can be made without causing too much challenge for the future process.

25 Q. So in that sense it would be useful for the objective to reflect the environmental objective of the plan change so that those provisions have a parent place in the objective?

30 A. Yes ideally, the tension is of course that the purpose of the plan change is to interim and is agile and well, it is streamlined as possible and by starting to bolster objective and even the policies are somewhat, we start to stray into the future water allocation plan process.

Q. Now you might not have had the opportunity to read Mr Farrell's supplementary evidence that was filed yesterday, have you had a chance to look at that?

A. No I haven't sorry.

5 Q. So Ma'am we're having printer issues so I've got his, the version that was lodged yesterday but I have got the correct version that you wanted which has got the full (inaudible 15:02:01) provisions from Mr de Pelsemaeker's 14 March but at the moment all I can hand up is the yesterday version.

THE COURT: JUDGE BORTHWICK

10 Q. Sorry, the one that you can hand up is yesterdays version?

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY:

Q. Which has current set of changes just not in the context of the full set of Mr de Pelsemaeker provisions but I understand you do have got Mr de Pelsemaeker 14 March evidence up there?

15 A. The evidence, yes.

Q. The schedule 1 changes, appendix 1 –

A. I have appendix 1 in front of me.

Q. Appendix 1, that's good so just while we're cobbling things together and what I'll do is I'll hand up to you...and also the next version that's coming
20 is in colour. So I'm assuming everyone else has got this online, they can print out 15 copies of the wrong version of Mr Farrell's evidence, no ones yelling at me that's good –

THE COURT: JUDGE BORTHWICK

So I'm looking at a version dated the 23rd, that's it, that's all, it's not the complete
25 set it's a partial set, understood.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

Q. So in Mr Farrell's appendix on page 6, he's marked up a revised set of changes to the objective, now you might recall in Mr Farrell's evidence in chief he split out the objective into a much shorter objective and then left
30 the rest of it as a policy, so that's why it looks shorter.

A. Yes I recall that, not the detail but yes –

Q. So I just want you to look at the first four lines at the moment where he reflects that in this iteration of the objective that the environmental part of the objective is in the interim protect the health and wellbeing of waterbodies from further adverse effects from water abstraction activities until a new land and water regional plan is made operative. So in terms of holding the line in the environmental sense and given that a lot of you proposed changes to the remainder of plan change 7 have an environmental focus, what's your view on bringing that environmental focus up to the objective at a high level?

1505

A. I guess on my reading of it now there is some similarities in the language used between Mr Farrell's objective and one of the early parts of my policy so without considering it in great detail, that familiarity probably suggests that would be okay. It does apply obviously more widely across the rule so it would also apply to the controlled activity rule and I would have to consider may be in little more detail as to whether that causes challenges for that streamlined approach but as applied to outcomes sought through a non-complying pathway it seems appropriate on the face of it.

20 Q. That's what I wanted to ask about that. Picking up on whether or not there should be exceptions for renewable energy and drinking water. The partially operative regional policy statement, do you agree that it gives effect to the national policy statement for renewable energy generation?

A. I mean it certainly should.

25 Q. Yes but have you reviewed it in that context?

A. I have looked at the regional policy statement in terms of the direction it provides for renewable energy generation. I haven't done a detailed analysis of whether it's translating the NPS through in enough detail or not but I do accept that there is policy in the RPS relating to very similar matters.

30

Q. Let's have a look at that so that's common bundle 562 in the partially operative RPS. I want you to find objective 4.3 which is CB562 or page 57. So first of all, the objective. Infrastructure is managed and developed in a sustainable way. To give effect to that objective there is

no requirement for an exemption for renewable energy or municipal water supplies, is there?

A. No, not overtly, no.

5 Q. And that policy 4.3.1, the emphasis is on recognition and provision for infrastructure by matters listed in A to E and none of those require an exemption from plan change 7 in order to give effect to that policy?

A. There is no overt direction but there is recognising and providing for infrastructure by protecting, for example, lifeline utilities which could include drinking water. Protection being a reasonably strong test.

10 1510

Q. So if we're thinking about protecting either drinking water or power generation, plan change 7 protects it to the extent that any existing permits or consents would be rolled over for the next six years?

A. As a minimum, yes.

15 Q. Then one would assume that when the land and water plan is in place giving effect to whatever the next version of the RPS will be and the national direction those infrastructure services will also be properly protected, won't they?

A. Assuming yes, to give effect to this, yes.

20 Q. And similarly, 4.3.2, just requires recognition of the significance of infrastructure including REG and municipal infrastructure. So we don't need to explicitly recognise those activities in order for the plan change 7 to be consistent with this policy, do we?

25 A. I guess unless one of the matters of significance around the infrastructure related somehow to duration but no, not specifically. It's not specifically spelt out.

Q. In policy 4.3.3, the functional need of infrastructure is provided for by at least allowing for the six year roll over of existing consents and permits, isn't it?

30 A. Probably in terms of the functional need of this infrastructure. If it's specific infrastructure I wouldn't know all of the details of the functional need. It may be that there is some element of the infrastructure that might require a longer duration but I don't think that's probably for me to say in terms of the details of the functional need.

Q. Okay. I just have one more question of clarification in terms of your amendments to the non-complying policy generally in the context of the exceptions for drinking water and hydrogeneration. Were you envisaging the granting of longer term but no increase in abstraction?

5 A. That's what I was envisaging.

Q. That's what you were trying to encapsulate. Okay. Because that still wasn't quite clear to me. That's fine.

A. In that context will be new water if there is an increase as opposed to a replacement.

10 Q. That's a very good segue because that's what I was just about to ask you about. In terms of new water, were you here for Mr Page's questioning of Mr de Pelsemaeker?

A. No, sorry, I wasn't.

15 Q. So if you could get the original water plan in front of you and go to rule 12.1.4.6. Just for the record, this comes from page 659 of the transcript. I'm not proposing to put the transcript to the witness.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Sorry, which page of the transcript?

A. 659.

20 1515

THE WITNESS:

So 12.2.4.6?

THE COURT: JUDGE BORTHWICK

And I just want to have a chance to read that, I imagine Mr Ensor does too.

25 **CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY**

Q. So that was put to Mr de Pelsemaeker and then when we look at in page change 7 policy 10.A.2.2, that is the policy, the plan change 7 policy that would apply to applications under rule 12.1.4.6?

A. Yes, based on the phrasing at the beginning of that policy.

Q. Yes. Now small question, first in your appendix tracked changes, you haven't picked up Mr de Pelsemaecker's tracked changes to that policy?

A. Possibly not.

5 Q. Is there reason for that or just it wasn't, it was just again one of those matters it wasn't in the Minister's radar?

A. It possibly might've been no oversight, yes that's correct.

10 Q. That's fine. But what this drew to our attention as Mr Page was working through it with Mr de Pelsemaecker is that there is something that would be treated as a loop hole where one abstractor has to apply under the non-complying framework because they're replacing an existing permit, so under the plan change 7 non-complying permit and their neighbour, as Mr Page put it, could apply for new water under rule 12.1.2.6 and be assessed as a restricted discretionary activity and have an easier consenting pathway by implication. Had you taken that into account when
15 you reviewed the effectiveness of plan change 7 in terms of achieving its objective?

A. No, I hadn't, no I hadn't drawn that conclusion.

THE COURT: JUDGE BORTHWICK

20 Q. So can you say, state your answer again, counsel's question is whether you took that into account and I thought your answer was "no I didn't draw that conclusion" so then the compete answer is "yes I did but I didn't draw that conclusions"?

A. No, so I didn't and therefore I hadn't drawn that conclusion.

CROSS-EXAMINATION CONTINUES: MS BAKER-GALLOWAY

25 Q. What Mr Farrell's evidence brings through now into the marked up version, and I can assure you that this was plead in the submission as relief so there is scope for it, it's right in the middle of the relief table, is a new non-complying rule 10.A..3.2 that would make those new takes for water non-complying also if they were for no more than six years. So
30 rather than being considered as restricted discretionary activity they would be brought into that same non-complying group as any of the other longer duration applicants. Now I know you haven't had time to consider

Mr Farrell's evidence in detail but conceptually do you agree that that is a more appropriate place for those applications for new water?

1520

A. Yes and it seems to align with the intent of plan change 7 as I read it.

5 Q. Thank you. And then finally while you've got Mr Farrell's supplementary, you'll be familiar that we've had this table with thresholds for minimum flows and allocation as a percentage of MALF?

A. Correct.

10 Q. And that was initially proposed in response to the use of the words "no more than minor" in the non-complying policy itself. What is now proposed if you look at Mr Farrell's 10.A.2.4, so I'll let you just read that.

A. Yes I think I've gathered I've the gist.

15 Q. I'll step through it, so the gist is that where there's a statutory requirement to assess this no more than minor term, either in the context of notification or the non-complying gateway, that the minimum flow and allocation thresholds in the table be used as a sign post to require that the comprehensive hydrological and ecological assessments are required to demonstrate the effects met the requisite threshold. Now in terms of plan change 7 providing as much certainty to all users, do you see that the use of the presumptive minimum flow and allocation table in that context is being of assistance?

20 A. I certainly think that if there's an opportunity for certainty we should look at it, I don't have the evidence behind the detail, I guess the, I guess my only reservation is a percentage of MALF is only looking at one thing so it would, it would depend on I guess the rest of the context in which it was being looked at, it would be for example if there was a cultural reason to look at things more closely but it wasn't picked up here that may not lead to good outcomes so, yes I acknowledge some, if there's some evidence to support some additional certainty then that's helpful but it just needs to be treated with caution I guess, the trigger that is being used.

25

30

COURT ADJOURNS: 3.24 PM

COURT RESUMES: 3.45 PM**THE COURT: JUDGE BORTHWICK**

I can indicate that the C=court will be rising at 5 o'clock because members of the court have business to attend to at 5.00. Right, Forest and Bird?

5 CROSS-EXAMINATION: MR ZWAAN

Q. (inaudible: 15:46:30) summary of your evidence, you looked at (inaudible: 15:46:32)?

A. Yes, I did.

Q. And in your view, is this a purely procedural or a procedural plus plan change, I just want to clarify? From your perspective.

A. In relation to the – I guess it's procedural plus; there is an – in terms of how I have proposed some of my drafting, there are environmental elements to the non-complying pathway and there is some carry over environmental elements to the controlled activity matters of control.

15 Q. And what was the basis of including those things in your latest iteration?

A. For including those in there?

Q. Yes.

A. With reference to the principles of the plan change in relation to the difference between paper allocation and actual use and with an eye to where practical, giving effect to the NPS FM if there are ways to do that without compromising, I suppose, the streamline nature or intent of the plan change.

Q. And so in terms of giving effect to the NPS FM 2020, in your view, do you think it's apparent in the Minister's direction that this be a concise focus plan change that the Environment Court deals with to allow the Regional Council to get on and focus on the longer term plan change?

A. As I understand it –

Q. Sorry, longer term land and water plan?

A. As I understand it, yes, this is an interim step to allow – essentially go back to this term, hold the line and then allow effort to be put into the substantive – giving effect to the NPSFM in its substantive form through the water and land plan, yes.

Q. And your understanding of what's required to give effect to the NPS FM, it's quite an evolved process to develop what values held in each catchment, isn't it?

A. Correct.

5 Q. And in terms of giving effect to that first order of the NPS FM of the health of the water, do you think it would be helpful and advantageous to be able to look at as much of the catchment as possible and without the constraints of allocations in place?

THE COURT: JUDGE BORTHWICK

10 Sorry, can you say that question again? In terms of tier 1 of the –

CROSS-EXAMINATION CONTINUES: MR ZWAAN

Q. in terms of tier 1 of the NPS FM, considering the health of the river as a whole, do you think it is useful and advantageous to be able to look at as much of the catchment as possible with as fewer constraints as possible
15 such as already allocated water?

THE COURT: JUDGE BORTHWICK

I don't understand the question.

MR ZWAAN

Sorry, my question is basically getting at saying in order to think of the health
20 of the river as a whole, if you have a constraint of an allocation for a longer term period of say, 35 years, that already locks up a significant amount – or could lock up a significant amount of water that then gives you fewer options in terms of giving effect to that tier 1 priority for a longer period of time, does that make sense?

25 **THE COURT: JUDGE BORTHWICK**

Q. It does but hasn't this already been covered by Mr Maw's questioning? And I also didn't think as a matter of principle this witness was against or was saying anything other than, perhaps with the exception of hydro or

drink water, that there should be anything more than six years and I think he was generally in favour of six years, is that not so?

A. That's correct.

MR ZWAAN:

5 Yes, that's correct. I guess I'm just trying to clarify one aspect that I think Mr Maw didn't necessarily cover in terms of being able to allow the Regional Council in order to look at that wider tier 1 principle to have as – should be able to look at that as a whole and that imposing a 35 year consent would frustrate the ability of the Council to do that just to clarify that point to try and surmise
10 where Mr Maw was going. That's kind of where my question is getting but if – I feel like it's largely been covered. Yes, all right, we'll leave it there then.

THE COURT: JUDGE BORTHWICK

Mr Welsh for Trustpower.

CROSS-EXAMINATION: MR WELSH

15 Q. Good afternoon Mr Ensor.

A. Good afternoon.

Q. I'm going to cover with you some themes that I wasn't going to cover with you when I prepared my cross-examination and first of all, can I confirm that the supplementary brief that you have – which has been the focus of
20 today's proceedings was prepared in response to an amended or recommended set of changes by Mr De Pelsemaeker which better aligned with the mandate of his client and you responded to in fairly short order.

A. That's correct.

25 Q. And you'd accept that there maybe issues of drafting but you've put forward some changes or recommendations to Plan Change 7 that currently sits before this Court in response to matters that are still missing or haven't been given full consideration, is that fair?

A. Yes, we responded quickly to the changes and acknowledged that the
30 drafting may not be perfect, nor might the suite of information out there.

- Q. Yes, so I'm not going to get into the weeds with you on the individual provisions given that but as I say, cover some themes. Now, the first theme I want to cover is the application of the renewable national policy statement on renewable electricity generation and my friend Mr Maw essentially put to you based on the words in the preamble that the REG NPS provides a framework for electricity by allowing consents to be granted for deemed permits that relate to the hydroelectricity. Put it a bit more eloquently than that but that was his essential thesis to you that it provides a framework.
- 5
- A. Yes, I acknowledge it provides a framework, yes.
- 10
- Q. And he put to you that based on the preamble, the NPS does not have application when considering allocation issues. Do you recall him putting that to you?
- A. Yes, he did.
- 15
- Q. And you referenced – you said: “I think there's some caselaw context for that”?
- A. Correct.
- Q. And he didn't ask you what that caselaw context was so I will. Mr Maw's opening submissions referenced or quoted in part but not in full, the decision of *Carter Holt Harvey v Waikato Regional Council*. Does that case ring any bells with you?
- 20
- A. Yes, it does. The details don't but the case does.
- Q. And in that case, the Environment Court found that the statement in the preamble should not be read as excluding the ability of regional councils to make freshwater allocation decisions which reflect the importance of renewable energy activities. Do you recall reading that in that case?
- 25
- A. Look, I honestly – I remember the theme, the details as I say I don't recall in detail.
- Q. Right but in that case the Court went onto say that even they were wrong in that regard, that it considered as a precaution or as a cautionary approach to consider the policy statements provisions which reflect and give strong guidance to the relevant statutory provisions contained in part 2, does that sound right or accord with your recollection?
- 30
- A. It sounds familiar, yes.

Q. So in that case, the Court found that even in allocation decisions, the RPS may be relevant. So I want to take you to the RPS and step you through some of those provisions.

THE COURT: JUDGE BORTHWICK

5 Is that a legal submission or is that a question to this witness because the witness didn't answer so I don't even know whether the witness is fully familiar with the case.

MR WELSH:

Well, I think the witness confirmed he's aware of the case.

10 **THE COURT: JUDGE BORTHWICK**

That's all he's confirmed, he's not aware of the detail, he also said that. So what was your last – what was the point of your last question?

MR WELSH:

15 I could have added: "do you recall that?" and he could have said: "didn't." But that's fine, Ma'am, I'll move on.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. So, I'm going to put to you the provisions of some of the policies in respect of the NPS and have you comment upon those, if you have those in front of you there in the – I think it was tab 7, common bundle 813.

20 A. It's been removed again, sorry.

Q. I'm going off memory, Madam Registrar, that it was tab 7 but it's at common bundle 813. Mr Ensor, I want to take you to page 4 of that document, the NPS and that, does it not, sets out that it is a matter of national significance to which this NPS applies, the need to develop, operate and maintain and upgrade renewable electricity generation activities throughout New Zealand?

25

A. Yes, correct.

Q. Yes. And the objective of the NPS is to recognise the national significance of renewable electricity generation by providing for its

development, operation and maintenance et cetera so as to meet the nation's targets for renewable electricity generation, is that correct?

A. That's correct.

5 Q. And are you aware that the current national target for renewable electricity generation is 100% renewable by 2030?

A. That is correct.

Q. And in policy A: "decision makers shall", that's directive language, isn't it?

A. Yes it is directive.

10 Q. Yes. "Decision makers shall recognise and provide for the national significance of renewable electricity generation activities", is that correct?

A. That's correct.

15 Q. And in policy E2, specifically around hydro, that requires regional policy statements and regional plans and district plans: "shall include objectives, policies and methods including rules within the plans to provide for the development, operation, maintenance and upgrading of new and existing hydroelectricity activities." Is that correct?

A. That's correct.

Q. And Plan Change 7 does not contain such rules or policies, does it?

A. Not in any specific sense.

20 Q. No and other than the wide sum provision specifically around Waitaki, I think the consensus is neither does the operative regional plan?

1600

A. As I recall that's right.

25 Q. Yes and that's despite the fact that within the implementation period in (h) policy (h)(2), Otago Regional Council was required to do so some 10 years ago, wasn't it?

A. I can't see direct reference to the date but I see that there is some discussion about the timing.

30 Q. A considerable number of years, shall we just settle on that, it was required to do that.

THE COURT: JUDGE BORTHWICK

Q. In policy H(2)?

A. H(2), yes Ma'am.

Q. So where are you referring to when you get to 10 years, sorry I can't see it either so just direct me to the, is it (a) or (b) or the preamble or what?

CROSS-EXAMINATION CONTINUES: MR WELSH

5 Q. Well Ma'am the regional policy, where a regional policy statement already provides for these policies which most probably did not at that stage, it was within 24 months of doing so of 2011 so 2013, or in (b) where there's change to the regional policy statement, then within 12 months of that becoming operative. So I might've overestimated the 12 years but the short point is Mr Ensor, there has been a considerable period since the
10 passage of this NPS in 2011 and there's still a policy vacuum in the regional plan sense in Otago despite that passage of the NSP?

A. Yes from my recollection of the operative plan, yes.

Q. And your suggestions in plan change 7 were aimed at trying to fill some of that void – vacuum?

15 A. It was recognising that there was some direction as discussed with Mr Maw earlier and that that there was an opportunity in plan change 7 to assist in giving effect to that direction.

Q. And when you reflect on the policies and matters of national importance that I've taken you through, do you believe that Parliament had in mind
20 when it passed the NPS something along the lines of "Regional Council's simply don't make hydro a prohibited activity, just give it a framework for securing consent and that is sufficient"?

A. I think the language would suggest that it would be stronger than that.

Q. Yes. Now Mr Maw –

25 **MR WINCHESTER:**

Sorry Ma'am, I just wanted clarification to my friend's question. I don't believe Parliament did have anything in mind because Parliament didn't the NPS for renewable energy generation.

THE COURT: JUDGE BORTHWICK

30 That was what a board of enquiry type structure, wasn't it?

MR WINCHESTER:

Well I think it was on, it's a subordinate statutory instrument Ma'am, so it's a minor point but an important one.

THE COURT: JUDGE BORTHWICK

- 5 Yes I mean my recollection and I haven't dealt with the NPS for renewables for at least two years but no, it's not, it's subordinate legislation but it's not legislation which was passed by an act of Parliament, it's come through another vehicle, is that the point that you were getting?

MR WELSH:

- 10 My friend's point is fair and I accept that and we can substitute parliament for board of enquiry of Minister for that matter but the short point of –

THE COURT: JUDGE BORTHWICK

- Well I don't even know if it was the Minister, I thought Royden Sommerville was involved in this at some stage on the Board and made, I don't whether he made
15 a decision or recommendations –

THE COURT: COMMISSIONER EDMONDS

I think that was only a recommendation, then it would've gone to an officials committee and it could've been considerably changed before it ended up as an NPS has occurred with the NZCPS process at the same, similar time.

20 MR WINCHESTER:

And so, forgive me Ma'am, the purpose of my question was simply that it's a very difficult question to pose to a witness as to what the decision maker had in mind given the opaqueness of the decision making process to do with this instrument.

25 THE COURT: JUDGE BORTHWICK

That's a fair point.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. I'll rephrase my question Ma'am. Mr Ensor having gone through the national, matters of nation significance in the policies, do you think simply ensuring that hydro can apply for a resource consent like any other use

5

1605

A. I mean, my reading of the NPS is that it is directive for a reason and that it highlights the importance of, in this case, it would be water extraction for that purpose. Yes, so there's a level of direction in that document.

10

Q. Yes, beyond providing for an ability to apply for a resource consent?

A. Correct.

Q. And you would agree that under section 66(1)(ea) a regional council must prepare and change any regional plan in accordance with a national policy statement, you're aware of that?

15

A. Yes.

Q. And that would include the REG national policy statement, wouldn't it?

A. It would.

Q. And under section 66, one's not free to pick and choose which NPS it gives effect to, is it?

20

A. No, there's no such direction as I'm aware through there.

Q. No. Mr Maw put to you on a number of occasions propositions around a deemed permit holder that operates hydro seeking 35 year rollover replacement consents, have you read Trustpower's submission and evidence?

25

A. I have and it's starting to get into the past somewhat now.

Q. Do you recall the relief in respect of duration in Trustpower's submission of seeking an expiry date of May 2038?

A. Yes, I do recall that.

Q. And that's considerably shorter than a 35 year term, isn't it?

30

A. It is.

Q. And the logic for that is to align it to the scheme within which these deemed permits are functionally integrated being the Waipori scheme, do you recall that?

A. I do recall that, yes.

Q. And that alignment would then allow a decision maker to undertake a full integrated management decision of the Waipori scheme in its entirety, wouldn't it?

A. Yes, it would.

5 Q. Now, one of the reasons that the Minister called in and directed this plan change to this port is because of the relationship with the NPS REG, do you recall that as one of the Minister's reasons for his decision to call in this plan change?

A. Sorry, not directly, apologies.

10 Q. My friend, Ms Baker-Galloway, put to you some objectives and policies from the RPS and took you through those, do you have those still available in front of you?

A. I'm not sure I do, sorry.

Q. I think it's in common bundle 568.

15 A. What would that be? Tab 4?

Q. Tab 3. Now, Mr Ensor, at common bundle page 568 or page 63 of the RPS, you'll find policy 4.4.1. Are you there?

A. Yes, I've got that.

20 Q. And I don't think this policy was put to you by Ms Baker-Galloway and that policy is to provide for renewable electricity activities by all of the following recognising – (a) I should say, recognising the benefits associated with those activities, see that?

A. Yes.

Q. Recognising the functional needs of those activities in (b)?

25 A. Yes.

Q. And in (c) recognising the importance of the resource needs of those activities?

A. Yes.

30 Q. And (d) and (e) continues in respect of the efficient use of those structures or facilities and matters of development of potential sites. My point is, Mr Ensor, in providing a pathway...

1610

1610 pb

Q. My point is Mr Ensor, in providing a pathway for hydro with a longer-term consent, do you consider that that is consistent with policy 4.4.1 and the policy direction that gives the decision maker in respect of plan change 7?

5 A. Sorry could you just reframe that question, the last part of that.

Q. Do you accept that under policy 4.4.1 and matters that it contains, the benefits of hydroelectricity are to be recognised?

A. Yes.

10 Q. And one of the ways that you have tried to recognise that and give effect to the policy directions is to provide a pathway for hydro which provides for a longer-term consent?

A. Yes, correct.

Q. And if you turn the page to common bundle 563, there's additional policy direction there on protecting existing hydroelectricity isn't there?

15 A. Yes, there is.

Q. And recognising the national or regional significance of renewable electricity, is that correct?

A. Yes.

Q. Mr Ensor –

20 **THE COURT: JUDGE BORTHWICK TO MR WELSH**

Q. What's your question about that?

A. Pardon?

Q. Sorry, now that we've established there's a policy in the RPS what was your question about it?

25 A. My question was, well it wasn't put to Mr Ensor so I wanted the record to record that there is such a policy.

Q. So okay so the record reflects that there is this policy?

A. Yes.

Q. And there's no other relevance?

30 A. Sorry?

Q. Where are you going with it?

- A. Well my point then was to recognise that that policy relates to protecting existing hydro or renewable electricity generation Ma'am which wasn't put to the witness before.
- Q. All right. Is there something in what this witness has said that would cut
5 across this in terms of protecting your output –
- A. No Ma'am.
- Q. – duration is different from output isn't it?
- A. Ma'am, I was simply putting the full spectrum of relevant policies to this witness which my friend Ms Baker-Galloway didn't do –
- 10 Q. Well do you want to ask him to comment on it or not?
- A. I'm happy if he wishes to comment on those policies.
- Q. I'm just wondering where you're going, it's not getting us anywhere. I mean I know you'll have evidence which will have all of this in and we will read it all but getting witnesses just to confirm that there are policies
15 doesn't take or advance the Trustpower case. For example, I would've thought a good question in relation to policy 4.4.1 rather than the question that you asked was whether or not a six year duration or what's the duration you're seeking for your –
- A. Well it's down to 17 and a half Ma'am as this process continues.
- 20 Q. I beg your pardon?
- A. I said it's down to 17 and a half years –
- Q. What does that mean?
- A. We've set, well the relief sought a date of May 2038 so when Trustpower filed the submission that was circa 18 years and it's now been reduced
25 down to 17 and a half years to get to that timeframe.
- Q. Is that a complaint about this process?
- A. No I'm not complaining at all Ma'am.
- Q. All right.
- A. If I said eight, if I stuck with 18 years that's longer than the period
30 Trustpower actually seeks, it seeks a term to align with it's existing scheme which is May 2038.
- Q. And the existing scheme what expires there?
- A. What expires, sorry?
- Q. Yes what expires, what expires at 2038?

A. All the resource consents that relate to the operation of the Waipori hydroelectric power scheme and the deep stream enhancement to that scheme, so everything in Waipori.

5 Q. Right okay so I would've thought the better question was in terms of implementing objective 4.4 and policy 4.4.1 and there may be other objectives and policies is it a better outcome under plan change 7 for their to be a six year consent that the 2038 or 17 year duration as proposed by Trustpower and then to support, the witness to support his answer with a view and of course that would also bring into play the rest of the matters
10 which are relevant under the NPS so I mean, I am actually really interested in that, what's the better outcome and why.

1615

A. Yes, Ma'am, I'll put that question. I did put a similar question around the NPS but I'll ask Mr Ensor –

15 Q. No, I don't want to trouble you.

A. No, you're not troubling me at all Ma'am.

THE COURT: JUDGE BORTHWICK

20 Q. What is the better outcome relative to the objectives under the NPS REG and the NPS for freshwater management, a six year duration or a duration expiring 2038 to coincide with other permits associated with the Waipori scheme and you know, you'll have to consider both schemes – both NPSs and if you could give us your answer and why?

25 A. Look, I think in terms of the NPS REG that there is a relatively directive policy in terms of providing for it and I see that there is, in terms of the NPS FM, there is value in terms of – I think it's policy 3 in terms of a sort of integrative management approach to water. From a practical sense, it doesn't make the job any easier giving effect to the NPS FM if a major user is having to consent a scheme on a piecemeal basis and whether
30 there's another mechanism that that could be done, I'm not sure but it would seem to me to recognise the benefits that the hydroelectricity generation activity provides to do that through a lining durations and having the scheme considered as a whole would also assist with the NPS FM delivery.

Q. So your answer is a better outcome might be to align the water permit duration with the duration of the Manapouri and –

MR WELSH:

Waipori, Ma'am.

5 THE COURT:

Q. Waipori, rather. Waipori and the (inaudible: 16:17:27).

A. In terms of an integrated freshwater management approach.

Q. To what extent is that approach actually reflected in this region insofar as under this water plan it appears that the water plan doesn't endeavour to align resource consents where multiple resource consents are required in relation to a particular activity, the plan is not a driving an integrated management approach.

A. That the plan change isn't?

Q. Well, operative plan.

15 A. Operative plan? The operative plan isn't necessarily either, no.

Q. No.

A. No, and I guess this is one opportunity, there's possibly others.

Q. Okay, thank you for that, carry on.

CROSS-EXAMINATION CONTINUES: MR WELSH

20 Q. Thank you, Ma'am. Mr Ensor, in your supplementary brief, you actually provided two options for providing an exception for hydro and drinking water and only the second has been the subject of questioning from my friends but if I describe it this way, the cleaner, explicit and more simple version is contained in your paragraph 13, is that right?

25 A. Sorry, I'll just find that. Correct.

Q. And that cleaner, simpler explicit version may avoid some of the particular drafting issues that you have encountered with Mr Maw and my other friends in respect of their – which arise in respect of the other option, do you agree?

30 A. It's actually by stripping out any thresholds that you're either in or you're out, so I agree it's very black and white.

Q. Yes, thank you. In terms of

THE COURT: COMMISSIONER EDMONDS

Could you just take me back to that, I missed the reference?

MR WELSH:

5 Sorry Commissioner, it's at paragraph 13 of Mr Ensor's supplementary, he actually sets out two options but doesn't include both of them in the tracked changes.

THE COURT: COMMISSIONER EDMONDS

So paragraph?

10 **MR WELSH:**

13 at page 4 of Mr Ensor's supplementary.

THE COURT: COMMISSIONER EDMONDS

Okay, so that's the italicised, for example, is that what you're referring to?

MR WELSH:

15 **THE COURT: COMMISSIONER EDMONDS**

Thank you, I've caught up now.

CROSS-EXAMINATION CONTINUES: MR WELSH

20 Q. Thank you. Mr Ensor, as I read your recommended changes, if a hydro application could not meet the entry thresholds or entry conditions under the controlled activity rule for whatever reason and one of those reasons may be lack of data as Mr Maw put to you, it would still remain a non-complying activity, would it not, under your changes?

1620

A. You mean the changes here in paragraph 13?

25 Q. Well under either or really, Mr Ensor, it would, if it doesn't mean a controlled activity standard –

A. Yes, that's right, without another rule in place as discussed earlier, yes.

Q. And you ascribed to the general planning consensus stat passing through the second gateway test of 104(d) for a non-complying activity for the relevant policy is near on impossible or at least very challenging?

A. Which policy, sorry?

5 Q. Policy 10.3.2 I think or 10.2.3 it is.

A. Sorry which version?

Q. Well the, I'm working off the –

A. Are you referring to Mr de Pelsemaecker's version –

Q. – Mr de Pelsemaecker's version.

10 A. Yes, so in relation to, well I'm looking at appendix 1, the appendix 1 version although I understand they take us to the same place but yes, my view is that it's very explicit, avoid granting unless –

Q. Yes and I suppose my, where, I'll cut to the chase, if as Ms Styles recommends in her evidence that hydro is dealt with as a discretionary activity instead of a non-complying activity, the consent authority would still retain full discretion to approve or decline that application, doesn't it?

15 A. They would retain that discretion, yes.

Q. And it would the full range of relevant matters to consider?

A. Correct, full discretion.

20 Q. And it could impose the full range of relevant or lawful I should say, resource consent conditions?

A. Yes, correct.

Q. And I suppose what, if that is the case, what benefit in respect of a activity that has a national policy direction that it's a matter of national significance do you see it retaining a non-complying status as opposed to the discretionary status?

25 A. I guess the benefit is in terms of maintaining the intent of the plan change and identifying – well I guess as its been drafted in my changes, keeping all of the exemptions in one spot so its either, you're either controlled of your exemption for whatever reason and you're dealt with in that way, you know aside from the, aside from the gateway test itself which may provide some level of, it might weed out certain applications but otherwise everything, it does get considered as if it was, with full discretion as you've described so that I guess the benefit is that it, there's a relatively strong

30

signal generally but by providing a pathway for hydro for example in this non-complying rule you're, in a way you are bypassing it I guess, that sort of extra level of, that extra test.

5 Q. Well one could take the view that making the activity non-complying would suggest to the decision maker perhaps that the application is not appropriate but given your comments around the national policy direction for hydro, do you think that would be a fair position for the decision maker to reach?

10 A. I, in terms of general appropriateness I'm not sure but in the context of this plan change which is supposed to be, you know, interim generally I think that's where the difference lies, we're looking at the significance of the activity amongst all activities subject to an interim regime, if that make sense.

1625

15 Q. I just want to cover one other matter with you. That's the policy that I think has received very little attention to date and that's policy 10A2.2 and I'm looking at again Mr de Pelsemaeker's 14 March version and that relates, does it not to new consents, so not deemed permits and not replacement consents which expire by 31 December 2025 so anything else, Is that correct?

20

A. Yes, that's what I understand, yes.

Q. You haven't recommended a similar exemption for hydro or drinking water in that provision, have you?

A. No, I haven't.

25 Q. Is there a reason for that?

A. I guess my expectation is that that would be addressed ideally through the new plan. I appreciate that there might be a circumstance where some reason might arise over the next six years or so to make an application but I guess my focus has been on the renewal process.

30 Q. Mr de Pelsemaeker describes one of the goals of plan change 7 is to discourage further investment in water related sectors. Would you be concerned given the national direction around hydro with that discouragement remaining in this plan?

A. I think potentially in the context of new water with the impending part 3 NPS process I would say that new allocation and new investment on the back of that should be looked at pretty cautiously.

5 Q. Can you help me other than the deemed permits which are peculiarity of this part of the country and perhaps the galaxiids, what's unique with Otago as it grapples to deliver and give effect to NPS freshwater management that doesn't apply to other regional councils that find themselves with older regional plans?

10 A. I'm off the top of my though the deemed permits and the complexity and peculiarity of that is sort of the key issue and that includes the environment is adapted to that on subsequent ecological or environmental standards but otherwise there is nothing that jumps to mind but –

15 Q. Because this policy doesn't relate to the deemed permits. It relates to all other, new future permits so nothing that jumps to mind. Would you agree that it would've been relatively simple to insert in the implementation of the NPS a direction that all council shall limit consent durations for new activities to six years while they grapple and implement the NPS?

A. I'm not sure about simple.

20 Q. But they could've included that.

THE COURT: JUDGE BORTHWICK

25 Shall we move this on because it's not going to help me that proposition as to what the decision makers there could or could not have included and whether they would or would not have included a six year duration? I understand the point that you are making regarding policy 10A2.2. I have read Ms Styles' evidence in relation to that. I am not assisted by this line of examination.

MR WELSH:

I'm sorry about that, Ma'am.

30 **CROSS-EXAMINATION CONTINUES: MR WELSH**

Q. There is no direction in the NPS or the RMA in respect of limiting consents to a six year term, is there?

A. Not that I'm aware of, no.

CROSS-EXAMINATION: MS IRVING

Q. Good afternoon, Mr Ensor.

A. Good afternoon.

5 Q. I just have a couple of topics to talk through with you relating to the territorial authority interests. The first relates to drinking water and how that term I suppose applies in the context of the NPSFM and then what it encompasses in a practical sense. Now my understanding of the second order priority in the NPSFM is its about the health needs of people, do
10 you agree with that?

1630

A. Yes.

Q. And one example of that that is identified in the NPSFM is drinking water?

A. Yes, there's one example and it's drinking water.

15 Q. So there's uses of water or other matters that are broader than drinking water that would fall within the ambit of the health needs of people?

A. Yes, I'm sure there are, the, I guess with the example given, it's the difference between sort of you know drinking water which is fairly fundamental to human existence, it does sort of set the bar relatively high
20 with its example. We can probably go without a shower for some time and make alternative sanitary arrangements but drinking water is necessary.

Q. And I think in response to a question from one of friends and I don't recall which one it was now but you referred to the national planning standards
25 and the definition of drinking water in terms of what you understand that term to mean.

A. Correct.

Q. And do you have that definition to hand?

A. Possibly.

30 **THE COURT: JUDGE BORTHWICK**

Which bundle?

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. I don't think the planning standards are in the bundle from the memory.

A. I may have included it as a footnote but I can't quite recall now, sorry.

THE COURT: JUDGE BORTHWICK

5 So if I Google it what would I be looking for?

MS IRVING:

If you, I went through that exercise, if you Google the, just national planning standards and...

THE COURT: JUDGE BORTHWICK TO MS IRVING

10 Q. And we're looking for definition?

A. Yes so page 56 of the document your Honour. I can read it to you if that would help.

CROSS-EXAMINATION CONTINUES: MS IRVING

A. Yes, sorry I thought I may have included it as a footnote but I haven't.

15 Q. So drinking water means: "water intended to be used for human consumption and includes water intended to be used for food preparation, utensil washing and oral or other personal hygiene." So it isn't just water that gets consumed by people is it?

A. No, used directly by people, they are too.

20 Q. And it's interesting that it is "intended" for those range of purposes isn't it, the definition doesn't rely on the water being used for those purposes does it?

A. I think maybe you could derive that from it, there's a clear intention it may be that there is an unintended use but the clear intention is that it's used
25 for those purposes.

Q. Yes, so if we think about that in terms of how councils may operate their drinking water infrastructure, I take water from a waterway, convey it to a treatment station, it is treated to drinking water standards and distributed. Now I put it to you that that water is intended for human consumption,
30 would you agree with that?

A. That's one of the intended uses.

Q. Yes and so any water in that system is drinking water isn't it?

A. Only if used as such, that's –

5 Q. But that isn't what the definition says is it, it's water: "intended to be used for human consumption" not water that is consumed by humans.

A. I guess it depends on what part of the system you are referring to it at, if we're talking about it coming out the tap of the household then there is a clear intention that it will be used for the matters described at treated to drinking water quality at the treatment plant is something else.

10 1635

Q. What about the water that might come out of the tap, say in my office, it's commercial premises but that water is to be drunk, correct?

A. Yes.

15 Q. I'd like to move on to the non-complying rule in your supplementary evidence if I can please and I just want to work through the practicality of operation of that rule when we're dealing with drinking water takes and catchments that have a whole lot of other water permits in them that may be operating under the more procedural controlled activity pathway.

THE COURT: JUDGE BORTHWICK TO MS IRVING

20 Q. You mean the controlled activity pathway or something else?

A. The controlled activity pathway.

CROSS-EXAMINATION CONTINUES: MS IRVING

25 Q. As I understand your policy 10A23 which is on page 2 of your appendix, you provide a carve out for activities for supply of the drinking water and you also require them to meet the provisions of policy 10A.2.3.1A through C, correct?

A. Yes, that's correct.

30 Q. So where we have existing takes for drinking water that don't have an existing residual flow or minimum flow, you intended – and I think questions from my friend, Mr Maw identified some challenges with the drafting – but how I had interpreted it was that you essentially were looking for applications for longer terms to take some steps towards the

matters that you'd identified in chapter C. It's an expectation that they would propose residual flows or minimum flows to help protect habitat, enhance the various values you identified there.

A. Correct.

- 5 Q. What I was interested to test with you is when we have a small number of takes within a catchment captured by this provision whether or not that is going to create a real challenge for those water users because they're not the only ones influencing flows in the waterbody that they're taking water from so if I perhaps put a hypothetical to you or one that's discussed
10 in the evidence for the Central Otago District Council, they have a take from the Manuherikia river and if they sought to renew that permit under your proposed framework here your expectation would be that they have a residual flow on that take past their intake, correct?

1640

- 15 A. Yes if they want an access to the long duration.
Q. Yes but in the Manuherikia there are of course many other permits including big intakes from the main stem that are going to be influencing how much water is in the Manuherikia river, aren't there?
A. Potentially, yes.
20 Q. And those permits, if they have been rolled over under the controlled activity rule won't have residual flow or minimum flow conditions on them will they unless the permits already did?
A. Unless they already had them.
Q. And so permit holders under or, drinking water permit holders under your
25 rule may well be prevented from exercising their consents because of the effect of those other takes on flows in the river, wouldn't they?
A. I –

THE COURT: JUDGE BORTHWICK

- 30 Permit holders under which rule, sorry, which permit holders are you talking about now?

MS IRVING:

So the drinking water permit holders –

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So this is a question in relation to drinking water only because I thought we might've been moving off from that but if not –

5 A. Yes in relation to the drinking water permits that can avail themselves as of this carve out.

Q. Yes this is the drinking water carve out, yes, okay.

A. Yes so they have an obligation to comply with a residual flow –

Q. Yes, if there is one.

A. Yes, well or if they have through clause (c) of Mr Ensor's policy –

10 Q. If there's one imposed and then you were, what was your next question, if you have to go via clause (c) and you are one of very few presumably because your territorial authority in the main, if you're one of very few permit applicants is the question then how does this all rub along with, you know that great farming body which is out there?

15 A. Yes so we could end up in the situation where the drinking water permits are subject to a residual flow and the exercise of their permit will be tied to that but that those permit holders have very little control over how much water is coming through the water way to them. So the residual flow in essence could be breached as a result of the exercise of the replacement
20 permits that have been rolled over pursuant to the controlled activity rule.

Q. Okay so that's the proposition to that-

A. Yes.

Q. – and I suppose the first thing is does Mr Ensor agree that that could, that could be a fact scenario which might emerge under the controlled activity
25 rule and the non-complying rule I guess it is?

THE WITNESS:

The combination of them?

THE COURT: JUDGE BORTHWICK

Q. Yes.

30 A. At, I guess it is a possibly, I think there is an opportunity to rectify it in terms of how that residual flow is expressed and whether it involves sort of an upstream, downstream measure or some other mechanism but yes

I can see the challenge, if there's no water coming in then you can't let any below your intake but I think you could set a residual flow that considers that matter.

CROSS-EXAMINATION CONTINUES: MS IRVING

5 Q. Do you think that would be important to make sure that those drinking water users actually have access to water when they needed it?

A. I'm not sure about access to water but possibly in terms of being able, physically able to demonstrate compliance with a residual flow it would be useful.

10 Q. Okay.

A. I guess whether there's water available to take is another issue.

Q. Yes.

A. As if we needed more issues to add to the mix.

1645

15 **THE COURT: JUDGE BORTHWICK**

Q. Bring it on. But I think the point that you're making Ms Irving is that drinking, the consumption of drinking water which is needed to sustain human life at least that and it may, bit woolly around the edges where that stops and starts but anyway drinking water to sustain human life has a higher priority under the NPS objective than say the use of water for agricultural activities or farming activities. So if farming, if you like is setting the pattern for residual flows or even minimum flows for a catchment which might work under their flow sharing agreements but not necessarily territorial authorities are involved in the flow sharing agreements then what? Is there going to be any water left for humans to consume? I get what you're getting at but I don't know what your answer to that is though.

20

25

A. I think it was really in the interim where if we assume that the controlled activity pathway were to get traction and a whole lot of those agricultural permits for lack of a better term were to be rolled over, largely without residual flow or minimum flow conditions then that would dictate potentially the ability for the drinking water permit holder to comply with a

30

residual flow condition that had enabled them to get a longer term consent.

5 Q. Why do you think largely without minimum flows or residual flows because into that mix then comes the potential and at this stage it's not adequately explored the potential for the water sharing agreements to come down in a way which at least provides for farming interests. It's not to say (inaudible 16:46:43) interest not at all.

10 A. I am dealing with Mr Ensor's supplementary which hasn't had an opportunity to consider the flow sharing conversation that we've been having in the last 24 hours so I think there is potential that that may overcome the issue that I'm identifying.

Q. There is also potential that it may not. I thought that's where you were going actually. It might not. Those flow sharing agreements as between primary users.

15 A. Yes, I think to be fair –

Q. (inaudible 16:47:21) primary sector that is to say.

20 A. – to be fair territorial authorities can be participants in those where they have takes within the catchment so that is not to say that those wouldn't provide an avenue to address the concern but my question was more that if we do end up with that six year controlled activity roll over how does that dovetail with an obligation for the drinking water permits to meet a higher standard and would it be more appropriate, in that interim six years, for there to be a review to impose the residual flow and minimum flow limits?

25 Q. What's the higher standard you're referring to specifically?

30 A. If they were to apply under this policy in order to obtain a longer term consent, it's my understanding that they would need to demonstrate that they were enhancing the environment. That was the function of Mr Ensor's paragraph C so they would end up with some form of residual flow or minimum flow condition on their longer term permit and I was interested in exploring how that fits in a catchment where the vast majority of water users are not going to be subject to that type of control.

Q. Understood.

A. There's fishhooks wherever we turn, I think.

Q. Yes, there are. I know where you're going and it's important.

CROSS-EXAMINATION CONTINUES: MS IRVING

5 Q. So I suppose, Mr Ensor, have you considered the implications of imposing that type of residual flow on drinking water standards when the broader water use within the catchment will be driving flows in the waterways that are affected?

A. Not specifically but I guess I'd like to acknowledge that it's only in relation to longer durations and if six year consent was sought. For example, under the controlled activity rule then the same restrictions would apply.
10 They would not apply. Whether that gets you out of trouble I'm not sure.

1650

Q. I think you will have the evidence on behalf of the Territorial Authorities which identified the challenges that a short-term consenting regime presents.

15 A. Yes.

Q. So in that sense, we're trying to find a solution that's going to cater for those challenges, aren't we?

A. Yes, understand that.

THE COURT: JUDGE BORTHWICK TO MR PAGE

20 Q. Mr Page.

A. I'm conscious that you're going to rise in nine minutes, Ma'am.

Q. Yes, I am precisely.

A. And I know that the witness needs to get on a plane tonight and you probably have questions for him.

25 Q. We have a few and we do need to rise at 9 whether the witness needs to be on a plane tonight is a different question because we're not going to finish tonight unfortunately.

A. Yes, I was going to suggest that my questions are few but it could just as easily be a submissions probably so I'm happy to forego asking the questions if the Court is able to get the witness released this evening.
30

Q. Okay. So you don't need him for questions because I don't want you giving evidence from the bar.

A. No. The questions I have are really around the exceptions that the witness has designed into the non-complying framework relating to matters germane to an NPS and whether same treatment might be given to NPS matters under the NPSFM-2020. It's really a matter for submitting

5 –

Q. I've got a lot of cross-examination out of Mr Maw about those exceptions and can they work or not work. There's the big question mark now over those.

A. Yes and so we've got some way to go before we're actually settled on what purpose the non-complying activity rules serve so I'm not sure that chasing the witness around circles at the moment actually helps.

Q. Okay, it may not. One of the things that we keep on coming back to is what is the objective here? It doesn't help us if the Minister has not made a submission on the objective to have planning evidence that goes "no, not looking at that" but we're going to be doing these other things under policy when actually the outcomes – they need to be determined in the objective. The elephant in the room is what is this objective and we're not here yet. I think Mr Ensor, you accept that is the elephant in the room, it's the objective albeit that the Minister hasn't commented upon that but it's still the elephant in the room and your policies aren't responding to an objective. Would that be fair?

MR ENSOR:

Yes, I think that would be fair.

25

MR PAGE:

I have a sense that there is an awkward dynamic developed today where the Minister and the regional council are, in fact, running in opposite directions and it's a little odd for OWRUG to be –

30 **THE COURT: JUDGE BORTHWICK**

I'm not sure that is so. I don't think that that is so but none of this is easy. You're trying to unpack and repackage a hundred year old problem with deemed permits, at least that's one of the things that you're doing here.

MR PAGE:

Yes, that's fair. In any case, I am happy to leave it.

THE COURT: JUDGE BORTHWICK

5 You're happy to forego. Any re-examination?

MS DIXON:

Yes, Ma'am, I did but I'm also looking at the clock and wondering.

THE COURT: JUDGE BORTHWICK TO MS DIXON

10 Q. Can we hold the witness over till tomorrow? Is it possible to catch a plane tomorrow?

A. No, Mr Ensor's got to be driving through the night to Rotorua as it is.

Q. Alright. I just have to confer with my friends. You can continue.

A. Thank you. I will be very quick.

15 **THE COURT: JUDGE BORTHWICK TO MR PAGE**

Sorry, Mr Page, does that mean you would've taken a few moments?

RE-EXAMINATION: MS DIXON

20 Q. Mr Ensor. A number of the questions that you've been asked this afternoon from my friends relate to hydroelectricity in one form or another and without chasing our way back through the National Policy Statement on Renewable Electricity Generation, a very straightforward question, if we remove water from hydroelectric generation and its consideration under the NPS, what is it exactly that we're protecting?

1655

25 **THE COURT: JUDGE BORTHWICK TO MS DIXON**

Q. You mean NPS freshwater?

A. No, the NPS REG.

Q. Okay.

RE-EXAMINATION CONTINUES: MS DIXON

A. Just the infrastructure whatever may be sitting in and around waterbodies.

5 Q. And secondly along the same lines really, Mr Maw, Ms Baker-Galloway amongst others asked you questions around hydro takes and particularly about locking in consents for long duration, if water is allocated for hydro use, very much in the context of how that would prevent water being available for use for other purposes or to others. My question is this. Are all hydro takes consumptive?

10 A. No, they are not. Some are what would be considered non consumptive.

THE COURT: JUDGE BORTHWICK

Q. Is your answer it depends whether they're consumptive or non-consumptive and it depends on the definition in the water plan, is that what you're getting at? I wasn't sure.

15 A. Yes, some are consumptive and some are not and yes, it would depend on that definition whether the take would meet that or not.

RE-EXAMINATION CONTINUES: MS DIXON

20 Q. And if a water take meets the definition of non-consumptive, what does that mean in terms of its availability for others to use after it's been used for hydro?

A. It's available for use.

25 Q. And thirdly, Ms Lennon asked you some questions about the priority order in the NPS freshwater management. Again, picking up on matters of renewable generation and pointed out I think that renewable generation or electricity generation of any kind is a lower order matter under the NPSFM. In the context of putting to you some questions around getting the sequencing right in terms of addressing Te Mana o te wai and looking to the needs of the waterbody as the NPSFM requires us to do, again bearing in mind the questions that you've had around hydro takes and the

30 NPS REG, what's your understanding of the status of one national policy statement as against another?

A. I understand that they're on equal footing.

Q. I'm sorry, could you say that again?

A. On equal footing, I understand.

Q. On equal footing and lastly you've been taken quite forensically by Mr Maw through the drafting that you produced last week in response to Mr de Pelsemaeker's changed position and he took you through provision by provision, particularly in relation to the non-complying policy that you have proposed. Just stepping back from that and the particular detail of the drafting, can you simply explain why you added the redlined material that you did, effectively on to the end of where Mr de Pelsemaeker's version of the non-complying policy stopped?

A. In terms of – I think it's clause C, the intention behind that is to provide, I guess a series of thresholds for activities that are seeking to access longer durations to meet which has an eye on first and foremost the health and wellbeing of the waterbody and then other matters besides and then the intent of that is to make the non-complying pathway more stringent and apply to, for want of a better term, true exceptions.

Q. Thank you.

1700

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. Just one question, in the follow up you talked about the status of one NPS versus another in your understanding that they're on an equal footing, it may be on an equal footing but when you dig into them isn't it like any planning document some elements are more, perhaps more directive than others, some can be reconciled, some may not be able to be reconciled?

A. Yes I think that's a fair comment, the starting point is the same but as you delve into them there may be trade offs isn't probably quite the right word but you know what I'm saying. You'll need to look carefully at what's being achieved and evaluate things next to each other.

Q. So in your answers in relation to the NPS REG for example, did you factor that in?

A. Yes I have and I guess, well acknowledging the drafting challenges that might exist I tried to bring forward some of the national policy statement

for freshwater elements directly into the rule – sorry into the policy so they are considered alongside the exemption for hydro for example, I guess in a more directive or certain way as opposed to just a wider consideration at section 104(1)(b).

5 Q. Okay, thank you.

QUESTIONS FROM THE COURT: COMMISSIONER BUNTING

Q. Probably just one question coming back to this drinking water issue and the fact that the waters taken and used for other purposes, have you turned your mind to how that might be dealt with?

10 A. Not in any great detail, I mean I recognise that there might be some challenges at that, at the far end of a pipe and really my inclusion of drinking water in terms of the definition was reasonably deliberate because it was clearer to me in the NPSFM that, that that would have a higher status than other potential users and it could end up being
15 confused or could confuse the situation as to what was a true exemption or it may mean the activities that, you know, an abstraction that has very little drinking water and mostly dairy shed water for example makes it through where that really wasn't the intention as I saw in the NPSFM in terms of the priority it gives it.

20 Q. So a difficult question?

A. Yes I think it's a difficult question to be (inaudible 17:03:26) generally, splitting drinking water off from other users I mean I acknowledge that.

Q. Thank you.

QUESTIONS FROM THE COURT – JUDGE BORTHWICK – NIL

25 THE COURT: JUDGE BORTHWICK

Anything arising from the Court's questions? No all right, well that's us and you catch your plane hopefully. Thank you very much for your evidence, I certainly do appreciate despite the rigor of the cross-examination exactly where you were trying to take this, you know that hasn't been lost on the Court what it was
30 that you were trying to achieve and so the evidence has been really helpful so

thank you. So that's us, through to 9.30 tomorrow with your witness Ms Williams.

COURT ADJOURNS: 5.04 PM

Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	<p>Indicates interruption:</p> <p>Q. I think you were – (<i>Interrupted by A.</i>)</p> <p>A. I was – (<i>Interrupted by Q.</i>)</p> <p>Q. – just saying that – (<i>First dash indicates continuation of counsel's question.</i>)</p> <p>A. – about to say (<i>First dash indicates continuation of witness' answer.</i>)</p> <p>This format could also indicate talking over by one or both parties.</p>
Long dash (within text)	<p>Long dash within text indicates a change of direction, either in Q or A:</p> <p>Q. Did you use the same tools – well first, did you see him in the car?</p> <p>A. I saw him through – I went over to the window and noticed him.</p>
Long dash (part spoken word)	<p>Long dash can indicate a part spoken word by witness:</p> <p>A. Yes I definitely saw a blu – red car go past.</p>
Ellipses ... (in evidence)	<p>Indicates speaker has trailed off:</p> <p>A. I suppose I was just... (<i>Generally witness has trailed off during the sentence and does not finish.</i>)</p> <p>Q. Okay well let's go back to the 11th.</p>
Ellipses ... (in reading of briefs)	<p>Indicates the witness has been asked to pause in the reading of the brief:</p> <p>A. "...went back home."</p> <p>The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted.</p> <p>A. "At the time...called me over."</p>
Bold text (in evidence)	<p>If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the <i>first</i> instance only of the interpreter speaking headed up with the word "Interpreter":</p> <p>Q. How many were in the car?</p> <p>A. Interpreter: There were six.</p> <p>Q. So six altogether?</p> <p>A. Yes six – no only five – sorry, only five. (<i>Interpreter speaking – witness speaking – interpreter speaking.</i>)</p>
Bold text in square brackets (in evidence)	<p>If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets:</p> <p>Q. So you say you were having an argument?</p> <p>A. Not argue, I think it is negotiation, ah, re – sorry. Negotiation, bartering. [I think that's what he meant] Yeah not argue.</p>