BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

ENV-2020-CHC-127

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:	28 June 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 of Royal Forest and Bird Protection Society of New Zealand Inc
J Winchester and S Lennon for Te Rūnanga o Moeraki, Kati Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Otakou, Hokonui Rūnanga (Kai Tahu Ki Otago) and Waihopai Rūnaka, Te Rūnanga Oraka o Aparima, Te Rūnanga o Awarua (Ngai Tahu Ki Murihiku) and Te Rūnanga o Ngai Tahu (collectively Nga Rūnanga)
P Page and B Irving for Clutha District Council, Waitaki District Council, Queenstown Lakes District Council, Dunedin City Council and Central Otago District Council (the Territorial Authorities)
J Welsh for Trustpower Limited
H Rennie for WISE Response Society Inc

NOTES OF EVIDENCE TAKEN BEFORE THE ENVIRONMENT COURT

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COURT RESUMES ON MONDAY 28 JUNE 2021 AT 9.33 AM

MR MAW CALLS

SHANE ANTHONY ENRIGHT (AFFIRMED) (VIA AVL)

Q. Good morning, Mr Enright. I'm going to ask you some questions just to confirm who you are and who you're appearing for before I then proceed on to ask you to read out your summary that you have helpfully prepared, but can you please confirm your full name for the Respondent?

A. Yeah, my full name is Shane Anthony Enright.

Q. And you are appearing today in support of a submission filed by Southern Lakes Holdings Limited, is that correct?

A. That's correct.

Q. And Southern Lakes Holdings Limited filed a submission on plan change 7?

A. That's correct.

Q. And you have also prepared, to assist the Court, a memorandum and a set of planning provisions, and the planning provisions that I have are planning provisions dated the 18th of March 2020, and those were circulated in accordance with directions towards the first weeks of this hearing, is that correct?

A. If I understand you correctly, you're referring to the several amendments that I filed with the Court, yes.

Q. Now, just so I'm clear, the amendments that you are seeking to be made to plan change 7, are those still the amendments that are set out in your document dated the 18th of March 2020?

A. Yes, they are, although I have seen some amendments that have been presented, I think, on the 16th of June, which supports some of those, at least, yeah, yeah, already.

Q. Okay. I will likely ask you some further questions about that, but before we get to that point, you confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief?

A. I do.

Q. Now, you have prepared a written summary, and a copy of that has been handed around the Court this morning. Perhaps you could read that summary, if that's what you're intending to do this morning.

A. Thank you. I would like to. I've provided that to the Court, at least, there's a, yeah, a summary or a synopsis of what I would like to present as my evidence.

Q. Okay, if you could proceed with that and then remain for any questions.

A. Thank you.

WITNESS READS BRIEF OF EVIDENCE

"Your Honour, and other court members, I'm representing, as mentioned, Southern Lakes Holdings, which is a farming business today. It's its only activity, so effectively representing the Enright family that has farmed in that region for, you know, many years, came into that region about the late 1800s. I appreciate that the Court is considering water-users in this process and in the formation of the plan change 7, it's most necessary. In my view, it behoves the Otago Regional Council in its application of water management processes to consider not just the environmental implications but the implications on its region and people in its region, in the Otago Region.

Southern Lakes Holdings itself has invested significantly into the use of water resources. We have four small irrigation projects, we've undertaken a considerable number of application processes, and to summarise one application process we more recently applied for, in 2017, that has cost us to date $53,303, simply for the consultant that we've been forced to utilise for that application process, and I think this undermines or explains the complexity of the process with Otago Regional Council today, that someone with two degrees at university is forced to utilise a consultation firm at such an expense. I don't draw any salary, I've never drawn a salary as a director from this farm or Southern Lakes Holdings. I've received no income in the entirety from 2007 to 2000 and, you know, I think, 20, which this is considering, and yet we've spent $53,000 just on the consultants for this process, and that undermines, sorry, I think that helps to explain the level of complexity that we're dealing with with

the Otago Regional Council. However, we are forced to do because these investments are necessary if we are to even consider that the farm would have a sustainable future, and that future, today, is not guaranteed, and I have simply highlighted a couple of examples where the processes for dealing with the Otago Regional Council have been quite difficult, and I guess it's not dramatic to say draconian.

One example is a consent process for the consent that we have, which was number 2692, and my father was informed in 2003 that he was required to renew that water consent, and that is drawing water from an area in the high country known as Humbug Gully. At this time, my father's eyesight was so impaired that he was blind in 50% of both eyes and he was unable to read those documents, and that's unfortunate, but we did inform the Otago Regional Council, and it had very little patience or consideration of the disability.

Under time pressure, that permit or that consent was renewed, but in the process of that renewal of that consent, now referred to as 94655, it resulted in a change in the locations that we were allowed to take water from, and hence a change in the water sources, and that was due to an incorrect Otago Regional Council report on those sources, because the member of the Otago Regional Council producing that report was not familiar with the historical titles of the property and made certain assumptions that my father at the time was unable to really deal with under the time pressure, and that person concluded incorrectly as to their located. Those forced changes at a time when my father was quite vulnerable and resulted in the farm being disadvantaged.

This is one example in terms of my father. I'm sure you've heard other examples from other members or other farmers in the Otago Region. My own personal example was in 2013, I received a notice form the Otago Regional Council that they had cancelled the right to take water from one of our water sources, Dunstan Creek. There was no direct consultation with us at the time, so this effectively came out of the blue, it was quite a shock, quite a concern for

us, because water resources, ultimately, for a farm, are just so integral and important.

So we were forced at short notice to install an irrigation system that was considered, under the Otago Regional Council guidelines, to be an efficient spray irrigation system, and we were forced to do that simply to maintain that water right. The timeframe that we were given to do that resulted in a lack of opportunity for consultation, and effectively, we made a poor choice in that irrigation equipment, and in the end, it was found to be ill-suited to the weather conditions, the environmental conditions, and actually our labour requirements, and that was because the irrigator has been severely damaged by a number of times we had very high wind conditions, north-westerly winds blowing through those areas and we had flood conditions at times where the irrigation tracks have been repeatedly damaged due to flooding conditions, and there forced us to have limited use of that irrigator, and it really does need to be simply replaced with a different choice that copes better with those situations.

That is coupled with the labour shortage in this remote area. There is no accommodation within that area, it's a very remote, old mining town in Central Otago, and so that particular choice requires a lot of labour to utilise it, but had Otago Regional Council taken a more consultative approach with Southern Lakes Holdings as opposed to the measures that it took in cancelling the water resources at short notice, this farm would have been must better served by simply the time to research better solutions and would have made more efficient and effective use of those water resources within the Otago region, and for sustainability of a farm in the Otago region.

What we see plan change 7 doing now is it assumes that the volume measurements are also reported from a point of take over the national communications networks. It assumes that there is access to communication networks that enable you to communicate effectively the water usage. In our region, we don't have that, you know, we're in a remote area that doesn't have a mobile network, for example, and there isn't New Zealand or Otago regional

communications infrastructure available to us in that area, but plan change 7 doesn't acknowledge these basic infrastructure issues, and it does not, therefore, accommodation in plan change 7 that there are large data gaps where water usage has not necessarily been able to be communicated and recorded. Coupled with the practices of Southern Lakes Holdings on this particular creek, we are part of a community of water users, and in this case, we have voluntarily reduced our water usages over time in order to favour other users on the water scheme, and that has an impact, also, in the calculation of an annual volume limit.

Plan change 7, in its present form, in this case, it's clause 10A.4.4, which is a method for calculating the annual volume limit, if we consider that in its present form, it would render this irrigation system ineffective in a dry summer, and I'm referring not to that clause in the form that it was originally when plan change 7 was announced, but in it's form as put forward on the 16th of June this year, which was recently reduced. It doesn't consider the limitations on use of some irrigators because of exceptions such as severe weather conditions where they are regularly damaged, flooding conditions, high – and I am referring to very high – north-westerly winds that come through our region. They belt through. What they do with our irrigators is they tip them over; they damage them severely. We have limited engineering resources in this remote region to repair them and limited labour opportunities there. From our point of view, that small irrigation system, which was a response to Otago Regional Council processes, would have cost today $250,000, and it ultimately is integral to the operation of our farm and its sustainability.

What Southern Lakes Holdings and my family is effectively seeking, and it is detailed in its submissions, which we put on the 26th of February this year, in terms of amendments to plan change 7, is simply to recognise that there are exceptions when making calculations to annual volume data that cannot be reasonably expected to represent the volumes that are actually taken, because there are data gaps, and so there is more water taken than can be recorded, because we don't have communications infrastructure necessarily in place, and

therefore, we have to rely on small companies and the limitations on that equipment, which isn't always reliable, and it doesn't represent the design of those irrigators, which are necessarily designed to deliver the minimum amount of water to sustain plants so that they can remain alive. If we simply use just the limited amount of data available and we calculate our annual volume limits, then those annual volume limits are significantly lower than what we actually need to sustain those plants in those paddocks, and which the irrigators are designed to deliver.

I just wanted to refer to the inclusion of deemed permits relating to the damming of water and the discharge of water. These are consents that are important to many users in the Otago region. In relation to our experience with the Otago Regional Council, we were required to upgrade the efficiency of our water irrigation system from what was effectively flood irrigation to a more expensive spray irrigation, and so, again, significant investment has been made to develop for our farm, the ability to take water, to convey water across large regions of the property, because we are in the high country, to store water, and then to install irrigation infrastructure. So Southern Lakes Holdings has invested into a storage dam that is very integral to that spray irrigation system. We have two centre-pivot spray irrigators. Without storage, we would not be able to sustain those irrigators over a dry summer, simply because the water sources are inadequately available to continue the irrigation without storing water.

The irrigation equipment on two of our irrigation projects are now completely dependent on the storage dam, and those new irrigation systems have taken five years to fully develop because it takes five years to develop pasture, the paddocks, and the fencing systems to match those irrigators to do this economically, yet those permits are now under review, and that would effectively devastate those irrigation systems if those rights or permits were to be removed, so it seems critical that we consider removing from plan change 7, at least, the deed permits with respect to dams and water discharging from those dams. That is our recommendation for plan change 7, to remove the deemed permits relating to dams and discharge from those dams.

Plan change 7 – and I am referring to the calculation of monthly volumes in this case – calculates, or proposes to calculate, the monthly volume usage over the arbitrary calendar month, so, in the case of January, 1st of January to 21st of January, and this doesn't really represent at all a weather pattern. It has no relationship or bearing to a weather pattern. In other words, if you have a dry months, it may be from the middle of December to the middle of January, and so, in another year, it might be from the 1st of January to the 31st of January, but I think it's quite clear that weather patterns don't follow arbitrary calendar months, so that when we calculate the water that we are using over calendar months, that reduces the representation of what is actually needed by those irrigators.

It seems also unnecessary to calculate this way, because modern computers simply have no limitation to aggregate the water usage requirements of users over a moving 31-day window. There are no limitations of computers to doing that, it is a very basic calculation, it is a common calculation to have a moving window, and so that is why we have highlighted that amendments be made to plan change 7, and, your Honour, I am referring to clause 10A.4.3 in plan change 7. We are recommending that we remove the definition of that month from a calendar month to be more representative of a period of 31 days or, technically speaking, it is a moving average window of 31 days, and that would be more reflective of measuring the water usage and the weather patterns in Central Otago. It would also limit the opportunity for underestimating the calculation of water needs by users.

Lastly, I wanted to make some comments on plan change 7 and its limitations for new irrigation areas. In the case of our farm, our family farm, or Southern Lakes Holdings have already designed for and commissioned equipment to extend the irrigation area, so we have put in pipes underground, we have put in infrastructure within our pump sheds to allow for the use of our water permits to have an additional area. We have brought on an irrigation area of perhaps 40 or 50 hectares, and it has been uneconomic for us at that time to fully install

all of the equipment necessary to irrigate the entire area, which would be 90 hectares, but we have invested already that money and that infrastructure for those increased areas of irrigation. What we are seeking from amendments to plan change 7 is that it recognise those already undertaken investments and the infrastructure that has either been installed or commissioned or in use prior to plan change 7 being notified.

Thank you, your Honour, that is the full extent of my evidence this morning. I appreciate you considering it.

THE COURT: JUDGE BORTHWICK

All right, Mr Maw has some questions for you, and then we will see whether or not the members of the bench have likewise.

EXAMINATION: MR MAW

Q. Thank you, your Honour, and good morning again. I do have some questions, and I thought I might start with understanding a little more about the irrigation set-up on the property. You have talked about two centre-pivot irrigators. When were they installed?

A. The centre-pivots were, sorry, installed in December ‘14 and January ‘15.

Q. And they’ve been operational since that time?

A. They’ve been at various stages of operation. Mr Maw, you might appearance that in a high country element, there are a lot of landscape barriers to putting a large irrigator on that property. There are significant a number of tree breaks, hillsides, creeks, all matter of landscape problems, so the progression of those irrigation systems have taken a considerable number of years in order to develop their travel, very expensive getting in excavators and earth-moving equipment and all manner of, can I say, physical barriers getting those implemented, so they’ve been in various stages over the years. They aren’t entirely complete even today.

Q. When you think about the period of time, September 2017 to March 2020, in terms of the full extent of irrigable area with respect to those two pivots, would most of the area have been irrigated during that period?

A. Well certainly by 2020 most of the area has been irrigated yes. Not at the initial stages, they would start with perhaps 10%, then move to 15% as we physically worked on those lands and redeveloped the lands which – and removal of trees and put in crossings that for creeks, many creeks and you've got, let's say, I don't know, maybe 30 wheels or 15 crossings to make.

Q. And if I'd asked you to shade for me on a map the area of, the maximum area of land under irrigation over that three year period, you'd be able to do that for me?

A. Yes, I would over the – over any particular period I'd be able to give you an estimate of that.

Q. Now you also mentioned that there had been some further investment made with respect to future areas of land that your company would like to irrigate and you mentioned that some investment had been made into pumping infrastructure. Have irrigation mainlines also been installed with respect to those future plans?

A. That's correct and that's what I was highlighting earlier when I was presenting, is that the piping has been installed with consideration of those irrigation systems, so that isn't already installed under the ground, the – we have the evidence to back that up of course, we have the engineering designs for those areas, it's really pretty obvious that that's what our intent was, this was not something where we're considering as an afterthought, the engineering reports show the amount of water that can be – that can travel within those piping systems and those piping systems are designed for an increased capacity of water and they are necessarily designed that way, but they are necessarily more expensive. So, had we not considered irrigating those larger areas, our costs would have been significantly reduced because we simply would have used smaller pipes than were required and that considerably reduces the costs involved.

Q. Now I'm interested in the storage dam that you mentioned. When was the storage dam installed?

A. So the storage dam is actually an old mining dam in our case and so that was effectively installed many, many years ago, we've been fortunate to leverage an old mining dam but we've had to make changes to that dam of course in order to provide for the water being stored in it and securely being installed in it and being discharged from that dam.

Q. And have you had to get any additional Resource Management Act permits with respect to that dam?

A. Fortunately not, unless I don't recall needing to go through any process with that dam, no. I don't recall having any, no.

Q. And when you mention discharges from that dam, those discharges into a water race with respect to connecting up your irrigation infrastructure or are they discharges into the stream or water body that the dam is in?

A. So I'm not sure I fully understand the question, but I think perhaps I can answer it anyway, the water comes via an old mining race into the storage dam and it is discharged into that creek which then returns to the main body of water which is in this case Dunstan Creek, it's a large body water downstream.

Q. And so the dam is authorised by the old mining deemed permits, have I understood that correctly?

A. I understand that is correct, yes.

Q. And when you made the investments in the infrastructure relying on that dam, you were aware that those deemed permits were expiring in October 2021?

A. I wasn't aware that they would be expiring, no. I was aware that they would be perhaps under review.

Q. Now you talked about some of the challenges that you may face in respect of gathering the necessary data to show the amount of water that has historically been taken and you referred to various weather events and the challenges that those pose. In terms of the rule framework that has now been recommended jointly by the expert planners, they have recommended the introduction of a restricted discretionary activity pathway which will apply where there are gaps in the dataset such that the controlled activity pathway is not available. Are you aware of the

restricted discretionary activity rule that has been recommended? Is that something you've had a chance to look at?

A. There is, well that's some frustration for me because I have requested it from the Otago Regional Council directly and in fact if you look at my, were to have the opportunity to look at my preliminary submission to the plan change 7 system, which I submitted, obviously some time ago, some time in 2020, there was a recommendation that – sorry, I just need to take a little time to find that request. Right so on the very end of that which is in this case page 6 of that submission, I highlight in a box on that page, quite happy to allow you time to find that if you'd like.

1020

Q. Can you just describe really precisely what it is you're looking at, so we're all looking at the same document?

A. So this is the preliminary submission dated 25th of March 2020 by the our family's Salt Lakes Holdings in response to the invitation to respond by Otago Regional Council on plan change 7.

Q. So have you had an opportunity to consider the restricted discretionary activity rule recommended by the planners or is that not something that you've had an opportunity to consider?

A. Well as I say and it says here in that submission, I – because there was notice and there was an email and notification of plan change 7 which stated, "there is a rule for activities that do not have five years of data and that do not meet not planned criteria for a short term consent". So this is what I'm presented with by Otago Regional Council and I highlight in a box on my document, specific rules are required that make clear the treatment of activities where there is not five years of data available and I have recommended that, in that same box, that submissions should remain open until these have been available for consideration and specific policy should be added with consideration given to high country operations where national infrastructure which I was referring to before in my evidence are not available to accommodate the level of measurement required and to my knowledge there has been no release or response from the Otago Regional Council on that submission that have released

this specific rules to – that would govern where data is not available. So, I hope that answers your question, we certainly made a request for this.

Q. Have you read any of the outputs from the planner's joint witness conferencing that has taken place throughout the course of this hearing?

A. I've read the recent appendix to which was released on the 16th of June, yes.

Q. And when you read that appendix did you see that there was a restricted discretionary activity being recommended to deal with situations where there was insufficient data or a data gap?

A. Can you guide me as to where that is in that appendix?

WITNESS REFERRED TO RULE IN APPENDIX

Q. Sure if I can take you to do rule 10A3.1A.

A. Yes?

Q. And if you tracked down through that rule you will see there that the council have reserved its discretion to consider whether water meter data in combination with other relevant methods and data as agreed with council, accurately represents…

A. Sorry Mr Maw which clause is this?

Q. Sorry it's over the page, if you're tracking down and I'm looking at a sub-paragraph (a) under a heading that the "Council will Restrict Its Discretion to the Following Matters".

A. So this is – sorry we're still going to 10 point…

Q. 10A.3.1A.

A. Okay I don't have that in this, a capital A. I've got 10A.3.1.

Q. It's possible we're looking at different versions of the document. What's the precise date on the one that you're looking at?

A. I thought it was the 16th of June – sorry, as at 18th of June 2021.

Q. Does that version have some blue shading in it in terms of the provisions?

A. Yes it does.

Q. Right I think we are looking at the same version. So, if you scroll down to rule 10A.3.1A.

A. Existing, okay I've found that now, yes.

Q. And you'll see within that rule there is some grey shading sort of on the next page?

A. Correct.

Q. And then I'm drawing your attention to the second box shaded grey that commences with, a sub-paragraph (a) and then a roman i.

A. Right I'm with you, thank you.

Q. Now this rule is intending to respond to situations where insufficient data is available for a variety of reasons and it seeks to provide a pathway for consideration of the use of other relevant methods to establish the amount of water taken historically.

A. Yes, it's unclear to me the intent of that or what the rules are on reading that. It says it will restrict its discretion, I'm not sure that that gives us any guidance on how it will apply that discretion which was the subject of our request in the first instance because it's a considerable concern for us. We would like to understand the policies and how regional council might apply consideration for water usage or water needs or investments into water usage. It's very unclear from that paragraph how it might consider the application's discretion and that's essentially it, I mean it's the nub of the concern here is we have no guidance on that and from our family point of view we have no ability to consider the impact of that on our sustainability of our farm.

Q. Now you mentioned in your summary this morning, where you highlighted some concerns with the way by which the monthly volume was to be calculated and you described the reference to a calendar month as somewhat arbitrary. Have you had an opportunity to test any real-world examples of the differences between a rolling 31 day average and a calendar month average?

A. Yes, I have and I apologise in the (inaudible 10:28:18), I'm an engineer and inherently have used these mechanisms because they are quite common in my field of endeavour. I did provide considerable evidence regarding the weather patterns in the Otago region in my submission. I drew these weather patterns directly from the national database for weather patterns, so we fortunately have a national weather station and

Lauder which is maybe 15 minutes from us and I drew data from that and I put that into my submission – my preliminary submission on the 25th of March. So, yes I have been able to test that but I – and in addition to that the use of a moving average to represent any phenomena or any scientific or natural phenomena, use of a moving window, averages are very common measure rather than having an arbitrary timeframe that doesn't relate at all to the natural pattern that we are observing.

Q. Thank you. I have no further questions. If you could please remain for questions from the Court.

A. Thank you, Mr Maw.

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK

Q. Thank you very much for coming and getting up so early, we will consider everything that you have said including your original submission, so thank you very much.

A. I appreciate that consideration, thank you, your Honour.

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

So we're moving to the joint empanelment of the priority witnesses. Okay, so everybody who is participating, if you can come forward?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Actually I meant to ask you Mr Maw. Did you think Ms King would be empanelled now or later given that she makes but a few comments, but critical comments and then she gives this detailed brief, how do you want to handle that?

A. Both. I thought that given that she participated in the conferencing, that I might have her participate in this discussion but that it – she would then be called separately in relation to her brief.

THE COURT: JUDGE BORTHWICK

Q. Anyone got any issues with what Mr Maw proposes? All right, fine, well very well, we'll do that.

TOM WILLY DE PELSEMAEKER (AFFIRMED)
SALLY ANNE DICEY (AFFIRMED)
MURRAY JOHN BRASS (AFFIRMED)
TIMOTHY ALLISTAIR DEANS ENSOR (AFFIRMED)
SIMON SHIELD WILSON (AFFIRMED)
ALEXANDRA LUCY KING (AFFIRMED)
SEAN WILLIAM LESLIE (AFFIRMED)

MR MAW:

Q. Good Morning witnesses. What I thought we might do to start is have each of you starting with Mr Brass, confirm your full name for the record and at the same time confirm that you participated in joint witness conferencing and produced a joint witness statement dated 18 June 2021 and that you are a signatory to that document which you can confirm perhaps by simply saying I do. So starting with Mr Brass?

A. **MR BRASS:** My full name is Murray John Brass and I confirm that I was part of that conferencing.

A. **MR DE PELSEMAEKER:** Good Morning, my full name is Tom Willy De Pelsemaeker, and I can confirm as well that I was part of the expert conferencing and a signatory to the joint witness statement.

A. **MR ENSOR:** My full name is Timothy Allistair Deans Ensor and I was also part of the conferencing and a signatory to the JWS.

A. **MS DICEY:** Morning. My full name is Sally Anne Dicey, and I confirm that I was party to the 18th of June expert conferencing, JWS.

A. **MR WILSON:** Morning. My full name is Simon Shield Wilson and I confirm that I was a party to the JWS.

A. **MS KING:** Good Morning. I'm Alexandra Lucy King and I was also a part of the JWS on the 18th of June.

A. **MR LESLIE:** Good Morning. My name is Shaun William Leslie. I confirm that I was party to the joint witness statement on June 18th.

Q. Thank you, now looking at the front page of the joint witness statement it is clear that perhaps you are and appeared and participated in the conferencing in different capacities. Now the four witnesses on the left participated at planners in terms of that conferencing and my understanding is that the three witnesses on the right starting with Mr Wilson participated not as planners but as technical witnesses. I'd be assisted if, starting with Mr Wilson, you could explain the basis on which you were participating in the conference?

A. **MR WILSON:** So, it was as a technical witness. My team is involved in the initial rounds of compliance when it comes to working with water users, so we do the initial assessments and we'd in the context of this deal with receiving the notifications, forwarding it on if it was the Council's role to do so, etc, so I'm not part of the compliance team but I do work closely with them, so I participate in that capacity.

Q. And Mr Leslie, my understanding is you are also in that team and appeared in a similar capacity?

A. **MR LESLIE:** That's correct and in addition to that, I was pulling data from the ORC's databases to feed directly into the conferencing.

Q. And Ms King?

A. **MS KING:** Hi Alexandra King. So I was there to assess the provisions in terms of the consenting function.

Q. Thank you. Now you have prepared a joint witness statement, are there any corrections that need to be made to that statement?

A. **MR DE PELSEMAEKER:** There is one. It is a tiny typo. It is, sorry, I'm just getting to the relevant clause. It's just above the controlled activity rule. It's under the heading 10A.3 Rules, note 3. And under note 3, the second line, entry condition 7, that should probably be entry condition 8.

THE COURT: COMMISSIONER BUNTING

Q. Could you just repeat that to me?

A. **MR DE PELSEMAEKER:** Yes, absolutely. Under the heading 10A.3 Rules. There are three advisory notes, the third one on the second line, you have reference to entry condition 7, and that should be entry condition 8.

EXAMINATION CONTINUES: MR MAW

Q. And all witnesses agree that that correction should be made? And, subject to that correction, do you all confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief? For the record, all witnesses so confirmed. Now, Mr de Pelsemaeker, I understand that you have prepared a brief powerpoint presentation in – highlighting the recommendations which have arisen following this joint witness conferencing. If it would assist the Court perhaps Mr de Pelsemaeker could take the Court through –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Sure. Do we have written copies of, hard copies of that?

A. No. We can –

Q. It's easy enough obtained though. Okay. Right, thank you.

MR DE PELSEMAEKER:

Thank you. I'll go through it quite quickly. When we started off the expert conferencing, the planners go together in advance 'cos we had limited time and the first thing we did was actually go back to the different options that had been discussed in the Court and look at them with a fresh set of eyes and going back through the Court records and the transcripts, we were able to identify four different options really. The first one is to do nothing scenario, which in a way the benefit of that is it's probably the simplest solution. It would keep the whole rule framework very simple and it would achieve the outcome of having a simple and cost effective process, but the cons of that is that really there is a risk that you're actually not achieving your goal of enabling existing activities to continue on the (inaudible 10:39:17) scale because abandoning the priority system might actually result in some people losing reliability of supply. The other thing as well is it might be an impact on flow regimes and, therefore, you might loose in a number of streams some high values as well. So in that regard, that option didn't really achieve two pillars of the plan change really which is like making sure you don't lose any further environmental values and allowing existing activities to continue. The second option we looked at was relying on a voluntary approach so stimulating catchment or water users to organise themselves in catchment groups and develop flow sharing agreements.

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That has some clear benefits, you'd allowed them to work together on a flow regime that they can all live with, from a council point of view as well, it removes some of the difficulties in terms of implementing a system that tries to replicate priority rights. The problem there is that and we've heard this through evidence as well, when people – when water users develop a flow regime, it takes seasons sometimes to trial that. So it takes a lot of time to develop it and we've heard also that you need a flow trigger – sorry a trigger to kind of instigate it. Like an incentive for people to come together. And that brings us back to the need for a minimum flow so in absence on information to kind of set those minimum flows in all the places where they are needed, that did not seem a viable option as well. Or not the best option.

The third option was to set minimum flows on the main stem of the Taieri and the Manuherikia and I believe we discussed it previously in Court as well. It would help to maintain the flow regime in the main stem but minimum flows, as I said before they don't provide much guarantees in terms of preserving flow regimes in the tributaries. Especially in the Taieri and the Manuherikia where flow regimes can be determined by how much water is being released from a dam. Also it would mean that in a number of instances in those catchments and specially thinking about the Taieri, a lot of deemed permits have already been replaced. So you'd have to rely on a section 128 review for those consents and again, but both the second and the third option, you'd actually end up with flow regimes that everybody can agree on or that are clear and transparent. But it actually are different from the flow regime that exists now.

So, then we actually landed on the fourth option which is just to amend the policy and rule framework in plan change 7 to put an instrument in place that tries to not continue the priority rights but replicate the effect that rights of priority currently have on flow regimes. There are some drawbacks and you're probably hear from Ms King and Mr Cummings later on. It puts – for council there are significant implications, also for water users but when it comes to finding an instrument that replicates that flow regime, we came to the conclusion that that is probably the best option, so we worked on that basis as well.

So translating that option into an amended framework for plan change 7, we thought we need to amend the policy first, policy 10A.2.1 and put in it additional limb which basically says, "avoid granting consents except where on the new consents the effect of right of priority is replicated", then we it comes to the rule framework, what we arrived at was to have an entry condition and the controlled activity rule and also in the restricted discretionary rule, that basically requires the applicant to propose in his application, a condition that replicates the effect of rights of priorities. And then also we proposed to set new matters of control and discretion in those respective rules as well. We also thought it would be useful to define what a right of priority is, and we based ourselves on some of the language that is in the Water and Soil Conservation Amendment Act.

One of the other outcomes of the expert conferencing is that we also started working on draft consent conditions. The planners came up with a draft consent condition – two actually. One for the dominant consent holder and one for the subservient one, and both are different. To make or to kind of streamline the process we thought it would be a good idea to include that proposed condition or those proposed conditions into the application form. And an example of the application form is appended to Ms King's evidence. And my understanding is also that there have been subsequent amendments proposed by Mr Cummings and Ms King as well to make those conditions more workable from a regulatory staff and an enforcement point of view. One of the other things that we looked at was the feasibility of developing a schedule that sets out the priorities to provide transparency to plan users being either people that want to apply for a new consent or consent officers processing those consent applications, and I tried to do that myself, I picked out three examples, Pig Burn, Small Burn and then also I tried to do Low Burn. And what I find was it works quite well when you are dealing with a small catchment with a limited number of deemed permits with priorities. It becomes quite time-consuming when you are trying to look at more complex catchments.

Now, that is not the biggest hurdle. I think the biggest hurdle is that in the end, it is the objective of having a schedule is to provide transparency and what I've found with trying to tackle the Low Burn is you quickly, actually get into a situations where it is very difficult to provide transparency in a written document. One of the reasons is because what I found in – it is probably not an isolated instance as well is that the priorities often, they exceed, or they go across catchment boundaries as well. For example, some of the deemed permits in the Low Burn have priorities that link back to priorities in Roaring Meg, so it becomes quite complex to kind of show that in a written or in a printed format.

The other thing as well is when I was doing schedule – trying the schedule, I use information from the consents database. When we previously discussed it, there are some inaccuracies especially when it comes to the historical

information that has been put into the database, so there is a risk that you are relying on incomplete or inaccurate information and then there's me also as well trying to translate it into a schedule, the risk of human error. And when you compare that to the actual deemed permits which – or the mining privileges that often have those priorities listed on them, in the document itself, you probably have better assurances in terms of accuracy and reliability when you go straight to the original documents than to go to the schedule. And that information is actually readily available for permit holders on their permit document. So, my experience from doing that exercise was that it's not a straight-forward process and you could actually create confusion by having a schedule that is not fully accurate and also within time, things will change quite quickly as consents get renewed or deemed permits gets renewed, so it needs to be updated very, very regularly so yes, there's that risk and I think my colleagues as well, they tried to do it as well and I think they came to a similar conclusion almost, so it's better to rely actually on the actual consent documents, in my opinion.

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Now I think it would be fair as well to kind of not ignore the concerns that have been raised by my colleagues as well, Ms King and Mr Cummings in their briefs of evidence. As I said before, there are implications for Council in terms of data management, enforcement role, you might as a councillor you also have the risk of getting involved in conflict mediation. There are implications for permit holders as well. it will mean for them that they might have to make sure that their water meters are telemeters which is currently not the case and not everywhere the case. Telemetry is required on the regulations but it's going to be phased in so what it means is that water users in some cases might have to fast track that process and put in telemeter water metres earlier than required. Also, depending on the option that we go for in terms of fine tuning the consent conditions, one of those suggested options clearly shows that there's a significant burden of proof on dominance consent holders that want to rely on their conditions and then finally it make it in some cases it can make the application process more complicated as well. Again that's illustrated in Ms King's evidence, especially where you're dealing where – with application processes where deemed permits are proposed to be split across different

shareholders and they don't come in all at the same time or where deemed permits are with a different priority status, are proposed to be amalgamated into one consent, so, and that's where I'll leave it at that but we are all happy to take any questions.

CROSS-EXAMINATION: MR MAW

Q. Thank your Mr de Pelsemaeker. Just a point of clarification, you noted that the witnesses agree that option B, the recognising the effects of priorities was the preferred option. Now my reading of the joint witness statement was that the planners had recommended that option, but perhaps the technical witnesses had preferred an alternative option. Have I read that correctly?

A. **MR DE PELSEMAEKER:** That's correct, yes. Yes.

Q. What I might do, I have some questions just to explore, the joint witness statement and on the way through that process I'd like to tease out perhaps some of the underlying differences between the planners and the technical witnesses to perhaps better understand the positions that each of those two groups had reached throughout the conferencing. So to start that process I'm interested to hear firstly from the planners, some further information in relation to why option B, and I'm referring to paragraph 1B in terms of the option that had been preferred, as to why that option had been preferred and I'm particularly interested in the planners addressing both the efficiency and the effectiveness of that option, so perhaps we might start by understanding when the planners were considering the efficiency of that option, what is it that they had in mind when considering that that was in their minds the most appropriate option?

A. **MR DE PELSEMAEKER:** Sorry, I'm collecting my thoughts. In terms of efficiency and effectiveness, that assessment is against the objective of the plan change and that is to transition towards a new regime promulgated under the new planning framework and as I said before, the efficiency with which that transition can occur is dependent on us not having to – or not losing ground in terms of the state of the environment

and I think if we replicate the effects of rights of priorities of all the options considered, that is probably the best mechanism to ensure that those values that we're trying to protect and that we're trying not to lose during that transition period that they are actually protected or maintained.

Q. So when you're giving that answer, are you thinking about efficiency and effectiveness essentially as a concept conjointly or are you focusing just on the efficiency point in terms of the answer you've given?

A. **MR DE PELSEMAEKER:** What was conjointly, yes I would also say –

Q. So I –

A. **MR DE PELSEMAEKER:** Yes, sorry.

Q. I'm looking just to understand whether – what the considerations taken into account in relation to efficiency, we'll come back to effectiveness once we've perhaps understood the efficiency component?

A. **MR DE PELSEMAEKER:** Yes, well the efficiency component as well and that's what I wanted to add onto that, we tried to come up with a planning framework that provides a pragmatic response in terms of keeping to control the activity pathway as simple as possible as well and that it's just by putting it on the new consents that replacing permits as a standard condition and it is basically up to the dominant consent holders to enforce – not to enforce but to rely on those consent conditions.

Q. Mr Brass?

A. **MR BRASS:** I guess from my thinking in terms of efficiency, the preferred approach is probably not quite as efficient or simple as simply ignoring priorities entirely, but I would consider it to be the second most efficient in the sense that it's an existing regime which is already documented in terms of existing priorities and which consent holders are well used to operating under and from that point of view is, therefore, more efficient than the two other options which would have required developing something that wasn't yet in place, but having said that, while it was the second most efficient in my mind, the effectiveness considerations then changed my view in terms of which is the preferred.

Q. Yes and we will come back to the effectiveness. Mr Ensor, Ms Dicey, are there any additions you'd like to make in terms of efficiency of the option?

A. **MR ENSOR:** No, I concur with Mr Brass' conclusions there.

A. **MS DICEY:** I agree. I think Mr Brass has put that very, very neatly.

Q. We'll move on then to understanding the effectiveness component. I'm interested to understand what it was that the planners had in mind when they were thinking about effectiveness. So what was being taken into account and then how was that – how did the taking into account of those components contribute to the recommendation in terms of the preferred option?

A. **MR ENSOR:** I think key for me was in relation to the objectives referenced to a transition rather than a step change into a new regime, so in terms of it being effective, it needed to, the recognition of priorities was key to transitioning through to a new regime, a new unknown regime by for want of a better term, maintaining a status quo of sorts as opposed to a – what could potentially be a step change through loss of priority where hydrology or the flow regime may change significantly from what is occurring currently. So that was a key contribution in my mind to the effectiveness of including priorities.

Q. Do any of the other planners have an addition to make in terms of what they had in their minds when considering effectiveness?

A. **MR DE PELSEMAEKER:** I agree with Mr Ensor. I would also say that one of, yes, well part of the objective of the plan changes as well to enable existing activities to continue as they currently are and it also, so carrying over or replicating the effect of rights of priorities assists in that regard as well.

THE COURT: JUDGE BORTHWICK

Q. We'll finish that line of questioning and then we'll take the morning break. So Ms Dicey, did you want to add to that?

A. **MS DICEY:** I agree with both my colleagues on that matter. I think the effectiveness was the real driver for this preferred option. It's really the only option that supports existing activities to carry on with regard to priorities and covers off the kind of, the dual concerns of the access to

water retaining existing access to water plus protecting potentially some of those flow regimes and related effects from those flow regimes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. When you say the related effects, are you – do you have in mind the incidental environmental benefits?

A. **MS DICEY:** That's correct.

Q. Any other comments from any of the other planners in relation to the effectiveness? Well, perhaps we'll press pause for now and take the morning adjournment.

COURT ADJOURNS: 11.01 AM

COURT RESUMES: 11.20 AM

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now before the adjournment, we were exploring the efficiency and effectiveness of the option recommended by the planners who participated in the joint witness statement conferencing, I'd now like to explore the same subject matter with the technical witnesses who participated in the joint witness conferencing and I have my eyes on paragraph 3 of the joint witness conference where Ms King, Mr Wilson and Mr Leslie consider that option 1A is more efficient and effective and just for the record, option 1A is the option which simply results in the rights of priority ceasing to have effect on 1 October 2021. So in a similar way to the way I explored it with the planners, I'd like first to understanding what the technical witnesses had in mind when they were thinking about the efficiency of the options and how that informed their recommendation that option 1A was more efficient?

A. **MR WILSON:** I guess focusing on efficiency, and Ms King can speak from a consenting perspective, but from a compliance and enforcement perspective, we didn't consider that Option 1B would be efficient. So it wouldn't be easy to implement.

A. **MS KING:** So from a consenting perspective it's – I considered it more efficient to not include priorities because it's less information that both the applicant has to supply and their counsel then has to then consider.

Q. Mr Leslie anything different?

A. **MR LESLIE:** No not really.

Q. So the efficiency consideration was really one about the extra steps that would need to be taken both by consent applicants in preparing their applications but also with respect to the Council in processing those applications and then perhaps a third limb, the enforcement, the extra enforcement that may arise?

A. **MR WILSON:** And potentially the – depending on what the clause is read, the extra steps that the consent holders would have to jump through in order to enable that enforcement.

Q. If we move onto effectiveness, what is it that you had in mind when you were thinking about the effectiveness of the provisions?

A. **MR WILSON:** So for me it was more that I have yet to be convinced that Option B would be effective at continuing the effects of the current priorities.

A. **MS KING:** And I agree and in terms of effectively transitioning these permits for a short term I, in my opinion it's more effective that the priorities weren't included.

Q. When you were thinking about effectiveness did you have in mind the incidental environmental benefits that may accrue with the priorities coming down?

A. **MR WILSON:** I guess my take on it is that I'm not sure, and we discuss it further in the document, but whatever we put in place to replicate priorities, may not necessarily replicate the effect of the priorities as they stand today, there will be some permits that have priorities that have already been renewed and, therefore, drop out of a chain, there will be others that aren't being renewed, there may be some that currently collectively hold a priority which are then split up so it's easier for them to exercise, so I'm not convinced that – and it's getting outside of my area

of expertise but I'm not convinced that you will replicate the same effects as the current priorities give you.

Q. Now before we move on from the efficiency and effectiveness assessment, you have included quite helpfully in the joint witness statement, at Appendix 1A, section 32(a)(a) analysis of the various options and there was one part that caught my eye in that assessment and I'm on page – oh the first page of the appendix and I'm looking at option 2 which is the option that has been recommended by the planners and in the box on the right-hand side there, there's reference to the risk of acting or not acting and sufficiency of information and there's reference there to or there's a statement that there is sufficient information available to understand the importance of priority rights in some catchments and it was the reference to some catchments that caught my eyes there and I was interested to understand what information you were thinking about when you were thinking about or used the phrase "sum catchment" so how widespread in your mind is the issue that you're trying to address by the option that you've recommended?

A. **MR DE PELSEMAEKER:** I think that's the issue that we've been grappling with all along since we started this discussion, is that we have evidence that priorities are being exercised, we have evidence that in catchments or in water bodies where there are deemed permits with priorities, there are also galaxiids but they're like snapshots really, we don't have a whole overview of how widespread the problem is because it's a risk that we can't quantify. I tried to quantify it but it's really hard to do it. I think we cannot act given the significance of the values that are involved. I, personally I have tried to kind of I guess confine the scope, geographical scope of this and also I think in light of the concerns raised by my ORC colleagues as well, I think it's probably something that we need to keep alive. In the past I tried to – I talked to Ms Dicey and Ms McKeague as well trying to actually identify the catchments or the water bodies where priorities effectively being exercised but that is a very hard exercise and it is without contact every single deemed permit holder individually, you can't really speak on their behalf. Also, yes, it's a

subjective matter. More recently, actually over the weekend and on Friday, I tried to explore another avenue which is to identify the catchments where galaxiids might be or where there is a high likelihood of them being and I have to say we've heard previous evidence at the start of the hearing that our knowledge as to where they are occurring they're specific distribution is not 100% complete, so we have a general feeling based on Dr Allibone's evidence, he indicated we have a general idea of their distribution, where exactly in water bodies they are, we don't know that everywhere but I think if that is definitely something that is worthwhile exploring, I actually talked to a freshwater ecologist at the ORC last week and asked him to assist me with a process of eliminating, I've got to take my notes but we did actually make a list of all the catchments in the Clutha FMU and the Taieri FMU which are the key ones where you have priorities and where you have galaxiids. Now there are also some priorities my understanding in North Otago and there might be some galaxiids there as well but what we managed to do that there was actually narrow down the number of water bodies quite significantly. Just to give you a bit of an idea and again those numbers are very preliminary, when we look at the number of water bodies and catchments and those two FMUs, they have surface water takes on them, we've got approximately 500 water bodies divided over nearly 60 catchments. When we eliminated the ones where galaxiids do not exist or are unlikely to exist, so we only keep the ones where galaxiids have been recorded or where there is a potential that they'll be, and also we eliminated the catchments like the Lindis and I believe the Luggate as well, where the deemed permits have already been – they are still current but the replacement consents are in place, then we arrived at a list of 88 water bodies and again, approximately a dozen catchments. So it narrows it down significantly. I think there is opportunity to narrow it down even further, by eliminating catchments where there are deemed permits but none of the deemed permits have priorities or where's there's only one deemed permit where the priority left and that is not an inconceivable scenario because a lot of those little water bodies only have two or three

maximum deemed permits on them. I also must say that we had very limited time, we didn't through the Taieri catchment as well, so we might be able to eliminate a number of other water bodies in that FMU. That helps us to identify where priorities can be carried over in order to safeguard in-stream values. I acknowledge that it's not a full response to the problem because in a number of catchments, the benefit of having priorities is more focussed on a water user outcome and keeping the reliability of supply.

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Q. In terms of the other planners and perhaps technical witnesses is there anything that you'd like to add in terms of reference to the "sum catchments" is that phrase is used in the table?

A. **MR BRASS:** And I would agree with Mr de Pelsemaeker that there will be some catchments where the issue doesn't arise but for me, the key thing was that there is sufficient information to understand that there is an issue in at least some catchments where the loss of priorities without some replication could lead to loss of quite significant values which I guess, sort of leading into the other part of that assessment there, is that there is a risk of not acting if priorities are not replicated or managed in some way. There are values that would be at risk, as a result.

A. **MS DICEY:** Agree with Mr Brass' comments. In addition in terms of the sum catchments, one of the key ones that we heard quite a bit of evidence about I think, was the Manuherikia. And that related not just in terms of the loss of indigenous species values but also water user access to water and the potential to upset the status quo of sorts within that catchment. And that of course affects a large number of water users, I would have concerns about potentially eliminating some or only focussing on catchments with galaxiids, (a), potentially because we don't necessarily always have the information about where those populations are but also that doesn't address the water user access component of the priority system.

A. **MR ENSOR:** I just briefly comment on the "sum". For me that was recognition that we couldn't put "all" in that statement, we didn't have a

level of understanding about the environment to say all. And we understood that there was enough of an issue to address it and Mr Brass has touched on that but that's why "sum" is used in my mind.

Q. Okay, I'm going to move on now to the provisions that have been recommended and to that I thought we might usefully start with the addition that's been recommended to policy 10A 2.1, it helpfully highlighted with blue shading within the joint witness statement. And the question that I have in mind is relating to the use of the word "effect" within that policy, the policy recommended starts with "The effect of any deemed permit right of priority …" and I'm interested to understand what you had in mind when you were using the "effect" in that context.

A. **MR DE PELSEMAEKER:** The effect on the flow regime.

A. **MR BRASS:** that would be my view as well. There are …

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Mr de Pelsemaeker was your response to that? Question is, what is the meaning of the word "effect" and your answer was?

A. It's the effect on the flow regime.

Q. Oh, effect on the flow. Just pause there a second, I just now want to re-read the policy with that in mind. The effect on the flow regime of any deemed permit. That's how we are to understand that policy? I've just interpolated the policy to read in, "flow regime".

A. The effect on the flow regime, that was created by the exercise of rights of priority.

Q. Yes. Right.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. I've got a follow on question, but you might want to go along in terms of this policy, I can put it out there and then you can decide whether that's the right time to ask it. I guess the question I have, is the policy talks about the priority regime existing at 18 March 2020, and I was having some difficulty with that date particularly when I looked at what you had in the rules.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I would think it fair to say that there are a lot of words in there that we need to tease out. So, I think we should hear your examination and see if we eliminate some of our questions because I think we've got questions perhaps on a number of the phrases and words used, trying to understand what you are meaning here.

A. Some of them have been highlighted including that date so we will – I intend to explore that.

Q. So, perhaps if we ignore the date and just think about this policy in principle, yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, yes. So, starting with and we were exploring what the effect that you had in mind was and my understanding is it's the effect of the priority regime on the flow regime.

A. **MS DICEY:** That wording I think also partly reflected a response from us to concerns raised about the fact and Dr Sommerville's legal opinion that the rights of priority will finally expire and so we're not just assuming that they're carrying forward. So to me it was also recognising that what once existed, no longer existed put plan change 7 is trying to replicate that and the effect of that and to me it actually goes further than just a flow regime because it's again, it's about access to water as well. So they're interlinked of course. Yes.

Q. Just to tease out then a little further in your mind, the effect of the priority regime could be a very broad matter, where is, if it's the effect on the – where it's the effect of that regime on the flows with in-stream, that's a more narrow sub-set of what the priority regime in its current form achieves?

A. **MS DICEY:** I wouldn't say what I suggested was very broad, it's still around the continuing theme that we've talked about all the way through with priorities, was really two-fold; access to water and the incidental environmental effects of that.

Q. Perhaps I'll put my question a little differently. You weren't intending to bring down the current way by which the priority regime is implemented, that wasn't one of the effects you were thinking about when you used the word, "effect" in?

A. **MS DICEY:** No.

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Q. Now I have highlighted the date, the 18th of March 2020 and I was interested in the effect of using that date in a context of the way in which the rules work and in particular, the way in which the definition is framed up, in terms of reference to the date, "one day prior to expiry". So perhaps the first question is why is the date 18 March 2020 used in the policy?

A. MR DE PELSEMAEKER: The intent there was to make sure that where priorities have been abandoned to replacement of resource consent, to not revive them. So, make sure that where priorities exist, at the moment that that effect is being carried over; so it doesn't work retrospectively.

A. **MR BRASS:** There's also one other element which is that some of the applications which are currently in play, may well not be resolved until after the existing deemed permits have expired and the right of priority associated with that, has then extinguished. So this was to create to a point in time at which we could, if you like as an accounting exercise say, "this was the right of priority that existed at that point in time and that's therefore what is to be re-created on the replacement consent".

Q. Is there a disconnect then when you look at the definition of right of priority and reference there to the date of the 30th of September 2021?

A. **MR BRASS:** The intention there, as I understand it was those dates are based on the final expiry as set in the Act. So it would ensure that the definition remains relevant post that particular date. So that's about that recognition but for accounting purposes if you like, suggesting the date of notification of the plan in terms of when priorities would be assessed from.

THE COURT: JUDGE BORTHWICK

Q. Pause there a second, I've now caught up with the purpose of the question and you're referring to the two lines following sub-clause (d)

aren't you? And from the 1st of October includes priority right, it was still enforced on the 30th of September 2021?

A. **UNKNOWN MALE VOICE:** Correct.

Q. Okay so is there a disconnect from the 18th of March with the two dates there, now that I finally caught up. What was your answer again Mr Brass?

A. **MR BRASS:** So, in terms of the definition, it was to apply to, if you like the existence of the right of priority. So if somebody was still going through a consent replacement process, post 30 September, the definition would ensure that the right of priority still has an existence in terms of the definition, so it hasn't completely disappeared. And then with it having been maintained through the definition, the date that you set the allocation that you design your replacement condition on would be based on the date of notification of the plan. It may be possible to align those, I haven't turned my mind fully to that.

Q. I thought your answer to the previous question by counsel was quite clever in terms of putting the 18th of March date there was to, so that no one gets caught out, if you like, depending on which way we go on the legal issue. No one gets caught out. So you can always look back to the 18th of March, and say, yes, it's whatever those rights were as of that date. Now I'm not so sure how solid that date is but for present purposes it doesn't matter. If you got rid of those two lines following sub-paragraph (d), what's the problem? So where ever you stand on the legal issue, whether the right falls away or doesn't fall away on the 1st of October of this year, if you can reach back in time to the 18th and say well if they had a priority then, we need to grab that or do something in relation to that.

A. **MR BRASS:** I think the concern then was that there are references to rights of priority or the effects of rights of priority elsewhere in the various proposed changes to the plan change. So, it was to ensure that for people post 30 September, that those references remained valid through the definition.

Q. Could you provide us an example?

A. **MR BRASS:** So, in controlled activity 10A 3.1.1 and over the page, "the council reserves control over the following matters". So that's a reference to the exercise of rights of priority which doesn't directly tie back to that date of notification of the plan –

Q. No I see.

A. **MR BRASS:** – so it's ensuring that that reference there and it may well be others but that's the one that I can see, oh sorry and similarly the matters of discretion in the discretionary activity. So it's to ensure that those references remain valid and are distinguished, post the 30 September.

Q. Okay, putting the dates aside, with the reference to the 18th of March 2020, what you are trying to do here is still enable a pathway through for applicants for replacement consents who have not had their application processed by the 1st of October 2020 and where the Court may make a determination that those rights from that date have ceased to effect and can't be carried over under 124. Is that right?

A. **MR BRASS:** Yes that is correct.

Q. All right well I'll keep that in mind. That's quite a clever idea but I'll keep that in mind. Not sure that you get there but good.

THE COURT: COMMISSIONER EDMONDS

Q. So, is the valid permit definition, does that have something to do with it because that does actually talk about a, in the context of chapter 10A, means a resource consent or deemed permit and then it has, "they has not expired or has expired but where the consent-holder can still exercise the permit under section 124 because one of the entry conditions is a valid permit, isn't it?

A. **MR BRASS:** That is correct in terms of the permit but I think where it also and it maybe an abundance of caution but allowing for the possibility that the right of priority may not automatically carry through with the deemed permit under section 124. So if you're in a situation where the effective legal requirements were such that you could still refer to a deemed permit

under section 124 but the right of priority had been extinguished, we wanted to sort of have that date that you could tie it back to.

1150

Q. So that it remains extinguished?

A. **MR BRASS:** No, so that there is a date that you can refer to. So when you're crafting a replication of the effective of the priority. You've got, even that right of priority itself no longer exists, you can go back to a point in time and say, what was it that existed at that point in time. Now, it may be, in the normal course of event, you would simply deal with the conditions that were still in effect through section 124, but we are wanting to cover the potential that right to priority were not being carried over through section 124 and referring to Dr Sommerville's views on that matter. So, it may be that this is not required depending on where that goes, that's a legal question. From a planning perspective, we wanted to ensure that that scenario was covered.

Q. Okay, so why didn't you just make that 18th of March date a 30th of September 2021 date? In your policy. Mr Brass, I'm asking you, why didn't you do that?

A. **MR BRASS:** We actually – and I'm just turning my mind back because we had quite some discussion and iterations on that, and I'm open to if any of the planners have a better recollection –

Q. Do you not recall what your answer – your thinking was there?

A. **MR BRASS:** I wouldn't guarantee it, no.

Q. Can't guarantee to recall, okay. All right. Tom De Pelsemaeker, do you recall?

A. **MR DE PELSEMAEKER:** No, I think it was just trying to capture the situation at the point of notification.

Q. Of the plan?

A. **MR DE PELSEMAEKER:** Of the plan, yes.

Q. Was it a more sensible date to have it prior to the – the legal issue which hasn't been determined, but if it did come in against, and that's what you're trying to cover, why not the 30th of September, because at least

most people will look up the legislation and go, oh, yeah, I know what that's about. The 18th of March, people might be struggling to sort of…

A. **MR DE PELSEMAEKER:** I cannot see any drawbacks from lining up the definition, or actually lining up the policy with the definition, the date and definition.

Q. Mr Ensor, do you recollect?

A. **MR ENSOR:** Nothing different in terms of the reasoning in lining it with the date of notification. I've got a nagging suspicion that there was something else, but it doesn't to seem to be – Murray might have recalled.

A. **MR BRASS:** I think part of the concern there was the converse of applications which have not resolved until post the 30th of September, as that if an application was completed and a replacement consent was being issued prior to the 30th of September, that if you referred to the 30 September date, it doesn't work because you're not yet at that date. So, if a consent was being issued in August for example, a reference back to the date of notification of the plan would be valid. A reference to the date in the future –

Q. I see, yeah, okay.

A. **MR BRASS:** – will have been expired or will have been replaced. It was that concern.

Q. Alright, Ms Dicey, you have got anything different to add?

A. **MS DICEY:** only addition was that for memory, and I'm not sure this was something I raised was that the 18th of March date was intended to kind of prevent anyone almost resurrecting a priority that had fallen by the wayside already consent had been replaced, the priority hadn't been replaced, but it still exists on some old document, and sometime tries to resurrect it.

THE COURT ADDRESSES MR MAW (11:54:12)

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I want to explore that last point just a little bit further, because I too am interested in the gap between those dates and what the implications might be, and I'm interested to know from the technical witnesses,

whether deemed permits do in practice fall away or are surrendered or whether they are actually still in existence up until the 1st of October 2021.

A. **MR LESLIE:** To some extent, that depends on the consent holder. We have a number of deemed permits in our system that are still current but they have actually been replaced by a resource consent as a status, "of not yet commenced" because, well there's a variety of reasons why that happens including the fact that the applicant has made the choice that they would rather just let the deemed permit expire than having to deal with the paperwork of surrendering a resource consent.

A. **MR WILSON:** Having said that though, there are a number of deemed permits which over time have been surrendered, I think around 200, from memory, yes.

Q. Ms King, in terms of the types of conditions that have typically been applied to RMA permits issued in replacement of deemed permits, is there a condition requiring that before the new RMA permit is exercised, the deemed permit is surrendered?

A. **MS KING:** Commonly it will say either the permit needs to have expired or surrendered, it's in one condition kind of merged, yes. So it needs to have done either of those things for this new permit to commence.

Q. Right so then picking up on the point Ms Dicey was making, which was one of seeking to ensure that, I know I may have misunderstood this but you were concerned that the potential re-exercising of a permit, after the 18th of March?

A. **MS DICEY:** So wasn't so much thinking of re-exercising an expired or surrendered permit but if that permit had been replaced, whether somebody with an RMA permit, whether somebody tried to resurrect a priority when they see this hit the ground. I think it's very unlikely. Yes.

Q. So staying with the policy, do the planners consider there would be some merit in clarifying the intent or the precise meaning of what the actual effect that is seeking to be replicated is? And we talked about the flow regime, was what it was speaking to but was there, do you consider merit and actually, precisely recording that?

A. **MR DE PELSEMAEKER:** I personally do. I think, just thinking back on what Ms Dicey said previously, I think reference to the flow regime actually captures both, looking after in-stream values and providing a flow regime that gives sufficient certainty of supply – not sufficient but the same certainly of supply as previously.

A. **MR BRASS:** Yes I support that and also in terms of efficiency, re-created the flow regime or replicating the flow regime is a relatively straight-forward matter of fact. If there are effects on people's access to water or in-stream values, then they'd require quite a bit more effort to understand so certainly my view is that the references to the flow regime which is a straight-forward matter of fact and the other effects would then flow from that but independently, if you like.

A. **MS DICEY:** Just thinking on the hoof really but I'd be a little bit nervous potentially. Referencing the flow regime, does that then open up the need for an assessment of what the flow regime whether there actually galaxiids in that stream, whether they'll be affected by any change. I think it potentially creates yet more complexity. At its very simplest replicating the effect of priorities is simply replicating the ability of one permit holder to tell another permit holder to do something. And so my preference, on the spot, probably not to go down that path.

THE COURT: JUDGE BORTHWICK

Q. Would your answer change if instead of a flow regime, you actually refer to what it is, which is a flow sharing regime? To me the benefit to the environment is completely incidental and it's also contingent on a number of other factors. So that's what it is, it's flow sharing as between abstractors. So would your views change if that's what the reference was?

A. **MS DICEY:** Perhaps not flow sharing because again I think the subservient doesn't see it as a sharing when they're told to simply turn off. I think the concept around sharing in the community is far more about ensuring everybody has access to some water rather than someone's got the ultimate right over somebody else. So I'd be again a little bit cautious

about that wording as well. Maybe, "replicating historical access to water", wording more along those lines perhaps.

A.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. When reading the policy, is there a risk that the current drafting reflects an actual regime that existed on an actual date?

A. **MS DICEY:** Sorry could you repeat that?

Q. So, looking at the drafting, is there a risk that what the policy is requiring is that the flow regime that existed on a particular date is to be replicated.

A. **MS DICEY:** Again I think I'd come back to the simplest perspective of all the effect ultimately is, is the ability of one person to tell another person to cut back on, at any given time, depending on the flow scenario.

A. **MS KING:** I think that there is a risk, that looking at that date you would need to go back in time and find out what priorities were existing then to know what the effect was at that date. If you're looking at it simply, you could read it that way.

A. **MR WILSON:** Just to add, that in order to replicate the effect, you have to replicate it on multiple permits so there's dominant and then subservient. So if one of those permits has been renewed in the meantime and you can't replicate the condition on that permit, I'm not sure how you replicate the effect.

A. **MS DICEY:** And that's where the date may be helpful, so the effect of the deemed permit situation existing as of 18th of March rather than, as existed historically in the early 1900s.

Q. And so in light of this discussion, is there some further work necessary to be more precise about what the effect is, that's coming down or to be replicated?

A. **MR DE PELSEMAEKER:** I think in terms of the risk that the current wording would trigger risk that applicants would be required to take comprehensive assessments…

THE COURT: JUDGE BORTHWICK

Q. Sorry, applicants who'd be required to undertake comprehensive was it?

A. **MR DE PELSEMAEKER:** Comprehensive assessments.

Q. Yes, on this.

CROSS-EXAMINATION CONTINUES: MR MAW

A. **MR DE PELSEMAEKER:** I think that risk is fairly limited given that you have a controlled activity and that it's fairly constrained. The benefit would be in considering applications under a noncomplying pathway. It needs to be clear that the date refers to the priority regime itself and not to the effect that was occurring on that specific date. So, if that's not clear then the policy needs to be amended, specifying which effects. I think clarity is always better, really, but I don't have any words in my mind now as to how you specifically can do it. Flow regime might be too wide. Yeah.

Q. Ms Dicey's been thinking.

A. **MS DICEY:** I'm not sure it would assist. I think it would almost be better to go the other way, which is the control (inaudible 12:05:51) for two reasons. One, the first is that it is coupled with a control activity pathway as the primary pathway, and so I think that in itself will keep it simple, particularly if it's coupled with a clear application form as well, which actually just suggests the condition to the applicants. The second is that it almost would be better to go simpler rather than more complicated, from my perspective, by taking out the word "effect" and using the world in the rule, which is simply to replicate the right of priority and to leave the effect component out of it altogether.

Q. Thinking about that a little further, if you were to replicate the current right of priority, it would include the current way in which rights of priority can be exercised and enforced.

A. **MS DICEY:** I think the word "replicate" leaves enough room for the controlled activity to create something slightly different, but in essence, replicating the effect of it.

Q. At its heart, is it the thing that you are seeking to replicate is in fact the ability for a dominant permit-holder to, I'm going to say, call priority over the subservient permit holder, and everything else is incidental to that, as

in, the flow regime is incidental to that option or mechanism being available, the incidental, the environmental benefit is also incidental to that, so is that the key element that needs to be replicated?

A. **MS DICEY:** Yes.

Q. So then, when we're thinking about the policy, might the policy be crafted in such a way that it focuses really clearly, that it's that element of the right of priority that is to be replicated?

A. **MS DICEY:** Yes, possibly.

THE COURT: JUDGE BORTHWICK

Q. Possibly? Yes or no? What's the possibly?

A. **MS DICEY:** Trying to think that through on my feet.

Q. Yeah.

A. **MS DICEY:** And then trying to think ahead as to what the wording might be around that.

Q. So you don't actually have to write the words, all you have to do is just really reflect on Mr Maw's questions, because it will be the same questions from the Court, which is let go of the wording of the Act, because you're kind of not reflecting what's in the act anyway, so it's going to cause confusion, I think, and let's go to the heart of what it is that you want to achieve. So your answer a couple of questions back to Mr Maw, Ms Dicey, your answer was – I think it was you – all you want to do is be able to tell your neighbour to turn off. Okay, well, that's pretty simple. I think I can put that into planning language rather than just "tell your neighbour to turn off," but if that's at the heart of it, why don't you just say it? Why isn't that in the policy? Which, I think, is Mr Maw's question.

A. **MS DICEY:** That's a fair question.

Q. Yeah.

A. **MS DICEY:** And so my answer would be yes to Mr Maw's question, and partly to explain, well, our use or my use of the right of priority is, I think, water users in Otago are very familiar with the right of priority wording, so I think that laypeople will understand what is meant by that, so familiar words.

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Q. I get the benefit of familiar words, but the potential problem that you have with that answer is that people understand rights of priority, it means I can tell my neighbour or neighbours to start reducing the water cut-off, but you don't intend people to start reducing, you just intend to cut off, so already, there's a disconnect between historical practices, which are well understood within Otago, and what it is that's going on in here. Now, we need to talk about the start, you know, the reducing aspect of this, anyway, but, yeah, I don't know. So I understand the benefit of using language consistently, but this policy doesn't and you don't mean it to, so perhaps new language is required. Mr Ensor.

A. **MR ENSOR:** Look, from my understanding, the effect of any deemed permit right of priority regime was that there was only one effect in it, and it allowed a dominant party to give notice to a subservient party, but if there is some uneasiness about that word or consideration that it could be interpreted in multiple ways, then I think it's worth looking at.

Q. Well, Mr Ensor, you have concern yourself, having signed up to this joint witness statement because I understood the legal effect of a right of priority was that I could ask my neighbour to reduce or to cease, so there's two effects. Only one is contemplated by the panel of planners, so you're already in that camp of, mmm, I wonder if there could be an interpretational issue in terms of consistent usage of language and how well language is understood, you know, by the community, so you're there already.

A. **MR ENSOR:** Yeah, I accept that.

A. **MR BRASS:** Part of my concern, which I think sort of led to my view in terms of using wording along the lines of "the effects of rights of priority" was that, to an extent, a right of priority that currently exists operates as a private property right. They are expressed that way in legal terms, they are valued when people are valuing properties. That is something that the Resource Management Act cannot create, it cannot create that sort of private property right, so it was looking to find wording which expressly

pulls them into a resource management issue as opposed to a private matter.

Q. But, you see, the problem with that answer is this: that you, then, in your definition used land law language of dominant and servant. Now, that is land law, and so then you immediately start to bring in this idea of ownership, and, of course, one of my questions is do we think we've got property and water now, and where does that go in terms of s 112, or 122, I've forgotten which way.

A. **MR BRASS:** Yeah, and I guess, from my point of view, that was where I was thinking the aim was to recreate the same effect in terms of the flow regimes and what that means for instream values and existing uses, but as a resource management activity, as opposed to a private property right, and I'm –

Q. Yeah, no, I appreciate that, and I think that's probably the correct approach as well, and this isn't to pour scorn or anything on anything you've done, this is your proposal, so, for my part, I will be looking to see how to make it work, but the question is what you want to work, you know, is it reducing and ceasing or is it just ceasing? Yeah, and anyway, is the value of this tool – I mean, it will be valuable for some people, but is the value of the tool that it actually sets up the flow-sharing regime anyway? That is the private agreements, and that's the value. Sorry. Plain-speaking is, I think, use plain language is what I'd encourage, yeah.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So just staying with the policy for one further question of clarification, have I understood correctly that the planners are not intending that the current enforcement mechanism relating to priorities is to be brought down? So at the moment, there's a mechanism where a user has to head off to the High Court to seek relief if the regime or if the notice is not given effect to. I'm assuming that that's not an effect that you had in mind to be replicated. Can you perhaps clarify that?

A. **MR DE PELSEMAEKER:** Correct, that's correct.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I couldn't understand – actually, just by the by, there's a legal issue there, because I couldn't understand why the evidence was that you'd have to go off to the High Court anyway. When I looked at s 413, it's to be enforced by the region under the normal mechanisms. I didn't follow all the way through, but I was at a loss to think why the High Court on that one.

A. Yes.

Q. Obviously, I hadn't read far enough.

A. Yes, I'll have to go back and refresh my memory.

Q. If you can come back to that, yeah. Anyway, High Court's not what's intended?

A. No.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. In fact, well, the enforcement, is the enforcement mechanism intended to be different from the enforcement mechanism that currently exists?

A. **MR DE PELSEMAEKER:** That's correct, enforcement would now be undertaken by council.

Q. And so, looking at the policy, ensuring some clarity in that regard might be helpful?

A. **MR DE PELSEMAEKER:** Within the policy? I don't immediately see a need to have that in the policy, personally.

Q. Perhaps the matter, again, could be clarified by making it abundantly clear what the effect of the regime that is sought to be replicated is.

A. **MR DE PELSEMAEKER:** Yes, I think that's a better way to approach it. Just reflecting on what has been said a few minutes ago as well, I did notice that Ms King raised some concerns as well as to how the effect might be interpreted by consents officers and whether there is risk that actually, instead of bringing down the priorities, applicants might propose a totally different mechanism, which is a residual flow, which would not do that, because priorities are exercised, you know, sporadically in most

cases, whereas residual flows, they are there all the time, and so that avoids that risk as well, in my opinion.

Q. Ms Dicey, did you have anything to add just a moment ago? No? Right, I wonder whether we might move on now to the controlled activity rule, so I'm looking at VIII, so it's the blue-shaded box, which, as I understand it, is the entry condition into the controlled activity pathway. Now, I'm it'd to explore what it was you have in mind at a principal level in terms of what needs to go into the application, and then test that as against the wording that's actually been recommended. So the first part of that exercise, what is it that you're anticipating should be offered as a condition, by way of entry condition to the controlled activity pathway?

A. **MR DE PELSEMAEKER:** That was something we discussed during expert conferencing. Coming up with a proposed condition and what specifically needs to come into that or needs to be captured by the conditions for dominant and subservient ones was, again, explored with input from Mr Wilson, Ms King, and Mr Leslie.

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Q. Any additional explanations as to what was intended to be required?

A. **MR ENSOR:** A recognition of whether a consent holder had dominant or subservient position in terms of priority.

A. **MS DICEY:** Yeah, I agree with Mr Ensor that the application would include the list of priorities relevant to that permit, and then also the application form would include a draft condition which an applicant could simply tick, so the intent behind that thinking was really to again to focus on efficiency, make it as simple as possible for both the applicant and the Council.

Q. And so, thinking back to the discussion around the policy, is this condition driving at the ability of one permit holder to have a priority over another or alternatively a subservient permit holder agreeing that somebody else has the right to restrict their take, that that's what this is about, it's that aspect of the priority regime.

A. **MS DICEY:** That's correct.

Q. So, when we think about that being the purpose and then we go back to the drafting of the rule, I just want to see whether that outcome is captured, because at the moment as I read the condition, towards the end it says that, "the application replicates the right of priority expressed in the deemed permit." Now, when you think about the definition that's been inserted in terms of the right of priority, is that intending to refer to the matters covered in the definition or a subset of those matters?

A. **MS DICEY:** Can I just clarify what you're focused on there, are you meaning the words, "expressed on the expiring deemed permit," whether that limits it, as opposed to the wording used in the definition, is that what you're saying?

Q. No, just starting with the words used in the definition, so the right of priority.

THE COURT: JUDGE BORTHWICK

Q. Perhaps another way of putting that is to say that the definition has a number of elements, for example, the definition says the right which enables you to instruct another person to cease or reduce their take. So, there's two of the elements, and so did you intend both those elements to be captured under the entry condition, or actually, only just some of those elements to be captured under the entry condition, is that what you were getting at?

A. **MR DE PELSEMAEKER:** So, when you refer – sorry, can I ask a question? Are you referring to – when you refer to elements, cease or reduce?

Q. Mhm. That's the example, there's other elements, yeah.

A. **MR DE PELSEMAEKER:** That was discussed –

Q. No, sorry. So, Mr Maw's question is this, Mr Maw has said, when he looks at the last part of the entry condition that says, "that replicates the right of priority expressed in the deemed permit," and then you go to the definition, and you go, well, okay, what's the right of priority, how is it defined. It has a number of elements, two of which are cease and reduce, and we know that your evidence is you're not intending to capture reduce.

So, what then are we to take out of the words, “an application that replicates the right of priority expressed in the deemed permit,” when we already know you don’t want to do that?

A. **MR DE PELSEMAEKER:** It is not a matter of not wanting to do it, we initially had reduced in there but reduced post-significant issues in terms of enforceability and also practically. If it is required to reduce taking then for clarity reasons it would be best that on the notice provided through the subservient permit holder, the dominant permit holder would stay by how much. Now that changes all the time because flows change all the time as well.

Q. Okay, so with that in mind, you don’t in fact want to replicate the right of priority in the definition, do you?

A. **MR DE PELSEMAEKER:** No, it is –

Q. No, so that’s what Mr Maw is getting at and so if that’s the case, is this entry condition clear?

A. **MR DE PELSEMAEKER:** Mm, it is really the order between the permit holders that we want to bring over, not all the other aspects.

Q. Yes, and so it’s about actually letting go, if you like, letting go of the legislation and saying what it is that you want to do.

A. **MR BRASS:** In this again, is difficult in terms of how you structure it but the effect of the ability to require someone to reduce would in a practical sense be carried over because of you’re the subservient consent holder, you don’t want to be told to switch off completely if you can avoid that. So, in a practical sense if reducing your take to half will mean there’s enough water at the dominate intake point, that the condition is not triggered, then by reducing, you have operated the condition in that way but we weren’t able to come up with some wording that would carry that across in a RMA enforceable context, so it’s in my view, it’s left sitting there as something that people are able to operate themselves, in effect but not as part of the wording of the condition because of the enforcement difficulties that Mr de Piemaker’s referred to.

EXAMINATION CONTINUES: MR MAW

Q. When you look at the text in the chapeau of the right of priority definition, might that wording actually be closer to the key issue that might need to be reflected in the policy? So, this is the right allowing the holder of a permit to instruct another permit holder or holders, to cease or reduce their takes when there's insufficient water to take to meet the authorised allocation. Is that really the key issue here that's the trigger for brining these things or re-creating these things?

A. MR DE PELSEMAEKER: The definition is very much focussed on the dominant permit holder, so I think it is important that where you have the subservient one that does not hold priority, as the dominant one over another one, that it is also reflected in the policy and any other wording in the plan change framework. So, simply transferring the language, I think might not work but, yes, it's definitely food for thought.

A. **MS DICEY:** I think that is the core aspect of the right of priority, the ability of one person to tell another one to turn off or turn down or picking up what my colleague just said, or to have to turn down or turn off; is the core aspect of it, yes.

Q. Now coming back to the wording in the entry condition, that refers there replicating or replicates the right of priority expressed in the deemed permit, now when you look at the definition of "right of priority", is it the intention that you are replicating that right as that right is set out within sub-paragraphs (a) through to (d)? So, are you replicating in the context of (a), for example, the provisions of the Water and Soil Conservation Amendment Act?

A. **MS DICEY:** No you're not replicating it exactly as it existed but yes, the definition is focussed on explaining what a right of priority is.

Q. So, what is it that is to be replicated when you look at the entry condition?

A. **MR ENSOR:** It's the right of allowing the holder of a permit. The (a), (b), (c) and (d) as I understand it is to explain that the authorisation.

Q. So, I'm probably paraphrasing here, what you're seeking to do is to replicate the effect of one permit holder having an opportunity to require

another permit holder to cease taking water, that's the element that is sought to be replicated?

A. **MR ENSOR:** As correct.

Q. Well I should perhaps also say, or the flipside of that in terms of a subservient permit holder.

A. **MR ENSOR:** In the inverse, yes.

Q. So then when you think about this entry condition and you think about the policy as informing perhaps what the entry condition is about, again there's perhaps a need to better capture precisely what it is that is needing to be replicated in terms of this right.

A. **MS DICEY:** Yes, I think that's probably fair.

A. **MR ENSOR:** I agree, I think we've had a reasonably lengthy discussion about this and there's enough uncertainty in the room that's it's worth looking at that again in the context of what we've been discussing around the chapeau of the definition probably is the starting point.

A. **MS DICEY:** And I'll just add to that as well and I think partly this reflects our journey with acknowledging that the rights of priority finally expire, but wanting to capture them in a point of time and carry them over but yes, it needs to be acknowledged that they're not exactly as they were back in the day. Yes.

A. **MR BRASS:** And just as part of that – part of the reasoning behind that, goes back to my earlier comment about transferring from a private property right arrangement which is where mining privileges started life to a resource management consideration and so that, certainly in my mind has been a large driver for looking for wording, the effect of, as opposed to simply one person's right over another person but I'm open to being convinced otherwise on the legalities of those terms.

THE COURT: JUDGE BORTHWICK

Q. So, you're still worried that if you just use direct language, "I've got a right to tell you to cease", sounds likes like private property and so that's language that we don't want to go in that direction. Is that what the issue is there?

A. **MR BRASS:** That was certainly my concern but if that language can be used in a way which doesn't create that issue, then I'm certainly open to using that language.

Q. Okay, mhm.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. You used the word "the ability."

A. **MR DE PELSEMAEKER:** I had similar concerns to Mr Brass. Also, we actually often went back to the definition during the expert conferencing, and the reason why we got so far away from it is because there are a few elements in there that are problematic. We talked about reduce and crease. Also, the reference to there being insufficient water as well was considered to be a hurdle from a compliance point of view as well, so that's why we kind of strayed away from it. I think we need to be mindful if we try to go back that we're still keeping those discussions in the back of our mind.

THE COURT: JUDGE BORTHWICK

Q. Go back where, sorry?

A. **MR DE PELSEMAEKER:** Sorry?

Q. When you say "if we go back," you mean back in the direction of what?

A. **MR DE PELSEMAEKER:** Back in the direction of using more language that is consistent with what's in the definition.

Q. You mean s 13 of the Water and Soil Conservation Act, or –

A. No, like, basically, you know, how we have the definition here in PC7 where it's basically one water user telling another one to stop seizing, yeah, stop taking water.

Q. Mmm, okay, mhm.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I was going to move on to the matter of control in relation to the controlled activity, so the new matter of control, (b)(a), and I'm interested to know what was intended in relation to this matter of control. So when I read the wording there: "Any condition that replicates the effect of the exercise of

the right of priority," that's starting to introduce a further concept in terms of the exercise of the right of priority, and I'm interested to know what it was the group was intending to capture by referencing the effect of the exercise of the right of priority.

A. **MR ENSOR:** Perhaps I could start off with the exercise being a reference to the mechanics, I suppose, of the process, the notice, and the process around it.

Q. Is there a distinction that you're intentionally drawing between the effect of a right of priority and the effect of the exercise of the right of priority?

A. **MR ENSOR:** I don't recall there being a clear distinction. There was replication of the effect of the right of priority, and then bringing in this process element, the process around exercising that priority.

Q. Was the intention to have Ms King and her team have to enquire as to whether or not the priority was actually being exercised?

A. **MR ENSOR:** No, that wasn't the intention.

Q. So Ms King –

A. **MR ENSOR:** I'm assuming you're meaning as part of the application process.

Q. Mmm, Ms King, when you read this matter of control, is it clear to you whether you should be enquiring as to the effect of the exercise or simply the effect of the priority?

A. **MS KING:** So reading that, it looks as if I should be assessing the exercise of priority, so then undertaking an assessment of whether that had ever been done and then replicating the effect if it had been done.

Q. And having heard that response, planners, collectively, does that highlight, perhaps, a need to refine the drafting of this matter of control?

A. **MS DICEY:** I do remember some discussion about this with Ms King at the expert conferencing, and the intent wasn't for consents officers to have to assess things such as whether they had been exercised and what effect that might have on species, et cetera, so if that's – we perhaps didn't get as far as we could have, should have, with that one, so it could be refined, I think.

A. **MR ENSOR:** Yes, if that is how it may be interpreted then I agree with Ms Dicey. The intention is that the consents officer can see that there's a condition that replicates that mechanism and not go further than that.

Q. And is that again capturing what is at the heart of this issue that one consent holder can ask or has the ability to ask another consent holder to cease taking.

A. **MR ENSOR:** Yes, in the inverse, yes.

Q. So, again, if you're tracking down through the policy through to the entry condition into the matter of control that's being reserved, if that direct thread can be connected through those provisions, that would perhaps better reflect what it is you collectively had in mind.

A. **MR DE PELSEMAEKER:** Correct. Yep.

Q. I should say, it is very easy for me to ask the questions, to actually do the drafting, I appreciate there are some complexities so please don't take my questions as criticism. I'm really trying to make sure that the drafting reflects what it was that you had in mind when you were putting the words together. Now, in terms of the drafting, the same issues would presumably apply because the same phrase is used on the restricted discretionary activity, and so, if the – and perhaps you can just confirm it's the same wording in terms of the matter of discretion that's used.

A. **MR DE PELSEMAEKER:** That's correct.

MR MAW ADDRESSES THE COURT (12:42:45) – TIMETABLING

MS DIXON ADDRESSES THE COURT (12:43:25) – CONFIRMATION TO CONTINUE THROUGH LUNCH

CROSS-EXAMINATION CONTINUES: MR MAW

Q. All right, I want to explore the definition a little further and I want to just understand how some of these concepts are intended to be replicated or not, and I want to start with the distinction between ceasing or reducing a rate of take, and I just want to understand in the first instance whether the recommendation from the group collectively or perhaps there might be

some alternative viewpoints, is for both elements to be replicated, so both ability to cease taking and the ability to require a reduction of taking.

A. **MR BRASS:** My recollection of the attempt there was to reflect what existing rights of priority state and that wording does have "the decease or reduce" and what, this is perhaps highlighted is that we may need to think about how that is carried over if the new version is not exactly the same, how we capture that but I think it's important that those words are be there in terms of the definition of what an existing right of priority is because in the wording used, that is the wording used.

Q. So, you're still saying it's still important somewhere to capture what the existing rights are, as opposed to looking forward in terms of what we want to achieve on a replacement consent?

A. Yes, so understanding what the existing right is from which we then work out how we best replace or replicate that. So this was about a statement of fact about an existing right of priority on an existing deemed permit or mining privilege.

Q. Is it important to have your reflection of what you say is the existing right when it's already there in the Act, in the RMA? To be fair what you got here, I don't think actually is accurate, if it's meant to reflect the existing right, it's introducing new language which doesn't appear either in the RMA or in the Water and Soil Conservation Act, so if that's what your intention was, it's just simply looking back, historically. Why do we need to do that? Firstly, is that what your intention was?

A. That was my understanding of the intention and I'm open to any other views.

A. **MR ENSOR:** Yes that was my understanding as well. In the policies and rules, we're referring to an entity or the effect of an entity and the intention was to reflect that, historical.

Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. Want to stay on the theme of whether the concept of a reduction of take is intended to be brought through and I'm interested to understand from

the planners first, how it is they envisage a notice might be given which captures a reduction?

A. MR DE PELSEMAEKER: I previously discussed it when we had expert conferencing, we had the benefit of people from the regulatory team being there and having the reference to reduction on a notice, it needs to say how much reduction is required and that is problematic in a dynamic system.

A. **MR BRASS:** Just to expand on that, I think perhaps the underlying problem is that the existing rights of priority operate based on the dominant holders' rights, so it's the amount of water that's available at their intake and does that give them enough to meet their allocation? The problem in an RMA perspective, is it an issuing a notice to the subservient holder, that needs to specify what they need to do which needs to be at their point of operation, not at the dominant's and it's that mismatch between the two which operate as a private property right, if you like, originally but is now difficult to carry across to implement that in an RMA perspective where you're telling one person what to do but it's actually entirely driven by what's happening at different point.

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Q. I'm interested in anyone with any practical experience who's able to assist by explaining how this current concept of reductions actually plays out, so Ms Dicey you seem the most likely candidate; in your experience if a dominant permit holder wants to call priority on a subservient holder and they only require a reduction in take, how does it actually work?

A. **MS DICEY:** I haven't actually got personal experience of this. But my understanding is that it's often just a phone call or a text saying, "I'm not getting enough water can you turn down please" and it might be, I don't know, whether it's an amount and I don't know whether a time specified and I would imagine that it would vary significantly. There may be a reasonable understanding of what's happening at somebody else's point of take but often, yes, on the flipside I also know of situations where water users, think they know what's happening at someone else's point of take and actually through kind of the last, how many years of flow metering,

those assumptions haven't always proved to be correct. So I imagine it varies considerably and it is, as Mr Brass alluded to, it's more difficult in the RMA context where you may not as the – so the dominant priority holder actually know for sure, how much somebody else may need to turn down by to get you the water that you're seeking, taking into account the complex hydrology that we can have on a lot of these tribs, so there may be flow losses between the points of take. Yes.

Q. So, just big picture, in terms of how you see this working, if this type of an approach is adopted, is it still the view that there would be informal arrangements as between water users, will be the predominate way in which the water sharing is occurring but that the driver for that is the regulatory backstop of the ability to give a notice?

A. **MS DICEY:** Yes that's very much so how I see this working. I think that people largely carry on as they have and will be loath to get the council involved, will be loathed to actually have to follow a lot of the notice provisions and that will be a backstop, a last resort really. And for that reason, that's kind of one of the reasons with the joint witness statement, I noted the concern that I had about it, were not actually replicating if we don't include the ability to instruct a reduction rather than simply a cease but I agree with Mr Brass' comments earlier that this is the backstop; the power to issue a proper notice, to go to the regional council and to ask another permit holder to cease their take altogether is a sufficient backstop that, in the vast majority of cases people will be communicating with their neighbours to ask them to turn down or turn off as the case may be, without even issuing a formal notice and involving the regional council. And so the backstop of the regulatory involvement, enforcement will be sufficient in most cases I think, a vast majority of cases for people to comply.

A. **MR BRASS:** And just part of what has, sort of informed that understanding is that from around the table, we don't have anybody who is aware of a case where a dispute over priority under the existing regime has gone to a "court of competent jurisdiction", I think is the old wording or to council to enforce. So in practise, they have been addressed

between the parties but the fact that there is a stick being held behind the back has what, given that the power to operate.

THE COURT: JUDGE BORTHWICK

Q. This is important, you Mr de Pelsemaeker you're not aware of any, I still think it's the regional council enforcing the action because I still haven't caught up with your High Court pal but anyway you're now aware of any action being taken in any court of competence jurisdiction to enforce the rights under a deemed priority?

A. **MR DE PELSEMAEKER:** Not personally aware of any.

Q. Ms King are you aware of any?

A. **MS KING:** No, I'm not aware of any.

Q. Mr Wilson?

A. **MR WILSON:** No, your Honour.

Q. No, okay. Thank you.

A. **MR LESLIE:** The best I can think of, I don't know if it was related to priorities or not, but the best I can think of is situations where the regional Council has gone out in the field to investigate complaints because there's no water left in the stream rather than there's not enough water left in the stream or where an upstream neighbour's drying out the stream.

Q. And those complaints of no water left in the stream, is that by an irrigator, or could that be by a member of the public?

A. **MR LESLIE:** I'm not really in –

Q. Not sure, okay.

A. **MR LESLIE:** – a position to speak to the details. I'm just operating of a general recollection.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now, staying with the definition if I might. There's reference to the phrase "insufficient water," and my understanding is that that phrase has caused some questions to be asked in the context of potential compliance. So, it would be helpful if you could explain why that phrase has been used and

where it is has come from. So, what was the purpose of including in this part of the definition?

A. **MR DE PELSEMAEKER:** I believe the phrase "insufficient water" comes from the Water and Soil Conservation Amendment Act.

Q. So, in a sense, all you were thinking to do, and I think you gave this answer to the Court, was pull through the existing meanings in terms of –

A. **MR DE PELSEMAEKER:** Correct.

Q. – this right of priority. You weren't seeking to draw a distinction between that underlying legislation and that which is in the definition.

A. **MR DE PELSEMAEKER:** Correct.

Q. Now, at the end of the definition, there's reference to not creating, again the phrase, "the right of priority for the purposes of section 124B(2)." I'm interested just to understand why it was considered appropriate to include that carveout.

A. **MR DE PELSEMAEKER:** I was reading over the documents yesterday evening and it was actually referred to in the notary. So, there's duplication. So, in my view that can be taken out of the definition. So, it is replicated under the heading "10A.3 rules notary."

THE COURT: JUDGE BORTHWICK

Q. What was the mischief that you were seeking to avoid by referring to the section 124(b)?

A. **MR DE PELSEMAEKER:** I have to rely on my memory, but in the Acts there is provision made for applicants applying to be basically lined up in a priority sense, first in, first served. So, it was to avoid any doubt around that, and I think that section specifically makes reference to the word "priority."

CROSS-EXAMINATION CONTINUES: MR MAW

Q. As I read, and I'm curious to the language used as between the note and the definition, the note refers to, and says that "the right of priority and the entry condition does not refer to a right of priority for the purposes of 124(b)(2)," whereas the definition notes that it does not create a right of

priority, and what I was wanting to understand was whether those were two different things that were being addressed.

A. **MR DE PELSEMAEKER:** They are one in the same. In all honesty, I think the discrepancy between the two sentences is probably a reflection of the time constraints we were working under, and I agree there is opportunity to fine tune the wording in the note as well, because it does not make reference to the ADR rule as well.

Q. So, it what you are seeking to capture here, or to refer to that you were not intending to create a right of priority –

A. **MR DE PELSEMAEKER:** To create a right of priority, yes.

Q. – for the next time round that consents get considered.

A. **MR DE PELSEMAEKER:** Correct, yep.

THE COURT: JUDGE BORTHWICK

Q. So, if that was to be retained as a note instead of part of the definition, the word “create” should be read instead of refer.

A. **MR DE PELSEMAEKER:** Yes, I think it’s quite appropriate.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. The final question I had about the definition was helpfully a very swift drafting issue. When I look at sub paragraph A, I wonder whether the first word of that sub paragraph which is also A, is in the wrong place and whether that should actually follow the word “I” in the chapeau.

A. **MR DE PELSEMAEKER:** That’s correct.

MR MAW ADDRESSES THE COURT (13:01:53)

LEGAL DISCUSSION (13:03:25)

QUESTIONS ARISING: MS IRVING – NIL

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Ms Williams?

A. I'm not sure that the matters that I've been noting are helpfully explored with the panel today. They might be better explored specifically with Ms King and Mr Cummings.

Q. That's fine.

A. And also with Mr de Pelsemaeker when he does his evidence in reply.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Nobody else? Mr…

A. I do a brief line of questioning for the panel but it doesn't require Mr Ensor to be here.

Q. I require Mr Ensor to be here and listen to everything that has to be said about priorities with the exception of the enforcement and consenting regimes so we can carve him out from that.

A. I don't have any questions for the panel about the drafting of what they've produced, what I want to do is explore briefly, the implications of the do nothing option which –

Q. I think you should, yeah, ask Mr Ensor about that too. Have Mr Ensor for that question.

A. Yes, all right. Well, it's three or four minutes' worth.

Q. Yeah, sure.

A. In that case, do you want me to do that now, Ma'am?

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Could we go to the operative regional plan as on common bundle page 59? If we can keep going – that's 56, to page 59. All right, so I'm going to ask a couple of questions about the implications of policy 5.4.3 that you can see on the screen, which is, for the transcript, on common bundle page 59, and my questions are intended to explore the implications of what is being described as the do nothing option, and what I understand the do nothing option to be is not to include the carryover of rights of priority under plan change 7, and so the first question I have for the panel is, when you have the chance to read policy 5.4.3, do you agree with me that this creates, for decision-making under the operative regional plan, a requirement to consider the effects of granting consents on the existing

priority regime? And I don't mind who wants to answer that question for me.

A. **MR DE PELSEMAEKER:** Yes, I recognise the policy. Actually, it was raised during the expert conferencing as well as a probably creating a link, because the difficulty that we have is that chapter 10 is a standalone chapter when it comes to replacement consents, and, yeah, that is a policy that would or that could be taken into account when you look at new consents to take order.

Q. Yeah.

THE COURT: JUDGE BORTHWICK

Q. New consents, did you just say?

A. **MR DE PELSEMAEKER:** Sorry, consents for water takes that were not previously authorised.

CROSS-EXAMINATION CONTINUES: MR PAGE

Q. Does anybody else wish to address the point?

A. **MR BRASS:** I think it's probably just confirming what Mr de Pelsemaeker has referred to in terms of takes that are not presently authorised is that that person, as I understand it, would not come into play for controlled activities under plan change 7.

Q. Yes, and so my next question – does anybody else from the panel wish to address that before I ask my next question? No? So my question that follows from Mr Brass's answer and Mr de Pelsemaeker's answer is that if chapter 10 doesn't include a policy similar in its effect to 5.4.3, does it follow that plan change 7 would have the effect of having a different water allocation policy framework that the operative regional plan?

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Have a different – say it again – a different what?

A. Water allocation policy framework.

Q. Just let me think about that.

CROSS-EXAMINATION CONTINUES: MR PAGE

A. **MR DE PELSEMAEKER:** The effect of going back to the do nothing scenario –

Q. Yes.

A. – would be that this element from the operative planning framework is not replicated –

Q. Yes.

A. – in plan change 10.

Q. Yes, and so –

A. In plan change 7, sorry.

Q. Yes, and so the concern about avoiding effects on existing lawful priorities, if that's not carried over into chapter 10 through plan change 7, does that then constitute a change of policy around water allocation if decisions under plan change 7 can't take into account policy 5.4.3? Ms King.

A. **MS KING:** Would that depend on the rule that it's being applied under? Under the operative plan, from my understanding, and please correct me if I'm wrong, if you are applying under the RDA rules in the plan, you wouldn't necessarily look to this policy anyway.

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Q. All right. Jared, can we go to common bundle page 183, please? And hopefully, when we arrive at 183, we might find the list of matters for discretion under rule 12.1.4.8. Yes, keep scrolling up, please, Jared. There we go. We're back. Can we look at the clause which is XVII? Scroll down to that, pause there. Now, I'll just give the panel a moment to read clause XVII. Ms King, is that the provision that you had in mind?

A. **MS KING:** Yes, I think, then you could assess that policy, and then I agree that it potentially might change.

Q. Yes. So is it the case that if what plan change 7 is trying to do is to carry over the status quo for a period of time, that we need some kind of mechanism, equivalent to what's in the operative regional plan, to enable priorities to be observed? Answer it if you wish, Ms King.

A. **MS DICEY:** I'm holding the mic, so I'll talk. Yes would be the simple answer.

A. **MR BRASS:** Just with the distinction that the existing policy is a matter which counsel has discretion over how to apply, the propose controlled activity, anyway, would be something that just applied automatically, so there's a shade of difference in how they apply that matter.

Q. Yes, thank you, but, so returning to where I started, if plan change 7 doesn't have a mechanism of that kind, would that actually represent a change in the way that water allocation decisions are made through the consent process, because we are missing something that the operative regional plan already deals with.

A. **MR DE PELSEMAEKER:** It changes the way which the decisions are made, water allocation decisions are made. Whether that means a change in actual effect on the ground, potentially, or in some, at least.

Q. And is that – since you've got the microphone in your hand, Mr de Pelsemaeker – is that change deliberate, or is it simply an accident of omission?

A. **MR DE PELSEMAEKER:** It was not a deliberate decision to exclude priorities. What I can say about that is that we have not monitored the exercise of priorities, so we didn't have any good information to say they were actually being exercised. Yeah.

Q. Okay.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Were your questions, Mr Page, directed at, you know, the general proposition, towards a general proposition that one should – that is, consent authority – always be considering what is the effect on another water user, is it, of allowing the exercise of a permit, so whether the taking of water under a water permit should be restricted to allow the exercise of another water permit, is that a matter of general proposition or is that a matter that you're directing more towards the presence or absence of some policy mechanism for priorities? I wasn't sure where you were

going, because certainly, the policy that sits above it has two arms, the existing lawful users, and it talks about priorities in the second part.

A. Well, what I'm doing, Ma'am, is exploring the implications of the do nothing option, since that's still live.

Q. Okay, so we're now at do nothing, and so priorities are not even – don't have a look in.

A. But what I'm trying to explore with the panel is whether the do nothing option is actually a change of policy, because –

Q. Yeah.

A. – because the operative plan does address effects on priorities and contains a mechanism to deal with that, but plan change 7 does not.

Q. So, I'm sorry, you've just lost me a little bit. Is this with a view to saying, look, what you've got here is too difficult, let's go with something that's already written up in the operative plan, and you've referred us to a policy and a matter of discretion. Is that what this is about?

A. No, what I'm trying to tease out –

Q. Yeah.

A. – is that do nothing seems to be the easy option.

Q. Yes, I don't know, but, yeah, okay.

A. But what I'm doing is attempting to draw attention to the implications of the easy option as actually representing a change in water allocation policy that hasn't been deliberately crafted into plan change 7, it's just an accident of not dealing with the priority issue.

Q. Well, is it an issue for any party that if you have a do nothing option – now, I do know that we've got witnesses who are –

A. Yes.

Q. – saying that, but I don't understand that any party present before the Court today is advocating a do nothing option, because that may have an impact on users' reliability and an incidental or a secondary impact on the environment, particularly in relation to galaxiids. I'm missing something here, I don't know what I'm missing, sorry.

A. Well, the only reason why I'm pursuing this is because the council has a dual personality at the moment. We've got Mr de Pelsemaeker, who favours one outcome, and we've got the consent administration team –

Q. Who favours another.

A. – who, for their own reasons, favour another, and I don't know what the council's position is right at the moment, so I'm exploring the implications of either outcome.

Q. Okay, okay. So there's nothing in this plan change. Why's that? And so the proposition is that, therefore, that's a change in policy in terms of managing the effects on other water users of a replacement consent.

A. Yes, because policy 5.4.3 sits in the operative plan to address the effects of granting decision consents on priorities.

Q. Yeah, plan change 7.

A. And plan change 7 does not.

Q. Mmm, okay.

A. That's all.

Q. That's it?

A. That's it.

Q. All right.

A. So I don't have any further questions on that subject, Ma'am.

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Q. Okay. It is an interesting question, though, in terms of what is the council's position at this hearing. I shouldn't laugh, but it's like, where is your client, but you are the client, so, you know, I actually have you in my sights, Mr Maw. So nobody pretends that any of this is easy, and if there's problems with the drafting, then the drafting, if you like, is of huge value, because then what it indicates is, well, it's not as simple as trying to replicate stuff that's already in a statute. So that's the value, it's actually, well work that one up, see how it goes, oh there's some problems yes. And so maybe then as I've reflected before we need to let go of some of that. I mean I understand that the priority system is really well understood but if this is to be carried forward and this is not an indication of the Court's thinking at all but, this is the solution that you've presented so, from my

part I'm interested to see, can it be carried forward or not. So, Mr Maw has covered a number of things that I wanted to talk to you about, what is the effect that is to be replicated? Whether replicated is in fact, a useful term, I suspect it's not because you're neither replicating what is actually in the legislation nor are you replicating what's in your definition, so that's going to be problematic and quite apart from the issue of whether or not flows are to be reduced and I think your advice is not but not worry about not replicating the effect of the current rights of priority by not recording the reduction of flows. Mr Brass your evidence is, in practice this behaviour is likely to emerge or to continue to be the case because people would reduce in order to remain on longer without actually there being a direction which is to cease. So your reflecting on what is current behaviour within the – now in terms of the exercise of those consents and I didn't hear anyone had any issue with that.

A. **MR BRASS:** That is correct.

Q. And I think the important point raised by Ms Dicey is that quite apart from, the value in of all this is because it's quite a coercive mechanism that then stands behind what are existing relationships within catchments and sub-catchments to, on an informal basis manage flows as between existing permit holders. And so that's what this value is, it's not, you don't imagine that people are going to be ringing up the council and saying, "well we want enforcement actions or prosecutions". The other thing that seem to me and you're all nodding, so that seems to be correct, that's how you see the mechanism. And the other thing that struck me as being just a little odd but I suspect I know your answer to this is that one of the things to be replicated was the maximum authorised allocation as authorised by one of four things and I'm thinking, no it's not. Well, maybe you intended that. You're not looking to under the right of priority definition, am I right in thinking you are not looking to replicate the full take as currently authorised under deemed permit?

A. **MR DE PELSEMAEKER:** That is correct. Yes. And yes, I think we probably need to reflect on how that words within the definition.

Q. Yes you do. If it even survives because your maximum authorised allocation which you're driving at, is actually now, which is under the schedule it's not as "authorised by these permits" at all. Do you all agree with that? Okay. Now as I understand it but I might be mistaken in this, I don't think counsel who've made submissions in relation to deemed permits and right of priority are saying that those authorisations that you refer to in the definition under sub-paragraph (a) and (b), so these are authorisations under the Water and Soil Conservation Act and the amending Act continue to exist because they ceased on enactment of the RMA under section 366. So, that's as I understand the law and maybe your lawyers are going to tell me that that's wrong but I didn't think they took any issue with that. So, those rights ceased under section 366. Everybody agree with that? Right. And all the planners are indicating that they agreed with that. So, if that's the case then there's no utility, no value in referring to (a) and (b) in the definition. Was interested in what you meant in sub-paragraph (c) to the rights of priority. So here you've got a deemed permit that is issued under section 413 so this probably just reflects my ignorance or lack of knowledge about the consenting regime or permitting regime. Did those permits for everybody get re-issued under section 413? Is that the case or not the case? I don't know? You think so? Because I couldn't see anything under section 413 which would have indicated that.

A. **MR LESLIE:** The short answer is no. My understanding is we essentially have three different types of deemed permits which is why I think part of the reason why there's the reference to (a), (b) and (c). So we have the mining privileges which have come through, was from the 1800s and have continued right through and are still valid under the RMA. We have the notified uses which were issued in the '70s and '80s, some of which replaced mining privileges and went on to become deemed permits. And then we have a swath of consents that were issued from the '90s through to the early 2000s where there was a, as I understand it, there was a bit of uncertainty over the implications of section 413 and so people were coming in with their mining privileges and the notified uses which had an

expiry date on them, that met the requirement under section 413 but they were getting them issued as new permits which were deemed to be deemed permits under section 413.

A. **MR BRASS:** And my recollection of the distinction there being issued and granted was that, where they were issued because they were still a deemed permit that council had no discretion. It was simply an accounting exercise to reflect on paper the existing situation. Hence the use of the term "issued" whereas granted implies, accounts for that, some discretion of a matter.

Q. It maybe that the definition doesn't survives or something else comes in its place but I'm just wondering with that explanation in mind, is sub-paragraph (c) actually required if what you've got is a valid permit? If it's valid, it's valid and the idea that you are issuing something, will get people like myself going, "wonder what that's all about" and it's not really helpful if it's valid and it's a deemed permit, it's probably captured by your definition for valid permit. What you think? Yes, everybody's happy, so (a), (b), (c)s gone? Perhaps, yes because we're just dealing with valid permits, (d), now I thought that was really interesting, what is (d), "resource consent granted in substitution of a deemed permit or mining privilege", what is that? Is that Small Burn or is that something else?

A. **MR DE PELSEMAEKER:** Small Burn and possibly something else.

Q. Okay so at least Small Burn.

A. **MR DE PELSEMAEKER:** But it would be captured as well, I think by the definition of a "valid permit".

Q. Well, if that's the case, because I don't know that we should have bespoke provisions for Smallburn who probably doesn't even know that consent is being discussed at this hearing. If it's valid and everybody agrees, and I do not recall the details of Smallburn except that something happened and instead of a new permit issuing, there seemed to be another deemed permit. Whether that was right or wrong to do that, if it's valid and there's no issue…

A. **MR DE PELSEMAEKER:** It is just a safety net, B is just a safety net to capture any irregularities -

Q. Yeah.

A. **MR DE PELSEMAEKER:** – that might have occurred in the past.

Q. I sat there, and I thought, does that actually cover all re-consented deemed permits to date, like 75% on the Taieri Catchment. No.

A. **MR DE PELSEMAEKER:** No. It is an exemption.

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Q. And if it could be interpreted to, if you like, allow deemed permits back, which is the very thing you don't want, you've already said you don't want to happen, then maybe you need to think about that a little more in terms of wording or think about actually does the valid permit definition actually cover this? Right. The other question that I have is the "regime" and I wondered what you meant by "regime' and whether the word "regime" was intended to colour the defined term right of priority. Regime, I thought that was interesting because, yeah… is it meant to be colouring the right of priority? Which on its face – at its minimum, rather, is at least the ability to be able to cease taking. Was it meant to colour that? Well, by colour I mean, does it mean to introduce practices that have emerged in some catchments in response to those rights? Including the entering into of formal and informal flow sharing agreements? That's a regime, is it meant to capture that?

A. **MS DICEY:** No. –

Q. It wasn't

A. **MS DICEY:** – from my perspective it definitely wasn't meant to capture that.

Q. All right. Could it?

A. **MS DICEY:** I don't think it would but if you've thought of that then possible, yes.

Q. I did. Yeah, no, I did, because, and again, because, and it's a reflection back of the evidence that you gave from Mr Maw's questions, it's actually, what you're doing here, what you're hoping you'll achieve here is the state is getting regulatory force to a coercive instrument which in practice will be observed by people within the catchment, and it would be exceptional and at the moment, unheard of, that Council's asked to enforce. So, it

may well give rise to – it may well be the basis upon which these other informal, formal flow sharing arrangements are entered into, but that's not – that may be what happens in practice, but it's not what's intended to be secured in this provision, is that correct?

A. **MS DICEY:** That's correct.

Q. Now, this again, it might be my ignorance, but it was just something how you phrased something at paragraph 6 of the JWS and you say there that the wording of the controlled activity rule was intended to exclude Council officers assessing whether or not a proposed condition was appropriate, and I was thinking, can you do that? As a consent authority, could a consent authority – okay, so, it's restricted its attention to the matter of control, but surely it can say, well, that's a wonky condition. I'm not talking about this, I'm talking generally.

A. **MS DICEY:** Yeah, I don't think you can actually a prevent a consent officer through a matter of control.

Q. Okay, and that would certainly be the case at the RDA.

A. **MS DICEY:** Yep.

Q. So, if you can't, is there anything arising out of that statement, but not allow processing officers to assess whether the condition is appropriate, because I recon they probably could, but I might be wrong.

A. **MS DICEY:** The intent behind that was to try and limit a consent officer saying, "well, there's regime of priorities in this catchment, now I need to go and understand whether that the result in flow regime has an impact on a galaxiid population and whether I should tinker with that or not." So, that was what we were driving at, to really wanting to try and limit through the wording, that occurring.

Q. So, limit through the wording any enquiry behind, if you like, the rights as between permit holders, would that be fair?

A. **MS DICEY:** Yes, that's correct.

Q. And that's perhaps what the policy was that Mr – the effect of the policy that Mr Page was referring to earlier, because that's looking at rights as between permit holders. All right.

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(no overlap)

Q. One thing that did bother me about excluding the restriction – the ability to tell your neighbour to start to reduce – and again, it may be in practice, that's what folk will do anyway, but I was worried whether, if it's just straight out cessation, that you could get to very low flows more quickly than you would otherwise under a regime that says, look, people, we all ought to start to reduce, it's in our bets interests, and, if that was the case, could you, under a cessation condition, alter not only reliability as between consent holders, but the flow in the river, to the detriment of the instream values?

A. **MS DICEY:** I think by the time priorities are even a question in someone's mind, in terms of calling a priority, the rate of abstraction has already reduced, so that's typical of takes from tributaries in Otago, that through the summer months, people aren't able to access their maximum rate of take, and they're dropping anyways, and so, say, if you're just talking about two permit holders, both of them would be on vastly reduced rates of take anyways.

Q. You mean before you get to cessation?

A. **MS DICEY:** Yes.

Q. Why's that? Is that just, like, common sense and good neighbourly behaviour?

A. **MS DICEY:** That's my understanding, that there is a level of kind of working together in that folk –

Q. Yeah, okay.

A. **MS DICEY:** Yeah.

Q. So you don't think that the cessation – you think it may be in theory that you'll get to absolute low flows in terms of the dominant permit or the superior interest, but in practice, people will be on a regime where folk are gradually reducing?

A. **MS DICEY:** Yes, I think that is correct.

Q. Does everyone agree?

A. **MS DICEY:** In a lot of circumstances, I mean, again, there's always such big variety of how people action these things, so –

Q. You can't presumably rule out the odd –

A. **MS DICEY:** Yeah, yeah.

Q. – undesirable behaviour.

A. **MS DICEY:** That's right, but I do think the flows in summer are self-limiting in their nature, that they do drop off, and people do respond to that, and a lot of the time, people's systems are designed for that. Historically, they'd access water in spring and put a bigger amount of water on their paddocks in spring, and then anticipate that reduction, and I think one of the examples you heard was Mr Weir in the Pig Burn, and he'd only used it three times in 10 years, and he was down to stock water, and so he was judicious in terms of how he was using that on his neighbours, but again, yes, that's only one example.

Q. Anybody got anything else they'd like to add to that?

A. **MR DE PELSEMAEKER:** Going through the expert conferencing, I think probably all of us thought about that, like, we can only go so far in trying to maintain those flow regimes. We've had some evidence in the Court as well, I think it was Mr Hickey who said the status quo in a dynamic system is never going to be a status quo, because you'll have delay effects, there will always be changes. Ultimately, we're kind of relying on people's behaviours, and those can change, so I think any option can only go so far.

Q. Yeah, and so the key element is that it is a dynamic system, yeah.

A. **MR DE PELSEMAEKER:** Yeah.

Q. Mr Brass.

A. **MR BRASS:** And also, for me, was being in a situation where there are uncertainties, there are variabilities, the plan change is intended to carry over until a new plan comes in, so it's really that 80/20 rule, or viewing things with a risk management lens, so accepting that, you know, we're not going to be able to craft a perfect solution, and if we could craft a perfect solution, you can implement it without requiring a whole lot more effort and activity on peoples' parts than this plan change is supposed to be triggering, so it's finding that right balance.

1340

Q. Okay, and so it was interesting that, Mr de Pelsemaeker, you raised evidence from Mr Hickey, because I'm pretty well sure it was Mr Hickey who said, look, the rights of priority and maintaining the rights of priority is not a foolproof way for saving those galaxiids, because within a dynamic system, he said – my recollection was, anyway – was that there's more going on than the exercise of the rights of the priority had to be. Flows were changing within Otago as a consequence of improvements to irrigation efficiency, moving from border dyke wild irrigation to spray irrigation, and then the subsequent throughput via groundwater/surface water into the rivers, and that was also impacting galaxiids. Does everyone recall that? And so – yes, sorry, Mr Brass.

A. **MR BRASS:** Yes, sorry, I would just add to that that even if we could lock in exactly the existing situation, for some species of galaxiid, they are in decline under that existing situation, so, as I say, even if we could lock something in, that does not automatically protect those species or those populations.

Q. So realistically, the outcome for some species may be that they, what, remain threatened or continue to what?

A. **MR BRASS:** The risk remains.

Q. The risk remains, so if they're threatened now, they'll be threatened under this system, and they may indeed become extinct, is that what you're saying?

A. **MR BRASS:** I would cross my fingers and hope not extinct, but certainly, loss of extirpation of local populations.

Q. Loss of what, sorry?

A. **MR BRASS:** Of local populations.

Q. Yeah.

A. **MR BRASS:** So for a number of those galaxiids, there are a small number of discrete and separate populations remaining, so each one of those populations that gets lost doesn't make the population go extinct but does increase the risk to the overall population.

Q. Mmm. So, in order for this transitional plan – you're recommending not only transition the right to be able to tell another to turn off, so that's one

right, not only, but it's also trying to hold true – it's also important in terms of the outcomes for galaxiids that there be no further improvement which is enabled through a plan in terms of efficient irrigation systems, is that what you're saying? That no more land conversions occur without a better understanding of what the interface between land and water.

A. **MR BRASS:** That would certainly be the case in terms of the long term in terms of plan change 7 and restrictions on increasing irrigation area. I guess that's really operating as a proxy in terms of trying to manage the impacts on instream flows, so again, it's probably a risk-management approach as opposed to something that's a fully-formed regime.

Q. Mmm, and does changing land use also have an impact or potential impact on the flow regime, and therefore, on the population of galaxiids?

A. **MR BRASS:** Yes, if that changes the way that an existing consent is operated, and it's quite possible for a consent to stay within its existing limits and conditions but be operated in a different way or utilised more fully, and while it's not really a matter for plan change 7 directly, also, the potential for any downstream effects in terms of runoff, discharge, et cetera, from changes in land use. So again, as a risk management approach, minimising the amount of things that are changing in the system does at least help minimise the risk.

Q. Right, and so that's how you conceptualise this plan change. What it is is it adopts a risk management approach in terms of minimising any further changes within the environment, both the land environment, water environment, which may then have a deleterious effect on the existing populations of galaxiids, is that fair?

A. **MR BRASS:** Yes, in terms of galaxiids, that's certainly my understanding.

Q. Anybody take a different view in terms of what this plan change is endeavouring to achieve?

A. **MR DE PELSEMAEKER:** No, I agree with Mr Brass.

Q. Okay. Mr Ensor, you do too? Yeah, and Ms Dicey?

A. **MS DICEY:** In terms of trying not to worsen effects on these populations, yes, but yeah, the kind of do nothing, the push pause and allow continuing

decline is the kind of background concern for me, so I'm not sure if it's achieved that, so just, yeah, yeah.

Q. And by that answer, I take it that you're not looking at option A, but what you're saying is that plan change 7 is a do nothing approach, even where rights of priority, or at least the right to tell your neighbour to cease taking, is brought forward in an effective mechanism.

A. Yeah, that's right. I was referring more to plan change 7 in an overarching sense.

Q. Yeah, yeah, yeah, yeah. Okay, all right.

MS DIXON:

(inaudible 13:46:22). I've got to ask if Mr Ensor could be excused. This is the point where he really needs to (inaudible 13:46:27) if he's going to make the plane this afternoon.

LEGAL DISCUSSION – WEATHER FOR FLIGHT (13:46:40)

COURT ADJOURNS: 1.48 PM

COURT RESUMES: 3.02 PM

THE COURT: JUDGE BORTHWICK

Q. Just a couple more questions from me. First question's this: for larger catchments where there are many deemed permits such as Manuherikia, how do you see this working out, assuming that the regime is well one regime, the controlled activity or RDA activity applies. Is that going to be difficult or easy to do with those many, many deemed permits. So that's what we given to understand.

A. **MS DICEY:** There are many deemed permits in those catchments but I'm not sure how many of those actually linked through priorities. So, say if there's 200 in the Manuherikia, there are sub-groups of linked priorities, is my understanding. So sometimes you might have a trib where there are just two that are interlinked. I haven't seen a permit with more than, maybe 10 priorities interlinked on it, that's off the top of my head but I can't recall one.

Q. So if you're thinking like the main stem of a river, say the Manuherikia or the Taieri or whatever, you're not thinking that there's going to be 100s of these interlinked permits?

A. **MS DICEY:** No, not at all.

Q. So, for something like the main stem of the Manuherikia, how many linked deemed permits with rights of priorities would there be, do you know roughly?

A. **MS DICEY:** Sorry, off the top of my head. I think there are about six within four to six within the main stem itself.

Q. Sticking with the main stem of the Manuherikia, are there also resource consents to take and use water. So you've got the old deemed permits which are trundling along but these are resource consents which are granted under the Act.

A. **MS DICEY:** To my knowledge, all of the key main stem takes from the Manuherikia are still authorised by deemed permits. There may be some outliers, some small privately-held permits and I'm not sure whether they

were ever interlinked through priorities or not. So, I'm not clear on those resource consents.

Q. So this is where we're really interested in this questioning of interlinking, if at all between resource consents granted for water permits in the ordinary way under the Act and deemed permits for the same water body. Can you comment on how this works in with something like that? So, perhaps the scenario I would put to you is that, I am the downstream permit holder on a deemed permit and there's an upstream RMA consent. How does all work in together? The RMAs and the deemed permits?

A. **MS DICEY:** In a situation like that, the resource consent is either been granted, in the first instance as a water permit under the RMA, it was never subject to a deemed permit priority or it's a replacement of a deemed permit which may or may not have had an interlinking priority. In which case at its renewal, the priority would have fallen away and they're usually in those circumstances, nothing would have replaced it. There may be some informal kind of system between the parties, the two permit holders. So to my mind it really only applies to those interlinking, remaining deemed permits with priority where most of them are still remaining as deemed permits. And in the catchments I've worked to, to date, that is been a driver for them to act collectively in replacing their permits and so I think what we've seen with some that haven't yet come in is that they've held off and were going to come in as a group. So, in many of those cases where there are significant interlinking of those priorities, mostly there won't be that many permits that will have been replaced.

THE COURT: COMMISSIONER EDMONDS

Q. What if there are, intermingled or RMA permits that effectively might be taking water and then somebody with a deemed – on the priority system effectively wants to tell somebody below, although have to be above somebody with an RMA permit wouldn't it? To do something because they've got insufficient water. The cause of the insufficient might not be the deemed permit, it may be the RMA permit which there's no ability to

tell the RMA permit to turn off. So what would happen in those situations? How many of them are there and what would it mean in terms of the person's ability to require that the priority arrangement be adhered?

A. **MS DICEY:** So, there are situations like that where you have some people who have replaced already and that is basically just the new status quo, as much as there is the status quo, in terms of some of those priorities may have fallen by the wayside and they either just don't get called or they can't be adhered to. Often, I would imagine that in some cases there maybe an informal arrangement or often the property itself and the infrastructure on that property will reflect, if it has been something that has been part and parcel of the regime on that tributary, then infrastructure may reflect that. The way the farm may have been developed, will reflect that and so, the setup of the takes may reflect that but basically there will be no ability for a deemed permit holder to call priority on someone, my understanding who's now holding an RMA consent.

1510

Q. **JUDGE BORTHWICK:** Would it be fair to say that for those permits which have been re-consented now under the RMA, that if that took place under the operative plan then that policy that Mr Page referred us to 5.4.3 was applied and considered at the time that the consent was decided? And in other words that the consent authority, in deciding to grant that permit did have regard to existing, I haven't got the words in front of me but the other existing lawful users including those persons who had deemed permits and with, I assume, right to priority. In other words, that policy is brought into account together with the assessment matters, Mr de Pelsemaeker.

A. **MR DE PELSEMAEKER:** I never worked in a consents base, but what I think would have, or would likely to happen is that consents officer would consider the policy, but it wouldn't actually bring down the priorities on the resource consents.

Q. No, I understood, I just need to know that it was considered, and then how that might be reflected in consent conditions, if at all.

A. **MR DE PELSEMAEKER:** Probably, if it was at all considered it would have been through the rates of takes or the volumes allocated, making sure that any downstream users would still end up sufficient water.

Q. Water. Mr Brass.

A. **MR BRASS:** But also note in my experience such consents because they've gone through the operative plan process, have been required as part of that to assess instream ecology, other users, and probably, particularly residual flows, sometimes minimum flows are applied, but I think there is a tension there within the operative plan in that you've got that policy which says to consider existing users, but you also have the policy which sets the allocation for that water body as all of the existing takes added up. So, in my experience it hasn't often been that you consent to being conditioned in a way that sort of winds that back. So, they would normally still have the ability to take without being subject to priorities in my experience.

Q. Is that because the allocation is the sum of all takes?

A. **MR BRASS:** Yep, so, therefore the water is technically available –

Q. Yeah.

A. **MR BRASS:** – you get your consent granted.

Q. All right. Ms King, what about you? What's your experience?

A. **MS KING:** Yes, I would have to agree with Mr Brass in terms of the allocation being available and then you may take in a parties as an affect a party, and you might get written from the party, or residual flows and flow sharing regimes also might be incorporated in consents.

Q. And Mr de Pelsemaeker.

A. **MR DE PELSEMAEKER:** Just one thing I want to add to that is we also have a policy in the plan, policy 642A which basically works a little bit like the schedule. So, when you have fully allocated catchments you come in for a consent. You only allocate based on historic use, except that the methodology is not spelled out. So, that again is a mechanism to make sure that the priority, is probably a bad word, but that the effect of the priority is translated into the allocated volumes and so you're not going to encroach on the allocation or water use of downstream users.

Q. Okay, Mr Ensor, did you have anything to add?

A. **MR ENSOR:** No, I didn't. thanks.

Q. All right, so, we're to understand that if there are any resource management consents out there and we understand there are resource management consents out there, that issues as to the allocation for those consents and the interaction of the using of that allocation have relative to deemed permits have been taken into account on consenting and that's not a matter that we need to turn our minds to? Everybody's nodding. Okay.

THE COURT: COMMISSIONER EDMONDS

Q. So, when you say that, you're talking about the priorities that there are on the deemed permits also being considered as part of that? Or not? Because I wasn't clear from your answers, and perhaps Ms King could start, because the last time you appeared in front of us, Ms King, I think you said – well, what I took out of it, and this might be quite wrong, was that priorities wasn't something that you concern yourself with.

A. **MS KING:** No, it isn't currently something we concerns ourselves with.

THE COURT: JUDGE BORTHWICK

Q. I thought Mr de Pelsemaeker's answer to – reference to policy 642A, I think you said just then, was that the – was to the effect that allocation under the deemed permit was brought into account.

A. **MR DE PELSEMAEKER:** Yes.

Q. Yup, and so perhaps if maybe you respond to the commissioner's concerns.

THE COURT: COMMISSIONER EDMONDS

Q. Isn't that a different point?

A. **MR DE PELSEMAEKER:** It's a different point, and again, I'm not a consents officer, so I cannot whether priorities have deliberately been considered, but the effect of a priority would have been – is visible, so to speak, on the water taking graph. It would have ramifications in terms of the volumes or the quantities of water that are being taken under the

consent audit – sorry, the permit that is supposed to be replaced. So, when it comes to renewal, policy 642A will ensure that the effect is captured and the allocations allocated under the new consent. Does that make sense?

Q. So, are we back to the trace point, then? So, that the use that all these people that may have priority rights –

A. **MR DE PELSEMAEKER:** Yeah.

Q. – and may or may not have exercised them. When the consents people looking, they're going back to the trace to see what was actually being used at various times, various conditions –

A. **MR DE PELSEMAEKER:** I'm not sure if –

Q. – hydrological conditions, et cetera.

A. **MR DE PELSEMAEKER:** Yeah, I'm not sure if they will actively look at that. I think, I'll let Ms King speak.

Q. Yeah, yeah.

A. **MS KING:** So, no, we don't actively look at what priorities were being exercised and how they were being used, but we do look at things like downstream users and what flow they were taking, and that helps us under 642A to allocate the water back to them, which if priorities were being used would help us make that determination, but we don't specifically look to see whether the priorities were being exercised.

Q. Right, so you're looking at the records of what they have been taking.

A. **MS KING:** Yes, yep.

THE COURT: JUDGE BORTHWICK

Q. Mr Leslie.

A. **MR LESLIE:** Just in addition to what Alex was saying, that's part of where the analysis that I perform on water use patterns comes into it, is if there are any certain patterns in the work that I do, I will rely that to the consents team so that they can take that into account.

THE COURT: COMMISSIONER EDMONDS

Q. But you don't go looking to find out whether that was as a result of people's priorities. You just take it as you see it in terms of the record?

A. **MR LESLIE:** yes.

Q. Thank you.

A. **MS DICEY:** Just picking up on what Mr de Pelsemaeker was saying about looking at the allocation, and I think that does take you so far in understanding people's access including potentially to some extent, priorities and how they may have been called on you or you may have called them, but it only goes so far because it doesn't necessarily reflect the timing. So, it's a total amount, or the maximum grate, but not the timing at which you've accessed the water which can be the critical component of priorities. So, when flows are low, you get to call priority and access flows. I think – it has been, in my experience, it has been quite a hands off approach by the Council and that possibly reflects the history of priorities in terms of leaving it to priority right holders to deal with amongst themselves, and that's almost reflected in the re-consenting, and we've actually, as their consultants worked with them to understand if the priories are important to them and if they are, then how does the effect of them get recognised going forward, and again, as I said, that's often been at a catchment scale, or sub-catchment based scale, and if they are important within that catchment, people have come together, worked together, and through the full assessment, have developed something else together.

1520

Q. All right. Anybody else like to answer? Mr Brass.

A. **MR BRASS:** For completeness, note that there is an element of a priority remains in the sense that most recourse consents will be subject to a minimum flow or a residual flow. They have to switch off at that point. Deemed permits don't. So, they have the ability to continue. So, while they can't call priority on resource consents, they do get to keep taking water after resource consents have had to switch off under low-flow circumstances.

A. **MR DE PELSEMAEKER:** I acknowledge that but the deemed permit catchments, if I can call them that. Catchments that are dominated by deemed permits, they might have minimum flows on them but they are

not effective yet. So the effects of those minimum flows wouldn't have kicked in yet. So they would all be deemed permits as well as consents, would not be held to any minimum flows in those catchments and as because another policy in the plan, that basically says, "they're only kick in 2021, on the expiry of deemed permits unless all the consent holders in that catchment commit to implementing that minimum flow earlier", which I don't think has happened.

Q. No. For the purpose of this discussion, the deemed permit catchments are which catchments in schedule 2A? So Manuherikia, presumably is one?

A. **MR DE PELSEMAEKER:** Manuherikia, Taieri, Luggate, Kakanui, I think there's a deemed permit on the Kakanui.

Q. Kakanui.

A. **MR DE PELSEMAEKER:** Yes, Lindis which is not yet but soon to be in the schedule hopefully. Have I forgotten any?

Q. Arrow?

A. **MR DE PELSEMAEKER:** Arrow is not yet in the schedule.

Q. Not in the schedule and what about Cardrona?

A. **MR DE PELSEMAEKER:** Not yet in the schedule.

Q. All right, so penultimate question and this is one I asked the lawyers but obviously didn't like it, so I'm going to ask you instead which is, if there's a vires issue, a legal issue that we have to consider generally with what you've proposed because what you're proposing is a condition that givens the dominant consent holder the right to tell somebody to turn off. I asked the lawyers could the vires issue, if there is one be overcome by requiring this could actually been our part of policy, requiring the applicant to obtain neighbours' approval and the neighbours' approval to be given for the application, on the terms sought. So that's really important. It's for that application, on the terms sought; so it's not conditional to anything. What do you think, if there's a vires issue there and I think there is potentially, could that overcome that, that's I guess in part, a legal question, in part a planning question. So the policy is, whatever the policy is but it has that

as a component and an application has been lodged together with the approvals or affected party approvals.

A. **MS DICEY:** Just to make sure I've understood you correctly, the workaround could be, if there is a vires issue, the workaround that you're suggesting is, so two permit holders, the dominant, subservient, the dominant has to obtain, the subservient…

Q. Approval for the application on the terms sought.

A. **MS DICEY:** On the terms. So the condition be applied against this subservient.

Q. But the subservient has actually agreed to it.

A. **MS DICEY:** Yes. I had contemplated something like that so almost a, whether it's a simple written approval as part of their application. I guess the potential stumbling block is that the subservient says, "no I don't like the idea of you carrying on your priority" and then almost pulling all of that group of priority holders down the noncomplying pathway.

Q. Yes. Well there's no doubt you could get a rouge applicant but is the answer to that and this is the second part of the question for a subservient permit holder, that they too are obliged to get the approval of the dominant together with any servient, so that everybody is being held to obtaining approvals for applications on the terms sought and no one's going rogue if you like.

A. **MS DICEY:** And perhaps, it's the 80/20 rule again. It might be even be a 90/10 rule and we did talk about those kinds of things quite a lot at the conferencing. I think that could be effective and I think that's actually very close to them "I will agree to this condition" but it's just taking a step further and getting the other priority holders within your subset to also make that clear that they've agreed. Yes.

Q. Agree.

A. **MS DICEY:** It's only a small step further.

Q. Mr Ensor, you happy with that?

A. **MR ENSOR:** On the face of it, that would seem like an option. It might also be an opportunity to alleviate some of the concerns raised by ORC

technical folk in terms of contact details and all those sorts of things, it would potentially provide a vehicle as it were.

Q. Yes. We've got to talk about that with Ms King and so, I saw it, either coming in the policy or coming in the entry conditions for the RDA or for the controlled, do you want to comment on that? It has to have some real force behind it.

A. **MR ENSOR:** I initially jumped to mind as being an entry condition. –

Q. An entry condition to.

A. **MR ENSOR:** – the policy can be more general about the priority issue.

A. **MR DE PELSEMAEKER:** I agree with what Ms Dicey and Mr Ensor said. Yes, I'm just, kind of sink, let it sink in.

Q. Okay, come back to you.

A. **MR BRASS:** I think it could be made to work but I would probably still have a preference if the use – essentially the applicant volunteers that condition as part of their application, be it through a tick box or whatever. If that can be constructed in a way that it deals with the vires issue I think that would be simpler.

Q. Yes this is to deal with the vires issue. My gut is that there is a vires issue and so what are you saying there? So, I would assume that every, the entry condition, if it's an entry condition, the entry condition is under the application. The applicant wouldn't be volunteering this as a condition. The applicant would be obtaining neighbours' approval to the application on the terms sought and that would be – I'm suggesting that it's not just the dominant obtaining neighbours' approval from the subservient but if you're also subservient then you're going back upstream to the dominant or downstream to the dominant, or actually whatever direction it goes. And looking at other subservients, that's what I'm suggesting so that everybody in that little water body or long water body's caught. Thoughts? Do you want to think about if further? How did you see it?

A. **MR BRASS:** My concern is that is adding a moderate amount of complexity to the process. If that was required to deal with the vires issue…

Q. Might be also required to deal with the rogue subservient permit holder.

A. **MR BRASS:** Yes I consider that that rogue situation could be dealt with under the plan and enforcement proceedings as per normal.

Q. Now this is where your neighbour says, "I'm not going to give neighbours' approval for you to turn off my water. I am not."

A. **MR BRASS:** Yes that only arises if that neighbours' approval is required. If the consent as the plan is currently structured doesn't require that neighbours' approval, then that rogue doesn't actually become an issue.

1530

Q. But is that right though because isn't the reason to bring this issue up, in raising this issue, it is because there is a potential for the flow regime to change and access to water to change hence people's hither to reliability of supply changes. So how can you say that people would not be affected by that. I mean, on that understanding, people might rightly say, at the 1st of October, there will be significant effects if there's not a policy response.

A. **MR BRASS:** Yes, and sorry I certainly was not intending to say that there wouldn't be an effect on parties. My thinking is more that, in terms of dealing with the vires issue. If the vires issue can be done by constructing the application in a way where the applicant has volunteered that condition without requiring a written approval process, then that would be a simpler way of addressing it, but I have to defer to the lawyers if agreeing to that condition is part of your controlled activity as opposed to a noncomplying. Whether that counts as having volunteered the condition sufficiently to address the vires issues, I'm not sure.

Q. Okay. All right –

A. **MR BRASS:** But if that was possible, that would be my preferred approach.

Q. To do what I've suggested, or to not do anything and just deal with it by the application?

A. **MR BRASS:** To just deal with it via the application for the sake of simplicity.

Q. Ms King, have you got any comments?

A. **MS KING:** Yeah, I do agree with Mr Brass in terms of whether there is the ability to word the application in a way that the applicant would not only propose the conditions on their own consent, but any conditions that would mean that someone had dominance over their consent could also be applied, and I wonder if that's a way around that issue. I probably couldn't comment on how easy it might be for an applicant to get written approval from someone prior, if that makes sense, and I agree with Mr Ensor in terms of it being an entry condition rather than a…

Q. Policy.

A. **MS KING:** Policy.

Q. But you don't think an entry condition is necessarily required? Is that what you're saying?

A. **MS KING:** I think if it was in the application form –

Q. Yeah.

A. **MS KING:** - where they had proposed it, but my only concern with that is if it's not an entry condition and they don't tick the box –

Q. Yeah.

A. **MS KING:** - you get yourself into a bit of a tricky situation.

Q. So then –

A. **MS KING:** So, then it would be –

Q. – on balance, an entry condition.

A. **MS KING:** Yes.

Q. Okay. All right. Anybody else want to comment?

A. **MS DICEY:** I do agree with Mr Brass, and perhaps it's simply that as a subservient deemed priority holder, by ticking the box saying you will agree to the condition, then you're inherently giving your written approval for somebody else to call priority over you. So, perhaps that actually…

Q. So, you're thinking this more applies to anybody who's in that category of being subservient.

A. **MS DICEY:** Well, it's less of an issue for the dominant permanent holder, because they are the one that'll be giving the instruction –

Q. Yeah, yeah.

A. **MS DICEY:** – so, they're not losing out. So, it's really about the subservient priority holders being told to give up their access by another permit holder to water, but by ticking the condition saying, yep, I agree to this condition, then they're effectively giving their written approval for that dominant person to call priority over them, and that's what the condition is doing, is allowing someone to do that over them.

Q. As written or to be tweaked?

A. **MS DICEY:** As written, with maybe some of the tweaks suggested.

Q. All right. Mr de Pelsemaeker.

A. **MR DE PELSEMAEKER:** Yeah, I agree with Ms Dicey. It's good to have the condition in the application and written approval on the terms of that application means that they agree to that condition. It also avoids the issue that written approval is being given, but it results in a flow sharing mechanism that is agreed by everybody but is different from the priority users.

Q. So, if they don't tick the box, then what?

A. **MR DE PELSEMAEKER:** I'm not familiar with the mechanics of consenting enough.

Q. Okay. Noncompliant?

A. **MR DE PELSEMAEKER:** Noncompliant. Yeah.

Q. Okay. Think about that.

A. **MR DE PELSEMAEKER:** If it's in the entry condition, it would be yes.

Q. Yeah. But I think on balance you're not suggesting any amendment to the entry condition? Or are you?

A. **MR DE PELSEMAEKER:** Not substantial –

Q. No, no, on this specific issue.

A. **MR BRASS:** No, no, yeah.

Q. No, okay, got it, all right, and then the last question was it seemed to me that, by now, hopefully, anybody who was wanting to seek a replacement consent, particularly for those consents expiring on the 1st of October, will have got their application in. If you wished to take advantage of either the controlled route or the RDA route, you are going to have to amend those applications substantially, and everybody's agreeing to that? Yeah, so we

can't assume that – well, one of the issues raised by you, Ms King, is what if you've got an applicant that's turned up, and, well, people who are the beneficiaries of a deemed permit who are wanting to slice and dice the deemed permit, you know, amongst the shareholders of a race, which, I think, is an example that you might have given us, then what are you meant to do with that? And the answer is I don't think this process contemplates those applications. They might have to, if they want their water for the next six years, under a controlled activity rule, they're going to have to amend that application and bring it back in line with the original permit. Would that be fair?

A. **MR WILSON:** There may still be the issue, though, with one of the downstream permits is looking to slice and dice, so would you then require them to amend their application as well?

Q. I would have thought the answer to that is if everybody wants to take advantage of this, then yes, is my thought. I can't see how you can do it otherwise. Ms Dicey?

A. **MS DICEY:** I don't think there's going to be a lot of slicing and dicing of anything under PC7. I think my understanding is that everything will just go on hold, and there will be a substantial reconfiguration of applications and basically going through the application form to realign the applications with the controlled activity or the RDA. Yeah.

Q. So this is really important. Does anyone see it any differently from Ms Dicey?

A. **MS KING:** It's kind of tricky to comment on what applicants are going to potentially do.

Q. To do, yeah.

A. **MS KING:** I am aware that a few applicants have been in the system for a really long time, and I don't know how open they would be to amending their application that significantly, but again, I can't really comment on what applicants might or may not do. I am aware that, where applicants have applied separately from shareholders, like you mentioned earlier, it is sometimes based on the fact that those relationships aren't the best.

Q. Happy?

A. **MS KING:** Yes, and so I don't know whether this will hinder that or create a pathway that they actually do end up applying together. It's quite hard to say how it will go.

A. **MS DICEY:** I just add to that, the applicants that I have been working with, I think they feel that if PC7 becomes operative in the form that it currently is, with the noncomplying activity pathway basically a closed door to them, they feel like they have no choice but to significantly alter their applications, yeah.

A. **MR ENSOR:** Just thinking a little bit about the entry condition versus just a tick box, I guess, and I'd have to give this more thought, probably, but having an entry condition, in a way, allows for some flexibility in the form that come –

Q. That it comes in?

A. **MR ENSOR:** – that these come in, and whether there was a slicing and dicing, then you might be able to achieve the objective without ticking the box. You'd have a very similar condition, for example.

Q. Mhm, so what's your scenario there, sorry?

A. **MR ENSOR:** I'm thinking if there was a number of shareholders on a race, for example, and their permits were coming in separately, there might be an opportunity for something slightly bespoke, if the written approval is provided, rather than just relying on a standard tick box.

Q. Yeah.

A. **MR ENSOR:** Yeah, early thoughts, obviously.

1540

Q. That's a good thought, though, because one of the things that worried me about something that you said, Ms King, was, well, folk might have been doing things their own way or going their own way for the last 30 years under deemed permits. Perhaps changing the point of take, perhaps – that was one of the things I know you did actually mention, changing the point of take, they may well be, have – there were other things that you mentioned as well, which the region may not be across, and so you get these applications in for the first time, and it's like – again, part of the answer to that is under the controlled and RDA, well, people might have

to be substantially amending – they may have to be doing 136 applications. I don't know, but we can talk about that later. So those are my questions, anyway. Ms Commissioner, have you got any questions?

THE COURT: COMMISSIONER EDMONDS

Q. Well, I just wondered about transfers. How are transfers dealt with in terms of this new rule framework?

A. **MR DE PELSEMAEKER:** Actually, I started thinking about it after reading Ms King's evidence, and maybe that's a little bit too late, I admit that. Ms King basically set out two scenarios, or a mixture of two scenarios, whereby you have transfers of shareholdership, if I can call it that, which makes the process more complicated, more complex, but it doesn't seem unsurmountable, in terms of you might still be able to achieve the outcome that you look for. The other one is the transfer or point of take, but I take Ms Dicey's comment, a lot of people, a transfer of point of take will often by accompanied by an investment in new intake infrastructure and irrigation infrastructure. A six-year permit is probably going to be discouraging that. However, I'll be honest, I did think over the weekend, like, does there need to be, in the controlled activity rule, a mechanism that, yeah, basically addresses that risk that there still is going to be a transfer of a point of take. Where that is coupled to a priority, you might have totally different outcomes.

Q. And so what are you suggesting then? How might you deal with that problem? Might it be an RD sort of thing?

A. **MR DE PELSEMAEKER:** It might be, and it might be in the controlled activity that you put in it. I'm just thinking out of the top of my head now, that there, yeah, that you try to consolidate the current point of take within the controlled activity, and if you don't meet that, go to an RD, but that is, yeah, listened, just off the top of my head now.

Q. So would there be quite a number of examples of these points of take that have never been regularised on the deemed permits, would there?

A. **MR DE PELSEMAEKER:** Sorry, been?

Q. Would there be quite a number of deemed permits where the point of take actually differs from what was authorised. A lot of people might have bothered to fix it up on the basis that, well, hey, we've got to do something about this sometime, in 30 years or whatever, anyway.

A. **MR DE PELSEMAEKER:** I recall some of the evidence that was suggested as well that the point of take is often not – I think it was the evidence of Mr Cummings – that point of take is often not properly aligned with what is on the consent or on the permit itself. Yeah. That is to be addressed, I guess, through regular auditing of those permits.

Q. So, I'm sorry, I'm a little lost as to what you think. I mean, if this is an issue, how might it be dealt with?

A. **MR DE PELSEMAEKER:** Yeah, I don't know how big the issue is, and, again, it comes down to risk management, I guess. I don't know how – like I said, I don't know how many people are intending to change the point of take. Is it worthwhile putting something in the controlled activity or in the rule framework to address that? It depends how big the risk is, because, by doing that, you might actually constrain people as well, or disincentivise that pathway.

Q. So if you're forced down the noncomplying route, which you could be, what's it likely to mean on the noncomplying activity route if things are pretty neutral all around in terms of effects, for example?

A. Well, under the noncomplying activity rule, you could consider the effects of the change of the point of take and what it means for the environment. There, you have that opportunity –

Q. I was just thinking, if you wanted to follow all the other entry things, but say, well, we can't do this one, but actually, really, it's pretty neutral in terms of the other controlled activity sort of things that you worry about and the effects, then you'd presumably get your noncomplying activity relatively simply, would you? No, a risk factor?

THE COURT: JUDGE BORTHWICK

Q. I guess my concern was more what Mr Cummings might have been talking about, that you hadn't done on audit – not you, personally – but

ORC has not audited these takes, and that there have been changes happening over the last 30 years which should, you know, permit holders should have sought permission from the regional council to amend permits, like amending the point of take, or transferring to another person or whatever, you know, Mr Cummings talks about, and so your database is a bit out of date, but then whose problem is that? It's ORC's problem. It's got a duty to –

A. **MR DE PELSEMAEKER:** It is, and I think in the last couple of years as well, we have done – again, Mr Cummings, later on, might be better placed to comment on that, but we've gone through catchments, I believe two years ago. We did the entire Manuherikia to audit water-metering data, and I think the same happened with the Cardrona not so long ago, so that has been done, but there are still, I believe, a number of irregularities.

Q. Right, so the question is whether those irregularities trip up this plan change.

A. **MR DE PELSEMAEKER:** Well, yeah, and I don't think that the discrepancy between where the point of take is on the consent and where the point of take in reality is not that big that it will trip up the plan change. What could trip up the mechanism that we are trying to put in place is people actively seek to change the point of take.

THE COURT: COMMISSIONER EDMONDS

Q. All right, so does that mean, then, that you're thinking that it mightn't be a desirable thing, then to have an easier pathway for an alternative point of take? On balance, is that when you've arrived?

A. **MR DE PELSEMAEKER:** In easier pathway, yes but not such that it encourages them also, if you simply allow for it under the controlled activity rule that could actually hinder you to achieve your outcomes which is to keep that flow regime going.

Q. Right so that's the control, that's something like RD?

A. **MR DE PELSEMAEKER:** Yes, if you can take the effect of that into consideration then the RDA could be a possible way to address that.

A. **MR ENSOR:** I was wanting to maybe comment on the irregularities between the point of take on paper and on the ground and I suppose it's probably another risk-based discussion as to how, if what we're trying to do here is reflect what's been happening rather than what's been on paper and then maybe the risk is a little more acceptable because of it's been wrong for 30 years that's what the environment is.

Q. Yes understood. Mr Leslie?

A. **MR LESLIE:** At the risk of being corrected by Mr Cummings tomorrow, my experience is that the majority of the discrepancies between what that paper says where the point of take is and where it actually is, are down to the fact that the deemed permits that have been re-issued or recorded by the regional council record the location spatially as a grid reference which is saying it's, somewhere in this 100-metre by this 100-metre square which creates difficulties when you're trying to talk about a specific point, and you might even have multiple waterways in the same grid reference.

1550

Q. Okay.

A. **MR WILSON:** I was just going to add that where metering is in place there is a process to capture the location of that metre as well, not saying that means there's not anomalies out there or differences between that and the paper but we do have information on where the abstraction point is supposed to be and a process for exemptions where the metering is different from the abstraction point.

THE COURT: COMMISSIONER EDMONDS

Q. I have just one last one, because I didn't feel that I got a full answer to my earlier question which was the position where you might have an RMA permit which has got conditions and things on it, and then down below that you've got someone with a priority one and they want to call time on somebody higher up because they're not getting enough water, and it may be the reason they're not getting enough water is because the RMA permit is able to take it all. So, I guess my question is then, well, how is

it reasonable to call time on somebody higher up in terms of your insufficient water lower down when actually it's an RMA permit that's causing that problem for you.

A. **MS DICEY:** So, just to understand and make sure I've understood you correctly. Priority two, upstream, RMA permit in the middle –

Q. Yeah.

A. **MS DICEY:** - and then priority one downstream. So, that might well be a situation in reality. The other example equally the same, or different, but equally the same effect is priority two up above, priority one down below with the drying reach in between, or drying reach somewhere between the two, yeah. Those are the instances, and there are many of them, where the priorities probably didn't get called and didn't get utilised. So, they've sat there, may have got called at some time in the distance past, but when the RMA permit came on stream, then maybe the priority just went by the wayside. Equally with the drying reach, maybe there was no point in calling because the water still won't turn up at the higher water priorities, winner take. So, there are lots of instances where priorities exist, but for whatever reason, they practically don't have effect.

Q. But what's to stop the person calling time on it?

A. **MS DICEY:** Historically?

Q. No, I'm not worried about historically, I'm looking at what might happen under a future regime.

A. **MS DICEY:** So, I guess the two link in my mind. Historically there has been nothing to stop them. In the future there will be nothing to stop them besides the social cohesion of rural communities, really, and again, I think it would be a very unusual situation with potentially significant social ramifications in some of these small communities.

Q. Okay. Thank you.

A. **MR WILSON:** I was just going to add. I think that's a very good questions and it's one of the problems that I have with carrying the priority system forward, and I think there's a sort of next level of that where you may have three in a row, and the one in the middle previously might have been the deemed permit that was in the priority scheme, and has now turned into

an RMA Permit and dropped off, which puts more pressure on the priority at the top, cause the person at the bottom used to be able to call priority over two permits, and now only has one they can exercise over.

Q. Thank you.

THE COURT: JUDGE BORTHWICK

Q. Okay, and I apologise, I didn't actually read properly your serving right of priority consent holder condition, which I see why you're saying on receipt that the subservient consent order is agreeing to turn off upon notice. So, have read that properly now. I guess the question still remains, should that be conditioned up as an entry condition? Think about your responses, Mr Ensor, you are free to go. Right, and then we're just, I think, turning to your balance. If anyone's got any questions rising from the Court's questions? No, okay, and then turning to your balance of your questions, Mr Maw. So, we'll just let time for Mr Ensor to slip away.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. I just wanted to pick up on this issue over the transfer of the point of take, and it occurred to me whether we might be conflating two separate things into one application, and whether the correct way to think about the – well, the correct way to think about addressing this issue where the point of take has changed is that that may require a separate application to change the point of take, and following the mechanism under section 136 of the Act, but that wouldn't necessary get in the way of dealing with the replacement of the permit under the provisions recommended for plan change 7. So, I'm just interested in whether perhaps I've understood that correct. I'm looking at Ms King in terms of how you process that type of application.

A. **MS KING:** Yes, you have understood that correct. It would probably be easier for the applicant to apply for a section 136 separate to their application as you've said. I do agree with Mr Ensor in terms of the risk potentially being low if it's the difference between the paper, location and the actual on the ground location, because obviously that's been status quo for a while. My biggest concern is where someone applies to transfer

a point of take, it might remove them out of where their current priority position is, them disrupting the entire priority regime, for lack of a better word, within that stretch of the river.

Q. So, then when you're thinking about how you might process that application and you're following a prescribed process in section 136, you'd be then turning your mind to the effects of the proposed transfer and the effect that might have on upsetting the, call it the apple car, upsetting the regime in terms of access to water.

A. **MS KING:** Yes, you would.

Q. Now, turning back to the joint witness statement, and there was a comment at paragraph 14, Mr Wilson and Mr Leslie noting or expressing a view that 15:58:13 would be required to properly enforce the conditions. Now, I am – I'll put that out there for you to answer if you're able to, but I'm interested to understand what the issue there was, or it may well be that's an issue that Cummings can usefully address when he's called.

A. **MR WILSON:** It's just around the Council's ability to monitor these things and have the information to check. So, if we receive a complaint saying, I've issued a notice telling someone to cease, we need to have information to see whether they've ceased or not and the easiest way to do that is to look at their abstraction records, and the easiest way is to have those coming in on a daily basis. So, have the information already in front of us.

Q. Okay. No, I understand that. All right. Moving on to the part of the statement that begins at paragraph 20, and here the three technical witnesses have expressed some of their concerns in relation to issues arising from carrying over the priorities, and I was interested to explore those a little if I might. Now, the first one I wanted to understand further was the point being made at paragraph 22, and there there's reference reducing the certainty of supply that they had under the deemed permit property priority regime, and I just didn't quite understand the point that was being made there. So, I wonder whether you could explain that a little further.

A. **MS KING:** So, the point Mr Wilson and I are explaining there is that if there is a deemed permit which did have priority which has already been replaced and that priority rank has been taken out of the system then the lower rank now has less surety of supply because the dominant priority holder may – prior it had two consents to potentially, ask to switch off, now it's only got one. So the surety of supply for that one user might be less.

1600

Q. And that a situation Mr Wilson was describing a moment or two ago?

A. **MR WILSON:** Correct.

Q. Now when you think about that situation, isn't the reality that that does reflect the status quo now is there is an RMA permit in the middle of the two?

A. **MR WILSON:** I think it reflects the status quo today. Depends I guess where you draw that status quo line and also I guess potentially the permit that has been renewed may still be a current deemed permit which is just going to expire in three months but there's priorities on it today that won't be there in three months.

THE COURT: JUDGE BORTHWICK

Q. Sorry I didn't understand the last part of that.

A. **MR WILSON:** We have a number of current deemed permits that have already been replaced but not surrendered. So there is priorities on that current deemed permit but the replacement's already been issued so today, there are priorities but from the 2nd of October there won't be a priority on the replacement consent.

Q. And the council did that under the operative plan, under what policies? There are policies referred to you by Mr Page and I think Mr de Pelsemaeker in his last response which required you have a look at the effect of another users.

A. **MS KING:** Yes, so under that potential consent application we would have assessed the effects on other users within that catchment under the operative regional plan and made a decision to grant that consent based

on that. So that consent may have extra conditions to look after supply to those other users.

EXAMINATION CONTINUES: MR MAW

Q. We have covered the balance of the questions I had there – or the questions from the Court have addressed the questions I had. I did want to finish by looking at the example draft conditions which are attached as appendix 3. Now I am not sure who is holding the drafting pen or who I should direct these questions to, so the entire panel feel free to answer. But just looking through the drafting there, the first question that arises in my mind and I'm looking first at the dominant permit, sub-paragraph, "(a), that the consent holder may serve the subservient consent holder." The concept of service is a variable concept and I'm interested to understand what precisely you had in mind when referring to the word "serve" in the context of this condition, what's the mechanism, how is the notice to be served to a subservient permit holder?

A. **MS KING:** I'm not actually sure if we had any specific way that the dominant would serve notice on the subservient, however reading Mr Cummings' evidence it is quite clear that it may pay to be more specific in that wording there. I'm not sure if anyone has got any further comment.

A. **MR DE PELSEMAEKER:** I think the wording as they are now, they open up a number of potential avenues to serve notice. Also referring to Mr Cummings' evidence, there are pros and cons to different ones. For example, the email one is a very quick one, but there are some issues around email addresses in part C, then by mail is probably the more common one but it implies a delay. So, perhaps it is best to leave it open and look at it on a case by case basis, what is the best possible way or most practicable way of serving the notice.

Q. Might the issue be overcome by the subservient permit holder specifying in their application how they wish to be served?

A. **MR WILSON:** I wouldn't have thought so, cause consents can be transferred during their six-year life. So, there's no guarantee what applies at the time of application applies for the life of the consent.

Q. Might that issue be picked up when a notice of transfer is given, though, if you think about the mechanism for transferring a permit.

A. **MR WILSON:** We'd certainly pick up that information at that point, I guess it still comes back to the privacy issue of the Council sharing that information.

Q. And the corollary perhaps to the service question, when reading the subservient consent holder condition, the phrase there is "receipt of written notice from the dominant consent holder." Was that left intentionally broad to cover a range of modes of service? Or was there something in particularly that the group had in mind with those words?

A. **MS KING:** Again, I think it is helpfully broad considering how broad the dominant is. Again, reading Mr Cummings evidence, it would be helpful if the subservient were to sign off receipt notice or notice of receipt so that if there were enforcement action, we were aware the notice was actually received.

Q. There might be some challenges with that by the recipient of a notice simply refusing to acknowledge service. So, at a conceptual level, what I've heard is perhaps keeping it broad at this stage to enable a range of options to be relied upon and I'm not sure whether I can go so far as to say there might be an opportunity to specify a mode of service on the part of the subservient consent holder as part of their application.

A. **MS KING:** It would potentially be helpful if Council did include that in the application form and then to let the dominant know the preferred mode of service with the subservient potentially providing contact details if that was the mode that they preferred.

CROSS-EXAMINATION CONTINUES: MS WILLIAMS

Q. Just thinking about the transfer situation and thinking about the privacy issue, I'm wondering if that could be overcome by having something in the original application perhaps or the original effected party notice however that's done and then potentially something also on the transfer application which basically provides a waiver of privacy for a new person that is taking the permit over to acknowledge that they understand that

their contact details will be provided to the dominant permit holder and also providing that information about their preferred contact.

A. **MS KING:** I'm just unsure about the legality of that, because are you stepping into the Privacy Act realm, or, yeah?

1610

Q. Well, that's what I'm saying, that you are asking that person to say that they understand that on a transfer to the new person, saying, because they're presumably also going to be signing the transfer application, to say that they understand that their details will be passed on, because, in the existing permit anyway, priority, or replication, we'll call it, of the priority, and that their details will be passed on to the dominant holder, to be able to contact them on what their preferred mode of service is.

A. Yeah, I'd be happy with that, if that was an option.

Q. Thank you.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Thank you. Commissioner, do you have any questions?

A. No.

Q. (inaudible 16:10:59), and I have no questions, so no questions. Okay, so good.

A. Long day.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Where to from here? In terms of these provisions, I mean, like, do we wait and see what comes out of Ms King and Mr Cummings before going further, or is this thing, you know – it certainly sounds like summary drafting is required. What do you want to do?

A. I would have thought we might best proceed with Ms King and Mr Cummings, because there may be additional matters that come out that might then usefully be picked up if there is to be some further drafting, so I suggest we continue on and hear that evidence.

Q. Okay, and then think about where to from after that, all right.

THE COURT: JUDGE BORTHWICK TO WITNESSES

Okeydokey, right. Well, thank you very much for your evidence, that's a huge effort, and as I said, even though cross-examination – and I know the Court's questions at times can sound really picky, but the task, you know, the task that was set you and how you've responded has been really helpful in terms of highlighting, perhaps, a route we can go down. Yeah, so it's all good work, so thank you, mmm.

WITNESSES EXCUSED

MR MAW:

I thought we might move on to Mr Cummings and give Ms King a break for a wee while.

THE COURT: JUDGE BORTHWICK

Okay.

MR MAW CALLS

MICHAEL ANTHONY CUMMINGS (AFFIRMED)

Q. Good afternoon, Mr Cummings. Can you please confirm your full name for the record, confirm it's Michael Anthony Cummings?

A. Yes, it is.

Q. And you have prepared a statement of evidence dated 24 June 2021?

A. Yes, I have.

Q. And in that statement of evidence, you confirm that you are the senior environmental officer in the compliance monitoring coastal Otago team at the Otago Regional Council?

A. Yes, I am.

Q. And that you have 15 years' experience with issuing, monitoring, and enforcement of resource consents, deemed permits, and permitted activities in relation to the rights and obligations of the taking, conveyance, and use of water, specifically in the Otago region?

A. Yes, I do.

Q. And you've set out in paragraphs 4 through 5 the background experience that you have in this regard?

A. Yes, I have.

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

A. Yes, I've got two corrections to make.

Q. If you could just take us through those, please.

A. Certainly. My first correction is in paragraph 15, the second sentence, I would like to replace the word "should" with the word "could" so the sentence reads: "Rather, the council could instead rely on its powers."

Q. Thank you, and there was a second correction?

A. There is a second correction, in paragraph 111.

Q. Yes.

A. It's the very last sentence, and once again, I'd like to replace the word "should" with "could" so the sentence reads: "Rather, the council could simply rely…"

Q. Thank you. Subject to those corrections, do you confirm that the evidence in your written brief and the evidence that you're about to give is true and correct to the best of your knowledge and belief?

A. Yes, it is.

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

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Anyone got any questions?

A. Just some brief questions, your Honour.

Q. You're for OWRUG right now?

A. Yes.

Q. Okay.

CROSS-EXAMINATION: MS IRVING

Q. Mr Cummings, I really just want to clarify a couple of points you make in your evidence. Perhaps if we could start with the discussion around the need for the monitoring to be calibrated so that you could understand whether or not people were continuing to take, whether it was in breach of the priorities and so on. Is that calibration really just requiring that to be consistent with what's required under the water monitoring regulations?

A. Are you asking in particular for the dominant consent holder, the subservient, or just in general?

Q. Just in general.

A. Yes, this is the basis for which we make our decisions.

Q. Yeah, and so in relation to consents for water permits, it's common, isn't it, for conditions to be imposed requiring compliance with the water

monitoring regulations and ensuring calibration of the water monitoring equipment?

A. Yes, it is.

Q. So, in that sense, it's nothing new that would be required to help administer this regime, is it?

A. No, but there are requirements under the water measurement and reporting regulations that require that there is to be telemetry. Under the regulations, the 2020 amendment actually specifies a particular timeframe where they've actually got to provide that telemetry, and in the most extreme cases, that's 2026.

Q. So they'll have to continue to comply with those obligations regardless of this regime.

A. Well, they don't have to abide by the requirement to telemeter their water take until such stage as 2026.

Q. Right, and if they don't have telemetry in currently, the alternative is to simply request a download of the monitoring information, isn't there?

A. That's right, and this information is generally held by a third party.

Q. Yes, correct. In relation to just the contact information, when an applicant makes an application for a resource consent, one of the pieces of information that is required is an address for service, correct?

A. That is correct, yes.

Q. And it's common these days for that to include email contact information?

A. I don't know. Unfortunately, I've been outside of the consenting team for quite some time. They do provide email addresses, but whether that's valid or useful as an address for service, I can't comment on, I'm sorry.

Q. In your experience with enforcement, are there circumstances where resource consent holders are required to provide contact information for the likes of affected parties to register complaints? And I'm thinking things like landfills, for example, where there might be odour complaints, or mining activities where there might be issues around dust, and applicants will provide contact information, publicly available, so that people can contact them if there is an issue.

A. I'm not aware of any requirement under consent to do that.

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Q. Do you think there would be any reason why a consent condition couldn't require the provision of email or telephone contact information?

A. I can think – well, yes that is possible as a requirement as a consent condition I believe, even though that's outside the scope of my expertise. What I would wonder though would be, if we were actually requiring the transfer because the activity's shifted. The transfer actually only refers to the holder rather than adjusting any of the conditions of the consent.

Q. So you don't think it would be possible for that information to be kept up-to-date as part of the consent condition?

A. Yes, it is possible to keep that information up-to-date. We work very hard with our records to make sure that they're up-to-date. There are circumstances where some of the people responsible for the activities are not necessarily, they're consent holder and that makes things a little more complicated.

Q. Yes, but as the consent holder you'd expect that they would have an obligation or at least pass on to the person that they employ probably to implement their consent if they had been issued with a notice of some description that would affect that person's role?

A. Yes, that would be a reasonable expectation.

CROSS-EXAMINATION: MS WILLIAMS

Q. Just a few matters your Honour. Mr Cummings I'm taking it that you are very much looking at enforcement from a prosecution perspective potentially?

A. I looked at this from all possible avenues that we can undertake.

Q. But the standard of evidence that you've indicated would be required, would be sufficient to support a prosecution if it got to that point?

A. That's right.

Q. And that's why for example, in your view it would be helpful if a dominate consent holder was to serve a notice on a subservient consent holder, that they had a witness accompany them if they were doing that in person?

A. Yes.

Q. And that's because you would see this as potentially heading towards a prosecution?

A. Yes, we always hope for the best but prepare for the worst.

Q. Yes, and it's certainly clear from the compliance plan that you've helpfully attached to your evidence and that's appendix 1, that the council's approach is actually to take a number of steps and approaches to enforcement before we get to a prosecution isn't it?

A. That's right. Yes.

Q. And so very much along the lines of talking to the potential problem consent holder in the first instance?

A. Yes.

Q. And then you talked about education and a whole series of steps before you would get to prosecution?

A. Yes.

Q. And that would be something that a dominant permit holder would also be aware of, that you would because you told us you will, actually be looking to take a number of steps before you would be looking to prosecution?

A. That's right, yes.

Q. And it might be that that person may then feel that for the instance they don't necessarily need to strictly follow the – or reach the standard of proof that might be required for a prosecution when the know that that's actually not what the Council's going to do in the first instance at least.

A. I don't know, I wouldn't want to put words into dominant consent holders' mouth.

Q. All right. Thank you. You've already talked with Ms Irving about the telemetry issue and that the alternative and the expectation of Council is that where people don't currently have telemetry in place because they're not yet required to under the measuring and reporting of water takes regulations, that they would still be able to download and provide that information within 24 hours of request, is that right?

A. I think 24 hours would be a bit of a reach, but they certainly would be able to provide that information if it was available, if their equipment was operating as it should.

Q. And of course, if their equipment isn't operating then that would actually potentially provide a defence for you in any event.

A. That's right. Yes.

Q. Yes. You've made some comments on the draft conditions, and I'm looking here at paragraph 71, and you've suggested, for example, the addition of the word "upstream" to the phrase "subservient consent holder."

A. That's right. Yes.

Q. And that's simply to clarify that obviously if a subservient consent is downstream, it actually makes no difference.

A. That's right.

Q. You also proposed that the dominant holder be able to exercise their right at any time. Having heard the discussion from the panel earlier today, do you agree that there are problems with that approach of a dominant consent holder being able to say at any time, no matter what the actual flow of water is, that, excuse Mr subservient holder, that's two kilometres upstream of me, I'm telling you to turn off.

A. Yes, I agree with the panel. There are issues with that. When I thought of that and considered that it was – when I was thinking of that, it was taking one of the ingredients away, or one of the requirements that I'd have to prove if I was to actually take this to court.

Q. Yes, and that was around the insufficient flows -

A. That's right.

Q. - that your concern that term "insufficient flows" is a bit loose.

A. That's right. Yes.

Q. However, part of the purpose of the replication, now we use that term, of these conditions is to provide for the incidental environmental effect of these applying to maintain flows at the low flows. So, actually the insufficient water or insufficient flow is a fundamental part of the priority regime, I'll call it that. do you understand that?

A. I do understand that, however, that was outside the scope of what I was asked to prepare for.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Can I just ask, Ms Williams, which paragraph you were referring to then? I just want to note up the response that's all.

A. That's a good point, your Honour. I sort of scribbled a whole heap of notes, and this is at paragraphs 101 –

Q. Okay

A. – and in particular at paragraph 105, you do discuss there about there's full discretion to give notice, but it wouldn't be replicating the existing priority regime.

Q. Okay. Thank you.

THE COURT: COMMISSIONER EDMONDS

Q. Yes, I did have a couple of questions, thank you. Afternoon. So I wanted to know how frequently the council uses the three-two-nine water shortage direction? Only, in perhaps you could give me a general sort of answer and if I need any follow up I can follow up on a…

A. This hasn't been used very often at all in fact. It's just been put there as an option that we can consider unfortunately well not unfortunately, the delegation for making a call under that section or a decision under that section is well above me, so I wouldn't know the thresholds were or how to comment on that further. But I do know that it is an option that council does have.

Q. And when you said it's not been often used, can you give me some kind of idea of when it has been used.

A. I know of once when it's been used.

Q. So what year was that?

A. I couldn't comment on that. I can't recall that.

Q. I presume that was during the irrigation season was it?

A. Yes it was over, it was definitely over a summer and it was a few years ago.

Q. And so did it have to be renewed, so I see you can only have it lasting –

A. For 14 days.

Q. – for 14 days and then you can keep renewing it. So how long did – if you can remember?

A. I believe it was renewed once or extended once.

Q. So that was for a month and so a portion was restricted or suspended, so presumably did the extent set out – in the manner set out in the direction? So I presume there was quite a long list of things that people had to do.

A. My role with that was in regards to ensuring people were aware of it. It only had to be advertised in the paper but we made sure that – we contacted people and made sure that they were aware of the rule and that they were following the rule. They were still allowed to have water under certain circumstances like for stock water or domestic use, but beyond that, I couldn't comment on the technical aspects of that particular rule.

Q. But you didn't have to take any enforcement action?

A. No.

Q. Other than perhaps reminding people about what – the fact there was an order and better follow it.

A. Yes.

Q. So the other thing you suggested is that section 17 of the RMA might be another mechanism that could be used. So how often would regional council have used section 17 with a regard to water matters?

A. In regards to water matters, I don't know sorry.

Q. So when you wrote that, what hypothetical possibilities were you thinking of?

A. The examples that I'm thinking of where issues like section 17 have been used have been involved with discharges. So discharges into the environment. I know that they've been used, I'm not sure what – for the exact details of what they've been used for.

Q. The discharges have been but you're not aware any in terms of quantity of takes and that sort of thing?

A. No I'm not aware of being used for – no.

Q. So, going back to my original question, so what do you think might be a hypothetical possibility in terms of the takes in the use of water?

A. The example I've written is in regard to using an abatement notice to request people to cease taking water, the abatement notice is set for a particular period of time with particular restrictions on it. And provided the recipient of the abatement notice abides by those rules. There's no further enforcement action.

Q. Okay. Thank you.

THE COURT: COMMISSIONER EDMONDS

Q. Just thinking about that. If you think that what the planning team has come up with is problematic, why does section 17 make it any easier? In fact, it's probably harder, cause you know, nobody's giving you written notice or anything else.

A. The challenges that I have with what was proposed by the joint witness statement are regarding whether it was the dominant consent holder was entitled to, and whether the subservient consent holder actually received the information.

Q. But how does section 17 overcome those two evidential gaps or evidential issues?

A. It overcomes that in the same way that our, the Council's minimum flows and requirements under that, if we've got control over how information – how the notice to cease taking water is given, it makes my job an awful lot easier when it comes to challenging someone that might have adhered to that instruction to cease.

Q. So, you think – your two problems are, a, whether notice is received?

A. That's right.

Q. Okay. So, that's a factual issue, and then the second is whether or not the dominant consent holder is entitled to exercise –

A. That is right. Yes.

Q. – the right. Okay. So, you think section 17 bridges the gap on the factual matter where the notice is received – bridges that gap or address that gap, how? Because you would still need a dominant consent holder

telling a subservient consent holder to, in this case who had been told to cease, and there would need to be evidence of notice being given, at least, and if not notice being received, an inferred notice being received due to the method of service. So, it's the same issue either way, so how do you stoop across it?

A. Sorry, I've realised now what the disconnect is. The section 17 would be considered if Council was aware of in stream values that were at risk because of somebody's activities, and going outside –

Q. Yeah, okay. So, it's in stream values, it's not actually abstractors behaving in a way that ensures that the flow in the river is available to be taken.

A. That's right. Yes.

Q. Well, maybe the disconnect there then is that, as I understand it, the right of priority in the past or currently sets off a flow sharing regime for want of a better word and that is for the benefit of abstractors and it might have an incidental benefit to the environment as it turns out, but it's for the benefit of abstractors, so that's it's primary focus, and that in deed is what is proposed to be its continued primary focus, abstractors being part of the environment.

A. Yes.

Q. It's only a side benefit that galaxiid might continue to survive or subsist under this regime but nevertheless that's how it's been promoted.

A. Yes.

Q. So, you would use section 17 duty to look after galaxiid, not abstractors?

A. That's right. Yes.

Q. All right. Okay. All right, that's helpful. Have you got any questions?

THE COURT: COMMISSIONER EDMONDS

Q. I think my only question, really, is you've set out in your process that could be followed if one priority holder seeks to serve notice on another. Has this ever happened in the past to your knowledge?

A. Not to my knowledge.

Q. So, this would be a whole new territory for…

A. That's right. Yes.

Q. Okay, well thank you for that. Thank you, your Honour.

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK

Thank you very much for your evidence Mr Cummings it looked like a very late night – served or it could have been a late night with Ms Mehlhopt I'm not sure but we got it on the day. That was like a minute before midnight. So Thank you very much, big effort. Thank you.

WITNESS EXCUSED

MR MAW RE-CALLS

ALEXANDRA LUCY KING (RE-AFFIRMS)

Q. Welcome back.

A. Thank you.

Q. You confirm your full name is Alexandra Lucy King?

A. Yes.

Q. And you are the team leader, consents coastal Otago at the Otago Regional Council?

A. Yes.

Q. You have prepared a further brief of evidence dated 24 June 2021?

A. Yes.

Q. And within that brief of evidence you've set out your qualifications and experience at paragraphs three through to six?

A. Yes.

Q. Are there any corrections you wish to make to your statement?

A. No.

Q. You confirm that to your statement of evidence and the evidence you are about to give is true and correct to the best of your knowledge and belief?

A. Yes.

Q. If you could please remain for any questions from my friend and questions from the Court?

CROSS-EXAMINATION: MS IRVING

Q. Just want to clarify at your paragraph 13 in your brief of evidence, you record your opinion that was recorded in the joint witness statement that more efficient and effective option for – as for the rights of priorities to cease in 1 October. Is that it? In that there's just nothing that regulates I suppose the relationship between water users or did you have an alternative method or regime in mind?

A. I did turn my mind to this and I did try to be as helpful as possible if priorities were transferred in terms of providing those potential consent conditions and things. I did not come up with a new idea.

Q. Was going to ask if you had, what it was. Perhaps just want to talk to you about the Pig Burn example that you worked through in your evidence and I think you expressed some concern around the complexity of taking or re-implementing a priority regime based on the application as being filed for the Pig Burn catchment and you highlight in your paragraph 38(e)(i) through to (v) sort of changes or components of the Pig Burn application that sort of addition a layer of complexity to implementing a priority regime. Is it your understanding that in that application there was a suite of residual flows and so on that accompanied that re-configuration of the regime on that water body?

A. Yes.

Q. And did you make any enquiries about whether or not the Pig Burn water users would continue to pursue that re-configuration if plan change 7 and the continued activity pathway associated with it was to become operative.

A. No, I base this test on the application in front of me.

Q. I just want to, I suppose, ask you some of the same sorts of questions that I just worked through with Mr Cummings in relation to your paragraph 47 in terms of issues around how notice might be given, confirmation of notice received and so on. Do you see there being any barriers to resource consent conditions that require provision of an email or contact phone number for the purposes of the notice requirements?

A. Yes. So, when you asked this question, I did turn my mind to it for a couple of minutes, and I understand Mr Cummings concerns if it was to be transferred to a new holder, that there potentially might need to be a variation to a consent condition. I did come up with an option that it could be a contact management plan or similar, where the consent the holder needs to keep that updated and therefore the consent condition would not need to be varied.

Q. That was my next question. That's what I had in mind, too.

CROSS-EXAMINATION: MS WILLIAMS

Q. And thank you Ms King because that very helpfully also addressed one of the questions that I was going to ask, and so, you would just on the same issue of a contact management plan condition, would that mean that for example if you have a change in personnel managing the undertaking of the activities, the consent holder remains the same, but people move on, and so you've got a new manager in effective who's managing the activity managing the operation of the consent and you would see that also being able to be captured by something like a contact management plan.

A. Yes, I think it would. It would potentially follow along the similar lines to other management plans we have that we ask the consent holder to keep it updated –

Q. Yep.

A. – and either provide it to the consent authority annually or upon request, and so if any of those changes are within there then Council has got the ability to get a hold of them.

Q. Would you impose on the consent holder a positive obligation to advise of any change?

A. Yes.

Q. Yes, okay, so that would address the change in personnel, and obviously on a transfer as discussed before, again that would also capture the ability by having a positive obligation, that would also capture the transfer to a new holder of the take at the same point of take.

A. Yes.

1650

Q. You've also – I actually now want to go back to policy 10A.2.1. In this you discuss at paragraphs 27 and 28 of your evidence, and in particular, this is where we have the reference to the 18 March 2020 date which there was some discussion with the planners on the panel this morning, but I don't recall you actually be asked about that date, and so I just wanted to explore with you, your reasoning at para 28 where you consider that would be sufficient and appropriate with a minor amendment

A. Yes, I did have time to consider the questions Mr Maw put to the panel this morning and he made quite a good point in terms of and I think I did comment on the fact that it would almost mean an assessment of the effect of the priority regime at that date.

Q. Yes. And is that a concern for you? That it would essentially lock in place something then which may not be actually in effect as of now?

A. It is a concern that that it a route that potentially you would need to assess. I don't think I can comment on whether it would be the same in now versus the 18th of March.

Q. Yes, and certainly from your perspective, if the purpose of plan change 7 is to largely a transactional plan change for it because it's a transitional plan change, you would not want to have to go and assess the effect of the priorities, is that correct?

A. Yes, that's correct.

Q. Okay. I just wanted to also explore with you I guess a little – the possibility that again was discussed with the joint panel around having either an entry condition or something in the application which requires essentially that the linking permit holders to consent to each other's permits, if I put it that way. You know what I'm talking about? And would that perhaps get across some of your concerns again as expressed in your evidence around not actually having all the information to put all the priorities into the permit?

A. Yes I think it may, in terms of – are you saying that then applicants would nearly be all applying at the same time for that specific catchment?

Q. I'm not sure that they'd necessarily be applying at the same time but because each applicant, as an entry condition has also got to obtain the approval and basically buy-in of particularly the subservient permits that that potentially picks up on some of your concerns about things getting missed.

A. I think it may. The reason I say "may" is because we would be working under the assumption that everyone got everyone that was necessary and I am aware that there are some catchments which I think Mr de Pelsemaeker discussed that link to water bodies and I just need to make

sure that everyone involved had given written approval for the entry condition.

Q. As part of the application would they be required be provide a copy of the existing permit? I'll call it a permit.

A. Yes.

Q. And that will have described in some way the existing rights of priority one it? Won't it?

A. Yes.

Q. So that it certainly gives you that starting point to check and you would then be following up on if there was someone that is listed there that is not then providing that approved party as part of the application?

A. Yes.

Q. And that would then enable you to identify perhaps where people were no longer operating and had essentially surrendered takes?

A. Do you mean no longer operating priorities or no longer operating deemed permits?

Q. No longer operating the deemed permit.

A. Yes, it may but then that also brings me back to my point of it potentially disrupting the entire priority regime if someone has surrendered or is no longer going to apply for that permit. So it would alleviate concerns regarding who would be involved in that priority system but it would still – I would still then have a concern about a priority regime being disrupted if a user had surrendered.

Q. So what you would actually perhaps also want as part of the application, would be a statement from someone who has surrendered a permit to just confirm that they have surrendered the permit or are no longer operating under that permit?

A. Yes, but I would still have the problem of regime being upset if that person had surrendered.

Q. But actually, if they've already surrendered then it would continue the regime as it is now.

A. That is under the assumption that they hadn't been utilising that previously.

Q. That does make that assumption yes but okay.

CROSS-EXAMINATION: MR MAW

Q. Ms Williams my friend put a question to you in relation to whether requiring written approvals might provide a "further backstop", my words not hers to ensure that you'd identified all of the relevant permits. When you think about that proposition, doesn't simply identifying the permits in the application achieve the same outcome because if the permits not identified in the application, the applicant wouldn't know to go and get a written approval from somebody, so it doesn't actually take matters any further?

A. No, I agree.

THE COURT: JUDGE BORTHWICK

Q. Right, two points of clarification. So you were talking about it and I'm not quite sure that I quite get it yet. Where you've got deemed permits which are linking to water bodies.

A. Yes.

Q. Talk me through what the issue is there.

A. I can think of the Low Burn where is also links to the Roaring Meg catchment. It just – I guess it just brings up complexities in terms of how that priority then sits within the Roaring Meg catchment.

Q. Now just to slow it down a little bit. So Low Burn, I'm familiar with that catchment. But are you saying that water's taken out of Low Burn catchment and put into the Roaring Meg catchment? Or is something else happening?

A. No, so one permit holder holds – so there's two permits that I can think that link the Roaring Meg and the Low Burn and they both have priorities within those catchments. So it's just…

Q. How does that actually happen? Like, if I was to grab their deemed permit, what would it say, roughly?

A. You're testing my knowledge a touch.

Q. That's all right.

A. It would have the priority ranking for both catchments within.

Q. Within the same permit?

A. No, I think thy would be separate – actually I can't answer that I'm sorry.

Q. Because I couldn't see but then it's probably my lack of imagination or just haven't seen enough of these deemed permits because I've only seen what Mr Maw gave me. But I just didn't know why it was a problem if you're taking water, say from the Low Burn catchment and its discharged into the Roaring Meg catchment; why that caused a problem for deemed permits. Just say if the deemed permit pertains to, you know the Low Burn, well people just continue to take in accordance with their rights, their subservient or dominant rights.

A. Yes I do see your point. I think maybe the point I was trying to convey and maybe I didn't quite do it probably was, it just creates another level of complexity in terms of – the application I was looking at was one permit holder who held shares in both a Low Burn and a Roaring Meg catchment and were applying to merge them into one RMA permit.

1700

Q. And then I think that was – that could be complex, not sure how they're doing that but that doesn't matter because, that was the question that I put to the panel was: "Do you anticipate people substantially amending their applications to take advantage of the controlled activity rule or the RDA rule?" and the answer was, "yes". They're going to have to be going under the existing regime, if I can put it that way and not doing these merging or divvying ups or whatever has been proposed and understandably has been proposed in response to the operative plan and this notify plan. So, I guess the question is, is that a problem, yes, is that a problem for this plan change now recommended by the planners and together with the priorities mechanism, a priorities mechanism or is that a problem which you see arising if people insist on their application for resource consent, which if that's what they're doing, it sounds like a noncomplying activity, but I might be wrong.

A. Yes, I think, I am unable to comment on what applicants may or may not do. I am aware that a lot of them will amend to come in line with PC7, however, I do think that there would be a number that maybe would try

and go down the noncomplying pathway for a variety of reasons, one being that they've been in the system for a substantial amount of time.

Q. Is that because they're fed up? Or is that because – what does being in the system, why does that necessitate a different outcome? Now, that from their point of view it might, because jeez I've invested a lot of money in this, and I get that.

A. Yes, so that would be the basis of my reasoning there, that they have applied for an application some time ago and invested a lot of money in the application as it currently stands.

Q. Okay. Do you think you need to come back tomorrow – I'll check overnight the Low Burn Roaring Meg application to see whether there is some complexity on the existing deemed permit or whether you're thinking of that reflects the applicants own desire to merge into one resource consent, takes from two different catchments.

A. Yes, I can confirm that with you.

Q. Yes, confirm that one way or the other, be really keen to know the answer to that, and then second question, just really, is dealing with the surrendering of the permit, and that could be problematic because the regime is upset, and does that – is the concern there that, say you've got five deemed permits on a single water body and number three is surrendered in total so it no longer exists, so to number one and number two under this scenario, a downstream, so it's the easy scenario, so instead of being able to call upon three permits to reduce or cease they can only call on two and that's problematic.

A. Yes, I think the basis would be that the surrendered permit had been used previously.

Q. Had been used.

A. Yes.

Q. So, if it's surrounded, then that order remains in the system.

A. Yes.

Q. Yes, and so in that sense it's not really problematic at all because number three is no longer in the system, the water remains in the system and number three has gone somewhere, whoever the permit holder was, and

so then one and two are rightfully looking at four and five to cease when flows start to recede.

A. Yes, and so in terms of flow availability for the one and two, it would probably be a positive, but if we are also looking any environmental gains with holding the priority system, that may also be disrupted.

Q. I see. So – yeah, there's not a lot you can do about that. if somebody doesn't want to remove their water permit.

A. No, no, we can't force anyone.

Q. No, couldn't force anyone to remove a water permit. So, that's nothing – I can't see how I can handle that.

A. No, and I – where I could try to come up with some way of handling it within the priority regime if we would move it forward, it was just a thought I had that I thought I should put down but didn't also have any way of adding that in.

Q. What was your thought? Sorry.

A. So, I just knew it was a concern I had, so I noted it down, but I didn't have any way –

Q. Right.

A. – rectifying it within the plan change.

Q. No. Okay, but that could be entirely hypothetical, that is that there is a hypothetical existing deemed permit holder who doesn't wish to renew their consent, who doesn't wish to apply for a replacement consent and does not, and that water remains within the system.

A. Yes, I think where the concern became apparent for me was looking at the Pig Burn example, where the third priority was shifting to the fourth priority location but surrendering their previous consent.

Q. Now, if you're going to do that, don't you need a 136?

A. Yes.

Q. Yes, and then isn't that the time to have a look at, well, what are the implications?

A. Yes.

Q. Yeah. Have I missed something in thinking it's a 136, if you're going to shift your take down to – yeah, have I missed something in that, is it as simple as that?

A. Within the application under my paragraph 38(b)(1), it says: "This application does not seek to replace the take for the third priority at that point," so, yes, I think it would be a 136 matter, as you have just said.

Q. Okay, all right.

THE COURT: COMMISSIONER EDMONDS

Q. So are 136s dealt with all (inaudible 17:06:34) not requiring any written approvals and things?

A. I haven't processed any that have required any written approvals.

Q. So they're dealt with non-notified, are they?

A. The ones I have dealt with have been. I can't say whether they all have, unfortunately.

THE COURT: JUDGE BORTHWICK

But what you're –

THE COURT: COMMISSIONER EDMONDS

Q. Why do you deal with them all non-notified? Is there a rule in the plan that allows for that?

A. The ones that I have assessed, I have assessed that there weren't any affected parties to the move of abstraction.

Q. And so other people, other priority people you assessed weren't affected, or weren't you worrying about the priority question?

A. The ones that I have processed were on the Pomahaka, and they were within – there were no permits between the take move location, if that makes sense, so it just moved 100 metres downstream, and there were no other users within that 100-metre stretch.

THE COURT: JUDGE BORTHWICK

Q. So as I understand, what the planners have proposed in the JWS is not a vehicle to allow the consenting team to come in and have regard to the

effect on the environment as a consequence of anything, the non-human environment, the galaxiid environment in particular, so it's not a vehicle for that? That might be, again, the benefit of it, but it's not the vehicle to allow you to come in and do that.

A. No, I agree.

Q. Yeah, and so if there is a s 136 application, though, I think what you're saying, because somebody wants to move their point of take, you'd be looking at the wider sense of environment, both human as well as creature, in-stream environment.

A. From my understanding, yes.

Q. Mmm, all right, thank you.

THE COURT: COMMISSIONER EDMONDS

Q. I did ask earlier about the effect of having an RMA permit sort of interposed in all of this, but I guess I'd just like to think about it slightly differently now, with an RMA permit right at the bottom of the tributary or something, somebody's gone in and they've done that and they've been thinking, oh, well, the whole deemed permit thing's going to go and people are going to have to come and get new consents all the way up this tributary, but if the priority system is retained, those people that had the RMA permit, they've been working on potentially a false premise, would that be right?

A. In terms of the thinking that the priorities would be gone by –

1710

Q. Yes, that they would be gone by the first of October or thereabouts and there would be a set of consents upstream of them, RMA permits –

A. Yes.

Q. – regulating what's to happen higher up in the catchment.

A. Sorry, I'm not quite sure if I understand the question. Do you mind rephrasing or retelling me?

Q. Well, if you've got a tributary and you've got an RMA permit that somebody's got at the bottom, and they've gone off and they might have got their deemed permit replaced as an RMA permit, and they would have

been thinking, oh, well, we've got our RMA permit, so we know what the regime is in terms of what we can take, but everything upstream of us is in a bit of a state of flux because what's gone on with the priorities in the past, people are going to have to come RMA permits –

A. Yes, that is –

Q. – because the deemed permits are going to fall away.

A. Yes, that is a possibility that that may have occurred, that everyone was under the assumption that priorities were ceasing to exist in October 2021.

Q. So might it be possible that a person in this position may end up in a disadvantaged position from where they thought they might end up?

A. Yes, it is a possibility –

Q. In terms of investments they've made, for example?

A. It is a possibility. I think it would possibility be dependant on their priority rank, so if they were a lower priority rank, for example, the Pig Burn, the lowest in the catchment's the lowest priority rank, so no one was able to call on them anyway, so it would kind of depend on a case by case basis whether that has any effect on their RMA consent.

Q. So what you're saying is they didn't have any leverage to begin with because they didn't really have any priority?

A. Yes, whereas if that was the first priority right at the bottom of the catchment and they had a lot of leverage, then I think that maybe, they would be at a disadvantage.

Q. Right, okay, thank you, that's where I was trying to get to. Thank you.

QUESTIONS ARISING: MR MAW

Q. Just to round out the s 136 transfer question, is your understanding that there's a very wide list of matters that can be taken into account when assessing a transfer application?

A. Yes.

Q. And as I read that, the consent authority shall have regard, in addition to s 104, to the effects of the proposed transfer, including the effect of ceasing or changing the exercise of the permit under its current conditions

and the effects of allowing the transfer. So when you hear that description, and it's out of s 136(4), that would give you the broad range of matters that you might need to consider when looking at a transfer, perhaps moving further downstream from an intervening consent holder's abstraction point?

A. Yes.

THE COURT: JUDGE BORTHWICK

All right, well, thank you very much for your participation, thank you.

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, so we are running a little bit behind, but no doubt we will catch up tomorrow.

A. That sounds suitably optimistic.

Q. I am optimistic. No, I am, actually, I'm sure we'll get there.

A. I do wonder, in relation to the – well, there's two things going on. We've got next the legal submissions on priorities. Now, those submissions have all been pre-filed, and I wonder whether there may be some efficiencies gained if counsel were to give a summary of their submissions rather than reading right through their submissions in the Court's hands on that.

Q. Oh, I see, okay. You could, perhaps with a particular focus on 124, because that's where you all disagree with Dr Somerville, who disagrees back, and he's actually filed his submissions, so that should be available, hopefully on the website, hopefully shortly, anyway.

A. That might be helpful to see that in advance.

Q. Yes, so, Daliah, can you also send that to the lawyers as well, upload it?

A. Okay.

Q. That's where the focus should come, I think, because I don't think you take any issues with – there were three issues –

A. Creature of statute.

Q. – creature of statue, everyone agrees, and the third issue, which I've utterly forgotten.

A. Which was can you have a plan that has a rule that has the effect of priorities, I think was the third.

Q. And so that's under consideration, yeah.

A. Yes, so it's really the second.

Q. Yeah, it's really the second, yeah.

A. Okay, well, we'll collectively –

Q. Bearing in mind, Dr Somerville's also to come back on the vires of what's been proposed as well, which is he's going to be doing that not this week but next Monday, given his other commitment.

A. Yes.

Q. And that's also why, you know, if there's going to be changes, it would be good that he see it, not just work his way through an old copy, mmm.

A. Yes, now, on that point, we had prepared some written submissions addressing the vires point. I know I was intending to deliver those immediately following the s 124 submissions, if that was the right time to deal with that.

Q. Yes, it is.

A. And my understanding is my friends have prepared perhaps a summary of the points that they wish to make in that regard, so we'll deal with both of those.

Q. No, Ms Williams is shaking her head.

A. Oh, no.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. She's doing that tonight?

A. Sorry, your Honour, simply, I was going to address it orally only, and I wasn't sure quite what my friends were doing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All right, okay, oh, well, we'll take it as it comes, but again, it's important that it does come in so that Dr Somerville can have regard to that, so not only have regard to the submissions, but I think have regard to the drafting as well, does it overcome any, you know, because if the question of vires exists regardless of the date, you know, the drop-dead date, is it 1 October or is it later, the issue arise. One way or the other, I think we are all agreed you are grappling with the issue.

A. Yes, and so then just we'll deal with that perhaps first in the morning.

Q. Yeah.

A. Now, I'm just flagging that because I appreciate we've got some witness availability challenges perhaps brewing tomorrow with respect to the empanelling of the planners collectively with respect to the objective. I wonder whether Ms Jackson can the Court as to constraints?

MS JACKSON:

So it would be helpful if we could set a time so Mr Ensor and Mr Hodgson can know when to join because they (inaudible 17:18:00).

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Yeah, so everyone was thinking about a time, so I'm in your hands.

A. I was just going to say, your Honour, that Mr Brass isn't on the flight tomorrow morning that he was expecting to be on, he's been moved to an afternoon flight.

Q. Okay.

A. (inaudible 17:18:22)

Q. So he's going to be here tomorrow morning?

A. So he can be here tomorrow morning. He would have to be away by, I think, 2.30 tomorrow afternoon.

Q. Okay, mhm.

A. So just in terms of timing, just so that you're aware of that, your Honour.

MR MAW:

I wonder whether we might start with the empanelling of those witnesses and then follow that with the submissions on priorities.

THE COURT: JUDGE BORTHWICK TO MS JACKSON

Q. It would be better, if everybody's happy with that. Okay, all right. So, in terms of Mr Hodgson and Mr Twose and Mr Ensor, are they actually, though, available in the morning?

A. They just wanted time so that they can (inaudible 17:19:06).

Q. Okay, and everyone's still happy with a 9.30 start?

A. Yes.

Q. Okay, all right, so be there at 9.30 and we'll crack on with the empanelment, and, Ms Perkins, I haven't heard anything from Ms Perkins.

A. She's happy to attend via AVL.

Q. AVL, okay. So who have we got with AVL, we've got, sorry, Ms Perkins by AVL, Mr Ensor.

A. Mr Twose, Ms Styles, and, depending on the weather, Mr de Pelsemaeker (inaudible 17:19:48) snowed in.

Q. Mr de Pelsemaeker?

A. Yeah, he lives up in – 400 metres above sea level.

Q. I should not have let him go.

UNIDENTIFIED FEMALE SPEAKER:

He's still here.

THE COURT: JUDGE BORTHWICK

Q. Well, okay, oh, yeah, well, and Mr de Pelsemaeker, that's fine, yeah, and maybe Mr Hodgson. His lawyers say he's unavailable, but don't say what he's unavailable doing, so we've asked for clarification, and hopefully, we'll know one way or the other, and Mr Brass, is he around, going to be around? He's around, okay, in person. All right, very good, and in terms of testing the AVL, how are we set for that? Good. All right, very good. All right, we'll crack on at 9.30 with the joint witness statement. The first focus is on the objective (inaudible 17:20:45), and then we can release some witnesses, hopefully. Thank you very much.

COURT ADJOURNS: 5.21 PM

COURT RESUMES TUESDAY 29 JUNE 2021 AT 9.32 AM

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Good morning anything arising overnight?

A. Two matters your Honour. The first is tidying up a loose end from yesterday wherein Ms King was assigned some homework to report back on in terms of an application.

Q. Oh, yes, she was.

A. Now two ways in which we might deal with that, we could have Ms King re-sworn and she could answer the question first up. Or alternatively she is participating in the impanelling of witnesses on the objective so she could just give her answer as part of that once she's sworn.

Q. We'll do it the second way. Yes.

A. The second matter relates to the proposed RPS and counsel have conferred in terms of a potential timetable to deal with both evidence and legal submissions on the relevance of that and Ms Mehlhopt, well, will address you on the particulars of those dates.

Q. Okay.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT

Q. Ms Mehlhopt?

A. Good morning. So we circulated a proposed timetable amongst counsel. I discussed some of that this morning, so the proposal would be that Mr de Pelsemaeker would provide a supplementary statement of evidence by Wednesday the 14th of July, appreciating that he's in Court several days this week participating. The parties would then file any planning evidence in reply to that on Wednesday the 21st of July. That would be followed by legal submissions from the council on Friday the 23rd of July with parties' legal submissions to follow on Wednesday the 28th of July with –

THE COURT: COMMISSIONER BUNTING TO MS MEHLHOPT

Q. So what's 23rd of July?

A. So 23rd of July was the Otago Regional Council filing legal submissions, parties' legal submissions, Wednesday the 28th of July and then any legal submissions in reply from Otago on Friday the 30th of July. So the sequential exchange, it would be anticipated that it may be something that could be dealt with on the papers given that's sequential exchange but that would depend on obviously your Honour and if any directions are sought by parties to these matters to be heard.

Q. I'm going to put a page limit over those submissions and across the evidence as well. We have just got a super abundance of paperwork and can't see that's in everybody's interests to be continuing, this approach. So what is a reasonable – I haven't actually looked, haven't been tempted to look at the obvious. So any sense of how – what are the issues that arise that might be relevant here to this? A good question isn't it? It's not the whole RPS hopefully.

A. Yes, it would be – the relevance of the RPS to the issues that the Court is actually to determine as part of this plan change.

Q. So then one of the preliminary steps should be counsel conferring over what those issues are, as they might be relevant to the Court's determination. Yes?

A. Yes, as to what those…

Q. Because thus far it's only been mentioned I think by Mr Page in the context of duration. So is that the only issue? Or was it something else?

A. Yes, and it would be obviously there's a question of what weight to be giving to the document, given that this stage that the document's at and also in reference to the language in the provisions and the strength of their direction. And then, yes Mr Page has referred to the timeframes in the RPS in relation to the freshwater visions and then there are also provisions relating to for example, renewable electricity generation and provisions that other infrastructure such as community water supplies, so it would be for the planners to work through the documents in terms of having regard…

Q. I think they need guidance though, what are the issues, that might be relevant, informing or determining this plan change. So when can and I

think parties need to get on to that before Mr de Pelsemaeker commits himself to writing a brief of evidence. So when can parties have that done by?

A. So, looking at that, if Mr de Pelsemaeker's providing evidence on Wednesday the 14th then to give him time to consider that, I think we would need those issues landed the Wednesday before that. So it would Wednesday next week but that might be – it may need to be Friday next week given everyone's involved in the hearing. You may want to hear from other counsel as to their availability to work through that.

Q. So that's the 9th of July is that?

A. Yes that would be.

Q. Okay normally I ask issues to be framed up as a question as well for the Court to determine which then has to take into account the language of the Act vis-à-vis the implementation or giving effect to, in fact I can't recall off the top of my head of this proposed RPS which as you note, quite righty will be subject to weight arguments as well. So, how would you go about that? Again, because whatever the issues are, those are the issues which will start to guide the planners.

A. Yes and I guess it would be informed by the council's closing submissions next Wednesday as well which will deal with the issues for the Court to determine on PC7 and then we can pick up.

Q. Okay. Everyone happy with that? Issues to come in before people commit to writing and then I do what a paper limit. Yes. So what's a reasonable number of pages? So, no more than six pages for evidence and how many pages for legal subs?

A. I would have thought it would be a similar page limit for legal submissions, your Honour.

0940

Q. So, no more than six pages even for legal submissions or evidence without prior leave of the Court. That actually for avoidance of doubt includes any attachments which people might care to attach to a brief or to a sup, so, no more than six. Yes, that's getting at you Ms Irving, that was cute, has to stop though, please. All right, so, no that's good. Thank

you very much. Now, overnight from the Court I have drafted something for deemed water permits, a potentially policy, a potentially entry condition, and so, I'd like to put it out there and it's a question of timing and I've got most of those planners, we can put it out there with them and let them go away. Yeah, so I've done something. It's not perfect. I haven't been able to get rid of word "sufficient," but there you go, and the so the approach I've taken is having listened to the planners yesterday, I had then adopted an approach which is quite akin to criminal law where you are looking at the essential elements which must come down in a policy or a conditions. So, what are the elements of the offence, everybody will remember that from their law school days. So, I've taken the same approach. What are the essential elements that have to come into the police and then implemented by an entry condition, so that's how I've approached it, so that's very much taken from what the planners were saying yesterday was important to them, so, you'll see a condition which is talking – an entry condition which is talking about ceasing taking water, it's not about reducing and ceasing, it's just ceasing taking water. I think you're actually talking about a residual flow, so I've started to use RMA type language as well. So, I have given that to Rachel who's given that to Jaren. So, this is just my offering, it is not perfect, it is still subject to vires issues, but it might get the conversation started, and yesterday it got the conversation and I think there's some significant issues with what we've seen thus far, so here's another go, taking – adopting quite a different approach. Okay, that's not to indicate that the Court is worded to anything that were not, it's just something that I've tried to work through. Okay, so we've got people coming back and this time it's for the second JWS and we're going to lead with the objective. So, everyone involved, come forward.

MS WILLIAMS ADDRESSES JUDGE BORTHWICK (09:43:28)

A. Excuse me, your Honour, just whilst the other witnesses are lining up, Mr Brass is now snowed in so he is appearing by AVL and I do have to get him sworn in to formally produce that second supplementary brief.

Q. What did he do?

A. Excuse me?

Q. Has he filed another brief? No, he did, yes, he did.

A. Yes, he did file that extra brief.

Q. Now, I see – yeah, that's fine. No, very good. So, after he's sworn in, have him produce that.

A. Thank you, your Honour.

THE COURT: MS BORTHWICK TO MR MAW

Q. But same process as yesterday, I think, Mr Maw if you could do what you did yesterday, have everybody in, lead with any questions that you might have – do you want to get Mr Brass to confirm that brief of evidence on behalf of Ms Williams?

A. Yes.

STEPHANIE STYLES (AFFIRMED) (VIA AVL)
CLAIRE PERKINS (AFFIRMED) (VIA AVL)
TIMOTHY ALLISTAIR DEANS ENSOR (AFFIRMED) (VIA AVL)
MATTHEW TWOSE (AFFIRMED) (VIA AVL)
VANCE HODGSON (AFFIRMED) (VIA AVL)
MURRAY BRASS (AFFIRMED) (VIA AVL)

EXAMINATION: MR MAW

Q. Good morning witnesses. If each of you could state your full name for the record and confirm that you each participated in joint witness conferencing on the 4th and the 21st of June 2021 and you signed the joint witness statement that was the product of the joint witness conferencing, and we'll work our way along the table for those in the courtroom and then I'll ask each of you by name to confirm those points, and whilst we are working through the people, if you could also confirm that the evidence that you're about to give is true and correct to the best of your knowledge and belief would be sufficient. So starting with Mr Farrell?

A. **MR FARRELL:** Yes I can confirm all of that.

Q. Could you state your full name for the record?

A. **MR FARRELL:** Mr Ben Farrell.

Q. Thank you.

A. **MS KING:** Alexandra Lucy King, I can confirm all of that too.

A. **MS McINTYRE:** Sandra McIntyre. I confirm that I was involved in the conferencing on the 4th. I wasn't able to attend on the 21st, so instead of that I contributed by first conferring with Mr de Pelsemaeker, Mr Brass, Mr Farrell and contributing by email both leading up to the conferencing and in terms of completing the JWS following the 21st conferencing.

Q. And you confirm the other matters?

A. **MS McINTYRE:** Can you remind me what they are?

Q. Yes, that the evidence you're about to give is true and correct –

A. **MS McINTYRE:** Yes.

Q. – to your knowledge and belief?

A. **MS McINTYRE**: Yes.

Q. Thank you.

A. **MS DICEY:** Sally Ann Dicey, I can confirm all of that.

A. **MR DE PELSEMAEKER:** Tom de Pelsemaeker, I can confirm all of that too.

Q. Ms Styles?

A. **MS STYLES:** Good morning. Stephanie Amanda Styles, yes I can confirm all of that.

Q. Thank you. Ms Perkins?

A. **MS PERKINS:** Claire Rose Perkins, I can confirm all of that, and just note as stated on the JWS that I joined slightly later on the second day, on the 21st.

Q. Thank you. Mr Hodgson?

A. **MR HODGSON:** I confirm I was there on the 21st but not on the 4th.

Q. You confirm the other matters?

A. **MR HODGSON:** Yes I do.

Q. Thank you. Mr Ensor?

A. **MR ENSOR:** Timothy Allistair Deans Ensor, and I confirm the matters and my attendance as recorded in the JWS.

0950

Q. Thank you. Mr Twose?

A. **MR TWOSE:** Yes, so Matthew William Twose, I can confirm all the matters and then in terms of attendance at the two witness sessions on 4th and 21st of June, as recorded I attended for the objectives' discussion.

A. **MR BRASS:** Full name is Murray John Brass, I confirm that evidence I give will be correct however I did not attend this set of JWS however I also could not attend the expert conferencing and did not sign JWS however I provided a second supplementary brief of evidence, provided my response to it and I have been involved in previous expert conferencing and discussions outside conferencing on the matter of (inaudible 09:51:04).

Q. Can you then just for the record confirm that you did produce a supplementary state of evidence and confirm the date of that supplementary statement.

A. **MR BRASS:** Yes I provided a second supplementary of evidence dated 24 June 2021.

Q. Thank you and that evidence and the evidence you're about to give is true and correct to the best of your knowledge and belief?

A. **MR BRASS:** Yes it is.

Q. Thank you, are there any corrections that need to be made to the joint witness statement? No corrections. Now there's one preliminary matter that I would like to attend to before we start working through the joint witness statement. And that's a matter that arose yesterday in relation to a question your Honour put to Ms King with respect to a particular application for resource consent. And Ms King could you please address the Court, having undertaken your homework last evening.

A. **MS KING:** Yes I can. So I went back and had a look at the application and the Roaring Meg catchment priorities are separate to the Low Burn priorities, however the application that is in the system looks to have one permit which would have both priority from Roaring Meg and Low Burn on it.

THE COURT: JUDGE BORTHWICK TO MS KING

Q. Is that because there's a – I'm not sure how they do this but is that because there's a common point of take or is it because that permit's working really hard, there's multiple takes for a single user or multiple users?

A. Yes so it's one user and they transfer water from the Roaring Meg catchment into the Low Burn catchment and then re-take it from Stratford Creek in the Low Burn.

Q. Okay. So, if the proposal is and I think everybody's agreed, applicants are going to have to amend their resource consent applications. Is there anything that you foresee creating difficulties for an applicant such as that one?

A. I did have a think about this and I think the best way for this applicant would be to separate those two consents so that the two documents rather than merging them into one.

Q. Yes. Thank you. I take it that particular applicant's already doing this? Is…

A. Yes.

Q. Just reflecting current practice?

A. Yes it is.

Q. Yes, okay, no that's really helpful. Thank you very much Ms King.

THE COURT: COMMISSIONER EDMONDS TO MS KING

Q. So you attached a whole lot of marked-up material to your evidence for your appendix 1, the application form.

A. Yes.

Q. And I'm assuming looking at your evidence, your focus in doing that was to address what you saw as issues in terms of the priority question?

A. Yes I did.

Q. Would that be right?

A. Yes.

Q. Because I was just a little bit puzzled as to, given the nature of a controlled and a restricted discretionary activity; why you would be asking applicants

to deal with – to tick a box agreeing with the assessment below and "adopted as my own", asking them to tick a box in respect of part 2, the NPS for freshwater, the RPS documents because I was puzzled as to why they would be relevant under the controlled and restricted discretionary rules which are mechanistic.

A. **MS KING:** Yes, so that is a good question. I think this application form was adopted from previous ones and it made potentially have been left in for that reason, but it isn't an overly onerous assessment the application the applicant would have to undertake within this. It's just that they are agreeing to adopt that within there.

Q. Well, I'm puzzled as to why they were to have to agree to adopt that.

THE COURT: JUDGE BORTHWICK

Do a part 2 assessment?

THE COURT: COMMISSIONER EDMONDS

Because I can't, yes, I can't see the relevance of it, but –

THE COURT: JUDGE BORTHWICK

Q. So are you required applicants for a controlled activity to undertake a part 2 assessment or something?

A. **MS KING:**

No, I wouldn't, I'm – I think it may potentially have been left in there from the previous application for which I – (inaudible 09:56:00) take it out.

A. Okay, I guess what we're saying is you know, those things become hooked for applicants to hang themselves?

A. Yes, no, I agree.

Q. In terms of the effort required under this plan change, so if it's – shouldn't be there.

A. Yeah.

Q. It needs to be removed but –

A. Yes.

Q. But I think you've taken that on board.

A. Yes, definitely. I can remove it. It was just the application form was in there.

Q. Yeah.

A. Just to be helpful.

Q. That's okay. It was actually really helpful to see it but, yeah, thank you.

A. Yes, no I can definitely –

THE COURT: COMMISSIONER EDMONDS

That's not to say there aren't other things in here.

THE COURT: JUDGE BORTHWICK

No, no.

THE COURT: COMMISSIONER EDMONDS

That require a thorough review but I thought I'd focus on the, the one that stood out.

THE COURT: JUDGE BORTHWICK

Yeah.

THE COURT: COMMISSIONER EDMONDS

Thank you.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now the matters that were considered through the joint witness conferencing comprised three topics, first the consideration of the objective. Second, there were some miscellaneous minor matters that were attended to, and third, the topic of stranded assets. Now Mr de Pelsemaeker, have you had an opportunity to prepare a summary of the content of the joint witness statement as you had for the one yesterday?

A. **MR DE PELSEMAEKER:** I do. I prepared a small presentation that maybe can be put on the screen?

Q. Yes, if we can – there we go.

A. **MR DE PELSEMAEKER:** Put on the screen?

Q. If you could take the Court through that?

A. **MR DE PELSEMAEKER:** Yep. So, Your Honour and Commissioners, as we did yesterday, we thought it would be useful to start off with a small overview of the matters that we, that are set out and the JWS that was signed after conferencing on the 4th and 21st of June. During those conferencing sessions, as Mr Maw was saying, we covered three topics, objective, stranded assets, and also minor amendments. Now, I propose to only take you to the first two ones. The minor amendments are really amendments for clarity and consistency and they're actually what we try to do with the majority of them was just formalise the discussions that we had during previous empanelment, so we're not gonna take you through them right now but we're happy to ask any questions if there would be any around that. Now, moving onto the first topic. It's about amendments to the objective and reflecting back on previous empanelment and the discussions and the questioning that took place there, we panels – sorry, we planners, we felt that there was merit in amending the objective for different purposes. Clarify the outcome. Also, we had a discussion about can we clarify the nature of the work transition from something towards something. Also, make sure that there is enough support for the framework that allows existing activities to continue and then also provide policy guidance for decisions that need to be made under the noncomplying activity pathway and also to some to be under the restricted activity pathway. When we started with looking at amending the objective, we ran into the issue that we basically started with one statement, one objective statement and if you try to put too many ideas into that, you kind of lose focus, so we all agreed that in order for all the different elements within the objective to have a clear focus, we actually thought it would be better to separate them out into different objectives, still making sure that they all worked together.

1000

A. Now, on the plan it agreed on a first objective, a redrafted objective, A.1.1, and that objective tries to do three things. It specifies the outcome of the plan change which is enable an efficient and effective transition, although

he changed the word enabling to facilitating, because facilitating – when you think about the word "facilitating," you think about a process, facilitating a process, and so it emphasises the process focused nature of the plan change. In that objective, we also tried to clarify what the transition is, from where to where, so it's a transition from the operative fresh water planning framework, and we put in there the word fresh water, because at the moment it is looking at fresh water in isolation, towards an integrated, new, regional planning framework, and the integrated, the word "integrated signals" that it looks at, resource management in a more holistic way in accordance with (inaudible 10:01:20). Also, we referred to a new regional planning framework signal that's it not just a new land and water plan but also a new RPS, and then finally that objective also sets out the three different activities that the objective relates to. Now, after that, the opinion started to diverge a little bit, and we ended up with two versions for the next objective or objectives. Ms Dicey will take you through version A, but since I have the talking stick, I might as well continue and talk a little about version B. Version B contains two objectives, the first one, new objective 10.A.1.2, it really, what it tries to do is, it focuses on enabling existing activities to continue if they continue under their current scale, there is no increase in historic use as well, so, that actually that new objective is actually very consistence where first limb of the new objective proposed on the version A as well, it's almost identical. So, there's not a lot of difference there. The second new objective proposed on the version B, which is the third one, that actually seeks to provide guidance when we're dealing with applications that seek to increase the rate of take, still within the consented limit of the previous consent where there is an increase in the scale or where a longer duration is sought, and what we came up with is an objective that says that we can allow for that, but the outcome that needs to be achieved is still that we provide for the implementation of that new planning framework. We considered making reference to environmental effects but given that plan change 7 does not really have a framework for assessing these effects, we didn't see much merit in doing that. the other thing, as well, by

referring by again to the implementation or the transition to that new planning framework, we ensure that there's consistency with first objective. So, it works in the same direction as the first objective, and also we felt that the plan supporting this version, we felt that making sure there is a low risk of environmental effects might assist with ensuring that the transition towards the new planning framework is actually happening, but in itself it's not enough, you also need to look at the duration of the consents, make sure that those activities can be reconsidered in time as well. Perhaps somebody else from the planners might add something to that. No? Okay, I might pass on to Ms Dicey, now.

A. **MS DICEY:** So, the difference between the version A and version B is really the same sticking point that we had with the May expert conferencing. I think the version A group didn't feel comfortable with hanging the objective with the words "not compromising," against a future outcome that's entirely unknown. So, again we didn't want to use those words in the objectives. We also didn't want to just pick out the prioritisation of freshwater acknowledging that the new integrated framework will be dealing with more than just freshwater, but other national planning documents as well. So, while PC7 is just focused on freshwater, the future land and water plan will border the mat, and so we tried to keep things as similar as possible, and so there is a lot of consistency between the version A and version B objective, the real difference is that instead of hanging things on a future planning framework and prioritisation of freshwater, we just focused on the risks associated with any increase in the scale or duration, and I don't think we thought that was a perfect answer because it still introduces, kind of, new concepts in terms of what is a low risk, but we felt that was still safe for ground. Any additions from anyone else from the video link?

Q. I'm sure you have friends out there, Ms Dicey.

A. **MR DE PELSEMAEKER:** Now, moving onto the second topic of discussion between the expert conferencing was the issue of coming up or actually refining a potential framework for dealing with applications where there is risk of stranded assets, and what we ended up was an

amendment to policy 10A.2.1. An amendment to the rule framework as well, so provide for restricted discretionary activity pathway to an amendment to a rule that we previously recommended, and the definition of mainline irrigation infostructure as well. So, in terms of the rule framework, what we are proposing is that there are a number of conditions that need to be met in order for those types of activities to be allegeable under the RDA pathway. Mainline irrigation pipes need to be installed prior to the notification date of plan change 7. The additional area that can be irrigated is only for a limited land users, viticulture and orchids, and also there should be on increase in water use above what is in accordance or in accordance with historical use. We also added a number of matters of discretion that actually not carry one matter of discretion, but they comprise two elements. One is Council retains discretion over the maximum size of the additional area that is to be irrigated, and the second one is use of good management practices on that additional area. We contemplated putting in a matter of discretion that focuses on water quality effects, but again because there is no clear framework to assess those, we thought maybe its to tackle it from that way, and that was through discussion with Ms King as well. It's not a perfect solution, again, probably the 80/20 rule a little bit, but we thought that that is manageable to some degree, and then finally because the RDA is becoming a little bit of a repository of different activities, I thought it would be good to just kind of set out what the RDA is doing now, if it were to be adopted and if we make provision for that expansion of irrigated areas within that rule. So it does four things now. It allows for irrigation expansion provided two conditions are met, one relating to the installation of Mainland Irrigation pipes and the other one relating to a land use or land uses. It also allows you to consider other data or other methods to calculate historical usage, also if you want to take water metering data post-2020 into account. That is the avenue as well. And when there is simply not sufficient data because of a technical issue as well, so those are the four, actually conditions that we try to cater for – situations we try to cater for under the RDA.

1010

Q. Four or three? You had three bullet points.

A. **MR DE PELSEMAEKER:** Three bullet points but yes, somewhat –

Q. Four concepts.

A. **MR DE PELSEMAEKER:** – quite related. Yes. And we're happy to take any questions.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Now I'm going to start with the objective and the two versions that have been captured in the joint witness statement. Now just to assist me with understanding who to be looking at when asking about the various options, it would be helpful if you could show me by way of show of hands which of you were supportive of version A and version B. Right that's quite helpful. So all of our remote attendees were version –

UNIDENTIFIED FEMALE SPEAKER:
(inaudible 10:11:55)

MR MAW:
Sorry?

UNIDENTIFIED FEMALE SPEAKER:
Mr Brass.

CROSS-EXAMINATION CONTINUES: MR BRASS

Q. Oh, Mr Brass has disappeared. You just had your video off Mr Brass.

A. **MR BRASS:** Just saving bandwidth, working from home.

Q. If you wish to say something, just flick your video back on and that will send a signal that you have contribution to make. Now in terms of with the remote attendees. If you do wish to add something to the discussion perhaps put your hand up's going to be the easiest way to flag attention and I'll make sure I loop back to make sure that we can give you an opportunity as we work through the process. So I want to start with the objective and I want to start with version A of the objective. So those

planners who had supported this version, it strikes me that the contentious element within that objective relates to the introduction of the concept of an environmental risk and the risk needing to be low. Now it occurs to me before we get to that point I actually did have a question for all of you in relation to the plan architecture. So I just might just roll back a page. So this question relates to all of you and particularly the planners. There was a desire to split the objectives up in to multiple objectives and you've set out your reasoning at paragraph 4 to improve readability and provide more specificity around the outcomes to be achieved and I just wanted to check that your collective understanding; if you are to split the objectives up into multiple objectives, is it your view that the objectives should all be read together?

A. **UNKNOWN FEMALE SPEAKER:** Yes, I think I speak for everyone but I'm not going to assume that.

Q. Mr Brass? Yes, Mr Brass is nodding. And the flipside of that, do any of you foresee a risk that particular objectives and my focus perhaps is on the enabling objective might be highlighted to the detriment of other objectives when the plan provisions come to be applied and I'm interested also in Ms King's view on that, based on her experience dealing with the processing of applications.

A. **MR ENSOR:** In terms of version A, I think the risk remains relatively low. The first objective is very process-based, it is talking about this transition and it doesn't drag in too much more and the second in version A, the second objective really sort of deals with those – with the activities that are being enabled. Separating the two out with the low test, coupled with what we have in front of us in terms of a noncomplying activity in my view, creates a relatively low risk of there being too much mischief caused by splitting them up.

A. **MS MCINTYRE:** And I guess if I can comment in relation to version B, we've, I think addressed the way the two, well apart from that first part which Mr Ensor's already talked about which essentially is about the scope of the plan change. The two addition objectives in version B are tied together by reference in both of them with a first, our 10A 12, ties the

enablement specifically to the existing scale and historical use of the permits whereas 10A 3 specially talks about, this is when the scale and rate of volume of take may need to be increased. So, they're two sides of the same equation and I think they clearly hang together.

A. **MS DICEY:** I agree with the comments of Mr Ensor particularly because and Ms McIntyre but because Mr Ensor was commenting on version A, I did always see there was a bit of a disconnect with the architecture of PC7 in that the vast majority of activities were being incentivised to go down a controlled activity pathway but the whole plan was framed in "avoid" language which is I suppose is one effective way of pushing applicants down the controlled activity but I think the enable, particularly in relation to the existing scale, consistent with historic use is far more in line and sets up and anticipates the controlled activity pathway for the majority of applications.

A. **MS KING:** And from a consenting perspective, I agree with Ms McIntyre that the second and third in version B are clear enough. To know which ones to be looking to.

THE COURT: JUDGE BORTHWICK TO MS KING

Q. Sorry say that again, the second and third?

A. The second and third objectives in version B.

Q. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, when you are processing an application, you'd be looking at the full suite of the objectives and not troubled by the fact that they've been split up into three separate objectives?

A. No, I would be looking at all three.

A. **MR TWOSE:** Yes, good morning yes look I was just going to simply add Mr Maw that in a fashion we did look at, a quite an expressed linkage of literally just stating the – or cross-referencing back to the first objective which is essentially 1.1 (b) and (c) but it's really a stylistic thing that either version A or version B, it refers to "deemed permits" or "water permits". So it's fairly clear I think in terms with the three are joined.

1020

Q. Thank you, now I have a question in relation to the first objective that it would appear you all agree on and my question relates to the word, "operative" within that objective and whilst I understand that at the present time there is an operative planning framework but there will always be an operative planning framework over the transition period and I have been exercising my mind as to how the current planning framework might best be referenced. So my first question is, is it the current state of the planning framework that is the start point for the transition that you were intending to capture by reference to the operative freshwater planning framework

A. **MR DE PELSEMAEKER:** The answer to that would be, yes, that is the current one, however, because this is going to be part of the operative framework, planning framework, it will cease to exist once a new planning framework becomes operative, so, I think that kind of avoids the confusion in that regard.

A. **MS MCINTYTRE:** I think you've picked on a slight ambiguity in there because I think well, we are talking about the current – I mean, Mr de Pelsemaeker's talking about the current framework, I think to clarify, we're talking about the framework at notification of this plan change because as we're all aware now, that framework has changed as of last week with the new RPS, and I think we certainly hadn't that that would be considered as part of that operative framework that we're talking about there, so I think there is a potential issue with that word, we may need to clarify it more.

Q. So, just from an intention perspective, was it a planning framework that existed, say at the date of notification, is that the start point that you had in mind when framing up this objective?

A. **MS MCINTYRE:** I believe it was – it certainly was for me.

Q. The record there is nodding from the participants on the AVL screen. Doe anyone take a different view in relation to what it was that was forefront of mind? No, and I'll put you on the spot, and bright ideas as to how that might be capture in the wording?

A. **MR ENSOR:** I mean, it could be – well, I actually don't think there's much of an issue with it currently, but there could just be a direct reference to the plan, the current operative plan by name, but I think it in a way including, sort of scooping PC7 up under this and then losing it all once the new integrated framework comes along is sufficient.

Q. Mr Twose?

A. **MR TWOSE:** Well, I think I agree with Mr Ensor, but possibly, the only practical way might be just to put in the date of notification so that the operative planning framework of – so, it's understand that it's a pre-PC7 operative water plan.

Q. Thank you. Mr de Pelsemaeker?

A. **MR DE PELSEMAEKER:** I'm just conferring with my colleges, because if we put it at the date of notification, it would not include the current operative RPS, and that is part of the – because it wasn't operative at the time, yeah…

Q. Is it then, is it the transition, and the question is, what was the starting point of this transition? Was it simply a planning framework that existing as at the date of notification?

A. **MR DE PELSEMAEKER:** Yes, but I think it's also important to make clear that after notification, we had an RPS which became operative as well, which should not be part of the planning framework that you will – it will not be part of the future planning framework, so I think that could be a complexity if we simply refer to the notification date. It could cause some confusion perhaps is what I'm saying.

Q. Ms King, you're the one who may have to deal with this. Does reference to the operative freshwater planning framework create any difficulties from an implementation perspective?

A. **MS KING:** It hadn't popped into my mind until this questioning, so I'm just trying to work through it now. Ms De Pelsemaeker has a good point in terms of the current RPS. Possibly because I didn't foresee it being an issue, I knew what it meant, so I don't think from a consenting team perspective it's a problem.

A. **MR DE PELSEMAEKER:** One way perhaps that we can deal with it is by referring it back to the NPS of 2020 and the framework that gives effect to those – to that instrument, because it is established that the current plan as well as the operative RPS does not give effect to that.

Q. Ms Perkins?

A. **MS PERKINS:** Yes, I just – I sort of agree with Mr Ensor. I don't think it's too much of an issue because we're not talking about assessments under that here, we're just talking about how this PC7 is about the transition from one planning framework to another, it's not really addressing anything else in here other than saying what particular activities are covered by Plan Change 7 in the fact that we are creating a transition, so I don't see that we probably need to – that we really need to add anything else to address the word "operative" versus it being the current planning framework, because as Mr de Pelsemaeker noted there is – especially with the RPS, that I don't think it really makes much of a difference at the end of the day.

Q. And Mr Twose?

A. **MR TWOSE:** Well I agree with Mr de Pelsemaeker and, look, you can simply slide the – if you're going to go with a date as a solution to this, then simply slide that along. I mean, PC7 won't – you know, it'll be operative post the date of the RPS anyway so you could simply just use that as your fixture point, or the day before the PC7 becomes operative, for example, or thereabouts. If a yes to the date is the solution to this, but again I just reiterate, you know, that it's – you know, in terms of actual impact, yeah it haven't occurred to the majority of plans before and possibly may not for our colleagues thereafter.

Q. Mr Ensor, your hand was possibly just scratching your hair. Is there anything final you wanted to add on this topic?

A. **MR ENSOR:** No, no, no more.

Q. Very good. Okay we will move on. Parties may perhaps comment on that in closing if it presents any issues but it's helpful to understand what the thinking was in terms of the use of that phrase. So I want to move forward now to consider the Version A of the objective, so those planners

that have recommended the second objective which is set out at paragraph 8 of the joint witness statement. Now perhaps the most contention – contentious element is subparagraph B where there is the introduction of this concept of a low risk for additional environment effects resulting from the proposal, and my first question is how might a consents officer go about interpreting the threshold of a low risk in the context of a plan change that doesn't set any environmental outcomes? And I might start perhaps with Ms King in relation to that, perhaps from an implementation perspective.

A. **MS KING:** The wording here does pose an issue for me in my perspective from a consenting point of view because I'm unsure whether – are you doing a risk assessment on the environmental effects? I'm just unsure about the wording there and what that would then mean for undertaking an assessment.

THE COURT: JUDGE BORTHWICK

Q. So you're unsure what is a risk assessment or –

A. Yeah, yeah.

1030

Q. Okay.

EXAMINATION CONTINUES: MR MAW

Q. So perhaps to assist with understanding what this particular part of the objective we're seeking to pick up and address, I wonder whether one of the planners recommending this part of the objective might describe what it was that was to be captured by this element?

A. **MS DICEY:** I don't mind kicking off – Sally Dicey – so to my mind, and this differs a little bit between us as to who was involved just in aspect conferencing on the objective and who was also involved in the stranded assets discussion. I was involved in both, and with the stranded assets, there was the proposed potential increase in scale, and then, through noncomplying, there might also be an increase in duration beyond six years, and also increase in scale and other matters. Could be anything under the noncomplying, and so this really set the stage in my mind for

the RDA pathway with the stranded assets, and so it linked through to the additions to the RDA pathway in relation to that, so that was quite confined in terms of how this aspect of the objective could be utilised, and then, with the noncomplying, I know, I agree and acknowledge that it does introduce a new concept, but in the noncomplying space, there will be a whole raft of considerations that will be brought to bear on this, and so those other factors, you know, MPS considerations, et cetera, will also be in the mix, so I'm not sure if someone else wants to add something to that.

THE COURT: JUDGE BORTHWICK

Q. So can I just clarify?

A. **MS DICEY:** Sure.

Q. You thought that this objective would set the pathway for the RDA stranded assets, and also inform the outcomes for noncomplying activity, so it's got two purposes in your mind?

A. **MS DICEY:** Yes.

Q. Yeah, okay.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Ms Perkins?

A. **MS PERKINS:** Yeah, I just note that I agree with what Ms Dicey has just said to the kind of two components of this, and I think it was important in our thinking that there was the first step for that pathway from the stranded assets conversation that comes after as well.

Q. Mr Ensor?

A. **MR ENSOR:** I guess, in the simplest terms, in my view, was that if there were going to be some exceptions, then there needed to be some recognition of the objective of how that may come through, and whether there was – I guess the stranded assets is the easiest example because the matters are relatively well-defined, I understand, from what I've seen, and there isn't probably a huge amount of assessment that needs to go on around low. The noncomplying activity pathway is a bit of a different story, but I think we're probably getting to the point now with the avoid

nature of the framework around it that it's a relatively small risk that that will be taken, and it would be up to those involved to try and determine what low is in that context, with site-specific and situational-specific matters in mind.

Q. Mr Hodgson –

THE COURT: JUDGE BORTHWICK

Q. Just pause there a second. When you're talking, Mr Ensor, about the avoid, can you just key me in to which avoid you're talking about, where that might be found? So here, we've got an objective. Is the word "avoid" in the objective or not?

A. **MR ENSOR:** Sorry, it's in the policies.

Q. It's in the policy for – on duration?

A. **MR ENSOR:** In the policy that was – yes, correct.

Q. Yeah.

A. **MR ENSOR:** Sorry, I'm just scrolling madly and not quite successfully doing that, but, yes, in relation to duration.

Q. In relation to duration, so how does your answer – you felt comfortable with the noncomplying activity because there are avoid policies in relation to duration, so what does that mean? Does that mean you can increase your scale or duration? Yeah, I don't understand how avoid gives you comfort. Could you just tease it out, how the avoid policy is a comfort?

A. **MR ENSOR:** It was in relation to a risk surrounding the use of the word "low" in the objective, and the question around having to do an assessment of what "low" means. In terms of the instances where an applicant might take a less-defined pathway, so, for example, the stranded assets example is quite well-defined, but in terms of something else, where they might want to increase duration, for example, the relevantly strict direction in that policy in my view means that the issues of interpretation around what is low or not will be relatively minimal.

Q. What's the strictness that you're referring to? The relatively strict direction in that policy, so which policy are you now talking about?

A. **MR ENSOR:** The one, the avoid policy in relation to durations.

Q. Okay, all right. I think I understand what you're saying, but –

A. **MR ENSOR:** I guess I'm saying that probably not that many applicants are going to take that pathway, and therefore require a consents officer or others to interpret low in the objective in that context, but what it does do is support the exception that has been identified, for example, stranded assets.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Mr Hodgson, you had a contribution to make, and I am going to come back to this point about the interplay with the policy shortly, but Mr Hodgson, you had something that you had flagged.

A. **MR HODGSON:** Sorry, I was – yeah, my concern was just in regards to the stranded asset issue and whether we may have, effectively, an orphan policy. We've got the, I think, very useful changes have been made in terms of a method and a policy change to address the stranded asset issue. My concern was whether, at an objective level, there was that support, and hence, that support that I've got for version A.

Q. So is it fair to say that, in your mind, you weren't seeking to open the noncomplying activity door further ajar with respect to activity seeking a longer than six years' duration?

A. **MR HODGSON:** I wasn't, no. I think that would be a fairly difficult proposition to navigate through this framework.

Q. Now, other planners who had supported this objective, did they have in mind the dual purposes as Ms Dicey has expressed, so both providing a parent for the stranded assets provisions, and also consideration for activities through the noncomplying activity pathway, or just one of those?

A. **MS STYLES:** If I may, excuse me, I was very much of the view that the group have all expressed, that this piece of this objective is trying to do multiple purposes, setting up the RDA pathway, and also trying to clarify what the point of the noncomplying pathway is. The other thing that was on my mind, and I know others', was the contemplation of a discretionary activity pathway, which had come up in some people's evidence with different activities, such as the hydro and community water supplies, and

other things that have been popping around with that discretionary activity, so having something in the objective that turns to consideration of things that are outside the controlled activity, which is the first part of the objective, the second objective, or the second objective in version B, is needed just simply to explain what the purpose is or what you test back against. In terms of the duration aspect, whilst we're all quite clear that that is very limited by the wording in the policy that sets up an avoid terminology, it seemed, to those of us who were discussing this, in the version A, that there needed to be something somewhere that anticipated that there could be activity seeking noncomplying or another status consent for a longer duration than six years, and simply saying "avoid" leaves everyone in a vacuum of what you may or may not consider, and this is where we were trying to attempt to give some guidance on what a consent-processing officer might turn their mind to when they're looking at those types of consents.

1040

Q. Is there a risk that introducing this element to the objective will result in the directive language in the policy being read down when it comes to application of the objectives and policies in the plan, in the context of a noncomplying activity application?

A. **MS STYLES:** I think everything would have be to be taken on, in its context. It's going to depend on what an old complying activity consent is seeking. They could be doing many different things as my colleagues have mentioned, whether it be an increase in scale or water, application or duration, and so we're going to need as a consent processing officer, to consider the objective and the policies that are relevant plus the nature of what is being proposed. It – you can't just simply pick pieces apart when you're processing a noncomplying activity and all matters are relevant.

Q. Ms King, sorry to pick on you again, when you're thinking about this from a consent processing perspective, do you foresee some risk that applicants will say less weight should be placed on the avoid policies because there's a, an objective which opens the door in terms of

consideration of activities which they say have a low risk of adverse effects?

A. **MS KING:** Yes.

Q. Now in terms of the planners who were supportive of Version B, you have provided some commentary or comments on the Version A. I would invite you now to share your views in relation to Version A and I think the concerns or views were expressed at paragraph 12 of the joint witness statement, so.

A. **MS MCINTYRE:** Since the microphone's here, Sandra McIntyre, I guess my two key concerns with Version A are first that I think the I suppose the uncertainty in about what is a low risk of environmental, a low environment risk that it seems to me takes us back into the same arena as the problems that we discussed, that we discussed at length in the hearing about the previous noncomplying policy which was tying to effects being not more than minor. It seems to me that exactly the same problems arise with this objective and I agree with Ms King, that that's gonna be a real issue in terms of processing noncomplying consents. The second problem I have with it, is that it doesn't provide any guidance at all in relation to what is a key, one of the key aims of this plan change which is to ensure that takes and uses of water can be considered within the framework of the new plan and the new MPS and that framework, when it is in place, so there's nothing in Version A which actually points to that key consideration.

Q. Mr de Pelsemaeker?

A. **MR DE PELSEMAEKER:** I agree with Ms McIntyre. During the presentation I actually had points in paragraph 12 in mind and I hope I expressed them well. What I did not mention was about the uncertainty around low risk, the concept of low risk of environmental effects and I've read what's been said about that. It, yeah, it is uncertain. I also think that it's essential that we are able to implement or achieve the outcomes that are gonna be set in the new land and water plan and without those outcomes, without them being known, it is kind of hard to say what

environmental effects are acceptable. Yeah, that's all I wanted to add to that.

Q. Thank you, Mr Brass?

A. **MR BRASS:** Yes, just to add that my main concern with that version is that it's not explicit about the need, the limit, consent, duration, and the example in Plan 1.1 is recent decision, I'm sorry, I forget the correct name of the applicant but it was the (inaudible 10:45:01) golf course, and in that case, the activity status predated plan change 7, but as notified plan change policies were considered, in that case the effects were considered to be no more than minor and consent was granted through 20 35, so effectively the noncompliant longer duration pathway, and we looked at that version A, I think that where the risk of additional effects is low, those sorts of applications would be able to pass through that even though in that case it's locking in for 14 years, a take which is well above (inaudible 10:45:53), which does then make that difficult to pull that back under a new allocation regime when the new plan comes into place.

Q. I'm going to move on next to version B, but before I do so, are there any final remarks that any of planners wish to make with respect to version A in response to the points that have just been made? Mr Farrell?

A. **MR FARRELL:** I will concur with my colleges in terms of those who support version B in what they just said. Just an observation, I think, and I'm not sure how the topic A group might take this, but I think there's a lack of appreciation of the extent to which the way that their version of the objective is written relies on the avoidance policy, policy 10A2.2 having real potency, and I think, Mr Maw, your question of Ms King, I agree with Ms King's response that if that objective survives, then if I was a commissioner or decision maker, I'd really be testing how potent is the avoidance test in policy 10A2.2, because the objective itself, in my mind, really does question that avoidance policy. So, to my mind, the objective recommended by version B planners is not a good parent to the avoidance policy. Version A sorry.

THE COURT: JUDGE BORTHWICK

Q. So, the objective of version A is not a good parent.

A. **MS DICEY:** Just listening to the discussion, I acknowledge some of the issues with this, it's always, I mean PC7 is not a plan change that allows for environmental assessments in the round and doesn't set up a full framework in the round for that, and that is what is so challenging around the noncomplying pathways, there just is nothing, no indication of what should be considered and what should be given primacy in terms of thinking. I think some of the issues that have been raised with that second arm of the version A objective are partly because they're hanging off the "and enable" introduction for that objective, and potentially starting separating them out as the version B, last two objectives have been separated would be helpful in starting, so it would be enable and then linking into the A, sub paragraph, and then sub paragraph B actually hanging off a start that is more akin to the version B third 10A.1.3, so that's the ensure, blah, blah, blah, are only allowed to, so, more of that, so that would do less to potentially weaken any avoid policies that come after that, so, it's more limiting, rather than the enable, which is really speaking to the controlled activity. So, that might assist with that, and I do just note again, that if an applicant is going down that noncomplying pathway, this is another test, it's not the only test, so there will be a full in depth assessment at that stage with an avoid policy in the mix which they're – I'm not sure we can compare decisions made at the moment under PC7 when the operative planning framework is still in play. It's not just PC7 in isolation, and so it will be a noncomplying activity assessment which considers both whether effects are no more than minor. The application against the policy framework, including low risk, and I think quite a lot of evidence would be required on that matter, so it's not a confined application or assessment at that stage.

1050

Q. Okay, we'll move on to version B now and explore its meaning. The first question that I have relates to the introduction, or a recommended introduction of a definition of transition period. Now, when I read the

definition of "transition period" it is covering what looks like a different – it might be a different period of time from the transition referred to in the first objective. I'm interested to understand whether a distinction has been drawn between the transition period referred to in these recommended objectives, compared to the transition referred to in the first objective.

A. **MR DE PELSEMAEKER:** That is correct. That's good observation. In my view the transition in the first objective is not a period, it's an action, whereas in the objectives – the following objectives, 10A.1.2 and 10A.1.3 under version B, you are referring to the period in which this transition is occurring, so they're slightly different concepts. Transition seems to be an obvious concept, but I think there is confusion – there is risk of confusion between – because we've used the word "transition," we've used the word "interim period," and we need to be careful as to how we use them. We've used the word "interim period" to refer to the period between now and when the new framework is becoming operative, but that is actually not the same as the transition period. The transition period is determined by the length of your consents really, because that's how long it takes to implement that framework. So we thought it would be a good idea to clarify that, and also put some constraints around that, bring it back to the six-year timeframe, especially when you look at the second objective which – under version 10A.1.2 enabling activities to continue during the transition period. It kind of brings it back to that six-year period. It makes it clear – crystal clear that it shouldn't continue for any longer. So that was the whole rationale behind it. Providing clarity and bringing it back to the need to constrain the transition period and therefore the consent duration.

Q. Any additions in relation to that explanation from those in support of version B? Okay, and we'll move on to what I detect to be the most contentious element of these two objectives and that appears to relate to the reference to not compromising the implementation of the new planning framework, and concerns have been raised in terms of how that phrase might be interpreted when there's no understanding as to what that planning framework might look like. So starting again with Ms King.

As you read that part of the objective how might you go about implementing that?

A. **MS KING:** I do note that there can be issues with referring to a document which – or documents which are unknown. However, when I read that it just reinforces in my mind the short-term duration so it would be – yeah, just reinforcing that you aren't compromising by recommending a shorter duration.

A. **MS McINTYRE:** If I can just add to what Ms King has said, I agree with her and I think there's a key difference to be made that the criticism of this wording that has been made by the people who support Version A, is that you can't determine whether or not you're going to compromise outcomes that haven't yet been set, but that's actually not what this wording points you towards. This wording is specifically talking about not compromising the implementation of the new framework, and as Ms King said, that takes you directly to consideration of whether you are going to be able to look at the uses that are being given consent within the new framework in it so it directly takes you to that question of duration.

Q. A second criticism made with respect to that part of the objective relates to the reference to a planning framework that prioritises the health and wellbeing of waterbodies and freshwater ecosystems, and as I understand the criticism, it strikes me that it is about saying that that is too narrow a focus in terms of what a new planning framework may be seeking to achieve. I'm interested in a response to that criticism.

A. **MR DE PELSEMAEKER:** We had some discussion amongst ourselves as to what concept should we bring in there to signal that what is gonna be in the new planning framework is gonna be change, paradigm shift from the current one. We thought about references to Te Mana Te Wai, but it's a little bit hard because then you are looking at something that at that point and yet there is now an interpretation of that articulated in the proposed RPS but that could still change, but having a reference there to prioritising the health and wellbeing of freshwater bodies to me signals a radical change from the current framework which is trying to do everything for everyone, and in doing so probably has too much of an emphasis on

letting existing activities occur as they were and a good example of that to me is the how the current allocation framework works, because it doesn't deal with over-allocation. Just fully allocated and that's where the thresholds is.

Q. And the final matter I wish to ask you about in terms of the drafting relates to the third objective, sub-paragraph (b), which it picks up the phrase, "Continue operating beyond the transition period". Now my question is one of perception with respect to (inaudible 10:58:45), this objective in whether that is sending a signal that may cause distress in the rural community in terms of the ongoing operation of activities beyond the transition period, and I'm interested to know whether any of the planners have read that objective as sending a signal that is perhaps not appropriate to be sending at this point in time?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Sorry, I'm a little lost as to what signal? The signal to the rural community?

A. Yes, that activities won't be able to continue operating beyond the transition period.

1100

Q. Can I just read that, with that in mind? I see, so the signal being in particular to vote who use, are taking, using water for irrigation, that they may not be able to operate beyond the transitional period which would be a missed step, you know?

A. Yes.

Q. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

A. MR DE PELSEMAEKER: I assume you mean continue operating under the consent granted under the PC7 framework, beyond? That would resolve the issue, would that provide more clarity? So it's not that the activity cannot continue but under the current conditions set under new consent. It is a possibility that it might be interpreted that way.

A. **MS MCINTYRE:** I think if you were to read (b) in itself without broader objective, you could take that perception but I think what it's actually – if you read the objective as a whole, what it says is that you're only allowed to continue operating beyond the transition period if it doesn't compromise and that, I think, what that flags and again, going back to the wording, "in terms of prioritising health and wellbeing of waterbody". What that does is that sends a signal to people that to continue operating in the future they are going to need to start looking at how their activities are going to provide for that prioritisation which I think is an appropriate signal to be sending.

Q. And perhaps one of the things I have on my mind is that it possibly doesn't send the signal that there may be time at the expiry of the transition period for users of the water resources to adapt, so the phasing in, the timeframes for achieving the outcome of a framework that is prioritising the health and wellbeing of water. I may be reading that differently to others but it was certainly something that struck me as I read through this objective.

A. **MS DICEY:** At the risk of butting in a version B discussion, I don't think there's ever been a signal to the rural community within PC7 that there will be an allowance for transition after PC7. That's not covered or addressed in PC7. PC7's only concerned with what's happening within its own lifetime really. And I think the rural community probably or water users are already concerned around the factors that you've raised. So I don't think that changes anything.

Q. Okay, right I'm going to handover version B to those in support of version A to provide some further commentary in relation to the issues that have been raised at paragraph 10 of the joint witness statement and we have covered some of those matters but I'm interested to hear from the planners who have raised those concerns.

A. **MS DICEY:** I think you've covered them pretty well Mr Maw. The only comment that probably came to mind for me is that whether it's compromise– so in terms of the very last part of 10A.1.3, about not compromising the implementation. Whether the wording is not

"compromising outcomes" or "compromising the implementation", to me doesn't really make a big difference. We're still not exactly sure about what outcomes will be being sought to be implemented under any future planning framework. I guess that just circles back round to the original issue we had even at the last expert conferencing, is an objective that it's very difficult to measure outcomes against this objective under PC7 because particularly in the early stages we really have – when the vast majority of permits actually likely to be processed under PC7, we may not even have a draft land and water regional plan, it's – we won't have one and so we really are crystal ball gazing.

Q. Any other comments on the version B from those in support of version A? Okay, we shall move on. I thought we might next address the stranded asset –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Should we leave stranded assets, so we can finish off objectives and then let folk who've got hearings go? Unless they're desperate to get in on stranded assets and are time rich.

A. Yes, as in, does the Court wish to ask its questions next?

Q. Well, yeah, but any –

A. And other counsel.

Q. – cross-examination as well. It just seems to me what was critical was that we had at least two people who were in hearings. So, and I was particularly concerned about the objective, because its purpose has not having heard now everything is not been signalled in the JWS sufficiently well. So, okay. So, we're all happy with that, anybody got any cross-examination on the objective? Yep, Mr, Welsh.

CROSS-EXAMINATION: MR WELSH

Q. I just have very, very limited, because most of the matters have been covered by Mr Maw, but I just wanted to clarify, and I don't mind who answers, in respect of the first objective, 10A.11, where A, B, and C sets out the permits or the applications to which the plan change 7 is intended to cover, and my question relates to A, which relates to the new takes,

and my understanding when you look at the policy is that there's the ambit of plan change 7 for new takes, new permits is limited to that policy direction on duration, and I just wonder if the language is a little bit loose around managing those, and whether it should instead read something along the lines managing *the* duration of permits for takes and uses, because plan change 7 has no other provisions relating to that. Any comment on that?

THE COURT: JUDGE BORTHWICK

Q. Does anyone disagree with Mr Welsh?

A. **MS DICEY:** I think that's a reasonable change, yes.

Q. **MR DE PELSEMAEKER:** Yeah, I agree, there is no risk in doing that and it provides clarity.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. My second question which goes against all rules of cross-examination in terms of an open question without knowing the answer, is that can someone from the version B team please give me an example of an application that would compromise the implantation of an integrated regional planning framework.

A. **MS MCINTYRE:** An example of an application that would compromise the implementation is one that was granted for a 35-year term, because that can't be reconsidered. It's subject to the limited provisions, and we've talked bout the issues around 128 consent reviews. A long-term consent would compromise that.

Q. Right, so in response to that answer, is that based somewhat on a pre-conception that there's a precedent effective associated with a single application that's granted 35 years, somehow compromising the implementation of an entire regional plan and framework coming through?

A. **MS MCINTYRE:** No, if the new planning framework is to give effect to, I think, to the NPS, among other things, the NPSM, then there are matters within that NPS, particularly in relation to address over allocation which are going to need to be looked at, not just across the board, but are going

to need to be looked at in terms of individual applications, it's not a – it's actually a matter that will need to be looked at in terms of certainly a large a proportion of applications or the consents that are out there now, it's not just a matter of precedent I don't think.

1110

Q. Right, and does anyone else in the plan version B team have a view that single application granted beyond the six years would compromise an entire regional plan framework implantation?

A. **MR FARRELL:** I think it is going to be a bit more contextual than that and to add to what Ms McIntyre was saying, I think on a case by case basis, if you've got submitters, and for example, Nga Tahu Rūnanga and Fish and Game showing up and saying that there are environmental outcomes for example, or integrity issues around implementing the MPS freshwater that are at stake, then I think that would be an example of how you might be compromising future planning framework.

Q. Mr Farrell, does that mean that you adopt the position compromising wider than just purely duration?

A. **MR FARRELL:** Yes, and I was going to actually say, because I didn't get a chance to put my hand up back in the first question you had, I don't actually agree with my counterparts, that the suggestion you had is appropriate because certainly managing the duration is the focus in terms of providing for a short-term framework, but beyond that the framework is the noncomplying activity status and it intentionally opens up all tests that might apply in the noncomplying activity status, and so at that point, beyond six years I think it's more than just duration.

Q. And Ms King, do you have any issues as to the process and application, with an applicant, for example, saying: "I can't possibly compromise the entire regional planning framework because I'm just one applicant," versus the counter which may be that you are seeking long-term consent or you raising effects that Fish and Game and co may have an issue with. How are you going to assess an application against the word "compromise," which is not one that appears in the act at all?

A. **MS KING:** Sorry do you mind just asking me that again?

Q. Well, I'm just wondering, trying to place myself in your shoes and wondering how you would assess an application when an applicant says, "I'm just seeking a longer-term consent. It's just me. I can't possibly compromise the ORC's rolling out of its regional planning framework by granting me a longer-term consent." How would you approach that argument against the arguments of Ms McIntyre who says, well it's one application for a longer-term consents so therefore it compromises the framework or Mr Farrell who raises effects' concerns with the application. Just how are you going to approach the assessment of that application?

A. **MS KING:** I guess it would be on a case-by-case basis dependant on what, in what way the application might compromise the implementation. So looking to Ms McIntyre's example where you need to be looking at allocation which could then compromise the implementation of a new allocation framework under the new land framework. And then in terms of Mr Farrell's example where effects might compromise the implementation, it would obviously be dependant on what those effects are, and I'll have to step through that whilst considering the objective. So, I'm not sure if I can give you a very specific example unfortunately.

Q. No, I think that's the answer.

QUESTIONS FROM THE COURT: JUDGE BORTHWICK

Q. Court's questions, I have some questions, not about objective 10A.1.1 and no questions in particular about version B, 10A.1.2. So, the questions relate to the version A objective, 10A.1.2 and the version B objective, 10A.1.3. So, just looking at 10A.1.2, the first thing the I noted and it's probably just an editing thing but your sub-paragraphs (a) and (b) are conjunctive. Which if they are a conjunctive, they're pulling in different directions. Agreed? So that should be an "and" or an "or" if that goes ahead?

A. **MS DICEY:** Yes. We did play with that wording a bit and I did have that concern as well.

Q. Okay. Everyone happy that's a disjunctive and an "or"? Okay? So, I think you've already have answered this but the second thing that I ask

myself, well, what does, looking at an increase in scale, so that's the sub-paragraph (b), that seemed to me to include, well almost anything really. It could obviously include rate of take and volume or area, might pertain to the infrastructure, laying out of the infrastructure maybe or something else. Can somebody help me, what does scale mean in this context?

A. **MR DE PELSEMAEKER:** It includes those matters, increases in scale, increases in the use, the scale of – the use of the water as well. Yes. It might include other things that we could not foresee at the time when we were thinking about it.

Q. So, it includes the increase in use of water and I think you are agreeing it can include an increase in area. and it can also include the increase in take – take and use.

A. **MR DE PELSEMAEKER:** Intake – yes take and use, yes.

Q. Plus other things not imagined yet. Okay.

A. **MS DICEY:** I'm not sure in head whether it included the "take and use" or the rate because those two things are almost separated out in both versions actually.

Q. So, tell me – slow your observation down there.

A. **MS DICEY:** Sorry, to my mind it doesn't include an increase in the allocation because in both versions those two things are actually dealt with separately. In the version A version it's – that consistent with historical use…

Q. *Or* and this is where the "and" "or" becomes important. So we're just looking at your version A. "At their existing scale and consistent with historical use *or* where the risk of addition adverse environmental effects resulting from any proposed increase in scale or duration". So I've interpreted the scale of the take and use or scale meaning something else maybe area or duration.

A. **MS DICEY:** So, we did have a conversation about whether scale – could the word "scale" alone could just cover off the use of the water and we thought that was too, might be too ambiguous and that's why we specifically included reference to the historical use. To my mind "scale" was more about area than anything else but I acknowledge that perhaps

that's too broad and yes. Others may have a different perspective on that.

Q. I've noted Ms Dicey that you think scale means "area" and does not mean "take and use", based on – the historical take and use. Correct?

A. **MS DICEY:** That's correct.

Q. Anybody else who supported version A, does scale mean "area"?

A. **MS PERKINS:** Generally when we were talking about this, it wasn't the context of the irrigation area but I accept that if this is to cover those situations that might fall into that noncomplying category, then that would also cover those people that did for some reason want to seek increases beyond what they historically taken. And if this is a – the part of the objective that covers those noncomplying activities, that scale would also need to cover those that might not comply with the controlled activity limb entry condition of the historical use.

Q. Yes, so Ms Perkins you're "area" together with plus historical use and increase in historical use?

A. **MS PERKINS:** I think the way it's framed, it does cover me and probably would need to.

Q. Yes and the question's what did you want it to do. That's really only, yes. Is it those two things or it something else? Pardon.

A. **MS PERKINS:** We mostly did talk about area. We mostly did talk about it in the context of area when it came to the stranded assets part of the conversation but I did miss some of the initial conversation on this with the group.

Q. Could scale mean something else in your mind?

A. **MS PERKINS:** I don't think so, I think the scale really is in relation to those components of the entry conditions. So where you're talking about the area or the volume or rate of take. In my mind that's where the scale comes.

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Q. Right. Ms Styles, you've got a particular interest in hydro. What do you think scale could mean your client, yeah, and this is your client now

seeking to advance either an RDA or a discretionary or perhaps even a noncomplying activity, what would scale mean to your client?

A. **MS STYLES:** For my client, it's largely related to the quantum of water which is the scale of the take, so when – they're not talking about scale in an area or a spatial sense, and I guess from my perspective that's limited for the Trustpower situation because they already take as an opportunistic take what is available, so they do no deliberate taking that will ramp up a scale. Essentially, the scale of what they take is limited by water in the river at the time. So, there's no intent to increase the infostructure in a way that would enable a greater scale of water to be taken and that was why the issue of being able to determine what the historical use it for Trustpower is key because it needs to reflect those seasonal and weather related events that change the scale of taking according to the water availability. For me, the question here was particularly related to the duration element and how that relates to longer term consenting for Trustpower.

Q. So, as I understand it, schedule B as it's – the schedule in the plan as it's proposed to be amended by the planners now addresses Trustpower's opportunity to take water, is that correct? There's no scaling back of that opportunity.

A. **MS STYLES:** It better addresses it.

Q. Sorry?

A. **MS STYLES:** It better addresses it –

Q. Better addresses it.

A. **MS STYLES:** – in so far that there is some water meter data that Trustpower holds.

Q. Okay.

A. **MS STYLES:** - but what Trustpower's also suggesting is sometimes they may need to show historical use through more than just the few years of water metre data, which is where the other entry conditions that go to the RDA rule kick in.

Q. So, in terms of your client's trying to achieve here, and what your supporting, scale does not go to a concern about the use of water or

historical use of water, scale goes to duration. So, that's setting you up, if you like, for a longer duration in an RDA discretionary or noncomplying context. Correct?

A. **MS STYLES:** Correct.

Q. Thank you. Mr Twose. Same thing, what does scale mean to you in terms of the, you know, the territory authority's interest.

A. **MR TWOSE:** Thank you. Well, as with Ms Styles, area is not a particularly relevant consideration, but the quantum of water. So, when you read B, the scale of the take and us the freshwater, so, it's low, medium, high takes. But again, I would also that with the version A 1.2B, it is as Ms Styles mentions, duration, I think, is a primary consideration for the TAs. When you're talking about scale, the change to – or the proposed version A 1.2B actually ties in with the RDA matters of discretion where in, and I'm referring to 3.1A.1, in double A, for community water supplies, with an existing water permit volume and rates, the extent to which there is need to provide for population growth within the term of the consent. So, that could be well be circumstances, your Honour, where the take needs to scale up for those factors.

Q. Okie dokie, give me that reference again, 10A 3…

A. **MR TWOSE:** Sorry, I'll read it out in full for the RDA, so that –

Q. If you give me the reference before you do, 10A…

A. **MR TWOSE:** Yeah, 10.A.3.1 A.1, this is the RDA activity.

Q. Oh yeah.

A. **MR TWOSE:** And then just going down to the matters of discretion, it is (AA).

Q. So, in a sense, scale, for you, also means scaling up for population growth.

A. **MR TWOSE:** Correct.

Q. So scaling up, what would you be scaling up, your rate and take?

A. **MR TWOSE:** Well, conceivably both, yes, so it talks about both the volume and rate limits.

Q. Yeah, volume and, yeah, your historic use would be scaled up to the population growth.

A. **MR TWOSE:** That's right, but with the caveat in (AA) that it's under the ceiling of the existing water permit, maximum volume and rate limits.

Q. Just remind me, existing water permit, the permit to be replaced, is that correct?

A. **MR TWOSE:** That's correct.

Q. Yeah, okay. So, Mr Twose, I've noted that scale would be applied in relation to the territorial authority's interest, both to support a longer duration and to support the RDA?

A. **MR TWOSE:** Yes, that's correct, your Honour.

Q. Yeah, okay, for scaling up, all right. Is there anything else that I'm not aware of, any other activities which might seek or which might view scale in a particular way, any other interests that are here? Nobody, all right. The second thing that really struck me was this phrase: "additional adverse environmental effects." You see, I sat there thinking, well, for consenting purposes, the comparator environment would be the existing environment, so the existing environment sets your baseline, which environment the concern of the regional council is that it is either degraded or degrading, so that's now my comparator environment, and so when you're looking at this objective, you're looking at adding to adverse effects on your existing baseline environment. Is that what you intended? So additional adverse environmental effects sets up a comparator to your existing environment, the environment as it exists now is your baseline, which environment might be degraded or degrading.

A. **MS DICEY:** That, I think, really reflects for me the evolution of this in relation to the stranded assets question.

Q. I want you to park up stranded assets and now start thinking about irrigators. Is that what you intended?

A. **MS DICEY:** Under the noncomplying rule?

Q. Yeah, would – yes.

A. **MS DICEY:** Yeah.

Q. But I also think, to be honest, I'll tell you what I think, that this actually sets up a pathway for consenting under a noncomplying rule or supports your pathway for consenting for discretionary, and does so in a way which now

sets up the existing environment, which, in some places, is degraded or degrading as the comparator environment. Is that what you intended?

A. **MS DICEY:** That wasn't what I'd intended, and I hadn't actually contemplated this with regard to a discretionary activity rule, so it was only within the context of what we'd been tasked to do, to setting aside other relief sought in terms of the stranded assets, and thinking about, as well, how that might apply to noncomplying. So it's hard for me to set aside the stranded assets component of it because it was very much focused and we had quite a lot of discussion about that if there are stranded assets and you're only adding a discrete area, whether the assessment should be on the whole activity in the round for the RDA, and we agreed that it should only be about the additional area, because the existing area irrigated could just proceed down the controlled activity pathway and be accepted on that basis, so it was really focusing that assessment just on the additional area, but, yes, I take your point in terms of the noncomplying and the baseline there. I suppose that's the baseline from a policy perspective, but still, those other factors, the assessment in the round under the noncomplying activity pathway of no more than minor as well, and all the other factors that come into play, or considerations.

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Q. Did you turn your mind to this as being a consenting pathway via – it would be unusual, but it has been proposed by you and Ms Perkins in earlier evidence – that there could be a consenting pathway for irrigation, the taking of water for irrigation purposes or for farming purposes via a noncomplying pathway. Which pathway is to set aside Ngāti Rangi, which is your desired pathway under your discretionary activity? I thought this was another go at it.

A. **MS DICEY:** Another go at a discretionary pathway?

Q. Another go at setting up a pathway which would have the same effect of the pathway that you would –

A. **MS DICEY:** No.

Q. – which would enable a large number of applications for resource consent.

A. **MS DICEY:** No, that wasn't the intent when we drafted this, and Ms Perkins can clarify from her perspective. It wasn't a go at, you know, coming at that from a back door kind of round.

Q. So, with that in mind, would it have that effect, additional adverse environmental effects? You see, I put this with a proposition, and I'll take an extreme one, but it's come in through – I think he was a farm management consultant for OWRUG, given economic evidence, and anecdotally, he said he knew of applications or farms south of the Waitaki River, on the plains out there, border-dyking and conversation to spray irrigation. Under current border-dyking, they were producing loads of up to 200 kilograms of N per hectare per year, and the proposal was to go to spray, with a significant reduction in the N output, and so that seemed to me to be there's two good things happening there, there's two good things happening there, there's a significant output in the N output, and potentially, although it depends on whether they wish to irrigate more area, a reduction also in the take and use. So you've got those two things happening, and just when I was looking at this, I thought, well, couldn't you just take those two outcomes, a reduction in N and a reduction in the volume of take and use, and say, well, there's no risk of additional adverse environmental effects, we are, in fact, reducing the possible environmental effects. Is that not a possible outcome?

A. **MS DICEY:** That is a possible outcome against this policy alone, and that's where I come back to relying on all the other considerations that would come into play through the noncomplying pathway.

Q. And, where I'm sitting, I don't know what you mean by that. So I've given you the application because it was just so interesting in its extreme number of the N output for that farm that he had in mind, so what is the risk of additional adverse effects? This is on your baseline environment, from a proposed increase in scale, so that could be, in this case, area, potentially, or duration – well, that's just duration – and the use of freshwater is low. So what do you have in mind?

A. **MS DICEY:** The broader considerations under s 104 in terms of the MPS.

Q. No, I've given you the scenario, so how would you apply that scenario? What would be the things that you would be looking for with that scenario?

A. **MS DICEY:** Off the top of my head, sorry, give me a second. Yeah, it's incredibly hard without having a full scenario to look at because there's all the other factors that will be at play in terms of the duration that they're seeking, the –

Q. Like, what, in relation to the duration that they're seeking?

A. **MS DICEY:** Seeking a longer-term duration, how that lines up, because there's still the avoid policies within PC7 as well, so there's still the avoid policies underneath this.

Q. So they're seeking a longer duration, but there's a policy that says avoid seeking a longer duration?

A. **MS DICEY:** That's right.

Q. So how do you see – how would one – if you're looking at that as the example, how does that work? You see, I don't get how that works in practice. You know, if it was to come before me, you've got an objective that actually contemplates a longer duration, and that is subject to there being no – that the risk of adverse environmental effects is low, and I guess, I don't know, maybe the focus then comes on the added environmental effects, which are effects as a consequence of the extended duration. Yeah, so then you've got a policy that says avoid the extended duration.

A. **MS DICEY:** Yes.

Q. So how does this work out, in practice? Because I just don't understand.

A. **MS DICEY:** So there is still the policy barrier of whether the application is consistent with the policy framework in terms of one of the gateway thresholds, so potentially, that trips it up in terms of the gateway, and then it's back to no more than minor, or assessing the effects of the application in the no more than minor threshold, and so that spins the application back into that no more than minor assessment that still remains for the noncomplying activity.

Q. Okay, so what you're saying is even though the objective contemplates a longer duration, and there policies that say avoid a longer duration, that

you couldn't get through the noncomplying activity gateway because of the policies that don't contemplate the longer duration, so you're back into the are we no more than minor, and then the question that I have in my mind is how does that no more than minor gateway test line up against there being a low risk of additive environmental effects in this objective? Does it line up? Is there synergy, or is there not meant to be synergy?

A. **MS DICEY:** I think the two would be separate tests, so there would be two separate tests that you would have to pass, so you would have to be able to show that there's no risk of additional adverse environmental effects from any increases in the scale or duration, but on the whole, in the round, there still can't be more than minor adverse effects. So the increase or the risk of additional adverse effect only relate to any part of the proposal that is an increase in scale or duration, but then the whole activity still needs to be assessed in terms of effects.

Q. So I've got the risk element on pertains to the increase in scale or increase in duration, but the no more than minor test applies both to that and to all effects of the activity on the environment in general, is that right? So the no more than minor –

A. **MS DICEY:** Yes.

Q. – test pertains both to the increase in scale, increase in duration, and other.

A. **MS DICEY:** It would be a holistic assessment of the effects of the activity. Others may well have a different view.

Q. I'm just thinking about what your view means, at the moment, before we go on to the next, make sure that I've got it down right, and from what you have told me, I understand you to say this is not an attempt to get around Ngāti Rangi, which we would say that you now assume that, assess the environment as if the activity is not taking place?

A. **MS DICEY:** No, that wasn't in my mind at all.

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Q. But wasn't it your concern that if Ngāti Rangi applied, you'd never get a resource consent granted

A. **MS DICEY:** Yes, but I wasn't going down that pathway, or that wasn't in my mind when considering this –

Q. Accepted. I clarified that. Now I'm coming back to your case as presented a few weeks ago. The concern with Ngāti Rangi and the reason for proposing the discretionary activity pathway was to, if you like, get around the difficulties that Ngatirunga posed for you.

A. **MS DICEY:** Yep. So, and that again is why I emphasised at the start that for me this speaks far more to the RDA pathway because in my mind that non-activity pathway, the door is firmly shut, so for me I really drafted this more the RDA pathway –

Q. Stranded assets –

A. **MS DICEY:** – stranded assets, yep, yep.

Q. Okay. Does anyone – it seems from the basis of what territorial authorities have said and what hydro have said, and irrigation has said, that there are different ways of viewing this objective and the implementation of the objective through this plan, would that be fair? That each – each group has a different interest or outcome in mind? Ms Styles is nodding, Mr Twose nodding also, and Ms Perkins has definitely said that, and – sorry, Ms Perkins – Ms Dicey, you said that, Ms Perkins you're agreeing? Yes. Does that of itself pause – give you concern sufficient to pause going down this line? That the outcomes, unless in this – the outcomes aren't sufficiently articulated. It means different things for different people. And Ms Dicey's nodding.

A. **MS DICEY:** Yes, I see that would be a concern.

Q. Ms Styles? Ms Styles is nodding. Mr Twose is nodding. Mr Ensor is nodding. Is anyone – all right. I guess as a matter of general principle my feel for permits – if the duration is increasing then potentially – depends what your activity is – but potentially your effects are accumulative over that increased period of duration which may lead to a greater cumulative adverse effect on the environment. So duration is not a neutral element in any resource consent. Does anyone disagree with that as a general proposition. Ms Dicey?

A. **MS DICEY:** No, I don't disagree with that. If I may, can I circle back round in terms of the objective meaning different things to –

Q. Different interests, yes.

A. **MS DICEY:** – yeah, and just so you're reflecting on that, perhaps that's okay as long as – I mean, the meanings that my colleagues refer to when they actually talk through those, I thought, oh yeah that's acceptable. Actually, no that's fine. I'm happy for the objective to also cover the community water supply or the hydro activities or aspects that they mentioned and as long as it's – as long as we're sure that it's confined to things that we all feel comfortable with are appropriate, then I actually have a sense of comfort. It's maybe just whether the word "scale" just needs to be added in the B to clearly cover the take and use or the matters so its scale is not meaning different things to different people. Perhaps that's the pathway through it.

Q. Okay, so scale might mean, from what I've been told, area or take and use or duration. It's one of those three things if it means anything?

A. **MS DICEY:** Although duration is specifically referred to –

Q. Is already there anyway.

A. **MS DICEY:** – separately.

Q. It's area or –

A. **MS DICEY:** So it would be area and historic use, or for use, so they're treated separately in A, so they're treated as they are distinctly scale and historic use in A, but then in B I think there's a risk if the word "only" – only the word "scale" used and "historic use" is dropped off there's a risk of differences in interpretation and perhaps it would just be clearer to bring some reference to taking and use down into B as well, and then that avoids that difference in interpretation.

Q. Mmm. All right. If – I take your point that from your perspective at least, Ms Dicey, that you felt that something in the objective was needed to signal the RDA for stranded assets because that's picking up an environmental effect, which it seeks to address by good management practices, is that correct? That that's why this is needed?

A. **MS DICEY:** That was the thinking, yes.

Q. For that specific exception?

A. **MS DICEY:** Yes.

Q. But then we've heard from your friends, Ms Styles and Mr Twose, that actually they also had outcomes in mind for their own respective interests or clients and that's fine, that's understandable. But I was wondering as a general proposition, if you had objective 10A.1.1 as you edited it – I actually thought it was an elegant solution, sorry Mr Maw, but I didn't see the problems myself but – objective 10A.1.1 together with the objective version B 10A.1.2, so with those two objectives secured, if there was an outcome which is process only, as it is for controlled activities, and perhaps with the exception of stranded assets, the other RDA matter and process only for TAs and hydro, Trustpower, and maybe Ms Perkins' Trustpower client as well – not Trustpower client – Ms Perkins' hydro client – if they were process exceptions then the only thing that you need, I was wondering is the only thing that you need, is simply to amend your existing 10A.2.3, policy 10A.2.3, to do what the council had done originally or do something like what the council had done originally, and that is to add at the end of the original 10A.2.3 the exception which is the exception where the effects of a proposed activity on the environment will be minor. So you've got the outcomes, you've got the process exceptions, and then you've got the out for the unknown future activity. Now, I suspect Ms McIntyre you're not going to like that. Why are you not going to like that? So with all of those exceptions carved out under the rules like we discussed?

A. **MS McINTYRE:** The experience in terms of the way the consents have been processed and the decision – the considerations that there have been in decisions for deemed permits under that essential policy framework with the no more than minor thing is that the no more than minor effects assessment gets looked at through the lens of the regional plan water which – and the policy framework and that, which has a very narrow consideration of the types of effects that we – that are considered so – and I think as was evident in our evidence at the beginning, that doesn't, at the very least, does not allow for any real consideration of the

effect on Kāi Tahu values. That's one example and that's the example that's certainly the Kāi Tahu parties are particularly concerned about, but it is just one. The reliance entirely on that consents are no more than minor has tended in the way that the decisions have been made, not to recognise the point that you've just made that duration is not neutral. It hasn't considered that and that would be a key concern that I have with it.

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Q. I mean, I take your point about the operative water plan. It is what it is and you get the results that you do, probably. Because you've got objectives intention and then you haven't got important people and community to the (inaudible 11:51:14) is not there, it's excluded, and so – but going forward if this plan is made operative – plan change is made operative, we don't have to, you know, in a sense, bother about what the operative regional plan is or is not saying about the range of effects which might be relevant. Things get processed under this particular chapter, where in all effects including effects on Kāi Tahu for longer duration consents have to be in the framework. The no more than minor test is problematic because it assumes - problematic for a whole list of reasons that I said in the Southland decision in terms of plaintiffs being oracles as to what the scale of effects are, and in particular, the assumption that duration is natural is just wrong, I think, or wrong in many instances, not every instance. So, is what you're pointing to there though implementations issues by the regional Council?

A. **MS MCINTYRE:** Well, I think that all the decisions that are being made on deemed permits are being made by an independent commissioner based on all the evidence, based on both the assessments that the regional Council is making and other evidence in front of them, I think the conclusion that I reached in terms of the way those decisions have been going is that this plan change has not been clear enough as to the reason for the limit on duration, and that's why I've kept coming back in in my evidence in terms of this JWS to the need to have something in the policy framework which makes it very clear why that limit on duration is

important for this plan change, because certainly, and I suspect that part of the reason that that has been, I suppose, underemphasised, has not been given much weight in terms of decision making is because we're sitting against a context and a background where certainly in the regional water plan more broadly and the way in which applications have been dealt with today, it has been a sort of a tendency to go to the longest duration possible, so we are sitting in that context, but I think because we are sitting in that context, again, that just emphasises the need to have a really clear direction in here as to why we need to be limiting that duration.

Q. Okay, thank you. Mr de Pelsemaeker.

A. **MR DE PELSMAEKER**: I agree with Ms McIntyre. I think that no more than minor test is all so, a bit problematic, because we don't know exactly what the effects are against what? You know, things like water quality, seems simple, seems straight forward but when it comes to effects on, of cultural values, for example, we don't know where they are so it's really hard to undertake that test. It's not articulated in the plan and it's work that needs to be done for new land and water plan, so I agree with – it all comes back to the duration.

A. **MS DICEY:** I may have misheard you but was the suggestion to add the no more than minor on the end of policy 10.2.3?

THE COURT: JUDGE BORTHWICK TO MS DICEY

Q. Yeah, or will be minor.

A. Will be mine – oh, will be minor because I think was that quite similar to an earlier version?

Q. Yep.

A. Which had, yeah.

Q. Everybody hated you know but no – and it's like, I – I get why people were hating because I've had a look at many of your transcripts before coming to this hearing and Mr Ensor's transcript in particular it articulates why it doesn't find favour, you know, because it's excluding for example TAs and excluding hydro.

A. Mmm.

Q. But if you took them out the big picture.

A. The carveout.

Q. On a process basis only and I know that doesn't resolve the stranded assets issue.

A. Mmm.

Q. But if they're out of the frame, what remains, yeah.

A. I think for me as well there was also the broader issue of that, the reflection of one of the gateway tests means that you've also shut down the policy test with the noncomplying and so that basically is a de facto prohibited activity rule.

Q. I thought, yeah, is that necessarily true though? So you've already got – so what you're doing is you're providing the exception to the six years, so six years except activities whose effects are, whose effects will be minor, so they're looking at a longer duration which is not neutral, I agree with you, Ms McIntyre, that is not a neutral proposition, so whatever that is, have to be no more than minor and I think Ms McIntyre, you're saying you can foresee implementation issues?

A. **MS MCINTYRE:** Yes.

THE COURT: JUDGE BORTHWICK TO MS MCINTYRE

Q. Yep, because you know because we've got to this state in this country because we declare everything to be no more than minor on an incremental basis.

A. Accumulatively as well.

Q. Accum – yeah, and Mr Farrell's nodding at that and you won't disagree with that? So the languages of – will be minor, no more than minor, not very helpful on a case by case basis. No one disagree? No one disagreeing, okay. Right.

A. **MS DICEY:** I mean, if I may add something to that, I think that problem with no more minor is added to by the fact that there is no reference in the policies or rules that are in the regional plan dealing with taking use and water that there is no reference to cumulative effects in the regional plan and water at all.

THE COURT: JUDGE BORTHWICK

Q. Yeah. Okay. Well those are my questions. Commissioner have you got any questions?

RE-EXAMINATION: MR MAW – NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

THE COURT: JUDGE BORTHWICK

Golly, that's hard, but you know, we're quite liked. I did actually quite like some of the drafting and I thought, well that's you know quite elegant actually, I thought, the first objective. I thought, "Well done, well done you", yeah, so thank you. That gives us a lot of food for thought in terms of how to proceed but thank you very much. Now I said I had a suggestion which is not as elegant as the first objective but anyway perhaps a way through the priorities questions. So do you want to release witnesses and I can put it up, people have got to come back to us, I think, anyway.

UNIDENFITIED SPEAKER:

We've still got the stranded assets part to deal with.

THE COURT: JUDGE BORTHWICK TO UNIDENTIFIED SPEAKER

Q. That's okay, so just for those people, Mr Ensor and I think Mr Hodgkins who are disappearing, the Court's going to be putting some words up, and going to be inviting your response. So you don't – you can disappear now but just to know that we have, I think we do have to find a way through that, the problem of deem permits expiring and the impact on flows and on users, so we'll be inviting responses from planners as to that, but it's put up with the view that you'll shoot it down or at least you'll point out where the holes are and if you shoot the whole lot down, then you know, again, we're just going to have to go back to the drawing board and think up other solutions. Yep, mmm.

A. Shall we do that now whilst they're all here or is that what you have in mind or?

Q. No, well – I just think Mr Ensor, I've had enough of your time on the stand, Hodgkins as well.

A. Hodgson.

Q. And we can move on.

A. We can release them?

Q. Yeah.

A. Yes.

Q. Shall we take a break though?

MS MCINTYRE:

Sorry, we do, can I ask whether you need me for any discussion or whether I can go my mediation?

THE COURT: JUDGE BORTHWICK TO MS MCINTYRE

Q. No, you go because you don't – you're not interested in stranded assets? Well you're interested –

A. I – I've involved and I'm not a major player in it, so there are no specific questions from me.

Q. No, not at all. I – you were of the view though that an objective was important for the stranded asset policy or not? Something new was…

A. I think you've got it in the – I am of the view that it's appropriate to address it in the policies and I'm –

Q. Oh, no, but did the policies require that? A parenting? As such by an objective?

A. I –

Q. You see I didn't see it as being obvious to me but, yeah.

A. I don't think there is a need to specifically provide for it in the objective. I think the objectives are broad enough.

Q. Okay.

A. You know, this is one of the circumstances.

Q. To, yep.

A. I think it can be specified in the policy but not needing to.

Q. Okay.

A. I don't think you need to flag everything in the objective.

Q. No, you see and that was my sense of it, so I was – but you know, I'm taking on board other views which are, well we've got to parent that objective, that policy, sorry, but my initial sense was actually we didn't need to parent it, yeah, in a specific way, but okay, Mr Farrell, you're cool. Do you want to go? Yep, good, all right, very good. Thank you.

UNIDENTIFIED SPEAKER:

That'll do, Your Honour, thank you. I just joined the departure list.

THE COURT: JUDGE BORTHWICK TO MR BRASS

Q. Good, thank you and I'm sorry I've imposed but some of you are particularly busy with other events but it is just what it is and we've got to crack on because we just do, yep, thank you. All right anybody, so who's – we're gonna take a break, 15 minutes. We'll get into stranded assets, hopefully finish that. Yep.

A. I seek to be excused

Q. Yes, if you've no interests in stranded assets, away you go.

A. (inaudible 12:02:56)

Q. Pardon? You're gone. Right. All right, very good. Anyone going to remain?

THE COURT: JUDGE BORTHWICK TO MS PERKINS

Q. You're going to remain, Ms Perkins?

A. Yes, I'm remaining. I have an interest in stranded assets.

Q. Okay, good, all right, very good.

COURT ADJOURNS: 12.03 PM

COURT RESUMES: 12.20 PM

CROSS-EXAMINATION CONTINUES: MR MAW

Q. So, I'm working through the joint witness statement, and I move onto the topic of stranded assets which commences at paragraph 18 on page 7. Now, some suggested drafted has been included at paragraph 20, including some drafting for the policy and also some policy for the restricted discretionary activity rule. The first matter that I wish to discuss was the narrowing down of the application of the stranded asset provisions to viticulture and orchids, and the joint witness statement records that the evidence that has been given only related to those topics. Now, that may well have been the case up until we heard from Southern Lakes Holdings on yesterday, Monday, where there was some suggest that extra mainlines have been installed with respect to pasture, but as I also read the joint witness statement, there was also a comment made about a lack of evidence in relation to the effects associated with activities other than viticulture and horticulture. So, my first question is, does the recommendation change in light of evidence that was given by Southern Lakes Holdings Limited on Monday with respect to the recommendation? And I appreciate that it may only be Mr de Pelsemaeker and possible Ms King who heard that evidence.

A. **MR DE PELSEMAEKER:** Yeah, I'm just going to speak for myself now, and my colleagues may disagree with me. Despite having heard yesterday's evidence, there's still – I know it doesn't seem actually for orchids and viticulture's, we don't know what the demand is or what the uptake is. We also heard some evidence previously about there is a difference between potential impacts between horticulture, viticulture on one side, and pasture as well. Pasture as having a higher risk potentially for sediment E. coli nutrient leeching. So, with that in mind, I am tempted to stay with the recommendation in terms of the rule. I did wonder about whether it would be appropriate to perhaps change the amendment to the policy, because the policy – the proposed amendment to the policy 10A21 sets out two tests. One related to land use, you have to be horticulture

or viticulture – sorry, orchids or viticulture, and the second one is around infostructure being in place at a certain time. So, if you remove one test, that would allow for consents to be granted to expand the area under irrigation for pasture under a noncomplying framework. As currently proposed or recommended the policy is almost like an insurmountable hurdle. The noncomplying framework also gives you better opportunity to look at the environmental effects which I think are warranted, given that there is a high risk there. That's my preliminary response to that.

Q. Now I may have lost the thread there. So you're recommending in light of the evidence, you are not recommending any further changes to the rule and no changes to the policy? So you are...

A. **MR DE PELSEMAEKER:** No, remove one test. So remove the restriction to land use. That is, potentially one way we can address it. Yes, remove the reference to "orchards and viticulture".

Q. In the policy?

A. **MR DE PELSEMAEKER:** In the policy but leave it in the rule. So the RDAs constrain to only apply to viticulture and orchards, pasture could come in under a noncomplying and have a reasonable chance of being a consent. That's my preliminary thinking on that.

THE COURT: JUDGE BORTHWICK

Q. Sorry, so remove the reference to "orchard and viticulture" in the policy.

A. **MR DE PELSEMAEKER:** Yes.

Q. Leave it in the rule, the RDA rule.

A. **MR DE PELSEMAEKER:** Yes.

Q. Pasture come in, if it wants to come in as a noncomplying activity. Yes?

A. **MR DE PELSEMAEKER:** Yes. And like I said, the reason behind it is because there is a high risk potentially. Yes.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Against which objectives and policies would (inaudible 12:26:55) such an application and its effects fall to be assessed?

A. **MR DE PELSEMAEKER:** That would be on the amended or the newly proposed objective 10A.1.1.3, I think. On the version B.

Q. So, they're not compromising the future implementation?

A. **MR DE PELSEMAEKER:** Yes, correct. Because in my view that includes the whole spectrum, duration as well as looking at the effects. And then obviously also under policy 10A2.1 and policy 10A2.3, on duration.

Q. Ms King is there sufficient policy and I include objective in that guidance for you to consider how an application to increase the area of pastoral land under irrigation might be assessed? So if the policy was broadened such that a noncomplying application for increased irrigated pasture was to be lodged, is there sufficient guidance for you to know how to go about processing that?

A. **MS KING:** I think, are you saying in terms if it was consistent with all policies?

Q. Mr de Pelsemaeker's preliminary recommendation is that the policy should be broader, such that it's not orchard and viticulture land that's being enabled in a sense. So if an application came in for pastoral land to be – a further area of pastoral land to be irrigated as a noncomplying activity, where would you look for for guidance on how to process that application in terms of the other objectives and policies in the plan change 7?

A. **MS KING:** I think the information in there is quite light. I think, considering the orchard and viticulture can be assessed under the RDA and you've got your list of matters of discretion to look to. On noncomplying there's not a lot of support in there in terms of what to be assessing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Isn't that the point of a noncomplying activity? You don't usually expect policy guidance or am I'm being too glib?

A. **MR MAW:** In terms of the, how you might actually come back to assess the effects, so the guidance on what might be appropriate from an effects' perspective when considering on a noncomplying activity there. In my submission, there often is guidance to be found in the objectives and policies of plan. More so the case where you have a complete plan with

the full suite, whereas given the procedural nature of plan change 7, it seems to be a policy vacuum for how you might actually go back considering on it's merit and on complying activity, and that may or may not be a problem, I'm just interested to know how in practice if that type of application was to be lodge it would be considered.

THE COURT: JUDGE BORTHWICK

Q. All right. So, how would you consider the effects of the expansion of the irrigation area where irrigation structure is already in in situ, which is the Southern Lakes example yesterday. So, how would you go about looking at effects and determining effects? The acceptability of facts or otherwise.

A. **MS KING:** Yes, well, as I was saying, it is quite light in terms of guidance in the plan change 7. So, you look to high order documents to potentially provide guidance on there to be looking. I can't think of anything specifically, currently, but that's what I would do.

CROSS-EXAMINATION CONTINUES: MR MAW

Q. Ms Dicey, Ms Perkins?

A. **MS DICEY:** So, going back to your original question. I mean, through this conferencing and with the additional option that we've kind of added in terms of specifying orchids and viticulture and then hearing from Southern Lakes yesterday, I mean, one option that has been playing on my mind was whether by specifying and limited a pathway to orchids and viticulture, it would be possible to make that a controlled activity pathway and then anything else, so pastural farming could go through an RDA pathway, and acknowledging also that behind the scenes is the NES limiting dairy and dairy support expansion with out a consent, so that's an added layer that would be on top of any dairy activity that would be expanding. So, it really just leaves sheep and beef under the RDA without any other mechanisms providing some oversight over that, and we did discuss that briefly during the conferencing and I think one of the concerns with that was again as Mr de Pelsemaeker said, we haven't got a sense of the kind of uptake that there might be of this, just how many

pastural farming systems might want go down that pathway, and then I guess as well, it comes back to that same issue that even if it is just sheep and beef operators, there really isn't a broader framework to assess effects that might result from the expansion, and so that's why we've thought it might be okay for orchid and viticulture because of the evidence that they're typically lesser effects to be managed.

Q. So, in light of the evidence that has been given about the risk associated with irrigated pastural systems, it wouldn't be appropriate to provide an RDA pathway in light of the lack of understanding of potential use of that pathway?

A. **MS DICEY:** Possibly, I'm still actually a little bit on the fence about whether actually it's going to be such a confined issue because we've actually only heard from one party. So, I would thought we would have heard from other parties, but they may not have turned their mind to it. So, I'm a still a little bit on the fence, but still probably err on the side of where we landed on the conferencing.

Q. Ms Perkins?

A. **MS PERKINS:** Yeah, look, I don't disagree with what Ms Dicey has said at all really. I think where we landed was on erring on that side of caution, going, well, you know, acknowledging the concerns that have been raised, one through evidence, and two through some of the questions from the Court with regards to the potential calmative and scale of effects and I think we just don't have enough before us to determine how widespread the pastural side of things could be. So, it could a bigger uptake than we might have thought. Bearing in mind it is still a six-year term, so people are limited to that term, so the risk is still on them for that uptake of area over a short term, no knowing the outcome of the longer-term planning framework, but I would probably err to the direction we've landed in terms of limiting it to the orchids and viticulture.

Q. Thank you, and Mr de Pelsemaeker?

A. **MR DE PELSEMAEKER:** Just one thing that I've thought about, I'm a little bit cautious to rely on the NES Regulations. It's kind of a safety net. They apply a threshold of 10 hectares, but also I don't actually think that

they apply to dairy support because it's only, I think dairy farmland which excludes dairy support, so – yeah. Just wanted to add that.

Q. And the second point I wanted to understand a little further is the question of whether the stranded assets pathway is only available through the RDA circumstances where there – the consent holder would be limited to the historical rates and volumes of take. I understood that that was the case from the presentation this morning, so have I understood that that is the intention?

A. **MS PERKINS:** Yes – Claire Perkins here – I'll just note that that, from the way we drafted it, was the intention, that there's no increase in rate or take, but the drafting we provided allows for where people haven't got a perfect measuring records and they can still add to the additional information requirement if their measuring record's not ideal, but it is still limited to the historic rate of taking.

A. **MR DE PELSEMAEKER:** It is not limited to what is calculated under the schedule, but still the amount of water that is granted in the new consent should be in accordance with historical use. It is – the RDA just gives you more – largely to calculate or determine historic use through different avenues.

Q. I'm sure my friend Mr Reid may ask you some questions about this, but thinking about the McArthur Ridge situation where irrigation mainlines had been installed for quite some time, but the last few blocks of grapes hadn't been added, I am left wondering whether the solution here actually accommodates that factual situation because the water necessary to irrigate those last few blocks wouldn't perhaps historically have been taken.

A. **MS PERKINS:** I'll just note, my understanding of the McArthur Ridge situation was that there wouldn't be an increase in historic rate and volume from my discussions with Mr Davoren on that initially. Mr Reid might be able to confirm that, but that was my understanding.

Q. I'll leave that to Mr Reid to pursue, but if that's the case that factual situation which we do understand would be covered then by the drafting that has been put forward?

A. **MS PERKINS:** Yes that would be correct.

Q. And the final question I have relates to the new manner of discretion, subparagraph C – well I'm looking at the joint witness statement – paragraph 20 subparagraph C, and then there's reference to a new matter of discretion suggested as follows, and this is the matter of discretion which enables consideration of good management practices. Now, I'll ask Ms King perhaps to see whether she can assist in terms of how you might consider an application, what re the types of good management practices you'd expect to see for viticulture and orchards in this context?

A. **MS KING:** This was a discussion point during the conferencing and Ms Perkins and Ms Dicey were able to direct me that both orchard and viticulture have well known documents that outline good management practices for those purposes, so you'd be referring to those when assessing the application under that matter, and I'd just like to note that that's only for the additional areas rather than any current areas.

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Q. Perhaps Ms Dicey or Ms Perkins could assist in terms of sharing their understanding of the state of knowledge in terms of good management practices and the documents that perhaps have been discussed. Yes, Ms Perkins.

A. **MS PERKINS:** So my understanding, which is assisted by the input from Mr Hobson at the time, so there is a number of good management practices that are out in the public from the industry bodies, so for example Horticulture New Zealand has – you know, they've produced documents with regards to what are good agricultural practices, and I understand that's to be the case for across the range of bodies, so dairy (inaudible 12:40:21) and the likes, but obviously we're just looking at horticultural – well, orchard and viticultural practices here, but there are industry standards available to represent that, and I know it's similar in other regions around the country as well, reference to good management practices.

Q. Perhaps the reason for my question is there have been many days spent arguing about what good management practices actually might be, and the use of the phrase caught my attention, but it may well be, given the confined nature within which it is being used in this context, there is sufficient information out there to assist with informing a decision to be made.

A. **MS PERKINS:** Look – and I think I do take your point and we did discuss this at some length amongst ourselves, but as you point out we came back to the fact that this was quite limited to probably a small number of parties only on the additional irrigation areas and that there is a reasonably good understanding of some standard sort of practices in relation to things like fertiliser use and the likes that that would be in place here, and this is not the full land and water plan with a full breadth of good management practices across every type of land use.

THE COURT: COMMISSIONER EDMONDS

Q. So it's not a defined term in the water plan at all?

THE COURT: JUDGE BORTHWICK

Not yet. Sorry, (inaudible 12:41:41), can you take that down until I say? Thank you. That's to come.

MR MAW:

I don't understand it to be defined in the operative regional –

THE COURT: COMMISSIONER EDMONDS

Q. Well, I just asked because it is in a lot of documents nowadays, and hence to define what it actually is, so I just wanted to check that.

A. **MS PERKINS:** No I don't understand it to be defined anywhere in the current planning framework.

EXAMINATION CONTINUES: MR MAW

Q. I loathe to suggest it be defined in this context without perhaps having seen the underlying documents, but in terms of – and perhaps it might

assist – in terms of adding this matter of discretion what was it you were seeking to achieve by adding it?

A. **MS PERKINS:** The main intention was to minimise any potential increase in respects of water quality countered with the evidence we received or heard with regards to the effects from these particular land uses being lower risk, and it was just to effectively ensure that there was some form of mitigational consideration of how water was used and how the land was used if you were to include a slightly increased area.

Q. The final question I had related to paragraph 25, but it relates to a comment that Ms McIntyre made about drawing a distinction between sunk and unsunk investment. I wasn't fully following where she might have been going. She has abandoned the good ship at PC7 so I'm not sure whether anyone else can assist with what distinction she was drawing in terms of paragraph 25.

A. **MR DE PELSEMAEKER:** I hope I've got this to get right, but I believe that she basically – because one of the things that we tried to achieve under Plan Change 7 is to protect people from making any investments that are going to be redundant or – yeah, due to new land and water plan, so her concern is that are we actually providing a pathway for these situations, are we actually encouraging to make further investment to complete the irrigation – that is my interpretation.

Q. That makes sense.

CROSS-EXAMINATION: MR REID

Q. So witnesses, I don't want to fly ahead on this issue about whether stranded assets should be dealt with by control activity exception or a discretionary exception but I just wanted to ask a few questions about the reasons for your electing to deal with it via a restricted discretionary pathway. So I just wanted to perhaps just stand back for a moment and look at the way that you are proposing to deal with it, the exception, whether it's dealt with as a controlled activity for a restricted discretionary activity and my proposition is that the way that this is proposed to be dealt with is already very restrictive and very precautionary. And so I'll just ask

you to comment on that but the things that I would point to in that regard and this is to answer Mr Maw's point, the way that this has been put forward at least by Strath Clyde is that there would not – it would be within the existing historical water use that this was being – that this exception was being considered. So the limitation on historical water use would continue to apply. There's obviously a limit on the date by which infrastructure has to be established and there's now a limit on activity type which I would suggest is very, very limited. And overall the evidence that has been put forward by the submitters that have raised this concern, at least on the horticulture and viticulture side covers a number of tens of hectares, that's the sort of scale of what we're talking about. So my overall proposition which I'd ask you to comment on, is that this is a very limited and precautionary approach in relation to a very limited problem that is being considered and in that context, does it need to be restricted discretionary?

A. **MR DE PELSEMAEKER:** I'll start off. First of all the RDA pathway as we see it as well, it's not a huge hurdle to jump but what it does do is that it provides a little – it gives more discretion to the consent authority. They can decline it. I acknowledge that in the case of McArthur Ridge we're dealing with yes, limited amount of hectares that are going to be added but as I said before we don't know really what the uptake is going to be across the region so therefore it's kind of hard to have any certainty around the cumulative impacts of that. Also another consideration is like the controlled activity rule as it is now is quite – it's quite tight, by lumping in more activities potentially you increase the information requirements or the matters of control and they would apply to people that would just seek to rollover their consent without an expansion of the irrigated area.

THE COURT: JUDGE BORTHWICK

Q. Sorry what was that point you said there – the last point also?

A. **MR DE PELSEMAEKER:** Well there are number of matters of discretion in the proposed RDA that give consent authorities some leverage in terms of managing potential effects. If we would widen the controlled activity

pathway as it is now, we would potentially end up bringing over those matters of discretion which makes the rule a little bit more complex. Gives council more discretion when considering applications just for a simple rollover, if I can use that term of resource consents and it creates uncertainty for the applicants. So it's just to the keep the controlled activity rule a little bit more tight in that sense. That is not the major consideration, but it is also something, a thing that we should keep in mind.

1250

A. **MS PERKINS:** Look, in my mind, it wasn't so much about the complexity of any rule, but rather that just the degree of risk, which is something that we were toying which. I sat very much on the fence very close to the controlled activity pathway being the appropriate way forward in this situation, but it really just came down to the fact that if we know it was just probably those three that we've heard from, I don't think I'd have a problem with it there, it's just that slight increase in risk of a potential larger number of people, larger land areas, falling into this, that that kind of combined risk of all of them was sort of a bit unknown, hence the slightly more cautionary approach of putting it in the RD pathway.

Q. But would you agree with me that, if there were larger scale applicants in this position, in the stranded asset situation, that the Court would have likely heard from them?

A. **MS PERKINS:** Ideally, yes, although I know from a number of clients in the pastoral side of farming things that the costs and process of being part of something like this is just something they're not willing to go down, recognising it's their own risk and cost of a rule framework being put in place that they haven't been able to contribute to, but it's just too hard to know, there hasn't been a survey done of the wider Otago region, knowing who may fall into this category or not.

Q. All right. So my second question is just in relation to the matters over which you're proposing that the consent authority should have its discretion restricted, and they are in paragraph 20, as I understand it, the maximum size of the additional area irrigated, and good management

practice. My friend, Mr Maw, has already covered good management practice, but in relation to the first of those two matters, maximum size of the area to be irrigated, against what criteria would that matter be assessed?

A. **MS PERKINS:** Ms King may be able to comment on this more, but really, the matter of control is there just so a limit can be put on the area, rather than determining whether or not that are was sufficient or not. It's more to enable a condition to the effect of limiting that makes the maximum irrigation area.

Q. So that's not really a matter of discretion, is it, in that case? Am I right in thinking?

A. **MS PERKINS:** Yeah, you're probably right there, but it was do we need to have something there that allows the consent officers to put a condition limiting the area on there? Someone else may have more thoughts on that.

A. **MS KING:** I agree with Ms Perkins in terms of my understanding as to why that was put in was to allow consents officers to impose a consent condition relating to the maximum area.

Q. So just so we're clear, it's not contemplated that there should be some sort of maximum area to which this rule applies?

A. **MS KING:** From my understanding, no.

Q. Yes, thank you.

THE COURT: COMMISSIONER EDMONDS

Q. In terms of the council being able to decline it, what situation might you decline it in?

A. **MR DE PELSEMAEKER:** Perhaps if the additional irrigated area would go against best management practices, yeah.

Q. So, it would be that good management practices if –

A. **MR DE PELSEMAEKER:** Yeah.

Q. – some accommodation couldn't be reached with the application in terms of what those good management practices were, you might say no.

A. **MR DE PELSEMAEKER:** Yeah, I think you have link to back to the matters of discretion. So, that would be possible you – yeah, your only consideration in that regard.

Q. So, if these applicants came along and signed up to various things in terms of these good management practices in their documents that were sort of capable of being converted to clear and enforceable conditions, that would probably be enough in terms of the Council to actually grant this?

A. **MS KING:** Yes, from my understand, that's correct.

Q. Okay. Thank you.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. As I indicated, I have a proposal for policy wording in relation to the deemed permit. Do you want me to flick it up and distribute it? I have tried to take out what are the essential elements which proposed by the planners, so, this is hopefully what's been reflected here. So, it's your elements, and I have kind of approached this a bit like a criminal lawyer, where you're looking for the essential elements to be reflected in policy and the conditions, so that's how the drafting has been approached. I don't mind that it doesn't work. It's a bit – you know, if it doesn't work then it's just an avenue close, so I'm learning something, that there has to be yet a different tool, because I think the tool we had yesterday was problematic for a number of reasons. So, it's okay for everyone to say that it doesn't work, and we'll just look for another tool if we can. You'll see that when it comes up on the screen, there is three words of phrases shaded. They're only shaded because here I have some query within my mind to whether I'm using terms correctly. So, I think this is a new policy where the application to replaced a deemed water permit, that as of the 18th of March 2020, was subject to a right of priority, the residual flow, because I think that's what you're talking about, it's the flow past a subservient consent holder. The residual flow at or below the point of take will be sufficient to supply an upstream permit holder. So, upstream comes from Mr Cummings evidence. He thought maybe that would be

useful. Entry conditions, so when that policy applies, the applicant proposes a condition to cease taking water when given notice. When - that can be better worded, when – there's probably notice in written that's given by an upstream permit holder, reservation of control, discretion, any condition to cease taking water when notice in written is given by an upstream permit holder. You'll need to define some terms. Deemed permit, right of priority is going to be as per section 413. Upstream permit holder probably needs to be linked back to the deemed permits, and the list of linked permits in terms of linked permits and notice, it's your notice of 72 hours, that's what notice means, notice in writing, 72 hours. So, that's the broad proposition. So, and it's subject to any vires challenges as well. So, I'll print that off and invite everyone to chew on that as I said. The words added below, I think you've got your own jargon for this plan, I just don't know what it is, whether it's at or whether it's below, but really, quite like that idea of the 18th March 2020, if there is a problem, and certainly Dr Sommerville's saying there is a problem come 1 October, so I like that idea. It doesn't get around Dr Somerville's problem in terms of the risk to farmers going forward, or other deemed permit holders going forward, but it does – it's helpful I though. So deemed permits as of that date had a right of priority. I don't know whether – I think residual flow is what you're talking about. I think it has to be at the point of take, and there's something to do with sufficiency to supply another person, and I've got sufficiency straight out of the section 13 of the Water and Soil Amendment Act and I couldn't think of a better word to use, also cognisant, Ms Dicey, of your explanation yesterday, well actually, famers are is pretty familiar with these terms, "sufficiency." I don't know if that's front and foremost of their mind, but they're familiar in principle with these terms. This would apply on receding flows through natural reasons but whether it's – but what it is trying to do is ensure that the permit which has a superior right is left water in the river, which I thought is what the rights of priority were doing. So it is – you know, to use your language, it's trying to mimic, or not entirely replicating, it's trying to echo those flow sharing arrangements but bringing it into RMM – RMA language for RMA

purpose. So that's my offering this morning, and we'll print that off, see what you think about it. If it doesn't lie that's fine, we'll look for another solution.

A. Just one question of clarification if I might. I'm just looking at the proposed policy and the very last part of that, to supply any upstream permit holder and –

Q. Maybe "any" is wrong.

A. Yes, just contemplating why "an" or "or." It's an upstream permit holder that had the right of priority as opposed to each and every RMA permit held –

Q. No, you're quite right, and then although you might pick that up in the definition, you see upstream permit holder is a permit holder who had a right of priority. So, you know, I just didn't want to stick too many things in the policy, but then you're sort of relying on the good definition driving it, but you're right, and not any – yes, it's not any upstream permit holder by any means. It's those who are holding rights.

A. That follows. That's helpful. We'll chew that over and explore it.

Q. Okay, so Rachel is going to print that off for you and then we can – but you know, you all do need to come back to us about what to do with those priorities because I think what's been proposed is problematic, and so then where do we go.

THE COURT: JUDGE BORTHWICK TO MR PAGE

A. May I ask a question of clarification Ma'am. I wonder whether we've got our upstreams and our downstreams around the wrong way?

Q. You are probably right. And I had actually thought about that myself this morning, thinking "Yikes," yes.

A. I think in the policy and in the reservation control it should be the other way around.

Q. Should be writtens given by the downstream permit holder to – yes probably, yes. I tell you what, I'll amend that so I won't embarrass myself in front of those planners. Yes you're right, it is, but you know – yes.

A. We understand.

Q. I'm not trying to do something totally novel.

THE COURT: COMMISSIONER EDMONDS

(Inaudible 13:03:52)

THE COURT: JUDGE BORTHWICK

Yes, I tell you what, I'll change the, and then I'll change the – yeah, okay.

THE COURT: COMMISSIONER EDMONDS

(inaudible 13:03:56)

THE COURT: JUDGE BORTHWICK

I'll make the amendments. There we go, losing the "Y". I'll make the amendments and then we'll distribute it, but are looking for, really do need to get some feedback in terms of, well what's going to happen in light of the, you know, cross-examination panel yesterday is this offering something worthwhile being explored? Well if it's not, that's fine, where do you want to go? We've got to land it because if we don't land it then it seems to me you can reject Plan Change 7, but that's a risk assessment in terms of who is exposed and the significance of the exposure and can reject it. You can go with perhaps the Ms Dicey approach which is long-term consents, because we know that should secure a minimum flow which should supplant the regime. So reject it, go with the discretionary consent, or put in a policy that might work – seems to be the options to me – or Government. That'll be the third time I've said it, but you know, Government need not step in if we can make this work, and I think the other thing that worries me, possibly – and again I'm just not close enough, and Ms King you'll be far closer than I – so Ms Dicey has proposed a fully discretionary activity which hopefully is going to give a minimum flow, and residual flows – all the good stuff that that will be replacing permits. While I know that – because Ms Dicey has proposed it, therefore it should be true for Ms Dicey's clients, I don't know that it's true for every applicant in Otago, and that's what I'm worried about. It's like if we go with that solution we've still potentially got a bunch of folk out there who's going to be caught out, and

Ms Dicey you'll agree, there'll be a bunch of folk out there caught out. Okay. So it seems to me a bit null. Unless Government steps in we have no option. We actually have to be providing a solution here, and so this is why I've offered it. How does that sound? Okay, and you agree with Ms Dicey, look beyond Ms Dicey's clients there are people who are not going to avail themselves of Ms Dicey's solution, not least because they don't have galaxiids living in their waterway, but because it just simply hasn't been proposed the way that Ms Dicey – their applications haven't been formulated the way Ms Dicey concedes them which is, you know, a whole of catchment, sub-catchment with a few imperilled galaxiids in locality, and that's not every application, so we've got – there are risks about which we – yes, you agree with Ms Dicey on that. Yes, okay. I'll do the edits before we show the planners, and we'll see where we go. And you'll talk to your friends about where to go on this –

MR MAW:

Yes, about what we might do from a process perspective. Yes, we'll start that discussion over the lunch break.

THE COURT: JUDGE BORTHWICK

Very good, all right, thank you, and I'll get back to you shortly in the next five minutes. I'll just take it away and do it in the chambers. So we're adjourned through to quarter past 2. Actually, I won't do it in chambers, I'll do it here because it's more convenient than bouncing up and down. All right, so we're adjourned and just ignore me doing my work.

COURT ADJOURNS: 1.08 PM

COURT RESUMES: 2.16 PM

LEGAL DISCUSSION – COURT AS CHAMBERS

COURT RESUMES: 3.29 PM

COURT RESUMES: 3.44 PM

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. We'll move on to your submission but there is actually something that we did need to reflect further on in chambers, but we can do that at the end of the day.

A. Thank you, your Honour. So I'd like to proceed first with the legal submissions there were filed on the 15th of June in relation to the expiry of deemed permits and rights of priority and prior to commencing with the submissions I do want to make an oral submission in relation to the relevance of the section 124 issue with respect to plan change 7 and the submission I wish to make in that regard is one of submission that the Court need not make a finding in relation to section 124. It's not necessary to make that finding in order to address the issues that are live with respect to plan change 7. And that submission relates to all of the options that are currently before the Court in terms of what might happen to plan change 7. Now in terms of the issues that have been addressed by Dr Sommerville and responded to in the written submissions, there were three questions that were asked. We are in agreement with Dr Sommerville in relation to questions, 1 and 3. The point of departure relates to question 2. So what I propose to do is to address the Court with respect to question 2 only and if the Court's content to take the submissions on the other two questions as read, I'd be content with that.

Q. Yes.

A. So, in relation to the second question, what I propose to do is to take the Court through the summary in relation to the submissions that are set out at paragraph 3 of the written submissions. It is noted the council does take a different view in relation to section 124 and considers that a deemed permit including the right of priority can continue to be exercised in accordance with section 124 of the Act. Until a decision is made, either granting or refusing consent and I set out the reasons for that submission. The first of which is that mining privileges are deemed to be a water permit or discharge permit under section 4131. Under section 4131 and sub-

section (2), such permits are deemed to include, as conditions of the permit, such are the provisions of the Water and Soil Conservation Amendment Act of '71, as applied to the mining privilege. A right of priority is provided for under section 11 of that Act, therefore a mining privilege with a right of priority is deemed to be a water permit or discharge permit including a right or priority as a condition.

Q. Just pause there a second. So you're saying under section 11, sorry I'm just slowly getting into the databases, so might go to hard copy. So, section 11 –

A. Actually, set it out in my paragraph 25 but yes, section 11.

Q. So you're saying section 11 creates a, yes what are you saying about section 11?

A. A water permit with a right of priority as a condition of that permit.

Q. And I wanted to look at that so, there you are saying the relevant section is 11 not 13, for the purpose of your argument? Correct?

A. Yes.

1550

Q. And I'm just about there. Now, I'm just wondering if that's right because sections 11, the title is, titled section 11 that is retention of right of priority and then it goes on to say, "Every holder of the current mining privilege who holds a right that was conferred by the Mining Act or any former Mining Act was in force at the commencement of this party act, entitling him to exercise the privilege with priority by reading of the user shall retain that right", so it's talking about the retention of rights, not the creation of permits.

A. That then needs to be read in the context of s 413(1) and (2) of the RMA.

Q. So the holder of privileges subject to a right?

A. Yes.

Q. Yep.

A. Then the deemed permit resulting shall be deemed to include as conditions of the permit and it says such are the provisions of sections 4 to 11, 13, 14, 16, as applied to the privilege.

Q. So as I understand this provision and you may have a different view, that firstly, the first question is, is there a current mining privilege or a right that is granted? Yes, there is. Is that privilege in this case, the mining privilege subject to a right? Yes, it is, and so both the mining privilege becomes a deemed permit and the right becomes the deemed condition? So, that section 11 of the Water and Soil Conservation Act is not creating a privilege per se nor a water permit per se? Yes.

A. It, yes, at section 413, that's having an effect.

Q. That – a fact, yeah.

A. Yes. Now back to paragraph 3, subsection (c) and section 413 (1) provides that the provisions of the Act other than sections 1 to 8 to 133 shall apply to a deemed permit and my submission is that Parliament has explicitly excluded provisions of the RMA from applying to deemed permits, and relevantly is has not excluded the application of section 154 and therefore, I submit that section 124 applies to a deemed permit except as otherwise provided in section 4132 to 10. There is nothing in section 413, that's in paragraph 2 to 10, to suggest that section 124 should not apply. Section 4133 provides that every deemed permit is deemed to have a condition to the effect that it finally expires on 1 October 2021. Section 1243 applies when a resource consent is due to expire and allows a holder of, a holder to continue to operate under the consent which includes the conditions of the consent. Section 4137 provides that a deemed permit holder may apply at any time under part 6 for another permit in respect of the activity to which the deemed permit relates. At section 124 is located in part 6 of the RMA. The continued exercise of a deemed permit under section 124, while an application is being determined, is consistent with the legislative purpose of section 4133 to ensure that mining privileges are phased out completely by 1 October 2021. The operation of section 124 ensures that deemed permits are phased out but that permit holders are not disadvantaged if the council does not determine their application before the 1st of October 2021. And finally, section 124 itself, explicitly excludes specific resource consent applications from relying on section 124. This does not include deemed

permits. Parliament had intended that section 124 was not to apply to deemed permits, I submit it would have said so explicitly.

Q. Is that reference to the coastal permit?

A. Yes.

Q. Okay. 165ZH.

A. Now those – that's a summary of the key points of the submissions on the second question. I do wish to address briefly in response to the submissions that have been filed in response by Dr Sommerville. The first point that I'd like to respond to is paragraph 8 of Dr Sommerville's submissions, and in that paragraph, he makes the submission that section 124 is a procedural tool to manage the transition between expired deemed permits and applications for replacements. Now, as I read Dr Sommerville's opinion, he seems to be suggesting that section 124 applies during the period of time between when the application to replace the permit is lodged, and the 1st of October 2021.

Q. Sorry, just pause there a second. I was just making a note of the paragraph that you're responding to. Sorry, so, you read that. you think the submission is addressing the period…

A. Between the lodgement of an application and the 1st of October 2021.

Q. Just let me read that with that in mind. Mhm.

A. Now, my submission that section 124 would have no effect during that period of time because the holder of the permit being replaced can simply rely on that permit up until the 1st of October 2021. So, section 124 has no relevance or no application and no effect during that period of time.

Q. Mhm.

A. To touch briefly on the use of the phrase "finally expire," and Dr Sommerville places some weight on the word "finally" in contrast to the description of other permits such as the coastal permits referred to section 168.

Q. Sorry, just before we move on, is that what he's actually talking about, though, at paragraph 8. So, you've got this section 124 is a procedural tool to manage the transition between the expired deemed permits. So, it's from the 1st of October, and the applications for replacement. So, it's

not from filing your application six months ago to the 1st October, it's actually from the 1st of October, forward, until there's a decision, hopefully.

A. If that was what the opinion was saying then, yes, I would agree with that.

Q. You would agree with? Okay.

A. But it seems to be that Dr Sommerville's saying that in the context of these deemed permits, section 124 has no relevance after the 1st of October. I read in isolation –

Q. Unless of course he's saying that 124 applies to the taking of water but it doesn't apply to the priority, and if that's what he's saying then you would still disagree with him, but…

A. Yes, and just in terms of the location of that paragraph and the two preceding paragraphs and his conclusion that section 124 can apply in the intervening period up until the expiry, and the issue I take with that, is it has no application. In so far of – in terms of reading paragraph 8 in isolation, I would agree it is a procedural tool to manage that to transition between the expired permit application – permits and I would go further, it's just not applications, it determination of applications and replacements.

1600

Q. All right. Your next point.

A. Some weight is placed to the phrase, "finally expiry".

Q. Yes which paragraph?

A. Paragraph 9. In contrast to the coastal permits referred in section 165ZH.

Q. Mhm.

A. The submission I make is that there's no difference between something finally expiring and expiring. There's no moment in relation – or the addition of the word, "finally" doesn't add anything to something expiring. Now my friend Ms Williams will address you further on the relevance of the phrase, "finally expire" in the context of the deemed permits in so far as that phrase is used with respect to the compensation provisions. Paragraph 11, Dr Sommerville refers to a deemed water permit being a creature of statute. It concludes that paragraph by noting that it has a

statutory expiry date after which it no longer exists in law. And that raises the question of whether a water permit or any other permit issued under the RMA for that matter is any different in the context of those permits and authorities also being a creature of statue. They're simply a creature of a different statue in this context.

Q. So what's your point, you've agreed that deemed permits are a creature of statue and you're saying that there is no – so what is your point?

A. There's no distinction to be drawn between...

Q. No distinction between a deemed permit and a resource consent?

A. Yes.

Q. All right. And how do you get there?

A. Resource consents are also creatures of statue in that the Resource Management Act sets in place a regime to apply for a permit, the permit is issued under that legislation and thus is itself, a creature of statue.

Q. Is that he's using the phrase though, "a creature of statue"? I mean isn't he using that in relation to the deeming provision? The deeming provision deems mining privileges to be something that they're not which is a resource consent, in this case, a particular resource consent, a water permit. Whereas resource consents that are the result of an application under the RMA are resource consents. And so, you're quantitatively looking at quite different things and that's how he was using "creature of statue".

A. Yes, if that's the case my submission is that nothing rests on that distinction given that the language used with respect to permits issued the Resource Management Act also uses language such as "expiring as permit" and section 124 operates in response to the expiry of the permit.

Q. Mhm.

A. In paragraph 13, Dr Sommerville submits that there is no longer an existing consent under which the holder may operate after the date of expiry. My submission, there's no difference between the situation that exists with respect to all other water permits or permits under the Resource Management Act 1991 that are – I'll use the word – protected by section 124. Those permits too have expired by that time. The phrase

existing consent in that context is referring to the consent that was the subject of the application to replace it which engages section 124 and that is engaged at a time when the permit is still a current permit. Two more points to address, the next one is paragraph 29 where Dr Sommerville notes that there is an interpretive presumption that Parliament intends to legislate in a way that produces a practical, workable, and sensible result. Now, in my submission, a reading of the relevant provisions in a way that results in section 124 applying in the context of deemed permits does produce a practicable, workable, and sensible result. I make that submission because, not on the basis that there will not be a gap between when applicants have lodged applications to replace their permits, and the Council determining, and any subsequent appeals being finally determined with respect of those applications. In the absence of that occurring, consent applicants would need to somehow predict how long the Council might take and appeals might need to be resolved and thus lodge their applications sufficiently early to avoid there being a gap after the expiry date, and the final point relates to paragraph 30. This was a point in response to the OWRUG interpretation, and if the submission is read literately, the legal consequence of OWRUG's would mean that deemed permits might never expire which would make it very difficult to address applications for resource consent by non-deemed permit holders. Now, I'm sure my friend will address you further on that, but in my submission, section 124 does not operate in such a way that protects in perpetuity applications that have been lodged prior to expiry, because there is still an overriding duty in the Resource Management Act to avoid unreasonable delay, and that would require the processing of applications.

1610

Q. So, with that in mind. What is the duty that applies to the processing of these applications? And I say that if some applicants or all applicants in terms of where the Court's decision goes need to amend their applications to take advantage of the control of RDA rule, and so the proposition is that obviously the Court's got to make a decision and then

there will be time needed to do exactly that and then time needed for processing. Is it possible for an applicant to simply place their application on hold, so that's the first proposition or (b), not progress it in a timely fashion, such that the benefits are or intended outcome for the region is not secure. In other words consent holders just simply continue to take water under their existing permits expanding their area of irrigation, increasing irrigation efficiencies and not adhering to historical use.

A. Yes.

Q. And so that's your risk?

A. Yes, not the…

Q. So how do you address that? How will…

A. The submission in response and it perhaps starts with the question of, "can an applicant for consent lodge an application and then the next day write to the council saying, "can I please put my application on hold?"" which used to happen a lot. The legislation has subsequently changed in relation to the period of time within which applications must be processed and the Act is now far more prescriptive about the timeframes within which both applications need to be processed and also requests for further information need to be responded to because that was another point at which the process was delayed. So…

Q. That being the case, I understand that there are hundreds of applications which are being put on hold. How long can that – is there a statutory time limit determining how long an application can be put on hold? And it may well suit all parties in the room that that's the case but beyond that, is there a statutory time limit that fixes how long an application can remain on hold?

A. I'd have to go back and track through the specific provisions within the Act. My recollection is that provisions have been tightened up with specific periods of time specified of course there is the ability to extend timeframes under 37A, I think it is but that only enables I think a doubling of that period of time without taking in to account a range of other factors such as effects on third parties.

Q. So I would actually like advice on that because that seems to me to be an issue here, is how long applications, (a), remain on hold, post Court's determination and then the impact on the attainment of the objective.

A. Yes, is that something that we could address in our reply or do you want to have a response to that…

Q. No, a reply's fine.

A. Okay. Yes, no, we'll certainly track through the provisions.

Q. Mhm.

A. And I think the second part of that is the (inaudible 16:12:59) duty to avoid unreasonable delay but I'll pick up that in the context of those other provisions which have more clearly defined time limits. So those are the submissions I wish to make in relation to the priority question. Do you wish me to address you now on the vires?

Q. Yes.

A. Right. I have actually prepared some written submissions on this issue and I'll hand those out. Now I should note that these submissions were prepared in response to the provisions that the – so these were prepared in response to the provisions that the planners had put forward. Now the world has moved on a little with the provisions circulated today but there will still be some matters I can distil from the submissions that will equally apply to the provisions that have been put forward. So I'm just need to work through carefully to make sure that those points come through. So in terms of the submissions lodged or in terms of what council's directed to respond to. Firstly, the vires of the amendments proposed by the planners that seek to replicate the effect of existing rights of priority, and secondly, to comment on whether a condition restricting a third party would be valid if the third party gives their approval prior to the condition being imposed on the consent. Now, it may well have been that what your Honour had in mind was this issue of the written approvals that was discussed yesterday with the witnesses, but things appear to have moved on from that point.

Q. You may still need that. I've just put up something which I think would work through, but as I said, I didn't look at the definitions, didn't look at

what a condition could look like. It may be that that overcomes the written approvals. Maybe, but maybe not.

A. Yes.

Q. Yeah, I thought it was a bit more streamlined than what was being proposed, but I don't know. It was all I could do at 7 o'clock in the morning.

MR MAW:

So in terms of the written submissions, at paragraph 6, I addressed the entry condition into the controlled activity rule, and that, I noted, had been replicated in the restricted discretionary activity, so same rule, and I think in terms of where things are perhaps heading, if a solution is to be found, it will apply both to the controlled and the RDA by way of entry condition, and in my submission, the entry condition component is important. It would be insufficient simply to have a tick box on the application form because the bringing down of the priority is a fundamental element of the controlled activity rule, and thus to qualify for consideration under that rule, an entry condition needs to be crafted.

In terms of whether that rule would be a relevant rule to include in a regional plan, I've addressed the functions of the council and note that the functions include the control of the taking, use, damming and diversion of water. In my submission, a rule dealing with the use of water would fit squarely within those functions, and I say at para 12 that the proposed amendments as they then were considered to be consistent with the requirements under section 68. I will perhaps expand on that submission once we hear back from the planners on the final set of provisions being recommended as part of our reply submissions.

I then turn, perhaps, to the more critical issue at hand of whether proposed conditions meet the requirements of valued resource consent conditions, and this is picking up on this third-party approval point. The vires of the amendments is directly affected by the ability of the rules to establish valid and

enforceable resource consent conditions. The provisions must lead to the establishment of lawful resource consent conditions in this regard.

I've set out at paragraph 14 the requirements for valid resource consent conditions under section 108AA. I don't propose to take you through those. At para 15, I make the submission that condition is directly connected to a regional rule, so if the rule is valid and within the functions of the council, then a condition responding to that rule fits squarely within section 108AA, and then the final point I make in this section is at paragraph 16, in that if the applicant chooses the controlled activity or restricted discretionary pathway, they will be agreeing to the condition by virtue of proposing the condition in the application to meet the requirements of the entry condition.

I then touch on some case law which addresses the requirements for consent conditions, and I've set out the relevant matters at paragraph 18. At 19, I have set out, perhaps, the corollary in terms of conditions that have been found or held to be invalid, and he categories there is if they are so unreasonable that Parliament clearly could not have intended that it should be imposed; second, ultra vires the powers of the local authority; a third, involving a delegation of the local authority's duties; or are simply uncertain. A condition may also be considered unreasonable or unlawful it is unenforceable.

Relevant to that context is whether reliance on compliance by third parties or third party approvals arises in this context. So a condition that relies on compliance by third parties has in the past been considered unenforceable. However, this was in the context of a condition stating that reversing and turning right from a site was prohibited, as the consent holder could not control the actions of those who came to visit the premises.

THE COURT: JUDGE BORTHWICK

So just pause there a second, I want to read that. Yeah, okay, mhm.

MR MAW:

The law on third party approvals was recently summarised in the High Court decision *Lysaght*, a decision of Justice Whata. This case noted the previous case law on the matter suggesting that a condition on a resource consent which requires the agreement of a third party is ultra vires, or that a condition imposed on a new consent cannot negate the resource consent of a third party. The conditions in this context do not rely on compliance by third parties nor the approval of a third party. There is no additional approval or action outside of the terms of the consent required as the consents will have been granted on the basis that the conditions are imposed.

Conditions will be placed on both the dominant and the subservient permits. I say that there is no requirement for the dominant permit holder to exercise the option of serving notice on the subservient permit holder to cease taking. However, if that action is taken, then the condition on the subservient permit requires the subservient permit holder to stop taking on receipt of the notice. The imposition of the condition on the dominant permit does not require an agreement of the subservient permit holder, or, I submit, vice versa. If an applicant does not propose to include a condition replicating the effect of the exercise of the right of priority expressed on the expiring permit being replaced, then that application will fall to be a noncomplying activity.

In *Lysaght*, the Court also noted the case law suggesting that there can be a distinction between conditions that require an applicant to bring about a result which is not within the applicant's power (i.e. to construct a new roundabout), and a condition that stipulates development should not proceed until an event has occurred (i.e. after the roundabout is constructed). Now, in my submission, in this context, the requirement to cease taking upon receipt of written notice is more akin to the latter. The event that has occurred is the receipt of notice.

THE COURT: JUDGE BORTHWICK

Just pause there a second – and Justice Whata had no difficulty with the second proposition?

MR MAW:

Correct.

THE COURT: JUDGE BORTHWICK

I take it that, not that you hardly ever find any cases that are directly on all fours, but is *Lysaght* dealing with a similar or quite dissimilar actual and condition, including the proposed conditions there?

MR MAW:

Quite dissimilar.

THE COURT: JUDGE BORTHWICK

Quite dissimilar, okay.

MR MAW:

But there is the case of *Hampton v Canterbury Regional Council* in the Court of Appeal that I will come to, which appears to be more closely aligned. It's a case in the water context, so I get to that shortly.

I touch next on the delegation of local authority duties or reserving discretion to a future date. It is submitted that the conditions proposed do not amount to an unlawful delegation of functions or a situation where the council is reserving a discretion to a future date. The relevant decision is being made at the time the consent is granted. The decision to impose the condition on the subservient permit will be made on the basis that the subservient permit holder has proposed the condition and therefore is agreeing to the grant of its consent in the knowledge that there may be times when they cannot take, i.e. when they have received notice from the dominant permit holder because the dominant permit holder is not able to abstract their maximum authorised rate of take.

In terms of derogation from grant, the council does not consider that this creates any issues in terms of derogation, and that this is on the basis that the condition would be imposed on the subservient permit at the outset, so that permit is granted on that condition. This is different to situations where conditions have

been found to be unlawful in the past, where they have negated the resource consent of a third party, as the condition is part of the rights that are conferred on the subservient permit holder when the consent is granted. The imposition of the condition does not affect resource consents that are already in existence.

THE COURT: JUDGE BORTHWICK

Just pause there a second, I just want to reread what you've said.

MR MAW:

Further, this is not a situation where the Council is reserving its discretion to a future date. The relevant decision is being made at the time of the consent being granted. That is, if the dominant permit holder cannot take its full allocation under its permit, then it can serve notice on the subservient permit holder to cease taking. Upon receipt of that notice, the subservient permit holder must cease taking.

I now address the example in *Hampton v Canterbury Regional Council*. Now, whilst the factual scenario was somewhat different, the Court of Appeal decision in that case did involve a scenario where a condition provided that a consent could not be utilised while another consent was being utilised, and I have set out condition 5 of that resource consent at para 31.

THE COURT: JUDGE BORTHWICK

Pause there a second. Yeah, mhm.

MR MAW:

In this case, the Court of Appeal did not appear to be troubled by the concept, although I should say that the decision ultimately was dealing with other conceptual issues, but it is an example of –

THE COURT: JUDGE BORTHWICK

What are the conceptual issues? I've read the case, what conception issues are you getting at?

MR MAW:

Now, Hampton was dealing with the –

THE COURT: JUDGE BORTHWICK

Right to transfer.

MR MAW:

It was a transfer between the two brothers Hampton, and whether the permit could have been transferred without notifying the other brother, from memory.

THE COURT: JUDGE BORTHWICK

Just pause there a second – and with *Hampton*, and I know it's referred to by others, ours wasn't quite clear what its relevance was to this case, but with *Hampton*, there, there was an application, as I understand it, a first application to transfer part of a water permit that is expressly subject to a cousin or a brother being able to utilise the right. Application was granted subject to condition 5, transfer was made to the third party, and then Hampton wanted to transfer his brother's share, and that's what that case revolved around, and it was like, well, heck, I thought the Court of Appeal said that's not the basis of your application and you're going to be stuck with it, you know, you're stuck with the basis of the application.

MR MAW:

Stuck with the condition.

THE COURT: JUDGE BORTHWICK

Yeah.

MR MAW:

Correct.

THE COURT: JUDGE BORTHWICK

Yeah.

MR MAW:

And the reason for highlighting it in this context was simply the condition within that case that referred to the party ceasing taking if another permit was being exercised.

THE COURT: JUDGE BORTHWICK

Okay, right, okay, so I understand now why it's being referred to. Okay.

MR MAW:

I note that the Court of Appeal in *Hampton* also referred to the decision in *Aoraki,* where the High Court held that a consent authority exercises its statutory functions of regulating or managing the allocation or use of a resource through its power to grant permits, and the High Court *Aoraki* noted that the RMA effectively prescribed a licencing system. The relevant, in terms of that submission, in this context, is that these conditions that are seeking to recognise that others have, I will call it, a right of priority over them is essentially an allocation mechanism under the Act.

Now, in terms of where I go next in these submissions, I am addressing the question or the issue of the condition is actually being volunteered by the applicant in choosing to go through the RDA or the controlled activity pathway. My submission is, notwithstanding that the condition is being volunteered by the applicant, the condition could validly be imposed by the council without necessarily relying on essentially on OGA condition, but in any event, I say that, because the condition is being volunteered by the applicant, it provides a further backstop in terms of the legality or the vires of the approach, and I will step through that approach now.

In this case, the Council submits that the proposed consent conditions meet all relevant requirements in order to be considered intra vires. However, for completeness, a condition that may otherwise be considered invalid may be able to be imposed if a consent applicant volunteers it. This is covered both by section 108AA(1)(a) and is the principle established in Augier. I have set out the passage from *Frasers Papamoa*, where the High Court held that the Augier principle is a narrow one, not to be extended beyond its proper role, and I will leave you to read that.

Now, in my submission, these requirements would be met by an applicant proposing a condition in an application to meet the entry condition. Now, I should note, when reading through the list in terms of para 34 from *Frasers Papamoa*, the application form itself does not use the language of an undertaking being given in terms of the condition. In my submission, the effect of volunteering a condition in this context would have that effect, but if there was a concern about that and the reliance was on the OGA principle, the application form could easily be amended to require that condition to be given on the basis of an undertaking.

THE COURT: JUDGE BORTHWICK

The applicant's undertaking?

MR MAW:

Yes. I submit that the grant of the consent would be issued in reliance on that undertaking. The imposition of the condition would be broadly encompassing that undertaking, and that there would be detriment to, in this context, other parties if the undertaking is not complied with, and so, in conclusion, the council submits that on the basis of this case law, and the council's statutory functions, the regulation of access to freshwater as between water users is a legitimate resource management issue that can be controlled through regional plans and that the proposed amendments to PC7 are lawful, and I would make that submission in the context of the direction of travel in the reframed or revised

provisions circulated today, and lead to resource consent conditions that, in my submission, are valid. Those are my submissions.

THE COURT: JUDGE BORTHWICK

Thank you. I suppose, for my part, what we have proposed is more clearly (inaudible 16:35:12) like than perhaps what the planners are proposing, but hopefully more simple in terms of the mechanisms to perfect it, both in terms of the form and material to be accompanying an application for resource consent, but we will see when they work it through, but anyway, the important point is that there is nothing that the Court has proposed in principle that offends your submissions.

MR MAW:

No.

THE COURT: JUDGE BORTHWICK

No. All right. Thank you.

MR MAW:

As your Honour pleases.

THE COURT: JUDGE BORTHWICK

Got any questions?

THE COURT: COMMISSIONER BUNTING

No, I don't.

THE COURT: COMMISSIONER EDMONDS:

They're very clear, thank you.

THE COURT: JUDGE BORTHWICK

Who next? Ms Williams.

MS WILLIAMS:

I believe it's me, your Honour. I might start with the vires issue, your Honour, and, with respect, I adopt Mr Maw's submissions.

THE COURT: JUDGE BORTHWICK

Okay, well, that's easy.

MS WILLIAMS:

And the only additional point that I would like to make, your Honour, in terms of vires is about the gap, if I put it that way. Sorry, no, sorry, vires, your Honour, is simply, again, to emphasise s 108AA(1)(a), which, in my submission, puts into statutory form the OGA principle, and, in fact, it doesn't refer to an undertaking, it simply refers to an agreement, so, in my submission, on the basis of 108AA(1)(a), actually an agreement is sufficient, it doesn't need to be specifically expressed as an undertaking.

THE COURT: JUDGE BORTHWICK

All right, okay, so, in principle, also, what the Court has proposed –

MS WILLIAMS:

Absolutely.

THE COURT: JUDGE BORTHWICK

Flows with Mr Maw's submissions, which you adopt, and does it resolve the drafting issues which we discussed yesterday with the planners?

MS WILLIAMS:

In my submission, they would, your Honour, and actually, again, I was reasonably comfortable that where the planners had landed was going to be intra vires, and certainly, the Court's version takes that further, so I'm comfortable with that.

THE COURT: JUDGE BORTHWICK

Vires aside, I think we had drafting issues in general, that was all.

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

All right, okay, thank you.

MS WILLIAMS:

Then, your Honour, turning to my submissions in reply – and actually, sorry, your Honour, I note that the front page doesn't say that they are dated the 15th of June, but they are dated the 15th of June, and, your Honour, again, just in respect of question 2, there are probably three points, your Honour, which I would like to highlight in my submissions. In my submissions, your Honour, you will see that my heading to my discussion of question 2 on page 5 is I've thereabout a qualifying application to replace a deemed permit, and that, in my submission, your Honour, is important, because this is actually coming back to s 124.

THE COURT: JUDGE BORTHWICK

Sorry, which paragraph are you at?

MS WILLIAMS:

So I'm on page 5, and it's actually the header to my section dealing with question 2.

THE COURT: JUDGE BORTHWICK

Okay, I just don't have this on page. I haven't got your right submissions. No, I don't, sorry.

MS WILLIAMS:

That's all right, your Honour.

THE COURT: JUDGE BORTHWICK

Page 5?

MS WILLIAMS:

Yes, page 5.

THE COURT: JUDGE BORTHWICK

Nearly there. Okay, page 5, and the heading question 2. Yeah.

MS WILLIAMS:

So question 2, where I say I disagree with Dr Somerville and I say I consider, on a qualifying application to replace a deemed permit, so that's important, your Honour, because the qualification actually refers to s 124, and the requirement under s 124 that an application is made at least six months beforehand or, otherwise, at least three months beforehand, and then, with council's agreement, in a sense, in essence, rather, to allow the permit to continue. So those are the two factors which make it a qualifying application, and the qualifying application is also tied to the expiry date, so it's tied to the expiry date of 1 October, so that's why there was this rush to get applications in before 1 April, by 31 March, or before tomorrow, 30th of June, and before 1 July, because those are the two dates that make for a qualifying application and which would allow s 124 to apply. I agree with my friend, Mr Maw, that the gap which is being addressed is the gap between when the permit expires and when the application is processed and a replacement new permit is issued. So that's the gap that s 124 addresses, and, in a sift statutory context, your Honour, there was an amendment to the Conservation Act in 2012 to address a similar gap between the expiry of concessions when applications had been made for replacement concessions.

THE COURT: JUDGE BORTHWICK

Which section?

MS WILLIAMS:

And that section is s 17ZAA, and I think 17ZAAB deals with a similar situation, but in essence, your Honour, my point is that there is, and it's acknowledged that there can be a gap between a permit or a concession expiring and the processing of a new application being completed for a new permit to be issued, and that gap is what s 124 is intended to address, and in my submission, your Honour, I agree, again, with Mr Maw that s 124 cannot apply until the current permit has expired, whether it be a deemed permit or a resource consent, however it is granted under the RMA.

So that's my first point, your Honour. My second point, your Honour, is actually in relation to the nature of deemed permits and the conditions that are carried over, deemed to be carried over by s 413, and so in my submission, your Honour, s 413(1) is very clear, in combination with s 366, that mining privileges have stopped. They are ended as of when the RMA came into force on the 1st of October 1991, and what had happened is that we have a new deemed permit which is created by the operation of s 413 as of the 1st of October 1991. So this is an RMA permit, it is not something else.

THE COURT: JUDGE BORTHWICK

It's a deemed permit, it's not a resource consent which is granted under this Act.

MS WILLIAMS:

Well, I'm actually going to take you –

THE COURT: JUDGE BORTHWICK

Okay.

MS WILLIAMS:

– and I think that's done by some of my colleagues as well, but the definition of resource consent refers to s 87 of the Act. Section 87 of the Act then sets out the various types of resource consent that could be granted, and that includes

a water permit under s 14 of the Act, and a discharge permit under s 15 of the Act. The effect of s 413(1)(c) and (d) are that deems permits that are a water permit and a discharge permit under those relevant provisions of the Act, and so, in my submission, your Honour, they are captured within the definition of resource consent, which is what s 124 refers to.

Then, your Honour, we have the application by s 413(2) of the various provisions in the Water and Soil Conservation Amendment Act 1971, and there's the reference to sections 4 to 11, 13, 14, 16, et cetera, and, of course, the priority right entitlement is continued by the operation of s 11 and then the ability to exercise under s 13 and I think 14, but that's not the entire story, because we also have, and I've set out in summary at para 33 of my submissions some of these other deemed conditions which are reflected from the Water and Soil Conservation Amendment Act 1971, so section 4 is the entitlement to construct and maintain water races and to divert and use the water in a water race, and then section 5 is the entitlement to excavate, construct and maintain and use a dam, section 10 is the entitlement to occupy land forming the course of the race or site of the dam. So those matters are also, if we are going to say that rights of priority are deemed conditions, then equally, these must be deemed conditions which are continued by the operation of s 413(2).

THE COURT: JUDGE BORTHWICK

Just pause there a second whilst I dial up the section.

MS WILLIAMS:

In my submission, your Honour, it just cannot make sense for those conditions, which are also deemed conditions, to finally expire on the 1st of October 2021 where there has been a qualifying application made under s 124. That would not lead to, in Dr Somerville's words at para 29, a practicable, workable, and sensible result.

Your Honour, the other thrust of my submissions in relation to question 2 was actually looking more broadly at the purpose of sections 413 to 417, and in my submission, in effect, there, they're almost a mini-code. They're not a code because a code would exclude the application of the rest of the RMA, and they don't do that, but they certainly are a specific set of provisions dealing with what are described for the purposes of those sections deemed permits, and in my submission, your Honour – and this is why, again, in my submissions, I referred back to the decision of Judge Smith and the Environment Court in 2002, the 28/2002 case where the Court summarised both the provisions of the RMA and the Water and Soil Conservation Amendment Act 1971, and, in essence, your Honour, the 1971 Amendment Act tried to – in the context of the 1967 Water and Soil Conservation Act, and also the Mining Act, which was fresh legislation as of 1971 – it attempted to deal with mining privileges and bring them into line with the Water and Soil Conservation Act, and the way it did that, your Honour, was by actually saying that there was no longer a perpetual right of renewal, which had been one of the key factors of mining privileges under the previous Mining Act.

However, what the 1971 amendment did do was it said that if an application to renew was declined by a consent authority – I'll call it that, because I think at the time, it might have been a catchment board, but whoever it was – that compensation had to be paid, and so the effect of requiring that compensation had to be paid if a replacement was not granted was that, in effect, they were continued, even though the perpetuity right ceased as of the 1971 amendment. By contrast, your Honour, what the RMA did in 1991 was it actually provided for the 30-year transition phase-out period for deemed permits, but also provided that no compensation is payable, and that is in s 416, and in my submission, your Honour, that's where the final expiry date is actually relating to. It's about not only do you not have an automatic right of renewal, but you no longer have a right to compensation, and that is the key distinction between the RMA reform as opposed to the consolidation which might have occurred under the earlier statutes. Sorry, your Honour, I do just have one more point on vires, just to return to that briefly.

THE COURT: JUDGE BORTHWICK

Sure, okay.

MS WILLIAMS:

This is actually s 413(9).

THE COURT: JUDGE BORTHWICK

This is on vires?

MS WILLIAMS:

This is on vires. This is in relation to, I guess, imposition of priorities, your Honour. Section 413(9) deals with the situation where, for an existing deemed permit, there is an application to transfer, and in particular, paragraph A is talking about – that refers to s 136(2)(b)(i), which is where there is an application to transfer a point within a catchment, but which is authorised under a regional rule, and it actually says that, despite that, you still have to treat it as if it was an application under s 136(4). It then goes on to deal with some other matters, makes it clear that they no longer will be property rights, they are now subject to s 122.

They're also now subject to the review provisions, which are otherwise excluded, and, importantly, your Honour, para (c) says that in addition to the matters which are set out in s 136(4)(b), and considering an application to transfer the whole or part of a deemed permit to another site, the regional council shall have regard to the effect such a transfer would have on the relative priority and entitlement to water in the catchment and may modify the priority or other conditions of the transferred deemed permit. In my submission, your Honour, that certainly puts in statutory form the thinking that dealing with priorities, which would have to be as between respective consents, is something that the council has the authority and the power to do, and to carry that further, your Honour, presumably, the council has the power to impose conditions.

THE COURT: JUDGE BORTHWICK

So you say this in order to support, in principle, the council can make objectives, policies, and rules pertaining to these priorities?

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

Yeah, so sort of a general submission, yeah.

MS WILLIAMS:

Yeah, so I'm not saying anything specific, although it may be, your Honour, that this addresses the question of how did a new resource consent end up with a priority condition, and it may be that it was actually through the application of this provision.

THE COURT: JUDGE BORTHWICK

That's Smallburn.

MS WILLIAMS:

Yes.

THE COURT: JUDGE BORTHWICK

All right. No, that's fine.

MS WILLIAMS:

Unless you have any questions for me, your Honour that is all I have to say.

THE COURT: JUDGE BORTHWICK

I do not. No, that's fine.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Just while we're hanging about, it's more a question for Mr Maw. Sub section 6 413, that's dealing with enforcement procedures and the application by the regional Council under 316, which is why I was thinking, this is High Court Business.

A. The submission that I have made in the context of the High Court business was the ability to enforce directly as between consent holders.

Q. Okay. All right. That, if you want to do that, it's got to go somewhere else.

A. Yes.

Q. Yeah, and the Court of confident jurisdiction then be…

A. High Court.

Q. At a High Court. Actually, it's probably a question for both of you because we'll call it at five. I know, I've talked to both of you about this, what about enforcement. You know, whether it's what the Court's suggested or what the planners have suggested. Is that giving you any anxiety? No, don't shake your head, cause we just got to get a solution and then get the heck out of here. It's a serious question, does it give you any anxiety? Okay. Firstly OGA conditions, so it's what the Court's proposing, it's maybe what the planners were proposing, OGA condition is directly enforceable, but just under the normal mechanisms I would have thought through 316.

A. Yes. 312 in my head.

Q. You might be right, yeah.

A. Anyway, there about there.

Q. Yeah, about there. So that's just enforceable in the ordinary way.

A. Yes.

Q. And it'll be subject to proof, et cetera. Prosecutions, well, no, Regional Council, can Regional Council enforce an OGA type condition?

A. My understanding is yes it can.

Q. Yeah.

A. Once it's a valid condition on the permit.

Q. Yeah.

A. It's a condition that can then be enforced.

Q. Yeah.

A. Because the breach of the Act authorised by the permit, if you're not complying with the conditions of the permit so you'd be in breach of the Act, so the offence is breaching the Act without complying with the permit.

Q. Vacant notices?

A. Same again.

Q. Enforceable by the Council, but action can't be taken or can it be taken by a neighbour? An individual.

A. Not in the context of an abatement notice.

Q. No.

A. The action that could directly be taken by a consent holder would be application for an enforcement order or alternatively, presumably a private prosecution.

Q. Yeah, yeah, and so prosecution, and again, I think it's the other thing giving me anxiety, and in some ways it's a silly thing to be anxious about, because no one's ever asked Council to enforce these things and there effect, I suspect, isn't because they replicate the Act, but because they replicate – they promote good behaviour or a continuation of certain behaviour.

A. Yes, and like lots of, say, new conditions or conditions touching on new subject matter, circumstances where they haven't been forced before, there's always a level of anxiety as to how it might play it out, but what one can do is work through those conditions and make those conditions as robust as possible, and that really is the exercise to be undertaken. I think it's fair to say that the compliance team did have some anxiety in terms of the conditions and that would have come through fairly loudly, clearly in the evidence, and that, I should say, was a helpful exercise, both for, perhaps the Court and also for the Council, but in the end we come back to the question of are the conditions and the types of condition being referred to here, do they fit within the framework of conditions that have previously been found to be valid in terms of sufficient level of certainly for a valid purpose, et cetera. The submission that I've made is

that, yes, they do, and therefore they are capable of enforcement, albeit there may be, as there always are, some practical challenges associated with enforcement, but those challenges exist with respect to enforceability of not just these types of conditions, I submit that the same issues might arise in terms of dealing with minimum flows or residual flow type conditions.

Q. So, to the extent – I just was thinking about that, a case of Sutton and Canterbury Regional Council.

A. Sutton. Which one was that?

Q. Oh, 2015 High Court decision. I think it's Justice Kendall, and about the Council's duties in terms of getting its records right. Getting its house in order. To the extent that Ms King and Mr Cummings are talking about issues about the Council's house not being in order, well, you've got to put it in order.

A. Quite.

Q. And I think you accepted the duty.

A. Yes.

Q. On behalf of ECAN.

A. Yes.

Q. Yeah, and on that decision, and so, it seemed to me, a lot of the anxiety was anxiety around its own records, but its also anxiety as to, this is probably one thing that does bother me, activities which have occurred, say, the shifting of the point of take, which have not have been regularised as it should have been regularised under section 413, and so, what to do about that?

A. Yes, I was listening with some interest, and in mind, I was trying to work out who's problem is that. Is it the Council's or the consent holder? Reality is it's both.

Q. It's both, and so, if you do come across that and I know the answer – somebody's sent to say, oh, well, you know, if they've done and it's been right, she'll be right for the last 10 years, she'll be right for the next five or six or however long. Is that – how would you approach that? Where you have got – and again, I remember from my days as a practitioner in

Canterbury, a lot of irregularities with the records which was both, clients were providing records again and hoping that were loaded correctly onto the database.

A. Yes, I would have thought as part of the consent replacement process, those issues will need to be resolved and or clarified, so, if you've got a situation where a point of take has moved, say unlawfully if they have followed the process under section 136, it may well be that upon consideration of that application, the Council will require a section 136 application to deal with the point of take.

Q. And it may require neighbours' approvals. In that case, two regularise.

A. Yes, particularly in circumstances if the point of take is moving or leapfrogging another permit. So, that will need to be considered. So, I anticipate that the applications will come, the point of take will be specified, there will be reference to the permit being replaced, if there's a mismatch at that point, it will become obvious, and will need to be regularised.

Q. So, I think what you're saying, despite the lack of transparency, if you like at the present moment as to how permits are currently being exercised, that is not causing you any anxiety in terms of what has been proposed to overcome the priority gap.

A. No, because the mechanism exists to deal with that issue.

Q. Yeah.

A. So, I'm comforted by the existence of section 136 to allow the transfer at the point of take, if that has in fact occurred.

Q. Okay, all right.

A. And, at –

Q. In saying all that, Ms King's and Mr Cummings' evidence is in fact extraordinary – I would have thought extraordinary helpful in terms of the exercise ahead.

A. Quite.

Q. Yeah.

A. And it's focused some attention on what the future may look like.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Yeah, and the effort to get people in to regularise what those activities are. Okay, so, Ms Williams, you've been nodding away.

A. I have.

Q. And so, knowing there's no particular anxiety around enforcement.

A. Well, Your Honour, I mean, again, so, the department as I have already referred to concessions, so, we have from time to time have concessioners who breach conditions of concessions, and sometimes the conditions are not expressed in a particularly helpful way, and so we often have to make a call between, do we deal with this as a concession condition issue or sometimes it has gone further than that it and it has to be dealt with as a prosecution, and we have prosecuted concessioners where they have undertaken activities which are not within, we consider the terms of their conditions, and we have lost. So, you know, so, I'm very familiar with the issues that were set through by Mr Cummings because those are matters that also the department has to rest its own regulatory function, and again, your Honour, I guess I don't see those issues as being insurmountable in terms of meeting a criminal standard of proof. What I guess I also took some heart from is that actually what the compliance plan attached to Mr Cummings' evidence indicated is that that is very much the Council's final option, and that there are a number of other steps that it will go through before it gets there, and again, as Mr Maw points out, there is certainly the ability for the third party, the superior permit holder to apply for an enforcement order or to take a private prosecution, and if they were to do that then they are going to be subject to that same standard of proof.

Q. Yeah.

A. So, that's, so, again, they will have to be certain of their ground to take that action.

Q. Okay, and so in terms of what the Court has proposed, no red flags?

A. No.

Q. No, okay. All right, well, we'll take a break and come back on Thursday, unless people have to travel, so, which might be Mr Welsh.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. You'd flagged you wanted to see us in chambers at the end of the day.

Q. Oh, no, I've actually covered the matter that I wanted to see you in chambers about.

A. Very good.

Q. You've addressed it. I don't want to – yeah, I'm just conscious of the fact you've got to travel. Ms Dixon's got to travel.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Oh no, are you going to be back Thursday?

A. I made strange travel bookings, and so I am leaving tonight.

Q. Oh, okay.

A. And back Thursday, and I have my closing on Friday, which, somehow between travelling I have to write.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. You've got to be back, because you've got cross-examination for Mr de Pelsemaeker.

A. Yeah, I do.

Q. No, that's okay.

A. Because there's certain statements that –

Q. No, that's okay, that's fine.

A. - Mr de Pelsemaeker does make.

Q. Did you want to – oh, so, do you want to address this now? Should we go on and hear what anything, whether there's anything in addition that you need to say to…

A. well, your Honour are you going hear from other counsel that are in the room? Ms Dixon and Mr Page.

Q. Yeah, well it just depends if whether counsel are traveling or do we just roll it over for Thursday.

A. I'm happy to roll it over

Q. You're happy? Okay.

A. Yeah, well, I am back on Thursday. That's… I'm flying back tomorrow night.

Q. Okay. All right. Thank you.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. Ms Dixon, do you want to…

A. I'm staying, your Honour, so I can do it on Thursday.

Q. You're staying, so there's no difference to you. Okay, very good.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. And you're local, so you don't get a choice.

A. No, no, no, we'll just do as we're told.

Q. Oh, I've noticed that about you. Okay, so, no, that's fine, so we'll adjourn and I need to issue a minute, which I will do, just circulating that stuff about deemed priorities, this time noting that we want a definition for downstream permit holder, not upstream permit holder. I'm sure that was a deliberate mistake. Okay, so, on that basis we're adjourned

COURT ADJOURNS: 5:08 PM

COURT RESUMES ON THURSDAY 1 JULY 2021 AT 9.33 AM

MS DIXON:

I can be quite brief in responding to Dr Somerville's reply to the submissions of legal counsel, and, with the exception of one point, I won't repeat what other counsel have already addressed you on, and the one point that I do want to come back to is his paragraph 6, so that's the first matter on what I want to speak briefly.

The position that Dr Somerville has taken is that s 124 applies in the situation we find ourselves in, but only up to the 1st of October 2021, which is the point at which the deemed permits expire. In my submission, that can't be the position, because there is no need for s 124 before the 1st of October 2021, and the reason for that is that up until the 1st of October 2021, these deemed permits are exactly that, they are deemed permits which are resource consents in their own rights, and Ms Williams took you, earlier in the week, and I would do the same, to the various sections of the Act that get us to that point, and I've addressed them in paragraph 15 of my submissions of the 15th of June, where I have pointed out that section 87(d) of the Act defines a water permit as a consent and s 413(1)(c) determines that a mining privilege is a water permit, so you put those two together, and the mining permits were given life as water permits, as resource consents, post the coming into the Act, up until the 1st of October of this year. So the real issue is not the status of s 124 in relation to these matters prior to the 1st of October this year, but post this year, and that, of course, is the point at which the counsel in the room and Dr Somerville part company.

My second point relates to the cases that I have discussed in my submissions of the 15th of June, and I've taken the Court, in those submissions, to two practical examples that I'm familiar with, where the question of s 124 post the expiry of what were deemed permits was in play, and the two cases concerned the consenting of the Clutha scheme, and the consenting of the Wairakei Geothermal scheme, both of which had a sunset clause in very similar terms to

those applying to the mining rights, and both of which were given a life under the Act of 10 years, so a considerable shorter period of time, but their final expiry, and the language is exactly same, was 1 October 2001.

So in terms of those cases, Dr Somerville has suggested at his paragraphs 16 and 17 that, essentially, the regional councils had acquiesced in the deemed permit continuing to be operated as if it were lawful, notwithstanding that it had finally expired on the 1st of October 2001. With the greatest respect to Dr Somerville, we don't know that the councils simply acquiesced in that situation, we don't know whether the councils themselves took legal advice, considered the situation, and came to the conclusion that the situation was as counsel in this room have suggested that it is.

I accept that there is little discussion in the Environment Court decisions on the point, but in itself, little discussion in something does not provide evidence that a position is wrong. There are many sections in the Act that have not been discussed in court decision, I imagine, despite 30 years of litigation of the RMA. Some things can be so self-evidently right that they don't need to be discussed by the Court, but even if we set that aside, in fact, the Court did turn its mind to this.

THE COURT: JUDGE BORTHWICK

Yes, are you saying it should be so self-evidently obvious to this court, and me in particular, that you are right and that the question should not have been raised?

MS DIXON:

I wouldn't suggest that, your Honour, no, I wouldn't go that far.

THE COURT: JUDGE BORTHWICK

So then what was that?

MS DIXON:

But I am saying that, certainly, for courts in the past, that may have been –

THE COURT: JUDGE BORTHWICK

May have been the case, may be that it wasn't raised and the Court just simply didn't turn their mind to it.

MS DIXON:

Well, my point, your Honour, is that at least in one situation, we know the Court did turn its mind to it, and that's the Rotokawa decision, which I have quoted at para 27 of my submissions of the 15th of June.

THE COURT: JUDGE BORTHWICK

Have you provided those cases to the Court?

MS DIXON:

I haven't. I'm not sure whether Mr Welsh – Mr Welsh says he has a copy, your Honour, because I know that he did as well. I haven't been back to my office since receiving Dr Somerville's material a couple of days ago, so it's been a little bit hard to access any additional material, but I can certainly provide that case. Mr Welsh says he has it anyway.

THE COURT: JUDGE BORTHWICK

That would be handy to actually have the case in front of me, wouldn't it?

MS DIXON:

Yes, it would. It would be useful to the Court, I think, to understand the context, though Dr Somerville is quite right, the is the only reference, there is not discussion of the point, which comes back to my earlier point, that it may be that the Court considered that there didn't need to be discussion because it could see the position.

THE COURT: JUDGE BORTHWICK

You're speculating, are you not? You're speculating.

MS DIXON:

I am, but in exactly the same way as I think Dr Somerville was speculating.

THE COURT: JUDGE BORTHWICK

You're both speculating, then.

MS DIXON:

I accept that. My point is that the Court did turn its mind to it. There is a reference (inaudible 09:41:16) because the question was not squarely before the Court because there had not been discussion on it, but the Court obviously, in my submission, turned its mind to it, otherwise, it would not have made the reference that it makes, that s 124 rights enable the continued exercise of the consents. So, whether there was discussion or not before the Court, it was obviously satisfied that that was the situation and recorded that in its judgment. So in my submission, your Honour, there is a relevant finding of the Court, there are relevant precedents in practice. Perhaps that's simply context, but it is useful to understand how this issue has been approached. This is not a new issue, the situation has been around for us in relation to other deemed permits for quite some time, and there is, in my submission, no precedent that says that s 124 does not apply to deemed permits post their expiry date.

The third point relates really to teasing this out a little bit more in terms of understanding Parliament's intent. In light of Dr Somerville's statement at paragraph 29 of his submissions in reply, which I am sure we would all agree there is an interpretive presumption that Parliament intends to legislate in a way that produces a practicable, workable, and sensible result. Now, coming back to the analysis in my submissions of the drafting, the language of sections 386 and 387, which are the sections that created and applied the deemed permit regime for the two cases that I've discussed, Clutha and Wairakei. As I noted, the language is similar, the same. The only differences are contextual differences. They all refer to final expiry, they finally expire at a certain date. As I've addressed in my submissions, they have duration as put in by way of the Act and so on. I probably don't need to take you through that again. I

presume that Dr Somerville accepts that analysis because he doesn't take issue with it, so the similarities of language, I think, stand before s 413 and s 386 and s 387.

So, accepting that the language applies, and that the situation was intended by Parliament to be the same across the raft of deemed permits that Parliament was addressing, a variety of situations, essentially, providing for a way forward for schemes, projects, sets of permissions, authorities, the language is variable, that had been authorised by other legislation prior to the coming into force of the RMA, so the Clutha scheme obviously hinges on the Clyde Dam in powering it, Wairakei essentially was the Geothermal Energy Act 1953, and so on. So Parliament was turning its mind to how to provide for those post the coming into force of the RMA, and, intended in my submission, to give them a reasonable life, so created the deemed permits for them, they are acted as resource consents, but gave them a reasonable life to function in that way before going through the consenting process that turned them into the RMA consents that we have today.

Now, the period that was chosen for the two schemes was 10 years. If we take the position that Dr Somerville has proposed and knowing that it took six and a half years in each case for those projects to be consented under the RMA. The consents didn't come out of the appeal process for either until 2007. In the case of the Clutha scheme, there was an appeal to the High Court that extended the period and so on, so we're looking at about six and a half years. On Dr Somerville's analysis, the company needed to replace those deemed permits with resource consents should have known to apply for those resource consents at the latest somewhere in 1994, because it should have known that it could not rely on being able to continue to operate post 1 October 2001. Now, in 1994, the act was in its infancy, there were barely any regional plans or district plans. They too were in their infancy. Councils were coming to grips with how to write these documents, and we all know how long the first generation plans took. In my submission, that cannot have been Parliament's

intention. It did not intend to give these projects, in effect, about two and a half years of real life, it ended to give them 10.

THE COURT: JUDGE BORTHWICK

So here's your submission addressing the final expiry of the deemed permits under s 386 and, I think you said, s 387, as at a date 10 years after the commencement of the Act, or is your submission addressing any rights which are attached to those permits as deemed conditions, or both?

MS DIXON:

I wouldn't have framed it quite like that, but I suppose it's a mixture of both. I'm trying to understand, given and applying an interpretive approach that says Parliament means something to be workable, sensible, practicable, et cetera, and what I'm working to, your Honour, is a position that Parliament would have intended to provide some certainty and demonstrating that if Dr Somerville's position is right, there is no certainty. Parliament intended in my submission, to give these consents 10 years of life, but also a reasonable period to apply for and work through the process of applying for new consents under the Act, and of course, s 124 provides exactly that, because it says you might apply six months before, or three months, with council's discretion, but certainly by 1 April, in the case of the two projects I'm talking about, 2001.

That's how Parliament provided a certainty, and then you apply the rest of s 124, which allows a former consent to continue to be relied upon post the expiry date under s 124. Parliament intended these consents to be replaced, Parliament gave a therefore, Parliament gave the certainty of a definite date for when they must be applied for, but then, in my submission, also recognised that the one thing the applicant absolutely does not control in this situation is processing time. I don't imagine anybody expected that it would take six and half years to consent Wairakei or the Clutha scheme, which is why my suggestion that somehow, the applicant should have known (inaudible 09:51:29) to apply back in 1994 or something.

In my submission, the Act can't have been intended to work in that way, but the thing that the applicant cannot control is processing time, and therefore, s 124, in fairness, and making the act practicable, workable, et cetera, provides that protection of allowing the applicant who is replacing their consents to continue to operate under the former consents while council and, if necessary, the courts deal with the processing and any appeals that might arise, and in my submission, that's an interpretation which is consistent with a practicable, workable, sensible framework. It avoids the messiness of the applicant somehow having to guess how long the processing and any appeals might take, and it's fair because the applicant has no control over those timeframes, and it's certain because the Act provides for the situation through the six-month requirement.

THE COURT: JUDGE BORTHWICK

So what do you think in relation to s 386(8) is getting at? So s 386 is dealing with existing rights and authorities under the Water and Soil Conservation Act. Subsection 8 says: "Nothing in this section applies in respect of any mining privilege within the meaning of s 413(1)." Why would Parliament need to – if it was providing comprehensively for permits, I think you're saying is in relation to one of the big dams, either Clutha, or what was the other dam? Yeah, s 386 provides for what? Was then utilised by what? Clutha and Wairakei?

MS DIXON:

Wairakei, yeah.

THE COURT: JUDGE BORTHWICK

Wairakei. Why the carveout for mining privileges under that section, such that they're dealt with separately under s 413? And I'll confess that I have not read 386 in detail, line by line.

MS DIXON:

My friends may have other thoughts, but I had taken that to mean that the sections in 386 apply to water takes, so cover, for example, 386 was the section

that was used to deal with the water permit for the ongoing operation, for example, of Wairakei. I had assumed that what Parliament was intending was to make it clear that the mining privileges have their own section, and that this section was not intended to apply, this 17 was not intended to apply to mining privileges.

THE COURT: JUDGE BORTHWICK:

So of the cases that you have referred, but I don't believe we've got a copy yet in court, which case deals with Wairakei and which deals with Clutha?

MS DIXON:

The references were actually given in Dr Somerville's footnotes. I'm not familiar with *Rider v Manawatu-Wanganui Regional Council*, one of the cases he refers to is *Rider*, which is not the case that I'm talking about. *Rotokawa Joint Venture v Waikato Regional Council*, his footnote 7, is the Wairakei scheme. Rotokawa Joint Venture Limited was simply the first appellant named, and that's why they appear first on the list. Contact Energy Limited is the Clutha scheme. I'll get those cases for your Honour.

THE COURT: JUDGE BORTHWICK

I would be grateful, and do either of those schemes deal with deemed permits or not – that is, mining privileges which are deemed to be water permits under s 413 – or are they solely concerned with s 386?

MS DIXON:

My understanding is that they are – it's a wee while since I've really read them from beginning to end – they are 386 cases. I think there may be some discussion of mining privileges in them as incidental to, because, of course, you talk about water in Otago in any context, really, you end up referring to the mining privileges, which are such a feature of this region, and, in fact, I'm going to talk to you in a moment or two in the context of the vires question you've

raised about the point, almost, where Clutha and mining privileges kind of coincide, but –

THE COURT: JUDGE BORTHWICK

Clutha and mining privileges?

MS DIXON:

Pardon?

THE COURT: JUDGE BORTHWICK

So at the point at which –

MS DIXON:

There is – my point is that it's hard to talk about water in the context of Otago at all without somehow or other the mining privileges coming into the picture, and I can give you an example of that in a moment, but in the context of consenting the Clutha scheme, no, from memory.

THE COURT: JUDGE BORTHWICK

Okay, and is there any case law dealing with s 387, or is that *Rider*?

MS DIXON:

Wairakei deals in part with 387. The consents that were reissued –

THE COURT: JUDGE BORTHWICK

Oh, of course.

MS DIXON:

– were issued for Wairakei are a mixture because of the way geothermal water is defined and because of the way water is defined in the Act, and really, the history of Wairakei in the '60s. It's a mixture of water takes and permits and the licensing scheme. Those are the point I wanted to make, your Honour, in relation to the priority position directly. You did ask a subsequent question, in

relation to the vires of the proposed priority regime condition and my friend, Mr Maw has addressed you on this on Tuesday and I'm very happy to adopt his submissions and there's no need for me to repeat the points that he has made. But I did think there was one useful example I could give you of a condition that I'm familiar with, that and it again arises out of Clutha.

That addresses, I think the concern that you have as to the creation of a regime that appears to allocate water as between parties. Now one of the points I think that Mr Maw made a couple of days ago was that, in fact the allocation of water and allocating and regulating access to water, as between water users is a function of a regional council and that does mean allocating between parties in some instances. And while we have been focussed a lot in this hearing on priorities to protect galaxiids and thinking about the need for priorities for environmental reasons, the need to maintain the effect of priorities in relation to this question of allocation between parties I think, is a live and valid issue before the Court as well and that's in my submission, the discussion of the last couple of days has been around that as well as the galaxiids. So the condition that I was thinking about that has been used by Otago Regional Council and has been imposed for some time, arises out of the fact that as pressure has gone on the Clutha as a source of water for irrigation, and for all sorts of uses but principally for irrigation, particularly as the need to protect the tributaries and the smaller water bodies around the region, has become apparent.

The Clutha of course at first blush is an abundant source of water. It's also a key factor in something like 750 megawatts of renewable generation in this country. So , it's not entirely an abundant source of water. There are times of the year when water in the Clutha is more valuable to electricity generation than in others. So a condition has been developed that in one sense protects contact access to water while at the same time giving access to the same to applicants who are seeking it but which also protects the environment. What I'm thinking about, the circumstances of the background are that Clutha is a run of river scheme, the only storage on the scheme is nine hours, in water travel time above the Clive dam. The operating range of Lake Dunstan, for good

environmental reasons is only a metre and while there's a broad operating range in Lake Hawea, which is the storage to the north. It's not extensive either. So there is a set of circumstances where in order to ensure that the operating range of Lake Dunstan can be maintained and in order to ensure that Lake Hawea doesn't drop below the minimum level set, again for good environmental reasons, and in combination with the fact that the scheme is very dependant on inflows into Lake Dunstan between Lake Hawea and the Clyde Dam, and during the winter, this is the reverse of the North Island incidentally, during the winter those inflows drop because literately the water is tied up in snow. It's the snowmelt in the spring that brings the water into the river. So, there is a set of circumstances where in order to ensure that the environmental circumstances can be addressed, a condition is imposed on applications for water to take from the Clutha that requires them to stop taking at certain times, and the condition was actually put in place in a decision is actually before this court on appeal, but this is not the matter that's on appeal, it's the Queensbury Ridges case, which is one of the cases that's been put on hold until PC7 is determined.

THE COURT: JUDGE BORTHWICK

So, the condition has been imposed on Queensbury, is that?

MS DIXON:

The condition has been imposed on Queensbury, and this is not what's being appealed, the appeal is about duration as you might expect, but basically the way that the condition works – the set of circumstances that I'm referring to are no take from the Clutha Mata-Au between the 1st of May and the 31st of August, so that deals with the winter low flows issue, and also, of course, is the non-irrigation season. So, no take from the Clutha between the 1st of May and the 31st of August and then a requirement to cease obstruction when specified river flows and a Lake Hawea level, a combination are triggered. Now, I'm happy to provide this to you in writing, your Honour, but basically what the condition does is through, apart from that time period, to take a measurement of the combined flows in the Clutha Mata-Au at Cardrona, Kawarau River, Chard Road, (inaudible 10:07:43) when they combined are below 250 cubic per hour, then

takes also have to cease. So, in my submission there is recognising the need to protect another party's access to water established already in this region, and that's an example of how it can be done.

THE COURT: JUDGE BORTHWICK

I don't think that I have ever indicated, at least from my part, that I have difficulty in principle with doing something in this space. If I had thought that I had a difficulty in principle, I would have taken a different course. The problem for the Court has always been that the relief proposed either in the submissions or by witnesses is ineffective, therefore something else is required, either as we've seen the plan is proposing their own amendment to policy and conditions, which is likely in my view to be ineffective, or the Court endeavouring to come up with its own solution, but frankly, the solution should be provided by Council and parties, I think, at this stage. So, it's in principle, yes, we need to be doing something in this space, Central Government hasn't, and we need to be therefore looking to do something in this space. The question is, what? We're at the tail end of the year and we're still struggling for the solutions to the problem. So, in principle, I have no problem with this, and indeed think in terms of managing the effect of abstraction as between users, this is something which is an RMA issue and can be properly be

dealt with under the RMA. Now, I've never said anything – or at least, I don't think I've said anything to the contrary. Consequently, have had to expend a lot of resource – your resources as well as the Court's resources – trying to look for solutions.

MS DIXON:

We may have been under the impression that you were concerned about, effectively, one party asking another to turn off, which is the way the priority condition is framed and the way (inaudible 10:10:33), for example, is set up.

THE COURT: JUDGE BORTHWICK:

No, and I haven't, for my part, I do not believe that I have ever expressed a concern in principle by one asking another to turn off, but whatever mechanism

is proposed, it has to be effective and efficient. It can't be the stalking horse for future litigation, and there, I think, certainly, the solutions proposed by the planning witnesses are a stalking horse for future litigation, and it may well be that the Court's own solution is a stalking horse for future litigation, it just depends on the records held either by the regional council or by farmers in terms of making the solution work.

Where we have also encountered difficulty is that the Court – perhaps with the exception of Ms Williams' submissions – has not been provided good submissions, or submissions on statutory interpretation, so as to understand what the priority issues are and then understand what the problem is that the Court needs to be working on. I can think of one party who's just simply submitted that they didn't see any reason or principle why the Court couldn't bring down priorities from the statute. I don't think that's correct, but I do think that there is a real issue that needs to be addressed, and I don't believe that I have said anything different, but actually, understanding both the legislative context, what is or is not happening, and then getting ourselves in a position where we go yes, there is a potential problem that needs to be managed and can be managed properly as an RM solution. That's always been the Court's concern.

MS DIXON:

I understood from the discussion with the panel on Tuesday that there was a level of acceptance across the planning witnesses, and I thought the Court, that there was a case for ensuring that the effect, however it's expressed, the effect of the priorities is preserved for the reasons that my friend on my left in particular has explored with the Court, but also around this question of providing for adequate water in terms of council's function, providing access to water to a number of users, which –

THE COURT: JUDGE BORTHWICK

I don't have any difficulty with that. It's how you get there. I think where the Court has not been well assisted by parties who are interested in this is to

understand the legislative context which originally created the rights of priority, and therefore, how whether these are expiring or not, and, if they are expiring, how then this translates into an appropriate RM response. Now, we haven't been well-assisted in that, which is why we are either in a factual basis, because there has been virtually no facts, if any facts, produced by the parties, to actually then understand, well, okay, there's these rights of priority which exist now, how are they being exercised? Then to understand what is the risk if they expire, whether they expire on 1 October or, best-case scenario, they expire at the reconsenting step some time after 1 October. If they expire then, what is the risk, if there is nothing in this plan change?

And that risk, and I have talked on several occasions now about risk, that risk is different depending on which catchment you're in. We've heard from some folk, they do actually exercise the rights of priority pretty much as we understand them to be, which is telling their neighbour to cease or to start reducing water. Other folk don't exercise them because, as in the case of Low Burn, there's always flow in the Low Burn. Now, they might be taking it down to low or all but no flow, but that's their right in law, and that's how they're exercising them, so they haven't needed to ring up a neighbour and tell them to do anything, or, in the case of Manuherikia, we're told that those rights have been used as leverage or as the platform, then, to enter into informal and formal agreements which capture all of the tributaries and the main stem of the Manuherikia catchment, so the risk in their case, I would have thought, low going forward, you know, if there was nothing in this plan change, but that's not the case for other people, and so we've tried really hard to try and have a proper factual understanding of how these rights have been exercised, therefore, to look, to have an understanding as to what solutions may be required in the plan change, but, in principle, yes, they are people exercising them, and yes, it provides the initiative or impetus to enter into flow-sharing agreements, which, if that disappoints on 1 October or it disappoints at the time of reconsenting, is problematic, and that is because land-use systems have been developed on an understanding that, we talk about farmers in this case, farmers may tell another

to turn off or to reduce, and that those land use systems, they can, as best as they're able to in a water-short region or a dry region, continue to farm.

So we've always understood that. What we've not understood and not been in a place well to understand is, as I said, both the facts and also the legal effect of that instrument, whether the instrument ceases on 1 October or whether it ceases sometime in the future. So you don't need to convince us about the need for something in this plan change. We've been there and have been there now for some time. If we weren't there, we would not be expending the Court's resources.

MS DIXON:

I absolutely agree, and I think everyone accepts that. It may be that the question about vires that came out at the weekend may have –

THE COURT: JUDGE BORTHWICK

It's the question of – oh, thrown you? Well, it shouldn't.

MS DIXON:

Well, not thrown us, but made us think that you were continuing to be concerned that a mechanism requires a turn off.

THE COURT: JUDGE BORTHWICK

And I think that is because if – and to be blunt, it's actually OWRUG which is creating the difficulties – if there is, as OWRUG submits, these provisions about deemed permits, not transitional, but say there's provisions which can simply be carried down by citing – which I say, is as we understand the submission – citing priorities, in other words, that the instrument under statue can be replicated and its effect can be replicated in this plan change, then I think we would have a problem with that. So it's putting the Court – some parties have not placed the Court in a good position actually or in law to make decisions.

As I understand it, it's been the thinking of some witnesses that it is perfectly valid to tell another party to have a condition that can require a third party to turn off. That's the vires issue that I'm concerned about, and that was footnoted in one of the minutes. So we're trying to, if you like, avoid that vires issue, and one of the ways to avoid the issue is by neighbours' approvals or, a clearer way, I hope, was through the policy suggested by the Court, which says that the applicant themselves are placing themselves in a position where they will turn off if a neighbour tells them to.

MS DIXON:

So your concern is the telling to turn off mechanism rather than the need to turn off?

THE COURT: JUDGE BORTHWICK

Yeah, yeah, it's the idea that I can tell the world to turn off as opposed to the obligation to turn off if another has required it. So it's all to do with the –

MS DIXON:

Is that so very different from the contact situation where, in fact, contact is not actually ringing up to say turn off, but what is being put in place –

THE COURT: JUDGE BORTHWICK

Queensbury agreed to that condition, didn't they?

MS DIXON:

Yes, they did.

THE COURT: JUDGE BORTHWICK

Yeah, that's right, and so in that sense, what we have proposed as a court is – and I haven't read the Queensbury conditions – but it sounds like it is like the effect of the Queensbury conditions, but what we understood OWRUG's (inaudible 10:20:12) and Ms Perkins to be saying was not like that, but then again, they didn't particularly work through how their regime would work so that

the Court could have confidence that it wasn't simply a regime which would offend, you know, the general principles that you can't have a condition that ostensibly controls a third party. So it was getting back to basics.

MS DIXON:

I agree, and it may be that this discussion has actually been overtaken by the panel, and the proposal that your Honour has put forward which the planners are now considering, and (inaudible 10:20:50) going to, because a lot of what we're talking about, really, is kind of the vires of the mechanism as much as the underlying principal, which is, perhaps, where I was addressing it.

THE COURT: JUDGE BORTHWICK

It's the vires in the mechanism, and again, that was clearly signalled in the minute, but the underlying principle, we have been there for some time, hence the Court's real interest to establish the factual basis for the exercise so that we could understand what the ambit of the problem was, so that whatever response came down in a plan change, it was actually dealing with that problem, and, you know, it was sufficient to deal with the problem in terms of their exercise.

MS DIXON:

The main difference in the mechanism that's being proposed is that one neighbour tells another. The main difference in the mechanism is that rather than the council directing that a consent-holder turn off, one neighbour is telling the other.

THE COURT: JUDGE BORTHWICK

Yeah, yeah, yeah, yeah, that's exactly right, but that needed careful thought as to how that would be expressed both in terms of the plan change, and then understanding how that would be picked up in a condition. Now, we hadn't had that thinking in the evidence to date, and indeed, I didn't think that ORC, coming into the case, was at all supportive of that because it felt – and again, we've heard some evidence from Mr Cummings and Ms King that if there's a trace in the water record, then that is sufficient. Well, in my view, it's not sufficient,

because it's ignoring – it's not sufficient, and I've indicated that. So maybe we are in agreement that there needs to be a mechanism in the plan change and that that needs to be appropriately formulated, such that it doesn't infringe a vires issue, it is intra vires.

MS DIXON:

And that's a question of drafting.

THE COURT: JUDGE BORTHWICK

And that's a question of drafting, but we've just not been assisted

MS DIXON:

Yes, yes, I understand.

THE COURT: JUDGE BORTHWICK

And if I said, if I believed that, or (inaudible 10:22:57) viewed that couldn't do that, I would have said that very clearly so that you could take that back to your client, the Minister, but I thought that we can. Now, in trying to understand the law about deemed permits, have not been well positioned to understand that, so then subsequently issued a minute asking what I thought were key questions for me to place myself in a position where we could start to look at what might that plan response be. Now, one of those questions, which is to do with s 124, parties are saying there's no issue, Dr Somerville is saying is an issue, but there's no issue in principle that there needs to be a plan response. I agree with that. That then, as far as I understand it, if Dr Somerville is right and you cannot continue to exercise your rights of priorities beyond 1 October, then there is a policy lacuna that only gets filled, if you like, by a grant of resource consent, because at that point in time, you then, fingers crossed, hopefully take advantage of a policy which is in this plan change, so, you know, to that extent, there is a risk for a group of people, and of course, his opinion, I think, can be seen to be going further than that, and that's exactly what I would expect an amicus, I would have expected of a lawyer to do if the question is asked of an amicus or any lawyer by their client, and if there are broader considerations at

foot, I would expect that lawyer to be telling their client that. Now, it seems to me, reading Dr Somerville's second opinion, that he is signalling that there are broader considerations. Now, that may be something that I don't need to decide because if he is right, it arises due to the operation of statute. All the Court can do to minimise any risks for persons seeking to replace those deemed permits is to turn out its decision quickly, but I understand that, in turning out its decision very quickly, that, at least, for one of the parties, that wouldn't make any difference because they wouldn't be in a position to respond before 1 October. So, to me, that's just litigation risk, it's nothing that the Court – the best Court can do is put people in the best position that they are able to be in, and that is what we've offered, and we're still pondering that. Whether or not we need to make a decision on whether Dr Sommerville is right about the expiry on 1 October of all rights or not, the Court is of a view that there does need to be something in this plan change. Everything else is for the parties.

MS DIXON:

A. Yeah.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. So, I think that probably is –

A. I think that's long enough.

Q. Long enough. So, you've had a chance to look over what the Court said in in its own provisions – its own suggestions.

A. Yes, yes.

Q. Intra vires, ultra vires.

A. Very briefly. I tried to get hold of Mr Ensor last night.

Q. He's busy.

A. He is busy and he was still busy when I tried to get hold of him. He has it and I know that Mr de Pelsemaeker has been communicating with him. So, that's to set up the further consideration of it. All I have from him was a sort of, looked pretty good, typed text message.

Q. Looks pretty good.

A. But it was a text message and it was kind of on the fly, but he is obviously considering, and I wouldn't want to express a view without some assistance from him.

Q. No, that's okay. He might have – I mean, regardless of the planners' options, the Court's suggestions or any other solutions, the effectiveness of those solutions is troubling the Court because what troubles the Court is both their record keeping. The implementation troubles the Court regardless of what solution is presently before us. The record keeping, the access to the records and the other thing troubling the Court would be that there has been action taken by permit holders for which authorisation was required but which authorisation wasn't sought in terms of moving points of take or even, I don't know, conferring the deemed permits to another permit holder.

A. Yeah.

Q. And you might say, well, who's problem is that, and I'd say that it's probably a problem for the permit holder in the first instance and the Council in the second. It's not, I can't see that it's problems with the Court because again we just do not have sufficient factual basis to think about any solutions, but the implementation troubles us, and I can't say anything more about that because, yeah…

A. It seems that we have laid to rest the border issue of the vires, it –

Q. Seems to be laid to rest –

A. Later is the broader issue of the vires –

Q. Sorry?

A. It seems to that we have laid to rest between us the broader issue of the vires, it's just making sure that the mechanism itself is intra vires.

Q. It's making sure that the mechanism doesn't give rise to any vires issues, and it's – so, in principle, yes, we think you need something in the plan change or government will have to come forward because the risk to individuals are of potentially significant in terms of their economic impact. So, there has to a mechanism in my govern or a mechanism in this plan change and we need to craft that in a way that it is doesn't infringe any – that it is both lawful and is effective. Yes.

A. Your Honour I'll find you though cases Mr Welsh has one, I found the other. It seems to me that you don't need the condition in writing that I was referring to that (inaudible 10:30:16) that position.

1030

Q. If you could just give me the condition reference, I've actually got *Queensberry* up in computer now but…

A. There's a reference at paragraph 6 and it's discussed again at 69. There's not a lot of discussion of it but the condition itself if…

Q. And the condition itself?

A. Paragraph 6 and 69 and then it will be in your…

Q. I see it's probably condition 6A, looking at it, combined volume from the Albert and Clutha – oh no it's not.

A. I'll check the number and come back to you.

Q. Yes, if you could just give us the condition.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Thank you very much. I've read your submissions Mr Welsh.

A. You have Ma'am?

Q. I have, yes.

A. Thank you. Ma'am I have copies of and I've checked. I didn't file these at the same time as filing those submissions, have a clean copy of the *Rider* decision.

Q. Thank you.

MR WELSH:

And I have, I think it's the first 12 pages of the *Rotokawa* decision but that's the relevant part for the purposes of our discussion. It's quite a large decision and the third case that I refer to in my submissions has already been placed before the Court and that's the Judge Smith's decision that Ms Williams, I think provided in respect of the *Minister of Conservation v Otago Regional Council*. That set out some of that background as to mining privileges and where they come from and how at that stage they were before the courts. So I haven't

handed that up and the other reason I haven't handed it up, I've got highlighting on that, so wouldn't be appropriate to do so.

Ma'am, I don't intend to summarise my submissions, but I'll answer obviously any questions you have in respect of those and just use the balance of my time in respect of responding to Dr Somerville's latest memorandum, if that's acceptable to the Court. I would start by noting that Dr Somerville's further memorandum has at least in my mind, removed any doubt that appeared in his May memorandum, as to whether he had considered that it was the deemed condition of priority that could not rely upon 124 to survive or whether the entire deemed permit could not. In my submission Ma'am Dr Somerville's earlier memorandum was a little bit loose in its language around whether he was referring to the deemed permit or the deemed condition on priority at times, but he has removed all doubt with his second memorandum and indicated it's both.

So at paragraph 5 and 6, Dr Somerville agrees that section 124(3) applies to deemed permits however he then goes on to opine that 124 sub (3) is available up to or only available up to 1 October. In response I would note that that is not what the RMA says on the face of it, at least in my reading. A pragmatic examination of the resource consent application process and section 124 demonstrates that there is no need for a deemed permit holder to rely on section 124(3), prior to 1 October as their permit has not expired. In essence under Dr Somerville's interpretation in submission, section 124 would be rendered meaningless. This is because prior to 1 October the only relevance of section 124 would be in providing – and in, probably, plan change 7 parlance – entry conditions for reliance after 1 October, those entry conditions being the filing of a replacement application, six months prior to the deemed permit expiry or between six and three months if the consent authority allows the consent holder to continue to operate and today being 1st of July, no party, if they have not filed already, can take the benefit of section 124 in the context of continuing to rely on their deemed permit.

At paragraph 11 Dr Somerville submits that a deemed water permit is not like any other resource with an expiry date as it is a creature of statute. To an extent, I agree. Deemed permits are creatures of statute, just like existing rights under section 386(1)(a), existing authorities under 386(1)(b), existing permissions that became deemed coastal permits under 384, and clean air permissions that became deemed discharge permits under section 385, and indeed resource consents under the RMA which do not exist the common law or equity. Deemed permits are under section 413(1) deemed to be water or discharge permits granted by the appropriate consent authority on the same conditions. Section 87 says that water permit and a discharge permit are resource consents. I agree that they finally expire on 8 October 2021, and I don't think any party has submitted otherwise, but that isn't the point, the issue that these are resource consents and that notwithstanding a deemed condition that the deemed permit expires, section 124 allows the holder to continue to operate under the existing consent until all appeals are determined, and that's no different, in my submission, from any other resource consent. In response to Dr Somerville at his paragraph 12, I disagree with the suggestion that there was no need for Parliament to explicitly state that deemed permit holders could not rely on section 124, if that was its intention. I address that in my submissions at paragraph 10 and 13.

THE COURT: JUDGE BORTHWICK

Sorry, just say that again, you do you. So, yeah, say that again, it just –

MR WELSH:

I disagree with the suggestion that there was no – there's a few double negatives in there, Ma'am, but I disagree with the suggestion that there was no need for Parliament to explicitly state that deemed permit holders could not rely on section 124 if that was its intention. Dr Somerville took issue with myself and some other parties when we noted that if Parliament had intended 124 not apply, it could have simply said so, like it had with section 165ZH, and Dr Somerville in reply has said there was no need for Parliament to do that, and I disagree with that. I note that Parliament in fact actually did state that permits

under section 165ZH cannot rely on section 124. So, Parliament, in my submission, turned its mind to the application of section 124, but more importantly, and I think Dr Somerville, with respect, has missed this, Parliament has explicitly provided in 143 sub 1 and sub 7 that the provisions of the RMA generally and part 6 specifically apply apart from the review provisions, and self-evidentially, part 6 includes section 124.

At 13, Dr Somerville opines that section 124(3) is not available after 1 October, as there is no longer an existing consent at that point in time. That is correct after 1 October that the consent has finally expired, the deemed permit, but he has in my respectful submission, misinterpreted section 124 and its references to existing consent. In my submission, in the context of section 124, the reference to the existing consent is in respect of the entry conditions for relying on the application of section 124. That is, filing an application six months prior to its expiry or between six and three months prior to its expiry with the consent authority's approval. At those relevant times, there is of course an existing consent.

At 14 and through to 16, Dr Somerville deals with the case law that I referred to in my submissions and I agree with Dr Somerville that those cases do not deal with deemed permits or rights of priority under deemed permits. My submissions did not suggest otherwise. The reason for addressing those cases is that they dealt with existing authorisations under section 386 which were deemed to be granted under the RMA under the same conditions by the appropriate consent authority, and which finally expire, in that case, on the 10th anniversary of the commencement of the Act, and it seemed me to Ma'am, that Dr Somerville had placed in his first memo, considerable weight and importance on the language of "finally expired," but had not addressed the Court on the similar or the exact same language that appears elsewhere in the Act, namely 386. So, that's why I provided those cases in my submissions. They're not on deemed permits under 413, they are on existing authorisations under 386, and, Ma'am, picking up on a discussion you had with Ms Dixon in terms of other applications that have relied on section 386, I did look at the Waipori decision

issued by his Honour Judge Smith, I think the reference off the top of my head is C001-2004, which dealt with the Waipori scheme. It's reference Save Mahinarangi Inc.

Senior counsel in that case was Dr Somerville, and that decision dealt with the reconsenting of the Waipori scheme which had existing authorisations and to the best of my recollection, Ma'am, there was no suggestion by senior counsel on either side, it was Dr Somerville and Mr Withnall QC, that Trustpower could no longer rely on those consents post 1 October 2001. I did thought it would be quite cute to provide reference from his Honour Judge Smith in respect of that but looking at the decision, it doesn't deal with it at all, it just proceeds on the basis of hearing the appeal. But coming back to the reason for referencing those two decisions, *Rider* and *Rotokawa*, I thought it was important to point out in 386 that essentially the same language of 413 exists. It is therefore at least analogist or every informative to your decision making.

I just have been thinking about your questions around 386(8) Ma'am, as to why would there be that carveout-ing. It would seem to me that the reason for that carveout may be that unlike the existing authorisations and existing rights, which also deal with water, they were quite – those rights and authorisations came from quite a different – or they are different beasts from mining privileges. They were issued by the Regional Water Boards as opposed to the mining wardens and they were issued under the Water and Soil Conservation Act 1967 as opposed to mining privileges that had their genesis under the Mining Act provisions or Act, but both deal with takes of water, and in my submission, Ma'am, nothing really turns on the carveout of 386(8). It simply is trying to avoid any – in my submission, any confusion that 368 is intended to apply to mining privileges, which has its own discrete section, nothing standing much of the same language appears in both. As Dr Somerville had not addressed 386 in his earlier memorandum, despite what appeared to me to be an emphasis on the words "finally expire," at his 42 and 45 of his May memo, and has not explained, despite the same language used, why section 386 and 413 would,

in his opinion, result in diametrically outcomes when both sets of rights are both deemed water permits under the RMA.

386 is also a deeming provision. In respect of paragraphs 19 to 32, I'll leave that for Mr Page because Dr Somerville is essentially devoting a fair chunk of his response to Mr Page's submissions, but I do note in response to paragraph 29, Dr Somerville's interpretation, in my submission, leads to the antithesis of the interpreted presumption set out in section in 29, and I doubt with that some of those outcomes in paragraph 4 of my submission which are well beyond Dr Somerville's considerations, but in my submission, the abrupt cessation of all deemed permits that have not been replaced by 1 October may result in significant and irreversible effects.

Now, I have in mind there a return of all flows to a stream where previously trout and brook char have not been able to gain access upstream due to the abstraction in a population of galaxiids existed prior to 1 October, and Ma'am, I would just observe, in my opinion, it's highly unlikely that these deemed permits will be finally determined prior to 1 October, notwithstanding the dedication and the speed that you devote to writing your decision in the Court's decision. I cannot see how applicants can amend their applications if need be, Council perform its processing functions, no doubt hold hearings, and trigger, at least in terms of any discretionary or noncomplying activities, hearing could be required, and of course appeals to the Court.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. So, regardless of how quickly the Court can turn out its decision and thereby seek to mitigate any risk arising should Dr Somerville is proven to be right, I accept your advice is that the Court can't do much within that space, just simply because of the volume of applications together with the processing time.

A. Correct, Ma'am.

Q. Oh well, we offered.

A. Well, I will be happy to be proved wrong, but I just can't see that that – if that is a, if the Court has in mind that as a potential solution to the issue –

Q. It's not a solution to the issue, it's just trying to – if Dr Somerville is right, if the Court doesn't need to make a decision on whether or not – if the Court needs to make a decision that yes, there should be provision in the plan change, and I think we're there and happy for some time, but doesn't need to make a decision on whether or not deemed permits finally expiring on the 1st of October and section 124 doesn't apply either to the deemed permit nor to the right of priority, then anything else that ensues is beyond the Court's reach, what the Court must do, and the Court, I think is your submission, and I think in principle we are there, it's that the Court needs to make some sort of a provision to regulate abstraction as between obstructive.

A. Yeah, so my submission, Ma'am, was not in respect of the priority issue per se.

1050

Q. No I understand your anxiety.

A. I tried to stick to the lane of 124 –

Q. To broader issue, yes.

A. – yes.

Q. Yes, no you understand what your anxiety is there. Thank you.

A. Thank you, your Honour, in terms of the drafting I think there's probably a wee way still to go in terms of the priority drafting. At the risk of trying to draft by committee, for example, Ma'am, I thought that one of the planners will need to come back and actually encapsulate in the Court's drafting what or how much or at least, what is sufficient to supply the downstream permit holder. What's that measured against? Is it their maximum right is it – I don't know.

Q. I know and I bet you what is sufficient, it seems on what little we know, it's whatever the superior permit holder says is sufficient. It's not a science – has never been approached as a science where people have the, yes apart from the total cessation, it's not approached as a science at all.

A. Yes. But Ma'am where that's tracking is that, where I was going to get to, where the Court's thinking is, I see no issue with you setting up an ultra vires condition…

Q. An ultra vires?

A. I see no issue with you setting up an ultra vires condition…

Q. You mean intra vires, hopefully it's within the law?

A. No, it would be within the law.

Q. Oh, good.

A. I see no issue that you have set up an ultra vires condition. What you're doing and where you're tracking would be intra vires.

Q. Oh good.

A. Yes.

Q. I thought you were saying the opposite.

A. Sorry I was saying it in the negative but –

Q. No problems with that.

A. No would be intra vires.

Q. Yes, we are trying to track an intra vires – the set up for an intra vires condition. That there are implementation issues, there might be but I just at this stage can't see the way around it, there wouldn't be a way around that as far as I can see and by Parliament it probably encounter the say implementation issues so.

A. No, it's not to say ultra vires conditions don't result by any consent authority, notwithstanding the best of plan drafting, but, Ma'am, I have no anxiety at all in respect of where that condition is tracking in terms of any intra or ultra vires issues, it seems entirely appropriate.

Q. Okay, that's good to hear.

A. Yes, thank you they are my submissions Ma'am.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Mr Page? I'm quite happy to take morning tea or just to continue, it's over to you.

A. The morning tea suggestion might be useful because what we've been doing over here while this has been going on is doing some drafting using

your template and we've emailed some revisions to that drafting to Dahlia and I would like to speak to that on the screen when I address the vires issue and I don't know whether Gerard's in a position to that? He is, fabulous.

Q. We'll take morning tea and have a look at it.

COURT ADJOURNS: 10.45 AM

COURT RESUMES: 11:15 AM

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Mr Page.

A. Thank you, Ma'am. I thought I would deal with the vires issue first, and my first submission on that is that the Court's drafting does not contain a vires problem. If there were to be a vires issue about these conditions, it would be to the extent that a condition of consent binds a third party. That doesn't rise because if we look at the same conditions that the planners produced in their joint witness statement, the condition that is enforced is the condition that attaches to the subservient permit and so it's the subservient permit that is enforced against that permit holder, and no objection to that can be taken from a vires point of view.

Q. The condition that is enforced is the subservient –

A. Yes.

Q. – what were they calling, permit holder.

A. Yes. If it were the other way around.

Q. Then there'd be a problem.

A. Yes. if it was the dominant permit holder's condition that was being enforced against the subservient then that would be off the vires.

Q. Yeah. Now, planners, they don't actually deal with that in their JWS?

A. No, they don't address that topic.

Q. Yeah.

A. But it seemed to me that the planners either by accident or by decision they were alive to the distinction by the way that the subservient permit consent was drafted. Because it seemed to me that that was the intention that was it was that one that was to be enforced, and if that was their intention in my submission that was correct.

Q. I think the Court – I tend to agree with you. I think, and this will be a reflection of time constraints, but some of these JWSs are getting shorter and shorter, and here's the Court has sat there with the draft and going, how is this meant to work, what are we – essentially going through its own

interpretation exercise because it's got insufficient text to explain what is on their minds.

A. Yes, and why they arrived at what they did. Yes. I understand that, but if we think about the conditions as only being enforced against that permit holder, in my submission, the vires problem disappears.

Q. Yeah.

A. And for that reason, my submission is that it is not necessary for there to be an OGA type mechanism in the entry condition, because the consent of the permit holder isn't necessary. Now, with that in mind, I have attempted some redrafting to anchor the purpose of the condition to the circumstances of which is of concern under the Act, which is the allocative effect of the priority, and so the policy - I'm sorry, we haven't tracked these from your draft.

Q. No, it's okay.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. That's fine, we worked all that out ourselves.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Figured that out.

A. Yes, and so, the change to the policy was to make clear that the sufficiency related to a higher priority permit downstream, and then the entry condition applies again where there is insufficient water passing the point of take to supply downstream permit with a higher priority. Now, over the break, I've had a debate with my friend Mr Maw about whether we should be expressing that in the present tense or in the past tense. That is the, "with a higher priority" as opposed to "had a higher priority". My view which I don't think's a unanimous one, I think even between Ms Irving and myself is that it should be expressed in the present tense because it refers to the conditions of the permits to be issued under plan change 7.

Q. I've made a note and now I want to read it with that in mind.

THE COURT: COMMISSIONER EDMONDS

So you weren't proposing any definitions?

THE COURT: JUDGE BORTHWICK

We'll get to that because I don't think you've got enough.

THE COURT: COMMISSIONER EDMONDS

That might be one way of dealing with the issue that your colleagues are raising, that's all.

THE COURT: JUDGE BORTHWICK

Just before you move on, can I just take your explanation and then read it into what you've written here?

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Okay, all right, got that.

A. I do think a definition would resolve the issue but I haven't had the time to craft one. I have crafted a different one though over the morning adjournment and Rachel has very kindly typed it in. I thought it might be useful to understand what is meant by "sufficient". In my submission, sufficiency is simply where one exercise of the permit doesn't derogate from the ability to exercise the higher priority permit.

Q. Okay and you don't…

A. That mightn't always be easy as a matter of evidence to prove but that's not something that you need to worry about in in the drafting because that's the practical reality on the ground will be as it is now which is that the higher priority permit holder will be standing on the bank of the river and observing that they can't get water, will wander upstream to the neighbours' place and find that all the water's disappearing up the neighbours' pipe and that's how anybody will know what's going on.

Q. Yes, there's no mathematical precision.

A. No.

Q. No. Did you need to define "higher priority" because I'm thinking you probably do which is yes – now again everybody out there knows what a

higher priority take needs but even so, that's a key term, "higher priority" and probably, I haven't even got it in front of me now, one of the things that we thought, "oh downstream water user", I think we said define "downstream water user", we're thinking that the idea of the relationships or linkages between upstream water users and downstream water users or your higher priority would be picked up in a definition.

A. Yes. It struck me that what a higher priority is would be apparent from the face of the permits to be replaced and the permits that are granted but that could be explained in a definition.

Q. Because – yes and again this is and my sense of it is that you'll need to explain it so that people know what the effort is. That they are and again it's a bit unclear but they're presumably looking for a deemed permit and on the deemed permit will have a list of folk or lower order priorities that a permit is or high water priorities that the permit holder is subject to, something like that and that that then needs to be brought forward in an application for resource consent and translated on to a condition. And that's the sort of work that we're expecting to see. The planners do and be good to actually just grab somebody's consent and see it done in practice.

A. Yes and it strikes me that that's always going to be a permit-by-permit process –

Q. Yes.

A. – they come in, you test what's on it and what needs to be replicated and what's been surrendered or changed in the meantime.

Q. And that's the uncertainties, isn't it because, you've got an old permit, a percentage of those are priorities may no longer cease, they're not being replaced, so they fall by the wayside and so what then gets left? And that goes to the effectiveness but I can't see a way around that unless you have schedule but the council says that itself will rapidly become out of date.

A. Yes.

Q. Probably for the same reason because some of these things have been surrendered already or replaced by RMA consents.

A. Yes. I can understand why a schedule in a plan is conceptually attractive…

Q. Or even out of a plan, it's conceptually attractive.

A. Yes, but the difficulty with it is that all the schedule does is aggregate together the information that's on permits.

Q. Which is how –mmm.

A. And so it doesn't add anything to the sum of human knowledge. It's simply keeps everything in the one place.

Q. Is it conceivable that there will be an information gap somewhere, such that you won't know or cannot know who the dominant or subservient permit holder is, to use the old language of the planners' language is, or will that always be with a bit of digging available somewhere?

A. Well, the short answer is I can't be certain about that because all I have been able to do is access permits that my clients have and observe the way in which the priorities are recorded on them and it's variable about how it's recorded but the fact is that they are recorded. Might it be the case that some permits don't record the priorities on it, I simply don't know.

Q. No, it's more in terms of working back, what's been surrendered, what's been picked up an RMA consent so, again it's actually having a complete and reliable record for the consenting purposes going forward.

A. Yes, well it may well be the case that permits within a priority regime might have been surrendered or might have – or simply never been exercised and are an historical artefact and the person coming forward for replacement doesn't know but the mischief there is minimal because even if an obsolete priority arrangement is carried over, there's no reason to think that anyone's prejudiced by that.

Q. Why?

A. Well because if the permit –

Q. Yes.

A. – either doesn't exist or can't be exercised then that position will continue.

Q. So then there's four things: surrendered, never exercised but could be, can't be exercised or is now an RMA permit – can't be exercised because you've moved your point of take.

A. Well, either that there's no water or that the infrastructure is entirely gone. There are water races and flumes and takes all around Otago that for a hundred years have been, not working. And all those will presumably come out in a wash on the 1st of October when nobody has applied to renew them. And so they will cease to exist anyway.

THE COURT: COMMISSIONER EDMONDS

Q. So could I just ask you a question about this 18th of March date –

A. Yes.

Q. – it wasn't until you all talking about that point of entry being section 124, in terms of section 124, had to have your application in by six months if you want to be sure, three months if you want to rely on the council's kindness and Mr Welsh got up and said, "well they ought to have, they had to be in by today or they're dead in the water". So I suppose my question to you, I know the planners had some kind of explanation and why they picked the date they did, I'm a little unclear as to the justification of that. My question might be, would something like yesterday's date be more in line with what you've also pointed out to me yesterday, you have to have put your application in to come within the framework of plan change 7?

A. Yes.

Q. That's my question to you, it's not anybody else's.

A. I don't have the difficulty with the 18 March 2020 date being there. Frankly I wonder whether there's a need for any date to be inserted because it's a question of fact when somebody applies to replace a deemed permit, whether there was a right of priority or not.

1130

Q. I – so, this is something the planners need to address, perhaps in a more fulsome way, as opposed to not at all. I don't think they address this 18th of March matter at all, because I had of that I recall, I had asked them the

question, why 18th of March, why not actually 30th of September and I felt they gave me a sensible explanation back one on 30th of September a prospective date.

A. Yes.

Q. And so, I think this is important. Is a dated needed? And if so, what date are they proposing, why are they proposing date. So, I've latched onto the 18th of March in my draft because I actually thought I got a sensible explanation. So, can we have – and again, it's the tyranny of shorter and shorter, briefer and briefer, JWS is coming in and –

A. Yes.

Q. – and people are going, I wonder what's on their mind, and, of course, you might know because you at least have an opportunity to talk to your witnesses and I don't until I get actually get them on the stand.

A. Well, I haven't discussed the date issue with Ms Dicey.

Q. No, but I'm just putting it out there because Mr de Pelsemaeker is at back of the Court. We need more explanation for recommendations coming through otherwise we're just guessing.

A. Yeah. Because, I mean, my view is that 18 March 2020 would be a better date than the 30th of September for the reason that Mr Brass gave when he was on the panel because some permits might get replaced before then. So, that's a better date if one is required. It's just not clear to me that any date is required.

Q. Oh well, the planners have to think about it. The need for the date and what date and what's the date addressing, and if no date, will that still be an effective mechanism.

A. Yes, because if we look at the wording of the policy on screen, if it's simply read "where the application is to replace a deemed permit" and of course we all know that deemed permits are prior to 1 October species. Was subject to a right of priority, does the addition of a date add anything. from the point of view of a permit officer receiving an application and saying what is the policy in relation to this policy.

Q. No. so, you and I are having a debate between ourselves, and I'm going, I wonder what the planners have in mind about the need for a date. Anyway, Mr de Pelsemaeker has heard that.

A. Okay.

Q. So, again, just the general instruction. In terms of putting it he essential elements for a policy and a condition, those elements actually have to be explained. Because the Court does not have access to the plan and witness unless they're recalled and put on the stand.

A. Yes. So, can I come then to the way I've re-drafted the reservation of control?

Q. Yeah.

A. I detected a concern somewhere about, and I don't know who raised it or whether I'm imagining it, about whether if the matter of control was simply that the taking of water had to cease when the downstream permit holder gives notices and there was nothing to anchor the reason why a notice may be given, that might be thought not to squarely address the allocation function of priorities.

Q. Ms King raised that

A. Ah, yes. And, so what I've done is split the reservation of control with conjunctive such that it is when the water passing is insufficient to supply, and the notice has been given. So, my submission, that would overcome the concern raised by Ms King. So, those are my efforts, Ma'am.

Q. Okay, I've no problem with that in principle. I think you probably need to define higher priority, maybe.

A. Yes.

Q. You might need to because they cease in 1 October talk about replace a deemed permit, I mean, I know it should be self-evident, but it doesn't do any harm just referring back to section 413, and that is all that that is doing.

A. Yes.

Q. So, we know that that species of deemed permit, not coastal permits or something.

A. Oh, I see. Yes, I understand.

Q. So, it's that one.

A. Yes.

Q. But it doesn't – I didn't think – they didn't need to recraft that, they just need to say 413.

A. Yes. Although, of course, plan change 7 only relates to taking –

Q. Yeah, I know.

A. – use consent anyway, so…

Q. That's probably me being – because the planners recrafted it, I thought no, no – yeah, so it's probably me taking the belt and braces approach, saying we don't need to do anymore than what we need to do.

A. Yes.

Q. Residual flow. You obviously don't see any difficulty with that. I mean, the Court's given its guidance. We are not suggesting that you a residual flow in a consent and so you don't think – so, that's our guidance. So, we didn't want it kicked out, because somebody said, oh, no, court's wanting residual flow, so, we don't want to – and that's not what, you know, the calculation of residual flow is not…

A. Yes.

Q. We're not expecting that and we don't want our drafting to be kicked out for that reason. That would be to misinterpret it.

A. Yes.

Q. Or misunderstand it, and then the question then became, should you be using residual flow although that's a tone which is well understood, it means that the flow parted your door.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. Yes, it's just that all those other matters do also refer to a residual flow, so, we did have a bit of a debate whether there may be some confusion as a consequence, cause they're for very different purposes and they come about through very different circumstances.

A. Yes, and so, that is why in the entry condition and the reservation of control, I've used the words "water passing the point of take," as opposed to word residual flow.

THE COURT: JUGDE BORTHWICK TO MR PAGE

Q. Because – and I think that's correct, because that's all we're thinking about.

A. Yes, and I know certainly, Mr Hickey's advice to me is that amongst that hydrologist, the residual flow is a particular species of thing.

Q. Yeah, this is why we –

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. So, would we then work back up and put that in the new policy?

A. Yes, commissioner, I think that would be the best.

Q. Yes, I think that would help.

THE COURT: JUGDE BORTHWICK TO MR PAGE

Q. So, you could perhaps just take out the word residual and just leave it at flow.

A. Yes.

Q. Yeah.

A. Yeah.

Q. Okay. Right, so, I don't think any of us have got any problems in principle. With that, I think you're asking, can that go forward to the planners, well, yes, and they can look at that and they can look at any other solutions that might have in mind. Higher priority I think does need to be teased out.

A. Yes.

Q. But that might be simply teased out by reference to back to section 413, because you'll need to be looking at a permit – I don't know. I'll leave it to and the planners, but certainly legal input is desirable at this stage.

A. Yes. Well, we'll work on that and I'll discuss that with my friends to make sure that we're on the same page about that.

THE COURT: JUGDE BORTHWICK TO MR MAW

Q. You have any problems, Mr Maw, with – apart from tense?

A. I'm interested in Mr Page's explanation in relation to removal of the notice requirement from the entry condition.

Q. Yeah, that's actually notice was actually important because, well – it was important for the planners. It wasn't just that notice was also key for the Council in terms of enforcement proceedings, I would have thought, have we given notice? We left that to be defined as probably notice in writing, and then the other thing that was really important for them was that you could only cease for 72 hours and again, we flagged what maybe that 72 hours is important.

A. Yes.

Q. And then there could be a rolling 72, but it's only 72, and so we flagged that in our copy.

A. Well, the reason for taking the notice out of entry condition is simply because it relates to my submission that no vires issues arrive from the giving of the notice, and so I conceptualise the giving of notice as being a machinery aspect of enforce rather than something which had to be spelled out in the entry condition to overcome a vires problem.

Q. We might need to think about that further.

A. But that was the thinking behind it anyway.

Q. So, you may need to think about that further and then come back to us which ever way you land with an explanation.

A. Yes. The other thing – I won't pursue that.

Q. Say again why you've taken or removed notice?

A. Well, I had understood that the way that the Court had crafted the entry condition in its drafting –

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Q. Yeah.

A. – was to ensure that the idea that was higher priority permit holder could give notice didn't confront a vires barrier if in the entry condition the permit holder had signed up to that. Now, my submission to the Court is that there is no vires issue arising from the giving of notice because it's the

permit condition of the subservient permit holder that's being exercised not the dominant permit holder.

Q. You might be thinking that, you might be assuming a lot, really, from my drafting at 7 o'clock yesterday morning. In terms of all of the elements that I had in mind, but, - sorry, I'm just trying to get into my own minutes.

A. There's minute in symmetry between the reservation of control in the entry condition. I had just conceptualised the giving of notices as being machinery rather than something that was required.

Q. I can see – okay, well that's something to think about, whether there needs to be reference to the giving of notice, either in the entry condition or the reservation of controller discretion, or both.

A. Yes.

Q. Anyway, things to think about it.

A. Yes. Shall we come to Dr Somerville's work?

Q. Yes, if you wish. Yes.

A. Well, not really to be honest.

Q. No, I know. With your drafting, shall we – what do you us to do with that? In terms of getting onto the record.

A. Well –

Q. Have you any formal submissions in relation to vires or are also adopting what Mr Maw said?

A. No, I'm adoption what Mr Maw said.

Q. Okay, and to get this on the record does this need to be on the record? It's probably desirable because it's come in.

A. Well, I think it could simply be styled as a submission document on the vires issue and uploaded to the website on that basis.

Q. Okay, and that's both versions or just the second version of the definition?

A. Just the second, Ma'am.

THE COURT: COMMISSIONER EDMONSD TO MR PAGE

Q. Did you want to take the word "flow" out in reflection? In the policy. Sorry, "residual."

A. To take the word residual flow?

Q. Yeah.

A. Yes, well if Rachel could make that change for me, I'd be grateful.

THE COURT: JUGDE BORTHWICK TO MR PAGE

Q. All right, and then so we'll just upload that –

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. Just removing the word "residual."

A. Yes.

THE COURT: JUGDE BORTHWICK TO MS DIXON

Q. Upload that to the – as your submission dated…

A. And I would support that, your Honour, because residual flow is defined in the plan by reference to policy 647, and so it's not helpful to have that term here.

THE COURT: JUGDE BORTHWICK TO MR PAGE

Q. No, fair enough. Okay, so, we'll just note that that is a sub submission to your – we note that as your submission on –

A. Yes.

Q. – just a submission by Mr Page. A second page document. Okay, and that's with the word residual take out, Rachel, and then we can upload it from there as a submission. Yeah? Okay. Very good.

A. Now, in relation to the section 124 matter, I should record formally so it's on the transcript that it's OWRUG's submission that you need not decide it.

Q. Yep.

A. I don't know that you need me to explain why, simply to record that that's the submission.

Q. No, you OWRUG need not – OWRUG submits that the Court need not decide the application of section 124 to rights of priority.

A. Yes.

Q. After 1 October. That's your submission?

A. That's my submission, Ma'am.

Q. And that I understand is because OWRUG supports in principle a policy and conditions being introduced into plan change 7, which is to have the same effect or similar effect to those expiring permits and their rights, would that be correct?

A. No.

Q. No, because if there was nothing in plan change 7.

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Q. Would that be correct?

A. No.

Q. No, because if there was nothing in plan change 7 then –

A. Yes. well, so the submission – the reason why its, we say you don't need to decide is because it is not necessary to address section 124 to determine the submissions that have been made because it's really a neutral matter, should plan change 7 proceed, it is OWRUG's view which supports what my friend Mr Welsh said that the prospect of having permits issued before the 1st of October is remote and so it's an issue that will have to be confronted in any event, subject to an idea that I've just had that I've shared with the Court, and if you reject plan change 7, it remains an issue that may need, and I say may carefully, to be confronted in other ways.

Q. The issue of –

A. Of, do deemed permits have the benefit of section 124. So, thinking about it in those pragmatic terms, it's a natural factor either way and so you don't need to deal with it.

Q. Just pausing a second.

A. Now, let me share the idea that I've just had with you.

Q. Now, is this worthy of sharing? Is it a work-type idea? Before we go down any rabbit holes. No, seriously, has it thought through?

A. Yeah, no, I've been thinking about –

Q. Yeah, no.

A. – it for the last day or two.

Q. Okay, good.

A. But I haven't shared it with the Court.

Q. Yep.

A. And this addresses the situation where you decide that you do or should address the 124 issue in relation to the permits have the benefit of 124, not just priorities, and you find that Dr Somerville is right. A work around for that outcome would be to replicate section 124 in plan change 7 itself as permitted activity. That, and if there are jurisdiction issues that arise in relation to that, just as the Court in the *Lindis* case, section 293 is your way forward.

Q. Putting that aside, 293 and the how to get it there, if you like, in terms of scope aside, what did you have in mind? Yeah, what did you have in mind, could you just tease it out.

A. Yes.

Q. What is the permitted activity? So, if I have filed an application to replace my deemed permit.

A. Yes.

Q. Okay, so, that's it. I filed an application to replace my deemed permit. Then what? What is permitted?

A. Then, well, exactly as the section 124 language proceeds, Ma'am, you may continue to exercise that permit as a permitted activity, subject to its existing conditions until that application has been determined.

THE COURT: COMMISSIONER EDMONDS

Q. So, the possible implications of that are people are incentivised to keep delaying, getting their permits decided and this permitted activity may go on for quite some years.

A. Well, that is a risk that, I think, was raised with Mr Maw earlier in the week about how section 124 operates in any event, and so we're – if Dr Somerville is wrong and section 124 applies, then the risk that transition period between the application and the determination may take some time arises pursuant to the statute anyway, and so, the risk is no different if the effect of section 124 is replicated as a permitted activity within plan change 7, so, again, Commissioner, my submission is that's a natural factor, because the risk of delay exists under 124 are not

suggesting a mechanism that has any different function to what the Act provides for. Because what I have in mind is that the linage in 124 is used is that the permit can effectively be exercised on its terms until the replacement is determined. Oh yes, implicit in that is provided the application was made prior to 1 April 2020 – 21, I'm sorry.

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Q. Sorry what date?

A. 1 April 2021.

Q. Okay. So, only those people that got in in the six months are covered by it.

A. Yes. Well, section 124 contains a discretion –

Q. Yeah, for the next three months, yeah.

A. – in the subsequent three months, and so, I'm envisaging the same machinery coming forward.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So that this is dealing with, if you like, the – if Dr Somerville is right in relation to, here the focus is on rights of priorities ceasing and that there being a gap between 1 October date and the eventual replacement date so your submission's really addressing the gap, what happens in the gap, or to fill the gap –

A. Yes.

Q. – and to hold everybody true to their current arrangements and therefore true to the flows that manifest as a consequence of that.

A. Yes.

Q. And when I asked the question, I was of both lawyers and Dr Somerville, it's that gap.

A. Yes.

Q. Not the whole thing, shooting match coming down, but it was that gap that I was particularly concerned about.

A. And the gap is either that the permits have the benefit of section 124 but the priorities don't or the gap is that neither the permits nor the priorities have the benefit of 124, but depending on how you decide that issue will

depend on the scope of what you might consider is a work around for the unfortunate outcomes of that.

Q. And this is where you now need to give some thought to this because you say the Court does not need to decide the section 124 issue, whether in relation to the whole permits continuing to be exercised under 124 or just the rights of priority exercised under 124. You don't need to decide that, what you need to decide is that there really is a need to have some replacement policy, and I think that we then have been there for some time and have been looking for that policy. So, that then creates a gap and potentially a litigation risk, but it's not in a sense – that is for the parties unless the parties are insisting that the Court either make a decision and close it down as best you can, because somebody might take it somewhere else, or might take up a declaration somewhere, so either the Court make a decisions or the Court act conservatively to fill a perceived gap, which may or may not exist, depending if we don't make a decision. So, it's like, I was quite happy not making more decisions than I need to and just leaving you with the litigation risk and not commenting on that.

A. Yes.

Q. Because my best scenario was always that 124 applies to the rights of priorities.

A. Yes.

Q. Yes.

A. Yes, and 124 applying to the rights of priorities and the deemed permits is the position that OWRUG advocates for, we're just dealing –

Q. So, you have to be clear, do you want us to make a decision or not make a decision, because then – the litigation, there are risks.

A. Yes.

Q. Yes.

A. Well, OWRUG's position is that you shouldn't decide 124, but I'm conscious that that view is not shared by all the parties in this room, and so –

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. I thought nobody wanted me to make a decision.

A. I was more agnostic about it, Ma'am.

Q. You were agnostic.

A. But that was discussion between counsel.

Q. I see, okay.

A. And that just boils down to what I mentioned in the Court, until that discussion that we had, I didn't see a litigation risk.

Q. You didn't see a litigation risk?

A. No, not really.

Q. Yeah, okay. Well…

A. And if a party wishes, saying if the Court, say –

Q. It may not even be a party that takes us up.

A. – no, but say if somebody appeals a decision of the Court that 124 does to apply to the permit –

Q. So, we make it –

A. – and I think if it applies to the permit it has to apply to the priority as well as I mentioned in my submissions, but if some person wants to appeal that, the policy will continue and plan change will continue in the interim.

Q. Well, it will, but it's just that there will be a policy which folk can take advantage of sooner or later just as soon as the Court gets a decision out.

A. See, my cheeky submission, Ma'am, would be if the Court finds in favour of the party's position then you should make a decision and if it doesn't' then it shouldn't. I was going to sit down now.

Q. I thought, of course, there would be, and that has been where – and we're thinking about that, whether to close it out, but we're also mindful if the Court need not make a decision then it should, I mean, that's just good judicial behaviour, if you like.

A. And I think that was the earlier discussion, Ma'am.

Q. And that was your earlier position.

A. Yeah.

Q. And then I thought, well, then as long as y'all know what the risks are, then we have done what we can, and so, now we're looking at Mr Page asking us to close out the risk, and so, you can't have it all ways, make a decision, not make a decision, close out the risk, not close out the risk.

A. No, I think Mr Page's submission has some appeal to close out an issue of that if the Court found in favour of Dr Somerville's position.

Q. Yeah, but then you require me to make a decision, which really, you'd rather me not.

A. Well, I don't like being the only –

Q. – and I only ask because nobody…

A. – one that says make a decision, but I'm not requesting the Court to make a decision.

Q. No.

A. I just don't see the same downside in the Court make a decision.

Q. Okay.

A. Because I think the parties have presented in my submission, a fairly comprehensive response to Dr Somerville.

Q. Well, you no doubt –

A. – that's for the Court to decide.

Q. – everybody can get to that at their closing submissions, what it is they would like the Court to do, but the Court asks the questions because it wasn't assisted to understand the nature of the beast or creature that it was being asked to recreate. Recreate the creature in the statute or do something looking in an effect, if you like, of that, looking at rights as between abstractors, and because the Court didn't understand the legal basis for the relief being pursued, the Court has asked questions. Unfortunately, from some parties' perspective, it's turned over a stone too many in asking those questions.

A. Well, perhaps if I just sit down on this point, Ma'am, from Trustpower's perspective, it doesn't need new jurisprudence to be created near the end of the RMA, so if – what is important is that come 1 October all permit holders are required to take active steps to stop their take, because I did point out some of the practical consequences of that.

Q. Yes.

A. There still will be ongoing activities because these races will still discharge from collections along the way of inflows, but also, the potential for an irreversible effect in terms of the ecology and that does exist and I think that should weigh – but you haven't any evidence on that, but that could weigh on the Court's determination.

Q. Okay.

A. In terms of an interpretive pragmatic solution.

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Q. Oh, well, everybody to think about whether they think the Court should make a decision and is to make a decision on 124 and its application to deemed permits. In your closing submissions, it just needs to be a sentence, what do you want us to do?

A. Well, that's tomorrow for me, Ma'am, so I'll give it some more thought than I did over a coffee.

Q. Over a coffee?

A. In terms of my comments to Mr Page, so, yes.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Okay, no, that's fine. Anyway, so that also applies to you, actually, and, you know, apart from the mechanism of how to get that in there, what is the mechanism, how does that stand up? The introducing the 124 mechanism.

A. Yes. Anyway, that's quite enough bright ideas for one morning for me.

Q. Yes, that's why I said is this one thought through, this one, yeah.

A. Well, no, I do advance it in all seriousness.

Q. Yeah, I know you do, because there is a – you know, from my point, I was only bothered not about so much the deemed permits, but was particularly bothered about the rights of priority, and then what?

A. Yes.

Q. And in that gap of time between 1 October and anything, time for folk to get their decisions in on their consents.

A. Yes. All right. Can I then touch very briefly on Dr Somerville's submissions? Because he –

Q. I do want you to address savings or transitional, because in your submission, you seem to go there's a savings provision, it's not transitional, and I wasn't sure why you said that, but that might have informed your thinking and your planner's thinking on the relief that she proposed at the outset. So what do you say, is the s 413 a savings or a transitional provision?

A. My submission is that functionally, it's transitional.

Q. Functionally transitional.

A. And I say that because of s 413(7), and this is where I depart from Dr Somerville's characterisation of OWRUG's submission, because he says that the implications of OWRUG's submission is that the deemed permit may never cease. In my submission, that's not a correct understanding of what we're at least trying to say, and what I'm going to do is to track through the elements of s 413 that, in my submission, are significant. So, if we look to s 413(1).

Q. Yeah.

A. I support the submission that was made, I think, by Ms Williams about the characterisation of the deemed permits in this case, that they are, in fact, water permits under 413(c), and thus are a resource consent as defined in the Act. Importantly, the words "deemed permit" have only very narrow application in the Act, and we see that from the last sentence of 413(1). They are only called deemed permits for the purposes of this section and 414 to 417.

Q. So deemed permits are only called deemed permits?

A. They're only called deemed permits for the sections 413 to 417. Everywhere else in the Act, the Act is blind to that status, and they are simply water permits. The next element of the section is 413(3), because this is where the expression "finally expires" is to be found, but the Act doesn't say that permits finally expire, s 413(3) says that the permits "shall be deemed to include a condition to the effect that it finally expires," so

413 is simply a species of deemed condition, and so forms part of the permit.

Q. Sorry, say that last part again? I'm just taking notes as you go. So –

A. Section 413 deems the inclusion of a condition, and it's the condition which says the permit finally expires, so by the time we've got to 413(3), we have a water permit with a condition that says it expires on the 1st of October 2021, and so that is really no different to any water permit that contains an expiry condition. There's nothing different about that species of condition through the use of the word "finally." So, having observed that we've got a water permit with a condition as to term, we can then move to s 413(7) and observe that: "the holder of a deemed permit may, in order to replace that permit, apply at any time under part 6," and that permit is the same permit that contains a deemed condition as to its final expiry, and as my friend, Mr Maw, observed, part 6 contains s 124, which doesn't carveout deemed permits, so it's simply a matter of tracking in sequence through the sections to understand the nature of the right that s 413(7) gives to transition from a deemed permit to a permit granted under the Resource Management Act, and so Dr Somerville is critical of the idea of reading words into s 413(3) saying that it's subject to s 413(7). In my submission, it's not necessary to do that.

Q. Saying that it is, sorry?

A. Well, in –

Q. I just didn't hear you, sorry, yeah.

A. Yeah, so in Dr Somerville's submissions, he says that the effect of what OWRUG's case does is to read into s 413(3) the words "subject to 413(7)" and he says that would be improper, and I agree with that, but that's not what we're doing, we're simply asking what is the nature and the content of the permit that section 413(7)refers to.

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Q. So, what is the content…

A. Of the permit that section 413(7)refers to, and it's simply the case that it contains a condition which specifies its expiry date.

Q. Mhm.

A. Now, that in my submission is the end of the matter. I want to say that section 124 doesn't preserve a permit.

Q. Doesn't preserve?

A. No. So, the permit expires on the date that the permit expires as specified on the permit. What section 124 does is create a statutory right to carry out an activity on the terms of the expired permit. So, if Dr Somerville is right that Parliament intended deemed permits to expire absolutely on the 1st of October, then section 124 isn't inconsistent with that because the permits do expire. It's just that the Act provides a statutory right to carry out certain activities if there is a replacement application on foot.

Q. Mhm.

A. In every other respect, I adopt the submissions of my friends that have been presented and so I don't need to say anything else.

Q. Very good. All right, thank you. Which brings us to Mr de Pelsemaeker who has just entered the room.

MR MAW CALLS

MR DE PELSEMAEKER (AFFIRMED)

EXAMINATION: MR MAW

Q. Do you confirm that your full name is Tom Willy De Pelsemaeker?

A. Correct.

Q. And your qualifications and experience are set out in your statement of evidence-in-chief dated 7 December 2020.

A. Correct.

Q. Now, you have prepared a statement of evidence in reply, dated 25 June 2021?

A. Correct.

Q. Are there any corrections that you wish to make to that statement?

A. Yes, there are some corrections that I would like to make to the summary statement as well as the evidence in reply.

Q. Pause on the summary statement, we'll come to that after we've dealt with the statement of evidence in reply.

A. Yeah.

Q. So, lets work through corrections to the evidence in reply first.

A. Yeah. There are a few minor typos but the key ones, and this is not a typo, that I think needs to be corrected is on paragraph 54 on page 24.

Q. I have paragraph 54 on page 23.

A. Correct, yes, it goes onto the next page.

Q. Oh, I see, thank you.

A. So, it's under drafting, a potential rule, I'll call it that, potential, 10A31B, that goes onto the second page, page 24, and on the second line under (ii), there is reference condition B and that should be condition (ii) and my apologies for that, that is because the drafting has gone through a number of iterations over the last couple of weeks.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. So, just pause there a second. So, the second – so, this page 24 under (ii) should read conditions (ii) (v) and (vii) of Rule 10A3.1.1 and condition II of rule 10A3.1A.1.

A. That's correct. Okay, I got it, and a similar or identical issue arises on page 32. Again, rule 10A.3.1B.1, and that is the sixth line up from the bottom of that rule under AII conditions, (ii), (v), (vii) of Rule 10A311 and condition B, and B should become (ii).

Q. Any other edits?

A. In appendix 5, sorry, appendix 7, which is a section 32AA analysis. In the table under option 4.

Q. Sorry just… yeah. Table under…

A. Option 4. So, that's on the next page.

Q. Yeah.

A. Third column under the heading "community water scheme upgrader." The first sentence can be crossed out. So, it is in the table under option 4 in the third column, and there you have the heading "community water scheme upgrader," and the first sentence can be crossed out. The sentence starts with the words "the risk of stranding opposite assists is reduced." So, that can be crossed out.

EXAMINATION CONTINUES: MR MAW

Q. Subject to those corrections, do you confirm that your statement of evidence in reply dated 25 June 2021 is true and correct to the best of your knowledge in belief?

A. I do.

Q. Now, Mr de Pelsemaeker, you have also repaired a summary of the evidence set out in your statement of evidence in reply.

THE COURT: JUDGE BORTHWICK

Do we need this? Inasmuch as I read this yesterday, this is my day off reading this. I don't know that we need another summary of this. Do you want a summary of this?

THE COURT: COMMISSIONER EDMONDS

No, no, I've read it several times, including in the middle of the night because I was having trouble sleeping.

THE COURT: JUDGE BORTHWICK

As I was a couple of nights before, thinking about that policy.

EXAMINATION CONTINUES: MR MAW

Q. Perhaps the only question I would but to Mr de Pelsemaeker, is there anything in the summary of your evidence in reply that picks up on any of the conferencing that occurred after you had filed your reply that you perhaps wish to highlight to the Court prior to answering questions?

A. Well, obviously, the matter around rights of priority, we'll address it to further conferencing tomorrow, and possibly on Monday as well, and I appreciate –

THE COURT: JUDGE BORTHWICK

Q. I kind of read this subject to knowing that you were going to go into that.

A. Yeah, yeah, yeah, yeah, yeah, yeah, and keep in mind as well, to provide explanation about why we are putting certain elements in there.

Q. Yeah. Oh, no, that would be excellent, because, you know, I don't have access to witnesses, so we're seeing it for the first time, hearing it for the first time, and then I'm left with the exercise of interpretation, and so, you know, where you've got key elements, such as dates or words and phrases, really do need some explanation.

A. Keep that in mind, thank you.

EXAMINATION CONTINUES: MR MAW

Q. Thank you. Do you confirm that the evidence you're about to give is true and correct to the best of your knowledge and belief?

A. I do, yes.

Q. Could you please remain for questions from my friends and from the Court.

THE COURT: JUDGE BORTHWICK

Mr Welsh, you were the first person to indicate that you had cross-examination.

MS WILLIAMS:

Just to clarify, your Honour, I did indicate the other day that I had questions for Mr de Pelsemaeker as well.

THE COURT: JUDGE BORTHWICK

That's okay, Mr Welsh got there first.

MS WILLIAMS:

I'm just clarifying that I'm –

THE COURT: JUDGE BORTHWICK

You're second, we know that, and I did ask Mr Cooper who else, and I think maybe OWRUG and maybe TAs have also indicated subsequently, so that's fine, and Ms Dixon, did you have any questions?

MS DIXON:

I don't think I do at the moment, your Honour. I know I indicated the other day that I might want to.

THE COURT: JUDGE BORTHWICK

We'll have you going last whilst you reflect on your friend's questions. Yeah. Okay, Mr Welsh.

CROSS-EXAMINATION: MR WELSH

Q. Mr de Pelsemaeker, can I take you to paragraph 50 of your reply evidence, please, and at that paragraph, you identify that detailed technical information around the implications of plan change 7 on the operation of HEP schemes has been nearly exclusively provided by expert witnesses on behalf of Trustpower, correct?

A. Correct.

Q. Yes, so you acknowledge, don't you, that Trustpower has provided detailed technical information on its schemes?

A. On certain aspects of its schemes, yes, correct.

Q. And because of the evidence of Trustpower that it has given, you have a better understanding of Trustpower's schemes in the plan change 7 context than hydro schemes generally, don't you?

A. Correct.

Q. And it seems to me, Mr de Pelsemaeker, that a concern that's apparent in your evidence is that there's limited information about how plan change 7 might affect other hydro schemes or operators, is that fair?

A. That is correct, yes.

Q. And as a result, it's difficult for you to understand how plan change 7 may impact on other schemes and operators, that's correct too, isn't it?

A. If I do that, I would make assumptions.

Q. And given that, if plan change 7 were to provide – a certain variety of words have been bandied around – carve-outs or exceptions that were limited to particular Trustpower assets or schemes, would this be less concerning to you than exceptions that applied to all hydro schemes generally?

A. Correct.

Q. Now, if you could turn to your 32AA analysis in respect of hydro, I think – is that appendix 4 or 5? Appendix 4.

THE COURT: JUDGE BORTHWICK

Just pause there a second whilst we find that.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. Actually, my notes were correct, it's appendix 5, so if you just turn one page, Ma'am, where you're addressing Ms Styles' evidence. Apologies for that. Now, in your 32AA analysis in appendix 5, you address the relief sought by Ms Styles' supplementary evidence, which, in summary form, proposed providing exceptions for hydro generally, don't you?

A. Correct.

Q. And you say in your 32AA analysis that a cost risk of the approach of Ms Styles' supplementary evidence, which you've put in under option 1, is it allows for extended consent terms for new and existing takes for all HEG schemes, correct?

A. Correct.

Q. And so limiting any PC7 duration exemptions to particular Trustpower schemes or assets would go some way towards addressing this particular concern of yours, wouldn't it?

A. Yes, I think, if I may expand on that, the nature of plan change 7 is that it's a process-driven or focused plan change, especially now, in its current form. In absence of a framework that sets out what the outcomes are to be achieved, and in absence of a framework within plan change 7 to address environmental effects, the risk component becomes important, and it really comes down to trying to constrain that risk, and I think in those kind of situations, identifying specific activities is a way of calculating the risk. It becomes a calculated risk rather than an unknown because when I thought about Ms Styles' evidence, I could not foresee how many applications council might receive over the lifespan of plan change 7, and what the proposals themselves would entail in terms of impacts or the scale of the activities.

Q. Thank you, so, picking up on that, one response to that concern or that risk you've identified is limiting any PC7 duration exemptions to particular Trustpower schemes or assets. That would go towards addressing that risk.

A. It becomes easier to comprehend the risk, yes.

Q. Yes, thank you. Now, I want to talk a wee bit around or question you around the MPSFM.

A. Yeah.

Q. And draw your attention to that matter. That may alleviate some of your other residual concerns. Now, are you aware that council has recently amended its water plan to include several mandatory provisions from the NPSFM.

A. That is correct, yes.

Q. Yes, did so on, I think, 1 June?

A. Yes.

Q. Yes.

A. In fact, it's in my evidence.

Q. And one of these mandatory clauses is clause 3.241, rivers, isn't it?

A. That is correct.

Q. And that provision that has been inserted into the water plan, in summary, requires the loss of river extent and values as avoided unless the council is satisfied that there is a functional need for the activity in that particular location and the effects of the activity are managed by applying their effects management hierarchy, isn't it?

A. Correct.

Q. And another clause inserted into the water plan, clause 2.2612, relates to fish passage, doesn't it?

A. Mhm, correct.

Q. Yes, and those clauses inserted into the water plan are now operative, aren't they?

A. They are now, yes.

Q. Yes. So do you agree that this means that when considering applications for water takes for new activities, the council will have to consider these

new provisions in the water plan to the extent that they are relevant to those applications?

A. They have to, but obviously

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Q. Relevant to those applications?

A. They have to, but, obviously, the ability to do so is constrained by the activity status as well. For example, if you come under the controlled activity status, you wouldn't be able to consider that matter.

Q. Well, I'm talking about new applications –

A. Oh, new application, yeah.

Q. – that are still to be determined under the water plan.

A. So new activities.

Q. New activities.

A. Yeah, yeah, yes.

Q. So my point is, for those new activities, which are captured by policy 10A.2.2 under plan change 7, but for those new activities, it's fair to say that the regional planning framework since we started this hearing has now become more fit for purpose than when plan change 7 was notified, hasn't it?

A. Correct.

Q. Correct. Now, I want to talk about your alternative relief, although I'm correct in saying that your opinion remains no change in respect of hydro, but you've provided, helpfully for the Court and the parties, an alternative should the Court be so minded as to adopt that, and that's what I want to talk about.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. So what paragraph are we going to?

A. We're going to – I think it's Mr de Pelsemaeker's 54, where he sets out that alternative approach.

CROSS-EXAMINATION CONTINUES: MR WELSH

Q. You're aware that Trustpower's four deemed permit races are functionally connected to the wider deep stream and Waipori hydroelectric power scheme, aren't you?

A. Yes.

Q. And you're aware that the wider suite of deep stream and Waipori consents all expire in 2038, that's been the evidence before the Court?

A. Correct, yes.

Q. And as part of your alternative relief, you've recommended, as an alternative, limiting Trustpower's deemed permit replacement consent durations to 2035 as opposed to 2038, when the rest of Waipori and deep stream consent expires, correct?

A. Correct.

Q. And you do that in order to set up what you suggest is an incentive for Trustpower to apply for its renewed full suite of Waipori and deep stream consents about three years earlier than it might otherwise have done so?

A. Correct. The reason, the key reason for going back to a 2035 expiry date is because it goes back to the original version of the plan – sorry, the plan change – and the intent that where we provide some leeway for longer-term consent durations, we would still try to make sure that they are considered within the lifespan of the new plan. The incentive, I think, is a consideration as well. Yeah.

Q. And I suppose, Mr de Pelsemaeker, I put to you another scenario rather than the one that you have suggested. Under the relief you've recommended would simply be for Trustpower to apply for the replacement of the deemed permit consents in 2035, when they expire, and then the remainder of Waipori and deep stream consents in 2038. That's a possible outcome and a rational outcome too, isn't it?

A. It is a possible outcome.

Q. Yes.

A. I think there are some efficiencies for Trustpower as well in bundling all those consents into one application, even if that means they have to bring some of –

Q. And those efficiencies, Trustpower sought by bundling in 2038. But if that scenario that I've just put to you did eventuate, then that would mean that we would not have an integrated management approach or assessment of the entirety of the Waipori scheme?

A. That is correct, yes.

Q. Now, can I take you to your paragraph 48, Mr de Pelsemaeker?

A. Yeah.

Q. And you have provided the opinion that certain aspects of the HEG schemes that are currently authorised by the deemed permits appear to have significant impacts on the water source from a hydrological, ecological, and a cultural perspective, and for your comments around those significant impacts, you provide citations in Mr Mitchell's evidence and Mr Maw's cross-examination of Mr Mitchell as recorded in the transcript, don't you?

A. Correct, yeah.

Q. Mr de Pelsemaeker, I'll put to you that Mr Mitchell did not say in his evidence or in the parts of the transcript that you've referred to that Trust Power schemes are having significant from a hydrological, ecological, or cultural perspective.

A. No, that is the correct. That is – he did not say it in those words. I simply reflected on what he said and the key to that statement is also the word "appear" or "may." It was a personal interpretation. One other consideration is, and it is not captured by what Mr Mitchell was saying, is that from a cultural perspective as well, based on what I've – and I'm not a cultural expert, but based on what I've heard and what I've read, there are some inter-catchment transfers which is a matter of concern I believe for iwi. It is also something that is noted in the proposed new RPS as a resource management issue of significant. So, that's where I was coming from.

Q. Okay. So, we got to the point that Mr Mitchell hasn't said what you've ascribed to him.

A. No.

Q. And I've reviewed the transcript and searched on the Beaumont water race, which is the only race that takes water from the Clutha to the entire catchment.

A. Correct.

Q. And what would you say Mr de Pelsemaeker that having done so I can find no reference by any of the iwi witnesses to the concern you've just raised?

THE COURT: JUDGE BORTHWICK TO ME WELSH

Q. So, iwi don't talk about that specifically, is your question?

A. No.

CROSS-EXAMINATION CONTINUES: MR WELSH

A. The cultural matter arose when I was reading through planned water plan the proposed RPS.

Q. So, it's more your concern then Mr Mitchell –

A. Yes, absolutely, yes, it's only…

Q. – or iwi's, as expressed. All right, well, I'm not suggesting for one moment that there are such effects, but if there were, Mr de Pelsemaeker, would not Trust Power's relief of a longer-term consent being a discretionary activity mean that those issues if they did arise could be address by conditions or declining the consent?

A. That's a possibility, yes.

CROSS-EXAMINATION: MS WILLIAMS

Q. Mr de Pelsemaeker, I wonder if we can turn first to paragraph 70 of your evidence, and that's on page 34, and in that paragraph, you just acknowledge that there has been evidence provided to this court that priorities are being exercised or are underpinning flow water sharing water agreements that currently exist between permit holders.

A. That is correct. Yes.

Q. And then I'd like to turn to paragraph 83 which is on page 38.

A. Yes.

Q. So, prior to this paragraph, you've been discussing some issues and you've also been talking about the evidence which has been provided by Ms King and Mr Cummings.

A. Correct.

1240

Q. And so, then you've got to a point in this paragraph where you've come up with a way to try and address those concerns.

A. It is something, and I am conscious of the limited time that we've got, something that I thought at the time might be worth exploring. My interpretation from Ms King's and Mr Cumming's evidence is that there is implications not just for Council, there is also implications for deemed permit holders. Basically, we're asking them to do a roll over for six years which means that they're going to be tied to their existing infostructure for the next six years, but because of this rule they had to put in telemetry which is not cheap. I was a little bit concerned that given all the extra obligations that the approach would potentially kind of fail under its own weight and I was looking at whether we could just simply constrain it to a number of areas where they are really needed. I understand that it that's only under addresses, only looks at priorities from an ecological point of view, and the benefits it creates for ecological values, I'm very mindful of the fact that there are other aspects to that as well, which is continued access to water –

Q. Sorry, what was before – what only looks back priorities in terms of its ecological values, is that what you just said?

A. No, this rule – sorry, this proposal would only look at the benefits it creates, incidental benefits it creates for ecological values, the way I've proposed to constrain it.

Q. Yeah, and that proposal being focus your efforts, if you like.

A. Where galaxiids are.

Q. Priorities where the galaxiids are. Yeah.

A. And we've heard evidence that priorities do play a role. The issue that I'm playing with it, and I think the Court as well, is to what extent is the exercise of priorities now overtaken by agreements such as the Falls Dam

agreement, and is the continued existence of the Falls Dam agreement, reliant on the priorities being carried over. I was hoping that I was going to get an answer to that in the last couple of days but that issue hasn't been discussed, and with that risk still being there, I think carrying them over as a default is probably the best way to go about it.

Q. So, just, and I'm going to ask you to put one side, I know that we've had wording proposed by the Court and we've also had wording this morning proposed by OWRUG, and I'm not actually asking you to think about that wording at this point. I did want to just perhaps run through the proposal in paragraph 83 because the way I understand your proposal in paragraph 83 which as you say is very much about an ecological effect and it's actually a subset of all ecological effects –

A. Correct.

Q. – because it is confined to galaxiids. So, the first matter which would need to be address is that there would need to be, as I read your paragraph, so, it's catchments where priorities are being exercised, so in terms of an assessment of an application, the first point is, not only is there existence of priorities, but they're being exercised, so we've got two points there.

A. Correct, yeah.

Q. The next condition, essentially, is that that is also a catchment where galaxiids are present.

A. Correct.

Q. And then the third aspect is that there is an interface between the presence of the galaxiids and the exercise of priorities.

A. Correct.

Q. So, you've actually, suddenly we've got at least three, and potentially four, because if we say presence of priorities and exercise of priorities is two different things, we've got four matters now.

A. If I may, probably the first criteria… if I would rewrite the sentence now, I would say, we're priorities exist on deemed permits.

Q. Right.

A. Yeah. And that is the exercise that we actually did or tried to do, yeah, it's not, the wording - should have worded it differently in that regard.

Q. And I know you carry on to say in paragraph 85 and on from there that you've talked to another colleague within the Council about how easy it would be to work out presence or likely presence of galaxiid.

A. Likely presence, yep.

Q. And you certainly, and I would accept as well, that the information before the Court is not sufficient to determine that at the moment.

A. Especially in terms of where priorities are being exercised. I would agree where they exist on deemed permits, that is something that can be addressed by simply going manually through the deemed permits. We've done that exercise in part during expert conferencing. It would be a matter of days. It's not – it's a hurdle that you can overcome, and with regard to the galaxiid populations, reflecting on what was said in court, I think there is a general understanding of the special distribution, the exact locations, there is a little bit of uncertainty around…

Q. Absolutely, and in part, that comes down to that galaxiids are often remaining in smaller tributaries where the only ability to actually access those tributaries is with consent of landowners.

A. Yeah.

Q. So, there's just that constraint in terms of, they might be, we actually don't know.

A. Yeah.

Q. Okay. So, I also was then reflecting on actually objective 10A.1.1 and that's set out in appendix 1, and I guess this is coming back to this purpose about facilitating an efficient and effective transition from the operative freshwater planning framework todays a new integrated regional planning framework, and the thrust of your evidence about this being a cost effective and efficient process –

A. Correct.

Q. – for applicants.

A. Correct, yes.

Q. And my concern, I guess, with trying to put a galaxiid condition in is actually that adds additional layers of complexity for processing and for applicants potentially because is it the applicants that need to point to presence of galaxiids or is it Council –

A. Yeah.

Q. – it just becomes more cumbersome.

A. I totally agree with you in that regard. My concern, as I said before, is that the way, with some of the drafting that was suggested or the amendments that were suggested on the proposed conditions. It was quite onerous for deemed permit holders to actually enforce them.

Q. Yes.

A. And my concern was that, well, if that is consequence of it, you might actually get the opposite effect, that people stop exercising them because of all the hurdles and the hoops they have to go through. So, one of the outcomes that the plan change is trying to achieve is to avoid loss of further environmental degradation. So, I agree with you, a more tailored approach is not cost efficient in that regard, but I think there was that risk and that was where I was coming from, and I also want to say about, that was a suggestion at the time when the discussion was still ongoing, and I just wanted to keep it alive at that point.

Q. And I understand that, so thank you for that explanation. There's just one additional matter that I wanted to flag with you because the focus within, or the way in which your conditions or pre-conditions, I'll put them that way, are framed in paragraph 83, it does term it to or confine it to catchments, and of course, we've had evidence actually from Ms King, I think, the other day, about there being cross-catchment –

A. Yeah.

1250

Q. – interrelationships between I think, it was the Roaring Meg catchment and the Lowburn catchment, if I have that right, so there's that complication, and the other thing which the Court, and you will have heard as well, has heard evidence about is that, actually, often the infrastructure which is currently being used for the exercise of priorities is the more

dated infrastructure, so we're talking border dyke blooding, and that actually also has an incidental environmental benefit because water then ends up in nearby by not connected water bodies, which otherwise would not.

A. Yeah.

Q. So there's a greater range of incidental environmental benefit from the exercise of priorities than just the galaxiids.

A. Yeah.

THE COURT: JUDGE BORTHWICK

Q. And you're agreeing with Ms Williams that there is a broader range of environmental benefit than just benefitting galaxiids through the exercise of those priorities, or I think that was your question.

A. Yeah, I would agree so. The fact that water is there, just the presence of water, is a value as well in many regards, and yeah.

Q. Okay, all righty, thank you.

CROSS-EXAMINATION: MS IRVING

Q. I'm going to be asking you questions with two hats on. I'll start with an OWRUG hat on, and then I'll put a territorial authority hat on. I'll let you know when I'm –

A. Thank you.

Q. – changing hats. I'd just like to start with your discussions on page 11 of your brief, please. This related to a conversation or matter that was raised by Ms Kate Scott around the possibility of phasing the replacement and the dates that might apply to renewed permits under plan change 7. At paragraph 26, you set out reasons why you think these concerns are perhaps not as severe as Ms Scott articulated them, and at paragraph A, you take the view that replacement permits will have a range of expiry dates as they are processed under plan change 7.

A. A range of expiry dates, but also they will be issued on different dates as well, so yeah.

Q. So when you say they'll be issued at different dates, you mean that their expiry date by virtue of that will be different or staggered? Is that –

A. Yes, yeah.

Q. I understand that correctly? Now, would you agree that one of the concerns that has been expressed, and I think particularly by the likes of Ms McIntyre, about the shortcomings of the current regional plan water framework, is that it has failed to allow catchment-based or cumulative effects to be appropriately accounted for?

A. Correct.

Q. Doesn't the approach or the outcome of issuing permits with expiry dates that are simply six years from their date of grant serve to repeat or exacerbate that same issue?

A. In the short term, I wouldn't say exacerbate, but you'll run the same risk, but also, my response was to Ms Scott's proposal, which I guess was, in her view, the consent expiry date should be further down the track, and to me, there was a risk there that you wouldn't be able to consider those consents within a reasonable timeframe to achieve the outcomes in the new land and water plan.

Q. Yeah, I think from memory, she talked about the possibility of staggering catchments.

A. Yeah, yeah.

Q. Is there not an opportunity through plan change 7, if we were to take a staggered approach to the expiry of permits under plan change 7, to improve the potential effectiveness or implementation of the land and water plan framework once it is operative, and I say that because you have an opportunity through plan change 7 to put a, say, common backstop on permits issued under it within the same catchments, allowing for more catchment based management of those replacements under the land and water plan?

A. There is an opportunity, but I think I also noted in my evidence, what Ms Scott presented, it almost was like a theoretical model, I was not presented with any expiry dates for specific catchments, so I couldn't really judge it on that basis. Again, though, there is a risk, if we do that now, that there is a disconnect between the expiry date, the comment expiry date that would be set in plan change 7, and then the timeframe

that is set in a new plan, so in an ideal world, you would have your timeframes and your new land and water plan first, and then determine the consent expiry date. I thought it was a really good idea, but I don't think that it fits well within this framework.

Q. Do you think that the proposed regional policy statement might provide us with some signals about those sorts of timelines?

A. It does. I haven't had time to go through it in detail. It does set timelines, but those timelines are for the accomplishment or the achievement, sorry, or long-term visions, and a long-term vision, to me, is something where the whole picture needs to be complete. The risk that you have is that if you work towards timeframes for achieving the long-term visions, that you put everything on the backburner until then and you work towards that date, and that you actually kind of miss necessary steps along the way as well.

Q. Do you think that is addressed, though, if the timeframes that might be staggered all fall within the life of the land and water plan?

A. Sorry, could you repeat that?

Q. Do you think that that issue is addressed, so that the possibility of, I suppose, simply kicking the can down the road again if the dates for staggering catchment sunder plan change 7 still fall within the life of the proposed land and water plan? So, in essence, being no later than, preferably before, 2035.

A. I think there's a bit of a risk. In order to set – we haven't done the work to determine how long the transition of different bits of work will take. What I'm trying to say here, in order for those long-term visions to be achieved within the timeframe set in the RPS, there might be a requirement to actually initiate certain aspects of that, change certain land uses way before that, and at the moment, we cannot do that without the work being undertaken.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.02 PM

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Ms Irving, are you now moving to TA questions?

A. Yes, that's correct.

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. Good afternoon, Mr de Pelsemaeker. Can I ask you please to turn to page 28 of your supplementary evidence? And I'm looking at your paragraph 61, and the reservations you express about Mr Twose's alternative relief. I'd like to talk to you particularly about your paragraph 61C and your concern that the assessment may not account for environment effects arising from community water supply takes being granted for durations up to 2035. I'm interested in, I suppose, ways that might fix that. Under – would it be an option for consent for community water supplies to be required under the operative provisions as well as plan change 7. So, that the environment effects matters that are picked up in the regional plan water van be addressed, but also the matters that Mr Twose includes in his role associated with the links of efficiency improvements and so on that he sought to include effectively as a nod to the NPSFM. Would that be a possibility?

A. Can I think, I'm just going to go back to Mr Twose's proposed rule.

Q. It's 10A31A.2.

A. So, my – because I actually thought it was really well crafted, the rule. I find that with a lot of things, but the matters that were addressed through rule as Mr Twose proposed it, seemed to focus on managing the demand side of water. I couldn't find anything in there that really deals with the effects of the taking itself on the waterbody. So, that was where I was coming from when I stated that.

Q. Yes.

A. Also, Mr Twose's rule applies to both new takes not previously consented, and takes that were intended to be captured by plan change 7, so, it was kind of like an amalgamation and I thought in that respect, the rule was falling a little bit short, and I pointed out an alternative option that if –

similar as what I did with the hydro schemes, like if the Court is minded to go and provide for these, this is something that they can do, and I kind of abandoned the RDA pathway. The key reason being that in both the case of community water supplies and hydro schemes, it's really hard to kind of predict what the effects are and actually what the type of activities are with the hydro schemes, like, they're so diverse and some are diversions, re-takes, takes, and the same with community water supplies, the activities themselves, especially when it comes to the end use can be so diverse and I think in a situation like that where it's really hard to predict what affects you have to address, the discretionary pathway might be a more appropriate way of dealing with it.

Q. That was going to be my next question.

A. Oh, sorry.

Q. If there may be two options to address the concern that you had. One might be to have the rule under plan change 7 essentially additive to the existing rule regime in the regional plan water instead of an entirely alternative regime as it is proposed to be currently, or, as I think you've identified, making the activity status fully discretionary, so the full suite of potential effects can be taken into account when an application is made. Do you agree with that?

A. Yeah.

Q. At your point of clarification really, your paragraph 62 sub paragraph B, you indicate there hasn't been information provided by other community water supply providers. Do you mean other than the territorial authorities?

A. Yes. correct. Yes. I thought that was really helpful to have that information. Yeah… from the territorial authorities.

1410

Q. Yeah. Following on from that paragraph, in paragraph C, you talk about the concerns raised by Ms Muir about the potential for changes in reliability and availability of water, and you effectively suggest that the territorial authorities should just put all of their infostructure on ice, awaiting future development strategies or the outcomes in the land and

water plan, and I suppose I'm interested in testing how that can possibly be appropriate given the obligations that the territorial authorities have to provide water supply, and the implications of a period of things sitting on ice. Now, you might recall that both Ms Muir and Ms McGirr discussed the periods of time that it took for projects relating to water supply to evolve. Both of them talked about that being a number of years, and so if Councils were to do as you suggest and just simply wait for at least, I suppose four years, currently, assuming the land and water plan becomes operative in 2025, and if we accept their evidence that projects will take a number of years to develop, it could be that we are towards the end of this decade before the territorial authorities can deliver on water-supply projects. Do you accept that?

A. They can – yeah. A little bit more nuanced than that. I think, from memory, what you're saying is correct, but also, when it comes to meeting their obligations under the NPSUD, or just simply responding to future demand for water. My understanding was that the current consents actually provide for sufficient, they have sufficient headspace already in them. The majority of the planned projects rely on consents that are not expiring within the term of plan change 7, so I think the problem isn't really there in the sense that they cannot respond to needs, to the need for water. The real problem is that they cannot progress their planned projects, yeah.

Q. I'd like to discuss your proposed alternative rule, which is on page 32, and I want to understand exactly what you were intending to capture, so if we look at your rule 10A.3.1B.1 and your para A, where we talk about any activity that is a replacement of an activity authorised under a deemed permit, both Ms McGirr and Ms Muir discussed projects that they had in the pipeline that were to be consented within the life of plan change 7 that would move take locations or even source water bodies. Now, those applications are, in effect, a replacement of an existing take, but wouldn't be a replacement of the same take. Are you intending – and this was the genesis of, I suppose, Mr Twose's suggested amendment, and the TA's

understanding that those types of changes would necessitate new consents?

A. Correct.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. As opposed to a variation, you mean?

A. Or as opposed to a replacement which is catered for in the rule that Mr de Pelsemaeker's proposed.

Q. Okay, so what's the proposition? I'm interested in this for the same reason you're interested in this. So what's the proposition? An application to relocate a point of take for, obviously, an existing authorised activity is a new resource consent and not a replacement, nor a variation?

A. Yes, so – and this where the devil is so often in the detail, and it's perhaps easiest to talk about it by way of example. So the Luggate take, currently taken from surface water body, the proposal is to replace that take with a groundwater bore, so moving source water bodies.

Q. Is it hydraulically connected water or gallery bore or is it from a deep aquifer?

A. So it's from – how long is a piece of string, I suppose – the groundwater zone is adjacent to the Clutha River, so it's hydraulically connected to the Clutha.

Q. Hydraulically connected. Are they regarded as two different water bodies under the regional plan?

A. Effectively.

Q. Effectively.

A. Yes.

Q. Managed as two different water bodies?

A. They're managed, one under a suite of takes from groundwater, and then, obviously, the surface water rules related to takes directly form the Clutha. From memory, the rules associated with the groundwater takes do factor in the potential stream-depleting effects of the groundwater take, but they're not managed as a single water resource, per se. The source water body for the Luggate currently meets with Luggate Creek and then,

ultimately, to the Clutha, but again, by the same mechanism in the operative plan, you would be applying under the different rule frameworks that managed the groundwater and the surface water. So our understanding is that it wouldn't be possible to transfer the permit from the surface water body to the groundwater take. So in effect, the groundwater take has to be applied for as a new activity, albeit it is replacing the water permit that has previously served that community water supply.

Q. And that's your understanding, you want to check that through with Mr de Pelsemaeker?

A. Yes.

Q. Yeah.

A. And whether or not, in his drafting, when he's referring to replacements, whether that is replacing the exact consent in its take point or whether it is replacing the water that is being provided for that community water supply, albeit from a different water source or take location.

Q. Okay, I'm just making (inaudible 14:29:12). All right, so –

THE COURT: COMMISSIONER EDMONDS TO MS IRVING

Q. So can you just take us back to the rule that's driving your question?

A. Mr de Pelsemaeker's rule?

Q. Yes.

1420

Q. So if you look at page 32 of his supplementary evidence, he's proposed a new discretionary activity rule, 10A.3.1B.1, and you'll see in his paragraphs A and B, they both refer to the replacement of an activity authorised under a deemed permit, or the take and use of surface water. That is a replacement of a take and use authorised by an existing permit. So, Mr de Pelsemaeker?

A. Yeah, I'm just waiting. Yeah. So I'm happy you raised that question. Like I said, it was very useful to have actually the information from the TAs, and being able to see what they're proposing, and it occurred for me that, indeed, you're correct, that the majority of the planned projects, while

they're intended to replace consents, they are consolidations of schemes or upgrades, and talking to the consents team about it as well, it would be a new consent, it would be a new activity, it wouldn't be a strict replacement. That being said, when I recall the evidence of Ms Muir as well, she was talking to the Omaka scheme, where it appeared that everything seemed to be up in the air a little bit again, so what I tried to do was to provide for two situations, where there is a need for a straightforward replacement of a consent, which is addressed through this rule, and also through policy 10A.2.3, where it is not the case, also make provision for a longer-term consent, more than six years, through a suggested amendment under policy 10A.2.2, because plan change 7, the way it is set up is that actually, when it's an application for a new activity, it still is considered under the rules of the operative plan, except that the duration policy under 10A.2.2 applies, so this framework tries to cater for the two situations.

THE COURT: JUDGE BORTHWICK

Q. Okay, just slow that down. So the policy that you're talking about where it's not a straight-out replacement but it's something else, give me that policy reference, this is your new policy.

A. It's on the top of page 31, policy 10A.2.2, so I deliberately changed the two policies, recognising that it is actually not, in some of the cases that were presented, it might not pan out as a straight rollover, but rather as a new activity, acknowledging that the scale of the activity would not always be more. Like, actually, where there is a consolidation, they're actually not asking for more water.

Q. Okay, so you convey that by your new words: "where this activity was not previously authorised by a deemed permit."

A. Correct.

Q. Okay, so whereas new activities are to be authorised under the operative water plan, save in relation to duration, which is what –

A. This policy applies.

Q. Yeah, so you're saying this policy applies to duration only?

A. Correct, so the first two policies, actually, apply to duration only.

Q. Okay, that's helpful.

A. But policy 10A.2.2 applies to the duration in respect of consents for new activities. Policy 10A.2.3 to the duration for activities that are currently authorised by deemed permit or an expiring permit, and that is not – that is following the setup of plan change 7 as it is proposed.

Q. I guess, and this may or may not be where Ms Irving's coming from, if you've got a straight-out carveout, if you like, for either new TA activities or replacement TA activities, it's just a carveout in terms of duration, why would you have a fully discretionary rule, because then that suddenly imports matters of effects about which this plan's got nothing to say in particular?

A. You're absolutely correct.

Q. So why wouldn't you take it down a different activity pathway, which would not allow for those considerations, because, after all, for new consents, aren't they picked up in your water plan anyway?

A. That is picked up in the water plan. The controlled activity rule and RDA, as such, they only provide for six years' time, so the other option would be have them as a noncomplying activity.

Q. No, I was thinking maybe another option could be possibly having them as a – have to think about this. If it's a replacement consent, having it as an RD where you're excluding considerations of effects on environment. If you're happy with that, you know, like for like, that's a true replacement RD, and limited matters of discretion, not full discretion, where you're going, golly, what's the metric by which I'd actually examine the effects? If there are truly knew activities, as you have discussed, they just get processed anyway under the operative plan, with a different carveout in duration under this plan.

A. That is a possibility as well. I thought, because we're giving them essentially 15-year consents, it might be appropriate, actually, to consider environmental effects. That was my thinking.

Q. Well, that's right, because, as Ms McIntyre said on Tuesday, duration's not neutral, and I tend to agree with her on that, duration isn't neutral, but

there then comes the issue of the value of what Mr Twose is saying, and I think you can see a lot of value there. Anyway, so I've clarified in my own mind how this all works. I don't know whether that's where you're going, but I now know how it works, so that's good.

A. Yeah, it was something that was developing as I was doing my s 32, like, are there any other options? My preference would still be six-year consents, and not because I want to be particularly hard-nosed about it, but what Ms Muir said, I think, applies to a lot of schemes that rely on large infrastructure. When it comes to a review, it is problematic. It's really hard, costly, to retrofit those in that infrastructure, and that kind of made me thinking, ideally, we should reconsent them for a six-year term and ask to refer that investment, but the – yeah, sorry.

Q. It could be more nuanced than that, then. If the concern is the applicant is upscaling its infrastructure and hardwiring that infrastructure into the plan in such a way that, you know, if there needs to be a response to quantity and quality, and this very much may apply to Ophir and the infrastructure out there, you'd want to be discouraging that at this point in time, but if it was a straight-out replacement, possibly a different approach.

A. If it's straight out, yeah.

Q. Because the infrastructure's already in the ground.

A. Yeah.

Q. Yeah.

A. Yeah, then, yeah, I don't see why you would make it different from a controlled activity pathway, you know, if it's straight out replacement, yeah. You're playing a little bit with the unknown.

Q. Mmm, I know, I know.

A. And on one hand, reading the evidence of the TAs gave me confidence that, in a lot of instances, there's not going to be an increase in effects, and, perhaps, in some ways, even a benefit. Intake infrastructures themselves have an impact on different values. If you're consolidating that, you remove some of the impacts, but then there's also the unknown.

Like, sometimes, projects change, and we've heard that through the hearing, so, yeah, that's where I was coming from.

MS IRVING:

Does that, perhaps, not point to the need for plan change 7 to provide a pathway for these projects, but where there are the likes of consolidations and so on, it may reduce effects, and those will be enabled by virtue of a pathway for consents longer than six years?

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. You mean on a merits and effects based assessment?

A. Absolutely.

Q. Who's put up the policies to look at the effects of those activities, though?

A. Well, I think this is the question and why I'm exploring the framework that would apply to the new takes, vis-à-vis direct replacements.

1430

Q. Sorry, when you say, new takes, you mean replacements or… you've got to be really, yeah…

A. They are takes in new places.

Q. Takes in new places.

A. They are serving existing community water supply needs –

Q. But those –

A. – so they're replacing the water –

Q. – they could potentially generate environment effects.

A. They could

Q. New environment effects.

A. They could. They could also have the effect of reducing.

Q. Yeah, sure, but you'd need a full merits-based assessment, and the question is, what metric would you be looking at it? And as I understand, the structure of this plan is to allow that for new permits as opposed to the light replacements to go under the old plan, at least you'd have some, as improvised as it may be, some assessment of effects out on that plan, but it wouldn't be happening on this plan, not on the relief now put up.

A. Yes, so long as there's that policy gateway to enable durations longer than six years on those new permits.

Q. I see. I don't know. I know what you're saying. Yeah…

A. The fundamental issue, I think, for the territorial authorities based on the 10A2.2 as notified was that those new replacements could not be granted for more than six years, that was the effect of the policy. So, if there is a pathway through that.

Q. Yeah but then the proposition is could we have long-term consents to take water from a different water body and that could be highly problematic if that water body is already over allocated.

A. Or it might not be.

Q. Or it might not be –

A. It may be moving –

Q. – but then that yeah, that yeah.

A. So, that's where that pathway is important, the opportunity to look at that.

Q. I know. Really, I understand that, I just don't see how this plan is delivering it. Yep, carry on.

CROSS-EXAMINATION CONTINUES: MS IRVING

Q. Just, I just want to clarify, in preparing this supplementary brief of evidence, have you had regard to the proposed regional policy statement

A. Not to a level that I want to comment on it now.

Q. So you have –

A. I have had a look at it but I was working on the understanding there was going to be an additional brief of evidence.

Q. So, the relief that you've proposed hasn't yet taken into account the identification of community water supplies as regionally significant infostructure.

A. No.

Q. I have no further questions.

RE-EXAMINATION: MR MAW – NIL

THE COURT: COMMISSIONER BUNTING

Q. (inaudible 14:34:46) questions about schedule 10A4, have you got a copy of it there?

A. I do, yes.

Q. It's attached to your… and I have interpreted it differently from my colleagues and I think that (inaudible 14:35:08) about where community water and hydro fitted into 10A4.

A. So, they are captured by schedule 10A4.

Q. Yes.

A. They are – the only exception is that under step 4, they are excluded from the method of removing atypical data. The rationale behind that is – in the case of hydro, the rationale behind it is because their maximum, their peaks in taking are determined by climate events, heavy rainfall events, so they have less opportunity to illustrate through the take records a pattern that reflects their historical use. What seems atypical might actually be reflecting their need. In the case of community water supplies, atypical data could be legitimate because of a community event, I think, we were playing with the idea of an AMP show in a small rural community that would have a spike in water use, and so, if we would eliminate that we could constrain them in that regard, so that was the rationale behind removing atypical data from step 4. Other than that, the schedule applies.

Q. Because I went back to joint witness statement for the technical people and it said that hydro in community could be assessed on the atypical data front on a case by case basis so it didn't suggest that it would be necessarily eliminated but it would be considered and that's not reflected in the actual 10A4.

A. And there might a discrepancy between what's actually there and how it's been recorded in the JWS, but, yeah, that is my understanding of the reasoning behind it, and I think there was agreement between the parties of excluding the removal of atypical data.

Q. Cause I was just a little bit confused with the way that there was no – I thought maybe schedule 10A4 could have benefited from some small reference to – apart from that taking out steps for – because my initial

reading of that, and I was incorrect in that, was that they weren't included in the schedule, but of course, they are.

A. They are. The only reference, yeah, is at the bottom of step 4 really, that mentions community water supplies. I think it is implicit in the fact that we removed the words "for irrigation purposes."

Q. At the top, yes.

A. At the top.

Q. Yes, yes.

A. But it is implicit.

Q. Now, I still found it a wee bit confusing and then at step 5, presumably, does that apply to community water?

A. Yes, that applies to all takes regardless, yeah.

Q. Because that wasn't all that obvious that it – because it seemed to be within the context of irrigation only. I just wondered whether some little clarification there might – in the future, when people have forgotten how they put it all together, it might help.

THE COURT: JUDGE BORTHWICK

You mean like an advice note or something like that?

THE COURT: COMMISSIONER BUNTING

Q. Or something that would help, yes.

A. Would you like us to provide you with some wording?

Q. Some wording…

A. And that could be done perhaps through the JWS.

Q. So, how do you mean through the – oh, yes, this is on Monday when you're coming back.

THE COURT: JUDGE BORTHWICK

When you're chatting to other folk.

A. Yeah.

THE COURT: COMMISSIONER BUNTING

Q. Yeah, that would –

A. Yeah.

Q. – if you wouldn't mind, please, yes, and there was one or two just editorial, and I think you've picked something some of them up but maybe not picked them all up. Do you want me to give those to you now? I could do that.

A. I'm happy to do that, yes.

1440

Q. So, if we go to 10A4.1, the methodology in item 4, it talks about rounding down in the second line, and I think you've used the term adjusted somewhere in other places.

A. Yes.

Q. So, that's just a point of detail.

A. Yeah.

Q. And of course, the comments on hydro and community water go through the rate of take daily and hourly volume stuff as well. Yes, under 10A4.3, in fact this goes back to each part of the rates, volumes, and so on, the heading is "methodology," and yet at the end of the third line, it just says "method." So, I wondered whether methodology might be a more consistent use, and then the methodology itself there and under item 2, the third line, the word "filtered" is used which I think in other places, it's used the word calculated, so that's just a consistency, and I think that might have been in a couple of other places as well, and then in 10A4.4, methodology (inaudible 14:42:02) starts with actual annual volumes, the word "actual;" should that be there? Because the term above is annual volume.

A. Yeah.

Q. So, it's just consistency in the terminology.

A. I think the word 'actual' is still used there, is to signal that the annual volumes refers to the, in the first couple of words of step 2, they could actually be different from the annual volume limit that comes out at the whole process.

Q. Okay –

A. But, it yeah, it might – I will come back to you on that on Monday.

Q. And so those comments just apply to each of the, you know, the rates, monthly, daily, and so on, just to ensure consistency throughout.

A. Yeah.

Q. I think that was all. Thank you, your Honour.

THE COURT: JUDGE BORTHWICK

Q. So, the commissioner is saying there's a sanity check in hard proof reading, if you could do that.

A. Yep.

Q. Because I'd prefer not to.

A. Are you comfortable with me liaising with –

Q. Absolutely – liaising with the other planners?

A. And Mr Wilson.

THE COURT: COMMISSIONER EDMONDS

Q. Well, the technical people, yes, that would be essential.

THE COURT: JUDGE BORTHWICK

Q. Because you've got the guts of it there, I don't think that's going to change. It's just one final hard check on the language.

THE COURT: COMMISSIONER EDMONDS

Q. So, 5, where you're talking about the margin of error to be applied to any calculation. That's repeated up in step 4. That's the only place where it talks about calculating the number of other data values which are within the margin that the error of that value. So, my question is, having that as a general proposition in 5, is that correct? Or is there situations where you apply the margin of error much narrower than just having it in 5 where it might imply that it relates to the whole nine yards.

A. I'm really sorry, could you repeat. I've missed the first bit of the question.

Q. Well, if you could just have a look at 5 which talks about the margin of error.

A. In which schedule?

Q. And it says to be applied to any calculation. So, I've gone and had a look to see to try and understand what is meant by that and I've found the only place where a margin of error is specifically referred to – I'm just looking at the rate of take here but the principle applies.

A. Yes, yep.

Q. Is under step 4, which, of course, we've already heard that this step 4 is supposed to be about irrigation and looking at 4E, that refers to calculating the number of other data values which are within the margin of error of that value, and F also refers to applying a margin of error, but my question is, does that – is that the beginning and the end of it there in F, and might this 5 imply that it applies to all of these measurements and calculations, I think there's' very like difference between measurement and calculation. So, I just think there needs to be a good hard look at this.

A. Yeah.

Q. And if this margin of error application to a calculation only applies to 4E and F then that should be made clear.

A. Yeah. I'll have a look at that and then we'll get back to you, yeah.

Q. So, I suppose, I'm wonder whether step 5 is really a step.

A. Yeah.

Q. Or whether it's just implication of what it is you have to do under some elements of 4.

A. That is something that I need to clarify.

Q. Yeah, I'm sure. Yes. So, I just wanted to be sure that I was absolutely clear what it was you were suggesting in terms of hydro and the community water supplies. Perhaps we could start the hydro, so we've got two alternatives that you've put in front of us, your preferred one and then something else.

A. Yeah.

Q. So, I just want to be clear that I fully understand what they are. So, if we could just have a look at the hydro one to begin with. So, hydro could choose to go down a controlled activity route?

A. Absolutely.

Q. Right, and then we've already talked about how the schedule might apply then and it's a more limited part of the schedule, or it could decide to go down the restricted –

A. Correct.

Q. – discretionary route and if it does that, how does that relate to the historical use point? Does it relate to that or not?

A. Correct. So, hydro could go down the controlled activity route if it decides they are fine with a six-year term, and they are comfortable with applying the schedule to determine historical use.

Q. Right.

A. If they are okay with a six-year term but they want either to take into account data, water use data, post 30th of June 2020, or they want to use alternative data or have determination of historical use based on synthetic flows or flow gaugings then the option is RDA as well, so six-year terms applies to both controlled and RDA.

1450

Q. Right.

A. It's only when they go for a longer term that they could apply a discretionary activity rule.

Q. And so that's your proposition, discretionary activity.

A. Well, I try to be helpful and, I think, point out that there's an alternative, because in both cases, hydro and community water supplies, the relief that was sought was much wider than the cases that were presented, a little bit. That was my feeling, or could have consequences beyond the cases themselves, and that's what I tried to do, really, with the alternative.

Q. And then the notion of having a schedule of particular –

A. Activities, yeah.

Q. – consents or activities, and you've given us the shape of what that might look like, so what activity status are you suggesting for that schedule?

A. That would be linked to the discretionary activity, the schedule, because there's a direct link.

Q. Yeah, no, fine, I'm just making sure that I'm clear.

A. Yeah.

Q. So I guess my next question after that is you didn't consider that a restricted discretionary activity might be appropriate.

A. It might, like –

Q. Using that schedule approach.

A. Yes, that could work as well. The reason why I went for RDA – sorry, fully discretionary – is I actually talked to the consents officers and I said, like, what would you look for if you had this kind of activity? And they said it, you know, could have various effects, it's really hard to predict. With an irrigation take, it's fairly simple. Water is taken, either for storage and then being used or directly for irrigation for a particular land use. With hydro and with community water supplies, it's much harder to predict the activity or the exact nature of the activity, and I think in that regard, that's where I decided to go discretionary activity, to be able to better respond to the particular aspects of a proposal, whereas an RDA, you limit yourself a little bit.

Q. So the hydro ones that are in your schedule, we had quite a lot of evidence about that, and it sounded like quite a fixed kind of activity, if you like, the way it's all designed.

A. It is fixed, yeah.

Q. So I guess my question is in terms of considering that under a restricted discretionary activity situation, would it not be possible to craft that in a way that you might pick up anything, if there is anything that may need dealing with?

A. In my view, possible, yes.

Q. So what kinds of things are you thinking might be dealt with here, going back to the evidence about what these activities actually are?

A. Given that they are not in a planning sense or according to the definition of nonconsumptive takes in the plan, they don't meet that definition, in the water-metering regulations, but, in a way, they are nonconsumptive. A lot of those water takes just mean that the water is being transferred or diverted into a different water body. You would probably focus on things like rate of take. It probably wouldn't be too dissimilar in the case of hydro

from the matters of control that are in the controlled activity rule. Yeah, I'm relying on my memory a little bit here. Yeah.

Q. I guess I'm just asking the question as to why restricted discretionary might not be an appropriate consenting pathway.

A. I mean, given that you have an existing activity, there is no change to the scale of it, we're not anticipating a change in effects, really.

Q. No, no.

A. And that's, yeah.

Q. Yeah, so why would it need a discretionary activity consent?

A. Well, I explained to you the reasoning –

Q. We could talk about the duration separately, but –

A. You could address it as a restricted discretionary activity, yeah. I wouldn't want to kind of give you – I mean, I would like to, but I'm not sure if I can give you an exhaustive list of all the matters that you would want to consider. I'd feel more comfortable doing that, going back to the evidence, and actually –

Q. Going back to the transcript and having –

A. Yeah, or, or, yeah.

Q. Yes, well, that, of course, is what we'll have to do. Anyway, we've taken about –

A. But I think to answer your question, I think it is possible.

Q. Yeah, okay. Thank you, I just wanted to be clear about that. I guess the other question was the duration, and you were asked about that earlier, so I probably don't need to ask about that further.

A. Yeah.

Q. Yes. So I just want to be clear now on the community water supplies, so again, there's a controlled activity possibility.

A. Correct.

Q. If that's the root that's chosen for the six years in very limited, reserved matters of control, and then I'm now looking at the restricted discretionary category, and that's within existing water permit volume and rate limits, so that's your sort of ceiling for your restricted –

A. Correct, yeah.

Q. – discretionary activity, so I looked at one of those footnotes – I'm going to have trouble finding the right page now – page 30.

A. Yeah.

Q. And so just looking at your footnote 69, and not taking on board these points about, well, is this a replacement activity, it looked as though there was a shortfall when you added up those permits, relative to what was intended, the total extraction.

A. The total?

Q. Because it says one's got 18,000 cubic metres, and then there's another 18 cubic metres, and then a new consent with a total of abstraction of up to 20,000 cubic metres.

A. Yeah.

1500

Q. So, this is not quite the headroom in there.

A. No, that's correct, and I've got this information from the evidence of Ms Muir, so in this case my reading is that the consolidation will actually result in a small increase of water compared to what was there previously allowed for under two consents. So, it's an increase in the scale, it's not a replacement at all

Q. No, so that would mean that it wouldn't come within the restriction discretionary parameters.

A. No, it would be assessed under the rules of the operative plan. As a new activity.

Q. As a new water, new activity.

A. Because it's essentially a new consent and the total take would be more than the sum of the two existing ones.

Q. So, I guess this is bringing us back to some of the questions that you've already been asked in terms of what you were then suggesting with your discretionary activity category.

A. The discretionary activity category is basically a safety net. As based on the information that was provided to us, the majority of the plan projects would essentially require new consents that would be assessed as new takes would come in under the rules of the operative plan. However,

when I was thinking back, you never know what's going to happen and Ms Muir also indicated that in the case of (inaudible Omakau they're back to the drawing board essentially for that scheme. So, I was providing therefore a situation in where TAs would basically look for a rollover of an existing consent connected to the schemes in the schedule that I drew. The two rules for the community water supplies and the hydro are kind of mirror images, really, of each other, and I did that also to keep the plan kind of simple.

Q. Well, I've noticed that but in terms of the policy.

A. Yes.

Q. Approaches you've used, I've noticed that you didn't have those as mirror images.

A. That's correct.

Q. I guess there's a drafting principle. I guess it would be fair to say that I struggle to look at policy that reaches down into the rules and imports it back up into the policy and in the case of one of those things, the hydro one, that's exactly what you've done because you take this to say except were rule blah de blah applies, but you haven't done that with your proposed policy approach to community water supplies and I thought that that would be easy to expunge your rule reference from the policy. I'm looking at your 23.

A. Yes.

Q. On page 54 which is your hydro.

A. That might actually be, sorry that might be a – I was going to call it a typo.

Q. Well, in principle do you agree with me?

A. I agree with you, and the strike out, the single strike out above the double underlining should actually be removed. My apologies for that. I did not notice it.

Q. Sorry, what can I…

A. We're on page 31. So, right at the end of the first, I would call it paragraph, there is, just above A, there's a double underlining, but a single strikeout above that and the single strikeout should be removed. My apologies.

Q. I'm completely lost as to where I'm meant to be looking, sorry.

A. I hope I'm not confusing you. Does that address you concern?

Q. I don't think it's good policy drafting to reach down the plan and grab rules and put them back up into the policy, and, yeah, people who've had me on other cases may find me very boring on this, but in Queenstown, we made it a no-no. So, perhaps there's no point in getting you to look at these, and there's several places you've done that so that's just a general point, and then I did have one other thing which I think, yeah, in your 10A2.2, I'm looking at the red line version in appendix 2, is it? I think it's appendix 2. So, this used to say only grant and it became avoid granting, and then it's got for a duration of no more than six years. Shouldn't it just say for a duration of more than six years? I'm on the red writing and the pages weren't numbered so I've numbered appendix 2 and this is on my page 5.

A. Correct, yes.

Q. So, because it's been changed to "avoid granting" it's not right to say "for a duration" of no more than six years. You just need to take out the "no" and the witnesses agreed to that, I understand.

A. Yes. I think I would make a lot of people happy if I did that.

THE COURT: JUDGE BORTHWICK

Q. Okay, so you would say, yeah, in terms of style, get rid of the words "no more than," you'd just go six years, avoid granting –

A. Yep.

Q. – resource consent. Avoid granting resource consents for a duration of six years.

A. Of more than six years.

1510

Q. Of more than six years, just the no.

A. Just the no.

Q. That would be a surprise decision of the Court.

THE COURT: COMMISSIONER EDMONDS

Q. So, I've got another thing in terms of the definition. 10.3A.

A. Yes.

Q. So, I'm puzzled as to why you have to have sets 2 in the stem of that. wouldn't it have it just been there's a condition that limits or restricts the taking of water under specified circumstances by the dozen.

A. Yeah.

Q. Yeah, so, you'd be –

A. Yeah, I agree with you.

Q. – happy to expunge those words. I'm just double checking to make sure there wasn't anything. thank you.

THE COURT: JUDGE BORTHWICK

Q. I've also got questions about TAs and hydro along the same lines but before I ask you them I'll have a cup of tea and think about whether I need to ask them, but I did have a question about plan architecture and your amendment 3 to the regional water plan which at one point I had up on my screen. So, I know that your appendix 1, and in your appendix 1, you have added three objectives, the first two of which, I have said were alienly drafted, which I thought they were, so that's 10A.1.1 and 10A.1.2. That was my initial impression, and then did not like your 10A.1.3, and I just wanted to talk to you a bit more in terms of plan architecture and make sure we're on the same footing. So, in terms of architecture of this, you've introduced a new objective which I understand the objective 10A.1.3 is to help with assessments of any applications which are noncomplying activities. Correct?

A. Noncomplying and RDA as well.

Q. And RDA as well.

A. Yeah.

Q. And the only RDA we've got is apart from folk who can't – haven't got all the data that they need for historical use would be –

A. Stranded.

Q. – our stranded asset, and then the only effects-based matter where the stranded asset such that it is, is the need to have a good management practice plan in place.

A. That, and there's also discretion around the size, but yeah.

Q. And size.

A. Yeah. Size would be additional area.

Q. And a bit like Ms McIntyre, it wasn't really obvious to me that you needed an objective to pick up on those very limited matters, the stranded assets, so that's something that we need to think about a bit further but when I had a look at your objective it occurred to me that there's no sort of daylight on the word scale and you would have heard me ask planners when they were joint in panel, what could scale mean, and amongst other things, it depends really what the planners, whose interest the planners were representing, but it could mean an area, was the evidence, it could mean the area, it could mean duration, and rate and volume of take, we've already got that there, and beyond that though, what other things scale could mean weren't really articulated, but the word scale seems to me, I don't actually know what that might mean or how that might be approached outside of perhaps farming, TAs, and communities. They may have a different approach to what scale means, and you agree with that? Or would you agree with that? What do you mean by scale?

A. It's hard to define. First and foremost, I would not think that scale would apply to duration, to me they –

Q. No, duration –

A. – it is spelled out there.

Q. Yeah.

A. And we discussed it at length, like what is there – how can we capture it most accurately. The reason why we kept scale in there was, one – and that was explicit in the discussion it was about the geographic extent of the area to which the water is applied. In my mind, as well, there is the deemed permits do not only apply to water takes, they also apply to – and there's some discharge permits and some damming permits, and with a dam, often the damming activity and the water take are separated out, so, in my mind, scale might be a useful term to capture activities authorised by deemed permits that apply to damming as well. I agree with you that it's perhaps not the most defined term or not the best-defined

wording, but it is there to intend that anything that might come up that isn't really captured by the other words in the plan.

Q. So, scale, you say, could apply to an increase in scale for damming activities?

A. I guess so, yeah. I don't know what else would capture –

Q. I don't know. I didn't imagine that, but I mean I hadn't thought about that, but that's your evidence? Because if it is, I'll start thinking about it.

A. It's definitely not captured by rate of take in my view.

Q. Yeah.

A. And we have deemed permits that apply to other activities than takes.

Q. Okay, so scale could apply to an increase in scale, whatever that may mean for both damming and discharge activities which are deemed permits being removed.

A. At least you can consider it.

Q. All right. So, that helps me in terms of the possible range, but in so far as scale means area and in so far as you've got policies that expressly avoid an increase in area, and they avoid an increase in duration and an increase in historical use as far as that means in relation to take and volume, then it seems to me you've got a fundamental problem with your plan architecture. You can't both have an objective that contemplates an increase in those variables and policy saying avoid that.

A. No. The increase in the rate of take and volume, you couldn't have an increase in the consented rate of volume, that's not allowed, that would be a new consent, but for community water supplies, we do allow for an increase above –

Q. I need to take community water supplies and hydro out of this discussion.

A. Okay.

Q. Okay, because there may be – because I know that there's maybe a need which you are responding to, or is it mean that you're responding to the population growth.

A. Yeah.

1520

Q. So, take those two others off the table. That leaves everything else, which is not just private sector but everything else. You've got clear policies that close out, avoid durations over six years, an increase in the area, and an increase in historical use.

A. Yes.

Q. Correct? So immediately, you've got yourself set up with a problem with your drafting, because your objective contemplates an increase in those variables, but the policy closes them down, so the policies that you've got don't implement that new objective 10A.1.3. Do you agree with that, they don't?

A. I do agree with you, yeah.

Q. Complete, they're in conflict. My proposition to you is what is the problem with – and again, this is said with territorials and TAs are still up for further consideration – but in principle, what is the problem with having your first two objective, 10A.1.1, 10A.1.2, your three policies which are policies to do with avoid – and I know you're saying you could simplify those in terms of rolling two into one, that's fine. So you've got two objectives, three policies which are avoiding certain things, and having a noncomplying activity, because whatever's not caught, and that is whatever is not duration, is not area, is not historical use, is a noncomplying activity, immediately imports considerations of merits, about which there is no metric, but then, of itself, that's not unusual for noncomplying activities. You can't possibly sit here and try and imagine what other activities might be out there in relation to which consent is required, which could be assessed on a merits basis. Honestly, I couldn't see, apart from fundamental issues as to drafting which just don't pass the sniff test, I couldn't see what the issue was unless you were wanting to walk back the avoid policies on duration area and historical use. If you wanted to walk that back, you needed to walk it back under the policies, rather than under this objective.

A. Yeah, and maybe that's the reason why it's in there, because we drafted it with forgetting about the backstop that is offered by the policies. I think when it comes to in the objective, the third objective, the reference to rate

of take and volume, we were anticipating, well, what is somebody comes in under the noncomplying and applies for a rate of take within the consent limit, but above historical use. Policy 10A.2.1 kind of closes that door.

Q. But you wanted it to when you started this process.

A. Yes, yes.

Q. Yeah, but everything else which you have not sought to exert control over, which is everything other than area, duration, and historical use, is still open for consent under a noncomplying activity pathway, albeit that there's no policy speaking to those activities, and of itself, it's not unusual, but it's just to be assessed on its merits, and again, no guidance on the merits outcome, but that's not unusual either, where you have activities which haven't been imagined or contemplated but which still have a chance, at least, under a noncomplying activity rule. Is that – yeah, I was just wondering what the problem was that you were trying to fix. I mean, honestly, if you want to walk back your duration and everything else, I think you do it in your policies, you don't confound the implementation of this plan this way, because I think it will have a confounding effect.

A. Yeah.

Q. Are you wanting to walk back the policies on avoiding an increase in area or not?

A. No, that's not the intent, no.

Q. Okay, mmm, okay, so that's not the intent, it's not what you're wanting to do, all right. Okay, and really, as to the balance of what you write there, I mean, I tended to agree with the planners who didn't support this, you know, it doesn't compromise the implementation of the integrated regional planning framework. I think that's problematic in terms of you might need to be an oracle to know what's actually coming up in that land and water plan, but is it necessarily, I thought, because you've already got 10A.1.1, which says "facilitate the effect of an efficient transition to a new plan," so I couldn't see what it was achieving because we already know we want an efficient effect of transition to a new plan.

A. We didn't – how to put this in the right words. The intent was really to signal to consenting officers that they need to apply a precautionary approach, and looking at the effects, it's not sufficient, it's the duration, that short-term duration. It's not –

Q. Do you not think that actually is signalled in your 10A.1.1?

A. Yeah.

Q. Facilitating an efficient effect of transition?

A. Mmm, it is, yeah.

Q. So do you agree that's not actually adding anything to the thinking, agree with that?

A. I agree, yeah.

Q. All right. So, anyway, your answer is no, you are not walking back the avoid duration –

A. No.

Q. – you know, longer duration, avoid increasing in areas and avoid historical use. You're not walking back those policies.

A. I'm speaking for myself now, yeah.

Q. Yes, speaking for yourself.

A. Yeah, yeah.

Q. Yeah, okay, because if you are, I'm thinking, well, there just needs to be a different approach.

A. No.

Q. Now, obviously, a number of other parties have a number of other approaches.

A. Yeah.

Q. You know, they're wanting longer duration. I just wanted to know what you were thinking. You are not walking it back, so that's really helpful. Now, just before we take that tea break and I think about TAs and hydro a bit more, but, you know, looking at amendment 3 to the water plan, the operative regional water plan has introduced about two policies and one objective, it's introduced, and that is fine, and I understand that if and when this plan change is made operative, those provisions actually apply to this plan change, correct?

A. They need to be made, yeah, they need to be brought into this framework, yes.

Q. And does that kind of happen automatically? Would that happen automatically, or does it need a resolution of council?

A. I think it needs a resolution of council again.

Q. A resolution of council, but it doesn't need a variation?

A. It does not need a schedule 1 process.

Q. No, process, okay. So anyway, all noncomplying activities, assuming that the council passes that resolution and amendment 3 is imported or applies to chapter 10A, all noncomplying activities would also need to take into account those other provisions in amendment 3, correct?

A. Correct, yeah.

Q. And I suppose, insofar as there is some provision for TA and hydro, along the lines of what they want, so a longer duration, if the merits-based assessment is taking place under the operative plan, then those provisions would apply to a merits-based assessment under the operative plan, leaving PC7 to deal with duration, that's how it would work?

A. If it's for a new activity.

Q. Yeah, for a new activity.

A. Yeah.

Q. For straight-out replacement activity?

A. Straight-out replacement activity.

1530

Q. Yeah.

A. There needs to be a link, we need to make a link between those new plan provisions and the new chapter 10A, so that does not mean that we need to consider these matters on the controlled and the RDA pathway, but when it comes to a noncomplying pathway.

Q. Okay, I guess that's where I was wondering. So you don't have to import those matters as matters of control if you had an RDA, matters of control and matters of discretion under those two rule pathways, those these needn't be applied there, but could be applied in noncomplying or could be applied in discretionary.

A. Yeah.

Q. All right, okay, well, we'll take a break, and I'll think more about TAs and hydro, but with TAs – just one final question – for the projects which were the subject matter of further evidence, of those projects, how many would you regard as being a straight-out replacement of an existing activity as opposed to a new activity?

A. I mentioned before Omakau. It wasn't intended to be a straight-out replacement at all.

Q. I don't think so, I think it's actually looking –

A. No.

Q. – for a new water body, that one.

A. And the other one is possibly Cardrona. Cardrona, I think, is – well, that's not even at the drawing board, is my understanding. Ms Irving might have a better understanding, but –

Q. So of those projects that have hit your schedule, as, you know, your alternative pathway schedule, new schedule where you're listing projects, of those, are they all replacements, or are some of those new consents, new activities, are they –

A. The majority are new activities.

Q. The majority are new activities, and so you're proposing to bring new activities completely under PC7.

A. No, no.

Q. Okay, so that's what's probably missing. What are you proposing?

A. No, what I propose to do or what I suggested as a pathway is two things: one, a change to policy 10A.2.2, which is a policy –

Q. Mhm, a duration policy, yeah.

A. – the duration policy for new takes, and that would take care of the –

Q. Oh, yeah.

A. – the majority of the projects.

Q. Because –

A. (inaudible 15:32:50)

Q. – they're still being, their merits are still being considered under the operative plan –

A. Correct.

Q. – but on duration, yeah, duration, something else is happening, yeah.

A. Correct. The RDA – sorry, the DA pathway and policy 10A.2.3, as I said before, is just a safety net. It's kind of, it's a bit weird because they take up most of the paper space, but I don't know if they're actually going to be needed if all of those projects turn out to be basically new schemes.

Q. Well, that's what I was –

A. Yeah.

Q. – wondering, and that's what I, you know, I've done all sorts of decision trees and pathways, and so homework for you over afternoon tea is to reflect again on those proposals, such as we've been told. Are they all for new water or are they replacements? And so I think that Court really needs to know that. Yeah. There is a problem, I suspect, with Ophir, insofar as it's taken from an unreliable source and would go to an unreliable source in terms of availability of water, so I think we would want to think really hard about that separately.

A. Yeah.

Q. Yeah.

A. I think, yeah, there six or seven different projects.

Q. Yeah, yeah.

A. I think at least five will be new projects and would not benefit from that DA pathway.

Q. Yeah, yeah.

A. Like I said, it's only there because I drafted it for the –

Q. Hydro.

A. – community water supplies –

Q. Oh.

A. – and I thought it's a neat way to – well, maybe it's not neat, sorry – it's an easy way to have something in place in case you end up with a situation where it's a strict rollover of a community water supply scheme consent.

Q. And so for a strict rollover of the activity, no change, that's what this alternate pathway is for?

A. That restricted activity, yeah.

Q. Okay, all righty. I shall think about that.

A. Discretionary activity, sorry.

COURT ADJOURNS: 3.35 PM

COURT RESUMES: 3.53 PM

MS WILLIAMS:

Excuse me, your Honour, just if I might interpolate, as you'll see Ms Dixon has left.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. I did interpolate her absence as her not being the in room.

A. So, look, just to let you know, your Honour, on behalf of Ms Dixon, I'm attending tomorrow, and I'll be able to pass on anything that arises during that time.

Q. Okay, thank you very much.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Okay, so you're alternative pathway for TAs should the Court be minded to go for a longer duration for new order or activities which have not been previously authorised by deemed permit or water permit, your alternate pathway set out at page 31, paragraph 66 with a new policy 10A.2.2, and that policy is instead of the policy on duration and the operative water plan.

A. Correct, because that's the word irrespective. Yeah.

Q. And so, from there, its assessment in the operative water plan.

A. Yeah.

Q. Yeah, and this the policy –

A. Sorry, it depends on there to be an activity rule, well, if it's linked – limited to the schedule only, it probably would be. If it would be widened opened and if we don't restrict it to activities in a schedule as I proposed then some community water supplies could apply for and you could send under controlled activity rule or restricted discretionary.

Q. This is for new order – for new activities?

A. For new order.

Q. For new order. Oh, yeah mean, because they want to avail themselves of your controlled activity pathway?

A. Sorry?

Q. Sorry, why do you say they could?

A. Well, no, the way – yeah, no, the schedule actually. If we stick to only the activities in the schedule it would be a full merits assessment.

Q. Yeah, and if something pops up in the meantime that the TAs wanted a consent for as a new activity, an activity not previously authorised. It still is a – that would still be a full merits assessment.

A. Yes, under the operative plan.

Q. Under the operative plan, and the duration for those would be what?

A. It would be determined under 10A.2.2. Oh, no, sorry, that would be under – no, no, 10A.2.2 would apply to all new consents, yeah. Irrespective of the schedule.

Q. But for proposals not listed in the schedule, they would simply be six years in that case, that the policy is saying six years.

A. Correct, yes.

Q. So, to get more than six years you have to find yourself in the schedule.

A. Yes.

Q. Okay, and then replacement activities, activities that are strictly replacements are longer, but you are not clear in your mind whether those activities that are listed in the schedule are replacement activities?

A. Like I said before, the way they are described in the evidence, the vast majority of them look like new activities, except I was not clear what is proposed in terms of the Cardrona scheme and as I said before as well around Omakau, it seems to be a little bit up in the air.

1600

Q. And just for plan drafting though, this is completely – policy 10A.2.3, in the first paragraph you finish by saying “except when” and some words are crossed but you’ve left in “applies and.” You need to take out the applies and to make sense grammatically.

A. No.

Q. No, you don’t? Okay.

A. No, it continues on the next page.

Q. Yes, that’s right. So, reading it out, the sentence would be “for a duration of no more than six years except where applies and the take and use of

water is associated," but that's a bit clunky, so, you could just simply delete the "applies and" couldn't you? And say, "except where A, the taking use and water is associated with the community water supply."

A. Correct.

Q. Just a couple of spare words.

A. You could actually do that, as we discussed earlier, initially, the idea was to have reference to rule 10A.3.1B.1.

Q. You'll upset the commissioner.

A. I know, and I acknowledge that, and you can take it out, but that's why the "and applies" but you can take it out.

Q. Okay, so I've just noted that saying you would also take out the words "applies and" just to make better grammatical sense of it. So, six years except where your one of the schemes listed in your schedule, and the problem with that is that you may or may not be a replacement consent.

A. Yes.

Q. So, you've got a potentially a confounding factor there, haven't you?

A. Yes.

Q. Okay, all right. So, there'll be a way around it.

A. Yeah, if I may. One of the things that also occurred to me was there might be a silver lining to this as well by giving it an exception, if you look at the consent durations that currently are in place for existing consents, some of them go to 2050, so, I just took that into consideration as well. Like I said, in principle I actually don't like schedules that much, but in this case, it looks like it's the only way of constraining the risk.

Q. Yes. so, you are not suggesting though that everything listed in the schedule is indeed a replacement consent.

A. No.

Q. And in fact may not even be.

A. It may not be, but the reference to the schedule is also made in the policy on duration that guides new water.

Q. Yes.

A. So, that's why I had the reference in there.

Q. I know. Okay, thinking that that might mis-que a consent authority. So, I think you were saying in principle, where the applicant is a territorial authority applying for a community water schedule – applying for a replacement consent for a community water scheme, in principle, you can support the longer duration until 2035, and that's what policy 10A2.3 is doing.

A. No.

Q. No.

A. In principle, if you are any schedule provider, I am in favour in short-term consents.

Q. All right, so that's, your – yeah.

A. That's my –

Q. – this is just the full back.

A. This is the full back –

Q. Yeah, okay, got it.

A. – only because, put up the option, sorry –

Q. Yeah, no, if the Court is minded to go for a longer a duration for replacement consents for community water supply, then this is what the drafting looks like.

A. It's just a suggestion.

Q. Yeah, just a suggestion.

A. And a suggestion to constrain it to those schemes. Because, with those schemes, like I said before, we've been provided with information that kind of puts us in a better place to…

Q. But you would need verification that the schemes are indeed replacements schemes, it seems – when I read this, I thought, all of those schemes are replacement consents, but they're not.

A. They are not.

Q. No, and so that's the confusion.

A. They're not. They are replacing existing ones, but they have a different design, different points of takes, so, essentially, they are new schemes.

Q. Okay, and then thinking about any rule for replacement activities which are community water activities, you've got it full discretionary. That would require a full merits assessment of the proposal.

A. I think that was consistent as well with what we set out when we started the plan change or what was notified where if you want to – because initially we had under the noncomplying activity rule provision for consents up to 35 years, sorry, until 2035. That was under the noncomplying rule and we thought because that allows a full assessment of all possible effects, and so, while the activity status is different in what is proposed in my – or what is suggested in my evidence of reply, it would still allow for all the effects to be assessed.

Q. Right. All right. As opposed to looking at at least parts of Mr Twoses', I think it says his RDA rule, in so far as those parts only apply to replacement consents and not new takes are looking an RDA rule for a longer duration and the matters that he's particularly focused on there, so it would, you still need water management – you need a water management plan, he's got a whole…

A. I thought it was actually – I learned a lot from –

Q. It was good, yeah.

A. – reading Mr Twose's evidence, but when it comes to replacement consents, I thought the matters of discretion are quite narrow and for a 15-year consent, almost 15 years, I thought it would be appropriate to widen that out.

Q. Oh, I agree, because – well, I agree in principle with that because I think the evidence is that the water plan doesn't contemplate the sort of enquiry that Mr Twose has for new consents and therefore for existing consents and so if you're going to be looking for replacement consent for a longer duration, I couldn't see why you would take any different approach, and so that his discretionary matters, matters of discretion for new consents would equally apply to replacement consent.

A. Yeah

Q. Yeah, and you'd agree with that?

A. I'd agree with that.

Q. That at least – to be some guidance on the long duration.

A. I'd agree with that, and I think I mentioned before when being questioned by Ms Irving that Mr Twose's proposal is very elaborate and clever in terms of looking at demand side and how you can manage demand in a way that encourages efficiency in end use, but it actually doesn't give much scope to consider the direct impacts on the resource that we're taking from, like, yeah, the actual take itself and the effects on the water body of that.

1610

Q. And I know it was Mr Twose's evidence why he was in supportive of 15 years was that he felt that consenting authorities had to have the opportunity to review the environment after the lapse of certain periods of time. It couldn't be that territorial authorities could keep on indefinitely taking water without ever review of the wider environment, so what that review of the wider environment entailed in its impact on territorial authorities was less than clear, and then that comes down to the debate about are territorial authorities interested in the end-use of water – that is, to what the person to whom you're supplying uses it for – or are they interested to the extent that they have an interest in the environment only, it is the change in environment, you know, over a number of years or as the years pass by, which seemed to be Mr Twose's emphasis, that it was the latter. How you would respond to finding out, for example, that you are in an environment which was impacted by, for example, contaminants or by water shortages, how would you respond to that, or are TAs right and they would never countenance a change to their conditions, even on an application for replacement?

A. Sorry, could you repeat the last sentence?

Q. On a merits assessment, how do you respond to a finding that you're in a water-short catchment, that there are over-allocation issues to do with water quality and quantity, if you are a territorial authority? What would be any change that the regional council would seek to impose on a territorial authority as a consequence of that finding?

A. I think some of the answers are probably, in terms of managing that end use and the impacts of the end use, are probably already in Mr Twose's proposed solution. Through a management plan, I think where regional council comes in is to kind of put some standards onto those management plans, as to what they need to meet, and linking them to the consenting regime, but at the moment, yeah, we don't have anything in the plan that allows us to assess any of the matters that would be captured by that management plan, apart from, perhaps, general water demand for residential use, stock water, but I think that's where –

Q. Is it fair to say that there's nothing in the operative plan that particularly –

A. That is not in the operative plan.

Q. – enlightens this either?

A. No.

Q. So, you know, this to me was at least a step change in thinking from the operative plan, so hence, it had some merit, a lot of merit, because it's not as if you've got a default over there to go to.

A. No, we don't, and I know that the practitioners do that, but they rely on industry guidelines, and none of that is actually linked in or is actually explicit within the plan.

Q. So if the Court was thinking about an RDA pathway for replacement consents which are truly replacement consents, and they then get picked up in this plan change as opposed to the operative plan change, notwithstanding that there are no outcomes for the environment, no outcomes stated in terms of objectives and policies, could this thinking in Mr Twose's RDA start to encourage TAs to think about their proposals or the crafting of their proposals more than what they are encouraged to do under the operative plan?

A. Absolutely.

Q. Absolutely?

A. We've heard a number of times that an increase on water use, take and water use, actually puts a financial strain on territorial authorities. The more water they use or that they need to take, the more expensive it is. It's almost the opposite as with the primary sector, really, so I think it's not

just lip service, I think they will see the benefits of that, I'm sure, and I think they will encourage their end users or somehow impose it on their end users, yeah.

Q. Okay, all right.

QUESTIONS ARISING – NIL

MR WELSH:

Ma'am, I don't have a question as such, but just a request.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Yes?

A. With the interchange between Commissioner Bunting and Mr de Pelsemaeker, Mr de Pelsemaeker indicated he would canvass the schedule changes at the JWS on Monday.

Q. Yeah, you probably need everyone.

A. Ms Styles isn't part of that JWS, and I close tomorrow, so my request was, if Mr de Pelsemaeker wanted to canvass others' views, could he please do so with Ms Styles?

Q. I would think that's completely reasonable, I understand, yeah.

A. It's just that I've closed tomorrow, and –

Q. No, fair enough, yeah, no, fair enough. There will be a way of managing that because it really is just the sanity check at the end of the process. I hope that's all it is.

A. Well, yeah, yeah.

Q. But there will be a way of managing that to ensure that your interests are not prejudiced, and Ms Styles is there.

A. No, thank you, Ma'am, I just thought I should ask because I don't want to assume that.

Q. No, no, well, you shouldn't either.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Did you want to say something about that?

A. No, Ms Styles or Mr Mitchell, because Mr Mitchell seemed to be – or they can do – yeah.

MR WELSH:

Probably Ms Styles, and then, if needed, she can liaise with Mr Mitchell for advice, but she's the one who's been involved more recent times.

THE COURT: JUDGE BORTHWICK

Okay, so you just need to think about that, Mr de Pelsemaeker, about doing that hard editing on that schedule. Is there any other – I'm hoping they're just simply editorial matters which need to be picked up, but other planners might have a different view, so I don't know whether you lead the process, then distribute it and ask for comments in a timely sort of way, bearing in mind everybody else's other obligations. Okay, that's us. Closings.

MR MAW:

So on to closings then. Now, just in terms of tomorrow's schedule, is the Court still planning on rising at 2?

THE COURT: JUDGE BORTHWICK

Yeah. Oh, well, I'm staying over, but you guys need to get back?

THE COURT: COMMISSIONER EDMONDS

Yeah, I'm afraid that there are no later planes to Wellington. That's the reason that we have to finish early, so we're sorry about that.

MR MAW:

I'm quite happy tomorrow, because I would otherwise need to seek leave to be excused at 2, so that sounds good.

THE COURT: JUDGE BORTHWICK

Actually, sorry, I just suddenly thought of a question for Mr de Pelsemaeker. No, you finish off what you're saying, though, because you're on your feet, thinking.

MR MAW:

I was just looking at the schedule tomorrow in terms of the list of parties closing. I don't understand there to be any changes for that, so we'll just get cracking on the list.

THE COURT: JUDGE BORTHWICK TO MR COOPER

Q. Did we have some latecomers for closings?

A. Your Honour, the only changes from the schedule are (inaudible 16:20:01) can be here in person, (inaudible 16:20:04) will be here in person not by AVL and (inaudible 16:20:10).

Q. I thought there was a latecomer last night. I thought I had a latecomer last night, maybe I'm wrong.

A. (inaudible 16:20:19) via AVL.

Q. That's fine, as long as Jarran has the details and so forth.

A. I'm not aware of anyone else.

Q. Okay probably thinking about PCA.

THE COURT: COMMISSIONER BUNTING

Can I just ask a question? For those that are doing it by AVL, will we get a copy before the –

THE COURT: JUDGE BORTHWICK TO MR COOPER

Yeah, Mr Cooper, can you ask Mr Reid just to send us a copy of his submission before he presents?

A. Yes.

Q. Yes, so that we've got something to read.

A. Yes, (inaudible 16:20:55) the morning.

Q. Good. Anything else? You right?

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Actually, there was one final question sorry. Mr de Pelsemaeker, I'm sure but I haven't been able to find it. I thought it was Ms Perkins who lead

evidence about – she not only gave evidence in capacity as a planner talking for Landpro but the Landpro submission but she also had five or six other farming entities that she was asked to advocate for, one of whom was hydro, is a station which had a hydro on it.

A. Yes. I believe so, Pioneer?

Q. I've looked and I've looked and I can't find the statement that she made. But sorry, who did you think it was if it wasn't this.

A. Ma'am Earnslaw.

Q. Earnslaw, yes could well be. Did you turn your mind whether there could be a possible exception for them or not? That's their hydro only, so it's not hydro irrigation, it's just hydro. Do you want to think about that some more?

A. I have a sense that it didn't cause any problems for them but maybe that's a bit –

Q. I don't think the plan per se poses problems but they just can't be bothered going through process every six years, is what the argument was.

A. It's a small scheme and it's for private use, I don't think they intend to do anything different than just carrying on their business.

Q. That's right. Yes, I'm sure she made the statement, "Earnslaw doesn't the water for irrigation".

A. No, it's a separate – and I think that could a concern where the water is used for both purposes but in this case, my recollection is that's only hydro.

Q. Yes, do you want to think about Earnslaw and because you're going to be around for the next few days and also whether or not your thoughts have changed in terms of them coming in on the schedule maybe, I'm not indicating anything, that was the only other entity where I found sure we had some evidence and it was a clear carveout for hydro, yes – electricity and then you might want to pick that up in your JWS as just a by-the-by matter. That was it.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. I'm just turning my mind to next week and we'll get a joint witness statement from the planners.

Q. Yes.

A. In terms of what then happens with that, I had in mind that either there would be no need for any questions but if there was need for questions then perhaps Mr de Pelsemaeker could be the representative of the group to make some questions on that statement rather than having to schedule…

Q. Everybody else back, yes, no that sounds reasonable probably pre-suppose.

THE COURT: COMMISSIONER EDMONDS

Q. Agreement.

A. Depends what it says a little bit but that's my thinking at this stage in terms of how that might be managed.

THE COURT: JUDGE BORTHWICK

Q. Yes.

A. But I guess you will just need to see what the statement says first.

Q. Yes because I don't have a sense of where the planners might be lining up the Court's thinking and the further approval to the (inaudible 16:24:48) by Mr Page. Yes.

A. It strikes me if there's lots and lots of red pen, there will need to be a need for multiple people to return to explain but if it is really a matter of refinement with some fulsome explanation about the refinement needing Mr de Pelsemaeker may be able to speak on behalf of the group.

THE COURT: COMMISSIONER EDMONDS

So, was there a suggestion somewhere along the line though that we should have the conditions?

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Yes, testing, testing, so be draft condition and then –

A. So there was Ms King and –

Q. I don't want Mr Cummings back because I think we understand all of that but –

A. Ms King to run awry over what the condition might look like.

MR MAW:

Yes, that would be sensible, and the –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. And also the testing because I think that's where –

A. Correct, Ms King's in a good place with the way she both understands the consenting side of things and also the planning piece, given her involvement here so it was anticipated she would be involved.

THE COURT: COMMISSIONER EDMONDS

Q. And so, what was – also taking an actual example –

A. Testing a live example.

Q. – and see how it tests (inaudible 16:25:50).

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Especially now that she has in mind that if you want to this, you're going to have to amend your application. And so that should start to simplify things in her own mind. At the moment it is complex and I couldn't see it working so it would have to come in on that understanding.

A. Yes, well I'd suggest that Ms King participates in that conferencing and if it does pick up, then ideally a practical example. And including the condition that would come down.

Q. Yes. Sounds good. So if everybody was happy with that, the representatives from the council can come forward, of course the planners may not be happy with that and we'll just take it as it comes. But that's to come on, when Monday?

A. Monday.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Monday preferably and nobody, except for you Mr Welsh, might be caught out. Well no, you won't be caught out in that because you're particularly interested in the priority issue are you?

A. No, just to clarify, I'm not asking that Ms Styles attend that JWS, just that Mr de Pelsemaeker liaise with her or bring her in at the end of it.

Q. No I was just thinking about your submissions on priorities.

A. No I'm done with that.

Q. Your issue is more that the whole thing might expire than, how do we work out…

A. I have the one sentence that you've requested in respect of the 124 issue. And that's all I've got in my closing.

Q. What was your one issue, one sentence?

A. Confirming whether I want – I'm asking you to make a decision on 124 or not. I've inserted that.

Q. Right and so you are asking?

THE COURT: COMMISSIONER EDMONDS TO MR WELSH

Q. (Inaudible 16:27:30) more than that.

A. No, I've got to have something tomorrow Ma'am.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Oh, okay, so they're giveaways.

A. I am not asking and I do not consider you need to.

Q. It's a sneak preview of tomorrow, right.

A. Might get on the earlier flight now.

Q. You might as well go, yeah.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. But, Ms Irving, this might actually impact on your client, knowing where those priorities go for the policy stuff, or not, in terms of your closing?

A. No, the priorities are not a huge issue for the TAs.

Q. Anyway, if you're prejudiced, you just simply come back.

A. Yes.

Q. Yeah, okay, good, all right, that sounds like a plan.

COURT ADJOURNS: 4.29 PM

COURT RESUMES ON FRIDAY 2 JULY 2021 AT 09.30 AM

THE COURT: JUDGE BORTHWICK TO MR RENNIE

Q. So, we're moving forward to closing, and think we're with you, Dr Rennie

A. I believe you have my closing – about to be handed to you.

Q. Just about to come. Okay, we're in your hands.

MR RENNIE:

So, I'm appearing today to provide the closing representation for WISE Response. In this closing, I will address the following further issues that have arisen since WISE Response was heard. Stranded assets, joint witness statements, and the recently notified Otago Regional Council regional policy statement. So, just to remind the Court, WISE Response called two expert witnesses, Dr Jim Salinger, an expert in climate change, and Mr Dugald MacTavish an expert in hydro geology. Dr Salinger presented evidence on the modelled future for precipitation in Otago and concluded that while some areas would get wetter, others would be dryer, and Mr Salinger's evidence has not been contested as far as I am aware. WISE Response takes from this a need to recognise increased risks to the water flows in the region and the need to be precautionary in the allocation of our water bodies. Mr MacTavish presents evidence on the ability to make environmental water flows now and the potential for new approaches to water allocation and land management to achieve such flows. His evidence on environmental flows has also not been contested as far as I'm aware. I'll refer to each of these experts as relevant as I go through the rest of this closing.

Mr McTavish also participated in the joint witness statements sessions. His participation in signing off the JWS agreements does not indicate support for the approaches discussed at those JWS as being more desirable than the relief sought by WISE Response but is facilitating addressing the technical matters of gathering and use of hydrological data. So, remind of the relief sought, the basic relief sought by WR was and is first that before any new consents are granted an environmental flow regime be established for each river. This should be based on the best available hydrological and ecological information

or modelling which would be reviewed once the other Statements and Plans are operative. Second, that allocations should not be based simply on past use but on demonstrating that the land use system is genuinely sustainable including under the sinking lid Net Zero Carbon emission policy by 2050. The relief sought by WR was not considered at the JWS meetings as it was considered outside the scope of the Court directions for the JWS. So, moving onto stranded assets. WISE Response shares the concerns expressed by the planners in the JWS statement of the 4th and 21st June 2021 regarding the basis for assessing what is a stranded asset.

Basically, just don't think that the information is there and it could be quite a variable concept. The concept of asset, however, is somewhat misleading, All other things being equal, an 'asset' whose ongoing financial value is dependent on a privilege that has a clear end date, depreciates in value relative to the returns achievable before expiry of the privilege. So, essentially the asset decreases in value as the date on which the privilege draws closer to its expiry. At the point of expiry of the privilege, the asset has only its current value without the privilege. Thus, any asset, such as irrigation equipment, once the privilege of being able to take water no longer exists, has only its sale, heritage or other similar values. The purchase of equipment does not entitle an owner to an expectation of obtaining a privilege.

The same applies to investment in viticulture and orchards. To the extent they are dependent on a privilege, such as a resource consent to take water that has a clear expiry date, the value of the orchard is what it is worth without the resource consent. That is the structure of the legislation, and that appears to be deliberate. WISE Response does not consider there is a basis in either evidence or theory for considering any allowance for supposed stranded assets. In summary, WISE Response does not accept that there can be a legitimate expectation that deemed water permits or any other expiring water permits would be replaced without considering the health or the water bodies and the implementation of the priority structure set out in the national policy statement on fresh water management. Moving onto the regional policy

statement of the Otago Regional Council 2021. The RPS was publicly notified, just this week, I think, last week. The RPS has relevance to these proceedings and to WISE Response's submission. In the interests of time I have focussed quite narrowly to those most directly relevant to WISE Response and I – do you want me to ready them out? The ones that are on the next page.

THE COURT: JUDGE BORTHWICK TO MR RENNIE

Q. I can read them.

A. I'm aware there might be people watching.

Q. We'll read them as we go though. So, we'll just take a pause and read through them and then move onto your next paragraph, but anyway, you're at paragraph number 19.

A. Okay. So, the relevant Integrated Management Policies essentially reiterate the decision priorities of the National Policy Statement Freshwater Management.

Q. So, we'll read IM-P2 decision priorities to ourselves. Do you want us to simply read to the end of the page up on paragraph 21? Is that Okay?

A. Could do. Just note there that we see the implementation of those priorities through this plan change as both practical and therefore required by the national policy and the RPS. So, yes, if you read through that to paragraph 21 and I'll pick up again.

MR RENNIE:

In summary these provisions call for action now in light of the information available, the evidence of future climate change risks presented by Dr Salinger, and the ability to implement environmental flows presented by Mr MacTavish. As argued in our submission, the so-called replacement permits are in fact new permits for a new activity. Therefore draw attention in particular to integrated management policy 10(2) which says, I'll just go back over the page, prioritise avoiding the establishment of new activities in areas subject to risk from the effect of climate change.

THE COURT: JUDGE BORTHWICK

Just pause there a second. Yes, 23.

WITNESS CONTINUES READING BRIEF OF EVIDENCE FROM PARAGRAPH 23

So this is further supported in the RPS freshwater policies. And I'll just read this one sentence, just a short one. IF-FW-P7, fresh water environmental outcomes, attribute states (including target attribute states) and limits ensure that jump to (5): existing over-allocation is phased out and future over-allocation is avoided, and fresh water is allocated within environmental limits and used efficiently.

THE COURT: JUDGE BORTHWICK

Q. Just pause for a second.

A. Okay, paragraph 24.

WITNESS CONTINUES READING BRIEF OF EVIDENCE FROM PARAGRAPH 24

"The Court has heard the evidence of Dugald MacTavish, an expert in hydrogeology, that environmental flows could be established for the catchments now. In the large amount of evidence before the Court I am not aware of any expert evidence being presented to contest that of Mr MacTavish. Given the uncontested nature of Mr MacTavish's evidence WISE Response considers that it is practicable now to implement in part the national policy statement for freshwater management and the regional policies identified above. This would be done by requiring that no new water take permits be issued, including so-called 'replacement' permits, without first establishing the environmental flow for the river from which it is taken. This would represent part of a phased approach to improving water management with subsequent plans supporting that. Regarding priorities we had just one comment here. There is one priority, the health of the water bodies. All issues of priority between other users needs to be seen within that context.

THE COURT: JUDGE BORTHWICK TO MR RENNIE

Q. Are you referring to deemed permits and the rights of priorities?

A. Yes that was.

Q. And so are we – are you risking there a confounding two quite separate issues, both the statutory creature which deemed permits are together with their rights and with the priorities established by the NPSFM?

A. We basically want to make the point that the health and safety of the water system needs to be the driving force in the deciding of those priorities and as we said, those priorities we consider, if there's going to be provision made for somehow including those priorities in future versions…

Q. Which priorities are we talking about? The deemed permits or the NPSFM?

A. The deemed permit priorities. If those were to be included in the future provisions…

Q. You mean the plan to come?

A. Yes, there's a proposal here of are a new policy.

Q. Yes, so you mean a plan change 7?

A. Yes.

Q. Is the case for the Department of Conversation is, that if you don't include the effect of those priorities and this is what Court's proposed policy and other provisions and they've been – wording for that has been worked up further by Mr Page, well you don't include something like that in these priorities you may change the existing flow regime which then may undermine further or may threaten further galaxiid populations which were already threatened or at risk.

A. Yes.

Q. Yes. So, then there's an incidental but important environmental benefit.

A. What we're trying to say, is we actually support that position.

Q. Oh, really? Okay.

A. That's what we mean by that…

Q. Sorry, you need to say, you need to…

A. I should have actually said that but…

Q. So you support the priorities, that's great. Yes.

A. Because if they are done in a way that reflects that particular outcome.

Q. All right.

MR RENNIE:

JWS of the 4th and 21st of June. We just want to say here, that we fundamentally disagree with the drafts provided as they do not prioritise the setting of the environmental flows. And that's been our concern all along. The joint witness discussions and there's been no agreements in those meetings regarding the WISE Response wording, so we fundamental disagree. We thought just to make it clear for the Court that the – if and if the Court does not grant the relief that we have sought then we do have a preference for version B of the –

THE COURT: JUDGE BORTHWICK

Q. Okay, I was just trying to look it up. So that's the 9th JWS.

A. Yes, I've…

Q. Yes, I'm just looking it up from our database. That was a JWS dealing with the objectives, stranded assets and –

A. Objective 10.

Q. – some odds and sods. All right.

A. Thank you.

Q. I understand what you're saying in relation to environmental flows but what was your submission on duration?

A. Sorry the duration of?

Q. Water permits.

A. Our view on that is that we didn't have a submission on the duration of water permits per se as we felt that they – if you set the environmental flows first then the water permits will be fitting within that context.

Q. Mmm.

A. So our view was that they're not being set until we have the flow set for PC…

Q. Do you understand that council proposes to do this through –

A. Yes.

Q. – the land and water plan to come, because it's not ready now to do this, ahead of workshopping and consultation with the community whereas Mr Page's client and many of the farmers would say, set them now. The downside to that is that, broader considerations which are of importance to the NPSFM may not be at the fore of informing those water flows. So there's two different approaches here.

A. So the – we think the environmental flows can be set on the modelled data now. We…

[1] Well you might be right but the be end in all is not – no, put this a different way. Even if you are right – no

[2] , anyway, I'll leave it there. I understand what your submission is, thank you.

THE COURT: COMMISSIONER EDMONDS TO MR RENNIE

Q. Just to confirm (inaudible 09:50:12) response, you didn't participate in that conferencing on the 4th and 21st of June?

A. No, we don't have an expert planner, and that was for expert planners.

Q. Okay, thank you, thank you.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

Q. I think we might be with you, Mr Anderson. Managed to leave my hearing schedule in another room.

A. It does seem about right.

Q. Does that seem about right? Anyway.

A. I'm sure something else will jump up if I've got it wrong.

Q. Yes, with you. You're opening and closing.

A. Opening and closing all at once.

MR ANDERSON:

So I haven't had a great lot of involvement in the hearing but have been watching and reading all the documents that have been coming through with interest.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER BUNTING

Q. You are light?

A. No, I've got the WISE Response one.

Q. Oh, you've got the WISE Response one. Okay, sorry, that won't help. Yeah. There you go.

MR ANDERSON:

So I'll just start with para 1. Forest & Bird accepts the underlying assumption in PC7. That is, the status quo can be maintained for a short period, so that ORC and the community can focus on development of a new Land and Water Regional Plan (LWRP) that will give effect to the NPSFM 2020.

THE COURT: JUDGE BORTHWICK

You need to slow it down a bit. Sorry, slow down.

MR ANDERSON:

I'll slow down, Ma'am. Forest & Bird agrees with the version of PC7 that was attached to Mr de Pelsemaeker's reply evidence. The exception to this is Objective 10A.1.3, which provides for exceptions to the hold the line approach in PC7. As detailed below, Forest & Bird seeks an amendment to this objective so that it more closely reflects the exceptions provided in the policies. I've set out the key issues for Forest & Bird in para 3, which are: the need for PC7, objective 10A.1.3, the exception sought for renewable energy generation, the exception sought for community water supplies, priority, provision for an increase in irrigated area.

In relation to the need for PC7, Forest & Bird disagrees strongly with the suggestion that PC7 is somehow not required. Forest & Bird rejects the suggestion that it is somehow appropriate to rely on the existing operative plan and use the NPSFM as the basis for decision making. Forest & Bird agrees with the submissions of the Council on this issue. In addition to the reasons set out by the Council, the Court is required to have regard to the Minister's reasons for making the direction to direct refer the matter. In my submission there are

two matters in the Minister's direction which strongly support PC7 being made operative in some form.

One of the considerations the Minister was: failure to implement the plan change has the potential to result in significant and irreversible changes to the environment, and secondly, the key reasons for making the direct referral are: calling in the plan change as part of a proposal of national significance would assist the ORC by allowing its staff to focus on developing a new Land and Water Regional Plan and avoid potential delays associated with the Schedule 1 process of the RMA that could complicate the development of a new Land and Water Plan. In my submission, it would be contrary to these directions for the Court to decide that PC7 should not be approved in some form.

It is not disputed that the Regional Plan for Water is out of date. However, OWRUG's position seems to be that PC7 should be declined because it does not immediately give effect to the NPSFM and notably the obligation to give primacy to Te Mana o te Wai. The response to this submission is in Clause 4.1 of the NPSFM, which provides: every local authority must give effect to this National Policy Statement as soon as reasonably practicable. PC7 does not need to fully implement the NPSFM, as long as it is part of Council programme of fulfilling its obligation as soon as is reasonably practicable. It is part of the Council's programme.

Minister of Conservation v Northland Regional Council supports this. That case related to a plan that had been notified under the NPSFM 2014 but fell to be decided under the NPSFM 2020.The Court traversed the relevant provisions of the NPSFM 2020, including Clause 1.3.4, Clause 1.3.4, which includes the obligations under Te Mana o te Wai, Policy 1, Policy 6, Policy 7, Policy 8 and Policy 9, and concluded that the obligation is a future obligation. I don't need to read that out, but I think the second line there, where it says that the obligation imposed upon the Regional Council and must accordingly be a future obligation rather than a current obligation. That's the key point, I think, that there's no

requirement to give effect to NPSFM immediately, but you've just got to do it as soon as reasonably practicable.

PC7 is part of the Council fulfilling its obligations to give effect to the NPSFM 2020. It is transitional but, this is to be expected and anticipated by Clause 4.1.1. The PC7 approach of rolling over existing consents while an NPSFM compliant planning framework is put in place is a better approach to fulfilling the future obligation to give effect to the NPSFM than the consent by consent approach relying on existing plan provisions advocated by OWRUG.

Moving on to objective 10A.1.3. Objective 10A.1.3 was considered by the planners in conferencing at JWS9. Agreement was not reached, with two versions, A and B, considered. I've put them in footnotes, because they are quite similar, but there are some differences in them. Forest & Bird does not support either of these options. The reason for Forest & Bird's concern is the broadly worded nature of both Version A and B, specifically the reference to low environmental effects and not compromising integrity of the new regional planning framework. This broad wording is not consistent with the way in which the PC7 has developed, which is provision for a small number of limited exceptions to the underlying premise that takes should not increase while the planning framework is put in place.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON:

Q. You can just slow down a little bit, and I want to reread that paragraph.

A. What I'm trying to say in that paragraph is that the way in which this thing has worked out is that we've had some suggestions of limited exceptions for things like renewable energy and community water supplies and irrigation for viticulture and orchards. So rather than having a broad exception in the policy for low environmental effects and compromising integrity, what I suggest, and I've done that in paragraph 17, is that the policy should actually say the way in which it's developed, which is – and I've got that in paragraph 17 in underline, which refers to – on page 5, at the bottom of para 17, I proposed and amended objective.

Q. Right, I'm just going to read that to myself before you say anything more. Okay, just pause. And this is an objective or a policy?

A. So that's an objective. So in the footnotes below, on page 5, I've set out the two versions that were put up at joint witness conferencing, and the main difference between them is one refers to the adverse additional – so in footnote 7, under 10.1.2B, it refers to where the risk of additional adverse environmental results from any proposed increase in the scale or duration of the take and use of freshwater is low, and the other version, which is version B, refers to – so if you go under footnote 8, 10A.1.3, is if this does not compromise the implementation of an integrated regional planning framework that prioritises the health and wellbeing of water bodies and freshwater ecosystems. So the suggestion that is included in these submissions is that we incorporate both of those bits in it, but the risk of doing that is that everyone will think that they are having low effects or they're not going to compromise integrity, so the suggestion is to actually set out the exemptions that are being provided in policy in the objectives.

Q. Just pause there a second. With that in mind, I'll reread it. Right, thank you.

MR ANDERSON:

So moving on to renewable energy. Trustpower have sought an exemption from PC7 for renewable energy. Forest & Bird is highly supportive of renewable energy as a method of combatting climate change. However, Forest & Bird does have concerns that the ecological integrity of water bodies can potentially be compromised if too much water is taken for any use, including renewable energy. In this case, Forest & Bird does not oppose the exclusion sought by Trustpower, This is because in the context of PC7, the issue is relatively modest. The schemes that fall for reconsenting under PC7 do not raise any significant concerns. However, Forest & Bird does not accept the reasoning proposed by Trustpower. In particular, it is not accepted that the NPSREG applies to the allocation of water. The use of water for renewable energy is a

second order priority under Clause 1.3(5)(b) as relating to the health needs of people. That's 1.3(5)(b) of NPSFM 2020.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

Q. Just pause there a second. So effectively, at subparagraph (a) of 21, you're saying: "it is not accepted that the NPSFM applies to the allocation of water." What you're saying is the NPSREG does not apply to the allocation of water, correct?

A. That's correct.

Q. Right, just let me –

A. Yeah, I've got a double negative.

Q. It's too early in the morning for double negatives.

A. I got up earlier than – well, I'm not sure if I did, but I got up pretty early this morning, only to be delayed in Christchurch Airport. Shall I carry on?

Q. Yeah, and you don't accept that use of water for renewables is a second-tier priority.

MR ANDERSON:

The preamble of the NPSREG makes it clear that it does not apply to decisions about the allocation or prioritisation of freshwater, and I set out the specific reference in the preamble. Trustpower has referred to the decision in *Carter Holt Harvey v Waikato Regional Council*, which indicated the preamble was not intended to be guide decision makers, and I don't need to read that out, but I think this is referred to both by Trustpower and the council in their submissions, so it's the middle of the first paragraph, which says: "We agree with Mr Cowper that the location of the above statement in the preamble illustrates that it is not intended to act as a guide to decision." In my submission, the Court's conclusion at 58 is difficult to reconcile with section 5 of the Interpretation Act 1999, which provides – I don't need to read that out, but the text in light of purpose, and 3 refers to the preamble – it says, subsection 2, the matters which may be considered in ascertaining the meaning, and that includes the preamble. My submission is that the NPSREG, that exclusion in the preamble is operative and it excludes it from the decision.

THE COURT: JUDGE BORTHWICK

Q. So what does *Carter Holt* say that's different?

A. *Carter Holt* says differently.

Q. Okay, what does *Carter Holt* say, then?

A. So if you go to the middle of 58, which I've set out –

Q. "However, we agree with Mr Cowper," yeah?

A. So if you start at: "It was submitted by some parties that the inclusion of this statement in the preamble precludes us from having regard to it when considering any of the contested issues to which it is relevant," and then the Court goes on to accept Mr Cowper's argument. I've put 59 in there as well because I think that's pertinent to the current case, which is that the –

Q. Yeah, okay, I do want to read 58 and 59 because it's not in the front of my mind this morning, (inaudible 10:04:00). All right, mhm.

A. So effectively, what I am saying is I don't agree with *Carter Holt Harvey*. In my submission, the preamble says what it says it does, and that's operative, i.e. the NPSREG doesn't apply to matters about the allocation of freshwater, but in 25, whether the NPSREG applies does not need a decision in this case. This is because 59 of Carter Holt can be applied, and that's why I put 59 in there. That is, while the NPSREG does not apply, there are relevant provisions in the RPS which can be relied on to provide for the exemption sought. In this regard, Forest & Bird agrees with Trustpower submissions and considers that the limited exemption sought by Trustpower can be justified in terms of policies 4.4.1, and 4.2.2 of the RPS.

Q. So in terms of any decision which must be made by the Court, does the Court need to get into any decision as to the meaning of the NPSREG and ascertaining it's meaning from the preamble, or indeed, whether or not the NPSREG does or does not apply to the allocation of water, and thirdly, whether or not renewable energy is a second water priority under the NPSFM? We don't need to go there –

A. We don't need, that's my submission, that's my exact submission.

Q. – and make those important decisions, we just need to, if we're happy with Trustpower –

A. That's correct. The purpose of making the submission is I didn't want the Court to make that decision when it didn't need to, when we might be confronted with having to make the argument elsewhere in dealing with –

Q. Well, okay, you want to kick that can down the road.

A. Well, I'm happy for you to make decisions.

Q. Oh, no, no, I'm not happy to write decisions that I don't need to write, and I've already said that as late as yesterday.

A. Yeah. All I'm doing is responding. Trustpower made submissions on this point, which I disagree with, and so I'd rather you not make a decision on that than make a decision the other way.

Q. Yeah, yeah, yeah, yeah, yeah. In fact, there's about, from memory, five or six points of law which Trustpower made a submission on, and unless Mr Maw wants to reply to all of them, we need not apply to all of them if there is an appropriate accommodation for Trustpower, not because of convenience, but because it actually made out its case.

A. I feel I've missed something. Did Mr Maw make a similar submission, I assume?

Q. No, I don't know if Mr Maw made any of those submissions yet. He's yet to respond, and so it's like he's probably thinking homework over the weekend. Again, if it's not a matter that we need decide, and these are critical issues, I would have thought, but if we don't need to decide them because there was an appropriate recognition – when I say appropriate, having a look at the (inaudible 10:07:29) for the Trustpower hydro, then we just need to crack on with Trustpower hydro and avoid making important decisions which would be (inaudible 10:07:37) elsewhere.

A. Correct, that's my submission.

Q. Okay, good. I love it when we don't have to decide things.

A. Good. I can leave you to read the question of renewable energy as a second order priority, because the same applies in relation to that.

Q. Well, we know, you better read it out, because Mr Maw might not like what Trustpower is proposing, a carve out for Trustpower, so you'd better read it out, because it is signalled as an important issue for Trustpower.

MR ANDERSON:

Forest & Bird does not accept that renewable energy is a second order priority under Clause 1.3(5)(b). The clause refers to the health needs of people (such as drinking water). This is aimed at ensuring this like safe drinking and swimming water. While climate change poses significant risks, it is stretching the words beyond their normal meaning to interpret this as a health risk. The usual interpretation of a health risk is as referred to described in Clause 1.3(5)(b), that safe drinking water is a health need. A health need of people would also be ensuring that water was safe for swimming. There is a suggestion that use of water for renewable energy is a second order priority report in the s 32 report for the NPSFM. In my submission, the reference to this does not overcome the problem that considering climate change as a health risk is not a reasonable interpretation. If the intention was that the use of water for renewable energy was a second order priority, the NPSFM could have said so clearly and unambiguously in Clause 1.3(5)(2). Again, this issue does not need a decision. In this case, whether renewable energy is a second or third order does not change the fact that it is subservient to the first order priority of health and wellbeing of water bodies and freshwater ecosystems. So, moving on to community water supplies. Forest & Bird takes the same position as Mr de Pelsemaeker – everyone else has been saying his name all week, so I'm struggling.

THE COURT: JUDGE BORTHWICK

He's very forgiving. Mr de Pelsemaeker, I think.

MR ANDERSON:

With respect to community water supplies, Forest & Bird's preferred position is that there are no exceptions for community water supplies. In broad terms the reason for taking this position is: a. to ensure the integrity of PC7 as a hold the

line plan change, and community supplies provide water for a variety of uses, not all of which may be considered as second order under the NPSFM.

THE COURT: JUDGE BORTHWICK

Can you just keep your voice up?

MR ANDERSON:

However, Forest & Bird would not oppose a limited exception as set out in paragraph 65 of Mr de Pelsemaeker's evidence in reply, which would provide exceptions for Alexandra, Clyde, Cromwell, Pisa Moorings, Omakau, Luggate, Wanaka/Albert Town and Cardrona. Providing these limited exceptions will not undermine the ability of PC7 to hold the line. Carrying over the priority system for deemed permits. Forest & Bird is concerned about the potential loss of the priority system for deemed permits. The concern is that, where a minimum flow is not set on a deemed permit or water permit to be replaced, the priority system would at least retain flows at the current level. This would have an ecological benefit over the situation where neither a minimum flow nor priority is set on any replacement consent.

The evidence is that the removal of these priorities under PC7 could result in the loss of some instream values. It may also mean that less water is available for those that have priority rights. It is accepted that PC7 cannot give full effect to the NPSFM, however, PC7 should not increase over-allocation or other effects that inhibit the ability of the Land and Water Regional Plan to give full effect to the NPSFM 2020. The provisions of PC7 should also ensure that the objectives of PC7, effectively to hold the line, are not undermined.

Given the effect of failing to carry over priority rights from deemed permits to resource consents will have on ecological values and existing deemed permit holders, the priorities need to be retained. It would undermine the hold the line plan change if a mechanism included in the deemed permits was not carried over. There have been some reservations about carrying over the priorities from Ms King and Mr Cumming. Ms King is concerned about the complexity of seeking to retain the priority rights, and Mr Cumming considers that the

conditions as currently written would be difficult to meet and suggests alternative methods of addressing the possible impacts of removing priorities. This includes s 17 of the RMA and the use of water shortage directions. These concerns are valid. However; section 17 and water shortage directions are inadequate and reactive.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

Q. So just slow down and keep your voice up, sorry. So s 27 – oh, yeah, I get that, yeah, yeah, yeah, that's Mr Cummings' evidence?

A. Yeah.

Q. Yeah, hold on a second. Yeah.

MR ANDERSON:

They are used to address adverse effects after they arise. It is better to address the issue at the time of granting consent, to try and prevent the adverse effect from arising rather than try and address it after it has occurred. Simply removing the priorities as being too hard is not an valid option. This would provide for increased takes, which is inconsistent with the objective of PC7 which provides for the enabling activities at their existing scale and consistent with historical use, and potentially create or exacerbate overallocation, inconsistent with the

NPSFM 2020. In its minute of 30 June 2021, the Court proposed some draft wording. Forest & Bird supports this draft wording as a starting point. The key point from Forest & Bird's perspective is that the drafting ensures that the matters of control and discretion ensure that the priorities are retained.

Just to briefly – the minute that the Court put out a couple of days ago was a useful start, I think, and clearly said that there's more work to be done on this, but the key point as far as I see is that if we have priorities and existing deemed permits, carrying those over, the key point to do is make sure to address the complexities of it, which are plain from the evidence of Ms King, I think, to make sure the council has appropriate tools in the toolbox to make sure those complexities are addressed, so that's why I think ensuring the direction the

Court's wording was heading, which is we'll make these matters for control and discretion, and then the council can sort out at the time of grant and consent how to roll those priorities over. I don't see any other way of doing it rather leaving it. Given Ms King's evidence, I think it's complex, there's no two ways about trying to deal with the large number of these consents that roll over.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

Q. Yeah, I think priorities can be – and we've endeavoured to express those in plain English, what is a priority, what has it done in the past? We've translated that into RMA language. The implementation, well, it's complex, but at least what it means is that the council's now got a duty – it's always had a duty, but it's now confronted with the duty to keep up to date its water records, and it hasn't, but that is a problem not solely of its own making, it's also a problem that goes the other way in terms of farmers wanting to retain control and not necessarily forthcoming in terms of what their activities are, how they're carrying out those activities. So this is the, you know, the time now that that comes to an end.

A. Yeah, and so if you look, the two options are relatively stark, we either drop the other priorities or we carry them over in some form, and if those matters of discretion and control are included in the plan, then the council will have to go through a process of sorting that out at consent time, and what that looks like, in some places, it might be quite simple what the priorities are, but in some places, it will be complex, but I don't think that's a reason not to do it, and so in that sense, the concerns about complexity are valid, but eventually, when you look at what the (inaudible 10:15:34) documents tell you to do, not carrying them over isn't an option.

Q. And you understand that this isn't a foolproof guarantee that those species which are threatened will be there in six years' time if the Court approves the plan as is, because they may not be, because it's the nature of the instrument, it's ad hoc and the abstractors –

A. I think the best way of dealing with that is to try and retain the existing framework as much as you can until the new plan comes in and when those issues can be properly dealt with. There's a whole range of reasons

why they are there at the moment and they might not be there in a few years, and to try and – we are not in a position to be able to prejudge what those are in this PC7 context. That's the role of the Land and Water Plan, to try and identify how that really, really important issue is dealt with, but hold on the line in the sense of let's keep things as close as they are in the current point in time, because if these species have lasted for such a long time in those places under the current system, then that's the best way of ensuring they stay there until we can kind of do it properly.

Q. All right. So just bear in mind the evidence that there are other threats or other changes happening within the environment which pose a risk to those species, quite apart from taking and using the water.

A. Yeah, absolutely. I mean, there's a whole range of risks that are posed. You know, trout are a problem, and the flows – it's all interrelated, so I do understand that there's a whole lot of those issues around that, but, yeah.

Q. This is one lever that needs to be addressed.

A. Yeah, in a big picture sense, just trying to retain the status quo is the best way of dealing with it, so trying to – particularly dropping the priorities, I think, is a bad idea, and so let's try and make sure the council has an obligation to do its best to ensure those are carried over, and that's what I think the Court's wording was aimed at doing, so just need to run through the process and make sure that's the end result.

MR ANDERSON:

As notified, PC7 provided that the controlled activity rule only applied to where, if water taken was used for irrigation, there was no increase in the irrigated area. I've set out Mr de Pelsemaeker's justification for that. I don't need to go through that. Forest & Bird supports this justification. This is obvious in the catchments where a reduction in allocation is needed to improve water quality. It is accepted that, in some circumstances, irrigation can increase in area while reducing nutrient losses. However, when the extent of the reduction in losses needed to meet the NPSFM is not known, and it is not appropriate to allow for an increase in irrigation, nor would such considerations be appropriately

considered under PC7's process approach and without plan provisions which give effect to the NPSFM 2020.

Things have moved on, and the matter was the subject of expert witness conferencing, where the planners did not agree on the objective but were agreed on the following policy, and I've set them out there with the additional wording there. Consequential amendments were agreed to rule 10A.3.1A.1. and 10A.3.1.1. The planners limited allowing additional irrigation to viticulture and orchards because evidence of investment had only been provided with respect to viticulture and orchards. Forest & Bird agrees that these amendments are appropriate, particularly the limit to viticulture and orchards. Forest & Bird would oppose this extension to cover other land uses, particularly dairy. The reason for this position is that Forest & Bird accepts the effects of additional irrigation for viticulture and orchards are likely to be minimal. Other land uses, particularly dairy, are known to have significant adverse effects on water quality and approving these uses could potentially undermine the overall purpose of PC7 to hold the line while a proper planning framework is put in place.

Conclusion: Forest & Bird supports PC7 as a necessary transitional step to a NPSFM compliant planning framework. It is critical that PC7 retains its integrity and provide for the rolling over of deemed permits at their existing scale and consistent with historical use. There is the possibility for limited exceptions where the environmental effects of doing so are low and it won't compromise the implementation of an integrated regional planning framework that prioritises the health and wellbeing of water bodies and freshwater ecosystems. The exceptions need to be expressly set out in the plan. Forest & Bird would not oppose limited exceptions for renewable energy, specified community water takes and for extensions to irrigation for viticulture and orchard to irrigation (but not other land uses and certainly not dairy). The removal of priorities on deemed permits is not an exception that can be properly made. The priorities serve an ecological purpose. While there are valid concerns about how the

rollover of priorities can be implemented in practice, removing them is not an option.

THE COURT: JUDGE BORTHWICK TO MR ANDERSON

Q. Thank you.

A. Those are my submissions.

Q. And I will give your wording for 10A.1.2 serious consideration. I think I can see the benefit of the approach that you have taken, yeah… so, anyway, I'll give it serious consideration, I will.

A. Thank you. All right.

QUESTIONS ARISING – NIL

MR ANDERSON EXCUSED

MR VAN MIERLO:

Good morning your Honour, commissioners. As the Court will recall, Aotearoa New Zealand Fine Wine Estates or AONZ owns and operates Manata Estate, an existing vineyard currently in the process of expansion and development, in the Lowburn catchment, near Cromwell. Substantial infrastructure development occurred at Manata in 2019, including installation of a 19 million litre water storage pond, pumping station for irrigation and frost protection, irrigation and frost fighting water pipelines, and vineyard plantings. A small further expansion of plantings is planned. The vineyard operates under organic principles. A wine tasting room and cellar door facilities are in the planning and development stage and the Court has had the benefit of a site visit.

Manata Estate holds deemed permits for take and use of water from the Low Burn. They expire on the 1st October 2021. An application has been lodged for replacement resource consent, under plan change 7 as notified. Manata Estate uses water sourced from those deemed permits for vineyard and pasture irrigation, and frost fighting. AONZ's interest and perspective is focussed on how plan change 7 will impact on the operation of Manata Estate. So, these submissions are similarly focussed. In these submissions, unless otherwise stated, I am assessing the drafting of plan change 7 as proposed in Attachments 1 and 2 to the evidence in reply of Mr de Pelsemaeker dated 25 June 2021. So, these closing submissions address the following matters; AONZ's overall position on the current proposed drafting of the plan change. An update on the resolution of outstanding matters discussed when counsel presented opening submissions for AONZ in Cromwell. Some comments on specific provisions, I touch on the discretionary activity rule status originally proposed in AONZ's submission, and briefly on the issue of priorities, in the context of how this issue may impact on Manata Estate. In terms of overall position, the importance of viticulture in the region is well established, and I've referred there to some of the evidence-in-chief of McArthur Ridge.

AONZ has kept a close watching brief on the development of plan change 7 throughout. Its position has evolved, as the plan change has evolved. In

opening submissions, I confirmed that AONZ is supportive of the intent and general drafting of plan change 7, as it was at that stage. I've set out some of those earlier submissions at paragraph 10, I don't think I need to repeat that, but I do confirm as I go into a little bit more detail below that AONZ remains supportive of plan change 7 as currently proposed. Turning now to some of the issues that were discussed in Cromwell. I did not that the supportive position was subject to some drafting issues. Particularly around the matters of control and discretion in the proposed controlled activity and restricted discretionary activity rules, and the related to use of the phrase "within the limits of," as opposed to "in accordance with." Those issues were referred to the next scheduled expert witness conference and the planners at that conference agreed that there were issues associated with the way those relevant controlled and restricted discretionary matters were worded and proposed revised wording to address this issue.

THE COURT: JUDGE BORTHWICK TO MR VAN MIERLO

Q. Are you happy with where that went?

A. Yes. yes, entirely happy with that. Yep, that's resolved that issue.

MR VAN MIERLO:

Another matter which was discussed with the Court when providing submissions in Cromwell was the concept of current irrigation infrastructure, and whether the record of historical rate and volume of water usage should be tied specifically to historical use using current irrigation infrastructure only. Again, this issue was referred back to expert witness conferencing, and the expert witnesses confirmed that there were a variety of reasons why the historical rate and volume of water should not be limited only to current irrigation infrastructure and that it was appropriate that the full record of water meter data years should be utilised in calculating historical use, and again, your Honour, just to confirm, we're happy with the way that matter was resolved and is now reflected in the revised wording.

I'll move to paragraph 18. So, as subsequent to presenting those submissions in Cromwell, we've continued to closely monitor the development of the plan change, through regular reviews of further amendments arising out of the conferencing of witnesses, or otherwise proposed by parties. AONZ has also worked with Council to test schedule 10A.4 using the deemed permits and water meter record held by Manata Estate as a worked example. This has provided some generalised indication of how Manata Estate would fare under plan change 7, in relation to the assessment of its water meter record when replacing its deemed water permits under the proposed policy and rule framework, and the schedule.

We have also liaised with counsel for Regional Council on some additional minor drafting consistency issues, again, these have now been addressed in the plan change 7, and so, AONZ confirms that it remains comfortable with the currently proposed wording of plan change 7 as set out in the appendices to the EIR of Mr de Pelsemaeker dated 25 July. Specifically, the Controlled Activity rule provides an efficient consenting pathway, with reasonable certainty of outcome, which enables replacement resource consent for Manata Estate's continued operation, and the completion of planned expansion. The possible pinch point is in relation to the access to adequate volume of frost fighting water in spring, but the current indications are that Manata Estate's metered water record, either with or without other relevant methods and data, will enable access to sufficient water rate and volume. Now, of course, there is no room for inefficiency or waste, and plan change 7 will encourage Manata Estate and other water users to manage water judiciously over the next 6 years. AONZ would, however, be particularly concerned if plan change 7 were to be further amended in a way that placed greater restrictions or limitations on access to water for holders of deemed permits such as Manata Estate when seeking replacement resource consent.

THE COURT: JUDGE BORTHWICK TO MR VAN MIERLO

Q. You got anybody in mind? Any proposals in mind?

A. No, I'm just conscious that things to do change and as I'm just signalling that we've looked at what's in front of us now, we're comfortable where that is.

Q. Okay. Got it. All right.

A. Nothing in particular that we can see yet.

Q. Nothing in particular.

A. I turn now to some of the specific provisions, very briefly, objectives, AONZ supports the revised Objectives. With regard to Version A or Version B, as set out in Mr de Pelsemaeker's evidence.

Q. I'd have to say, I think court found both those, aspects of both those versions problematic.

A. Problematic, okay.

Q. There were a couple of objectives which is I think is objective .1 and .2 as redrafted, which for anyway, looked good, but then what followed after that was problematic.

A. Right.

Q. And it may well be that what Mr Anderson's just suggested could actually provide a way forward, maybe.

A. Yes.

Q. Part of the second sentence help might setting up stranded assets and other activities. That's what I thought, yeah.

A. Yep. Okay, so turning to that very briefly…

Q. You want to look at what Mr Anderson just said?

A. Well, I was going to turn first to Objective A and B.

Q. Okay, so I'm just going to jump into the JWS. Is that where you want me to be?

A. Yes.

Q. So, 10A.1.1 looked for me fine. Version B 10A.1.2 seemed to be good as well because that – both of those were actually addressing drafting issues on the objective that were before us, and then version A seemed to be skiving off, you know, hiding off and doing something different and so did the 10A.1.3 seemed to be departed from the instruction and doing something different or setting up something different.

A. I think the point from my client's perspective is that we felt that under either version it wouldn't impact negatively on…

Q. I don't see how it could impact on Manata.

A. No, and so in that sense we were comfortable with either and don't take a position. In terms of Mr Anderson's proposed amendments, again, I'm pretty comfortable with the way that was heading. Again, it seems consistent with what we understood the intention was going to be. So, turning to policies, the amendments to policies as set out in PC7 as currently proposed are also considered appropriate. The reference to historical rather than actual rate and volume of take is specifically supported. AONZ is supportive of policy 10A.2.1 providing for additional irrigation area for viticulture and orchids where mainline irrigation pipes were installed prior to 18 March 2020. However, in the case of Manata Estate, planned additional plantings will not give rise to an increase in the area under irrigation, so this amendment is not relied on. You may recall, there was a large area on the property that was previously irrigated as pasture in any event.

Q. Oh, okay, so you've got the – it's irrigated land.

A. Yes.

Q. Now is going to be converted into an orchid.

A. Viticulture, yes.

Q. Yeah, viticulture.

A. But it won't increase the overall aera on the property under irrigation.

Q. No, and it won't increase the historical use of water, presumably.

A. It should not.

Q. It should not.

A. The issue is around frost fighting.

Q. Yeah.

A. And so, whilst the overall volumes won't change there is a refocus in terms of volumes to spring whereas under previous regimes more water would have been used in later summer which now won't be needed.

Q. Yeah. Frost fighting presents its own issues, doesn't it?

A. Yes.

Q. Because you need a great big dollop of water to fill up ponds at the beginning of a season.

A. Keep the ponds topped up.

Q. Yeah.

A. Fortunately, from an environmental perspective, that water – the greatest demand is at a time when there seems to be the most water around.

Q. Yes.

A. So, from that perspective it's actually a positive.

Q. But your comfortable that the schedule now accommodates the filling of ponds for those purposes?

A. Yes, we've looked at the numbers, it seems to work. Now, my only hesitation when I say "seem" is because we don't know exactly what the weather patterns are going to provide, and the risk is if you get an unseasonably bad run of frost, that is where an issue might arise, but as I say, the numbers as far as we're able to, tend to support what we anticipate will happen.

Q. But if you have a run of frost, you may not have capacity in the pond to continuously frost fight.

A. Yes.

Q. Yeah. So, there's some assumptions around the number of consecutive dates for fright fighting, isn't there?

A. Yes, that is true. I think the key thing from my client's perspective in terms of access to the water is from the race being able to draw down in accordance with the rate of take that has been historical been provided for and enable those ponds to be topped up during that period.

Q. Okay, that sounds good.

MR VAN MIERLO:

I think that takes us to the controlled activity rule, paragraph 27, the revised wording set out in the appendices to Mr de Pelsemaeker's evidence in reply is considered appropriate and is supported. As I've just been discussing, it is anticipated that Manata Estate's application for replacement resource consent will processed through the controlled activity pathway. Support the restricted

discretionary activity rule wording. We don't anticipate having to rely on that in terms of the specific stranded asset pipeline rule. Importantly, though, the rule does provide some discretion to Council to consider other relevant methods and data when assessing historical use. This does appropriately provide a degree of flexibility not otherwise available to applicants using the controlled activity pathway. Discretionary activity status. In its original submission AONZ sought a discretionary activity pathway for resource consents over six years. In light of the way plan change 7 has developed through the hearing process, with a clearer focus on a process plan change, and roll over of existing rights under deemed permits on an interim basis.

AONZ is no longer specifically seeking that relief, and I do note in this respect, the evidence in reply of Mr de Pelsemaeker on this issue, at paragraph 18 where he raises a number of concerns about that, that proposed rule status. Turning now to priorities, the deemed permits held by Manata Estate are subject to priorities. This was discussed by Mr Paulin in his evidence to the Court. Manata Estates' rights to take water have priority over other deemed permits and at least one other deemed permit has priority over Manata's take. AONZ's decision not to engage directly on priority issues, and its position on priorities is shaped by the factual situation as it relates to the Estate. Manata Estate's water take from the Lowburn is from a point located higher in the catchment, relative to the majority of deemed permit holders over which it has priority. In a practical sense, the lie of the land is largely consistent with, and facilitates, the exercise of the legal priorities which Manata Estate holds.

In addition, as the Court is aware and as we've just been discussing, Manata has invested in substantial water storage infrastructure in recent years, and that storage capacity provides a buffer against both dry periods, and potentially if it were to arise, competing demands for water by other users. This storage buffer is considered likely to be adequate, if needed, for most of the year, with the possible exception of spring frost fighting, when Manata's demand for water to keep its storage pond topped up, will be greatest. During spring, however, natural flow levels in the Lowburn are generally higher, and other non-viticulture

users demands are likely to be less. So, for these reasons, Manata Estate, on a practical level, may be more insulated than some other deemed permit holders, from some of the priorities issues, and their implications, that have arisen in plan change 7. AONZ is supportive of the approach whereby priorities are reflected in replacement consents as conditions but appreciates that a number of practical and legal complexities. I have seen the drafting attached the Court's minute and also a revision of that which I saw online this morning, which I think Mr Page –

THE COURT: JUDGE BORTHWICK TO MR VAN MIERLO

Q. Mr Page.

A. – has prepared. AONZ would be comfortable with that sort of recognition of priorities and certainly would agree that they must be retained as accurately as possible to reflect historical usage.

Q. But, quite a side from its future proofing, if you could put it that way, through storage, Manata is located higher up in the catchment, so presumably there is few, if any abstractors above it.

A. There's two abstractors above it, as my understanding. One is of a lesser priority, and one is of a higher priority, but there's a bit of uncertainty as to whether that higher priority take is actually being utilising or being utilised at a rate.

Q. Right, so in theory, Manata could tell the lesser to turn off?

A. I believe that's right, but the reality is –

Q. They probably don't because of the storage, and so when you come to engage with this, just say, yeah, you come to engage with this and something comes down in the plan, Lowburn was unusual in as much as lots of priorities but nobody seemed to be exercising them for a variety of reasons, not less that there was always something left in the river to take which doesn't sound good in terms of an environmental outcomes, but anyway, that's the reality in Lowburn, but I guess from your point of view, you would need to engage with it, whether you choose to exercise it or not is a matter for you.

A. Oh, yes.

Q. You'd still have to go through the process.

A. Absolutely, when I said, "hasn't engaged" what I was really alluding to was haven't attended in terms of cross-examination, filing submissions, and the usual.

Q. No, no, that's absolutely fine, so – but anyway, what you've seen this far today is something that your client when it comes to making an application or amending an application could implement.

A. Yes, yes.

Q. That's the key thing. Yes.

A. Yes, and we've certainly been watching the drafting as its developed, and yes, are very comfortable with the way of what's been – and really do support the fact that whatever comes out of this should continue to reflect the priority regime as best as its able to, but I think, as your Honour eluded to, the practical of the situation as it was described to me is there's always been water in river, the relative size of Manata's take as opposed to what it is in that creek means that in practical terms this hasn't been an issue. I think your Honour's right in theory and as a matter of law, Manata could, if it was running dry, tell the take above it to cease, desist, but if that upstream take, if its replacement consent reflects its historical usage, which it would under plan change 7, then its not going to be an issue, because it hasn't been in the past, so, I think the status quo will continue for at least six years.

Q. Yeah, okay, no, I understand that. thank you.

MR VAN MIERLO:

So, in conclusion, AONZ has closely followed So, in conclusion AONZ has closely followed the development of plan change 7, because access to reliable adequate supplies of water for irrigation and frost fighting purposes is critical to the ongoing operation and development of the Estate. AONZ supports the availability of an efficient, cost effective, process for the issue of replacement resource consents for deemed permit holders, proposed controlled activity and restricted discretionary activity pathways are supported, notwithstanding that

they provide an interim six year consent process only, until a replacement Land and Water Plan is operative."

THE COURT: JUDGE BORTHWICK

A. Now I thank the Court for the opportunity to present these closings.

Q. No, all right good. So it sounds like today, all of Manata's concerns have been resolved or capable of being resolved. Yes.

A. Yes, we're (inaudible 10:41:44) with where the process is.

QUESTIONS FROM THE COURT – NIL

THE COURT: JUDGE BORTHWICK

Q. All right, Mr Reid. Mr Reid is coming in by AVL. Good morning Mr Reid.

A. Yes, good morning your Honour.

Q. Good morning, can you see us?

A. Yes I can see you.

Q. We' in your hands Mr Reid.

A. Thank you your Honour I've prepared some closing submissions.

MR REID:

May it please the Court. These closing submissions are made on behalf of Strath Clyde Water Limited; McArthur Ridge Vineyard Limited; and Mount Dunstan Estates Limited. The relief sought by the McArthur Ridge parties has focused on changes to Schedule 10A.4 in regards to the calculation of the historical rate of take and daily, monthly and annual volumes; and the irrigation area limitation in Policy 10A.2.1 and Rule 10A.3.1 which is the "stranded asset" issues. These matters have been discussed and tested throughout the hearing and I do not intend to cover all of this ground again today. In regard to Schedule 10A.4, the McArthur Ridge parties support the amendments proposed in Appendix 2 of Mr de Pelsemaeker's Evidence in Reply of 25 June 2021, agreed following the expert witness conferences.

THE COURT: JUDGE BORTHWICK

So, those are issues, just to interpolate your Honour are resolved so far as the McArthur Ridge parties are concerned.

MR REID:

In regard to the area limitation, Mr de Pelsemaeker has proposed extending the period for determining the maximum area irrigated to 18 March '20 and this would partially address the concerns of the McArthur Ridge parties by allowing for areas that were newly irrigated between 2018 and 18 March 2020. And so there were some areas in that category your Honour, so some that had been newly developed but would not have been caught by that earlier date. However, the problem of stranded assets would not be resolved through that amendment

alone. The expert witnesses propose making provision for the issue via an amendment to the restricted discretionary activity pathway. And just to be clear about that and to interpolate again your Honour that would mostly address the issue that McArthur Ridge has raised. It will be, in my submission the stranded asset question would be better dealt with via an amendment to the controlled activity rule, and it is this issue that I will focus on in these submissions.

THE COURT: JUDGE BORTHWICK

Q. So, is the outstanding issue for McArthur Ridge, what is the appropriate activity status for the rule?

A. Yes it is your Honour. Yes.

Q. Okay.

A. And so I don't – I'm addressing the question in these submissions but it's really just to have an absolutely right – McArthur Ridge is largely content with what's proposed.

Q. Yes.

A. So turning to the stranded assets question and what I've just tried to do in the submissions for the Court's assistance is just outline the evidence, where I understand the evidence has got up to on these questions.

MR REID:

Dr Davoren's evidence on stranded infrastructure was that the issue is more likely to arise in the horticultural industry (including viticulture) because of the way horticultural developments are often carried out. Typically, the total area planned for development is identified at the start of the project. The irrigation demand for that total area is calculated, and the irrigation infrastructure is designed and sized with the total demand in mind. The mainline irrigation infrastructure for the whole area is constructed to these specifications at the start of the development. Once the irrigation infrastructure is in place, planting is typically carried out in a staged way, with matters such as availability of root stock, commodity prices and other market conditions dictating the speed of development. In the case of viticulture, a grapevine then has a five year horizon before it gets to full production. What this means is that for horticulture and

viticulture development, significant capital investment in infrastructure is required at the start of the development, but it can then be some time before water is actually turned on across the whole property. The McArthur Ridge vineyard development is an example of this process. The total development plan was 237 hectares and the irrigation infrastructure was designed with a capacity to service this entire area. Dr Jordan confirmed that this –

THE COURT: JUDGE BORTHWICK

A. I've just set out a quote from Dr Jordan.

Q. It's okay.

MR REID:

The mainline irrigation infrastructure necessary for the entire development was installed between 2002 and 2004 and planting has occurred in a staged way since that date. Paragraph 13, PC7 as notified does not respond to the issue of infrastructure that has been constructed but not yet used for irrigation. The expert planners involved in the expert conferencing on this topic agree that PC7 should respond to this issue. So what is the appropriate response? The McArthur Ridge parties proposed an amendment to Policy 10A.2 and Rule 10A.3.1 of PC7 to respond to the issue of stranded assets. This proposal was considered in the expert witness conferencing in May, and then again in June. The outcome of this conferencing was a proposal to amend the Policy and the rule, to provide for stranded assets by way of an RDA pathway, this pathway only available for orchard and viticulture land uses. The McArthur Ridge parties accept that this proposal could potentially deal with the problem but submit that provision would be better made for stranded assets within the controlled activity pathway. This is because the RDA pathway provides less certainty for applicants and creates potential complications where, as with McArthur, the development is a small part of a wider scheme, and at paragraph 18 I've highlighted some of the evidence from Ms Dicey as to what that issue is.

THE COURT: JUDGE BORTHWICK

Q. Just pause there a second because I'm not quite sure whether I'm with you on that. Hold on. Don't quite get it but I'll ready what Ms Dicey says

and then I'll come back with a question. Yes, so McArthur is a shareholder of the Manuherikia scheme?

A. Yes, it is, your Honour.

Q. Yes.

A. So McArthur's a small shareholder in a much bigger scheme with wide interests and it may be that schemes may be reluctant to go down a restricted discretionary pathway to just to address one issue, when they would otherwise be controlled.

Q. And could the scheme quite conceivably just simply not make provision for the addition land – the water required for the land? Yes.

A. Yes, and they may be reluctant to do so because it may mean that they have to go down a restricted discretionary pathway and run the risk that, however small but there is no doubt a risk that the consent is declined.

Q. So that the scheme could down the controlled activity pathway and not make provision for your clients' total area which it would irrigate, could be that the scheme is also anyway going down an RDA pathway because of complications in terms of gaps and data records and so forth. And if it's going down the pathway, anyway then, presumably be no problem to pick up this issue for McArthur.

A. Quite your Honour, there'd be no issue in that circumstance.

Q. Yes, okay.

A. But they just can't be guaranteed that that's what…

Q. No, I understand what the issue is. Thank you.

So, that complication is then balanced in my submission against the matters that the expert planners rely on at paragraph 19.

MR REID:

So, they recommend the RDA pathway because of uncertainty concerning how many landholdings, the stranded asset issue would apply to and the potential for water quality effects from the expansion of irrigated areas. To be clear about what the expert witnesses are saying, I've just summarised that at paragraph 20 and this is a reference to paragraph 26 of the joint witness statement. So, the Joint Witness Statement records that the planners agree a controlled

activity pathway could be used if there was sufficient information that the combined effects are low with respect to the number of applicants who might seek the pathway, or the area of land potentially affected, but given the lack of information about the risk, a more precautionary approach may be advisable

So, in submission your Honour, it's a relatively low conviction recommendation on the part of the experts, that they're sort of equivocal about whether it's really necessary. So I then go on to discuss the evidence that's in front of the Court and to summarise that on Water Quality Effects because that seems to be the main concern. The concerns about the potential water quality effects associated with providing for stranded assets arose in the context of irrigation for pastoral land use. However, the expert planners have recommended that the stranded asset pathway apply to orchard and viticulture land uses only, thereby avoiding the potential issue with water quality effects associated with increased pastoral land use.

The evidence before the Court is that orchard and viticultural land uses do not have significant water quality effects; and that the potential effects are significantly less than the potential effects pastoral land uses. There are a number of reasons for this. Orchards and viticultural land use do not involve the grazing of animals associated with diffuse discharges. According to Ms Sands, the nutrient leaching rates of low impact horticulture (such as fruit crops) are generally similar to or less than unirrigated sheep and beef farming, with less water quality impacts with regard to E. coli and sediment, low impact horticulture crops use much less water than irrigated pasture (again providing Ms Sands for Horticulture New Zealand), she referred to the water use for low impact horticulture is being on average one third of that for irrigated pasture.

The evidence specifically in regard to viticulture is that the nutrient requirements of vines are very low compared with other uses. viticulture does not require an annual application of fertiliser. The need to apply fertiliser is assessed using three key factors – soil nutrient level; vine health; and visual observation. If the vines are healthy and producing well, and soil levels are normal, no fertiliser is

applied. If nitrogen is applied, it would be in the order of 25 kilograms of nitrogen per hectare per year, which is low compared to other types of agricultural activities. Studies, particularly in the Marlborough area, have identified that nitrogen leaching from vineyard activities are very low. It is uncommon to apply phosphorous to vineyards, particularly in Central Otago. If phosphorous is applied, it is typically an adjustment prior to planting, with infrequent application thereafter. Because of this low application rate, and because the application is targeted at the vines themselves, the risk of run-off is low.

In viticulture it is critical that the correct amount of irrigation water is applied, overwatering can have significant adverse effects on vine health and production. Soil and vine monitoring are used to determine water requirements, and irrigation is managed to match the daily water needs. Water is applied with a targeted and precision based system, it is not a broadcast application. The risk of water quality effects is further mitigated by PC7's limit on the allocation of water to historic land use. For orchards and vineyards, having an adequate supply of water available is crucial. So the volume of water allocated to the property will be a limiting factor limiting the extent of additional development and associated water quality effects. Further, including the use of good management practice as a matter of control ensures the council can impose conditions to further mitigate any potential water quality effects.

Turning to the potential scope and application of the rules, Mr de Pelsemaeker says that there has been no evidence provided to the Court about the number of orchards or viticultural operations that are at risk of having stranded assets. This concern was also expressed by the JWS, where the planners refer to there being no information about how many landholdings the stranded asset pathway could apply to. In my submission, the concerns in relation to this issue are overstated for several reasons. First, the pathway only applies to a very specific factual situation - only if all mainline irrigation pipes to service the additional area were actually installed prior to 18 March 2020, and the additional area had not been irrigated prior to that date. Second, even for properties that do fall within the stranded asset criteria, the extent of any additional development that

can be done, will be constrained by the design capacity of the system that is in place and the available supply of water, unfettered expansion would not be possible. Economic and practical considerations will also restrain the extent of development over the six-year consent period. The timescale for development of orchards and viticulture properties is much slower than for agricultural land uses. Time will be needed to obtain rootstock for areas that were unplanted and unirrigated before March 2020, so rapid development is unlikely. Additional costs will also be incurred in any expansion. The uncertain supply of water at the end of the six-year consent period is likely to further inhibit enthusiasm for widespread development, even if irrigation infrastructure is already in place.

So, is there a need to potentially decline the applications? A further reason identified by Mr de Pelsemaeker in favour of the RDA activity status is that under controlled activity status the council would lose its discretion to decline a consent. However, having accepted that stranded assets should be provided for in the Plan Change, it is unclear why a discretion to decline consents falling within the limited stranded asset criteria is necessary. The matters of discretion that have been identified are not matters for which consent application would be declined. During cross-examination on the 29th of June, the expert planners could not identify any scenario in which an application, having met the strict stranded asset criteria, would need to be declined.

Conclusion. Many of the concerns raised by McArthur Ridge parties in relation to PC7 as notified will be addressed by the amendments now proposed in the evidence in reply by Mr de Pelsemaeker. The exception is a proposal for responding to the issue of stranded assets. PC7 as notified creates the potential for infrastructure that is in the ground to be unable to be used. This would lead to sunk costs and an inefficient use of resources. The expert planning witnesses all agree that this is a problem with PC7 that needs to be addressed. However, they have taken a precautionary approach by recommending that the issue be dealt with via a new limb of the restricted discretionary activity pathway. The difficulty with this recommendation is that it provides less certainty for applicants and will potentially be ineffective in

addressing the issue, particularly in a scheme situation. In my submission including the stranded asset pathway within the controlled activity rules would avoid the potential complications of the RDA pathway and provides a better outcome. In my submission, there is no real reason in front of the Court for taking a" just change that to "RDA pathway approach on this issue, when the stranded asset exception is so limited in scope. The risk of extensive irrigation development occurring within the scope of the rule is low; the potential water quality effects of allowing additional irrigation expansion for vineyards and viticulture are minimal and can be adequately dealt with by the council via the controlled activity conditions."

THE COURT: JUDGE BORTHWICK

Q. Thank you. No questions from me, understood those submissions and again will give very careful consideration to the appropriate activity status but otherwise I think, where everybody has got to is now resolved your clients' concerns, save in relation to that one issue.

A. It has your Honour, thank you.

WITNESS EXCUSED

COURT ADJOURNS: 11.03 AM

COURT RESUMES: 11.22 AM

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. All right, we're in your hands, Mr Welsh.

A. Yes, thank you, Ma'am. Ma'am, you should have, very shortly, three documents. The first one is self-evident and that's the closing submissions, and basically as a function of being remote and needing to print these submissions yesterday lunch time which pre-dates the discussion with Mr de Pelsemaeker. I did some homework over night, but I couldn't incorporate them into the submissions proper.

Q. Okay, yep.

A. So, I'm going to have to talk you through that when I get to that relevant part. The main change from the written submissions is contained within the loose one-pager.

Q. Right.

A. Which is a proposed restricted discretionary rule picking up on comments from the Court, in particular, Commissioner Edmonds to Mr de Pelsemaeker, and the approach we took was to include the controlled activity, matters of control and moved them across as matters of discretion, and then in F, that probably was the challenging matter, and Ma'am, I say it's challenging because there's the two different constraints. On one hand, your Honour has noted in her view that duration is not always natural, it can be, but it might not always be, and against that is your Honour's comments also that the architecture of plan change 7 doesn't provide for the merit based assessments. So, those two countervailing considerations, and as a way of addressing those Ma'am, Mr Styles and I have come up with matter of discretion F, which in my submission appropriately tries to respond to those competing considerations. The third matter or the third document you have, I have referred to two cases in my closing submissions that I didn't refer to in my opening, and so I've just provided copies of those to decisions Ma'am.

Q. Very good. Okay.

A. All right, now I should just start by saying the submissions are longer than I would have preferred for a closing, and the reason for that is essentially because unlike the parties you've already heard from this morning, Mr de Pelsemaeker hasn't, in terms of his primary recommendation to you, hasn't accepted the relief that Trust Power is seeking, so, I have to address that in writing, but I may not have to address that orally with the Court and we may take that as read with your leave at some point.

Q. Do bear in mind the, what I said to Mr Anderson, does the Court need to make a decision, for example, does the Court – one of the, your points, in your opening submission was that renewals could be seen as both tier two, tier three if we don't need to decide that then we won't because it's a fairly significant issue.

A. Which is why Mr Anderson suggested not deciding that.

Q. Yes, that's right.

A. And Ma'am and I thought that would be a good biproduct of this decision if you found in favour of my submissions, but I do take your point, but I might just comment on Mr Anderson's submission in respect of the tier two matter.

Q. Oh, you certainly can respond to those.

A. Yes, and probably just before we get into these. Ma'am, I've gone back and looked at my opening submissions, I did not use climate change, or the health effect associated with climate change, as a basis for submitting that electricity is a tier two matter –

Q. I didn't think you did. I thought it was more practical than that.

A. – I didn't even go there or imply that. Yeah, it was practical. So, it wasn't so confined as climate change, at all. In terms of Mr Anderson's other comments around the application of the NPSFREG, I would just point out that despite Mr Anderson's submissions, section 67 does require you to give effect to all NPS's and that includes that, so, whilst you might not in your decision, it's open to you not to engage on a large analysis of the REG, you still nonetheless need to give effect to it and be satisfied that you're giving effect to it because of 67. So, I'm so sure that that one can be side stepped as neatly as Mr Anderson suggests, but you will recall –

Q. That's to do with the – well, it's the, yeah… I think you're right, I mean, if the NPSFREG says this is an allocative regime for fresh water, it might say that but then both those NPSs, in fact three are in play.

A. Yeah.

Q. And so, to the, I guess to the extent that it is on the plan change, how does those NPSs – how are those NPSs given effect, I think, is the key question.

A. Yes.

Q. Yeah.

A. And the other point I was going to make around REG and Mr Anderson inviting you to either not address or to disagree with his Honour Judge Whiting's decision in *Carter Holt.* I was just going to note that in – to be honest, in terms of plan change 7, it's not a full allocation regime in the same sense that *Carter Holt* was dealing with. Here we've got a limited class of deemed permit holders with a rollover set of provisions, essentially, and not a full environmental assessment, for example, other permit holders in the rivers that the deemed permit holders could take water from, aren't part of his allocation process, so, really it's just a consenting regime, Ma'am, in as far as it is, so, my view that the preamble doesn't cause any problem, but that's in my opening submissions, but –

Q. I think if you take – if there are carve outs in case, a carve out for Trustpower or a carve out for Earnscleugh, maybe I don't know, Mr de Pelsemaeker's still thinking about that, but if there are named carve outs as opposed to policies that seek something for hydro, then the scope is very much more limited and more focused but there is an allocation of water under resource consent.

A. There is.

Q. Is it an allocative regime? Well, if it's just focusing on Trust Power, maybe not, and we'll hear from Mr Maw about that.

A. I understand why some parties have submitted to you, Ma'am, at the start of the hearing in particular, that this is an allocative regime, and there's an element – and I'm not saying there's no element of allocation, because

it's providing for a framework for consenting, but in my submission, it's not a full allocative planning framework with all allocations in play under this narrow plan change 7, and therefore, the preamble doesn't present any issues, and if you feel that it can, Carter Holt says it need not, and then my third backup submission was even if you disagree with me on those first two points, the RPS still provides you with a way forward, for providing for renewable energy, and Mr Anderson – probably the first time we've ever agreed on anything – did agree on that. So, ma'am, they were the points that I just wanted to respond to with Mr Anderson on that.

MR WELSH:

I come to my introduction, and in opening Trustpower's case, my overarching submission was that without amendments of the nature sought by Trustpower, PC7 is an inappropriate – albeit interim – planning framework. I made that submission on the basis that it didn't give effect to higher order RMA planning documents, and Mr de Pelsemaeker has been rather refreshingly frank at times in terms of acknowledging those matters, that it doesn't give effect to those higher order documents further. While the precise relief sought by Trustpower has – quite properly – been refined during the hearing, my principal submission stands. How to provide for hydroelectricity generation activities within PC7 is a key issue, not the key issue, but a key issue before the Court.

Ma'am, in these closing submissions I do not intend to re-traverse material covered in opening submissions. I stand by my opening submissions, I haven't seen a need to go back and abandon any of those, so I don't comment on how this relates to Trustpower. The Court is well versed on that. I don't comment on the legal framework generally, and I don't provide a detailed analysis of why hydro should be treated differently, or provide a detailed explanation lying behind the relief sought, but I don't want to step you through the relief sought by Trustpower, which I've annexed at the back of these submissions, when I get to those. Also, ma'am, I don't address you in any detail on the RPS because that day is yet to come in terms of addressing the Court on those provisions.

I wonder, ma'am, if I could, with your leave, having said that, take 2.1 and 2.3 as read. That simply is a reflection of my opening submissions around the relationship between the two NPSs, but at 2.4, since my opening submissions, the High Court has issued a decision that is consistent with the approach I submitted should be taken with respect to the relationship between the NPSFM and NPSREG in the context of plan change 7.

THE COURT: JUDGE BORTHWICK

Now, happily, I have read that decision.

THE COURT: COMMISSIONER EDMONDS

So have I.

MR WELSH:

This is the only bit I'm quoting from that decision.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Pardon?

A. This is the only bit I'm quoting from that decision, but –

Q. And I think, well, golly, the exercise now before the Court is to line up all three planning, you know, NPS instruments and look at the differences and nuances in their words as it works its way down. I was really looking forward to your submission, how you do that, rather than starting that exercise myself.

A. Well, Justice Palmer had the benefit of a recently adopted Regional/Coastal Environmental Plan. You don't, and the closest you have is the recently notified proposed regional statement, and that has a long way to travel before its set. So I think the fundamental issue or the fundamental guidance that Justice Palmer gave in respect of neither trumping one another and reconciling them stands, but you don't have that fallback because you have older planning documents, but, having said that, the operative regional policy statement does provide you,

perhaps, your roadmap, and that's why I spent some time in the operating submissions addressing some of those policies.

Q. Remind me, what does the operative – this is the operative RPS – what doesn't it do? Because I didn't think – it doesn't engage the NPSUD, because it couldn't, because, you know, that's really new, it doesn't engage with any version, as I understand it, of the NPSFM. No excuses there – there's an excuse in 2021, but otherwise not – and does it engage with REG? It does, to a point.

A. It did, to a point.

Q. Yeah.

A. So I'm not saying it's a perfect roadmap.

Q. No.

A. And it will take you down some bumpy roads and some dead ends, I think, but that is what you have, and so I think the task of the Court is to try to reconcile that, and then I think Davidson says, failing all that, that's what part 2 is still there for.

Q. Yes, so in lining up those three NPSs, we've going to find a lot of gaps. Even for the NPSREG, which it does engage with, there are gaps.

A. Yes.

Q. And then there are complete misses for those two other NPS instruments, and you're saying okay, so your approach is not – I think what you're saying, or, who is it, Justice Palmer –

A. Palmer.

Q. – is saying is go back up to part 2 as opposed to going back up to the NPS instrument itself, so if the RPS is not dealing with the NPSFM, you don't go to the NPSFM, you go to part 2, is that what you're saying?

A. It's not what I'm saying.

Q. You think that's what Justice Palmer's saying? Hmm.

A. Yeah, I think he certainly has –

Q. You leapfrog the NPS instrument.

A. Yeah, so I'm just looking at my quote.

Q. Yeah.

A. He goes back to – he says: “Neither the NZCPS nor the NPSET should necessarily be treated as trumping the other and neither should be given priority over or give way to the other,” and that’s quite a challenge, actually, because, in some respects, the NPSFM, at times, will conflict with the REG and vice versa, but he says their terms need to be carefully examined and reconciled if possible before turning to that question, so I think he does envisage some analysis within the two or three NPSs as it is here, and somehow, you are required to examine and reconcile those if possible, and I think your part 2 is there as the backstop.

Q. Okay, so looking at the actual planning instruments, then going back up to the NPSFMs themselves if the planning instruments are not particularly engaging, and then, failing that, going up to, and if you still can’t get the answer, go to part 2.

A. Yes, ma’am, because the comments that I’ve highlighted there in terms of Justice Palmer’s application of the Supreme Court decision indicate some analysis within the NPSs and reconciliation by the Court.

Q. Within the NPSs themselves.

A. Yes.

Q. Yeah, and, okay. Anyway, I thought that’s a large task.

A. It is.

Q. And I was thinking that the lawyers would do it for me.

A. Well, I’ve tried in part, because I’ve submitted that I don’t think that, in terms of the REG and the FM, in my opening submissions, I submitted they weren’t in conflict, and I did take issue with the approach of Otago Regional Council that have picked and chosen which parts of the NPSFM they think that they can bring forward into plan change 7, and I haven’t heard a good reasoning why other aspects, other than the ones that require consultation and all those setting of values, why other aspects, for example, around policy 4 and policy 15 on the climate change, why those parts can’t have some recognition within plan change 7. If you’re picking some parts of the NPSFM, then you should bring in what you can as soon as reasonably practicable.

Q. Is the caveat of that, though, that is true, but to the extent that it's on the plan change, that you're actually dealing with a matter which is on the plan change?

A. Well, it fitted my case, ma'am, in terms of having some recognition of hydro, which I've submitted is within or is on the plan change, because, as notified and still as Mr de Pelsemaeker stands by it, there is no different recognition of renewable energy. So I think, as the case has evolved, at least the thinking and the questions from the Court, perhaps, indicate that some of these matters have been overtaken through the Court's teasing out of the various witnesses as to how to provide that recognition in a carveout or in an exemptions sense, so I think that may have responded to those initial submissions in terms of how to do that, rather than in a policy sense. Does that make sense?

Q. Yeah, no, that would be fair, yeah. Okay, all right, thank you.

MR WELSH:

I'm at section 3 now, paragraph 3.1. During the hearing, certain matters have been agreed between the planners and technical witnesses, largely summarised in the joint witness statement of 21 May 2021, which go some way towards addressing some of Trustpower's concern. I should just say Trustpower had a lot of input around the schedule, and the schedule has been vastly improved form the notified version, which frankly, it was unclear as to whether that schedule even was intended to apply to non-irrigation uses, so we've travelled a long way, and Mr Mitchell is quite content with the schedule as contained in the final version, and we just need to do that final verification of that submission with the changes that Mr de Pelsemaeker is going to make in response to Commissioner Bunting's comments.

However, the more fundamental concerns of Trustpower, including providing a framework for certain activities to access for longer term consents than six years, remain outstanding, at least in terms of the provisions put forward to the Court by the council. In his statement of evidence in reply, Mr de Pelsemaeker includes a section addressing hydroelectricity generation, and he

acknowledges that plan change 7 as notified would have established a regional planning framework that was inconsistent with higher order planning instruments and statutes, which I understand to include the REG. Mr de Pelsemaeker then fairly summarises some of the key concerns that have been raised by Trustpower and others, and I just want to commend Mr de Pelsemaeker in his reply, I thought he very fairly set out the alternative positions of all the witnesses, and it was a fair and fulsome summary of those concerns. Mr de Pelsemaeker makes a new recommendation to amend, and I set that out in respect of that matter, and Trustpower agrees with this recommended amendment, which addresses a matter that was raised in evidence.

Beyond the proposed minor amendment, Mr de Pelsemaeker's latest recommended wording provides no additional recognition for hydroelectricity activities, and he remains, at least in writing, firm in his view, but he was a little bit more equivocal when put to the sword by Commissioner Edmonds around the activity status, and I just say that his position is despite his frank acknowledgment around the risks and costs associated with his proposed approach, and I just set that out, ma'am, in 3.5. Those risks and costs, in my submission – I'm at 3.6 – runs counter to the policy positions in the NPSREG, the NPSFM – and I don't want to lose sight that I'm not submitting it's REG to the cost of NPSFM, the two, on these points, can be reconciled – and the partially operative RPS. 3.7 and 3.8, I'm not sure if I need to take you through that. That's more just providing some response and rebuttal to Mr de Pelsemaeker's primary recommendation, and I just feel I'm in a wee bit of a parallel universe, arguing two cases, ma'am.

THE COURT: JUDGE BORTHWICK

That's all right. I just want to read that to myself, then.

MR WELSH:

Thank you, ma'am. Turning to Mr de Pelsemaeker's alternative option that he suggests may be open to you for a longer duration, at the end of the section of

his reply evidence addressing hydroelectricity, Mr de Pelsemaeker makes the following acknowledgement: “For a variety of reasons the Environment Court may be minded to adopt a different position with regard to the management of (some) HEG schemes. If that is the case, an alternative option would be to amend PC7 to include a new DA rule for takes and/or uses of water authorised by deemed permits associated with the operation of the Waipori and Deep Stream HEG Schemes, only for a term that (better) aligns with the expiry dates of other consents authorising the operation of these schemes.”

Mr de Pelsemaeker then provides some potential alternative wording that he considers is a pragmatic planning response. Trustpower disagrees with Mr de Pelsemaeker’s rationale for limiting the duration of replacement consents to 2035. It also disagrees with Mr de Pelsemaeker’s assertion that his alternative proposal "is effective in terms of addressing Trustpower’s concerns". It is not. Trustpower considers that Mr de Pelsemaeker’s alternative relief is an improvement on his primary recommended relief, but it still does not go quite far enough, and I will take you through, now, the relief that Trustpower seeks, ma’am, and I should just say, we’ve tried to respond to the concerns expressed by the Court and the parties and constrained the relief that Trustpower originally sought. I will outline the evolution of the relief sought by Trustpower at this hearing, and the alternative relief that Trustpower is now proposing, which builds on the wording proposed by Mr de Pelsemaeker.

The relief sought in Ms Styles’ summary evidence, I’ve attached that as annexure A just so you can follow, track that through, but I don’t think I need to step you through that. As the hearing has progressed, the relief sought by Trustpower has been refined, including to try to take account of matters raised by the Court and other parties, as I said. The relief most recently sought by Trustpower is the wording attached to Ms Styles’ summary statement, along with those annexures, is in A, and Trustpower would support relief of the nature contained in Annexure A or wording to similar effect, but I want to have a better go at it than that, ma’am, and so I’ve put forward annexure B, which includes

this one page on the RDA, and I want to talk to that for the remainder of my submissions.

In recent weeks, Trustpower has sought to engage in discussions with the council to narrow or resolve issues between Trustpower and the council, including in light of the Court's comments regarding hydroelectricity during the hearing and the issues raised by the parties. No substantive response has been received from the Council beyond being served Mr de Pelsemaeker's statement of evidence in reply. Despite this, Trustpower has sought to further refine potential alternative amendments to PC7 in an effort to both provide for Trustpower's concerns and also address the issues raised by the parties and the Court. That relief as now proposed is set out at Annexure B. So, ma'am, I wonder if I take you to annexure B and come back, making a note where I'm up to, and I'll just propose just to talk you through the couple of pages in B. Hopefully the printer has made sure it's in colour, and the tracking in red –

THE COURT: COMISSIONER EDMONDS

No.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. We've just got black and white.

A. Sorry, I'm still in my main submissions.

Q. Oh, sorry, I thought you were taking us to annexure B, (inaudible 11:49:56).

A. No, no, I'll explain that one page, how that fits in. Sorry.

Q. Oh, right.

THE COURT: COMMISSIONER EDMONDS

And it is colour, thank you.

MR WELSH:

So, ma'am, I haven't gone through and reproduced another version of plan change 7. The changes, for example, to the schedule and the RDA rule around

if you're not in compliance with the schedule, I've adopted a position, for better or for worse, that they're kind of locked in.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. So the changes to the schedule?

A. Yeah.

Q. Okay, and what was the other thing?

A. And the RDA rule.

Q. RDA rule.

MR WELSH:

Which was for the six years still, but if you don't comply with the schedule, it gave you that alternative pathway, because, as you may recall, Trustpower couldn't avail itself of the controlled activity, even if it was willing to take six years, because of the problems in the schedule, and then we still have some issues in the schedule around the need for more, I hate this word, but more bespoke solutions around modelling and synthetic data, so that's why we still support that RDA rule, but I'll set out – but I haven't included those in this because, as I say, I sort of have treated those as locked in. In terms of the objective, Ms Styles was the version A camp. I have proposed – and this fits with out earlier relief – I have proposed changes to policy 10A.2.2, and that's in respect of new consents, but I haven't tried to – we've retreated, well, in my view, considerably.

We're not seeking that as to apply to all hydro. You have no evidence before you on all hydro within Otago, and I also haven't sought to have a longer-term consenting regime for all Trustpower assets, and the reason for that is that Paerau and Patearoa has that linkages with irrigation, and so I felt that that was a fair concession to make and jettison that scheme, because that brought in difficulties we didn't need, and so I've made suggestions around a longer-term consenting for just Waipori and Deep Stream, which are essentially one and the same, they're functionally integrated, and then I thought, well, how do we get over this fact that the policy in the water plan, the operative water plan, when it comes to duration isn't the be-all and end-all. It's pretty good, but it's

not great, and so I've tried to bolster that in the context for plan change 7 for those applications by including some sort of considerations around effects associated with a duration period exceeding six years, and that doesn't suffer from the same difficulties of the merits-based, because at least in the water plan, there is more of that machinery than plan change 7.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. So remind me, policy 6.4.19, is that the duration policy in the water plan?

A. Yes, ma'am.

Q. Which is the one that inevitably leads to a 35-year consent if you have a look at the text following it, "explanation and reasons"?

A. Which is why I've tried to bolster it, and through plan change 7, so I don't have any scope issues, by trying to say that in addition to those matters, you will also consider any environmental effects associated with a longer-term consent, exceeding six –

Q. Right, and disregard the explanation and reasons which lead you to a 35-year consent?

A. Yeah.

Q. Yeah, you'd have to write that in too, because I don't know, it's not sounding attractive at the moment.

A. Well, okay, that's disappointing. The reason why I've still hung on to the new consents is that Trustpower has two applications currently sitting in ORC, and one relates to the Beaumont water race, and because it's a new permit, it gets caught by the six-year policy direction. That consent is to bypass and to allow the water to continue to flow down an ephemeral stream to ensure the structural integrity of the Beaumont water race, and that's absolutely essential, because a few years ago, Trustpower got prosecuted for a blowout event where sediment entered the Clutha River because the race received more water than it could handle. So it seems a perverse outcome that something that is there to protect structural integrity of infrastructure gets caught by a six-year permit.

Q. Yeah.

A. And this was just my solution to try and provide for that.

Q. So, okay.

A. That's the reason why I've said that Trustpower doesn't have, I have no knowledge of any big new enhancement to the Waipori scheme other than that application that I've talk about and the one I've also mentioned, which was the capturing of some flood flows in the Deep Stream. They're the two applications before ORC.

Q. Which one has to do with Beaumont of those two, or is that a third?

A. So, no, there's the two, so there's what's called the Beaumont bypass application, because it bypasses the water race, and the second is a Deep Stream enhancement, where it captures some additional flood flows form the Deep Stream diversion, and that's a water permit under the RMA.

Q. So both the Beaumont bypass and the Deep Stream enhancement –

A. Yes.

Q. – they are new applications?

A. Correct.

Q. Not replacement consents?

A. No, not replacement consents, new applications.

Q. New applications.

A. Yes.

Q. And, sorry to be so obtuse, but I simply don't know your business like you do, but when you're referring to Waipori and Deep Stream, do you mean the Beaumont bypass and Deep Stream enhancement, or do you mean something else? You've got Waipori and Deep Stream hydro.

A. Yeah, as the schemes.

Q. As the schemes.

A. And so they're two applications, the Deep Stream enhancement and the Beaumont bypass are associated with the Waipori and Deep Stream schemes.

Q. Okay.

THE COURT: COMMISSIONER EDMONDS TO MR WELSH

Q. So there was evidence on all of this, was there?

A. Yes, there was, Nicola Foran provided some evidence on it.

Q. I thought I remembered that.

A. And you'll recall some interchange between myself and Mr Maw. The difficulty, because Trustpower's applications, they didn't want to file evidence on all the applications because we're not called in on these proceedings, so I gave you some evidence, but, to be fair, not volumes, but there is some evidence.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. So really, what you're proposing here is for those two new resource consent applications, that they proceed in the ordinary way under the operative plan, but that the operative plan policy 6.4.19, in a sense, is amended to introduce a consideration of environmental effects.

A. For the longer duration.

Q. For a longer duration.

A. Yeah.

Q. And so then the question would be is that on the plan change to be proposing a policy that in effect amends, even for limited circumstances of the schemes that you have noted, but would amend the operative plan?

A. Well, it wouldn't be on the plan change in terms of scope if I sought to amend that policy. I can't amend policy 6.4.19, I can't do that.

Q. No, you can't.

A. But I've tried to achieve the same outcome within the context of plan change 7, which is on the plan change, because the plan change 7 says for new consents, you're limited to six years.

Q. So this is new, because there's text in red, and I'm assuming this is new to Ms Styles' evidence.

A. No, Ms Styles –

Q. She wanted this originally? I know, sorry.

A. Yeah, she –

Q. So it's not new to Ms Styles' evidence?

A. Well, the wording is more constrained than Ms Styles' evidence. Ms Styles was very clear, she wanted the ability for hydro, generally, to

have a longer-than-six-year consent, and I've thought, well, I'm not going to get that through, let's constrain it to what I think we have a reasonable chance of getting through, which is to the Waipori and Deep Stream. So it's within the scope of our submissions because it's a very much constrained outcome form what we originally sought.

Q. And your reference to environmental effects in this context of duration is because you accept duration's not neutral?

A. Not as a –

Q. It may, in some circumstances, be, but in this case, is not neutral.

A. Not as an absolutely statement. I would accept that duration may not be neutral, but I don't accept that it is not neutral in all cases.

Q. Okay.

A. It can be.

Q. So in the case of hydro, do you accept that it may not be neutral, and consequently, and assessment of effects on the environment pertaining to, you know, the duration?

A. No, your Honour, it's more that I've been listening to your comments and your view that you don't consider duration neutral.

Q. Often, it's not, yeah, yeah.

A. Yeah, and so I've tried to respond to that rather than being what I think.

Q. What you think. Okay, all right.

A. I'm not trying to be cute about it, that's –

Q. Yeah, but, you know, sometimes, though, the Court actually just asks question because it is just questions of clarification, it's not indicating an outcome.

A. No, and that's the challenge.

Q. And sometimes – yeah, that's right – and sometimes we make –

THE COURT: COMMISSIONER EDMONDS

Take it too literally, I thought, sometimes.

THE COURT: JUDGE BORTHWICK

We take it too literally. Often, actually.

THE COURT: COMMISSIONER EDMONDS

Sometimes we go, oh, yes, that's fine, and then we're off onto the next thing.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Sometimes, we're test thinking, not because we actually thought it was a good idea, but because we wanted to see, could it be closed down, should it be closed down, and that might have been our thinking, so we put it forth, had it closed down, we go, oh, yes, move on to the next thing.

A. Fully accept that, and, your Honour, you often preface your questioning with "should be so minded" and "we're exploring," so I don't take as gospel and translate each question into the Court's decision, so I fully don't do that. The issue is that – and rightly so – the JWS process couldn't or were not permitted to address hydro and community water supplies in the policy context, so this is my chance to.

Q. No, because it needed – it does, actually – no, this is your chance.

A. Yes.

Q. And we took that approach because we just needed to be making some calls, yeah.

A. So that's why you're seeing this language, not for the first time, because Ms Styles' evidence has been consistent around new permits.

Q. Okay.

A. The new language is my more constrained –

Q. Yes, understood.

A. – settlement offer, for want of better words.

Q. Right.

A. So that's new, and then I come to the deemed, the replacement consents, and I should say the blue, if I'm correct, is the language of Mr de Pelsemaeker.

Q. Yeah, right, so I've read the blue.

A. Yeah.

Q. (inaudible 12:02:16)

A. And the thinking with Ms Styles was that there still needed, in a policy sense, and you may disagree, some sort of policy recognition or hook for

the rules that followed for the carveout, and that's purely why that's there, ma'am.

Q. So the blue – so blue is –

A. The blue is de Pelsemaeker.

Q. Oh, right, and red is you.

A. Yeah.

Q. And this is new in the case of duration (inaudible 12:02:47). Oh, I see, and that's so that there is a policy hook.

A. Yes, Ma'am.

Q. For the carveout.

A. Now, just to confuse matters, that red in 10A.2.3 I drafted yesterday morning, and it doesn't completely line up with the restricted discretionary wording I've presented under F on the loose piece of paper, so while standing here on my feet, I just realise that's not quite matching up, and I prefer the loose piece of paper language, but anyway, the purpose of providing the changes in 2.3 is simply to be that policy hook, whatever that may be, ma'am. Then I come down to the rules, and this may be where I've taken the Court more literally than you were intending through your questioning, because I was suggesting a way forth could be the discretionary route for a longer-term consent for these replacement consents. I was very encouraged by the questioning, so that's what brought me to (inaudible 12:04:00) that's put up in alternative, which is the loose piece of paper, that's the new rule for the RDA. Either or, Ma'am, but my preference clearly is the RDA, in light of the Court's questioning yesterday.

Q. So that gets us to your loose leaf.

A. Yes, so that's the loose leaf. So what I've done there is, as I said, I've taken the – the rule provides for the limited class of hydro replacement consent which are set out in Mr de Pelsemaeker's schedule, and that appears in the box at the bottom of that loose leaf, and all I've done is inserted the coordinates for the intake locations that were to be confirmed, so I've had Trustpower provide those to me. I've set out Mr de Pelsemaeker's suggestion that the RDA rule here would reflect the

matters of control, and then, in response to those issues of duration need not always be neutral or is not neutral all the time, versus the difficulty around the lack of architecture, I've proposed, with Ms Styles' input, matter F. So I've tried to limit the class, and I've tried to give – you can't have it all ways, Mr Welsh – so I've put in F for the ability for the decision-maker to actually turn its' mind as to how the applications can or don't provide for a longer term in terms of the adverse effects.

Q. Now, I see that there's no drop-dead date.

A. No, and that's what I was going to talk to you as well, Ma'am. So I haven't put in a drop-dead date, but I'm very happy for – well, Trustpower would be most happy with a drop-dead date of May 2038. That then aligns completely with Waipori and Deep Stream.

Q. Okay.

A. And there's no issue with having a drop-dead date.

Q. Very good.

A. Okay, if I bring you back into my submissions, Ma'am.

Q. Oh, no, just pause there.

A. Oh, sorry, yeah.

Q. I'm just looking at matters of discretion. Okay, yeah, back to your submissions.

MR WELSH:

I'm at 4.7 and I should have just read this out, because it does probably more eloquently than I've just done in terms of setting out those changes. So I'm just trying to scan if there's anything else I need to – in 4.10, I confirm, Ma'am, the date of 2038, and I've said that's perfectly acceptable for a drop-dead date, and then in 4.14, I talk about bolstering that policy 649, but I accept we cannot amend that in terms of scope, but I just say that an integrated management approach would be to limit the maximum term to 2038. Then, in 4.15, I just take you through why, in my view, these changes are appropriate, and I might just take you through that, Ma'am.

In A, I say the existing Waipori and Deep Stream HEPS have been the subject of evidence before the Court. Limiting the relief sought in the manner proposed goes towards addressing Mr de Pelsemaeker's concerns raised in evidence regarding a lack of evidence on other operators' schemes, and his comment that detailed technical information around the implications of PC7 on the operation of HEP schemes has been nearly exclusively provided by expert witnesses on behalf of Trustpower. So I'm trying to respond to that observation in B. The Waipori/Deep Stream HEPS is of regional and national significance in terms of its contribution to achieving renewable energy targets.

Excluding Trustpower's Paerau/Patearoa scheme (as proposed) avoids broadening the scope of the provisions to a scheme that has an association with irrigation. The Waipori Scheme is likely to be subject to consent applications and decisions for maintenance and/or enhancements within the life of plan change 7, and in fact, I say, has already got two permits that have been lodged. Trustpower acknowledges that it is unusual for a planning document to include provisions specific to certain schemes or assets, being the Waipori and Deep Stream, as is proposed in Annexure B, but I submit this is an appropriate response which provides certainty with respect to the scope of the provision, being the scheme for which the Court has heard evidence on. The objectives. PC7 objectives have been the subject of caucusing by the planners. No detailed proposed amendments to the objectives are included in B. However, I submit that if the Court is minded to include specific recognition for hydro within PC7, then it will be appropriate to include a simple hook for hydroelectricity/renewable electricity generation within the objectives, and that comes back to that discussion, your Honour, I've just had with you.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. Funnily enough, that's, I think, what Mr Anderson was doing as well. He was providing, in his redraft of that objective – I didn't like all of it, but –

A. No, neither did I.

Q. – I liked some of it because there was a hook there for your activity.

A. Yeah.

Q. Yeah.

A. Yeah, and that's all I've tried to do.

Q. Yeah.

A. The wording may not be attractive to the Court, but it was the simple hook there.

Q. Yeah.

A. In terms of Mr Anderson's suggestions, Trustpower's firmly in the version A camp in terms of compromise. I think compromise is just completely uncertain, and I'm not sure how anyone measures it, unless it's in the most egregious application that's so completely and utterly contrary. I'm not sure how an individual applicant compromises the rolling out of an entire planning framework unless we all accept that each application creates a precedent effect.

Q. Okay.

A. I struggle with that.

THE COURT: COMMISSIONER EDMONDS

Q. Or a plan integrity effect, perhaps.

A. Perhaps, yeah.

Q. Yes, thinking of it that way.

MR WELSH:

Five, I just set out why it's appropriate to have a longer-term regime. I'm not sure, Ma'am, I need to flog the horse on that.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. No, not if you're saying what you've said before.

A. Yeah, it's pretty much the same.

MR WELSH:

I just note in 5(2)(g) that that needs to be updated in respect of that proposed restricted discretionary one-pager, so it could read in (g): "The applications are

proposed to be restricted discretionary activities with a matter of discretion relating to duration."

THE COURT: COMMISSIONER EDMONDS TO MR WELSH

Q. Sorry, where are you, Mr Welsh?

A. I'm in 5.2(g), Commissioner, and it's one of the problems with being remote, I haven't had the chance to update these.

Q. Oh, sure, no, no, that's fine.

A. So the full 5.2(g) would read: "The applications are proposed to be restricted discretionary activities with a matter of discretion relating to duration," full stop, and strike the rest.

MR WELSH:

I'm in 5.3 now. Provision for longer duration consents for hydro has been supported in principle by a range of witnesses and parties during the plan change 7 hearing, and I set out in (a) to (d) those, including Mr Brass for the Director–General of Conservation, who appeared to support, in principle, longer term consents for hydro, Ms McIntyre, who also acknowledged there may be circumstances where hydroelectricity may justify a longer term, and Mr Ensor for the Minister for the Environment, and Ms Dicey for OWRUG. I comment on the RPS, Ma'am, just in the context of – I'm not going to foreshadow any of the submissions I may make, but really, I just want to point out that it does, at least as notified, show that some of the submissions I've been making throughout this hearing are where the new planning framework regime may very well head, at least as notified, so I just wanted to point though out to you. In 6.3, the upshot is that the Proposed RPS is consistent with Trustpower's case during this hearing. Nothing Trustpower has identified in the Proposed RPS detracts from the arguments made on Trustpower's behalf at the hearing, nor the relief it is seeking. If anything, I submit the Proposed RPS provides additional support to Trustpower's case, but I fully acknowledge the weight to be given to the RPS is limited due to the very early stage we're at in that lifespan. I don't submit that you need to take this into account whatsoever, but I just thought it may be

interesting in terms of the exposure draft – everything relative in terms of interesting.

THE COURT: JUDGE BORTHWICK

It's another document that I have not been tempted to read yet.

THE COURT: COMMISSIONER EDMONDS

No.

MR WELSH:

No, but I just thought that in terms of what the future may hold, and I say may, there is, in clause 6, a requirement for an increase in generation storage, to promote the increase in generation storage, transmission, and use of renewal energy, and also climate change. I expect you to do nothing with that, Ma'am, I'm not submitting otherwise, I just thought that it shows that the future may not be so entirely inconsistent with the case I've been trying to present. 124, your Honour, you wish to have that in writing, so counsel address the Court –

THE COURT: JUDGE BORTHWICK

Well, you declined to give a spoiler alert, you see, so now you've got to actually commit.

MR WELSH:

Yeah, so counsel has addressed the Court on the application of s 124. I do not wish to canvas those matters again. However, for the avoidance of doubt, Trustpower is not seeking the Court to make a finding on s 124 as it relates to deemed permits if the Court considers it does not need to. I can't tell you as counsel that you should not, I can only submit that I do not consider you need to.

THE COURT: JUDGE BORTHWICK

Need to, yeah, thank you.

MR WELSH:

So we've come to my principal submission, and that is that the relief sought by Trustpower appropriately gives effect to all applicable higher order planning documents, and, in terms of s 32, the relief sought by Trustpower is the most appropriate means of achieving the purpose of the Act, and Ma'am, I just want to thank – because this is my closing and I don't intend to be back here next week – I just want to thank the Court, the full bench, for your perseverance and the manner you've conducted the hearing, and I also really want to also acknowledge my colleagues. It's unfortunately, the collegiality that I've experienced here is not always replicated in hearings and I just thought I wanted to acknowledge that.

THE COURT: JUDGE BORTHWICK TO MR WELSH

Q. It's a South Island thing.

A. Yeah, well for an Aucklander it's refreshing. I just wanted to acknowledge that on the record.

Q. Thank you very much. You've run a very focused, tight case and that has been of enormous assistance.

A. Thank you, Ma'am. They are my submissions.

QUESTIONS ARISING – NIL

MS IRVING:

Now, these submissions have perhaps taken a slightly unusual approach in that the Court will probably recall that we had a number of questions asked of us by you in relation

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. I did, that's just what I was just grabbing, what was the questions.

A. And as I've worked through those questions, they've really touched on the key issues that I wanted to discuss in closing. So, the closing takes the form of responding to those questions and rather than taking, I suppose, a normal approach to closing submissions –

Q. No, but, you guys – counsel came back with an agreed set of issues, so…

A. Yes.

Q. All right, and so, you're now working through those.

A. Yes.

Q. Okay. Good.

A. The other topic that is addressed in here is the topic of scope for the relief that Mr Twose has suggested in his most recent supplementary evidence. Do you want me to take you through those submissions or would you prefer to take those as read?

Q. No, I need you to take me through those. Thank you.

MS IRVING:

So, in terms of scope, obviously the Regional Council has taken the position that the new rule proposed by Matthew Twose was not on the plan change because, in the Council's opinion, it is either unrelated to the plan change 7 case, prejudicial to potentially affected persons or both. Now, I accept that the test set out in Clearwater Resort Limited and Christchurch City is the appropriate test for assessing what is on the plan change, I submit that the assessment of that requires a more pragmatic approach to the mischief which Mr Twose's new rule seeks to remedy. Despite what may have been intended by Regional Council in notifying plan change 7, policy 10A.2.2 does change the way that new water takes for community water supplies will be consented. The Regional Plan Water recognises community water values which are provided for by community water supplies and plan change 7's policy regime creates a highly directive overlay with respect to duration that fails to provide for the ongoing obligations of territorial authorities. Counsel submits that this change to the status quo is not Just an indirect policy sidewind, but it is a fundamental change to the management regime and adversely affects the TAs ability to satisfy their obligations. Turning to the test for on plan change. In *Palmerston North City Council v Motor Machinists*, Justice Kós describes the bipartite test in Clearwater in this way.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Do you want us to read that for ourselves?

A. If you'd like to, yes.

Q. Yeah, no, I'd like to get that back into my mind. Now, your submission is – it's addressing the concern as to new water.

A. Yes, that's right.

Q. Not replacement consents.

A. Correct, yes.

Q. All right.

A. So, the first limb of the test requires the Court to compare what would have been without the plan change with what will be after it. This is an enquiry into what the plan change will actually do. The Court in Clearwater reasoned that if the effect of a plan change is to change the function of parameters in an unchanged part of the plan, then this would be open to challenge. It is submitted that Policy 10A.2.2 functions more like a rule than a policy.

Q. Sorry, so, policy functions more like a rule than you said more than policy, but you have here an objective.

A. Yes, well, 10A2.2 is a policy not an objective, so that's just an error on my part in paragraph 11.

Q. Oh, okay, so, how do you want that sentence to read?

A. So, it is submitted that 10A2.2 functions more like a rule than a policy.

Q. Okay, thank you, I'll just make that correct.

MS IRVING:

It supersedes all other policies in the plan and strongly directs new water takes only be granted for six years or less. Thereby constraining the parameters of the relevant provisions of the Regional Plan Water even though the words of those provisions remain unchanged. In my submission, this is not an isolated policy directive as suggested by the Regional Council. Instead is a substantive change which affects the territorial authority's ability to satisfy their medium and long-term obligations under the Local Government Act and the Health Act. Had Policy 10A.2.2 not been included in plan change 7 then counsel would understand the position taken by ORC with respect to the scope of plan change 7. However, by virtue of policy it results in a functional change to the status quo for both replacement and new community water takes. Counsel for the ORC refers to the public notice for PC7 which provided that a plan change proposes

an objective, policies and rules that manage the replacement of deemed permits with water permits and the replacement of expiring water permits and facilitates the transition from the Regional Plan Water for Otago to a new fit for purpose Regional Land and Water Plan. This statement does not reflect the function of policy 10A.2.2 which introduces an additional control for new water takes. Counsel submits that omitting the functional effect of the plan change on new water takes for community supplies, or any other new take for that matter in the public notice does not mean these are out of scope. It simply indicates that the ORC failed to articulate the full effect of plan change 7 in the public notice.

THE COURT: JUDGE BORTHWICK

Just pause there a second.

MS IRVING:

It is further submitted that differentiating between direct and indirect changes caused by plan change 7 applies an unnecessary gloss to the enquiry into what the plan change actually does. Plan change 7's policy 10A.2.2 changes assessment of new takes, it is of little moment whether this is a direct or indirect change within the plan change. Mr Twose's proposed rule 10A.3.1A.2 seeks to rationalise and consolidate the provisions of plan change 7 as they relate to community water supplies. As discussed in his evidence this recognises the special nature of community water supplies and their recognition as a tier two priority under the NPS for freshwater management. Turning to the status quote, without policy 10A.2.2, the status quo requires the Regional Council to assess new community takes as a discretionary activity and to consider the various obligations and constraints including those relating to duration. The crux of the TAs position is that policy 10A.2.2 changes the assessment of new water takes by restricting the potential duration of a consent to six years. Policy 10A.2.2 is highly directive, such that it is functioning much like a rule. Whether advertent or not this is a functional change to the assessment in relation to new takes and as such alternative methods to address this are on the plan change. The TA's proposed rule integrates specific considerations of actual water use,

measurement, and proposed water management alongside a duration that is more appropriate for community water supplies. These reflect the types of considerations that are likely to flow from the councils developing freshwater management regime pursuant to the national policy statement. It is submitted that the TAs proposed relief satisfies the first limb of the clear water test since policy 10A.2.2 changes the assessment of new community water supply takes and the relief proposed is directed at this functional change to the status quo.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Right, so ORC's concern in relation to new take, sorry I haven't actually – I've neither got ORC's submission in front of me nor your original submissions on the plan and of course it was made by four or five TAs.

A. Yes.

Q. And they might have taken different approaches but ORC's concern is that not one TA made a submission on the duration policy for new takes?

A. No, don't think it was that. I think that none of the relief specifically sought to bring a rule into plan change 7 that addressed the new takes of water.

Q. So wasn't so much that TA's hadn't made a submission on new activities?

A. Correct.

Q. And is your submission because they have?

A. Yes, it's slightly opaque I have to confess in the various submissions. The submission that I draw your attention to in particular, was the submissions from the Queenstown Lakes District Council which addressed the issues around the replacement and enlargement of water takes and as we know, a consent that would essentially increase a water take would require a new application under the operative plan. So, in my view and I think it's a view shared by Mr Twose, is that that provides direct scope for the relief that he proposes but equally the other submissions which raise questions around the policy, I believe also provides scope because we in essence proposing an alternative method to address the mischief that policy has created.

Q. And so, do I take it that reading across the TA's individual submissions or further submissions, we will find submissions on policy 10A 2.2.

A. Yes.

Q. You will?

A. Yes.

Q. Okay. And so is there any issue that the relief being pursued by Mr Twose is not the same relief as you originally submit it?

A. Correct and that that relief essentially includes a rule that pulls in new takes whereas obviously the notified version of plan change 7 didn't directly seek –

Q. Introduce a rule so, yes.

A. – to regulate new takes via a rule. Yes.

Q. Yes because it was amending a policy in the operative plan.

A. Correct.

Q. Well was –

A. Creating a new policy.

Q. – no amending the operative plan by creating a new policy as to duration but no rules.

A. Correct.

Q. And so now what Mr Twose is done is introduced a rule clearly pertains to those new activities.

A. Yes.

Q. And that's the offending part.

A. That's my understanding of council's position, yes.

Q. And you're saying, that is true, that's what Mr Twose is doing. That is what he's doing.

A. Yes.

Q. But that's not a problem because there was a submission made on policy 10A 2.2 –

A. Yes.

Q. – and at least as far as QLDC go, they were dealing – their relief was dealing with both replacement and enlargements, were the enlargements being within the new water camp.

A. Yes. That's right.

Q. Yes. All right.

A. There are and I highlight them in the footnotes some other submissions from other parties that seek, I think again, in slightly opaque terms but rules to implement policy 10A.2 and an example for those is the Forest and Bird submission and I highlight the relevant paragraph of their submission.

Q. Which footnote are you at there?

A. Number 10 on page five.

Q. So if we were to read Fish and Game, we would also see relief seeking rules for new activities?

A. Well essentially, it's a fairly broad submission seeking that there should be rules implement policy 10A.2 in effect. They don't propose any specific drafting or that type of thing but it does raise the spectre of a specific rule for new activities.

Q. And then they propose one, it's a noncomplying activity should you go over six years and that is also relief that we're considering.

A. Yes. And so I think when you look at what was raised in the submissions on behalf of QLDC, I think the issue is flagged there. I think that the relief essentially flows from those submissions around policy and the effect of that policy. So that falls within the scope of plan change 7.

Q. So I understand the submission today and I'll read the submissions filed last year with that in mind. Yes. You weren't a – your clients weren't – didn't make a further submission in response to Fish and Game though?

A. No, they did not.

Q. Okay. Thank you. I'm not quite sure, where did you get to? 24, procedural fairness.

MS IRVING:

So the regional council expressed some concern that the restricted discretionary status of the rule limits the ORC's ability to consider the environmental effects of new takes for Community Water Supplies and that this limitation, may result in potentially affected persons not having the opportunity to be heard. It's my submission that the proposed relief doesn't present a real risk of prejudice. Firstly, the effects of the new rule and consequential changes

have been traversed in the section 32AA assessment completed by Mr Twose. Alternative pathways similar to those promoted by him were traversed in the submissions made in relation to plan change 7. The ORC did not, in their submissions, identify a particular group that may be at risk and I would note that there is a broad spectrum of interests represented in this plan change 7 process, and if there was a risk, I would suggest that would be extremely low, if it exists at all. This is supported that the fact the proposed rule relates to a limited range of takes, and those identified as having a second priority under Te Mana o te Wai. Other potential water takes are in the third priority. And community water supplies are elevated vis-à-vis these third priority uses by the NPS objective, which in Counsel's submission has some bearing on the potential for there to be parties that would be affected. As a result, I submit the proposed relief passes the second limb of the Clearwater test and can be said to be on the plan change. We've talked about the scope within the submissions that were filed but, in their eyes, got reference to the relevant parts of the *Queenstown* submission and any others I thought might be useful. So, turning now to the questions that had been raised, the first question was whether the territorial authorities' obligation is to provide drinking water or water, including drinking water.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. See, I was working of your – I think we went, said these ought to be the issues, can you confer and come back.

A. Mhm?

Q. You came back on the 7th of May and some of them were just tweaked slightly, that was all – some of the issues.

A. Very minor tweaks I think.

Q. Yes.

A. Substantively they're the same.

Q. So you working from that? Your own memorandum or my minute?

A. I actually can't quite recall where I pulled these questions from. I think I cut and pasted them. I suspected they've come from out memorandum because that would have been a Word document.

Q. Ok, I certainly recognise that question.

MS IRVING:

So, firstly the territorial authorities' obligation under the Local Government Act is to provide water services. The Local Government Act s 130 requires a territorial authority to continue to provide water services and maintain its capacity to meet its obligations. Water services is defined in the Local Government Act as water supply and wastewater services. And water supply is defined as the provision of drinking water to communities by network reticulation to the point of supply of each dwelling house and commercial premises to which drinking water is supplied. It is submitted that meaning is readily apparent, and that the obligation of the council is to provide drinking water. Now I have previously traversed the interpretation of drinking water in the earlier submission. So, I haven't sought to do that again here. The next question is, when assessing an application for a new or replacement permit are there environmental effects of the end- use, a relevant consideration under the provisions of the Regional Plan Water?

As set out in the evidence on behalf of the territorial authorities, Council have sought and obtained consents for take and use of water for a particular purpose. That purpose can vary from consent to consent, but of most relevance are the consents for the purpose of community water supply. It is submitted that the use of water in these instances is the supply of water to the community. Now, I just thought it would be useful to provide a bit of context around the inclusions of use within the provisions of the Regional Plan Water. So, prior to change 1C becoming operative, the plan referred simply to the take of water. Plan change 1C which was promulgated to help address water allocation issues added the term "use," and it also in its operative form, added a new rule to chapter 12 which I've reference at my footnote 13, which created a permitted activity rule for any use of water associated with a take consent granted prior to 10 April 2010.

It is submitted that the activity that is relevant in the context of these take and use consents is the purpose for which the water is taken, that being community supply, and what I characterise as the primary use. It does not extend to the downstream activities undertaken by people who have been supplied with the water from the scheme, or the consequences of such activities that are controlled by other sections of the Act, and what I would call the subsequent uses. Therefore, consequential effects on water quality arising from the subsequent uses or discharge of water provided via a community supply scheme are not relevant. This is inherent in the scheme of the Act. The take and use of water is managed under section 14, whilst discharges and land use are controlled by sections 15 and section 9 respectively. The provisions in the Regional Plan Water function in a similar way.

Depending on the nature of the subsequent use, discharges arising from it may be a permitted activity pursuant to rules in the RPW and now plan change 8 or the specific user will need to obtain consents. Those subsequent uses are not 'authorised' by the water permit. A good example, I think, of that scenario relates to the treatment of sewage and associated discharges. The discharge of treated wastewater is not authorised by the take and use consent despite it being a reasonably foreseeable consequence of a community water supply. The consequences of the subsequent use of the community water supply requires its own consent to discharge, and that forum is the best place for assessing those effects arising from that. The High Court in Ngāti Awa held that the starting point for consideration of end-use effects is that subject to Part 2 section 104(1)(a) requires a consent authority to have regard to any actual and potential effects on the environment of allowing the activity.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Now, I don't read any to be addressed further on NGS reporter.

A. Okay.

Q. I'm familiar with all of those cases.

A. That's fine. I'm happy to move past that. So, if we carry on –

Q. I think that you should, and just bear in mind this guidance, has Mr Twose proposed something which your clients support?

A. Yes.

Q. And if he has then, do the issues that you're raising need decision or are they potentially working against his relief, and I think that's where we've had the difficulty where planning is saying one thing, counsel, sometimes you can knock our confidence in terms of those outcomes that Mr Twose is seeking, so just bear that in mind because Mr Twose has done a sterling job, Mr de Pelsemaeker says he's done a sterling job too. He has, he has really given those provisions and the operative plan a big nudge. Whether OIC goes with that in some future plan, I don't know, but I don't doubt that most TAs have as a primary use, water for drinking water purposes, but some TAs don't, which is the problem that we had with Clutha. So, if you're wanting to – and the problem with Clutha, as I understand it, is that the environment is changing about it and there are water quality issues and another environment water quantity issues. Mr Twose was of the view that you can't have long-term duration consents, you need – he was of the view that, I think he said either 15 or 20 year duration consents because at that point then you need to do another check of the environment that the taking is happening in the context of and that might resound in different approaches being taken under a water management plan, and I think Mr De Pelsemaeker said if there was a change in that future environment, so, in the setting of where TAs taking is happening, you may need to go back and revisit the TA consent, and the likely place to revisit it was under a water management plan. Now, other witnesses like Ms Muir was totally again revisiting anything in relation to TA consents, but Mr Twose's evidence was not that you could indefinitely rollover and rollover and rollover these consents, you had to be cognitive of the new environment setting after a period of time, you know, 10 years, 15 years, six years, 15 years, 20 years, 35 years, but you had to at some stage spot and have a look at the context that that taking was happening, and I have no difficulty in principle with that, and I have certainly no difficulty in principle with the need to actually for this Council

and every other Council in the land now to reconcile their three NPSs that we're dealing with. Where it gets – so, there's a – I think your submissions have introduced uncertainty where perhaps no uncertainty exists, at least from Mr Twose's thinking and approach.

A. Yes.

Q. And its introduced it by saying all water must be treated to a drinking water standard, therefore all water is supplied for drinking water purposes, when we know darn well that is not the case in some districts, as in Clutha, drinking water for human consumption was a secondary purpose.

A. Well, I –

Q. I know you don't agree with that. I know you don't agree with that but because – but that's created uncertainty for your clients, where I just for the most, I don't think that should exist, because, yeah…

A. Yes, and I – it is, I think, challenging because there is a wide variation in the nature and form of the community water supplies that the various councils manage, and I think that in the context of a plan change, what I think that means is, that there should be a pathway that allows us to look more closely at those individual circumstances and adapt accordingly, and that is essence what Mr Twose's option provided for in particularly broadening or introducing those aspects of water management and efficiency and so on, so, that those received more careful attention as a result of plan change 7, and they have perhaps done under the Regional Plan Water, and that would, I think, in my submission, be a – well, allow for some of the issues or concerns that have perhaps arisen in relation to the likes of the sterling scheme, because I think what we also need to recognise with these schemes is that as the Regional Plan Water identifies, they have become important and are often relied upon by the communities that they serve, and so, I don't think it's likely to be a palatable outcome if they are simply cut off entirely, but if some of the broader uses that they currently serve are cut off, there will need to be –

Q. How do you mean broader uses that they serve the council –

A. Well, things like the diary shed washdown for example, that's provided by the sterling scheme.

Q. But I think that was Mr Twose's evidence, he was actually trying to close that out.

A. Yes, and I think that that's possibly where it will end up, the question is, how do we facilitate that, and that's something I think that could be and can addressed, consent by consent, utilising the matters of discretion that Mr Twose has included in his rule.

Q. There is another approach, though, if you're wanting to – if the District Council wants to become, it's almost like a water control authority supply or water for the primary sector, if that is one of its purposes, or a purpose that it has carved out for itself, if that is what it wishes to do then it needs to happen in a way which resonates and responds to the prevailing environmental circumstances, and the pause point for sterling is where there is a change in the environment which is happening, particularly in terms of water quality, if you chase through the documents presented by Tom Heller in his evidence, he did not take the Court through all the trend analysis that is contained in some of his documentation, but if you have a look at that, then that tended to indicate that you needed to push pause, have regard to the environmental setting that that activity was in and then decide if that is one of your purposes, what responses that should be in your water management plan, as opposed to saying, well, that's not our problem, that's the region's problem. So, in other words, integrated management is what really needs to be taking place.

A. Yes, and I suppose there's the point where I might depart with you on that, is whether those effects and changes that are arising in water quality are effects that fit within the forum of the take and use permit or relate to that subsequent use.

Q. Yes, and I understand that, and you would say, they're outside of our permit.

A. Yes.

Q. But what Mr Twose said was that you actually had to have a fixed duration because the environment in which that permit is being exercised changes or will change over time and then you needed to have regard to those

environmental changes and how a consent on application for renewal might respond, and that seemed imminently sensible.

A. Yes.

Q. So, for example to take another example that does not apply to sterling, you might be taking water – volume of water in a water short catchment, which is shorter by the day, I'm thinking here of…

A. Omakau. Yes.

Q. Omakau, yeah, Omakau, and so, at the time you were actually consented, there was water available for that scheme, but now 20, 35 years on, the water source has become unreliable, and it's not become unreliable necessary because of TAs, community water, because it had been taken in supply for community water purposes, but for other demands which are now on the same environment for the same water it becomes unreliable, do you just ignore that you're in a water short catchment and roll it on for another 35 years or is there time again – is there a need to push pause and say, well, lets look at board of planning, what's going on in this catchment and then make careful decisions around allocation needs.

A. Yes. I would say that my understanding of the reliability issue in relation to Omakau was to do with sedimentation and the fact the surface water is prone to sedimentation –

Q. Well, okay, then just take that example as a hypothetical.

A. Yes.

Q. As opposed to Omakau.

A. Yeah.

Q. It's hypothetically your environments changed, do you just say, yeah I want another 35 year consent, that's none of the – the environmental issues, water shortage and over allocation is nothing to do with us, it's everything to do with the diary farmers or whoever you want to blame it on, or do you stop and have a wider look at – in an integrated fashion as to the allocative needs or demands of various groups.

A. Yes.

Q. Subject to tier 1 of Te Mana o Te Wai, and I would have thought it was the latter.

A. Yeah, and I don't think we're disputing any of that, and I think that Mr Twose's matters of control, and I think as Mr de Pelsemaeker pointed out yesterday, have primarily focused on the sort of demand side element of that and what the TAs can be doing to ensure that they're not just taking water for water's sake.

Q. Yep, and there's no dispute about that. the Court suggested those mechanisms, but to have regard to that, and he has do that and he's done it, I thought, I'm reading, very well, but I don't know the views of my colleagues on that. He's done an excellent job, but that's the problem – the problem that the Court's gone, and I think your client has, especially for new water, is that that integrated planning hasn't been done.

A. Yes. I accept that.

Q. So, it's not an end-use of water per say argument, and as I said, we're then really struggling with, we've got good relief we think we can work with Mr Twose, maybe, don't know, because there's some key decisions that need to be made, and then potentially legal submissions which undermine our confidence about where Twose's relief would go, should we put it in a plan.

A. I think the issue that has been of particular concern to the Territorial Authorities is the issue that arises from the likes of the Omakau, like it stands, where because they are replacing an existing water supply but the way that the rules operate means that's a new consent, and it creates an awkward, or it is awkward fit with the way that plan change 7 has sought to manage matters and I think as described in the evidence on behalf of, particularly Queenstown and Central Otago, the short-term nature of plan change 7 bucks up against the way that the Territory Authorities plan their infostructure and seek to manage that, and –

Q. I would think that could be said for the primary sector, though, it's up against people's succession planning, people's desire, and audible desire for moving from inefficient irritation to efficient irrigation, but it bucks up.

A. Yes.

Q. And that seems to me to be a reflection of the absence of integrated management and regional, and then it follows a district scale.

A. I think, yeah… I mean, if we're looking at it from a district scale perspective and I think conceptualise it in terms of the sort of infostructure planning exercise that Territory Authorities are responsible for, then preparing their infostructure, ensuring they have long-term access to the water to supply that infostructure is entirely consistent with their obligations –

Q. But it takes place in the context of regions own responsibility's and hence it is the conversation that is happening between those local authorities, and it's not one prevailing against the other, but very much a drive, especially under the MPSUD or integrated management.

A. Yes absolutely.

Q. And that's where those tensions get reconciled and hydro gets a look in occasionally as well.

A. Yes.

Q. Because hydro then comes in under its own RNG.

A. Yes. And I think the thing that we're trying to achieve here is essentially acknowledging that things are not as they should be from an integrated management point of view and how do we, I suppose shepherd the territorial authorities through, recognising that challenge but also recognising the strategic planning obligations that the territorial authorities have and where we essence have landed on that, is through the relief that Mr Twose has promoted. What I would say is that where Mr Twose has landed, is not the dream result from the territorial authorities' point of view. They would still like to see water access and consents being secured for much longer terms than what Mr Twose has suggested but they, I think accept albeit begrudgingly that we've got a process that we need to work through here to get the regional planning framework up to speed. And so something that is – there's an accommodation required on their behalf in order to facilitate that. And that's the 15 or end up to 2035 date that Mr Twose has suggested. Quite what happens beyond that, I don't know. We might find by then we have an allocation regime in place that will mean that they can get longer term

consents again, I don't know. But we felt that that was a reasonable place to land, recognising the different things that need to be achieved.

Q. Okay, no need to think about that and we need to think – you're Luggate example, you say it is enlightening only because I haven't gone back and re-read all of the TAs evidence coming into this week of the hearing but understand what they want to achieve at Luggate but we're moving from water body to another. It does demand a full environmental effects assessment and it's like well, Mr Twose is not offering that and you see that's difficult. Yes.

A. It is difficult and I acknowledge that challenge and I think in the questions asked of Mr de Pelsemaeker yesterday, tried to explore what possibilities there might be to address that.

Q. Where were you going on the issue of an effects' assessment for new water?

A. Yes, so I thought there were potentially two options there. The first one would be to effectively have Mr Twose's rule apply in addition to the operative provisions relating to the new water takes.

Q. So, have Mr Twose's rule apply, in addition to?

A. Yes.

THE COURT: COMMISSIONER EDMONDS TO MS IRVING

Q. Sorry, like the RD rule?

A. Yes.

Q. As RD?

A. So, no the current – we can't change I suppose the activity status of the existing rules in the operative plan. So either – so there's a rule where an identified scheme and you're replacing your consent which is a controlled activity. If you're a new consent, it's a discretionary activity. So that would, through the discretionary activity pathway of course, make the assessment…

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. But with no –

A. All of the effects.

Q. – end game in sight because there's no policy?

A. Well, that's where the policies in plan change 7 and the restrictive matters of discretion in Mr Twose's rule would apply.

Q. No so just start that again. So start it again you've lost me but I am really interested so don't think that we're not interested, we're interested. So the proposition is, new activity, got that.

A. Yes, so if we've got a new activity under the operative plan, a consent whether that activity would require discretionary consent…

Q. Yes, equals a "d". Okay.

A. So, that means everything is on the table. That rule applies in conjunction with the rule under plan change 7.

Q. So, that discretionary operative regional water plan rule plus –

A. Yes the restricted discretion.

Q. – plus your RDA equals new water.

A. Correct. And so that, I think, I mean it's not perfect, I accept that but the extra matters that Mr Twose had introduced around efficiency water management planning get pulled into the new consent regime which is that nod to what is required under the NPS and all of those things but gives that opportunity for that broad assessment and the effects of that water take on a new body if that were to be the case.

Q. And you've got a drop-dead date of 2035 –

A. Correct.

Q. – because honestly that duration policy's just, well got the region there but okay. So not the duration for – so drop-dead date.

A. Yes.

Q. Okay.

A. The other alternative I think would be to make Mr Twose's rule a fully discretionary rule perhaps for yes…

Q. Yes, but then that's problematic because it's very hard. What are we doing with the effects?

A. And I think, the other thing to bear in mind I suppose on that is that the direction in the part of the plan – how do we use this plan? For the new takes of course requires the provisions in chapter 5, 6 to apply. So in

relation to the takes, I know you don't like them but in terms of the effects of the take on the water body, there are at least, some objective and policy provisions that address those issues.

Q. So that's kind of – so a fully discretionary rule. So that's your part, alternative to new activities, fully discretionary as Twose proposes.

A. Yes, well I think Matthew's proposal's restricted discretionary currently.

Q. Yes, he does.

A. So you could leave it at that to cover the replacement consents.

Q. Yes.

A. But for new consents, if it's additive, then the activity status would be discretionary by virtue of the rule in the operative plan and the bundling that would occur. So we introduce those efficiency water management obligations through the restricted discretionary rule.

Q. Yes, the efficiency water management obligations which, where are they sitting now for Mr Twose? Are they under a policy or are they under a rule?

A. They're in the rule from memory.

THE COURT: COMMISSIONER EDMONDS TO MS IRVING

Q. So, a little confused because it's in his restricted discretionary rule isn't it?

A. Yes, it is.

Q. I've got his document here, you said it was – he was now sitting at discretionary but isn't he now sitting at restricted?

THE COURT: JUDGE BORTHWICK

Q. No, this is a whole new way of looking at it.

A. Yes, this is a different.

THE COURT: COMMISSIONER EDMONDS

Q. Sure, but I've got Mr Twose's version here and I'm just trying to turn to the relevant pieces that you're referring to so I can fully understand what you're suggesting so. I find those under 10A.3.1A(ii), is that right?

A. Yes.

THE COURT: JUDGE BORTHWICK

Q. What's the date of his brief, I just want to –

A. It's the 12th of May.

Q. Right, I'll just go to a different source.

THE COURT: COMMISSIONER EDMONDS

Better check I've got the right date of brief there. Yes, 12th of May?

THE COURT: JUDGE BORTHWICK

Rachel, can you just check, I've now got Mr Twose's 12 May brief, but can you just check it's actually on the website?

THE COURT: COMMISSIONER EDMONDS

I couldn't find it on the website, and I found that I must have brought it with me which is fortunate. I gave up yesterday looking for it.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So, what you're suggesting – so, you've got option 1 which is that – option 1 for new activities that the… let me see – it's still discretionary under the operative water plan, plus together with an RDA, under this plan for new water, so, it brings Mr Twose's thinking. So, that's your first option. The second option is that it is simply fully discretionary under this plan, but that you need to, I think you're saying, you need to introduce Twose's thinking perhaps in a policy to this plan.

A. Yeah.

Q. So, you're thinking with a discretionary hanging off underneath it, but it would still need consent under the operative plan, and so, - oh no, you're not thinking that, you're thinking of bringing in chapters 5 and 6 selectively from the operative plan.

A. So, there's a preamble to the plan which tells us how it works, which says, and it's on, looks like the third or fourth page of provisions, where it says insert the following text and how to use the plan, and it says for applications, for water permits that are not replacing either a deemed permit or an existing water permit will be assessed in accordance with the

provisions of chapter 5, 6, blah blah blah blah. So, if we had a discretionary rule in plan change 7 that essentially overtook the chapter 12 rule, the provisions, the objectives and policies in chapter 5 and 6 are intended to still be relevant because it is a new water take. I'm inclined to think that the option 1, the additive rules is perhaps slightly neater. Another, option 3 perhaps, would be to introduce those extra elements that Mr Twose identifies into the policy that would irrespective of whether the application was under the operative plan or only in relation to replacement consents under plan change 7. That would also overcome the Regional Council's concern about scope because we're not adding a rule in relation to new water takes.

Q. Say that one again.

A. If we incorporated Mr Twose's efficiency and water management requirements into a policy, that policy would apply under or to both an application under chapter 12 for a new consent and an application under plan change 7 for a replacement consent because we wouldn't be adding a rule for new consents in that scenario it wouldn't raise the issues that the ORC have expressed concern about in relation to scope because we are not adding a rule that regulates new takes under plan change 7.

Q. But that doesn't, that might address your scope issue, but it doesn't address the fundamental issue of where you've got new activities, the policy thus far and that plan says six years, you want longer than six years, and for that, ordinarily, I would expect a full-merits assessment which is under the – which is under the operative plan at the moment for new consents subject to six years.

A. Yes, so I think if you were to deal with this via a policy route, there would be a policy specific to the community water supplies with the backstop date of 2035 that introduced those water efficiency, water management obligations, but because the new consent would require a discretionary consent under the operative plan, your full merits-based assessment can take place as a discretionary rule and leaning on the provisions to the extent they exist to assess the effects of the take on those wider environmental matters.

THE COURT: COMMISSIONER EDMONDS

Q. So are you hanging this off a duration policy effectively? Is that what you're doing?

A. Effectively, yes.

Q. With the duration being up to 2035 and then you're hanging those extra things off it is that what you're suggesting?

A. Yes, so if we look at Mr Twose's suggested changes in his supplementary brief, his suggestion in relation to 10A.2 is a six year duration except where the rule applies which suffers from that drafting.

Q. Oh reaching down the plan to write your policy, using rules, love it.

A. But except where rule – if we ignore that for moment, the resource consent granted will expiry before 31 December 2035. So effectively we'd elaborate that policy to cover those auto-management efficiency requirements. And then the rule that Mr Twose suggests could apply only to replacement consents in relation to new permits or new consents, the operative plan rules would apply, but, of course, policy 10A2.2 and its' extra machinery would kick in.

Q. The duration, expanded duration policy.

A. Correct.

Q. For community water supplies.

A. Yes.

Q. There's a lot of content in those restricted discretionary matters, just in terms of thinking about them in policy terms, is that, are they crafted in a –

A. Yes I'd need to – this isn't, I have to confess, not an option I have explored with Mr Twose. So, I probably need to work with him on that if we were to go down this route.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. If we were mindful of going down the routes, probably indicate that in an interim decision – so the options seem to be from the regional council's preference is six years either, new or replacement. Six years renew or replacement, potentially longer subject to the Twose matters in his new

RDA or and his new RDA, the replacement matters wouldn't just be what he – the couple of matters that he's noted. It would actually be the full suite otherwise what is the point of actually applying for a replacement consents. It's again, it's just, it's not a business as usual, the environment might have changed including your population, or your further suggestions which is that, I think that the policies are remaining the same in the – for a new activity requires a discretionary consent under the operative plan and everything's on the table in terms of a merit assessment plus a RDA rule under the new order plan which is Twose re-thinking and drop-dead date of 2035 or your second alternative seems to be amend policy 10A2.2 which is the duration for new consents to bring in his thinking around matters for consideration on an application for new water together with a drop deed date of 2025, and his rule, such as he's got it, would only be – so, that's your policy consideration for duration, otherwise it's being processed under the operative plan in his rule, such as he's proposed it, would only apply to the replacement consents, but my thinking was, if you're looking for replacement consent, you'd be looking to do all of the good stuff that he knows in his matters of discretion.

A. Yes. So, effectively, all of the good stuff is the quid pro quo for the longer term that you need to be beginning to these steps toward those things which is the sort of nod to the NPS requirements and moving in that direction and to do that or to get the longer term, you've got to commit to that.

Q. So, it's more than just about the longer term, the other element is you get what the deemed permit or the up to 25 permit allowed so there's no historical use of it. You can have whatever volume – rate of take and volume your deemed permit allows, if in some cases it even specified that if any particularity, I don't actually know the answer to that, do we know the answer to that.

A. Yeah, most of the permits specify rate of take, and I feel like it's generally an annual volume. I think some of them might have a maximum daily volume, but they don't tend to have the monthly volume that you tend to

see on the irrigation consents, and my understanding in relation to that is because of the potential for there to be some wild variations.

Q. Big needs, yes, we heard evidence on that, didn't we?

A. Yes, so they do provide a little more elasticity than the other permits.

Q. I guess, I raise it just so we don't forget that other element.

A. Yeah, I just thought that where we had actually landed on that was the way that the schedule operates is just not to kind of trim back the atypical data but you still do that same analysis.

Q. Sorry, the schedule? The controlled?

A. 10A4 or whatever it's called. So, that schedule still applies to replacement permits.

Q. Well, parts of it do, but not the – I think that was point of some of the questions -

A. Correct.

Q. – that Commissioner Bunting asking yesterday. There was clarity required in terms of, was it only that step 4 that didn't apply.

A. Yeah, that's my understanding, and I'd agree with the explanation that Mr de Pelsemaeker gave to Commissioner Bunting's questions, that the reason that the atypical data analysis was agreed not to be appropriate for the community water supplies is because of the tendency to be quite variable and when you people need that water, you need that water, so, yeah, trying to remove that atypical data would potentially create an issue for the Territorial Authorities and require significant storage increases to address that.

THE COURT: JUDGEBORTHWICK TO MS IRVING

Q. Right, you can think about those options and Mr Maw can respond.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You've got a fair idea as to what –

A. I was sitting here contemplating precisely what is that I'm now responding to.

Q. That's what I'm asking. Do you know precisely what you're responding to?

A. I understand there are now a range of options. I have no clarity over which option is being pursued and what it looks like.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. What it looks like, I think that's the big question, isn't it?

A. Conceptually, I kind of understand, but I'm struggling to be fair.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So, do you want to commit to writing?

A. I can do. I can do. I mean, yeah, our thinking has evolved as we listened to the evidence and I acknowledge some of the concerns that Mr de Pelsemaeker's raised in his reply, so, I suppose a bit like Mr Welsh, am searching for ways to help address those things. So, I can look at working something up.

Q. I think that's going to be really important.

THE COURT: COMMISSIONER EDMONDS

Well, we're struggling with it too.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Well, I think broadly, I think I know where you're going, then where get – where I trip, I'm finding it difficulty to understand, because Mr Twose had sort of a fully worked up sort approach for new consents but something not marginally different for replacement consents, and why would you want a couple of added matters. Three added matters for replacement consents under his rule, I just want to make sure we are talking about bringing forward for both replacements and new consents, all of his thinking. Because I struggle in principle, why replacement consents, if that's what they are, replacement consents, should not if Mr Twose's advice is to have another look at the environment in which they're set because those environmental settings may have changed, why we're not having a broader look at both how the Territorial Authorities are going around their business of supplying, and also the context at which they're supplying, a really careful look at that.

A. Yeah, no, I understand.

Q. So, we need to be on, we need to understand, exactly, if you like, what's the offer.

A. Yeah, sure.

Q. And need to know that probably before the end of business today, although, we'll rise at 2 o'clock. Everybody needs to know, what is the offer here?

THE COURT: COMMISSIONER EDMONDS

So that people have a got a chance to look at it before we come back next week.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Yeah, because for replacement consents a fully worked up environmental assessment is required, you kind of go, why would want to department from being in lockstep with the other NPSs. It's exactly what we – you know, you should be now, all authorities working together to collaboratively to resolve those, that high order thinking under the NPSs as opposed to one departing and say, well, look, blow that joe, they're a bit late, it's not fair, every council in the country is under the same constraints and pressures. So, we either push pause for six years or you perhaps flesh out your two alternatives there.

A. Okay. Do you want me to finish with the closing submissions?

Q. Yeah, well.

A. Because I don't need to carry on with the end-use topic, I'm happy to move on from that.

Q. Look, I don't think you do, I mean, we're, speaking for myself, stumbling around trying to understand why the end environment not be relevant. Why do we ignore what the environmental setting is for these takes? I thought it was – it is ultimately an NGS problem because that sets the environmental setting that your activity is taking place in, but that is not to say you can control those NGSs. But it is not say that the environmental context is irrelevant and Mr Twose says it's relevant, that's why he's come down off 15 years.

A. Yes, and I think in terms of understanding the environment which your take is coming from, I would agree, that is absolutely, I mean, that's where you start your analysis. I think where we perhaps depart is how far down the chain do you go in factoring in or accounting for the effects that are a consequence of your take that arise from the uses that may –

Q. Are enabled

A. – rely on your water.

Q. Are enabled by your supply, and that's the key really.

A. Yes.

Q. That, for this region is the key question where there doesn't seem to be adequate controls on the broader and through its regional plans, plural and that it now needs to stop and take an integrated management approach as opposed to this aggregated approach which is taken to – hither to today so, yes and the TAs have got caught up in that but probably rightly so because they need to be part of that integrated approach not a part from it.

A. Yes. I think you understand the issues exactly …

Q. I do but yes, well I think I better understand the issues as a consequence of this hearing but I think I always had concerns to the environmental context to some of these supply.

A. Okay, so if we carry on with we've got some topics in relation to the relevance of the –

Q. The NPSUD?

A. – yes national policy statement for urban development.

Q. And you have followed Justice Palmer's (inaudible 13:31:14) approach.

A. Yes I believe I have.

Q. Okay. Right. Will, that's good.

A. Yes that's comforting.

MS IRVING:

So the application of the national policy statement for urban development is obviously set out in clause 1.3. It applies to all local authorities that have all or part of an urban environment within their district or region; and to any planning

decision that affects an urban environment. Depending on whether a particular territorial authority qualifies as tier 1, 2 or 3 there are different obligations within the more detailed implementation provisions" of the national policy statement. Dunedin and Queenstown and then also Otago are identified as Tier 2 authorities within Appendix 1 of the NPS. For the other Councils, it's necessary to determine whether they contain an urban environment. It's apparent from the evidence the Councils themselves are at various places in the process in undertaking the work required to identify their urban environments in light of the relatively recent national policy statement and the changes to the definition of urban environment as compared with the previous urban development capacity policy statement. Now that particular question around the definitions was discussed in the submissions that I filed dated 23 April, so I haven't traversed that again.

So in my submission, the NPSUD is relevant to plan change 7. It qualifies as a planning decision and there are urban environments that will be affected by it. And that's on the strength of the evidence from, particularly Ms McGirr and Ms Muir. Further enquiry will also be required into the relevance of the NPS urban development when specific applications for water permits are made to determine whether they themselves affect an urban environment in an individual case. And that is because resource consents are also identified as a planning decisions within the national policy statement. So, in that sense of we take the Stirling example, Luggate forms part of the Upper Clutha urban environment as identified by the Queenstown's council so, the NPSUD in my submission would most certainly apply to the assessment of that application. The question of whether it might apply to the likes of the Stirling take, I think is a little bit less clear. I would say that the command area of Stirling itself wouldn't be a urban environment. The question for Clutha District of course will be what the extent of the urban environment is within their district and that would need to be determined before you could be clear I think about whether or not the NPS was directly relevant to the assessment of a consent for the likes of the Stirling take.

So, it is submitted that giving effect to the NPSUD in this planning decision is best served by providing a pathway for the community water supplies to allow the territorial authorities to exercise their functions and meet their obligations under the NPS. Whether longer term consents are required in each specific instance will be a matter for the decision maker at the time of the consent application when further more specific detail is available regarding the proposal for which" the consent is sought. So the question, are the provisions of the NPSUD applicable to all TA permits to take and use water, or only those within or supplying an urban environment? I think the NPS drafting is clear. It does only apply to permit applications serving or within an urban environmental and as I've said, would need to be determined at the time this specific application was made. But in relation to the plan change 7 decision the relevance of the NPSUD is determined by whether there are or likely to be water permits supplying urban environments that are affected by the plan change. And in my submission the evidence is been quite clear on that front, that there will be urban environments effected. Turning to the consistency or otherwise of the provisions in the NPSUD and the NPS for freshwater management.

I think it's almost trite to say that national policy statements occupy the first tier of generality identified in the EDS case and that those documents set the national direction through policy statements which are then intended to flow through into the subordinate documents. And in my submissions, this means it is in the lower order documents that are required to reconcile any possible inconsistency between those national level documents. The national policy statement for urban development obviously requires local authorities to provide sufficient development capacity to meet expected demand over the short, medium, and long term. Development capacity includes development infrastructure and of most relevance here is the network infrastructure for water supply. The NPSUD is, in effect, silent on water matters beyond that context of network infrastructure. At its core, the NPSUD drives at strategic and integrated planning (and across statutes in some respects) to meet its objectives. This includes ensuring development capacity can be served with infrastructure. The NPS for freshwater management which was gazetted three

months after the NPSUD seeks to protect the wellbeing of waterways as its first priority, and the health needs of people as the second.

Clause 1.3 sets out the fundamental concept of Te Mana o te Wai, and includes preserving the balance between water, the wider environment and the community. It is submitted that this is a recognition that water plays a role in all facets of sustainable management, and that will by necessity include the allocation of some of it. Looking at the relationship of these two documents to one another, the NPSFM clause 1.3(2) identifies that Te Mana o Te Wai is relevant to all water management. Therefore, to the extent that the NPSUD (or actions required by it) touch on water management issues Te Mana o Te W ai will have a role to play. Whilst the NPS urban development is directed toward development and the NPSFM is directed towards protection, it is submitted that this difference of direction does not make them contrary to one another, and in my submission, this is evident from some of the provisions within the NPSFM itself such as those at Clause 3.22 and 3.24.

The NPSFM carves out exceptions for activities or at least processes through which activities waterbodies can occur, and that includes the likes of the specified infrastructure. It is submitted these provisions demonstrate how other facets of sustainable management can and should be accommodated within the context of Te Mana o Te Wai. It is submitted that the potential for inconsistency between the NPS's arises if one assumes that the outcomes available under them are binary in nature. Specifically, that development capacity can only be provided by taking away from health and wellbeing of water bodies. Whilst that is a theoretical possibility and may arise if an environmental bottom line would be breached, for example it is not the only possibility or indeed the most likely one in my submission. Both documents need to be interpreted in light of the RMA's purpose. Whilst the NPSFM sets a clear requirement to provide for the health and wellbeing of waterbodies, it is submitted that this is still required within the context of sustainable management. Effectively, in my submission, the NPSFM still contemplates an allocative regime. Crudely, it is a question of how much water is required to

provide for the health and wellbeing of a waterbody, and then how much is available to serve the other community centric well beings to preserve the balance between them. In short, the holistic and symbiotic relationship between water, the environment and the community enshrined within the concept of te mana o te wai and is not served if no water can be used at all. If that were the outcome of the NPSFM then the purpose of the Act would be defeated.

Finally, it is submitted that the obligation with respect to the NPSFM and NPSUD under plan change 7 is the same. They must both be given effect to, whether they are consistent or not. I observe that there is no statutory requirement for the NPS's to implement one another. Implementation of them is a task left to subordinate policy and plan makers, for better or worse). It is submitted that achieving. It is submitted that achieved the reconciliation, if it is required is a constraint on plan change 7, not an issue of construction between the NPSUD and NPSFM. I think it is accepted that plan change 7 as notified does not and is not intended to give effect to the NPSFM. It remains an open question whether this is an acceptable proposition under the Act. The provisions of plan change 7, as articulated by Mr de Pelsemaeker, are inconsistent with the NPSUD because it fails to provide for any term beyond six years. As set out in the evidence on behalf of the TA's terms longer than that necessary to support their provision of infrastructure, including to provide development capacity that is infrastructure ready and/or compliant with the obligations the TAs have under the LGA and Health Act, and the amendments proposed by Mr Twose have sought to address these shortcomings within the framework of plan change 7.

So, are the Territorial Authorities statutory duties to take and supply water and the ORCs functions under the Resource Management Act section 30 reconcilable under the NPSUD and NPSFM? Now, obviously, the Act distinguishes between the regional councils and Territorial Authorities. There has been some extraneous commentary in environmental and resource management law texts indemnifying the additional regulatory pressures that Territorial Authorities will have in relation to drinking water supply and the

establishment of Taumata Arowai. In particular, they note that Territorial Authorities will often also have a role of municipal water supplier and in respect of such water supply, the water supplier is required to maintain certain levels of water quality and to protect sources of municipal water supply. I think it's with particular reference to the NES in relation to sources of drinking water. Counsel interprets the Court's question to mean will the various implementation steps required under the NPSUD and NPSFM provide a forum for reconciling the potentially competing statutory functions of the ORC and TA's. To that, I would say "I hope so, if done well". However, whether that may occur does not address the more immediate issue. What to do with Plan Change 7? It is submitted that the Court must resist the temptation, as strong as it may be, to leave the issue be resolved later. Which is what Mr de Pelsemaeker would have you do, and in my submission is not available under section 67(3).

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. What do you think he's having us do, sorry?

A. Well, by in essence saying let's just hold the line for six years and then we'll address all these issues in the context of the land and water plan.

Q. Remind me, what is sub section 3 of section 67?

A. That you must give effect to a national policy statement.

Q. But you would agree with me, would you not that this planning instrument by itself cannot fully give effect to the NPSUD.

A. Yes.

Q. Or REG?

A. Yes.

Q. Or FM?

A. Yes.

Q. So, that it is constrained by its own scope. With the scope in mind, it then needs to reconcile these three NPSs.

A. Yes, no, I agree with that.

Q. So, there's no, so, where's the submission driving.

A. It's driving at the fact, and I come to it in the following paragraphs, that through plan change 7, you effectively need to do what you can to implement the various national policy statements.

Q. Is that correct, do what you can? Because that was the submission of Wise. Do what you can, you should, because you have the data available, now, I think was there submission, therefore you should minimum flows or a flow regime in place now, but that's well beyond – you know, the ORC would say that's well beyond the scope of this plan change, so it's not doing what we can, because in theory you could do that but you would also miss out on other things that you can't do, and that might drive away from integrating management. So, what does – it's not, do what you can, it's do - it is giving effect to, I would have thought the NPSs within the scope of the plan change.

A. And, I mean, I think that's right. I don't think anyone is suggesting that through this plan change you can set minimum flows and allocation limits and things like that which is sort of the full extent of particularly the NPS for the freshwater management, but if –

Q. And why can't you? Why can't you do that?

A. Well, I think, I mean, that is, I think beyond –

Q. In theory you can, presumably if you've got the data – the evidence available, in theory you can, but why could you not? Because there is a reason in law, I think why you could not. You could not because it is not on the plan change.

A. I don't think I would go so far as to say that there's a blanket statement because it is possible, I think, that and I think this beam was perhaps developed during earlier parts of the hearing, about whether some of the challenges created by the lapse or expiry of priorities, say, could be addressed by an alternative regime. So, I think there could be situations where setting some sort of minimum flow might fall within the scope of this plan change –

Q. Oh, you mean –

A. – but I'm not suggesting that I'm advocating for that position on behalf of the Territorial Authorities.

Q. No, no. So, you're saying that with regard to rights of priorities, as the example, a solution could have been, set a minimum flow, so if rights of priority are expiry on October, then a solution for this plan is create a minimum flow.

A. Possibly. If you could, or if it was possible to demonstrate that doing that would achieve the purpose of the plan change around trying to hold the line and do all those sorts of things, and I think that approach sort of aligns with the submissions I made earlier around Mr Twose's relief being an alternative method to achieve the same outcome. So, I think there is more breadth I suppose in terms of the options you might have available to you then directly whether or not this plan change as notified either sought to set minimum flows or whatever other method might have come up, but I don't think that's an issue that touches directly on the case for the Territorial Authorities.

Q. No, I'm just wondering where your section 67(3) – section 67 sub section 3 submissions actually go.

A. And If I take you to my paragraph 89, one of the policies within the national policy statement for urban development requires local authorities to provide at least sufficient development capacity at all times, and in my submission, that doesn't give the Councils a free pass until they have completed the implementation steps required by the NPS and further policy 8 within the NPS requires Councils to be responsive to proposals that would add significantly to development capacity even if it is unanticipated by the planning documents or out of sequence. Such a proposal might arise at any stage. In my submission –

Q. You see, I get to, let's not bother with integrated submission of your integrated planning. If you are correct, the region doesn't need to bother to go down its RPS process, you can go out of step, you are no longer in step with a submission like that. It's not what's intended, I would have thought.

A. Well, I think what we've got to acknowledge is that getting to that place of integrated management doesn't happen overnight. So, we have a period of time now where that end point, we're not there yet, we don't have all of

the pieces of the puzzle in place. However, the obligations to provide for development capacity and so on still exist under the NPS and in my view, that's a thing that you need to be bearing in mind when you're thinking, well, how do I give effect to that, and in my submission, the way that you give effect to that within the context of plan change 7 is by providing a pathway. Now, that pathway –

Q. And it is not the Regional Council's case as it provides for all water, a territorial water, a pathway, that's actually consent.

A. Mhm.

Q. So, it's provided.

A. Yes, that's their case, my case, or the Territorial Authority's case is that that pathway is not long enough.

Q. Okay, anyway, we'll move on. So, you're paragraph 90.

MS IRVING:

Yes. So, as I've said, to give effect to the provision, you have to provide a pathway. The position advanced on behalf of the TA's seeks to strike a balance between the need for TA's to have some extra certainty for infrastructure planning and delivery purposes and the ORC's need for water permits to come up for renewal within the life of the land and water plan. Turning to what is required for development capacity to be infrastructure ready. As I've previously identified, development capacity must be provided at three different time horizons, short-term, being one to three years, medium-term, three to ten, and long-term, 10 to 30. It is submitted that what is required to be infrastructure ready will vary across these time horizons. The time horizons are of course rolling, and so infrastructure ready over the medium term needs to progress so that it can become infrastructure that is ready in the short term in order to meet policy 2 for the NPS for urban development. Most relevantly for the purposes of these proceedings is what is required for development capacity to be infrastructure ready within the short and medium term, particularly given the life of plan change 7.

It is submitted that short term development capacity is intended to be capacity that is available to be called upon with a degree of immediacy, i.e. it needs to

be ready to go. For water supply infrastructure to achieve this, water actually needs to be available to deliver via that infrastructure. A pipe without water to go into it is not development infrastructure as contemplated by the NPSUD in my submission for the simple reason it cannot do its job without the water. To perhaps demonstrate the point that further, no Council would accept a subdivision was ready to go if roads were not formed and capable of being driven on. Suggesting that water supply infrastructure is ready without water is akin to saying legally vested, but unformed roads are ready to be driven on. Over the medium term it is my view that it is important to ensure that water is available to serve infrastructure that will be built to be infrastructure ready requirements in time to meet short term. It is submitted that such an approach is consistent with the Council's strategic planning obligations under the LGA and the NPSUD and the integrated management obligations under the Resource Management Act. It is tempting to say that it is not necessary to actually have the water available until there are people there to drink it. However, I submit that this approach would not represent sustainable management as it runs the risk of infrastructure or development occurring that cannot be served with water supply via the infrastructure at the time that it is required.

It is submitted that Mr de Pelsemaeker's suggestion that TA's must put all future development on hold until the Land and Water Regional Plan has been promulgated is totally at odds with the TA's obligations to provide development capacity on the short and medium-term horizons. The TAs cannot do that. Putting infrastructure development on hold is exactly what the NPSUD was intended to stop TAs from doing. The NPS provides a national direction to get on with it. Does the requirement for development capacity to be infrastructure ready require a water permit? I've already traversed that to an extent. I think that the answer to that is absolutely, yes, for short-term capacity and likely the early years of medium-term capacity requirement, recognising that this needs to be maintained on a rolling basis. The only caveat to that would be where a regional plan, through its water allocation provisions has identified allocation specifically for water supply purposes and there can be a high degree of

certainty that water will be available when applied for. Finally, does the RPS or a Regional Plan Water allocate water for Territorial Authorities. On this issue I agree with the discussion in Mr Twose's supplementary evidence of 12th May. The regional planning documents do not directly allocate water for Community Water Supplies, and that's save for Welcome Creek, which is near to the Waitaki River. There is a recognition of the need for certainty for water supply values by virtue of the controlled activity rule for community water supplies identified within the schedules. Arguably, this is a form of allocation for Community Water Supplies relative to other uses that require at least a restricted discretionary consent. But this allocation only applies those existing supplies identified in the schedules.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Okay, thank you for your submissions. When do you think – if you want to pursue those two alternative points of relief, I do think we need something sketched out to make it quite clear exactly what you're proposing, and you know, if you're bringing parts of that RDA – Mr Twose's RDA roll up into policy, what parts are you brining up, and to policy and for who, and then, yeah, I think, yeah, because he treats new water and replacement water under the RDA differently and I have not heard the justification or defence for that.

A. Yeah, I'll need to confirm, like, I'll need to take this to –

Q. Probably need to take this –

A. – particularly the CODC and Queenstown, and I do know that at least one of the people is on leave until Monday. So, yeah, if it could be, say, lunch time on Monday, I could make that work, I'm sure, and confirm my instructions on that. I mean, I can do what I think it could look like by the end of the day, but I just won't have been able to run the past the necessary people.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. What do you need, Mr Maw? Apart from certainty.

A. It would be helpful to have it. I would be happy to receive on without prejudice basis, the sketched-out provision –

Q. A sketched-out look, yeah, and then take instructions.

A. – yes, because it will inform our thinking over the weekend in terms of framing up the response to the case put forward, and I appreciate that then may well change subject to instructions, but we'll have a better chance amending submissions already written and writing submissions fresh on Monday night.

Q. Yeah, no, that sounds sensible. So, by the end of today, which means…

A. Yeah, midnight's fine.

Q. No, it's not.

A. It's fine for me, I should say. 5 o'clock, how about that?

Q. That's actually pretty sad that everybody's working till midnight. But, no, 5 o'clock today, sketched-out, handed over on a without prejudice basis, obviously the Court's not going to see it until there is something to see, and then by lunch time Monday. I think that's all for today. Any questions?

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Ms Williams?

A. I just have one question, your Honour, and that's really on behalf of Ms Dixon as much as anybody, and that is Dr Somerville, when is he coming back?

Q. I haven't spoken to him. Soon.

A. Soon? The reason I'm asking on behalf on Ms Dixon, is she is just trying to work out whether she should come for Monday afternoon or whether she needs to be here in the morning.

Q. But not Monday. Monday is full.

A. Okay.

Q. I think.

A. Right, so definitely not Monday.

Q. No, not Monday. It will be Tuesday, but I just must get round to talking to him. All right. Okay, so I think we're adjourned through to 9.30, and thank you for your submissions, too. Spent a good deal with those, so, I'm grateful.

COURT ADJOURNS: 2.04 PM

COURT RESUMES ON MONDAY 5 JULY 2021 AT 9.32 AM

THE COURT: JUDGE BORTHWICK TO MR MAY

Q. Anything arising over the weekend? No, very good. So we have no questions for Dr Somerville so we advised him that the doesn't need to be back. I saw the draft hearing timetable and Mr Maw you're down for closings on Wednesday? You're not. Did you need some more time?

A. We are but I am confident we will get to them tomorrow.

Q. That's fine. I just needed to know that so that we can sort of make our arrangements as well.

A. Yes.

Q. But if you needed more time, that was fine as well.

A. No Tuesday's the day.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. We're in your hands Mr Page.

A. Your Honour, I'm simply going to start with the written text and present it and refer to a decision which I've given you which was the last chance resource consent decision which was discussed in the evidence for Ngāi Tahu but I'll get to that a little later on.

Q. So I got two decisions or maybe I got a copy for somebody else. Last Chance, okay.

MR PAGE:

OWRUG maintains that Plan Change 7 must be rejected. It is fundamental to OWRUG's submission that the Council has obligations under the NPS FM 2020 and section 67(3) of the Resource Management Act that cannot be put aside at the behest of the Minister's recommendation. Te Mana o te Wai is the single objective of the NPSFM 2020. Although the NPS need not to be given full effect in Plan Change , neither does section 67(3) of the Act entitle the ORC to grant itself a holiday from the objective and policy 1. Freshwater must be managed in a way that gives effect to Te Mana o te Wai. Does PC7, within the scope of what it does, do that? OWRUG says "no". Forest and Bird's closing submissions cites the Environment Court's decision in *Minister of Conservation*

v Northland Regional Council for the proposition that the NPS FM 2020's obligations on regional councils are future obligations. The decision does not say that. It is true that the Court noted, at paragraph 31, that certain of the Part 3 implementation provisions set up future process obligations, but it did not rule that the objective or policies did not apply. The Court's decision is problematic in that paragraphs 33 and 37]it held that the NPS FM 2020 is a matter to which we should have regard. It treated differences between the 2014 and 2020 versions of the NPS as a matter of weight. It appeared to escape the Court's attention that the test is "give effect to" under section 67(3). The context of the Northland case and the present one that you're engaged with are very different. In Northland the Court held the relevant operative objectives in the RPS were consistent"

THE COURT: JUDGE BORTHWICK

Q. Sorry which paragraph are we up to?

A. I'm in number six.

Q. Yes, so you are sorry. Yes, you see you must be adlibbing, "The Court held in the Northland …".

A. Yes sorry.

Q. I'm looking for keywords like Northland and you're adlibbing.

A. I realised that it was confusing unless I said which Court I was talking about.

Q. Very good.

MR PAGE:

The Court held that relevant operative objectives in the RPS were consistent with the NPS 2014 and 2020, as were the Regional Plan provisions. The Regional Plan also had settled minimum flow provisions, and there was no disagreement about them. The issues at large were relatively discrete, concerning rootstock survival, out of take limit, supplementary takes, and Dune Lake Levels. None of those issues required confronting the need for a paradigm shift head on. OWRUG submits that clause 1.3(2) of the NPS FM 2020 makes it clear that Te Mana o te Wai applies to all freshwater decisions,

and that PC7 is a freshwater decision. And so are decisions to grant resource consent under plan change 7 also freshwater decisions. It is true, as the Court said in *Minister of Conservation v NRC*, that the obligations in section 3 are yet to come. But Te Mana o te Wai has started. The ORC considers that Section 4.1 of the NPS (every local authority must give effect to this National Policy Statement as soon as reasonably practicable) means that plan change 7 need not give effect to the NPS in itself. That is accepted, to a point. What is not accepted is that section 4.1 enables the ORC to bring forward a Plan Change that continues a situation inconsistent with Te Mana o te Wai, where there are better options available. The NPS FM 2020 is the yardstick by which Plan Change 7 must be tested. And now there is an additional matter to be had regard to, being the proposed Regional Policy Statement. The third paragraph of the purpose of the proposed regional policy statement records that it gives effect to national direction.

THE COURT: JUDGE BORTHWICK

Q. Now just – I'll read that slowly to myself. What is the ORPS?

A. Otago Regional Policy Statement.

Q. Oh okay, so it's not operative.

A. No.

Q. Okay. But in talking about the Otago Regional

Q. Policy Statement, is it talking about the proposed, or is talking about the operative?

A. It's talking about the proposed.

Q. It's talking about the proposed, and the national direction instruments.

A. Yes.

Q. They are the NPSs?

A. Yes, they are.

Q. Okay.

A. So, I say in paragraph 12, unsurprisingly the NPSFM 2020 is specifically listed in the table of national direction instruments as an NPS being given effect to. Given that the proposed RPS seeks to implement the NPS FM2020, which must be given effect to by PC7, it is submitted that

substantial weight is justified notwithstanding the early stage of gestation of the proposed Regional Policy Statemented. In one important respect, the NPS FM 2020 and proposed RPS are consistent. Both documents make clear through policies that Te Mana o te Wai is the primary obligation of all decisions made in relation to fresh water from the date of commencement of those documents, and so, what I've done for the rest of page 3, the top of page 4, is set out the provisions that OWRUG relies upon.

Q. In the PRPS?

A. These are proposed regional policy statement provisions, yes.

Q. All right, we'll read those to ourselves.

THE COURT: COMMISSIONER EDMONDS TO MR PAGE

Q. We don't actually have P2 and P3. So, we've got –

A. Yes.

Q. – which are referred to in giving effect to Te Mana o te Wai, I just wondered why that was.

A. Well, only that they weren't particularly relevant to my argument about the importance, in particularly policy 4. So, there's no particular reason to exclude them, I can produce copies of those provisions if you would like. So, policy LF-WAI-P2 refers to mana whakahaere, recognising of practical effect to Kāi Tahu rakatirataka, and it's concerned with sharing decision making functions which is a matter for the Otago Regional Council in my submission. Policy LF-WAI-P3 integrated management requires the management of the use of freshwater and land in accordance with tikanga and kawa using an integrated approach, and it sets out a number of layers to that integrated approach. My focus, Commissioner, in these submissions is to understand whether a breathing space or a holding the line or however you wish to describe it is consistent with particularly policy LF-WAI-P4.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. And might not P3 be important to that with the integrated management of land and water?

A. Yes, it is.

Q. All right. So, we're to understand holding the line… yeah, okay, I mean, reading from what you've told me about P3 and I haven't read P3, an issue will be whether any line can be held, absent any planning on land use.

A. Yes, and well, of course, PC7 doesn't deal with any of that.

Q. No, it doesn't, but neither does the operative plans to any large extent.

A. Yes, and so, in terms of land use regulation, we have PC8, which deals particularly with water quality from discharges, and then we need wait until whatever the Land and Water Regional Plan might contain to integrate those, but the submission from OWRUG is that the need for integration as identified in the proposed Regional Policy Statement and in the NPS occurs regardless of whether or not plan change 7 is approved.

Q. You were at paragraph 14.

MR PAGE:

Counsel has been unable to find any reference that is in the proposed Regional Policy Statement to the need for an interim holding the line period consistent with the Minister's recommendation. It is submitted that PC7 is inconsistent with Policy LF-WAI-P4. The duty of the Court, therefore, is to test plan change 7 against the objective of the NPS and the proposed RPS. That testing must be conducted to levels, firstly, does plan change 7 itself, give effect sufficiently to Te Mana o te Wai compared with not adopting plan change 7? And secondly, does the plan change machinery in PC7, if it is not rejected, require that decisions made under it are with themselves tested against Te Mana o te Wai? It is submitted that Plan Change 7 fails on both counts. That is because the very function of Plan Change 7 is to avoid resource consent decisions confronting the requirements of Te Mana o te Wai until land and water regional plan has been notified or made operative. That breathing space is not permissible. There is no holiday from Te Mana o te Wai. On the second count, there is nothing in the objective and policies of Plan Change 7 which provide any deliberative machinery to guide resource consent decisions towards the

achievement of Te Mana o te Wai. OWRUG realises that that is deliberate, but again, the absence of a framework that requires the objective of the NPS FM 2020 and policy LF-WAI-P4 –

THE COURT: JUDGE BORTHWICK

Q. Just pause there. So I'll make changes by deleting the word "and" –

A. Yes.

Q. And adding in 4 to P4 in the next line.

A. Correct.

WITNESS CONTINUES READING BRIEF OF EVIDENCE

"…of the proposed regional policy statement to be brought into account in freshwater decisions points to the fundamental flaw in the plan change. That is what OWRUG's discretionary pathway is intended to address. On the 28th of October 2020, the Court made the following direction: "Unless directed otherwise, as a minimum, the Regional Council's evidence will assist the court and parties to have a proper understanding of the context for the plan change and, amongst other matters: describe the state of the environment at a catchment and/or sub-catchment level in such detail as is appropriate to understand the proposed plan change; identify the significant resource management issues that the plan change seeks to address; OWRUG suggests that in the context of a plan change designed to stop applications lodged by permit holders being granted for more than six years, the ORC's evidence should have explained: What consents had been granted, and what the problem with them is by reference to the NPS FM2020. The Court has never been provided with an analysis of the consent decisions, save as to the term of consent, to enable the problem being addressed to be accurately evaluated." So, in my footnote 8, I've referred to exhibit ORC1 and that was the weekly report that's provided to the Minister by the Otago Regional Council on progress with the permit renewals.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So when you say, "evidence should explain what consents had been granted –

A. Yes.

Q. – are you referring to deemed permits which may have been issued or just simply – which may have been issued I think was the evidence last week or may have been nothing really in terms of they were deemed and so no further steps were required to be taken in relation or by ORC, so that's deemed permits and, or are you talking about resource consent decisions to grant consents, post the enactment of the Act or both?

A. No, well, what the ORC was doing was reporting weekly to the Minister but the deemed permit applications that had come in and the consents that had been granted. But my point is that the only parameter that the regional council was reporting on, presumably because this was asked for, was the term of the replacement permit. Nothing is reported about the effect of those replacement permits on over allocation or on any of the other environmental gains might have been achieved through the replacement permits.

Q. So just pause there for a second.

A. And so my point is that the Court has never been provided with an analysis of the consent decisions, save as to term to enable the problem being addressed to be accurately evaluated.

Q. All right and so, is it your submission that the Court must have over the last 30 years have been provided with an analysis of deemed permits together with resource consent granted to and the basis for the grant or is the Court to receive evidence as to the state of environment which in of itself will be a reflection of the operation over a long term of those consents and changes in the environment and whether those changes are adverse of not?

A. Well there's two parts to that Ma'am. Yes, the Court should have received evidence at a catchment and sub-catchment level about the state of the environment and that's what you directed the regional council to do. But secondly, the Minister's recommendation expressed concerned that the granting of long-term permits was unsustainable and in order to know whether the Minister was right about that, the Court needed to receive an analysis about what is being granted and why that's unstainable.

Q. Thank you.

A. Top of page six, the sub-paragraph (2). And this is the second thing I submit that the Court should receive. It is "what permits, organised by catchment and allocation, are the subject of applications for renewal, and what ones remain extant along with an analysis of what they seek."

Q. And that's that getting at?

A. Well, what that is getting at is understanding what remains at stake.

Q. And what the extant being, how many resource consents with a duration longer than 2025?

A. Well no, my submission is that the Court needed spatial data about what applications remained to be granted and what they sought in order to test the significance of what plan change 7 was intended to achieve.

Q. And when you say "what applications remained to be granted", what are you referring to?

A. I particularly have in mind the deemed permit renewals applications which are with the ORC.

Q. What are you getting at? Are you getting at they should have been a catchment or sub-catchment analysis across the region, of every single deemed permit that has sought to be replaced by a resource consent which is a full merit assessment. Is that what you are getting at?

A. Well…

Q. What evidence did you expect this council to bring at sub-catchment or catchment level for every deemed and every replacement consents because – which may or may not be already filed. What information do you expect them to bring?

A. What I expected the Court to be presented with in the light of your…

Q. I'll decide where that goes in terms of the information to be brought. I'm asking you what it is that you say this council should have done and has not done. And we'll start off with the deemed permits because they're easier, they should in theory be in by now but may not be.

A. Yes. My submission, what needed to be produced is an analysis of what permits are on foot.

Q. What applications for replacement consents are on foot?

A. Yes.

Q. Or what permits exist out there in the region? Which?

A. The council knows what permits exist and they also know what applications have been received to replace them. So without knowing that, my submission the Court doesn't have a clear grasp of the scope of what plan change 7 is trying to do.

Q. I'm sorry you've lost me. I don't understand what you're trying to convey. I really do not. So, you're saying that the Court doesn't know how many applications to replace deemed permits have been made? Other than a numerical sum?

A. To take the Taieri catchment for example, you've heard from some witness, I think Ms McKeague was one; that about 80% of the water volume in the Taieri catchment has been re-consented already for terms longer than 25 years. That would have been, in my submission very useful for the Court to have known at the outset, to know what the risk and the benefit of plan change 7 is for the Taieri catchment. Because otherwise how does the Court know what is the risk of acting or not acting and that scenario can be repeated for all of the catchments in which there are deemed permits.

Q. Can it be repeated for Manuherikia or is the majority of deemed permits for Manuherikia up for consenting on the 1st of October?

A. Yes, the majority are.

Q. So then it cannot be repeated for Manuherikia.

A. Well, but what you could have been told is what has been sought by the permit holders in the Manuherikia.

Q. I see, so we do be drawn on the merits.

A. Well in order to know what the import of plan change 7 is, my submission, you need to know what are you comparing with? If you decide to reject plan change 7, what is the risk of that decision? The risk of that decision is that the permit applications that are run on foot will come forward and fall to be decided but you don't have a sense of what that looks like…

Q. What do you mean, "what that looks like"?

A. Without knowing what the applicant seek by way of replacement permits, you don't know what the risk of rejecting plan change 7 is.

Q. Is that not something that you could reach an informed view when you have a look at the operative regional plan which, your own witness Ms Dicey has said that there is a need for plan change 7 and was her change in evidence. And numerous witnesses have said that the operative regional plan does not implement the NPS for renewable electricity for freshwater management or for urban development and their predecessors and fair enough that doesn't implement 2020 –

A. Yes.

Q. – but predecessors are documents, they haven't implemented. So numerous witnesses have said that, hard to find any policy which is resonating with those documents under the operative RPS with a small sample of provisions for the NPS REG and when one – isn't one to look at those planning instruments as a predictor as to what could occur should plan change 7 be rejected and everything be consented?

A. Yes but not the operative regional plan water on its own, and so I will come –

Q. Because you will have to have a look at what? Waste?

A. No. We have to have regards to the national instruments themselves and you have to now have what? And you have to now have regards to the proposed regional policy statement.

Q. So your submission essentially is that the Court can be confident that there would be a better or best result, forgotten how the language goes – a better result under a reject submission with an application for resource consent which is not before the Court and to arrive at that decision, the Court would it not need to be satisfied that those other instruments are fit for purpose? Your own witness says they're not.

A. That's right.

Q. Yes and you're saying they are.

A. OWRUG's submission and we'll come to how I develop that as we go. OWRUG's submission is that for the next six years which is all that plan change 7 deals with, there are better outcomes available –

Q. I understand that.

A. – without plan change 7 than with it. It's as simple as that.

Q. As simple at that, all right. Thank you. Please continue.

A. So we're back at paragraph 20.

MR PAGE:

There is still, to this day, no quantitative spatial assessment of what or where the problem is. This is infuriating to the OWRUG members in the Manuherikia catchment as they know that their proposal goes so much further towards implementing Te Mana o te Wai than PC7 does, but the Court has not been enabled to compare apples with apples. OWRUG would love the Court to see what is proposed. So, what is the cause of this problem? The problem is the recommendation made by the Minister under section 24A of the Act. The Minister recommended to the Otago Regional Council that it adopt an adequate interim planning and consenting framework to manage freshwater until the time that new discharge and allocation limits are set, in line with the requirements of the National Policy Statement for Freshwater Management. Of course, the relevant NPS at that time was the 2017 version of 2014. The Minister went on to explain the sort of thing that he had in mind, a narrow plan change that provides for the relatively fast issuing of consents on a short term basis, as an interim measure until sustainable allocation rules are in place. The Minister's recommendation shows no sign of being informed by what permit holders actually proposed through applications then on foot or under preparation, or how consent decisions (such as for the *Lindis* decision) measured up against the (then) NPS FM 2014. That context is missing from the Minister's recommendation and from the ORC's evidence. Nor does the Minister's recommendation rule out the possibility of longer-term consents where substantial benefits in line with the NPS FM are proposed and available for immediate acceptance. In short, there is nothing at all in either Professor Skelton's report or the Minister's recommendation that requires the council to turn its back on environmental gains for six years.

The consequence of rejecting plan change 7 is that applications for replacement permits fall to be considered under the regional plan water, the new proposed RPS, and the NPS FM 2020. That is problematic. The obvious and reasonable criticism of that process will be how Kai Tahu will get to exercise rakatirataka, manaakitaka and their kaitiakitaka obligations, but these matters are now addressed in the proposed regional policy statement. Those issues will be front and centre in the setting of allocations and residual flows in each suite of permits. The aspirations of mana whenua are unescapable. OWRUG would welcome Kai Tahu to the process as a decision-maker. How the ORC shares decision making authority with Kai Tahu is a matter for those parties. Plan change 7 neither hinders nor advances Kai Tahu's aspirations to participate in making freshwater management decisions. OWRUG does wish to answer the criticism made by Mr Ellison and Ms McIntyre of the Last Chance resource consent decision. Mr Ellison suggested that there was no scope for cultural concerns to be considered, and thus his concerns were ignored. It is submitted that that is not an accurate understanding of the Commissioner's decision, and that's the decision which I've the Court a copy of.

The real problem was this: preapplication consultation with Aukaha Limited and mana whenua occurred, including a site visit hosted by the applicants, but the people who took part did not appear at the hearing to explain what their concerns were or how they might be addressed. Aukaha Limited declined to participate in a prehearing meeting arranged by the ORC, so the reporting staff were blind to the outstanding issues except in the most general sense raised in the submission. The evidence called by Aukaha, including that of its Chairman Mr Ellison, did not address the particular water bodies or the resource consent applications at issue. None of the witnesses had ever been to the points of take. The Commissioner was nevertheless satisfied, on the basis of the hydrology and freshwater ecology evidence (supported by ORC technical staff), that the new residual flows proposed provided for Mauri and Mahika Kai considerations, as well as Issue 4.13.2(a) of the RPW (which describe issues of concern to Kai Tahu). So, there was an actual finding about those matters.

The real dynamic in this case was the paucity of evidence about the creeks to substantiate the cultural concerns.

There is no doubt that the Regional Plan Water is lacking when measured against the NPSFM 2020, but all the policy in the world will not help in the absence of evidence, and there is a lesson in that case. OWRUG's experience is that decisions require painstaking evidence collection and analysis. It is slow and it is expensive, but it is necessary. There are no alternatives. Poor decisions are a function of poor evidence, rather than a lack of will to accommodate other people's values. Each river and tributary is different, the hydrology is different, cultural and ecological values are different, takes are different, and land use patterns and history are different. OWRUG has no confidence that the Land and Water Regional Plan will be informed by better information that is available now. The scale is wrong. FMUs and Rohe are at such a scale that policy settings and flow limits at that scale are unlikely to be helpful in deciding applications. OWRUG submits that it is better to get on with applications, at least on an interim basis, guided, as we must be, by the NPSFM 2020 and proposed Regional Policy Statement.

So I now move on to if there must be a plan change, what must it contain? Firstly, as to scope, ORC's position is that the OWRUG's proposed discretionary pathway is out of scope of the relief in its submissions because it was not specified. Submissions including OWRUG's that raise discretionary and restricted discretionary pathways, are identified in a schedule attached to these submissions. Trustpower, Horticulture NZ, and Banarch Farm's submissions propose a middle tier featuring a discretionary rule. OWRUG's submission sought both a permitted activity rule (now withdrawn) and outright rejection. OWRUG's submission is that if a discretionary pathway cannot be included that enables NPSFM 2020 considerations to be addressed, then the case for rejection under s 67(3) is all the stronger. Seen in that context, OWRUG's proposed discretionary pathway is an attempt to find a way to accommodate PC7 in circumstances where the strong preference is for rejection. Ms Dicey was trying to be helpful. OWRUG is bemused for that effort

to be met with a technical foot trip. OWRUG says that the duration for the permits renewal process under plan change 7 is deficient – by duration, I mean six years, Ma'am.

THE COURT: JUDGE BORTHWICK

Mmm, hold on a second. Yeah.

MR PAGE:

And simply serves to repeat the problems inherent in section 413(3) of the Resource Management Act, which made all deemed permits expire on the same date. Thus, the workload bottle neck that caused Professor Skelton to be asked by the Minister to investigate the Regional Council's capacity to deal with the deemed permit problem will be repeated in six years' time. That is to say nothing of the consulting community's capacity to deal with the problem, as explained in the summary evidence of Kate Scott for OWRUG. Frankly, the consulting community is exhausted, and we haven't even started with the proposed Regional Policy Statement and the Land and Water Regional Plan yet. Those will need time to bed in. It is unwise to recreate a situation where a six year permit term is imposed on the whole of Otago with no thought given to the relative priorities of the issues and the specific needs for each catchment, and this comes back to the lack of evidence again. The proposed regional policy statement does contain some provision for prioritisation through the vision objectives. Mr de Pelsemaeker suggested that the priorities and timing of transition towards National Policy Statement compliance will be a matter addressed in the Land and Water Regional Plan. That is too late. The time to identify priority catchments and stagger the implementation of the transition phase is now. That is what controls the next round of consents, or at least the timing of the next round of consents, anyway.

Ironically, the Otago Regional Council was on the right path before plan change 7, with its intention to pursue priority catchments plan changes for the Manuherekia, Arrow, and Cardrona catchments. That was referred to as the MAC plan change in Professor Skelton's report. There were technical problems

with it, and it was withdrawn in 2018, but the ORC was on the right track at the right time. OWRUG recognises that the Court has not been provided with evidence marshalled in a way that enables the issues in each catchment to be prioritised in terms of subject matter and time. That is despite the direction made on the 28th of October 2020 directing the Council to marshal its evidence in such a way that identified the Resource Management issues by catchment. That was never done and still hasn't been done. As it happens, Mr Hickey advises counsel that sequencing the catchments for reconsenting at the end of plan change 7 would be relatively straightforward if he was directed to do so. OWRUG's position is that six years is completely hopeless. Nobody can move forward, and no gains are made for the environment. OWRUG favours embracing Te Mana o te Wai now and implementing the regimes set out in the applications for resource consent currently lodged with Council, recognising that they are but an interim step on the way to fully achieving Te Mana o te Wai. The simple proposition is this: the implementation of residual flows and minimum flows must be a better expression of Te Mana o te Wai than doing nothing.

Turning to dams, the reply evidence of Mr de Pelsemaeker recommends against excluding deemed permits for dams and associated deemed permits for discharges from plan change 7. His reasoning for RMA dam and discharge permits not requiring inclusion within plan change 7 is that "recently granted resource consents" they have been through a Resource Management Act process and have – it should be "have," not "gave" – have conditions that manage environmental effects. That distinction is misconceived. None of the dams identified in Mr Sheehan's evidence, RMA or Deemed Permit, can be described as recently consented, but if that logic were to hold true, then there would be no need for water take and use permits granted under the Resource Management Act to be included in plan change 7 either. Plan change 7 simply captures a date range for both deemed permits and RMA permits.

Mr de Pelsemaeker's second reason concerned the need for integrated decisions, which is superficially attractive, but it is submitted that the more

coherent approach is to recognise (as it says on the front of the document), that plan change 7 is concerned with water take and use permits only. It has never been concerned with damming permits and it is submitted that the inclusion of deemed permits for damming is a sidewind rather than a matter of deliberate policy. The section 32 analysis does not identify that dam permits were ever intended to be part of plan change 7. There are good planning reasons to exclude dams. Firstly, the permits to dam water are of a fundamentally different nature than permits to take water. Damming permits leave water in the system. It does not remove water. Therefore, the environmental effects are different. Certainly, there may be down-stream influences on hydrological patterns (both positive and adverse) that are of long standing. Secondly, the reservoirs formed by dams are in themselves water bodies and thus their needs have to be considered pursuant to tier one of objective 2.1 of the NPS. That is apparent from the definition of "water body" – should be "in the Act," not "and the Act." "Water body" means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area, and "lake" is defined to mean a body of fresh water which is entirely or nearly surrounded by land. "Pond" is not defined in the Act. The Concise Oxford defines pond as: "a fairly small body of still water formed naturally or by hollowing or embanking." Reservoirs, according to scale, are either a lake or a pond.

As the evidence of Brendan Sheehan and Matthew Curran showed, there are in fact relatively few deemed permit dams in Otago, but Frasers Dam (operated by Pioneer) and Falls Dam (operated by the Falls Dam Company Limited) are two examples of significance to OWRUG members, and for which they seek their exclusion in the operation of plan change 7. OWRUG does not perceive that any party is advocating for a position that, at the end of a six year plan change 7 term, that the drainage of Falls Dam and Fraser Dam is in serious contemplation. One might wonder why OWRUG members are concerned about that. The answer is that the question puts the issue the wrong way around. If no party is contemplating that the Dams should be drained, then why do they need to be included in the plan change at all? Surely their continuance

is contemplated and thus section 128 may be deployed to bring operational conditions in line with future take and use permits.

Mr de Pelsemaeker, in his primary evidence, made it clear in his criticism of a s 128 review mechanism, that the mechanism was inappropriate because it did not provide for the cancellation (or failure to renew) permits in their entirety. That is, of course, correct. There may be an irony in all of this because of the way that the High Court's decision in *Ngāti Rangi* applies. One of the difficulties with the noncomplying pathway for OWRUG is that *Ngāti Rangi* requires consideration of the "environment" absent the permits under consideration. That creates major difficulties for noncomplying pathway for water takes. But it provides an interesting issue for Dams. That is because, absent the dam permit from the notional environment, the consent authority must contemplate the environment when the dam has been emptied. No party wants that, so if that is the comparator for renewal, it is difficult to contemplate how any adverse effects might be said to arise from renewal except in terms of the hydrological functioning of the river downstream, which are apt to be addressed through conditions and thus s 128.

THE COURT: JUDGE BORTHWICK

Just pause there a second. Okay.

MR PAGE:

All of this complexity points to a different planning circumstance for dam permits than there is for take permits, and the misconception that plan change 7 is an appropriate vehicle to manage the reconsenting of dams. None of the issues raised by Mr Sheehan in his evidence fall to be considered under plan change 7 consents. The controlled activity pathway is not designed to deal with dams, so why bother at all? OWRUG submits that all dams should be excluded. The evidence of Mr Curran provides a marked-up version of the amendments that OWRUG seeks. Turning to priorities, it has always been OWRUG's position that, should a form of plan change 7 be adopted, then it is necessary for priorities to be included in the transitional arrangements. Counsel perceives

that the Court now accepts that position or is at least receptive to it. OWRUG is unconcerned about the drafting detail, so long as priorities are effectively carried over and can be enforced by permit holders. The key for OWRUG is to ensure that through the plan change 7 period, the essential dynamics of water allocation are enabled to continue. OWRUG has no particular expectation that the Otago Regional Council will involve itself in enforcement. It never has and that is unlikely to change. Therefore, OWRUG is not bothered about the concerns of Ms King and Mr Cummings as to the potential enforcement difficulties they perceive. OWRUG considers that enforcement will continue to be very much a matter between farmers and that the prospect of enforcement orders or prosecutions remain as a backstop to encourage good behaviour.

Section 124. It is fundamental that the Court should only decide what it must. Everything else is obiter dicta. For reasons advanced on the 1st of July, counsel submits that the Court does not need to determine s 124 matters arising in the hearing. If the Court decides that it should determine whether deemed permits under s 413 have the benefit of s 124, and then finds in favour of Dr Somerville QC's view, then Court rightly perceives a difficulty that it shouldn't ignore. At that point, OWRUG submits that there is a mechanism which is available to overcome the problem. It is submitted that section 124(1) to (3) can effectively be crafted into plan change 7 as a temporary permitted activity rule that may be exercised by those with deemed permits who have made application for replacement on or before 1 July 2021. Those permitted activities would expire in each case on the determination of the reconsenting application, as section 124(3) records.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. What would the permitted activity be?

A. It would be whatever's recorded on the face of the permit, Ma'am.

Q. Yeah, no, so if you've got a deemed permit to take and use water, you would then have a permitted activity to take and use the same water.

A. Yes, Ma'am.

Q. For how long?

A. Until the replacement application that's on foot has been determined.

Q. Okay, so you've got, firstly, a rule permitted their activity.

A. If there's an application on foot.

Q. If there's an application on foot, yeah, and then a rule that says – so what would the rule structure look like? Have you drafted this?

A. No, Ma'am, I'm simply saying that the structure of the rule would be exactly the same as the structure of s 124.

Q. So you haven't drafted this? You were just saying just copy in 124 into a rule?

A. Yes, I mean –

Q. So, firstly, I'm permitted from, just say I'm the deemed permit holder and I'm now permitted from the 1st of October.

A. Yes.

Q. You would have to have subsequent amendments to the controlled RDA in your (inaudible 10:27:11), you know, your (inaudible 10:27:13) in the mix. You would then have to amend all of those provisions. Would you not say something about after – how would that work? I'm sorry, I'm lost. How would that work? I'm permitted, you're already permitted if a rule in a plan says you're permitted to take and use water, so there would be, in your formulation, a rule in the plan that says you can take and use water, but there would be another rule that says you're not permitted when your application for resource consent is considered, but you wouldn't need an application for resource consent, because you're permitted?

A. Well, the application for resource consent would be for the period post the permitted activity.

Q. Mmm, so when does that kick in? It kicks in, what, when? So the rule in the plan would say you need a resource consent to take and use water, after some decision is made is made about needing a resource consent to take and use water?

A. No.

Q. No? What would it look like?

A. No, the rest of plan change 7, whatever the Court decides it to be, would remain as it is, but simply, there would be a permitted activity rule which

says for those who have got deemed permit replacement applications on foot as from 1 July 2021, they may, as a permitted activity, continue to exercise that permit on its terms until the application is determined.

Q. About which you didn't actually need a resource consent because you're permitted? Yeah.

A. Well, no, this is the problem, because if Dr Somerville is right, on the 1st of October, they did need –

Q. Oh, I know you've got problems if Dr Somerville is right.

A. Well, this rule only would apply if you should hold that he's right.

Q. Except that this is also in your submission, OWRUG's submission, and it was also Ms Dicey's evidence, so I'll just somehow make s 124 apply. That was the submission, and that was also the evidence, was it not, and it just beggared belief how you could bring down a statutory provision as a rule in that fashion, but anyway, that was a submission.

A. Yeah. I'm not submitting that the rule would refer to s 124, it would simply adopt the structure and the language of s 124.

Q. Well, I think if you were going to be pursuing this, and you should have, as did Mr Welsh, do, have conferred with somebody as to the appropriate drafting of that provision and have that before the Court. Anyway, I'll think about it.

A. Well, it's simply a way to deal with a scenario that OWRUG says shouldn't arise. All I'm saying is that there is a mechanism available to deal with that if the Court goes there.

Q. Well, the easier outcome is that we do what you say, we simply don't make a decision, and OWRUG take the risk.

A. Yes.

Q. Yeah.

A. Yes,

Q. And you understand what the risk is –

A. Yes, we do.

Q. – is that Dr Somerville is indeed correct.

A. Yes.

Q. Yeah, all right.

MR PAGE:

Coming to my paragraph 60. OWRUG is especially proud of the witnesses who gave evidence for it in the week of hearing in Cromwell. The quality of leadership brought to freshwater management issues by Anna Gillespie, Jan Manson, Margaret Hore, Amanda Curry, Kellie Heckler, and later, for the Taieri in Dunedin, Emma Crutchley, that evidence was remarkable. The advancement in thinking now leading the reform of water use should weigh heavily with the Court. Those women are miles ahead of the ORC. They have not been waiting for leadership to arrive from afar. The Court might wonder at the waste, disappointment, and disenfranchisement that might result from adopting plan change 7 when for years these leaders have been setting about, in their own communities, engineering a paradigm shift. The Otago Regional Council is effectively telling the farming community that they should stop the progress they are making to allow the Council's regulatory machinery to catch up. A good horse should not be made to move at the same pace as a lame one. OWRUG recognises that Te Mana o te Wai has as its central concept engagement with mana whenua and reflecting their values in decision-making. Sadly, that has not been developed or advanced as far as it should be. That needs to happen and OWRUG is prepared for it. But throwing away the progress that has been made, which is for the benefit of all water users, is not the way forward in the attainment of Te Mana o te Wai.

What, then, is the risk of not acting? Suppose that there is no plan change 7, what is the risk? The answer is that the applications on foot are processed under the operative plan. Some parties consider that the outcomes are unsatisfactory. That is a matter of perspective, but it is accepted that such decisions cannot fully implement the NPSFM 2020, but they will go further than PC7 does. The Minister's recommendation was predicated on the granting of long-term consents frustrating the implementation of the NPSFM 2020, but would it? The power to call in and review consents, catchment by catchment, is provided in s 128. Section 128(1)(b) was specifically amended in 2020 in

advance of the issue of NPSFM 2020 to provide the necessary review machinery.

The ORC's opposition to reliance on s 128 seems to be this: firstly, consents cannot be cancelled. Secondly, reviewing consents is administratively burdensome and an expense on the Council, whereas applications for consents are funded by the applicant, who then also carries the persuasive burden. Thirdly, water cannot be reallocated between water users under s 128, and fourthly, that consent holders have some protection under s 131(1)(a) through regard being had to the viability of the activity. OWRUG says that none of those reasons should be viewed as meritorious by the Court because, firstly, although much has been made of the need for a paradigm shift, there has also been recognition of the need for a manageable transition period for the farming community. No evidence of any consent that should not endure in some form beyond six years has been produced. Yet the farming community has been told that their permits may not be renewed. Secondly, the potential cost of s 128 is self-inflicted. The Council largely failed to get its planning house in order in anticipation of 1 October 2021. Consent holders were ready. It is unreasonable to sheet home the cost of that to consent holders. Thirdly, no evidence has been given about the need for water to be reallocated between extractive users. The Minister's recommendation referred only to new discharge and allocation limits. Plan change 8 deals with discharges. That leaves allocation for plan change 7 to deal with. That debate is about how much must be left in the river before water is allocated, and s 128 is equipped to deal with that.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Just pause there a second. Sorry, I don't quite get what you're getting at in paragraph 3.

A. Well, I'm going to back to what the Minister's recommendation was, and the need for short-term consents was concerned with allowing new discharge and allocation limits to be introduced, so plan change 7 doesn't deal with discharge, plan change 8 does that, so plan change 7 is only

concerned in terms of the Minister's recommendation with new allocation limits. My submission is that new allocation limits, in terms of tier 1 and Te Mana o Te Wai, are about how much water is left in the river before there is any water available for allocation.

Q. So new allocation limits are about how much water left in a river, yeah, before what?

A. Before there is freshwater available to be allocated, and my submission is that introducing limits established under the Land and Water Regional Plan is what s 124(1)(b) specifically does.

Q. So introducing limits established under the future plan –

A. Land and Water Regional Plan.

Q. – the land, is what?

A. Is what s 128(1)(b) is designed to do. It specifically enables the council to call in catchments and impose those limits.

Q. All right, thank you.

MR PAGE:

The s 131(1)(a) viability consideration carries the have regard to deliberative formula. That is the same test for s 104(2A), which is relevant on reconsenting, so that issue is neutral to the risk of acting or not acting.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Which issue is neutral?

A. The issue about whether farmers, existing farm operations, will continue to be viable, is relevant under s 131 on a s 128 review., whereas under s 104(2A), the consent authority must have regard to, on a renewal application, to the existing investment in infrastructure, so what OWRUG's submission is is that that is effectively the same issue, which has to be addressed whether you go down the review pathway or the reconsenting pathway, so it is not a reason to say that s 128 is not a suitable mechanism.

MR PAGE:

Section 128 has the great benefit of enabling the Council to control the timing and sequence of reviews. It can pick the priority issues and call in permits for integrated consideration. By integrated, I mean as between permits. In reconsenting, the applicants drive the order and timing of applications, and the risk of ad hoc implementation of the Land and Water Regional Plan remains. Plan change 8 and the Land and Water Regional Plan both contemplate rules managing land use, discharges, and water quality. When those rules come into effect, section 20A applies. The mechanism to align that timeframe with water take and use reconsenting post plan change 7 is not obvious. Although regulatory compliance is assured by the Act, there remains a substantial risk of failure to integrate decision-making whether plan change 7 is approved or not. Now, what I'm getting at there is if we fast-forward six years and contemplate the reconsenting of plan change 7 permits, how does the timing of that merge with farmers' needs to obtain permits in relation to land use and discharges, either under plan change 8 or the Land and Water Regional Plan? There doesn't seem to be an indication about how those timeframes will be integrated.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. When you said either, and I picked up the Land and Water Regional Plan, but what was the plan before that?

A. Plan change 8.

Q. So is this a submission about plan change 8, or is it – what sort of submission about, plan change 8 and plan change 7?

A. Well, no, it's really a submission about integration, because with or without plan change 7, there still seems to me to be a real risk that we've not going to have land use and discharge decisions merging in time with water take and use decisions, because we're going to have a whole bunch of the water take and use coming up for reconsenting within a different time scale to the need to obtain whatever consents are required under the Land and Water Regional Plan or plan change 8.

Q. Well, I don't know that, in terms of the timing of PC8 and any applications for resource consent which have been sought, together, with application

under PC7. In fact, I don't think I know very much at all, other than parties wish to set down PC7 before PC8.

A. The simple point I'm trying to make, Ma'am, is that we still have parallel processes that are potentially out of sync with each other in terms of timing whether you grant PC7 or not, because the six-year term under plan change 7 will come up for reconsenting entirely independently of the land use consent process.

Q. Oh, so what you're getting at there is that you could get a land use consent for a period longer than six years under PC8?

A. Yes.

Q. Okay, all right.

A. Or –

Q. Yeah.

A. Or the need for a land use consent under the Land and Water Regional Plan may well arise before the plan change 7 permits fall for renewal.

Q. So you think you'll get a Land and Water Regional Plan made operative, or I guess notified, notified and made operative?

A. Yes, well, it has negative effect from notification, which is the end of 2023.

Q. Yeah, so you'll get a land and water plan, which is notified and/or made operative before expiry of six years.

A. Yes.

Q. And what's the point that you're making there?

A. And so then applicants will have to, at some stage during 2024, be applying for whatever land use consents might be required under the Land and Water Regional Plan, and then, subsequently, as a separate process, the PC7 permits will fall for renewal again. So my point is that it appears that there is an ongoing risk of disjunct between take and use permits on the one hand and land use and discharge permits on the other, because the timing doesn't seem to be aligned.

Q. Right.

A. My last paragraph, then.

MR PAGE:

There is a good deal more at stake to be lost then there is to be gained through PC7. The human cost of the Otago Regional Council's messaging that permits may not be available after six years is significant, and OWRUG gratefully accepts the Federated Farmers' evidence that was produced, and in particular endorsed the poem read out by Mr Lord. As it happens, the proposed regional policy statement contemplates a much longer transition towards the attainment of the visions for freshwater than six years. Time is on our side, for all of us. OWRUG seeks a kinder transition that keeps the community together, rather than one that divides it.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So I only had one question arising on your submission, and that was paragraph 34, and here, it's the scope issue, and you're talking about the Trustpower, HortNZ, and Banarch Farms submission –

A. Yes.

Q. – proposing a middle tier featuring a discretionary rule.

A. Yes.

Q. Was OWRUG a further submitter in relation to any of those three?

A. No.

Q. Okay, and I presume that Trustpower's not seeking anything in relation to private sector?

A. No, I don't think so.

Q. No. Now, I haven't bothered to go back, but Landpro, Ms Perkins also proposed a discretionary activity rule, although it was, you know, the same as Ms Dicey's. Did Landpro make a submission on that point?

A. I'm sorry, I don't know.

Q. You didn't check that? Because that would have been the easiest route, I would have thought, if Landpro had done, and whether or not you'd actually made a further submission, but you didn't check the Landpro?

A. Well, no, OWRUG didn't make a further submission on the Landpro.

Q. Okay.

A. I don't think we made further submissions on anybody's submissions.

Q. Oh, okay, but you didn't double-check to see what they'd done?

A. No, I haven't checked the relief that Landpro seeks. I can do that, but it was particularly, probably HortNZ's is the closest to what OWRUG seeks.

Q. Remind me, I've got so much relief, so what's HortNZ?

A. HortNZ did seek a longer-term discretionary consenting pathway as a discretionary activity.

Q. Okay, but you haven't checked – righto, but you haven't actually checked Landpro to see whether or not they did something similar?

A. Not in the original submission, no, I haven't. I'm aware that Ms Perkins did in her evidence, but I haven't –

Q. Double checked to see where the scope came?

A. – rewound back to see where that came from.

Q. All right. I thought that was the easiest route, but I haven't checked either.

A. Well, I will check Ma'am, and I will advise you once I've got my head around that.

Q. Very good, that's my questions. Any questions?

QUESTIONS ARISING – NIL

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Who to next? Ms Maker-Galloway.

A. Apologies. Forgot to get them single sided, and I just note that these submissions don't address the proposed RPS yet.

Q. That's all right.

A. So, depending on what process for that is, these are sort of side note onto that.

Q. We already issued a minute on that.

A. Yes, that will be our process, so, we'll take part in that.

MS BAKER-GALLOWAY:

So, in summary, though, Fish and Game's position has not been changed by the evidence and legal submissions considered throughout the hearing to date, fundamentally. It seeks that PC7 be interim framework to manage all surface water abstraction consents, including surface water connected to groundwater which to the extent possible within the scope of PC7 must give effect to the

NPSFM, and beyond that PC7 must prevent frustration of the future implementation of the NPSFM by the new proposed RPS and the future Land and Water Plan. Fish and Game supports the provisions of the NPSFM as identified by Mr de Pelsemaeker as being relevant, but in addition Mr Farrell places slightly more emphasis on policies 13 and 14 than does Mr de Pelsemaeker, but I just note that nothing really turns on that point. It's as much a matter of technical detail, and in B, Fish and Game supports that PCM prevent further over allocation, commences phasing out overallocation and holds the line in terms of the degraded state of waterbodies associated with overallocation, and that PC7 ensures that only consents for short terms are able to be granted in the interim.

Fish and Game's focus has been on the fundamental aspects of PC7 relevant to the above, namely the Objectives, the strength of the policies, and the broad application of the rules, so that in combination there is a high level of certainty and direction as to the above, and an absolutely minimal risk of consenting pathways for activities that would otherwise frustrate the above. To the extent that PC7 allows for consents to be rolled over on the same terms for six years, Fish and Game does not oppose this and has taken no active part in the technical and legal issues arising from determining historical abstraction and priority arrangements, and Fish and Game also does not object to where the issue of stranded assets is landing. As noted in March in opening, it is a significant concession to give away the opportunity for environmental improvements to be required now, after such a long period of degradation. However the bigger picture and medium term gains arising from implementation of the NPSFM are the priority, and if by allowing the existing state to continue for another six years results in a PC7 that has best chance of not frustrating implementation of the NPSFM overall, then that is the outcome that best gives effect to the purpose of the Act and the NPSFM, and I just note, following on from Mr Page's comments, it's really clear that that point is one of the key differences between Fish and Game and OWRUG which is how much weight you give to in the medium term, in the quickest sense, giving full effect to the NPSFM, vs I guess getting some environmental gains now but extending the

time by which the NPSFM will be implemented, and I think that's one of the questions that the Court's going to have to grapple with and place weight one way or the other on those two outcomes.

Back to the submission, so, as a minimum however Fish and Game are of the view that PC 7 must hold the line, in terms of adverse effects of abstraction and start to the correct the direction of travel away from over allocation, and the associated adverse effects, and that should read, of the take of water. So, and I correct that because this is obviously not about the use of water and the associated land use effects, this plan change can't affect adverse effects associated with the use of water, it's only controlling and stopping more adverse effects associated with the take of water. So, my legal submissions address the following matters, Objective 2.1 of the NPSFM, the objectives of PC7, deemed permit dams, NPSREG and any exception for hydroelectric power, and then the scope and issues arising on Fish and Game's relief to in respect of the first point in contention of scope is that (i), where we sought that PC7 applies the directive 6 year term and noncomplying activity status to new water permit, and secondly, the inclusion of the policy and presumptive table for minimum flow and allocation thresholds that are presumed to have more than minor adverse effects on ecological health unless comprehensive hydrological and ecological assessments demonstrate otherwise. But looking firstly at the objective 2.1 of the NPSFM. A key focus for Fish and Game throughout the hearing has been what Objective 2.1's articulation of Te Mana o te Wai means, and how it is not practical or possible to second guess how that is going to be expressed in the Otago context. This sits alongside the express directive in the NPSFM policy 1 to give effect to Te Mana o te Wai. What is clear is that the definition of Te Mana o te Wai and the directive to give effect to it is a fundamental shift, and it can't be realistically given effect to on a case by case, consent by consent basis.

Many witnesses also agreed that if longer term consents were granted, it would take longer to implement the NPSFM, i.e. it's going to be less effective, and if section 128 was used to try and implement it before consent expiry, that would

be a less efficient process. Throughout the hearing, certain aspects of Objective 2.1 have been teased out a little, to help illustrate the depth and breadth of work, analysis and testing that is going to be required to express what giving effect to it will mean in Otago, and in each FMU. For example, and I defer to the case for Ngā Rūnanga, without Ngā Rūnanga being involved with ORC at the very outset of the process implementing the NPSFM and articulating Te Mana o te Wai, any plan making process cannot properly give effect to the NPSFM. It also became clear that aspects of the Objective while maybe initially having simple meanings on their face, are really not so simple, and will require very careful evaluation in Otago. For example, for limb (a) and the prioritisation of the wellbeing of water bodies and ecosystems, a lot of focus, including admittedly Fish and Game's, has been on the second limb of (a), namely how can PC7 prioritise the wellbeing of ecosystems, with a focus on the chemical, physical and biophysical characteristics of water bodies. The view of many is that given the complex hydrological and ecological assessments that need to be done at a catchment or LCU level, along with identification of freshwater objectives and values, it is not realistic that PC7 can ensure that prioritisation is addressed as soon as practicable, if it enables long term consents to be granted.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Just pause. What is LCU?

A. Sorry, it’s not LCU, it’s FMU.

Q. Oh, okay.

A. I was in a landscape land there for a minute. Oh dear. Too much time in Queenstown.

Q. Let me just read that last sentence with that in mind. What did you mean by the second two lines? It’s not realistic that PC7 ensure prioritisations address, well, firstly, what did you mean by that? Not realistic PC7 ensure prioritisations address.

A. Probably, if you read it in a different order.

Q. Yeah.

A. If PC7 enabled long-term consents to be granted, it won't ensure that prioritisation of limb (a) is addressed as soon as practicable. That's probably a better way of saying that.

Q. Okay, no, I get that. Okay.

MS BAKER-GALLOWAY:

Paragraph B, but even more fundamental might be how the first limb of (a) ends up being expressed in Otago, the wellbeing of the water body itself, and this is distinct from, but related to the ecosystem limb. Again, I defer to the case for Ngā Rūnanga where this was articulated by Mr Ellison, Whaanga and Bull. To give effect to this first limb of (a), in Fish and Game's submission, water bodies will need to be restored to the point where, to put it very basically, rivers and streams look like rivers and streams again, not nearly empty channels. But to what state is that restoration required to give effect to the NPSFM, PC7 can't second guess the answer, so in order to not frustrate giving effect to it, only short-term consents can be justified. I also submit that while protection of non-migratory galaxiids is an important issue highlighted by the Minister for the Environment, giving effect to Objective 2.1 (a) will involve looking at this in an integrated and comprehensive way. The granting of long-term consents locking in unnaturally low flows is not likely to give effect to prioritising the health and wellbeing at an ecosystem level, nor the health and wellbeing of the water body itself. By all means short term consents can ensure the non-migratory galaxiids ongoing protection from predation, but longer term that may not be the complete answer to the full suite of measures required to ensure protection of the non-migratory galaxiids as well as giving effect to Objective 2.1 (a), and therefore long term consents with just a single species' focus will frustrate implementation.

Limb (b) of the NPSFM Objective is also likely to be fairly contentious in terms of its articulation. Does it just relate to the very basic and obvious health needs of people? Drinking, washing, not getting sick from contact with water, or does it go further than that, the wellbeing people gain from being beside, or recreating in and on water? The wellbeing from gathering food, mahika kai, trout, salmon,

and the growing of food to feed people or even generating electricity. PC7 can't determine this 2nd level priority and what it means for Otago's water bodies. It is likely to be highly contentious in my submission and granting long-term consents will frustrate that as well. So, now moving to the objectives of plan change 7. In terms of where the Planner's 9th joint witness statement landed, Fish and Game's preference is that the Objective be limited to limb 10A.1.1 and limb 2 from version B, and I've just set them out there for B as a reference. In terms of any objective that references allowing activities to increase in scale, or operate beyond the transitional period, Fish and Game sees this as being of critical importance for the Court's determination. It is submitted that there has not been a compelling case put for increasing scale of takes, with the exception maybe of stranded assets, and it is further submitted there has not been a compelling case put for exemptions to the six years term, and I'm actually going to quality this statement, but I'll read it out, for either municipal water supplies, or hydroelectricity, addressed below. Now, going to municipal water supplies, Fish and Game will actually follow the Regional Council's position on the municipal water supply except. I understand it's getting even tighter than in Mr de Pelsemaeker's evidence in reply, so rather than, as my understanding, so rather than just sort of saying, no exceptions on municipal supplies.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So, whatever Mr Maw says tomorrow goes?

A. As I understand it, from my discussions with Mr Maw, unless he changes his mind, in which case I will object, as tightly constrained as possible, focused on very specific projects or upgrades, and if that's where it's going, we've got no objection to it.

Q. So, we've seen that with Mr de Pelsemaeker's evidence that there are some projects that he was contemplating, but do you think the drafting has moved on?

A. Well, as I understand it, it's still evolving.

Q. Yes, and it's probably… all right.

A. So, we're sort of saying, a case has been put for certain exceptions that the Regional Council is considering accepting, and Fish and Game won't oppose that, if that makes sense.

Q. Very good.

A. In this regard – and that's just in respect of municipal water supplies, not hydro – in this regard, any objective that contemplates additional takes, or longer-term consents, weakens the purpose of PC7 and the ability to implement the NPSFM next.

Q. Just pause there a second. Mhm.

A. However, if the Court finds there is a for such an objective in terms of plan architecture, i.e. if a parent objective is needed for a policy and rule the Court decides is appropriate in terms of exceptions for either municipal water supplies or hydro, then Fish and Game supports version B's 10A.1.3 or similar as that parent objective for exceptions. Does that make sense?

Q. Did you have a look at what Mr Anderson for Forest and Bird proposed yesterday and in particular – not yesterday –

A. On Friday.

Q. On Friday, so he had a new drafting of the objective and in particularly, his second sentence which this is for the objective which seemed to have quite a useful hook if I could put it that way in contemplating that if there were to be exceptions, the exceptions are whatever the exceptions are, I mean, obviously there needs to be some decision making on the Court on that, but I thought it was useful drafting, rather than the drafting put forward for version B which is what your client supports.

A. I've skimmed his legal submissions.

Q. So, you just have to have a look at his objective, and we'll take the morning break, so that'll give you time to look at his objective, second sentence in particular. You may disagree with all of his exceptions, I think he has TAs and hydro, you're not with Trustpower for an exception, you're not, so, that's okay, so, it doesn't actually depend on you being with Trustpower, not with Trustpower, but the second sentence I thought was useful drafting, you know, if there is to be an exception, then the objective

should make quite clear what the exception should be so that it's not used as leverage over the next six years, leverage for hydro for example.

A. Well, as a matter of principle, that's what I'm driving at, is any objective needs to not open the gate for other people.

Q. Yeah, and so, I haven't got the wording in front of me, I heard it for the first time, I haven't gone back to analyse it, but when I heard it I thought, that was a clear – it seemed to me to be a clear expression of the exception, so, I'll leave that with you but we'll in your final paragraph 13.

A. If the Court determines there are to be no exemption – that probably should read exception policies, and that there is effectively to be an avoid policy in the form of 10.A.2.2 or similar, then it is submitted that any objective that contemplates exceptions will undermine and confuse 10.A.2.2. So, yeah, it depends on the Court's finding, in terms of, will there be any exceptions?

Q. Well, that seemed to me to be problem with the drafting in B. B…

A. It's still quite wide, isn't it?

Q. Well, it just seemed to create an architectural problem with the writing of the plan, so, you've got an objective that seems to contemplate an exception but it's broadly expressed and then you immediately launch into avoid policies, well, that doesn't make a lot of sense.

A. Yep, so that could be much tighter. I'll look at Mr Anderson's, yeah.

Q. Yeah, it could be much tighter, and I think that's what Mr Anderson was perhaps proposing in his objective that it was a clearly defined exception such that you could see sensibly how those avoid polices were otherwise working.

A. All right.

Q. All right, well, we'll leave it at that and take the morning tea and back in quarter of an hour.

COURT ADJOURNS: 11:08 AM

COURT RESUMES: 11:28 AM

MS WILLIAMS:

Apologies, your Honour, just before Ms Baker-Galloway continues, I've had a message from Ms Dixon to say that unfortunately her plane has made it to Christchurch but currently it is too windy to land in Dunedin, so apparently they are going to re-fuel and they are going to try again but I just wanted to alert you that there is that potential difficulty.

THE COURT: JUDGE BORTHWICK

That's okay, I think we have time even if she's on tomorrow.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So, you're going to come back, having had a look at, yeah…

A. Yes, so I've had a look at Mr Anderson's suggested addition to the second objective, and I can certainly see structurally that the main body of that would work. I obviously, yeah, no objection to reference to stranded assets as long as somewhere in the rest of the plan change that's defined as it's been proposed by Mr de Pelsemaeker, as tidy as possible.

Q. Yeah.

A. Obviously, we have a different position in terms of renewal energy.

Q. That's okay. Yeah, no, it was more the hook in the second sentence that seemed to have some merit.

A. Yeah.

Q. And as I said, that's not an assessment, we've only read it once, but at that time, it was, yeah, it struck as something as worthy as looking at, giving another nod to.

A. Yeah, and the voided except in limited situations.

Q. Yeah.

A. It would be even better if those were identified, and then it would be really tight. What those limited situations are, if they can be listed somewhere.

Q. And that, I think, is what Mr de Pelsemaeker's evidence is doing, it's got a schedule, so we know what they are.

A. Which is the best way to do it, I think.

Q. Yes.

A. In terms of paragraph A and B, I'm not sure about those.

Q. Neither were we.

A. Especially A. A doesn't really help us at all, I think, and B –

Q. No, no. Yeah, no, I don't, I think that comes out of the original version B and it didn't strike us.

A. Yeah.

Q. Okay. All righty.

MS BAKER-GALLOWAY:

Okay, good, so, next section is on deemed permit dams, paragraph 14 and, sort of same position as Mr Page in terms of the relevance of the definitions of water bodies and water. So, I'll just whip through paragraph 14. It's understood that there is no real dispute that the body of water behind deemed permit dams are water bodies in accordance with the RMA definition as they are not excluded from the parent definition of water, not being in the subset of exclusions of being water in any pipe, tank or cistern, and I think it's as simple as that. They are water bodies. As such, those dams are captured by the NPSFM as well. When it comes to fully implementing the NPSFM, and what restoration of TMOTW means for the FMUs within which those dams sit, the assessment will be complicated by the fact that prior to those dams being in place, the wellbeing of the water body might have had a different character to that supported with the dam, which obviously now supports a different character water body, with a different state of health in and of itself, and supporting a different ecosystem, and the challenge in assessing how to give effect to the NPSFM in the context of modified catchments is present in many catchments, and those with storage dams and diversions may be most complex.

Modified catchments now support different ecosystems, and this is yet another reason why catchments and FMUs as a whole, should be able to be assessed, as unencumbered as possible by long term consents, when the Land and Water Plan is progressed. This will require a holistic and integrated assessment, with as few exceptions as possible, and finally, in my submission, there was no

compelling case why the maintenance issues associated with deemed permit dams should override the above. Those dams' deemed permits were due to expire this year, those same maintenance issues would have been apparent in the years preceding now, and the challenges in terms of investment and certainty have obviously been overcome in the lead up to the expiry. On the issue of providing for hydroelectric energy at the expense of implementing the NPSFM at the earliest opportunity, Fish and Game's position has not changed. By providing for the effective rollover of consents such as those for Trustpower's four races that divert basically all of the flow in four streams in the upper reaches of the Waipori scheme, renewable energy is being provided for, albeit for a shorter term than the rest of the consented Waipori Scheme. Given the four races in question only contribute in order of 5% to the scheme, there is no evidence that the scheme is somehow rendered unviable or that there will be practical or operational concerns if for some reason the Land and Water Plan requires less water be diverted. The NPSREG does not explicitly require that renewable energy be provided for at the expense of environmental or other bottom lines, or other uses of national importance.

I do acknowledge that the Climate Change Commission recommendations include an emphasis on increasing the role of renewable energy generation, to 50% by 2035, that’s across the energy system, which includes electricity, process and building heat and transport. This target is broadly equivalent to the 60% renewable energy as a share of total primary energy supply as outlined in the Commission's 2021 Draft Advice. However, these recommendations do not exempt application of environmental bottom lines, or priority of allocation of resources between users, and have to be weighted in that regard. By 31 December this year, there should be an Emissions Reduction Plan and National Adaptation Plan written under the Climate Change Response Act, from the Climate Change Commission, and from that date RMA decision makers must have regard to them, but until there is more detailed national direction beyond the NPSREG as to how renewable generation is to be weighted, and at what expense in terms of environmental bottom lines, it is submitted there is no justification for treating hydroelectric power take and use any differently in PC7.

A rollover for six years will enable a review in six years' time of the national direction and whether the use of water for hydroelectric power should be able to continue on the same terms in the context of direction in the NPSFM and any climate change related direction that must also be had regard to.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. So, what if you had to identify the issue as a question for the Court to decide in relation to this particular submission, what would it be?

A. What's the issue?

Q. Yeah, what's the issue.

A. One issue is that possibly by the end of this year, we will have those emission reduction plans and national adaptation plans in place, and by the end of this year, the RMA – so, it's the Resource Management Amendment Act 2020, says that by 31 December 2021, you have to have regard to these reduction plans and adaptation plans on your decisions on policy statements and regional plans. So, one issue that very soon there will be national direct that is required to have regard to and by rolling over the consents for six years that means in six years at the latest that national direction can be reviewed when the permits come up for replacement again.

Q. So, it targets absent policy is not a matter in itself that should be given weight, in other words, the fact that the government has it's own targets, or even the commission has recommended targets, is not a matter in of itself that should be given weight, it's the policy to achieve those directions which is the matter to have regard to, and so, prior to hearing from government as to what that policy is, a six-year rollover is sufficient.

A. Yes.

Q. Okay.

A. Because if those consents are granted for longer terms, that delays implementation of the full suite of national direction.

Q. All right. Thank you.

A. I guess to round that off, one thing I probably should have put in writing, so when the Land and Water Plan is notified, not only will it have to give

effect to national policy statement on freshwater management, under RMA amendment Act 2020, it will have to have regard to these emission reduction plans and national adaptation plans, so, these specific amendments to section 61 and section 66 coming in law but they don't take effect until December.

Q. All right. Thank you.

MS BAKER-GALLOWAY:

So, now we're moving onto scope for the two challenged parts of Fish and Game relief. So, this section addresses the scope of relief sought by Fish and Game in accordance with the amendments to PC7 recommended by Mr Farrell in his supplementary evidence, and the position reached by the planning experts in the seventh and ninth joint witness statements. There are two aspects of the amendments proposed in Mr Farrell's 24 March supplementary evidence which ORC contends are not within scope, A, to insert a new policy 10A.2 and a new noncomplying rule 10A.3.2.2 to apply to applications for new water permits, and B, to insert a new policy 10A.2.4 and Table 10A.2.4 with presumptive minimum flow and allocation thresholds, to replace the no more than minor test. ORC contends that the amendments sought regarding new water permits are not about or on PC7, and the amendments sought regarding the replacement of the no more than minor test are not within the scope of Fish and Game's submission.

So, firstly, addressing new water permits, the relief sought is about or on the plan change. Fish and Game agrees with ORC's summary on the principles of scope and the applicable case law regarding what on the plan change means but does not agree that the relief sought is out of scope of the plan change as notified. PC7's Objective 10A.1.1 as notified explicitly referred to it establishing an interim framework to manage new water permits, as well as replacement permits. I've just set out the quote for ease of reference. Policy 10.A.2 2 as notified also directed that new consents for take and use of water was restricted to the duration of six years. So, new permits are clearly within the scope of PC7, as is their duration, and PC7 left the activity status of those new permits

untouched. Fish and Game considers that while it may have been ORC's intention for new water permits to be managed in this way, the extent of PC7 is not limited so as to make Fish and Game's amendments beyond scope, and Fish and Game's proposed change is entirely consistent with, and better gives effect to what PC7 is all about. PC7 is about facilitating the transition from the operative Water Plan to a new Regional Land and Water Plan which achieves the purpose of the NPSFM, through the development of an interim framework to manage freshwater until such time as new discharge and allocation limits are set in line with the NPSFM.

As per the latest joint witness statement the experts have agreed on a new objective 10A.1.1 which clarifies this intention, and one of the ways in which PC7 seeks to achieve this is through providing direction on the consent duration for all water permits to take and use water. PC7 provides this direction through objective 10A.1.1, both as notified and as per 9th joint witness statement version in policy 10A.2.2 both as notified and as it's evolved, but there is an inconsistency between that direction and the extent of coverage of the methods employed to implement it. There is a gap. Sitting under the objective, policy 10A.2.2 now directs ORC to only grant consents for new takes for a duration of no more than six years. Yet the rules in Chapter 10A which implement this policy directive are incomplete, with the taking and use of surface water as a new primary allocation take remaining a restricted discretionary activity in accordance with Rule 12.1.4.6, regardless of duration. So, there is a gap in PC7 in failing to include a noncomplying rule in Chapter 10A for new primary allocation water permits that fails to implement the direction of policy 10A.2.2 to only grant consents for six years. Only grant is a strong direction and a restricted discretionary rule will be less effective at implementing that direction than a noncomplying status for consents with a term in excess of six years. Fish and Game submits that only grant is comparable terminology to avoid and is most effectively implemented through a noncomplying activity rule.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Just pause there a sec. Rule 12.1.4.6 includes as a matter of discretion, matters which the Council's limited it's discretion duration.

A. Yes.

Q. Yeah, it does. Okay.

MS BAKER-GALLOWAY:

Further, the introduction of the rule can be considered a consequential change flowing downwards from the objective and policy and the relief sought in Fish and Game's submission that the six-year term apply to all water permits. Similar to the scenario discussed in *Campbell* the new rule is consequential relief in that it introduces a method which gives effect to the objective and policy, to ensure compatibility throughout the plan. Fish and Game does not agree with ORC's view that there is a procedural fairness issue here, in that potentially interested parties would have been uninformed of the amendments now proposed by Fish and Game. It is clear from the section 32 report that the scope of PC7 extends to providing direction on the duration of consents for all water permits. It is submitted that a layperson's interpretation of the direction would not necessarily be limited to objectives and policies as ORC suggests, and it could easily be an interested party's interpretation that direction includes rules, activity status and consent-ability generally. There were a number of submissions which sought relief along these lines. A potentially interested person uncertain as to the scope of PC7 for new water permits given what the Objective and Policies stated about new permits and consent duration could have reviewed the summary of decisions requested and would have seen that a number of submitters sought to ensure the six year term to new water permits, which logically would bring into the frame the issue of activity status. At this point they could have made a further submission or joined the proceedings as an interested party.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Now, do you have a list of those other submitters?

A. Yes, so the next section details not just Fish and Game's submission but a couple of the others that do have that same relief.

Q. And when you say a number, how many are we talking about?

A. Well, we've highlighted the KOs, the Central Otago Environmental Society one, Fish and Game's one, and those are two we've highlighted.

Q. So, one other, KOs?

A. Fish and Game's and KOs.

Q. Okay.

MS BAKER-GALLOWAY:

Yeah. So, the Fish and Game submission, this is paragraph 37, sought general relief that PC7 develop an interim framework to manage all surface water abstraction consents, and that PC7 ensure only limited consents for short terms are able to be granted. The submission also sought consequential changes to give effect to the general relief sought, which Fish and Game submits includes introducing rules which implement policy direction. In its specific relief, Fish and Game supported policy 10A2.2, to limit all new consents to a duration of six years. The submission expressly records that Fish and Game interprets the policy as limiting every consent, including new consents, to a term of no more than six years. The submission seeks that amendments are made to chapters 6 and 12 to be consistent with the policy and amend the provisions to make all applications for new surface water, including connected groundwater, abstraction activities noncomplying. The submission by the Central Otago Environmental Society also provides scope. The submission states that there is a need for an interim regime that ensures any consent issued prior to the new Land and Water Plan is time limited, to ensure the objectives of the NPS-FW are not subverted, and then finally, on the merits, much was made of the limitations of the restricted discretionary rule itself, in particular that it does not enable a full assessment of effects to be considered, including on values important to Nga Rūnanga. Many agreed as to these limitations and that they posed a risk. For this reason alone, it is submitted that it is not appropriate to allow applications for new water for terms beyond six years to be considered

pursuant to the restricted discretionary rule and the too limited matters of discretion.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Just pause there. So, is your concern that if you have a policy that say only allow or void, whichever way it's written up, consents for new activities for a duration of six years, but if you flip back into an RDA, it loses the force of only allow or void, which is not grant.

A. Yes.

Q. Generally speaking, not allowed, not grant.

A. Yep.

Q. So, it tends to muddle or confuse the messaging for the consent authority.

A. Yes.

Q. Because as a – for a consent longer than six years where they are a new activity, they still fall to be assessed as a RDA.

A. Yes.

Q. Despite the not allow direction.

A. Yes.

Q. And so, then what direction is given to longer than six-year consents. It is whatever the matters of discretion are, is that what you're saying?

A. Yes, and so, it's those matters of discretion which have been criticised in this hearing as being deficient.

Q. Yeah, okay. All right.

MS BAKER-GALLOWAY:

Now moving onto more than mirror table, the presumptive table, and the focus here is whether the relief sought is within the scope of the submissions. ORC argues that the relief sought by Fish and Game to give additional guidance to the more than minor test is not specific enough, and that it cannot be said that the relief now sought was reasonably foreseeable as a direct or logical consequence of the relief sought in the submission. Fish and Game submits there is scope in its submission for this change. At paragraph [8] of the Submission identifies a non-exhaustive list of issues for Fish and Game

including uncertainty in the operative Water Plan around the environmental baseline to use when considering adverse effects, and regarding provisions 10A.2.3 and 10A.3.2.1, the submission states all other applications should be noncomplying if they do not qualify for the controlled activity pathway. When considering this pathway, additional guidance should be given to the no more than minor test to describe this result in a surface water abstraction context. Fish and Game submits the introduction of Table 10.A.2.4 is a method to achieve more certainty around the likely threshold for adverse effects on ecological health, and gives guidance in terms of the section 95A(8) (b) and section 104D assessments on whether ecological effects are likely to be more than minor due to the degree of hydrological alteration. There is also scope for this relief in a number of other submissions, the submission by MFE sought that the noncomplying rule be deleted, and a prohibited activity rule replace it. MFE expressed concern that potential applicants would not be effectively deterred by the noncomplying rule and raised the question of the adequacy of the rule criteria, which are based on the operative Water Plan which Professor Skelton's investigation found to not be fit for purpose

Mr Sole's submission expressly seeks that the no more than minor test is expanded on. At para 3, the submission states, "A pathway to issue consents up to 15 years in duration is not consistent with the findings of Professor Skelton or the recommendations of the Minister and should be removed as it derogates from the intended outcomes of the plan change. If it is not removed, at the very least, a definition should be added as to what constitutes a no more than minor adverse effect, including in the cumulative sense, in the context of surface water abstraction. The WISE Response submission seeks relief that before any consents are issued an environmental flow regime is established for each river which is irrigated, might be the wrong word, and that with that information, the Council would be able to renew consents in the knowledge that the long-term health of the rivers was re-secured. The Director General submission seeks that Policy 10A.2.3 and Rule 10A.3.2 be improved by providing further criteria, including a range of suggested criteria that involve reviewing and maintaining various values and flows of the catchments and waterbodies, and the Forest &

Bird submission raises issue with the no more than minor test and seeks that it be replaced with outcomes that must be met, and at 21, I've set out the quote. "Policy 10A.2.3 which provides an exemption to the six-year consent duration on the basis of no more than minor effects is also problematic. It is uncertain on what basis no more than minor is determined, whether this is considered in terms of effects on specific values and includes localised impacts. This could be clarified by stating what is to be protected and maintained," and at 24(h) the submission seeks that Policy 10A.2.3(a) be amended by "removing the words "no more than minor" and replacing with outcomes that must be met, such as safeguarding the life supporting capacity ecosystem processes and indigenous species including their associated ecosystems of fresh water to give effect to Objective B1 NP," and finally the Te Ao Marama submission also raises issue with the no more than minor test. "Ngā Rūnanga consider that the test in this policy of "no more than minor adverse effects on the ecology and hydrology of the surface water body" is not equivalent to upholding and protecting the mauri of waterbodies whilst using water in a way that provides for te hauora o te taiao, te hauora o te wai and te hauora o te tangata." So, collectively, there's a lot of scope in those submissions, in a nutshell.

On the merits, it is submitted that when put to them the relevant experts generally agreed that the degree of hydrological alteration set out in the Table recommended by Dr Hayes could be determined on the basis there is sufficient recorded data or ability to model the degree of hydrological alteration and secondly that the degree of hydrological change is appropriate to trigger a presumption of more than minor adverse ecological effects, unless comprehensive assessments are undertaken to displace that presumption. Fish and Game also consider that the presumptive table is a useful benchmark given that many of the applications Fish and Game are seeing are significantly in excess of the scale of abstraction provided for in the table recommended by Dr Hayes. The Court will recall Mr Paragreen's big Appendix D, that big landscape table, along with his summary table at his paragraph 83, showing examples of abstraction in excess of 1000% of MALF compared to the presumptive standard of 20 or 30% of MALF depending on the size of the river,

and residual flows as low as 12% or less of MALF compared to the presumptive minimum flow standard of 90 or 80% or MALF depending on the size of the river. This significant contrast is just one way to illustrate just how extensive abstraction is in Otago, and the scale of the challenge that the Land and Water Plan will have in assessing what changes in allocation are required in order to give effect to the NPSFM, and finally I note, that Mr de Pelsemaeker supports in principle providing further guidance to applicants and decision makers when making decisions that turn on whether effects are more than minor. Other witnesses agreed guidance would be useful.

Due to his concerns with the clarity and practicality of the use of Fish and Game's Table 10A.2.4 in the context of a policy, Mr de Pelsemaeker suggests the Table not be in the Plan. So, having reflected on that and given the level of agreement that the presumptive table provides good guidance as to when the likely scale of effects at least require a comprehensive assessment to disprove a presumption of more than minor adverse effects, it is submitted it would be useful to have the guidance contained in PC7 to provide more certainty and consistency. If the Court finds it is not appropriate at the Policy level, it is submitted that such guidance could be contained in a very similar framework, in the Methods schedule to PC7, so that assessments at that section 95A and section 104D stages of the process at least start from a consistent presumptive basis in terms of ecological effects.

THE COURT: JUDGE BORTHWICK

So the methods, if you're going to introduce (inaudible 11:56:24) – sorry?

THE COURT: COMMISSIONER EDMONDS

Yeah, sorry, I was just getting out the PC7 to see whether you (inaudible 11:56:29) the Judge has beat me to it.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Where you're going to put it, yeah, is the question, and I was just looking at the ninth JWS, because it incorporates most of those changes, which

are at least agreed, a few things in dispute, but that's okay. Where would you put it?

A. So you'd put it after 10A.4.4, methodology for calculating annual volume limit, put it, you know, put it right at the end of the schedule.

Q. Yeah.

A. And it would read basically the same as the draft policy from Mr Farrell, and so the heading would be – actually, I haven't thought of a heading – the heading could be what the heading is for the table in Mr Farrell's evidence, which is presumptive minimum flow in allocation thresholds, and then it would just be the wording of the proposed policy and table.

Q. All right. You would need to have some other narration, presumably, in the plan, so that you could actually be queuing in applicants to be looking at that methodology. How would you go about that?

A. Well, I mean, given that the rest of the plan at the moment does not use – I think we've managed to get the reference to minor effects out of the rest of the body of the plan.

Q. I think so, I think they're gone.

A. So I don't think it would need a signpost.

Q. You don't think it needs a signpost?

A. Because the words aren't in there currently.

Q. Well, how would a decision-maker know that he or she had to apply the schedule, or have regard to the schedule?

A. Look at that method.

Q. Sorry?

A. How would a decision-maker know to look at that method?

Q. Yeah.

A. Well, the most logical place would be under the noncomplying rule 10A.3.2 and have an advice note.

Q. Okay, question for you, so presume or assume that something like the ninth JWS is approved by the Court, which is more or less, you know, your direction of travel. I mean, obviously, there's some debate around the objectives which would need to be resolved, but there would be a controlled activity, RDA activity, including RDA stranded assets, and

something which will be announced tomorrow by regional council in relation to TAs, but not hydro, so that's where you're sitting at.

A. That's where we're sitting, yes.

Q. That's where you're sitting at the moment, and the objectives make clear that it's a process plan only. To the extent that there are some exceptions, there might be a hook in that objective, the Pete Anderson suggestion, saying these are the exceptions, whatever they are, and beyond that, there are very clear policies that say avoid or only allow. So, if you were an applicant and you couldn't bring yourself under those exceptions, or the controlled activity rule or RDA rules, which, of themselves, might seem to be exceptions anyway, you know, to the normal requirement to have a look at the effects on the environment, so if you can't bring yourself within that, you're left with a noncomplying activity, and the question that I put to Mr de Pelsemaeker was if you're left with a noncomplying activity and you have very strong avoid policies, so avoid in relation to duration, obviously, here, we're only talking about deemed permits, and I know you want to bring in the new activity permits, but avoid in relation to duration, avoid in relation to irrigation area, so no more increases, and avoid in relation to – what's the other thing, the third avoid – duration, but there's another avoid.

A. (inaudible 12:01:27)

Q. We've got historic use, so avoid in relation to any increases over historic use, three clear avoids. Sitting with a noncomplying activity, if I was going to be doing any one of those three, that would strongly suggest, probably, that the application should be declined. Beyond that, if I was proposing something else, how does the noncomplying activity – perhaps it doesn't – how does the noncomplying activity rule work? I'm seeking an application which otherwise isn't covered by those policies or covered by those rules, it's a noncomplying activity, which means that you just go through the usual test under s 104D, or is there a fundamental problem with the structure of those avoid policies and the rules such that the gateway if effectively closed, both gates are effectively closed before you started, because it seemed to me it was arguable that the effects

gateway, provided you weren't duration, historical use, or irrigation area, the effects gateway was not yet firmly closed as it might have been at the start of this process, and I wanted you to comment about that.

A. Well, if the three avoid directives were pure, you would have a prohibited rule, there wouldn't be an option for noncomplying, and that's where the Minister started with their submission.

Q. So remind me, why do you think that is so under the current structure?

A. Well, the issue was a very practical issue, because the effect – I can't remember the name of the section – if a prohibited rule is just a proposed prohibited rule, any applications lodged while it's just proposed are processed as discretionary, so we all quickly realised, despite initially supporting the prohibited rule, it wasn't going to act like a prohibited rule, it actually works, as, in fact, discretionary, and that's why we're all now focusing on how this noncomplying rule works.

Q. Okay, so I'm asking about how a noncomplying rule works, so how would a noncomplying – absent your machinery, how would the noncomplying rule work? Could it still work with all of the amendments which have been agreed to by the parties?

A. Would it still work?

Q. Yeah, could it work?

A. Is there still a consenting pathway?

Q. Yeah.

A. Yes, I think so. Despite the strong policy direction, if you're going through that first gateway, the 104D gateway, you're obviously not going to get through the policy gateway, you're clearly going to be contrary to the avoid policies and directions, but you might get through the –

Q. Effects.

A. – effects are no more than minor gateway, and then you get assessed on the merits again, yes, subject to the same policy directions, so it would have to be a very clearly completely benign effects-based proposal that didn't frustrate the long-term implementation of the NPSFM to be approved.

Q. So where we are today compared to where we were in the beginning, there is now a gateway strictly on effects?

A. Yes.

Q. If you were looking for a longer consent, you'd probably still be knocked out by, you know, the durational policies, which are avoid, but if you weren't triggering one of those three avoid policies, if you weren't in that camp, then there's still a gateway via noncomplying.

A. Yes, a very small one, yeah.

Q. A very small one, and so if that's correct, why introduce the Fish and Game assistance or guidance?

A. Guidance, for certainly, because if there is a proposal on the table that, in a cumulative sense, doesn't reach those flow allocation thresholds, then that's a fairly clear signal that the effects are minor or less, cumulatively, even, and if there's agreement between the witnesses, and I've footnoted as many I've found, but there's probably some more references in the transcript, there's agreement that that degree of hydrological alteration is a safe presumptive standard between going to be minor or less or do more work to figure out if effects are minor or less. It's not definitely effects are more than minor, it's do more work to figure out if effects are minor or less.

Q. Now, with that in mind, if Ngāti Rangi applies and you're looking at the environment as it would have existed without those takes being in place, again, why go with the Fish and Game? So accept that with Ngāti Rangi applying, is it without all of the takes, or just the take that's under consideration of the decision-maker in mind?

A. It's the environment absent any –

Q. Any?

A. – consents that are going to expire.

Q. Any consents that going to expire?

A. Yeah.

Q. So just because, you know, consent A is before the decision-maker, the decision-maker would have to take into account all other permits expiring in relation to that water body, whatever scale it is.

A. Yes, otherwise, it wouldn't make any sense.

Q. Otherwise, it wouldn't make any sense.

A. Yeah.

Q. Okay, again, if that is true, why introduce the Fish and Game approach?

A. I guess it's still the same answer, to have a certain point below which an application is most likely to be appropriate, and above which it definitely needs a lot more work to determine whether or not it meets the minor or less threshold.

Q. But as I understand the table, it's not a test.

A. No.

Q. But it's an indication.

A. It's a trigger to do more work.

Q. A trigger to do more work. Do you lose some sense of that trigger to do more work by including it as a methodology?

A. Maybe.

Q. All right, thank you.

A. Thank you.

THE COURT: JUDGE BORTHWICK TO MS BAKER-GALLOWAY

Q. Thank you, that's food for thought. Thank you very much.

A. Very good.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. Ms Dixon's next but here, so that's fine.

A. Yes, so I am ready to go your Honour.

Q. You're ready to go.

A. So if you're willing to hear from me then…

Q. We're in your hands.

A. Your Honour, I do have to apology, our printers automatically do double-sided and I didn't even think about it.

Q. Oh, no, it's just such a strong preference, because I tend to write all over these, and yeah.

A. Yes, so apologies for the fact that they are double-sided and not single-sided, and the other thing that I have to apologise for up front is that I had

a mental note to deal with section 124 and I didn't so, I will deal with that at an appropriate point –

Q. Adlib it.

MS WILLIAMS:

Just to let you know that it's not actually in the written subs, so I apologise for that also. So your Honour I thought I'd actually start by going back to the Director-General's submission and where the Director-General has started on plan change 7 and so the original submission supported the transitional nature of the plan but it really did seek a process plus version be implemented., and so I just want to confirm that the Director General does support purpose to provide a simple, efficient and cost-effective transition from the operative Plan to sustainable management of freshwater resources in Otago under an integrated planning framework, including the recently notified proposed Otago Regional Policy Statement and the anticipated new Land and Water Regional Plan, and in my opening legal submissions of the Director-General I clarified the concerns are principally about threatened non-diadromous galaxias, and I included in a footnote there your Honour, just a reference to the definition of diadromous and non- diadromous which was in Dr Dunn's evidence, way back when, so that's just there for clarity.

The Director-General "wants to ensure plan change 7 does not result in changes to existing water flow and hydrology patterns which could worsen the existing environment for these fish and their habitats over the transitional period that plan change 7 is in place. So, on that basis, there are some specific relief which was sought in the original submission which is abandoned and that includes seeking implementation of relevant Schedule 2A minimum flows, originally the Director-General sought flow triggers or banding to provide for priorities sought, instream values providing for life-supporting capacity of nonmigratory galaxias and other freshwater species, and protection of significant habitats, and additional matters of control to protect non-diadromous galaxias and maintain habitat diversity. So, those were addition matters which were sought to be put in to I think the rules your Honour and those specific

matters of relief are formally abandoned and I just wanted to clarify that. However, he does seek that plan change 7 “enables the activities ... to continue operating during the transition period at their existing scale and consistent with their historical use, my emphasis, and that picks up, your Honour, on the version B of the 10A.1.2 objective and that is my emphasis there on “existing scale and consistent with historical use”.

So, continuing activities on that basis will maintain at the existing environment for non-diadromous galaxias and other freshwater species and their habitats. Plan change 7 does not claim or intend to enhance habitats or provide additional environmental protection. However, I submit plan change 7 must not result in changes to the patterns of existing scale and historical use activities which may significantly worsen the existing environment for galaxiids and other freshwater species., and on that basis, the Director-General supports a simple 'process' version of the plan change. Your Honour, I submit that replicating priorities is necessary to continue activities at their existing scale and consistent with historical use of water in Otago. Plan change 7 needs to bridge the gap to a new integrated planning framework. That’s why it is important to replicate priorities where these are present. Where takes with higher priorities exist downstream of other takes in the catchment, the presence of priorities has shaped historic use patterns by imposing a default allocation of water between users and thereby providing an incidental environmental benefit by retaining water instream longer. Even where priorities have not been formally exercised, their presence has shaped existing patterns of use through the knowledge that they can be called upon in situations of insufficient flows, and I have referenced there your Honour some of the parts of the parts of the transcript from the Cromwell hearing.

In response to this water users have come up with various informal and in some cases and I think here perhaps of the Falls Dam agreement, formal water sharing arrangements to address low flow circumstances, all of which are underpinned by priorities. I submit, when replacing deemed permits, plan change 7 must include a mechanism to replicate priorities to continue activities

operating at their existing scale, consistent with historical use. This will ensure the incidental environmental benefit priorities provide to Otago's freshwater ecosystems, not just to non-diadromous galaxias and their habitats, is maintained during the transition period. Turning to how the plan change can replicate or mimic priorities, in response to the Court's directions the planners have conferenced, resulting most recently in the eighth JWS. In that joint witness statement, the four policy planners assessed various management approaches under section 32 and concluded that replicating priorities was best. Ms King and the technical staff preferred not trying to replicate the priorities as they had concerns about consenting and compliance issues, and I address those concerns further on.

I've set out at paragraph 14 your Honour, the approach from the eighth joint witness statement and I'm not sure that I really need to take you through that. At 15, the Court does not favour the Eighth joint witness statement approach. The Court provided alternative wording (a new policy, entry condition reserved, matters of control and discretion) which were further refined by counsel for OWRUG. The planners are considering this refined wording and I understand there is new wording to come, and potentially a further witness panel presentation tomorrow. I don't have the advantage of having seen that before I wrote these submissions. I just wanted to set out, really what I thought were the essential elements that we need to consider for process. So this is what I set out at para 17, the current deemed permit, as at 30 September 2021, is subject to permits with high priorities which are downstream, because it is the downstream, which is very important here. The second point is that there is not enough available water to supply the downstream higher priority permit at their point of take, and then the third factor is that if the lower priority permit ceases taking water, that will result in the downstream higher priority permit having an available water supply."

THE COURT: JUDGE BORTHWICK

Q. Now I obviously agree with taking an elemental approach because I suggested that. What in plain English is actually going on here and I think

you're capturing that but so your paragraph 18 is to the effect of whatever comes next. Should I discontent?

A. Yes.

Q. Okay.

A. And so again, I perhaps won't go through para 18, it's trying to try and fit that in. I'm not a planner your Honour, I will readily accept that so this is just again trying to put this forward and to me and as I say at para 19, I wanted to get away from residual flow because residual flows is used in a particular way in the plan. It references back to policy 647.

Q. I'm not bothered by that. I put "residual flow" and highlighted it at that time, saying that might not actually be the correct term. And then I think it was suggested that it just be knock back to "flow".

A. Yes.

Q. And that's fine.

A. And equally your Honour it did seem that there was some concern about what sufficiency or insufficient might mean.

Q. I know and that's simply because it's language plucked from the Water and Soil Conservation Act and I suspect any farmer would know what a sufficient flows means –

A. I'm sure they do.

Q. – without too much definition. Yes.

A. But yes there just seemed to be some concerns about those terms. So that was why I was thinking about what's another way to look at this and it seemed that really the fundamental question is, "do I have water available to me for my supply or not?" and that's a very simple factual question. "Do I have water – available water to meet my supply?" and if I don't will the person, here, upstream from me; turning off, stopping their take, mean that I do get water? Because those are the things that matter.

Q. That still goes to sufficiency though. You shouldn't just be asking your neighbour to turn off if you've got sufficient water.

A. Yes.

Q. Will be a bit perverse wouldn't it? And the thing that Ms King was worried anybody I think but anyway I think there's general agreement on what that looks like.

MS WILLIAMS:

Yes, your Honour. So, carrying on at para 20. As I've said, I've considered this as a water allocation and supply issue. So, on an allocation basis, the lower priority take should only be required to cease taking water when the downstream take does not have available water for its supply, and I've also tried to link the requirement to cease of take to the actual availability and supply of water to the higher priority take, because in my submission, if the cessation of take by the lower priority will make no difference to the available water supply downstream, then there shouldn't be a requirement to cease the take.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

Q. I think that was the point I was getting at. You'd be really perverse to be asking your neighbour to be doing that.

A. Yes, absolutely, yes.

Q. All right, so you're saying this – is this another option or this a check list against whatever comes in from the planners? Because broadly speaking, I don't think the policy that I drafted – the policy that I drafted captures this.

A. Yes.

Q. But as I indicated at the time, it needed refinement.

A. Yes. So, I understand the Council may also have some additional wording.

Q. Is that new policies and new provisions?

A. Mr Maw will have to answer that. I think he's taking the OWRUG wording and potentially worked from that.

Q. From that, okay. So, it's not a third option.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Now, I'm looking at you Mr Maw it's primarily something you wrote.

A. Yes, I'd describe it as a refinement of the option that had been put forward on and commented on by Mr Page and refined to address some of the issues which have occurred over the intervening days.

Q. That's all right. I think it is a joint legal and planning issue, this one very much, which is why we're still here debating the words.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

A. So, really, in essence, your Honour, I'm not trying to put forward another option.

Q. Okay.

A. But I'm just trying to put forward, my thinking on how this works. Moving, your Honour, to the question of can the Council impose enforceable conditions to replicate priorities, and this is addressing the concerns, firstly from Ms King and the technical witnesses.

Q. I don't think I need to hear from you about that. I think I've already indicated that –

A. You're not concerned?

Q. I'm not concerned.

A. All right.

Q. I think if Otago Regional Council's house is not in order and if that also applies to farmers in terms of how they have been operating or beyond or outside of their permit conditions or consent conditions, that is something that needs to be addressed, but I can't see that we can do nothing. I think something has to be done.

A. Yes.

Q. ORC brings its house back into a state of order in terms of its management and control of information and likewise farmers and they might need to apply for additional permissions if they have, I don't know, shifted their point of take or transferred informally the permit to another person, I don't know how they do that, but something may need to be done and the onus is on them, and you see, this is difficult, so, if, I mean I don't know what's going on out there, but I do know that RIC says it

hasn't had any oversight, I think any oversight is what was used, so, if permits have been transfer to new permit holders from different locations or different points of take, how that ends up in the wash, I can't foresee, but it may well be that to get through, if it's – PC7 is confirmed to get through these sort of controls, the applicant is obligated to go down a pathway wherein they accept other conditions from all other restrictions by other persons and it may not be in all a priority. I just can't, I can't see how it's going to be resolved.

A. I suspect that those issues are not really confined to the issue of priorities because they are just factors of if you are seeking to replace a permit and the ownership of the permit is complex and many of them are, that doesn't matter whether there's priorities there or not, that's just on any replacement you're going to be facing those same issues. I have to say that I do suspect that part of the complexity has arisen because of the fact that initially these mining privileges were granted many, many moons ago, and the privileges attach to the specific points of take, so, and then the infrastructure following on from that point of take and so because of that that's meant that there's been shares and then sort of parts of shares and those complications of ownership have arisen because of that historical nature and people holding onto that original grant at that point and that's part of the reason for the complexity and I suspect that many of the replacements which had already gone through had already dealt with amalgamated et cetera, but that's not what we are dealing with here and now, what we are dealing with here and now are those which have not yet been replaced which are due to expire in October and where applications to replacement have now been made. So, that's what we're dealing with.

Q. Anyway, those, apart from foreshadowing that there are complexities perhaps within the existing arrangements which users have come to absent any regulatory oversight, and that's Ms King's evidence and also Mr Cummings, I'm not sure what the Court can do about that, we're not being placed in a position through primary evidence or factual evidence to have a good understanding of those issues. The most it can do is

suggest a simple mechanism and I would have expected parties with an interest in this an particularly the primary sector to have said if there were fundamental concerns about those mechanisms and I didn't – we did ask Ms Dicey whether there would be, for example, in relation to (inaudible 12:26:37) as an example of a longish water body, and she didn't indicate to that us that there would be any issues arising.

A. No, and I think that's right, your Honour, I think again, it comes back to that the complex background landscape is a landscape within which water users have been operating in any event and they will continue to navigate that between themselves and also with Council and I don't think the Court actually needs to get involved with that.

Q. All right, thank you.

A. Your Honour, I do spend quite a long time on the enforcement question.

Q. Okay.

A. So, I don't know whether you want me to run though any of that.

Q. No, I will read it, we will read it, but I think at this stage, the mechanism… yeah.

A. Okay, well, your Honour, perhaps the thing that I probably do want to reiterate is that we have had quite a lot of evidence about the influence, the community influence around the way priorities are exercised or not exercised and the way in which it had facilitated and encouraged existing water sharing arrangements and really your Honour, my submission ultimately is that those can be expected to continue, the enforcement of priorities on an individual basis is very rare and I really don't foresee that the Council is going to have to do any much and with respect I agree with my friend Mr Page that it will probably to firstly be between the holders as opposed to anybody else, and if at some point, there is a wish or a want to look at some kind of enforcement action, Council has the opportunity to educate the higher priority holders about what actually is required of them and to facilitate discussions between the two permit holders so there's lots of discussions before we actually get to that. I do want to address your Honour the suggestion of alternative enforcement

mechanisms, and here I'm at para 37 and that those could be an appropriate or better tool to replace a priorities consent condition.

Q. Oh right, this is section 17, and 329.

A. Yes, your Honour, and really, where I got to that your Honour is that actually the adverse environmental effect has occurred at the point that you are looking to evoke either of those mechanisms, so for galaxiids, that could mean that populations and other species present who are maintained by the exercise of priorities, may already have been lost as part of the adverse environmental effects, before the Council's threshold to pursue that mechanism is reached, and so I don't favour those as an alternative.

Q. Unless you want to take us through paras 37 through 39, we'll hold the adjournment now for lunch.

A. Thank you, Your Honour.

Q. All right. Thank you. We're adjourned through to 1.30.

COURT ADJOURNS: 12.29 PM

COURT RESUMES: 1.34 PM

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS

A. So, your Honour I was at the top of page 9, paragraph 40 but Mr Maw has helpfully told me that this was in relation to Mr de Pelsemaeker's evidence in reply where he had proposed dealing with priorities and confining it to catchments with galaxiids and Mr Maw has helpfully told me that that's not a matter which the council intends to pursue so if you are happy for me to skip over that, then I will not read through paras 40 to 45.

Q. Yes. Okay. 46?

MS WILLIAMS:

So, that takes up to yes, your Honour the top of page 10 and perhaps if before I get into those matters your Honour this is where I will formally address section 124. And in my submission your Honour, the Court does not need to make a decision and that's the position I take. And following on from that then, there are some matters where the Director-General just doesn't have a position and so I just wanted to speak briefly to those because there have been submissions made seeking specific provision for some activities; hydro, community municipal water supplies and stranded assets and the Director-General didn't further submit on those. We didn't specifically submit on them either. We just don't have a position and similarly whilst in the general, the Director-General supported the intent of the plan change we didn't make or seek anything specific in relation to the schedule. We weren't part of the expert conferencing and so the outcomes adopted and supported, and I don't have anything further to say on that. And your Honour, as at para 49, I did open the Director-General's case by referring to the National Policy Statement for Freshwater Management and Te Mana o te Wai, and so I thought it would perhaps be a nice little synergy to close on that and so at paragraph 50. The replication of priorities on replacement consents for deemed permits through plan change 7 should maintain the existing health and wellbeing of water bodies and freshwater ecosystems. And in my submission, that is consistent with the first priority of Te Mana o te Wai. Other than that I do reiterate my previous submission that, apart

from considering the fundamental concept of Te Mana o te Wai, plan change 7 is not intended or attempting to give more than limited effect to the National Policy Statement. It is a transitional plan change, it intended to bridge the gap to the sustainable management of freshwater resources in Otago under a new integrated planning framework.

THE COURT: JUDGE BORTHWICK

Q. Now, we heard evidence from the planners that while there Eighth JWS, I use the word "replicate", they did not intend the existing system of priorities or statutory recognition of priorities to be replicated –

A. No, that's (inaudible 13:37:51).

Q. – all that's been done is to create a new cessation condition. So you understand that it's actually different?

A. Absolutely your Honour and equally I'm certainly not seeking a like-for-like in that sense. I'm seeking that there be a mimicking where it matters.

Q. And even if it's brought forward and is effective for everyone, that of itself, may not maintain the existing health and wellbeing of water bodies in so far as there are land use activities and together with activities involved with the taking and use of water and discharge of contaminants which have a subsisting effect and cumulative effect ongoing, which is not being proposed to be managed at all by this.

A. No, it's not. And so whilst I'm using the word "maintain" –

Q. Yes, doesn't say…

A. – there is, I guess, it's maintaining the existing situation. Whatever the existing situation is. So if the existing situation is a steady deterioration then that will continue. And I guess again your Honour it's playing the long game in terms of the – rather than attempting to fix something now which actually is not going to be particularly lasting.

Q. Okay.

A. We would rather and this is where I get into your Honour, we would rather focus on the newer proposed instruments.

Q. Okay, no I understand that. That's clear. So, it's maintaining your existing situation or at least it's not introducing a new element to that environment, which is one, of potentially different flow patterns.

A. Yes, it's not going to confound the existing environment because that's the real concern, is that we are going to end up without that, with something which actually doesn't just continue the steady deterioration but actually results in an immediate deterioration, so at para 52, I take confidence from the recent notification of the proposed regional policy statement. It demonstrates the council is working towards the integrated planning framework, including for freshwater. I also take confidence from amendment three to the operative regional water plan, which implements, by resolution, sections 322, 324, and 326, and I have noted in the footnote, your Honour, the specific provisions which have been put into the operative plan. So, in conclusion, your Honour, the Director-General remains supportive of the limited and transitional nature of plan change 7 to maintain existing scale and historical use of water, including by mimicking – I'll make that, your Honour – the effect of priorities, and while in a perfect world it, would be unnecessary, the refined version of plan change 7 as included the reply evidence of Mr de Pelsemaeker is supported by Mr Brass for the Director-General. I do acknowledge that the precise wording for the objectives and some other provisions still need some work, and particularly on the objectives, your Honour, where we have the version B, which is supported by Mr Brass, and I'm sorry, your Honour, I don't have specific wording, but Mr Brass was of the view that if the Court considers that objective 3 was not necessary and that it was dealt with sufficiently by objective 1, another approach could, perhaps, be to have an advice note underneath the objectives just to deal with the noncomplying situations and direct people back to the first objective.

THE COURT: JUDGE BORTHWICK TO MS WILLIAMS:

Q. So what is the problem with the architecture of the plan and the noncomplying rule as it now presently is written?

A. I don't think there is one, your Honour.

Q. Okay, right.

A. I'm just reporting what my planner has told me.

Q. What he said, okay. Right, and so if there was a problem with the way it was notified, both in having avoid policies and then having a policy about no more than minor effects, together effectively closing out the gateways for an application to be considered, is it your view that that problem no longer exists with the amendments which are proposed?

A. Yes, your Honour. I think that we are very happy – as I say, leaving aside the objectives – we are happy with where your amendments have landed.

Q. Okay.

A. And also subject to where we get to with priorities.

Q. Okay, very good.

A. And so overall, I submit the evidence before the Court supports a process focused version of plan change 7 to allow all parties and Council to focus on the mahi to provide an integrated planning framework which will give effect to the NPSFM.

Q. Okay, thank you very much.

QUESTIONS FROM THE COURT – NIL

MR WINCHESTER:

Good afternoon, Ma'am. I can confirm that conditions on the Taieri Plain were quite unpleasant this morning, so, yes, it wasn't an awful lot of fun coming in, but I made it, so I can that Ms Dixon –

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Didn't, mmm.

A. (inaudible 13:43:43) the odd trouble. Now, I'm ready to go if that suits the Court.

Q. Yeah.

A. Right, let's see.

Q. We're in your hands.

MR WINCHESTER:

As your Honour pleases. I will start at paragraph 2, your Honour, and I will just interpose at a couple of points to address some matters that have arisen during the Court of my learned friend, Mr Page's submissions this morning, and I'll just foreshadow the two points I wish to address you orally on, and that is with regard to the last chance matter, and also an argument about the proposed regional policy statement. I'll deal with them when convenient. Starting at paragraph 2, as outlined in opening, and reiterated through evidence, the position of Ngā Rūnanga on proposed plan change 7 largely stems from concerns about the failure of the existing planning framework in Otago to appropriately recognise and make provision for the relationship of Ngā Rūnanga with freshwater in the region, and the risk that long-term resource consents granted within that framework will lead to entrenchment of over-allocation and further marginalisation of Ngā Rūnanga interests and values for another generation. It is submitted that the position and concerns of Ngā Rūnanga have been borne out throughout the course of the hearing. In particular, it is submitted that plan change 7 was intended to be a process plan change, to preserve the status quo until a new regional planning framework is in place, that the granting of consents with durations that last well into the life of the new integrated regional planning framework, and even extending beyond the life of the new integrated regional planning framework, and even extending beyond the life of the new Land and Water Regional Plan will compromise the implementation and effectiveness of the new framework.

The effect of the fundamental concept in the National Policy Statement for Freshwater Management 2020 (NSPFM), Te Mana o Te Wai, is that it is not appropriate for there to be any activities for which there are exceptions to short-term consent durations, and the various versions of plan change provisions advanced by many parties opposing PC7 were not fit for purpose. This has been reflected in the significant and necessary retreat by opposing parties from the unrealistic and inappropriate positions adopted at the commencement of these proceedings, and early on in the proceedings, Ma'am, you'll recall that there was a suggestion that there was no problem that plan change 7 was intended to address, and that, I think appropriately, was abandoned quite

swiftly. As such, the position of Ngā Rūnanga remains largely as outlined in opening submissions, and there is nothing of substance that it resiles from in that respect. In terms of the issues that it has an interest in, and has called evidence about, it is submitted that it has made its case. To recap, the opening submission and position of Ngā Rūnanga was, in summary the operative Water Plan is deficient in its ability to manage the effects of water abstraction, particularly the effects on values of importance to Ngā Rūnanga. The direction it provides for decision-making inappropriately prioritises consumptive use over instream values and it does not give consideration to cumulative effects, and I think, with your leave, Ma'am, it's at this point that I wish to address the submissions, potentially might be characterised as evidence, from my learned friend, Mr Page, this morning, about the last chance matter.

I'm conscious that you may not wish to hear a debate about this discrete point at this time of the hearing, but it's been put in issue and my instructions are to go on the record on behalf of Ngā Rūnanga about what has been said, and so, from paragraph 28 of my learned friend's submissions, he takes the opportunity to answer the criticisms made by Mr Ellison and Ms McIntyre of the last chance resource consent decision, and the underlying issue here, there's some suggestion that Ngā Rūnanga – or, indeed, the Rūnanga – through Mr Ellison failed to essentially carry out an evidential burden, failed to gross an evidential threshold in relation to participating in that matter. In my submission, the real issue stems from the weakness of the existing plan framework.

There is a criticism made at paragraph 28(1) about pre-application with Aukaha Limited, including a site visit hosted by the applicants, and then some suggestion that those people didn't appear at the hearing to explain what their concerts were. Well, my clients went on the record, that was an officer of Aukaha who said the matter would need to go back to Rūnanga for a view to be taken, and that was put in writing as on the record, so it wasn't at officer level that the position was able to be taken, and that was very clear. Then, if we turn over to paragraph 28(3), where the criticism is that the evidence called by Aukaha, including that of its chairman, Mr Ellison, did not address the particular

water bodies for the resource consent application at issue. None of the witnesses had ever been to the points of take. Well, the underlying position is that the plan framework is so narrowly focused that cultural evidence is only relevant if it relates to ecological effects at the point of take. Mr Ellison gave general cultural evidence about the cultural landscape and matters of concern in general, but this wasn't able to be considered because the regional water plan only allow consideration of issues at the point of take.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. So Mr Ellison gave general evidence about what, sorry?

A. About the cultural landscape, but it was beyond the scope of matters that the plan allows to be considered, and that is –

Q. Because it's an RDA with limited matters of discretion?

A. Yes.

Q. Anyway, starting point, as I understood, the concern for Ngāi Tahu is that the – and I might have understood this wrongly – but the operative regional water plan starting point is not a starting point which does prioritise the mana of the water, nor adopts a ki uta ki tai approach, and has not attempted to grapple with the NPS of 2014 or 2017, so, in that sense, Ngāi Tahu is required by applicants to engage in a planning framework that does not resonate with their cultural values, so it's not all about gathering mahika kai at a point of take, it's fundamentally much wider than that, but the requirements for persons who would take and use water hitherto have been engaged with us on our own terms, and that's the sticking point, as I understand it, for Mr Ellison, required to engage with others on their own terms, which might be the paradigm of the dominant population group within this country.

A. Indeed, Ma'am, I think that's a fair summary, and so there's a mismatch there, a fundamental mismatch, and it's encapsulated in the last chance matter, because the real issue was that the evidence that Ngāi Tahu wanted to give was not able to be considered under the plan framework, and that just demonstrates the problem that we're dealing with, from my client's perspective, with the existing plan.

Q. Okay, so it sounds like I've understood what your client's concerns are in terms of the rules of engagement.

A. Yes, so the key point is that the criticism is not accepted because it's a creation of the plan framework, which we are trying to address through this process.

Q. Okay.

MR WINCHESTER:

Thank you, ma'am, I'll carry on, I was at paragraph 5(b). It is 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. Long-term water allocation decisions (that will 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. My client says that PC7 is necessary, but it is not intended that it give effect to the NPSFM, nor that it should be subject to further changes that attempt to give effect to the NPSFM. Rather, PC7 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. The only way to give effect to the principles of the Treaty of Waitangi, in this context, is to involve mana whenua in developing the new integrated regional planning framework, and to provide time for the engagement process between ORC and mana whenua to be completed. Either dispensing with PC7 and seeking to apply the NPSFM to individual consent applications or amending PC7 in an attempt to give effect to the NPSFM 2020 is not acceptable because both processes would bypass mana whenua involvement. This is a critically important matter for Ngā Rūnanga.

There has obviously been a considerable amount of evidence and focus on a number of discrete issues during the course of the proceedings, including on

matters that Ngā Rūnanga has not participated in – such as priorities, but it is submitted that this has not disturbed the substance of the Ngā Rūnanga position. In terms of the latest position, Ngā Rūnanga is largely aligned with the regional council in terms of what is the most appropriate planning framework to address the issues. In that respect, Ms McIntyre's opinions as expressed in Joint Witness Statement 9 of the planners represent the current Ngā Rūnanga position. The main area where there may be a difference is as to the potential for an exception to the short duration consent regime for community water supplies and hydroelectricity generation, which Ngā Rūnanga would not support. It is appropriate at this point to acknowledge the role of regional council, which is to be commended. Given the difficult position that it was in and the complexity of issues before the Court, it has taken a responsible and thoughtful approach throughout. Just in terms of the current position, and I will get to it later on, there is a reservation about version B of the objective, and I will take your Honour through that in some detail. I do understand, however, conversation with my learned friend, Mr Maw, that things may be moving on again. In light of particularly the closing for Forest & Bird, there's been a refinement, and I don't have specific instructions on that, and I understand that Mr Maw may be picking up the ball and running with it on that, and we'll wait to see where that gets to, but it may simplify matters further.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. I can't say that we were wholly wedded to version B, so it will be interesting to see where that goes.

A. No, well, some problems have been spotted with that, Ma'am, and I'll explain that to you.

Q. All right.

MR WINCHESTER:

Turning to problem definition and acceptance, it is submitted that there are two limbs to the problem that PC7 is intended to resolve, first a planning problem, and an environmental one. The limbs are inextricably linked. Planning problem

PC7 is founded on the fact that the operative Regional Plan does not offer flow and allocation regimes for catchments in the Otago Region which give effect to the NPSFM. The Water Plan is also deficient in appropriately recognising or providing for the rights, interests and values of Ngā Rūnanga in freshwater. It is not consistent with the principles of the Treaty of Waitangi and fails to identify the relationship, established by the Settlement Act, of Ngāi Tahu ki Murihiku to freshwater in parts of the region. It is submitted to be beyond doubt 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. As submitted in opening, the Minster's direction means that PC7 is, as a matter of fact and law, a matter of national significance. The PC7 framework is consistent with the response of the Minister for the Environment to the Skelton Report. It is intended to be largely "procedural" rather than substantive in nature.

Despite the issues identified in the Skelton Report and the Minister's direction for PC7 to be referred to this Court, some parties initially argued that PC7 is unnecessary, or that PC7 could be amended to better give substantive or partial effect to the NPSFM. There were a number of striking features about some parties' positions, particularly their apparent lack of understanding of the NPSFM and unwillingness to address the challenges for water allocation in the region. As the hearing progressed, a number of key parties materially altered their positions and theories of the case, and I've made reference in the footnote to the emergence of the galaxiids as the heroes around which opposing positions appeared to revolve, and that was not something that was foreshadowed initially, rather a sidewind in my submission, Ma'am. These underlying issues meant that some parties were prepared to advance a business as usual approach, enabling existing uses of water to continue and even expand. Despite this, it is submitted to be clear that, as a process-based plan change, PC7 needs to be as simple as possible and set an interim platform for a NPSFM-compliant water plan in the future. It should reflect a genuine hold the line approach, rather than one which envisages the granting of substantive long-term privileges to user groups.

In terms of the environmental problem, it is submitted that there is clear evidence of widespread over-allocation of water in Otago, and that was quite striking from Mr de Pelsemaeker's evidence-in-chief, as well as widespread degradation of water quality, with resultant impacts on the way of life of Ngā Rūnanga and other parts of the Otago community. There was uncontroverted evidence that NPSFM national bottom lines for some ecosystem health and human contact attributes are not being met in many rivers. To the extent that the PC7 provisions 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, it should go some way towards preventing inappropriate decision-making and halting further environmental degradation under the inadequate current planning framework. In this context, it is submitted that it is imperative for the language of the PC7 provisions to be as clear and conservative as possible, and highly directive. It is submitted that, given that the NPSFM mandates a need for significant improvements across a range of degraded environments, unless the Court has reliable evidence that less onerous provisions might be effective, it should as a matter of course, elect to adopt the most environmentally cautious and directive language available to it for PC7. The early experience in other regions is that it has been difficult for the paradigm shift in the NPSFM and its predecessors to gain traction, and it is submitted that PC7 should not have the effect of making this any more difficult, particularly given that the starting point in Otago means that there is a very significant planning and environmental change that needs to occur. It is submitted that this is particularly so, given the time that will be required for the NPSFM and FMU processes to be completed. The presence of a regime that allows increases in takes or extensions of irrigated areas, for whatever purpose, will increase the risk of the environment continuing to degrade, and that irreversible effects on highly valued resources will continue before an NPSFM-compliant framework is able to be implemented.

I set out at paragraph 22 the three broad options before the Court at the commencement of the hearing. I'll take those as read and move to paragraph 23. It is submitted that the course of the hearing, in conjunction with the conferencing of experts, that the course of the hearing has confirmed that neither of options (b) or (c) are appropriate, and that option (a) is most consistent with the intent of the plan change, which is to be a process-only plan change. It now appears to be beyond dispute that the primary intention behind PC7 is to facilitate the transition to a new planning framework, although I do understand and I will address the Court on it that my learned friend, Mr Page, has advanced and argument this morning based on the proposed regional policy statement that perhaps plan change 7 should be rejected, and I will come to that. Option (b) is not dead, so it seems. While it will be addressed in further detail below, acceptance of this position also means that it should be unnecessary for the Court to conduct a detailed assessment of PC7 against the proposed Regional Policy Statement, given that PC7 should provide breathing space and a platform which enables transition to the new planning framework, of which a new fit for purpose RPS is one component. I do address the regional policy statement later, so I think it's probably a convenient point to deal with my learned friend's submissions.

I just want to turn to the positions of other parties, and I need to reiterate that the primary concern for Ngā Rūnanga for plan change 7 is the importance of short-term consent durations. That is, from its position, at least, non-negotiable. It can accept some exceptions for specific scenarios, such as stranded assets, but always subject to the six-year maximum duration of consent. It was submitted in opening for Ngā Rūnanga 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 for the instream needs of water bodies. The accuracy of this submission was demonstrated by the legal submissions and evidence given by some parties at the early stages of the hearing.

The current position in Otago is founded on a series of historical and cumulative 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. This commoditisation and consumption paradigm and the desire for this to continue to prevail over other values has been apparent from the evidence and legal submissions of a number of parties. Given, however, the narrowing of issues through the hearing and the abandonment of relief by some parties, the remnants of this paradigm are the strategies of seeking longer duration consents, staggering of consent expiry dates, exceptions to the plan change provisions for particular purposes and uses, and/or recognition of discrete factual situations.

It remains the position of Ngā Rūnanga that the duration of consents to be granted under the PC7 regime is absolutely critical. Duration is not a neutral factor. It is submitted that exceptions to short-duration consents are inappropriate for a number of reasons. In addition to those reasons provided by Mr de Pelsemaeker in his statement of evidence in reply, if long term allocation decisions are made through granting consent for replacement of deemed permits or renewal of other consents before the new regional planning framework is in place, there can be no question that the ability to implement it, and therefore its effectiveness, will be undermined. For the new planning framework to comply with higher order documents, it is entirely necessary for the consents granted under the PC7 provisions to be considered within the life of the new regional planning framework. The new regional planning framework will need to give effect to the NPSFM, including the fundamental concept of Te Mana o Te Wai. The hierarchy of obligations in Te Mana o Te Wai ensures that the health and wellbeing of water bodies and freshwater ecosystems is the first priority, to be considered before the health needs of people and the ability of people and communities to provide for their social, economic and cultural wellbeing, now and in the future. By definition, this means any uses of water which are second or third order priorities will need to be considered within the

life of the new regional planning framework, and this seems obvious, your Honour, but that is because it needs to be determined how best to prioritise the health and wellbeing of water bodies and freshwater ecosystems, so that needs to be done first.

In addition, part 3.5 of the NPSFM establishes that Te Mana o Te Wai requires a ki uta ki tai approach, which in turn requires that local authorities must recognise a number of things, including the interconnectedness of the whole environment. It is submitted that a ki uta ki tai approach cannot be fully realised in the context of making individual decisions on consents. If consents are granted for terms that extend well into and beyond the life of the new regional planning framework, this would undermine the significant effort and engagement that is currently occurring between Ngā Rūnanga and the regional council, and there is a likelihood that Kāi Tahu will be locked out of freshwater management for another generation. This situation is submitted to be fundamentally inconsistent with the Treaty principles and would undermine the ability of Kāi 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. Given the history outlined in the evidence for Ngā Rūnanga and the very real concerns that are held, there is a considerable burden and duty felt by the current generation to ensure that the ability to achieve restoration of both the environment and cultural identity through a new regional planning framework is not lost, and certainly, I'll just divert there, in terms of the proposed regional policy statement, I know that evidence has not been given on it, but a pretty cursory read of that regional policy statement indicates very strong alignment, certainly with regard to freshwater and integrated management in terms of land use and freshwater, very strong alignment with the national policy statement, and very strong reflection of treaty principles, so it is certainly a first step on that process, and a very powerful foundation in addition to the national policy statement for a compliant.

THE COURT: JUDGE BORTHWICK TO MR WINCHSESTER

Q. What's your response to any submission, and I think we've heard it more than once through the course of the hearing, and evidence to the same effect as well, you know, why wait for the land and water plan when every applicant for resource consent will and should have a course straight to the operative and now proposed RPS, together with the NPSs themselves, you know, direct reference up to those high order instruments? Do you agree with that approach, as opposed to waiting for a land and water plan to come through?

A. Well, Ma'am, the answer is no, I don't agree with that approach.

Q. And why don't you agree?

A. And the reason for that is the history of decision-making on an ad hoc basis is littered with examples where, in particular, cumulative effects cannot be effectively considered. Duration of consents won't necessarily be aligned, so it will be rather a hodgepodge of decisions sitting out there, and quite apart from that, the national policy statement is very clear in its directions around participation in the process of plan making. It's not optional, it's mandatory to involve my client in those processes, and it's not just a triumph of process over substance. If one recalls the evidence of Mr Ellison, Mr Whaanga, Mr Bull, going through that process and having people genuinely understand, not just read the words, but understand what is being talked about and why it's important has to be done so that the plan provisions are appropriately effective, otherwise, they're window-dressing, Ma'am.

Q. Otherwise what, sorry?

A. They're window-dressing, or they run the risk of being window dressing.

Q. All right.

MR WINCHESTER:

In relation to stranded assets, there may not be enough information to evaluate the nature of the risk for this exemption. Although there has been evidence to suggest that the risk of adverse effects caused by viticulture and orchards is less than that caused by pastoral farming, just because a risk is lower does not

mean there is a low risk or no risk that expansion of irrigated areas will cause adverse effects. Nevertheless, a narrow restricted discretionary activity status for this matter is accepted by Ngā Rūnanga, provided the consent duration does not exceed six years, so as not to entrench abstraction and reliance upon the ongoing availability of water. It is important that PC7 does not send a message to users that high-risk investments will be rewarded. A primary goal or purpose of PC7 must be to allow the NPSFM to be appropriately given effect to through subsequent planning processes. It is therefore necessary to reflect on the importance of that goal, and the centrality of Te Mana o Te Wai to decisions about water and land. Throughout the hearing, numerous witnesses accepted that Te Mana o te Wai means putting the needs of water bodies first and that amendments to the PC7 provisions were not capable of giving effect to Te Mana o Te Wai. It is submitted that numerous witnesses also accepted that the various exceptions to short-term six-year consent durations were not consistent with Te Mana o Te Wai, in that the exceptions were sought for uses considered to be second or third order priorities in the hierarchy of obligations set out in the NPSFM. Yet, few of those witnesses, or the parties they gave evidence for, promoted provisions that will allow for Te Mana o Te Wai to fully be given effect to, through the new regional planning framework, and I hate to harp on the poor old galaxiids, Ma'am, but in terms of a ki uta ki tai approach and importance of taonga species, I think Ms McIntyre certainly is one witness who said that galaxiids, while they are a taonga species, are not the only one that's at risk, so singling them out for special attention in the framework is not compliant with the National Policy Statement for Freshwater Management.

It is submitted that the NPSFM mandates that there is no alternative approach to the management of freshwater. Te Mana o Te Wai is identified as the fundamental concept. As noted above, the concept cannot be said to be new, nor is it unique to the NPSFM. Rather than being referred to as the fundamental concept in the 2017 version of the NPS, Te Mana o te Wai was referred to as the matter of national significance. When comparing the references to Te Mana o te Wai in the two texts, the one significant difference is that the hierarchy of obligations is clarified in the 2020 version. In the NPS, this hierarchy of

obligations is clarified to ensure that the health and wellbeing of water bodies and freshwater ecosystems is the first priority, to be considered before the health needs of people and the ability of people and communities to provide for their social, economic and cultural wellbeing, now and in the future. Although it is more explicit in the NPSFM, it is submitted that this hierarchy was always implicitly fundamental to the concept of Te Mana o te Wai. The explicit inclusion of the hierarchy clarifies and reinforces the direction that the health and wellbeing of water bodies and freshwater ecosystems is to be considered before any other factors, including human use. In this way, it is submitted that parties were never in a position to argue that Te Mana o Te Wai is a new concept introducing unexpected obligations, or that existing assets, investments or infrastructure ought to be recognised or protected. It is submitted that the national freshwater planning direction has been clear for some time, indeed, prior to 2017. Exceptions to the PC7 provisions to enable longer-term consent durations to be granted are not appropriate.

Furthermore, if there are concerns about rights, expenditure on assets, stranded assets, or the cost and certainty related to seeking short-term consents, then several matters are submitted to be relevant. First, what the possible legal basis for these rights might be, including rights to have consents with longer durations granted because of investments having been made or the cost of obtaining consents. Secondly, these rights need to be set against the context of the rights, expressed both in the Treaty of Waitangi and in settlement legislation, that Ngā Rūnanga 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 Ngā Rūnanga. During the same time period in which the rights associated with deemed permit holders have increased, Ngā Rūnanga have experienced significant physical, economic and spiritual loss, as the mauri of water bodies and sources of mahika kai have declined due to the loss of quantity and quality of water in the rivers, streams and wetlands.

The Court appears to have understood the importance of these losses and the importance of mātauraka, and I have provided some quite detailed footnotes in the notes of evidence, Mr Bull and Mr Ellison gave evidence before the Court, and based on the Court's observations, Ma'am, it seemed to be clearly understood what they were saying. In summary, the degradation of the environment is a diminishment of mana. This loss also extends to the loss of mātauraka, being the understanding, knowledge and history that accompanies cultural practices. Without mātauraka retention, mana whenua cannot fully exercise kaitiakitaka. Right at the bottom of that page, Ma'am, at paragraph 25, there is quite a telling observation from Mr Ellison. The mātauraka 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 the things that keep us connected and allow us to even better exercise kaitiakitaka. That's why we keep pressing on, despite the invisibility of some of these taonga. It's just a function that we do. We seem to be doing that every generation, and spending more time doing that than doing the catching, which is, in my submission, an incredibly telling distillation of the problem.

In light of many factors, not least of all the state of the environment, changes to the regulatory frameworks around water use and allocation cannot be said to be unexpected, or uncommon. Similar regulatory changes have been in train around the country and, at a minimum, such changes are submitted to be part of the cost and risk of running a business. Seen in this context, some inconvenience and additional cost to users that might result from PC7 is hardly unfair or unreasonable. It should at least enable users some additional time and breathing space 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. It is submitted that the hearing of this matter before the Court should go a long way towards educating stakeholders about the change in expectations and practices that will be required in the future.

Now, I want to turn to joint witness statement 9, Ma'am, as being at least the latest expression of the planning framework that my client supports through the efforts of Ms McIntyre, and I might go directly to paragraph 42, which is where we start dealing with the differences between Version A and Version B of the objective, and, as I've said, I accept that this potentially could become redundant down the track, depending upon what's advanced by Mr de Pelsemaeker and my learned friend, Mr Maw. The planners diverged on the wording for the additional objectives, producing Version A and Version B. For completeness, although Version B includes two additional objectives and Version A only includes one, it is submitted that both versions share a significant commonality, being the following objective, so that wording there features in both Version A and Version B. The versions then diverge. Objective 10A.1.3 in Version B, supported by Ms McIntyre, provides that activities authorised by deemed permits or water permits, for takes and uses of freshwater expiring prior to 31 December 2025, are only allowed to increase their scale and rate or volume of take and/or continue operating beyond the transition period, if this does not compromise the implementation of an integrated regional planning framework that prioritised the health and wellbeing of water bodies and freshwater ecosystems. On reflection, Ngā Rūnanga is concerned that the language of 10A.1.3(a) in Version B may have an unintended consequence and considers that refinement of the objective is required to align fully with the underlying process purpose of PC7. The problem is, Ma'am, that it's possible that the reference to increasing scale and rate of volume in A, which is intended to provide a foundation for the narrow restricted discretionary activity provisions of stranded assets and community water supplies, could be called in aid of noncomplying activity consents, and that's because the objective is only intended to apply to replacement consents, and not new consents, so reference to an increase in scale and rate or volume of take is arguably out of place. The essence of it is that this is sort of an internal contradiction, and that language in A just doesn't belong, quite frankly.

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Q. No, it's problematic. I asked Ms McIntyre a question about that, or she was responding to a question about the necessity for that wording vis-à-vis stranded assets, and I think she said it didn't occur to her that that wording was actually needed for the stranded assets exception, and I reflected back that was my thinking as well, just to have an exception for stranded assets wasn't calling out for something to be done in the objective setting, but very much, I saw what was written here as creating a new pathway via noncomplying rule, and it was problematic because you had these other policies shutting it down or shutting it out through the avoid or only let allow wording. Mr de Pelsemaeker said on a subsequent day that he'd not intended to walk back – that was my language – walking back the strong direction on no increase in area, et cetera, and he said no, no, he wasn't intending to walk that back, but this language does exactly that, yeah.

A. It does, because my understanding is what it's intended to do is deal in the stranded assets context with the same availability of water as under an existing consent, but just extension of the irrigable area, so not an increase in rate or take or volume, because, of course, that's noncomplying activity, so there are solutions there, Ma'am, and I address that in paragraph 44, and the simplest one is to delete that subparagraph of A, in which case, 10A.1.3 would work, but there is potentially an underlying issue, Ma'am, as to whether the Court concludes on the merits that the stranded assets provisions need to have a home in the objectives.

Q. Yeah, and Ms McIntyre's evidence was that it didn't need to have a home, and that was where my thoughts were. I was really surprised to see something being put in here for stranded assets, but just deleting A, I played around with just deleting A before we heard from the witnesses, and then that is then to create a pathway for increasing duration. If you keep B, ensure activities authorised by deemed permits and water permits are only allowed to increase their duration if they didn't compromise the implementation, then immediately, you run into problems there with the avoid policy, which is avoid longer than six years, so it's

like, well, what are we doing in this space? I didn't know what it was all about.

A. That does create a tension of itself.

Q. The JWS was not well explained and it went well beyond what we thought was actually meant to be happening in there, so, and same question for Ms Williams, is there a problem with the avoid policies and the eventual noncomplying activity rule? I can't think what would fit in there, but is it unworkable as it was thought to be at the beginning of the hearing?

A. Certainly, Ma'am, my submission is that there is no problem with the avoid approach or the noncomplying activity pathway, and it may well be that my learned friend, Mr Maw, and his witness have the solution to this issue with some tidier drafting. No pressure.

Q. That's good, all right.

A. But, I mean, the underlying point, Ma'am, is that certainly Ms McIntyre has reflected on 10A.1.3 in terms of what it's intended to do and what it actually potentially does, but of course, it doesn't do the right thing in its current form.

Q. Okay.

MR WINCHESTER:

Dealing with version A, which has been recommended by some of the other planning witnesses, this will require an assessment of additional adverse environmental effects, and whether the risk of such effects is low. It is submitted that this objective, because it deals with substantive considerations and envisages expansion of existing rights, is inappropriate. For these reasons, it is submitted to be clearly contrary to the process intent behind PC7. Furthermore, to the extent that there will inevitably be subjectivity in the assessment that this objective requires, it clearly opens the door for increases in scale and/or duration of takes, or at least arguments about such matters. Contrary to what is suggested by the planners who produced Version A, it is submitted that this objective would be at odds with the intent of providing for a short-term consent framework, which is to ensure that the implementation of a new planning framework is not undermined by granting of long term consents

and increased reliance on water before the new framework is in place. In addition, experience in dealing with consent processes under the notified version of PC7 shows that the policy framework does not provide a clear enough direction about the reason for the six-year consent duration, and I understand that when the planners were empanelled last week, Ms McIntyre gave you quite clear answers about that and about her experience around that. Subject to our submissions above regarding Version B, such direction would be provided in Version B, particularly though use of the words: "if this does not compromise the implementation of an integrated regional planning framework that prioritised the health and wellbeing of water bodies and freshwater ecosystems."

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Q. So what are you saying there in the first sentence? Oh, the notified version of PC7 shows the policy framework.

A. Yes.

Q. Well, that was a bit – it doesn't provide clear direction or clear enough direction around the six-year duration.

A. No.

Q. Does that remain to be the case if you're looking at the latest iteration?

A. Well, it's obviously come a long way, Ma'am.

Q. Is it the issue that it's not about whether there's direction or not, it's about successive decision-makers just simply not placing any weight on it, on PC7?

A. Well, that's the risk, that all the effort –

Q. I mean hitherto, up until this point in time.

A. Oh, I see.

Q. That's what decision-makers, independent commissioners have done.

A. Yes, well, certainly, long-term consents have been granted.

Q. It's probably, I think the policy direction's well-understood, it's just that it's not been given weight. Would that be fair, or is it more subtle thinking than that?

A. I don't think I'm in a position to answer that, Ma'am. I don't know, but the reality is that longer-duration consents have been granted, and I suspect part of that is simply a degree of inertia or momentum, that's sort of what's happened, and, you know, you can find an exception or an individual circumstance for any individual application to justify a longer duration of consent.

Q. All right, mhm.

A. And no doubt the advocacy of people working for the applicants has been very effective.

Q. Mmm. He's laughing. Right, thank you.

A. I don't think he was expecting that.

MR WINCHESTER:

Dealing with stranded assets, Ma'am, planners also addressed the issue of whether PC7 should respond to stranded assets. In summary, some of the planners agreed that PC7 should respond to stranded assets in the context of orchards and viticulture, by way of amendments to Policy 10A.2.1 and the RDA rule 10A.2.1A.1. The justification for providing for stranded assets in the context of orchards and viticulture was on the basis that there is evidence before the Court of a lower risk of adverse water quality effects under orchards and viticulture compared to pastoral systems. Of greater concern to Ngā Rūnanga is the issue of water quantity and increased reliance on the availability of water, both of which would be exacerbated by the granting of longer duration consents. It is noted that the amendments made by the planners do not include any standard or threshold for the extent of financial investment in mainline irrigation pipes, for example, there could be cases whereby very large investments have been made in order to irrigate very large additional areas, they do not consider the additional financial commitments that may have been or will be made as a result of installing mainline irrigation, such as purchase of trees and crop support structures, and do not consider the implications of creating financial reliance on water that may not be available under a new planning framework, or the possibility that investment in alternative water sources might be required. These concerns provide some discrete examples

why Ngā Rūnanga has the view that exceptions which would provide for longer consent durations exceeding six years are not appropriate. Ngā Rūnanga is, however, willing to accept these risks on the basis of a narrow restricted discretionary activity rule which allows use of infrastructure that has already been installed but, consistent with the general provisions in PC7, is subject to a short term consent duration. It is quite clear that if any permits continue to be granted under the current planning framework for timeframes that extend into the life of the new planning framework, this will undermine that framework, and I think I've already given that submission.

I just want to move to the Regional Policy Statement, and I'll take your Honour through these written submissions before I respond to my learned friend's submissions. The proposed Regional Policy Statement, and I understand some parties have sought an opportunity to address the Court on issues related to implications of the proposed RPS on PC7. Ngā Rūnanga is concerned about the delay that consideration of these issues would involve, particularly because there is no reason why the RPS should affect the content of PC7. While it is accepted that the Court must have regard to the proposed RPS, and that arises from s 66 of the Act, it is not required to give effect to it. It is submitted that, for the reasons outlined below, hearing and addressing matters related to the proposed RPS is not necessary before this court and that the costs of a delay will far outweigh the benefits of completing this process. It is accepted that the proposed RPS will be a relevant consideration under section 104 of the Act for consents being granted under the PC7 framework, particularly those taking the noncomplying pathway, and the proposed RPS sets timeframes for the achievement of freshwater visions, but these are timeframes that relate to outcomes being achieved, rather than the times by which action must be taken.

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Q. Can you tell me, tease that out a bit further? I still have resisted any temptation to read this RPS, so the outcome being achieved rather than the actions that must be taken, can you just explain what you mean by that?

A. So the suggestion is that the Court should hear some evidence and submissions on the potential impact of the RPS on the content of PC7, or, indeed, on the question of whether PC7 should be approved at all, and I understand that has been advanced this morning, as I understand it, on the basis that some directions in the currently proposed RPS will impact on timeframes relating to freshwater decision-making, and what I am saying at paragraph 57(b) is that the proposed RPS does set timeframes for the achievement of freshwater visions, but these relate to substantive outcomes, so that outcomes are intended to be achieved by a particular time. It's not how they're done, so it's not process specific, and the RPS does not make directions about the times by which a specific action needs to be taken.

Q. And by action, can you give me an example? I mean, is this an action which the Water and Land Plan is to provide for? So, for example, if the outcome is, I don't know, all water bodies should be above the national bottom line for all of the national bottom lines in 30 years' time, that would be an outcome?

A. Yes.

Q. But the action would be within each catchment or within certain catchments to reduce in output by 10% year on year, that's the action?

A. Indeed.

Q. And that's the detail that we're waiting for?

A. Yes.

Q. Yeah.

A. So, yeah, as a theoretical example, Ma'am, yes, indeed.

Q. Yeah, yeah, it's probably a nonsense example too, but anyway, something like that, okay.

A. But no, you've captured the point.

Q. Yeah, and so you understood the submission this morning to be saying what, confusing the outcome and actions or what, do you think?

A. No, I think it's saying something entirely different, basically, that we're wasting our time with PC7 and we should all just be getting on, because PC7 doesn't give effect to the proposed Regional Policy Statement.

Q. No, so it's not an instrument which is talking about those actions as such, is that what you're saying?

A. Correct.

Q. So because it's not, and, in that sense, isn't giving effect to – but it's not, it's beyond its scope, I would have thought, to be giving effect to an instrument that wasn't even alive before it was notified, possibly.

A. Well, the situation –

Q. In the sense of actions, not in terms of Te Mana o Te Wai.

A. Well, yes, but the situation does arise where new plans emerge and need to be either had regard to or given effect to during the course of various RMA processes, given the duration of them. So that's not a new concept, but the underlying point is that this court's duty is to have regard to the proposed RPS, not to give effect to it, so I say there's no duty on the Court as a starting point, and the suggestion that, as I understood the submission, it was that plan change 7 should be rejected because it doesn't address Te Mana o Te Wai and is not compliant in that respect. Well, that's never really been its purpose, in my submission, and I have just got the written submissions here, and it's probably convenient for me to deal with it now, so if you have the –

Q. I do.

A. – closing submissions for OWRUG before you, Ma'am, starting on page 3 there's acknowledgement at paragraph 13 that the NPSFM and the proposed RPS are consistent, and I understand, I don't really want to get into a forensic debate about what's in the proposed regional policy statement, because it's a pretty big document, and there is also the risk of cherry-picking, and it does need to be read as a whole, and I think the risk of cherry-picking is very ably illustrated by my learned friend's argument this morning. So reference is made to an objective, and that can be found on page 121 of the proposed Regional Policy Statement, and it's the part of the RPS that deals with land and freshwater. As I say, it's at page 121. There is quite a bit of content which precedes that, including some detailed objectives and policies on integrated management, which are highly consistent with the National Policy

Statement on Freshwater Management, and make reference to matters such as ki uta ki tai and Te Mana o Te Wai, and one would expect that. So to get to this part of the Regional Policy Statement and identify an objective, and the objective is Te Mana o te Wai, and it's recorded there, and then, as I understand it, say that there are two supporting policies which particularly underpin the argument that PC7 is unnecessary and should be rejected because it doesn't give effect to these parts of the proposed Regional Policy Statement because they should be accorded significant or overriding weight, that's my understanding of the submission. There's a couple of policies under the objective which, if you're reading it in the round, and it's just a couple of policies which support an individual objective, policy 2 under this objective deals with mana whakahaere, and it refers to recognising and giving practical effect to (inaudible 14:47:07) rakatirataka in respect of freshwater by facilitating partnership in the Act of involvement of mana whenua of freshwater management, providing for a range of customary uses, including mahika kai and incorporating mātauraka into decision-making. So, you know, when you read this objective, this one objective in the proposed Regional Policy Statement, and then read it in the round with its supporting policies, I'm not sure you can effectively mount the argument that somehow, the proposed plan change 7 fails, and, of course, policy 3, which I understand has not been referred to in support of the argument, I would have thought, from a cursory glance, is also highly relevant. It's entitled integrated management ki uta ki tai. Manage the use of freshwater and land in accordance with tikanga and kawa, using an integrated approach that does seven different things. So somewhat of a rear-guard argument, I didn't really expect to be dealing with it, but the proposed Regional Policy Statement is a justification for rejecting PC7. My response is the submission is ill-founded because it is incredibly selective, does not address the proposed Regional Policy Statement as a whole, doesn't overcome the legal test, which is that the Court only needs to have regard to it, and I would have thought maybe a case of being careful what you ask for, because if PC7 is gone and the proposed Regional Policy

Statement has overriding weight, based on this argument, then it will carry a lot of weight under s 104 in terms of decision-making on freshwater.

Q. As would decision-making under, if PC7 is rejected, you're then referring to decision-making under the operative regional plan?

A. Yes.

Q. Yeah, and so if this proposed RPS has overriding weight over this plan change, it would, also follows, have the same overriding weight under the operative water plan, is that what you're saying?

A. Well, if I follow the logic, yes.

Q. Yes.

A. So you would essentially disregard the operative regional plan as being redundant, because it is so clearly noncompliant with the NPSFM and the regional policy statement, and then that just rakes you back to the NPSFM and the RPS, and, you know.

Q. And I think that's what I was asking you before, how satisfy is it, or whatever the right terminology is, simply to apply direct the NPSs and RPSs to a consent application, which is really what you're saying is what you're effectively left with. Whether in law you're left with that, but in practice, you might, it seems to be the approach now, (inaudible 14:51:01) directly of higher order policy documents, which content is not articulated yet or sufficiently articulated down through the RPS and into a new Land and Water Plan.

A. Yes, and if those higher order documents are to be given the weight in respect to which they're due, then basically, does everything shut down in terms of decision-making? Because in terms of actually giving effect to Te Mana o te Wai, how do you grant a consent or a replacement consent for abstraction when you haven't made the assessment of the values of the water body, and shouldn't you take a conservative approach? Well, you know, either not going to grant the consent or grant for a reduced take or just not going to grant it at all until we do the work, because there's a lot of machinery in the NPS about what needs to happen.

Q. To understand what values are being upheld by Te Mana o te Wai, the work needs to be done, rather than simply (inaudible 14:52:12).

A. It's not just a legal argument, there's a lot more to it than that.

Q. Okay, all right, no, I think I understand.

A. And I may have misunderstood the submission, but I've been just trying to follow it on its face.

Q. Mhm, okay.

MR WINCHESTER:

I'll just move to my conclusion now, with your leave, Ma'am. From the perspective of Ngā Rūnanga, the most important aspects of PC7 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 unsatisfactory situation, and largely forego its rights and interests being recognised or provided for through that short-term consent process. On the other hand, the importance of mana whenua having a strong voice and role in the management of land and water beyond the short term period cannot be overstated, and considerable effort is being invested by Ngā Rūnanga to ensure that this is realised, including in the proposed regional policy statement, it's quite a powerful document, Ma'am. For the reasons outlined in the evidence in chief for Ngā Rūnanga, it is vital that this occurs before another generation goes by.

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Q. So I take it from what you said that your client also oppose longer-term consent to renewals for existing community water supplies, together with existing hydro?

A. Yes.

Q. Yeah, and the reason for that, could you just round that out?

A. Well, the reason for that is that it locks in the reliance on the availability of water, and those particular uses are, well, it goes without saying, they are generally very significant, they are volumes of abstraction, are significant water tension.

Q. Right, and you see there that you don't consider there are countervailing matters which the Court ought to weigh or have regard to, first in terms of the importance of renewables and eventually meeting any policy content about being 100% reliant on renewable forms of electricity generation in the first instance?

A. First of all, Ma'am, I don't believe the 100% target is in the national policy statement for renewable electricity generation.

Q. It's not, it's a government policy.

A. It's a government policy. So I accept that there are tensions between the national policy statements, but in terms of the correct approach to interpretation, one generally places greater weight on the more directive national policy statements, and when it comes down to a contest, as it were, between Te Mana o te Wai and the very generally expressed directions in the national policy statement for renewable electricity generation, Te Mana o te Wai wins by the length of a street, in my submission, and it deals with those priorities around use quite directly. The needs of the water bodies first, then uses as second and third-order priorities.

Q. Okay, and in terms of providing for community sources of community water supply, what then in terms of, in particular, those communities that would already or do already have access to that water, where the infrastructure's already in the ground, so replacement consents for TA assets.

A. Are you talking about duration?

Q. Duration, yeah.

A. Yes, the position is that they are clearly second-order priority, second, the health needs of people, such as drinking water, and the primary task under the national policy statement is to define and put in place a framework which addresses, first of all, the health and wellbeing of water

bodies and freshwater ecosystems, so that happens first, and if you grant a consent for the second water priority for longer than six years, then you run the risk of undermining that first priority.

Q. So in terms of any plan to come, and I think Mr Page has – he'll forgive me, or I'll indicate if I misdescribe what he said – he said the first priority is to determine how much water needs to be left in for the health of the water body itself and its ecosystems, so what needs to remain in before you start to look at what can then be taken out for whatever use that might be. Do you agree with him in principle?

A. Yes.

Q. The allocation first is to water?

A. Yes.

Q. And with that approach, thinking about territorial authorities and the need to provide water for communities, do you see it as an outcome under the land and water plan that they stop or reduce taking, or where that community already exists, or something else. How does the two get reconciled in a water short catchment where more water's required to be left in for the health of the waterway, or is it a stage process, the water body's not healthy, but to get to healthy over a period of time, say 20 years or 30 years, whatever the period of time is, there needs to be a staged retreat, if you like, and therefore, reducing allocation over time?

A. Well, there's different ways of slicing and dicing it, and that's exactly what the values process should address, but by granting a longer-term duration consent, you've taken that chunk of water out of that water body, taken it out of the mix, and therefore, you can't appropriately weigh the competing values and interests, because that's already out there, and I don't think my client is unrealistic enough to think that things change overnight, and water bodies won't become restored overnight. Indeed, given the evidence, just can't, it'll take a while for some of them, but it's the change of thinking and planning around it and possibly the programmes that come with it in terms of, you know, consent reviews that are, in fact, meaningful because they're tied to things that are stated in the plan, will

come out of an FMU process. So it's an entirely different way of thinking about –

Q. I know that.

A. Yeah, so that's a very abstract answer, Ma'am, I apology.

Q. I know, but it is an abstract environment that we're dealing with. So TAs, as I understand it, would say that under the MPS for development, for the tier 1, 2, and 3 developments, and I'm using the wrong language now, but, you know, they need water and they need it now, and that's their starting point. It's also their finishing point. What's your response to that?

A. I understand that approach. Some might regard that as an engineering perspective. There is evidence and I am not in any way – I don't want to pitch it any higher than that, other than to say that there are networks, water-supply networks throughout this country that are not in good condition, and that territorial authorities across the country need to address issues of inflow and infiltration and leakage, and so it's not as straightforward as saying we just need more allocation, so it's not easy, and major investments are underway, we've got the three waters process sitting there in the background, not sure whether that's going to be the silver bullet to aging infrastructure, but they are conversations that need to be held in an integrated way.

Q. Mmm, and so the demand for water, and water now, do you see it as being more of the same in terms of approach to allocations over the last 30 years, at least, with this region, which is a disaggregate or unintegrated approach, where consents for taking use are considered quite apart from activities which they are related to, and many land use activities in particular?

A. That appears to be the pattern, Ma'am, and a very strong paradigm. I suppose the other issue around community water supplies is the evidence of how much of what is abstracted is used for the second order priority, the health needs of people, including drinking water and how much is used for other third-tier uses such as the industry, et cetera. So, I mean, it is a very difficult question because there's probably a paucity of evidence around – well, there is some evidence before the Court around

the proportion of some of the community water supplies and how much goes to drinking water and what the condition of their networks is, but it's very hard to create a planning framework around those issues.

Q. All right, thank you.

A. I mean, I understand my learned friend's position, and that of her clients. I don't have a simple answer other than if one reads the national policy statement on its face in terms of those priorities, it's quite clear.

Q. Yeah, yeah. The NPS is clear on its face, but then you also have to bring down considerations under the NPSUD, which is still under development, in fact, both are under development, and that's where you could leave it. You could just let the regional council get on and develop its land and water plan and finalise its RPS, but I'd have to say, it's just in terms of finding an accommodation, and I know it's an accommodation from your client's point of view, but for TAs, we're just left with uncertainty, where water is being used for third-tier and intentionally used for third-tier uses.

A. Well, yes, I mean, that's probably in the same sort of category, it's all around behavioural change, as to whether other sources, other methods, might become viable. It's simply just the abstraction and use paradigm has had its day.

Q. Okay, all right.

A. As the Court pleases.

QUESTIONS FROM THE COURT – NIL

UNIDENTIFIED FEMALE SPEAKER:

Sorry, Ma'am, I just need to – I have a hearing in Queenstown tomorrow, so I'm going to excuse myself.

THE COURT: JUDGE BORTHWICK TO UNIDENTIFIED FEMALE SPEAKER

Q. You should take off.

A. As much as I'd like to be here to support Mr Maw tomorrow with his closing, I'm afraid I can't.

Q. Okay, no, that's fine. Very good. Thank you very much for your participation.

COURT ADJOURNS: 3.07 PM

COURT RESUMES: 3.25 PM

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. Ms Dixon?

A. Good afternoon your Honour, Commissioners, first of all thank you for coping with my wandering around the South Island today. And thank you also to my friends who obviously were able to deal with timetable changes and so on. So here we are, as well as a set of closing submissions, you are going to given a copy of a case. You may recall that last week when we were talking about the priorities question and specifically about section 124, I discussed a number of practical examples where section 124 had been replied upon. There were three cases that were relevant. Mr Welsh gave you two of them and I've now provided you with the third. The third is the Clutha example, and I have tagged paragraph 18 where there is reference to the fact that the Court describes contact has having authority to continue to operate under section 124.

Q. All right.

MS DIXON:

So turning to my legal submissions. I hope they're pretty brief. So starting at paragraph 1. The Minister for the Environment (the Minister) generally supports the proposed shape of PC7 as it is emerging from this hearing. I noted in opening that there was a risk that this plan change attempted to do too much, namely to anticipate the full Land and Water Plan that is to come, rather than providing a transitional framework. In my submission the balance is now about right in what is proposed (subject to a couple of matters that I address below). The controlled activity pathway is incentivised, the noncomplying rule is a tough gateway and the genuine exceptions to the six years default duration can be provided for appropriately.

LEGAL DISCUSSION – SUBMISSIONS NOT DISTRIBUTED TO COUNSEL

(15:28:36)

MS DIXON:

So the issues that I want to address, set out below: scope, the objective, the priorities policy, community water supplies, hydroelectricity generation, and the noncomplying rule. So starting with scope, in his submissions of the 7th of April, counsel for the Otago Regional Council raised an issue as to whether the relief sought in the supplementary planning evidence of the Minister's planning witness, Mr Ensor was within the scope of the Minister's submission on PC7 in respect of a longer duration consent for hydroelectricity generation and drinking water supply. He submitted that an exemption for these activities could not reasonably have been foreseen as a direct or otherwise logical consequence of the relief sought in the Minister's submission. Counsel for ORC, Mr Maw helpfully set out the principles that apply to scope issues in those submissions, and what I done in the paragraphs that follow is basically to pick from those submissions because I don't disagree with anything that Mr Maw said about the principles that apply, and so what follows is largely taken from his submissions, though not in a as fuller version as he provided there. So essentially and I think probably your Honour if I start from, probably from 8.

In giving a decision on the provisions of PC7 and any matters raised in submissions, the Court must be satisfied that there is scope to make any such amendments to PC7. In doing so, the Court must consider whether submissions received are about PC7, and if so, any amendments are within the scope pf a submission such that the Court has the jurisdiction to make the amendments. The terminology used in section 149E(1) of the RMA for a submission to be about a matter is different to the terminology used in schedule 1 of the RMA, which requires that submissions be on the proposed plan. I agree with Mr Maw that the requirement in section 149E of the Act for a submission to be about a matter should not be approached any differently from the approach developed in case law for determining whether a submission is on a proposed change, and the scope of submission should be approached in the same way. So turning to amendments then which are within the scope of a submission, they must be fairly and reasonably within the general scope of an original submission, or the proposed plan as notified, or somewhere in between.

The question of whether an amendment goes beyond what is reasonably and fairly raised in submissions will usually be a question of degree, to be judged by the terms of the proposed change and the content of submissions. And this should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

The Courts have recognised that decision-makers need scope to deal with the realities of the situation and a legalistic interpretation that a council can only accept or reject relief sought in any given submission is unreal. Approaching such amendments in a precautionary manner, to ensure that people are not denied an opportunity to effectively respond to additional changes in the plan making process, has also been endorsed by the Courts. Mr Maw explores this in more detail but ultimately the proposed changes need to be appropriate in response to the public's contribution. So, turning to the relief that is sought by the Minister for the Environment. In my submission, the position taken by Mr Ensor is within scope. It’s just discussed to be within scope a submission must be within the general scope of “an original submission". It does not need to be within the scope of a particular submission. The matters Mr Ensor was discussing, and which will be addressed further were squarely before the hearing in the submissions of Trustpower Ltd in the case of provision for hydroelectricity generation and the Territorial Authorities in the case of community drinking water, both of whom sought durations for these activities longer than six years. Secondly, the relief sought may be amended to reduce the ambit of what is sought. The Minster's original position was that any activity seeking a duration of more than six years be prohibited. As discussed in my opening submissions, the Minster revised that position to noncomplying status and to leave open that some specific activities, properly assessed, may warrant a longer term. The position of Mr Ensor was consistent with that position, had the Minister reversed these positions — started from supporting a noncomplying rule and then sought to amend that to seek prohibited activity status that would indeed have been out of scope as it would have expanded the relief sought, and then, thirdly, the Minister (as well as the local authority and the Attorney-General) have greater flexibility in terms of the scope of their

submissions. Section 274(4A) limits the evidence which may be called to within the scope of the appeal, inquiry or other proceeding. Most section 274 parties face a further restriction in section 274(4B) and may only call evidence on matters arising out of the person's submissions. But the joinder status of the Minister is not subject to section 274(4B). Therefore, the Minister is only restricted by the scope of the appeal, inquiry or other proceedings.

So in summary, the Minister's position responded to additional changes in the plan-making process proposed by other parties and any amendment that may be made to PC7 to provide for hydroelectricity generation or community drinking water as supported by Mr Ensor is already "reasonably and fairly raised in submissions".”

THE COURT: JUDGE BORTHWICK

Q. Now remind me what was the objection precisely, to Mr Ensor by the regional council?

A. Essentially, the expression that Mr Maw used was that an exemption for these activities could not reasonably have been foreseen, as a direct or otherwise logical consequence of the relief sought in the Minister’s submission.

Q. And these activities, that’s hydro and TA?

A. Yes. Mr Ensor’s evidence addressed and in fact the whole position has changed of course since then, and the scope of what’s being sought in relation to hydroelectricity and I think community drinking water has reduced, what is being sought has truncuated somewhat. But what Mr Ensor was doing, was exploring in his evidence a rule that would effectively act as an exemption that would take these two activities, certainly out of the noncomplying status and what is evolved is a rule or a policy framework that will actually provide for those activities directly.

Q. But Mr Ensor himself though, he was seeking to carve out an exemption for hydro and territorial authorities?

A. Yes.

Q. Is that what you were saying?

A. Yes, and community drinking water and hydro.

Q. Yes. It's a different rule to provide for territorial authorities, sorry, community water. Okay, and those would have been noncomplying activities under the original framework, or he was trying to – you can't, don't recall but he was trying to carve out an exemption for them.

A. He was carving out – yes, that was the way in which it was framed, to carve out an exemption for –

Q. And that was not something which was said to, what either arise in terms of the Minister's own submission or in terms of whether it was on the plan change itself, the exemption or both?

A. The criticism was that it wasn't within the Minister's submission.

Q. And your submission is, that it was within the submission of territorial authorities and Trustpower but that the Minister make all evidence beyond his own submission? Is that what you're saying?

A. Yes, that is part of the argument. I think the argument really, is whether or not the questions in scope mainly arise as to whether or not this is a left-field, a side wind that's come from nowhere, that public participation couldn't have foreseen but my submission is that whether it was in the Minister's submission or not, these issues were clearly before the hearing, and, in fact, that's what Mr Ensor was responding to.

Q. And there is no difficulty in principle, with the Minister responding to the submissions of other entities, like for example Trustpower and the territorial authorities, notwithstanding that the Minister himself has not made any further submission in respect of that? So the fact that there's a submission somewhere, the Minister can just simply – no I'll start again. *Any* party can call evidence in relation to a submission made by another party. It doesn't matter whether they made a submission on the same provision or further submission on the same, in response to that other party's submission; they may call evidence? Is that what you're saying?

A. Some parties are a little more limited than that, and that's where the significance of section 274(4B) comes in.

Q. Yes and so for other parties, so who can't prevail themselves of that provision, what then? Because I think we've heard, even this morning that some parties are point to a submission being made by third parties.

They've not made any further submission in support or in opposition to the third-party submission but say, because that submission is made therefore they may pursue the matter themselves? Is that correct?

A. Yes. I think…

Q. I don't know.

A. In terms of, I think the position's different in terms of making submissions and in the calling of evidence. That's where section 274(4B) comes in.

Q. We'll get to 274(4B).

A. But in terms of the ability of parties to make submissions on issues that are before the Court.

Q. Yeah.

A. Then yes. in my submission, people can do that because once an issue has fairly been raised and it is before the Court then the issue is on the table. The rules around scope are designed to ensure that someone doesn't seek something that is, I described it as leftfield, but something that couldn't have been anticipated at all, not necessarily in that particular submission, but couldn't have been anticipated, wasn't fairly raised, and before the Court, which is the, my last sentence, that what Mr Ensor was addressing was already reasonably and fairly raised in submissions and therefore was before the Court, no one was being taken by surprised by a sudden discussion of that matter.

Q. Yeah, and in your submission, it did not matter that the matter was fairly raised, say by Territorial Authorities or by Trustpower, and that the Minister didn't make a further submission. What is important is that it was raised by somebody.

A. And the issue wasn't a matter that the Court was already considering.

Q. Okay.

A. It's a fairness principle that underline the whole basis of scope, really.

Q. But then the Minister has greater flexibility because of section 274(a).

A. He has more flexibility around evidence.

Q. Yep. Okay.

A. Not the Minister alone, but restriction that applies to other does not apply to the Minister and a couple of other significant parties. So, turning then

to the objective, and I'm aware that this discussion has probably moved on even since I finished writing this last night, and that I know that there are, I think, more versions potentially floating around and you may have heard more today, but this is where I with the assistance of Mr Ensor was last night anyway. The content of the objective has been the subject of some debate of this hearing. Of the two versions proposed in the Joint Witness Statement on the 21st of June 2021 of the Planners' panel, Version A was supported by Mr Ensor. In the Court's discussion with the panel last week there appeared to be concern that 10A.1.2(b) of version A was enabling an increase in the scale and duration of take, even with the rider that this should only occur Where the risk of additional adverse environmental effects was low. Ms Dicey discussed possible amendments to the Objective to meet this concern. A revised Objective as described by Ms Dicey and reviewed by Mr Ensor, could be, and I've attempted to take, with Mr Ensor's assistance what Ms Dicey described and then to formulate it, because the issue as I relisted to the discussion was around, I think, the linking of the word "enable" with the matters that are not drafted here in my new 10A1.3.

Q. No. Well, it's apart from enabling, it was the ideal that you could have additional adverse environmental effects, thus your base line environment can be one which is an environment that is over allocated in a sense of water quantity or water quality, or is, as I put to the planners, is an environment which is degraded or degrading, but that we were only interested in if the risk of additional adverse environmental effects is low, you additive that the low risk of additional adverse environmental effects relative to or based on the environment which itself may be called into question. It just seemed to me to be problematic and again this is issue that I put to Ms Dicey and she responded as she did, and the transcript will show that. What if you've got an application, what if your application is to move from an inefficient to efficient irrigation system, thus you're actually reducing historic use – yeah, you're reducing historical use and potentially changing the contaminant profile of your irrigation area. Should those two reductions be weighed against – to secure those two

reductions, the evidence has been, you need to enable irrigators to have a greater area of land so that the move to an efficient system is economic over a longer period of time and so there becomes this trading and balancing off, I thought, where the phrase "additional adverse environmental effects" was problematic. You could well be going – you could well be reducing aspects of the adverse environmental effect from primary sector, taking less of water and undermining at the same time, the Land and Water Plan to come in terms of an allocative regime. In fact, I thought this just opened the door, consenting pathway under a noncomplying activity will for most or many primary sector consent, so it seemed to be huge problematic, no section 32 analysis, and I wasn't satisfied with the response of Ms Dicey, which was, you know, old section 104D, there would be lots of considerations, lots of considerations, it just, the language itself was fraught with difficulty

A. Yes, and she was describing how at least some of the language difficulties could be picked and one of the ways that she suggested was to take inversion A, I'm looking at the joint witness statement, 10A1.2 and separate that out into 10A1.2 and 10A1.3 which would have the effect of disconnecting the word "enable" from B of 10A1.2 which was part of the problem in terms of assessing additional environmental effects and so on.

Q. Well, she might have seen it that way, but I think the greater risk for me was the risk of around the words "additional adverse environmental effects." I did not k now what that meant, and it seemed to be opening up a consenting pathway extensively though a noncomplying activity rule, but actually, the other planners said, on no, this is the setup for community water, for hydro, for RDA, for the stranded assets and for primary sector discretionary, so, in other words it was the setup for the full gamut of relief sought by a number of parties who are wanting to have more than six year durations. That's as I understood their evidence, and I was very concerned that they should have approached the joint witness conference that way, because I thought the Court's directions were clear, but see, you don't need to be addressing me on the language of ensure to enable, you need to be addressing, I think, what could come under the phrase

"additional adverse environmental effects," whether that's now a baseline environment of the existing environment and you're looking at the additive.

A. We had about two versions of that particular phrase last night, in the end, I've stayed it as Ms Dicey expressed it. An alternative way of actually approaching that, that expression would be to say something like, where the risk of further environmental – adverse environmental effects over any that they already exist. It's cumbersome.

Q. But why, yeah why in principle, if – because this won't be the same in all places and everywhere and Otago, or maybe it is, but why, if you've got a degraded or degrading environment would you contemplate an increase in scale and historical use or a long term consents, why are you contemplating that?

A. Well, I think, it's there for the reason you described before, that it provides that additional policy to recognise that there may be circumstances potentially if you could make it through the noncomplying rule where it may be Council's decision appropriate to grant along the consent, and it's at least foreshadowing the possibility of that and putting some parameters around it in an objective sense, there are various things if you are going to do that that you have to ensure are met. Thresholds, baselines, whatever, and one is the question of risk.

Q. Yeah, and I'm well familiar with the phrase risk, my concern though, it is being applied to a base line environment which may be degraded or degraded and it's the additive risk from the baseline, why is that okay? I don't know, and what is wrong, and I suppose the other question for you is, is there something fundamentally wrong with the setup as it currently is in version 9 for the noncomplying activity. You may not get, probably shouldn't under an avoid policy, get more area or increase in historical use or take or what's the other one? Duration. You may not get more of that but there may yet be an activity which is not actually triggering one of those three elements, which should be appropriately considered under a noncomplying activity rule and under the tests.

A. Version B didn't provide to that either though, in fact the way version B –

Q. You don't think version B opens the door for increases and all of that?

A. The issue with version B as I understood the discussion.

Q. Oh, version B for – yeah, no, I didn't like that either, sorry, I didn't like either of them, I thought they were both problematic.

A. Those were the two that we were playing with because the problem with version B is the language around compromising the implementation –

Q. Yeah, like what does that mean?

A. Yes.

Q. It doesn't mean anything, and I think I reflected that back, you would have to be something of an oracle to know what that would actually mean and why would you actually need to say it because the first objective –

A. Covers it.

Q. – surely is actually encapsulating what the outcome should be. So, to be clear, I don't actually like either of them, and I didn't know – I didn't understand properly why these things were even being contemplating. Ms McIntyre for Nga Tahu said, well, you don't really need a version B, if this was the setup for stranded assets, it didn't occur to her that actually needed it, it didn't occur to me that we didn't it, but version A was being supported by other parties who are wanting to set up RDA and discretionary activities as well as arguably something – a pathway through noncomplying. I don't recall – am I right in thinking there's no section 32 analysis of that, of the version A, version B?

A. I can't remember whether the plan has provided one either, in the end, we can go back and check.

Q. And that's why Mr Anderson's objective, and I only like the second sentence, is useful, because it actually then provides a hook to hook in, if I could use that language, to hook in stranded assets, community water and hydro. Those are the exceptions, then I thought it was a nice entre word into that, if that's what the outcome was.

A. Yes. We seemed to have reached the point that I reached in paragraph 20 your Honour actually, which is –

Q. You didn't like it.

A. Just delete 10A1.3.

Q. Delete what sorry? Yeah.

A. Just delete 10A1.3, which is either the A version, B version, which talks about not compromising the implementation.

Q. Oh good, because I thought you were trying to argue for it, I was like wow.

A. Well, no, not for version B. Mr Ensor is –

Q. Not for version B, but even for version A and version B to be deleted, is that what you're saying? Yeah, you are. You're actually saying delete.

A. Certainly, if even the version of 10A1.3 that I provided, which is kind of based on what Ms Dicey was describing, if that doesn't work either because of the problem with additional adverse environmental effects and the very specific reference to increasing scale, and you'll notice that Mr Ensor's suggest was, lets call a spade a spade, we're talking about irrigated area.

Q. Yeah.

A. Lets call it that and or the rate or volume of take, but if those are too precise in fact, too specific for the purpose of this particular limb of the objective, then I agree, we're probably better to lose it all together.

Q. I can foretell all sorts of implementation issues in this ledger.

A. The problem is, this is lawyers drafting and maybe it's not always a good idea, but we swing between the very specific, talking about scale or rate of take and so on, and then terms that become quite loose and quite subjective, like not compromising something or trying to evaluate the risk of additional adverse environmental effects and it's a very difficult thing to actually apply.

Q. Look it is, but I think the question for you though is if you didn't – if you – assuming that Ms McIntyre is right and there's no need to have a setup for the stranded assets in an objective, there wasn't any need to do that, you could have introduced the RDA rule quite comfortably without having that set up or signalling that set up in the objective, then what is – is there something fundamentally problematic with the noncomplying activity rule that needs to be fixed, if there are exceptions. Is there something wrong with that noncomplying rule because that's –

A. No, because I think the way we are approaching, the only two exceptions that really are realistically – sorry, I'd add stranded assets in that, but the two that I'm interested in which are community water and the very limited hydro that we're now talking about are provided for outside the noncomplying rule. That's the way it's developed.

Q. Yeah, and if you're not caught within the exceptions, you're noncomplying and probably not going to – it sounds you probably aren't going to get resource consent if you are trying to seek a longer duration, bigger area, or greater historical use, because they all have the word avoid attached to that, so you should be avoiding that, but if you're not in those three categories, then isn't it just, well, what's the effect to the environment or whatever else it is that you're seeking or proposing.

A. There's been a bit of discussion about that, hasn't there, around section 104D and the fact the void policies are strong, they're meant to be strong.

Q. And they're meant to be strong.

A. So, it's going to be about the adverse effects on the environment.

Q. And so, we do have any – do we have a frustrated gateway, is the gateway test frustrated in anyway with the plans presently as written which of course is not reflecting OWRUG's interest and the interest of others about a deed but that's a different issue. Right now, with this plan, does that noncomplying activity work? There is a –

A. It is a very tough gateway.

Q. It's tough but it is open.

A. I had thought it was impossible. I had thought it was tough and I think that's where the Minister wanted to be.

Q. He wanted it tough. Okay, very good.

A. At the risk of getting into trouble, my next heading is the priorities policy.

Q. Have you been redrafting? You should show this to Maw this or the planners.

A. This was floating around –

Q. This is really funny because I just didn't see – I know we usually send planners away to do their bit without the interference of lawyers, but on this one, I think it's an impossible job, I think it's both a legal and a

planning issue and that everybody had to come together which is why we got the first JWS and the planners said they hadn't actually received direction from their lawyers, we're getting at the end of the hearing we really had to push that one on which is why we referred you to the facilitation of Dr Somerville and not because he had any solutions but just to get the thinking going, and so, what this is really saying – I hope you talked to Mr Ensor about this before you went back into that planning conference, because it's a – both disciplines need to be reflected in this.

A. Yes. What I'm about to talk about – he had been working on drafting as I think everybody had, taking your Honour's words last week, hearing the comments on them and kind of using that as a base and working from there. This was before whatever Ms (inaudible 15:59:15) circulated last night to the planers which they're happy talking about today, but I think it is useful because he's taking these ideas into that planning workshop that they've been holding, but I do want to, before we get into the drafting, I do want to read you paragraph 21. The Minister supports enabling the operation of priorities to continue during the transition period, being the life of PC7. The effect of their exercise in the past has been to create and maintain flow patterns whose loss will have unquantifiable instream effects. This is particularly so where ecological conditions protecting galaxiid species are at stake. The specific places where this is important cannot be known with any certainty but a general approach to maintaining priorities in the interim offers the best insurance against inadvertently degrading the environment further until the new Land and Water Plan.

THE COURT: JUDGE BORTHWICK

A. And just before I go on, I want to pick up on something that my friend, Mr Winchester was talking about before when he said in the context of discussing priorities, that there had been a focus on galaxiids which had developed as the hearing as gone on and of course, that's right. Galaxiids have become the sort of poster child for the instream effects.

Q. Yes.

A. But my point is that it's actually bigger than galaxiids. And we don't have all the information and it doesn't seem that we can have all the information but we do know that flow patterns have created particular circumstances, galaxiids are one aspect of it but we actually don't know what else. But we can know that if we allow those flow patterns to change fairly abruptly, there will be instream effects that we can't quantify and those instream effects are likely, we suspect – we expect to have an adverse environmental effect and we can protect against that at least in the short term. So in my submission, it's wider than the galaxiids' issue. Though that's certainly has where the focus has landed.

Q. Yes and I understand why people have latched on to the galaxiids. But when you say, why did you, did you have anything in particular or not beyond the galaxiids? I mean you just don't know, do you?

A. We just don't know, I think that's our problem but we have – we can contemplate that there are stretches of water which may dry up, if the priorities are taken away or equally may have water – may have flow where there hasn't been flow. That's going to change things.

Q. Okay.

A. In terms of a new policy, again this is Mr Ensor, putting his thinking cap on. He is of the school that says that we need to be clear in the policy what it is that it's doing but he was quite keen to leave the detail in terms of the relationship between the priority holders to the entry condition and to the preservation of control discretion, so he came up with about three versions really which I've included here for the Court's information as I say, this will have feed into, I hope discussions today and I'm sure life will have moved on already. But he was thinking in terms of, the first one:

MS DIXON:

Water abstraction may need to cease so as to ensure supply to any downstream permit holder having priority. The second one, a slight variation on that. When requested, water shall not be taken so as to supply any downstream permit holder, and then the third version, when the application is to replace a deemed water permit that was subject to a right of priority, the

replacement permit shall provide for this priority. That was actually his preferred one.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. Was it?

A. Because it just says what it is, was where he was coming from.

Q. Hold on a sec, let me read that again.

A. And the Entry Condition and the Reservation Control / Discretion are pretty much as we, he hasn't changed those as were floating around last week.

Q. Oh, I see. I don't like that.

A. Setting out the relationship…

Q. No your third policy, just looks as if you can replicate some statutory right in a policy whereas the other two I think are more correctly, attempting to do something that is new.

A. He was aware of that and he was, saying to me, does the third policy raise vires issues in your mind etc? Whereas the other focus on, the downstream, the supply of water ceased, ensuring supply etc.

Q. I'd be disappointed if it came back like that.

MS DIXON:

Yes, I don't, I think that's very unlikely actually, because I think he might be in a class of one on that one, but his thinking was at paragraph 23. The preference is for the detail of the relationship between the priority holders to be addressed in the entry condition and the matters of discretion rather than the policy itself, and he was trying to find an alternative to the problematic reference to "residual flow" which I think we've all accepted is a defined term in the Operative Plan and doesn't have the same meaning as it's used here. I'm not averse to a reference to sufficient flow, it is helpful in ensuring that the priority is only exercised in circumstances where the water's needed and flows are low. But I'm also aware that, and this is from Mr Ensor, other factors than abstraction can also prevent flows being sufficient even when the exercise of priority is occurring.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. You mean when the water body itself is in decline, naturally it's – yes…

A. Climate change or just no rain.

Q. Well it's a hot summer with little rain, that's all I'm thinking of, so it's actually natural. So it's nothing to do with abstraction but –

THE COURT: COMMISSIONER EDMONDS

Q. Well, it might be if there's an intermediate RMA permit.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Could be.

A. We did explore that in questioning and may've got a permit that allows him to take the water. And they're not bound into any priority system.

Q. But then they, surely when they were getting their consents granted had regard to the impact or the effect on the…

A. One would hope so.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. One would hope so.

A. I understand that the desire to link to sufficient flow is to ensure that the exercise of priority is not being done, where it doesn't need to be.

Q. Yes. Well that's right, it's both the language in the old Act and it's sufficiency, I don't know, just seems the need to be in plain English really. Everybody, I would think that the downstream farmer would know what a sufficient flows means in terms of he or she able to take water, to meet all or some of their needs?

A. I think they're back working with…

Q. I couldn't think of a better word. Looked at the thesaurus and I just couldn't come up with a better word than "sufficient". Yes, it needed to in a sense lack precision because this isn't a precision instrument where we were saying or even suggesting – remotely suggesting that a residual flow should be figured out and formally adopted for each of these consents. Wasn't like that, we weren't suggested that.

A. In terms of a question that I think your Honour asked last Friday and I'm at paragraph 26 now, as to whether this should be a replacement of the sub-para (e) or a standalone policy, from a drafting perspective, it would seem simpler for it to be standalone.

Q. Yes.

MS DIXON:

Right, turning to the question of community water supply, the two exceptions if you will, that were flagged by the Minister at the beginning of this hearing. Counsel for the Territorial Authorities has submitted in closing that under s 130 of the Local Government Act 2002, a territorial authority has an obligation to provide water services which includes water supply. Water supply is defined to include the provision of drinking water. Counsel for the TAs also points to the relevance of the National Policy Statement on Urban Development 2020 to the urban environments within the region and to the National Policy Statement for Freshwater Management where drinking water is a tier 2 priority under the NPSFM Objective. These provide guidance as to how community water supplies should be provided for under PC7. I agree with the general thrust of the submissions of counsel for the TAs. The combination of the Local Government Act and these national policy statements mean, in my submission that there is an obligation on territorial authorities to deliver drinking water. The changes that have been recommended by Mr de Pelsemaeker in his evidence in reply and in the 7th Joint Witness Statement, allow for the granting of replacement consents with a greater rate of take and volumes that exceeds historical use. However, these are still to be short term consents and Mr de Pelsemaeker conceded last week under cross-examination that effectively the territorial authorities are being asked to put future development of necessary water delivery infrastructure on hold until the LWRP has been promulgated. In my submission, that's not an appropriate outcome of PC7. Therefore, and therefore Mr Twose's proposed 10A.3.IA.2 or to similar effect, because I understand this rule is still moving. I think perhaps it happened this morning, I'm not sure, Ms Irving is looking again at the content and shape of that rule.

THE COURT: JUDGE BORTHWICK

Ms Irving was to come back to us at lunch time or after lunch time, so we'll probably go back to Ms Irving to see what her client's instructions were.

MS DIXON:

Right. But the concept is supported with the provision that consent duration expires on later than 31 December 2025, and in that sense, I think we have moved quite a long way from the beginning of the hearing when a limited consent duration of that kind as I recall was not under contemplation. So, it's not six years, but it's certainly not 35 either. A much more limited period than that. So, turning to hydroelectricity generation. The second activity that counsel has previously suggested needs some special provision is hydroelectricity generation given the National Policy Statement for Renewable Electricity Generation, and in particular, the focus In this hearing has been on the replacement of four deemed permits held by Trustpower as part of the Waipori and Deep Stream Schemes. While Mr de Pelsemaeker in his evidence in reply states that he remains of the view that new and existing hydroelectricity generation activities should remain limited to six years until the new plans comes into force, he also provides a backup option in relation to these deemed permits. The backup option is a discretionary activity rule that would limit the duration of these replacement consents to 2035.

In closing, counsel for Trustpower has accepted limiting its relief to these four races, again, at the beginning of the hearing we were talking about something much or potentially much bigger, but suggested that a term to May 2038 be provided for, as has been sought in the applications already lodged. The significance of 2038 is that that date aligns with the renewal of the wider Waipori Scheme consents. It is unusual for a planning document to include provisions specific to certain assets as proposed by Trustpower and accepted by Mr de Pelsemaeker but in this instance in my submission, it is an appropriate course. It limits the rules in particular to matters on which the Court has heard evidence, and it provides certainty as to the scope of the rule. Counsel has reviewed the reasons Trustpower offers in its closing submissions for why a longer consent

term, three years longer, should be available for these consents. As counsel for Trustpower notes, longer consents may not be granted. The status sought is restricted discretionary and therefore Council has discretion to decline following a merits assessment. The proposed rule which is now Annexure C as provided to the Court in Trustpower's closing on the 1st of July, we need to get the dates right because I know it has moved. That rule is supported.

The scope of the exception is limited and providing for the replacement consents to expire in 2038 rather than 2035 as Mr de Pelsemaeker accepts will sync the consents, and enable Integrated management and an assessment of the schemes as a whole, which in my submission is an important consideration in terms of RMA management, and again just to address a comment to Mr Winchester's comments, he talked about, I think in response to questions, he talked about the uses, and I think he was probably meaning volumes, being very significant in terms of why he thought hydro should not be accepted in the way that I have just accepted, and the focus of his concern is of course that we are locking in hydro generation on a scale in a way that is inappropriate for PC7. In my submission, because the relief the Trustpower is seeking is so very contained now, just the four deemed permits, and really three years longer than Mr de Pelsemaeker was willing to support, and has the advantages of brining together, as I said, integrated management in the way that is efficient but also enables the effects to be properly considered that warrants the exception that's being sought, the limited exception that's being sought, and then the last thing I wanted to address you on is the noncomply rule and really to say what I said just a few moments ago. I noted in opening that the intent of PC7 was a narrow plan change with a framework intended to operate as carrot and stick. The controlled activity rule, the carrot was created to provide applicants with certainty and to be a relatively easy gateway, the quid pro quo for which was a short-term consent. For those who wished to pursue a longer-term consent, the bar was set high. I submitted that the noncomplying rule needed to be tougher and counsel supports the noncomplying.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. Right, and so we don't have to turn our minds to Mr Ensor's quite detailed policy in support of a noncomplying activity rule, I think, that he gave in evidence.

A. Mr Ensor?

Q. Yes, Mr Ensor. He had, I can get it up in front of you, but he had quite complex – I don't think it was the rule – he had quite a complicated policy, I thought, supported a noncomplying activity rule, or it could have been just complicated noncomplying activity rule which required decision makers to look back at te Mana o te Wai and a whole heap of other things, so we don't need to be concerned with that now.

A. In my submission though, I think we have dealt with the key things and the framework, more or less, is now sitting before the Court.

Q. And that framework is more or less articulated in the ninth JWS, and to the extent it's not, it's dealing with matters such as Mr Page's relief that he's seeking, but more or less, the Minister is on board with the ninth JWS and where the provisions have got to.

A. Yes.

Q. Yeah. All right, that's really helpful.

QUESTIONS ARISING – NIL

THE COURT: MS BORTHWICK TO MS IRVING

Q. That does actually take us to you, Ms Irving. You were to get your client's instructions and come back to us.

A. Yes, and I have been doing that. I'm just waiting for one of the Councils to come back to me and I was planning on jumping on the phone when Ms Dixon finished. I have circulated where I got to in drafting up the options that we had discussed yesterday to Mr Maw in his mailbox, so I've had the opportunity to review that and so far the instructions that I have received are outline is finding favour with the Councils, so there's just one more of them that I need to touch base with, but I'm anticipated that those instructions will align, and I've got a memorandum drafted up to file as soon as I've confirmed those.

Q. And did you get that wording through to the Regional Council Friday?

A. Yes, I did.

Q. And has that wording been checked by your planner?

A. Yes, I have talked it through with Mr Twose.

Q. Has he seen the wording?

A. Yes, he has. Yes, so I put something together, sent it through to him, before I circulated it to the Council, so he has had input on that.

Q. Okay, right, so what do we need to do with your – Council doesn't give instructions.

A. Can I answer that question if that's a problem?

Q. Well, they've got to get instructions before Mr Maw gets on his feet tomorrow, don't they?

A. Yes.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Mr Maw, have you got any thoughts about that?

A. I have a view in terms of what the position that's going to be advanced by the Council tomorrow –

Q. Okay.

A. – which doesn't necessarily require the final position

A. from the territorial authorities to be confirmed.

Q. Yes.

A. It may well be in, if instructions are to be confirmed, we may not be that far apart but in any event I will be pursuing the relief which the regional council seeking in the context of community water scheme.

Q. Okay.

A. So I'm happy too…

Q. So you're not particularly prejudiced, you've got an answer if you like? Yes. Okay. Well you should chase. I mean I know what it's like being stuck in a hearing. So, no you should chase away and let us know at nine-thirty what the story is but at least four councils are in favour of that. I mean that much you can say. Yes. Thank you. That leaves us with priorities unless you wanted to talk about something else?

A. I did, I wanted to talk anybody the starting time tomorrow.

Q. What time would you like to start?

A. We've got a fair to do and also a fair bit to print in the morning. So a 10 o'clock start would just give us a little bit more time.

Q. No that's fine. How long do you think you're be on your feet?

A. Realistically tomorrow we've got two things to do. We need to potentially hear back from Mr de Pelsemaeker reporting back from the conferencing. Now just on it, I haven't yet seen what has been delivered or whether I just don't know.

Q. Have you got something from him?

A. I had an email, haven't actually read it. Can only do one thing at a time.

Q. Yes.

A. Well there's a joint witness statement being circulated amongst the experts at present, my understanding had been that Mr de Pelsemaeker would report back and essentially present the outcome of that joint witness statement.

Q. We want to see it before he does and then it's just not fair to the Court to do anything other than that.

A. Quite. So we'll file that as soon as it lands and then…

Q. He'll be landing it tonight because there was meant to be something in tonight.

A. But I think that's certainly the – it is drafted I – it's been circulated as Ms…

Q. So you're just waiting on signatures?

A. Perhaps.

Q. Hopefully.

A. Hopefully. So it certainly will be filed, was my understanding. So that will obviously need to be considered and then in terms of how we deal with that tomorrow, again it actually depends on the content and I don't know what they've said so it maybe beyond or different to the provisions that I certainly have in mind and that – from a lawyer's drafting perspective, I had thought might be appropriate. So there is at least a set of provisions that I was minded to pursue but still I'd like to understand if there are some

issues with those and for transparency we've circulated that drafting to the planners for consideration.

Q. And everybody was happy with what you circulated or – I mean to it's both as I said, both legal and planning. Yes.

A. Yes. And there's then potentially two ways to go about that, I could address what comes out in legal submissions from a drafting perspective but I say that subject to the caveat I don't know whether they've strayed a long from that which I was otherwise going to pursue in closing. So I need to actually see what's been landed.

Q. So do you want an 11 o'clock start?

A. Probably would help. Now let me just think.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. Will you get through everything if you do that?

A. I think we will get through everything tomorrow. Realistically closing submissions I had in my mind, an afternoon would be plenty so three hours' worth and realistically just thinking about that in terms of the core or the key topics – the case for plan change 7 and the national policy statement for freshwater and its inter-relationship with other national policy statements. Then got the issue of priorities, then community water schemes, hydroelectricity generation and in relation to those two topics I can signal that there will be some further lawyers' drafting in relation to how the provisions can be accommodated in terms of –

THE COURT: JUDGE BORTHWICK

That would be good, Mr Twose has got some really good thinking but it's not nailed.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. It's quite confused.

A. He does but it's and I should signal that whilst what Ms Irving has sent was a helpful starting point there's certainly been some adjustments made to that for reasons I will explain in the submissions tomorrow. So, I'll need to step through that drafting.

THE COURT: JUDGE BORTHWICK

There needs to be a lot of adjustment to what he had, it was problematic, but, yep.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So, might that be available ahead of time so we could do some homework.

A. That's a good question. We are –

Q. It would be very helpful.

A. We could file that so it's available perhaps first thing in the morning.

Q. Well, that would be perfect.

A. And I should signal also the objective in terms of the version of the objective that some of my learned friends are referring to that I'm likely to pursue. I have a version of that, so that's the essentially the Forest and Bird addition to objective 2 in directive language covering the exceptions. I'd be happy to circulate that in advance as well, so you can at least have a chance to think about that and ask –

Q. So, anything major that's being done, that would be helpful. What about the schedule? Because there were some issues with that.

A. Now this is the schedule 10A4.

Q. Yes. It might have looked minor but actually some of those things were a bit more substantive in terms of what subject ascertaining what it is your doing.

A. So, my understanding is that the – there's a separate joint witness statement coming with that information in terms of, I'll call it the tidy up and the explanation for what I've described as inconsistent use of phrases as to whether that was intentional or not. My understand is it's not contentious as it is between the planners and technical experts in terms of matters of clarification or drafting for consistency, and there are a number of matters to be picked up. The focus has been on priorities today. There is a draft on the refinements, the close proofread, et cetera, it may well be that that may not be ready immediately in the morning. We'll do what we can on that but it may be that that document can be

simply taken as read for what it is if it's dealing with matters of consistency and there's an explanation. Again, we actually see what it says, there may or may not need to have a witness further explain that which it says. Which brings me back to what we do with drafting and what we do Mr de Pelsemaeker in the context of the joint witness statement for priorities. I think all we can do is await the outcome and then we reconvene in the morning, a decision can be made as to whether the Court would be assisted by hearing further explanation from Mr de Pelsemaeker or whether we simply proceed with the legal submissions and deal with drafting through the lens of those submissions.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Well, he should come and attend court, certainly, he's available for the Court's and anybody else's questions.

A. Yes, sure.

Q. Yes, so, we'll leave it at that.

THE COURT: COMMISSIONER BUNTING TO MR MAW

Q. Sort of begs the question, god forbid, is tomorrow enough time to do it all.

A. I've made a number of suggestions that will be finished tomorrow.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. We should be.

A. We should be. I mean, if matters arise that need further consideration, that will be what will be, but I certainly anticipate being able to get through the closing submissions and deal with if we need to call Mr de Pelsemaeker. I mean if he started at 11 and we took an hour or an hour and half with him, that would leave the lunch break, 12.30 to 1.30, then the rest of the day through to 5 for closing submissions, that ought to be sufficient time.

Q. So, the Court has it, the Court can analyse it before talking to Mr de Pelsemaeker and then the question for you, well, cause you're getting it for the first time as well in a sense, whether it lines up with your legal

understanding and legal direction or whether something else spun out of the conference.

A. And that – we'll just have to wait and see. It might or it might not, but in any event, in terms of drafting, we will get through to the Court the drafting that will be attached to our legal submissions as soon as possible, so that you can actually look at provisions.

Q. Yes, so, then you'll be providing us a copy of what you said they ought to be considering?

A. Yes, it may even go – be refined further. If for example, today, they've said, actually we like what you did but we'd recommend changing this bit and this bit. I may say, hadn't thought of that, so therefore I agree. Might be that set of provisions but what I'd like to, optimistically be able to do is attach to the submissions the version of provisions the council is ultimately pursuing and hopefully it lines up with what's come out of the…

Q. What's come back out of it?

A. Yes.

Q. Okay. Yes. Well I can't see any difficulty with that. I know that we let planners draft policy but this is really unusual because it has quite a legal content.

A. Yes.

Q. And so I think it is the joint disciplines.

A. Yes. And in terms of having the sort of, looking back on the last couple of weeks, trying not to interfere in the process in terms of understanding what the problem that the planners were trying to solve and understanding in a sense what their key elements were that they were trying to bring through, I think the earlier processes in drafting have really assisted with that. It's then a question of well, how do you actually draft it and I accept drafting is a – that's both a dark art but a mixed discipline art.

Q. No that sounds all good to me. So I'd be quite comfortable the fact that it is both disciplines, it's not that legal counsel should have had quite a – I think on this occasion quite a strong direction into that framework for the planners to draft. But it's not to say lawyers can't draft, of course they

can. Right, very good. So 11 o'clock for a start but if could get those documents ASAP to us, I guess in the morning that that means about eight o'clock, that's when we're starting. Most of us would be here by eight o'clock and we'll have those printed off and we'll just start work of reviewing and so. Yes.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So we're happy if you drip feed them if that's more efficient than trying to get the whole nine yards together. I know, we'd rather not be sitting here twiddling our thumbs we'd rather start work.

A. You'll most certainly have things to start at 8 am and yes, if the whole package is not there by then, we'll certainly most sure that which is ready for consideration has been sent through.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So that's to provide us the JWS which hopefully is all signed but it's also to provide us, I guess, a short memo or something, the relief that council is or the provisions the council is pursuing in relation to priorities. So we'll have both and compare and contrast to see if there are in fact any differences. Yes.

A. And the version of the objective and the rules and changes to the policies to accommodate the council position for community water supply and hydroelectricity generation.

Q. Very good. And just apropos next week, when we start to climb into the decision, what would be really helpful is actually to get those plan provisions in a Word document.

A. Yes.

Q. I've been wrestling with the –

A. The conversion software to PDFs which –

Q. – converted and it does cut and paste really well and we're starting to type out everything as we go. So it there was a possible to get that in a Word document that would actually just be a my PA, a rather large task.

A. What I had hoped to be in a position to do but I suspect we won't quite be there is to have a Word version showing the notified version of the plan

change and then the changes being pursued by the council tracked into that as a Word document.

Q. Yes.

A. And it just maybe that might need to follow later this week.

Q. That's fine, absolutely fine. As long as it does follow and then that is one task that I don't need to attend to.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. It's the most painful part of things if we don't get that.

A. Yes and I think as part of that we'll also just send through a clean copy of the notified version as a Word document because ultimately if the Court agrees the case is made out, there may be some other matters that need to be added in.

THE COURT: JUDGE BORTHWICK

Well, that's right, because there is a number of parties who, not necessarily OWRUG or Fish and Game today but are making proposals which are worthy of consideration, so we have that in the frame but there's other parties as well. We'll put in the formatting that we need. Yes.

COURT ADJOURNS: 4.34 PM

COURT RESUMES ON TUESDAY 7 JULY 2021 AT 11.16 AM

THE COURT: JUDGE BORTHWICK

So, we've had a chance to look at the three matters which have come in this morning in fact, 4 o'clock this morning, which we shouldn't be working this late, but anyway, but we only had a look from 8 o'clock onwards, and there's quite a bit of material there, and so what we did was, I tackled priorities, Commissioner Bunting tackled the schedule, and Commissioner Edmonds had a good look over the community water supplies, and so we haven't particularly and in detail reviewed each other's work, and aside from reading what it was that was filed this morning, beyond those areas that we've been working on, we haven't had a chance to consider in detail those other subject matters, so, it is the case that we do have questions, and some of those questions are not just stylistic or editorial matters, but are matters going to substance. So, it may well be that counsel also have questions, but if we can't get a satisfactory resolution today then we can do one of two things, we could issue interim – three things probably, we could have everybody back tomorrow and just work through the issues that we see are being thrown up so that we are in the best chance possible to release a final decision on this plan change or alternatively we could release an interim decision or alternatively we could do some drafting back in chambers and then release that and ask for parties to comment on it, which is not quite akin to an interim decision, but what we're driving at there is that we would – that some of these matters are of such important that they do go to the rejection or otherwise of the plan change, particularly priorities, and go to substantive relief, particularly in relation to community water supplies, and we would far rather the parties put their best foot forward, then simply have the Court reject their relief or reject the plan change when if given more time and with the advice of counsel they could have got the drafting over the line. So, we're trying to put you in the best position as we possibly can. So, that's the broad comments that I have in relation to that.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, how do you want to handle today? We've got two-day JWSs coming back.

A. Yes, I thought we might first hear from Mr de Pelsemaeker in relation to each of those joint witness statements.

Q. Yep.

A. And it may well be that he becomes the recipient of the first round of questions in relation to the drafting.

Q. Yep.

A. And he will able to assist where he is able to, and so far as my learned friends have questions in relation to the content, I rather expect I ought to be given an opportunity to ask questions.

Q. Sure.

A. Our closing submissions are ready to be given, acknowledging that they were drafted through the lens of the provisions as they then stood.

Q. At 1 o'clock this morning.

A. Yes, and that may well – but, in essence, the substance of those submissions doesn't – that's unlikely or won't change if the drafting continues to evolve to achieve the outcomes which those submissions are drafting at.

Q. Okay.

A. So, I'm still minded to give those submissions today.

Q. Yep.

A. And then I think we just see where we get to in terms of drafting in terms of the three options that you have identified.

Q. Very good. Okay. So, we'll have Mr de Pelsemaeker back and Ms King, I think, is she coming to?

A. That's a good question. Yes, she is. Yes, and perhaps just as they are coming up, I could also signal that the provisions that were circulated, you may recall, had a schedule for the hydroelectricity generation assets of Trustpower. There is an additional matter – or an additional row to be added to that schedule with respect to the application for the deep stream enhancement, and that was inadvertently left off that table.

Q. Has it been on a previous table?

A. I suspect this is the first iteration of the table, but Mr Welsh has helpfully pointed out that that's an addition that needs to be made. So, we have

an updated version of that, but I just thought I'd flag that now. If it would assist, I'm happy to hand up that –

Q. It's probably – yep, good that we have everything in once place.

A. And you'll see with that document just handed up on the very last page, there is tracked in in blue, reference to deep stream and the map preference.

Q. Okay, great.

A. Evidence was given by Ms Foran, I understand, in relation to that enhancement project and a consent application as I understand been lodged for it.

Q. All right, so we'll uplift the document filed at 11.22 am on the 6th of July to the website rather than the document filed earlier this morning. Right, good. Right.

MR MAW CALLS

MR DE PELSEMAEKER (AFFIRMED)

MS KING (AFFIRMED)

Q. Mr de Pelsemaeker, can you confirm your full name for the record, please?

A. **MR DE PELSEMAEKER:** Tom Willy de Pelsemaeker.

Q. And do you confirm that your qualifications and experience were set out in your evidence-in-chief filed in relation to this matter?

A. **MR DE PELSEMAEKER:** That's correct.

Q. And you participated in joint witness conferencing on experts and planners in relation to miscellaneous minor amendments and smaller hydroelectric generation schemes, and produced a joint witness statement dated 5 July 2021?

A. **MR DE PELSEMAEKER:** That's correct.

Q. And you were identified as the person who might usefully report back in relation to the content of that statement?

A. **MR DE PELSEMAEKER:** That's correct.

Q. Do you confirm that the evidence that you are about to give is true and correct to the best of your knowledge and belief?

A. **MR DE PELSEMAEKER:** Yes, I do.

Q. And do you also confirm that you participated in expert conferencing for planners in relation to deemed permits and associated rights of priorities?

A. **MR DE PELSEMAEKER:** That's correct.

Q. And that conferencing took place on both the 2nd of July and the 5th of July.

A. **MR DE PELSEMAEKER:** That is right, yep.

Q. And a joint witness statement was prepared and signed by all participants, including you.

A. **MR DE PELSEMAEKER:** Yes.

Q. And again, you were nominated as the person to report back in relation to that joint witness statement.

A. **MR DE PELSEMAEKER:** Yes.

Q. Ms King, can you please confirm your full name for the record?

A. **MS KING:** Alexandra Lucy King.

Q. And you have set out your qualifications in experience in your evidence-in-chief to this matter?

A. **MS KING:** Yes.

Q. And you participated in the expert witness conferencing of technical experts and planners on the 5th of July relating to minor amendments and smaller hydroelectricity generation schemes?

A. **MS KING:** Yes.

Q. And you were a signatory to that joint witness statement?

A. **MS KING:** Yes.

Q. You also participated in the joint witness conferencing planners in relation to deemed permits and associated rights of priorities?

A. **MS KING:** Yes.

Q. And you are a signatory to that joint witness statement dated the 5th of July 2021?

A. **MS KING:** Yes.

Q. And do you confirm that the evidence you're about to give is true and correct to the best of your knowledge and belief?

A. **MS KING:** Yes.

MR MAW ADDRESSES TO JUDGE BORTHWICK

Q. Now, you Honour, I thought we might start with the technical joint witness statement in relation to the minor amendments.

A. Yep.

Q. Now, the Court has read, as I understand it, this document, do you or would the Court be assisted in a summary being given or are you happy to proceed to questions from my friends?

A. Straight to questions.

Q. Does anyone have any questions in relation to this joint witness statement? No questions, so everybody is entirely happy with the drafting?

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Ms Irving.

A. I am interested in asking some questions around the drafting of the community water supplies.

Q. So, you know you're dealing with just the schedule at the moment – we are dealing with the minor amendments to the schedule.

A. Sorry, I don't have any questions about that.

Q. No questions. Okay, anybody else got any questions about the drafting of the schedule.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Mr Winchester, you're looking pained.

A. Yes, I'm just trying to get my bearings in terms of the documents, Ma'am.

Q. Yeah, sure.

A. And I don't want to make the same mistake in terms of whether I'm asking about the correct documents, and so this is the JWS on miscellaneous matters, Ma'am.

Q. Yeah, minor amendments, it looks like it's called.

A. Miscellaneous minor amendments, 5th of July.

Q. Yep.

A. Yes. Okay, just a couple of matters with your leave, Ma'am. So, if we're looking at policy 10A – well, actually Ma'am I'm just thinking, I probably –

so the miscellaneous minor amendments are only the matters in yellow, aren't they?

Q. I think the miscellaneous minor amendments are in particular, the schedule and it might be the matters in yellow, that's probably more to do with – just focus on the schedule, I think.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Is that right, Mr de Pelsemaeker?

A. That is almost correct. There is one minor change that we have proposed, which is to the definition of take cessation condition.

Q. Oh, that. that's nothing to do with deemed permits though is it?

A. That is nothing to do, this is only minor –

Q. Yeah, it came in earlier, yeah.

A. This is only changes.

Q. Yeah.

A. But other than that, all the recommended amendments relate to the wording of the schedule and it is indeed highlighted in yellow. It would also be perhaps good to point out that the base text for the plan change document was, the plan change as it was included in the last or the previous JWS, I have not used the version that I recommended in my evidence of reply, for the simple reason that the other expert witnesses – well, it's not fair on the other expert witnesses to use that.

Q. So, would that be like the ninth version, I think.

A. That's correct, yes.

Q. The eighth being priorities, the ninth being other matters.

A. Yes.

Q. Okay.

MR WINCHESTER TO JUDGE BORTHWICK

A. Well, that being the case, Ma'am, I don't have any questions on those matters highlighted in yellow.

Q. Okay.

A. I did have – I guess I can signal some questions on activity status and for the hydrogeneration carves out and potentially the community water supply stuff.

Q. Yeah.

A. But that – I'm not quite sure when that pops up.

Q. We'll get there.

A. Yes, thank you Ma'am.

Q. I mean, we've got questions too, so that's – yeah, we'll get there. Nobody else has got questions on the schedule? No, we'll go straight to Commissioner Bunting's questions.

THE COURT: JUDGE BORTHWICK

Q. So, what we're going to do is, the time available, which is not a lot of time this morning, we'll though up our edits, court's edits, and you can have a look at those while we're talking, so this is the schedule.

THE COURT: COMMISSIONER BUNTING TO MR DE PELSEMAEKER AND MS KING

Q. I don't think they've got page numbers. So, can you scroll down to a heading which says "10A.4 schedule." It's quite a long way through. The first – it was mainly to do with some of terminology that we've used and the consistency of the terminology.

A. **MR DE PELSEMAEKER:** Yes.

Q. Under 10A4.1. In the second line it talks about maximum rate of take and caps, and if you've got your version of it there, I'm sorry…

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER AND MS KING

Q. So, we'll just move on from this subject, we'll give you a track change, so you actually see what the changes are that the Court's actually suggesting.

A. **MR DE PELSEMAEKER:** Yep.

Q. But we'll come back to that shortly. We'll have to edit the document again. Okay, now moving on to – so, what we're going to do is we're going to

move to community water takes, I think, in particular, or hydro, community water takes and hydro, and these are the changes which I think are changes which the Regional Council's now supporting and are changes which are outlined in a document entitled "OIC position on objective 10A1.1 and 10A1.2 community water schemes and hydroelectricity generation." So, we'll just move to that because we have concerns about the drafting there, but as may other parties, and as has been indicated by Ms Irving and by Mr Winchester, they do.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. How do you want to handle that? Because now I've got a storm of JWSs in front of me, what you've proposed here is not in any JWS.

A. Correct.

Q. Good. All right. So, I don't know. You might need to lead it through your witnesses, maybe, they don't like your drafting. So, we might not actually go with it.

A. It's entirely possible. These would ordinarily have been attached simply to our closing legal submissions, and I may have received the questions, so I'm not suggesting that Mr Winchester might ask me some questions, but I'll ask Mr de Pelsemaeker.

EXAMINATION CONTINUES: MR MAW TO MR DE PELSEMAEKER

Q. Have you had an opportunity to read the recommended changes for the community water supply schemes and the hydroelectricity generation schemes?

A. I have had a chance to look at those, yes.

Q. And are you in a position to answer some questions from my friends in relation to those provisions as far as you're able, given that you didn't necessarily hold the drafting pen for the entirety of the preparation of these conditions, provision?

A. Yeah, I'm happy to assist however I can.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. Very well. Now, your Honour, are we also dealing with the objective, or did you want to deal with that separately to CWS?

Q. No, we'll deal with the objective at the same time. Yeah.

A. Very good, so the entirety of this document.

Q. Yeah, mhm.

A. In terms of, do you want me to lead some evidence in relation to these provisions, or just hand over to some questions.

Q. No, yeah, I mean, firstly – sorry, I had my attention somewhere else – do we know whether or not Mr de Pelsemaeker and Ms King have sighted the documents, and are they in support of the documents? Probably should get that out first, particularly, also, in relation to the implementation side of things, how easy is this? Ms King's comments are, in fact, really important, and then ascertain whether or not they would make any other drafting amendments, and then I think we can, and if they are in support of it, they have to give us reasons, and presumably, that would be with an eye on s 32.

A. My suspicion is Ms King won't have had eyes over this document, so she's unlikely to be in a position immediately to answer questions, but Mr de Pelsemaeker might well be.

Q. Okay, well, what we could do – do you want to handle that? Because Ms King is really important. As you know, it's policy plus consenting together make a plan change, or a plan.

A. I wonder whether the way forward is for Ms King to hear Mr de Pelsemaeker's planning response in explanation in relation to questions, and then perhaps she may be asked some questions, either in terms of having at that point had a chance to hear the questioning and some of the explanation and assist where she's able.

Q. Yeah, she can then have – we'll give Ms King time for quiet reflection and then have her back on the implementation side. Yeah, okay.

A. So we'll start with questions for Mr de Pelsemaeker.

EXAMINATION CONTINUES: MR MAW

Q. Now, Mr de Pelsemaeker, you've had an opportunity to consider these provisions, and I want to start with the objective. The objective differs form the objective that you had recommended in your most recent reply evidence in that the objective 1.3 that was being pursued, it was no longer being pursued, but rather, the limited exceptions to be provided for have been incorporated into objective 1.2, and in relation to objective 1.2, there are two categories of changes. The first is that in the first sentence, there's reference to a six-year period. Now, you may recall that you had recommended a definition of transition period in this objective. That's been replaced, rather than having a definition, simply referring to the six-year period for the life of the permits, and then the second change is the addition of the second sentence, which commences: "With any increase in scale," which captures the limited exceptions within the policy and rule framework for stranded assets, community water supplies, and hydroelectricity generation. Now, have you any comments to make in relation to that drafting, and are you able to advise whether you agree with the drafting or otherwise have concerns with that drafting?

A. In terms of the reference to an additional six-year period, I think that's pretty well aligned as to how we define the transition period. We defined it to make clear that the transition period is not the same as the interim period between now and the plan becoming operative, but I think the wording, as provided, achieves the same, so I'm pretty comfortable with that. In terms of the second part of suggested objective 10A.1.2, it is more directive than the version that we have put up. It's very specific, it almost reads like a policy, but, at the same time, it does reflect very accurately what's in the policies, so I don't think that it causes any problems at all, yeah.

Q. So when you say doesn't cause any problems in that context, it doesn't have the effect of weakening the policy provisions that follow?

A. I think, on reflection, it probably does the opposite, because it almost mimics what's in the policy, whereas our objective was a little bit less specific.

THE COURT: JUDGE BORTHWICK

Q. When you mean "our objective was less specific," you're referring to version B objective in the 9th JWS, or something else?

A. Correct, version B, and, in particular, the last objective, objective 10A.1.3, because, from recollection, there was no reference made to specific land uses in there, so in that sense, by bringing in a reference to viticulture and orchards and community water supplies, you almost narrow it down.

Q. And perhaps one of the consequences of that narrowing is that the noncomplying activity pathway is not broadened in the way that the previous version may have allowed for?

A. Correct.

Q. Are there any other comments you wish to make about the object before we move on to the policies?

A. No.

Q. Okay, so tracking through into the policies, the substantive changes that have been made with respect to each of the policies relating to, in the first instance, community water supply schemes, and in the second instance, hydroelectricity generation schemes, and, looking at, in the first instance, the community water supply schemes, and I'm at policy 10A.2.2, an exception to the six-year term has been provided with respect to community schemes identified in the schedule, to a limited class of schemes, on which the Court has heard evidence. There's also reference to a consent expiry date of 31 December 2035, so in essence, a 14-year consent term, which will still fit within the life of the Land and Water Plan to come. There's also a condition requiring water – I shouldn't say a condition, there's a policy requiring the provision of a water management plan, and that term has been defined in terms of what is anticipated to be included in that plan, and that definition is set out towards the back of the document, and third, and perhaps this is where the policy may deviate which the Territorial Authorities were pursuing, there's a requirement if a longer duration than six years is sought to assess the adverse effects on the environment, including any consequential effects of the end use of the activity. So, that's been brought into the policy and also reflected in

the rule. Similarly, for hydroelectricity, there's an exemption to the six-year term, only relating to the schemes set out in the schedule. The expiry date, 31 December 2035, and again, a full assessment of effects associated with the duration exceeding six years is required. Perhaps, the final observation, the policies have separated into their constituent parts, as in policy 2.2 is applying only to duration for new applications. So, new applications for those activities remained to be considered under the operative plan and in relation to the third policy that's relating to the replacement of existing consents or permits, again, with the carve outs with respect to community water supply and hydroelectricity generation assets included in the schedules. Are there any observations that you wish to share in relation to those policies that have been recorded in the document?

A. Yes, a few comments. In terms of the consent expiry date, that aligns with my thinking which, and I think I explained that last week as well when presenting my evidence in reply, where a longer consent duration is given, my preference would still be to have those activities reconsidered within the lifespan of the plan. So, I'm comfortable with that. The reference to water management plan in relation to community water supplies, from recollection, that reflects, or the definition of that term reflects what was presented, the drafting that was presented by Mr Twose, which I thought was a good addition, and also, the reference to the need for an assessment of environmental effects, that addresses my concerns, my initial concerns with the relief that was initially requested by the community water supplies. I think where a longer-term duration is sought, in this case, up to 14 years, I think it is appropriate to do an environmental effect of the take as well as of the use of that water. So, I am pretty comfortable with the provisions in, both provisions in policy 10A22. My only question with regard to policy, 10A23, is whether there shouldn't be a reference in the B part to include a reference to the requirements set out in policy 10A.2.2.2. Sorry. What I'm trying to say is are there, perhaps, any issues with the drafting?

THE COURT: JUDGE BORTHWICK

Q. We'll find out shortly.

A. Yeah.

EXAMINATION CONTINUES: MR MAW

Q. So are you reflecting on the – cross-referencing in subparagraph A, which brings down the matters set out in the 2.2 policy –

A. Correct.

Q. – for CWS, whereas the hydro limb, limb B –

A. Yeah.

Q. – doesn't bring down the assessment of environmental effects requirement for the period exceeding six years.

A. Correct.

Q. So there should be a cross-reference there.

A. There should a cross-reference is what I'm trying to say.

THE COURT: JUDGE BORTHWICK

Q. And now all of that went so fast, I didn't get any of it.

A. I'm sorry.

Q. So just on the paper before you, which is the Otago Regional Council position, what policy are you addressing right now, it is policy what?

A. I am addressing now policy 10.2.3

Q. 2.3?

A. Yes.

Q. Okay.

A. Sorry.

Q. Right, and what are you saying in relation to policy 10A.2.3, what are you saying?

A. Well, that policy has a clause, clause A, which relates to community water supply schemes, and clause A, the second line states, includes the requirements set out in policy 10A.2.2(a), (b) and (c), and I wonder whether that needs to be amended to set out in policy 10A.2.2.1(a), (b) and (c), so it only applies to what is in policy 10A.2.2 and stated in relation to community water supplies.

Q. Right, so just add a subparagraph 1.

A. And then, yes, in that case, just add a subparagraph 1.

Q. Yeah.

A. And then, with relation to the clause B underneath it, I wonder whether it wouldn't be useful to have again there an amendment, and so it states that the take and/or use of freshwater for hydroelectricity generation in the locations identified in schedule 10A.5.2, and the application includes the requirements set out in policy 10A.2.2.2, subclause 2. Does that make sense? And take out: "The consent expiry date is no later than the 31st of December 2035," and that way, I think what is currently happening is that the reference to policy 10A.2.2, clause 2(b) is left out, and by replacing the words: "The consent expiry date is no later than the 31st of December 2035," with: "The application includes the requirement set out in policy 10A.2.2 clause 2(a) and (b)," you capture everything.

Q. Yeah.

EXAMINATION CONTINUES: MR MAW

Q. Follows.

A. Sorry.

THE COURT: JUDGE BORTHWICK

Q. Well, you don't need (a), (b), (c), do you, if you've just got clause – if you just reference –

A. 2, you can just –

Q. You could just go 10A.2.2(1) community water supply, and then you'd grab everything, wouldn't you?

THE COURT: COMMISSIONER EDMONDS

No, no, don't you want to grab the stem as well?

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. What's the stem?

A. For the whole thing

Q. Not with you.

A. Because it has where the activity was not previously authorised and those sorts of things.

Q. Look, again, I'm on the wrong provision. What provision are you looking at?

A. I'm looking at 10A.2.2, there's a stem, and then it splits it out into two things with some particular requirements, but I wondered if there was any harm in just having 10A.2.2 and then just leaving it as: "And the application include a requirement set out in the policy," without digging down into whether it's 1 or 2.

Q. Yeah, but he wants to –

A. Because it drags the stem (inaudible 11:55:17).

Q. – he wants to dig down, because subparagraph (a) and subparagraph (b) are referring to community water supplies and, secondly, hydro, respectively, so that's what he's trying to change.

A. No, no, I think my point is slightly different, because what he's trying to do is make sure that all of the requirements, whether they're for the community water supply schemes or for the hydro, are dragged through so that they also apply in terms of the 10A.2.3.

Q. Yeah, I'm at a loss. I think what he was suggesting was just putting in 10A.2.2 subparagraph 1 here, for community, and subparagraph introducing it in (b) for hydro, the application including the requirements set out in policy 10A.2.2 subparagraph 2 is in order that it clearly refer to hydro, is all that he's wanting to do.

LEGAL DISCUSSION – PROJECT DOCUMENT FROM SCREEN (11:56:33)

THE COURT: COMMISSIONER EDMONDS

I've worked my way through it and I agree, the first one should have one after it, and the second one should have two, so I've got myself over the line on that, thank you. I guess one of the points that I'd been concerned about was that associated with those power schemes, for example, and by putting the requirements of two, you very clearly do that, that was the only thing.

THE COURT: JUDGE BORTHWICK TO MS MEHLHOPT

Q. So, Ms Mehlhopt, do you know where the edits are to go?

A. Yes, I know where they are, just figuring out how it works, just with me typing (inaudible 11:58:39) screen.

LEGAL DISCUSSION (11:58:53)

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Don't panic, there should be a water management plan. It's just –

A. Just where it goes is the question.

Q. It's where it goes.

A. Yes.

Q. And then as a general comment, as drafted, wouldn't be effective as a water management plan condition where outcomes are usually known, and the water management plan just simply secures how you're going to get to those outcomes, yeah.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. And you expect other conditions to contain the outcomes?

A. Yeah, and then you – you know, so something's actually done. So, we've had a go

Q. I went around the country 13 times as part as a conditions of consent road show that involved a lot of the judges as well. Yeah, for my sins I had to go to 13 locations and go through what management plans were and what they weren't, and this is very definitely what they aren't in a way it's presented.

THE COURT: JUDGE BORTHWICK

There's no ideal solution, but I think we've got some ideas which might get you there as well.

THE COURT: COMMISSIONER EDMONDS TO MR DE PELSEMAEKER

Q. So, I suppose, it was just the language in 1 and 2 that were associated with the power schemes, and in the second one, you've just got identified

and scheduled 10A.5.1, and I think it's an appropriate time to ask the question, I just wondered what the reason was for the different language, there may be a good reason, but what is it.

A. The first one was "associated" the use of the word "associated," is that correct?

Q. Actually, now I look at that, the community water supply one is okay, so it's just the hydro one, why there's the difference in the language.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. Sorry, which – we'll just get to the changes, we'll confirm the changes are correct now up on the screen before we move to the Commissioner's question. So, Mr de Pelsemaeker, if you could look at the screen.

A. Oh, yes.

Q. Is that the change that you want to make? I mean, me, I would have just deleted the A, B, and Cs of the matter, because it just simply follows, if you're grabbing sub paragraph 1 and you're grabbing sub paragraph 2, that's sufficient.

A. That is exactly what I intended.

Q. So, Ms Mehlhopt, paragraph A, if you just delete after 1, the sub paragraphs A, B, and C. So, 10A.2 – yeah, that's right. Just get rid of those and you can do the same for the second sentence, and that's what Mr de Pelsemaeker is wishing to achieve, and then Commissioner, I am not quite sure you are really talking about associated.

THE COURT: COMMISSIONER EDMONDS TO MR DE PELSEMAEKER

Q. Well, it's just in 10A.2.2, I mean, there's maybe a good reason for this, I suspect there, but I just want to hear it. For the hydro, it talks about associated with the Waipori and deep stream hydroelectricity power schemes identified in the schedule, and then over the page when you're talking about the ones that are replacing deemed permits or water permits in other words not new water, B talks about the take and use of freshwater for hydroelectricity generation in the locations identified in the schedule, and I'm just wanting to understand why the difference in the language and is it appropriate.

A. Probably the wording in policy 10A.22 subclause 2 is perhaps more appropriate even though it's more wordy but it's more appropriate than the wording in policy 10A.23 subclause B, because there are a number of activities associated with these schemes, and the location itself, it will be within the vicinity of the location as opposed to exactly where. So, the location probably refers to the location where the parts of the scheme are located, but the activity might not precisely there. So, I think that while the wording in policy 10A.22 is a bit more wordy, it is probably more accurate. Well, more appropriate.

Q. So, what amendment would you propose to make in relation to 10A.2.3?

A. I would just apply the same wording as 10A.22 subclause 2. The take and use of water for hydroelectricity associated with the Waipori and deep stream. Hydroelectric power schemes are identified in schedule 10A.52, and I would just maybe take out "fresh" in "freshwater," because freshwater applies to all ground water, whereas this rule only applies to surface water and connected ground water.

EXAMINATION CONTINUES: MR MAW

Q. Now, Commissioner Edmonds, I'm not sure whether we've answered the difference to the language used for hydro compared to the language used for the community water supply schemes, which isn't perhaps as broad, because it doesn't have the phrase "associated with." Have you got any observations on…

A. I think as well, you apply for a take and use of water, as opposed to apply for a community water supply scheme. So, my recommendation would also be to add in subclause A, the words "to take and use of water for a community water supply scheme identified in"…

Q. And the same change to policy 2.21.

A. Correct.

THE COURT: COMMISSIONER EDMONDS

So, if you look at the convention used in a lot of PC7, it just talks about the take and use, it doesn't talk about the take and/or, I'm not clear, why you need

and/or, anyone who's mediated with me will know that I often dig down into and say what's that actually adding.

THE COURT: JUDGE BORTHWICK

Q. So, Mr de Pelsemaeker, what's your answer?

A. So, we distinguished the distinction or where the distinction is used, it is because deemed permits are usually only for a take, whereas water permits granted under the RMA are for a take and use. In this case it is for an application for a new consent. So, it would have take and use. So, I think you could – yes, you could take out the word or and the slash. So, under subclause 1, the take and use of water, and under subclause 2, the take and use of water again, because they are new consents, and they will be issued for the taking and the use.

EXAMINATION CONTINUES: MR MAW

Q. And the same change in the chapeau, second line?

A. Yeah.

Q. And also policy 2.3.

THE COURT: JUDGE BORTHWICK

Q. Sorry, could you just go back up to the chapeau? So, freshwater, you did say something about freshwater, and you amended it later. Is freshwater correct in the chapeau?

A. In this case it is correct because this duration policy applies to all applications for new and existing takes. So, the six-year duration applies to takes or ground water as well if it's a new take, whereas the next policy is a policy that guides duration of consents that replace existing permits, and that policy only applies to surface water and connected ground water. So, there we don't use freshwater, because freshwater captures everything. So, here we can also take out under there that "and/or use of surface water is appropriate" in the bottom line, because it refers to historical water permits.

EXAMINATION CONTINUES: MR MAW

Q. And then sub paragraph B. We may have already done that one. So, A and B also has the phrase.

A. And in those cases, we can take out the "or" under A and B.

THE COURT: JUDGE BORTHWICK

Q. Is it take and?

A. Keep the and.

EXAMINATION CONTINUES: MR MAW

Q. Well, that's the question is take/or or is take/and?

A. No, because they are consents it will be take and use.

THE COURT: JUDGE BORTHWICK

Q. Take and use. Mhm.

A. Yeah. No, that one should stay.

EXAMINATION CONTINUES: MR MAW

Q. We'll move on perhaps now to the restricted discretionary activity rule. So, the first one that appears in the document is the rule relating to community water supply schemes, and a restricted discretionary activity rule has been recommended in relation to applications where a duration for longer than six years is to be sought for activities again that appear or are listed in the schedule, and again here this reference to a water management plan and there is reference to the discretion as restricted to the extent to which that plan meets particular requirements which have been taken from the evidence or the drafting of Mr Twose, I understand. Ms King, I rather suspect you may be asking questions what some of those requirements might mean at a practical level from a consenting perspective. Any comments or observations, Mr de Pelsemaeker, in relation to the RDA for community water supply?

A. My only immediate comment is what kind of stands out is the requirement in the policy to undertake an assessment of environmental effects as part

of the application is not carried through into the entry conditions of the RDA.

Q. Do you have in mind sub paragraph 8 of the matters to which the discretion has been restricted?

A. That is correct.

Q. So, you would recommend that that is brought through as an entry condition?

THE COURT: JUDGE BORTHWICK

Q. Sub paragraph H.

A. I would word it as follows, a new (v), the application includes an assessment of any adverse effects on the environment, including any consequential effects of the end use.

Q. Including any consequential effects of the end use.

A. Of the end use.

Q. And how are you defining end use?

A. Excuse me?

Q. What do you mean end use?

A. The end use of the water whether it is used for a range of purposes. It might be used for irrigation of community facilities, sorry, like parks and sports fields. It could be domestic use or industrial use.

EXAMINATION CONTINUES: MR MAW

Q. Any other observations that come to mind?

A. Not at this point. No.

Q. So, then tracking through the drafting, the next proposed rule is the restricted discretionary activity rule for the longer duration period for hydroelectricity generation, again limited to the locations and schemes listed in the schedule.

A. Yeah, my observation there is the lack of entry conditions to the rule. With the wording provided there, I would add or replicate the entry conditions (i) and (iii).

Q. Now, replicate from where?

A. Sorry, from the recommended rule, 10A31A2 for community water supplies. I don't think there's a need to replicate (iv) in that rule because the limit on the consent duration is already spelled out in the chapeau of the rule for hydroelectricity schemes. The chapeau already says no consents with a term later than 2035.

THE COURT: JUDGE BORTHWICK

Q. Isn't that the case of community, though?

A. That is also the case with community water supplies, but there, it is spelled out in an entry condition.

Q. It's spelled out in the policy for community and spelled out in the entry condition –

A. Correct.

Q. – of the RDA activity pertaining to community, so it's spelled out in both locations?

A. Yeah.

Q. And why would you not spell it out in both locations for hydro, both in the policy and in the entry condition for hydro. Oh, I see where it is. Yeah, okay, you put it there.

A. It's in the chapeau, in the last –

Q. It's in the chapeau, okay, got you. All right.

A. It is not a material factor. I think perhaps for user-friendliness, it might be easier to have rules that are symmetrical, in a sense, so it might actually – if I would draft from scratch, I would actually take out the reference to the 31st of December 2035 date and put it in an entry condition so it kind of mimics it, and it also makes the sentence a little bit shorter, but that is a cosmetic change.

EXAMINATION CONTINUES: MR MAW

Q. Any other observations in relation to the hydro RDA?

A. So I know also that the matters of discretion do not include the discretion for council to consider environmental effects.

Q. Is that because subparagraph (f) is limited?

A. It is, yeah, (f) kind of words it, yeah.

Q. Is it implicit in subparagraph (f) that an assessment would, in fact, be required?

A. Yeah, yes, yeah.

THE COURT: JUDGE BORTHWICK

Q. Is it also implicit that you're only interested in cumulative effects, so effects beyond the six-year period?

A. In both cases, the manner of discretion – and when I say both cases, community water supplies and hydroelectricity generation, the matters of discretion limit you to consider the effects arising from a long-term duration, not necessarily from the actual action.

EXAMINATION CONTINUES: MR MAW

Q. Are those things related, though, in that one simply informs the other? Perhaps, put another way, it's the effects assessment which will dictate whether a longer duration beyond the six-year period is appropriate.

A. I wonder whether it's as worded, and maybe Ms King can confirm or disagree, but I wonder whether it almost excludes consideration of effects that would occur under a short-term consent, so the simple action of taking water, it wouldn't change if it was work. Some effects would be the same if consent was granted for, let's say, five years, or whether it would be granted for 10 years. The effects of a take on, for example, fish passage or whatever would be the same, it wouldn't defer, so I wonder whether it kind of poses a risk that those effects are going to be ignored, because they would be there for a short-term consent as well.

Q. Tracking back through the genesis of this drafting, my recollection is that it came through from Mr Welsh in terms of trying to capture the ability to assess effects. If a consent was to be granted for a period of longer than six years, in my understanding, if I had read correctly, was that it would be all effects to be considered beyond the six-year period, with a view to determining whether, in light of those effects, the duration being sought was appropriate.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So all effects?

A. Yes.

Q. Because the architecture of this plan, quite apart from these exceptions, is simply to accept, if you like, any adverse effects of the activities on the environment, so that if you're asking or seeking for a replacement consent from a catchment which was degraded or degrading, the effects of the replacement activity are accepted, provided that the consent only lasts a short term, for six years, so quite an interesting species of plan, but anyway, that's the plan. If you want to go longer than six years, then all effects are in contention, is what you've hoping to (inaudible 12:28:47).

A. That's what I'd understood.

Q. Yeah, yeah, not merely the effects from six years onward, which may be the cumulative effects from six years onwards.

A. Yes, and that's how I understood the case put forward by Trustpower, was that a full assessment of effects would be required –

Q. A full assessment, yeah.

A. – for the longer duration, and it wouldn't stand and fall on its merits.

Q. Because then, the presumption that adverse effects of take and use of water from a degraded or degrading water body would be set aside, and you'd start to look at the effects again.

A. Yes.

Q. You would look at the totality of the effects. Gee whiz. How would you –

THE COURT: COMMISSIONER EDMONDS

So you've got it limited by using mitigate or remedy, and when Mr Welsh put this forward, I thought he's very deliberately left out avoid.

THE COURT: JUDGE BORTHWICK

Avoid, yeah, yeah, I saw that.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. He's saying that you can only deal with how you might mitigate or remedy it.

A. Yes, and that, if you think about the context that was at play here. They were small tributaries high on a catchment, where all the water was abstracted and I can thus see why he is being careful not to use the word "avoid" because there will inevitably be effects on those water bodies that can't be avoided if all of the water is being abstracted from them.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. And at least one the water goes out the catchment, but the others water is returned back into the catchment –

A. Yes.

Q. – at some point downstream.

A. Further downstream, yes.

Q. Is the one out of the catchment which is particularly problematic and its only saving grace is that it's been done for the last hundred ,150 years, whatever.

A. Yes. Whether that makes that right or not, is an interesting question but a question to be considered and Mr Winchester's client of course will have – well, as Fish and Game did have a view on that.

Q. Yes Mr Winchester's client has a firm view on that I think, yes.

A. Yes. And yes, so then tracking back to how this may play out, it comes down to the question of, is the duration itself appropriate in terms of what is sought in light of the effects and that assessment will inevitably require an assessment of the effects and whether the methods available to mitigate or remedy are sufficient to justify the duration.

Q. But without a outcome statement in the plan is to what's…

A. And that's where the challenge arises. If you think about the decisions to to be made on duration of consent, my submissions are that duration is broad, it's a top down approach starting from the sustainable management purpose of the Act and duration is to be viewed through that lens, not through the lens of starting at the bottom of a plan and working up through the provisions. Now this is – we might get a decision on that issue from the High Court – and we will get a decision in the fullness of time because this issue was live for the Clutha appeal argued last week –

Q. Okay.

A. – informing my submission in terms of a top down approach –

Q. Yes.

A. – for duration, I say everything's in, case law authority on that I say is clear. Duration is measured in light of whether the duration meets the sustainable purpose of the Act and thus noting the matter is limited such as it is without a void, the consent authority still has full discretion to determine the appropriateness of the length of the permit, taking into account whether the methods available are appropriate or not.

Q. You mean under this approach here?

A. Under this approach here.

Q. Okay so, then if that's that you're wanting to do. Is the word "continuing", I wonder if that's what's perhaps tripping me up when I was looking at this. So adverse effects of the environment from the activity *continuing* beyond a six-year duration. In fact what you're wanting to capture is the effects in the environment from day one and so. It looks to me that you somehow can ignore that and then have a look at, well are there any additive effects. Or a cumulative of effects, I think as Judge Jackson used to call them. I don't think that's actually where you were wanting to go, you want to have a full assessment of effects so there's some ambiguity perhaps in the word "continuing"?

A. Yes.

Q. It's a bit like and, you know, and I know (inaudible 12:33:55) did not like it, the version A policy for the objective which –

A. Was the addition adverse effects are low.

Q. – seemingly said, your baseline environment is the environment with the effects, and let's have a look at the risk of any additives. To me, it kind of has a sense of that, and you don't want to go there, you want to go from day one.

A. Yes, that's how I have read that, but I appreciate you can read that in two different way because of the word "continuing". I would read that, and I had been reading it as if the word "continuing" wasn't there. It was adverse effects of the activity beyond the six-year period because through

the lens of this plan, a six-year permit can be rolled over with no consideration of effects for a six-year period.

Q. Yes.

A. So in a sense that's the – I'm reluctant to call it "permitted baseline" but it's the baseline of the starting point here.

Q. But do you mean a baseline and that's really important because and I suppose it's, I was going to say, maybe it's different because it's hydro, maybe it's different because it's community but you have no added effects coming in from, say other activities like land use which are adding to or interacting with the taking and the using. So with something like farming, it's not just that you're taking and using water for irrigation, you've got associated activities such as land use, application of fertilisers, whatever it is which are interacting also with the take and use which are having effects on water quality which may be far distant in terms of their spatial extent and may not become manifest immediately or it might be several years downstream and all of that stuff where we talked about I think in *Wilkins* especially.

A. So hydro doesn't…

Q. Predicting that you're going to have a minor effect like, how can you do that? Yes.

A. Hydro in my submission doesn't present the same difficulty because it doesn't have the consequential uses hanging off the back of it. It's water's back into the water body.

Q. Yes and they're not doing anything around that which might yes…

A. No and of course the permits and the schedule are exclusively limited to hydro with a carve out, the ones that were also used for irrigation for example, the Pioneer permits. So –

Q. The only thing that you'll be wrong on that – potentially wrong is for whatever new activity Trustpower was wanting to do, so which effects are not in the environment and so they may very well be becoming manifest over time and space while beyond a six-year period.

A. Yes.

Q. Yes.

A. So the two and the two specific new activities, if I can call them that. One was the enhancement for the deep stream which was taking addition water when flows were available. So in a sense it's still taking all the water but it's taking a volume of water above which the intake structure can currently handle.

Q. So it's just an increasing the intake structure?

A. Yes, it's my understanding and there is an associated increase in the volume of water, in light of having a bigger intake structure.

Q. Okay so they're leaving less water within the system because of their bigger intake structures?

A. Yes.

Q. So that might be new effects.

A. Yes.

Q. Within six? Which yet – have yet to become fully expressed in the environment after six?

A. Yes.

Q. So what were you wanting to capture there?

A. So in terms of those effects, that new applications actually considered – or fall to be considered under the operative regional plan. So, the – and I haven't tracked back through the provisions in that plan to understand what the effects' assessment would be all this policy is doing is saying that, you can apply for longer than six years –

Q. Of course.

A. – in that context.

Q. I see, whatever's in that old plan continues to – so it's just.

A. So the RDA rule doesn't actually apply to the new take, so it's only the existing.

Q. Yes. Just a durational.

A. Yes and just for completeness the other new activity was a by-wash I understood to avoid sedimentation issues. But again processed under the operative plan but with the duration policy overlay.

Q. So with that in mind, do you think the word “continuing” is the best word to capture what you were wanting? So methods arising (inaudible 12:38:51) continuing beyond that six-year period.

A. Now I'm not sure are you asking me a question or the witness a question?

Q. I don’t know because I suspect it’s your wording so.

A. Yes, well it’s Mr Welsh’s wording. He may not be best with what I'm about to say but I wondered whether…

THE COURT: JUDGE BORTHWICK

Q. So how do you understand sub-paragraph (f), Mr de Pelsemaeker?

A. I understand it as under this paragraph, you can discard any effects that would occur under a six-year consent term. That is how I would understand it. So, because it’s an effect arising from the activity being granted a longer-term consent as opposed to a six-year consent.

Q. So you don’t understand it the same way do you?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You understood it slightly differently didn’t you

A. Yes, I understood you discard for the first six-year period and then everything beyond that is in…

Q. No, you do understand it the same way.

A. Yes, I think so.

Q. Yes, okay.

MR DE PELSEMAEKER:

And to me that’s a little problematic.

THE COURT: JUDGE BORTHWICK

Q. Yes, tell us why’s that problematic.

A. Because a lot of the effects – you might have effects that arise for the sole reason of being granted a consent beyond six years, but a lot of the effects will be there regardless to duration. They will be caused by the immediate action of a take and to me, at the outset of the plan – the plan change process we developed a framework whereby you basically draw

a line in the sand, if I may go back to the phrase for six year consents. If you want to go longer, up to a 15-year duration you'd be a noncomplying activity rule – full assessment of environmental effects. Now here, I'm pretty comfortable with lowering the threshold in terms of the activity status but personally I think it's for a 15-year consent which, I think going forward will be the norm for a long-term consent. A full assessment of environmental effects is appropriate. That captures all environmental effects.

EXAMINATION CONTINUES: MR MAW

Q. So, that would include the effects for the first six-year period?

A. Yes.

Q. So an applicant essentially then will have the choice whether to pursue six years without doing an assessment –

A. Correct.

Q. – or if the applicant wants longer in this context –

A. Correct.

Q. – everything's up for consideration. So, if – just following that through you'd then delete out the "continuing beyond a six-year period"?

A. Arising from the activity full-stop, yes. I think also and my apologies because I haven't had much time to consider this and my thinking is developing as we talk, I think we also need to go back to the policy because I think that concept is embedded in the policy 10A.2.2 sub-clause 2B.

THE COURT: JUDGE BORTHWICK

Q. And that reads? So you're reading that as if that's a full environmental effects?

A. Yes. Well that's not how I read this but –

Q. No that's what I'm asking you, 2B, do you read that, if you're going to go longer than six years but no longer than 2035, you need a full environmental assessment or are you reading it differently? Associated with a duration…

A. I think you could read it as the effects associated with a longer duration.

Q. Term. Yes. Whereas you're saying, well look, where this is tracking, I guess under the RPS which I've yet to read but a 15-year consent would be regarded as a long-term consent, going forward is your prediction. And people are saying, well heck we don't have to look at the first year's – six years' worth of effects and you're saying that they should, if they want a long-term consent, you've got do it properly.

A. Yes I think that's appropriate in this instance.

Q. And that is the case in relation to new permits but is that also the case in relation to replacement permits, where it's strictly replacement?

A. If they would go for a longer term consent, yes.

Q. If they would got for a long term – you'd still want to have a full worked up assess– okay.

A. Yes.

EXAMINATION CONTINUES: MR MAW

Q. And would that – we've been talking about the hydro context, would your thinking apply to the community water supplies as well? So if a longer term was to be sought, a full assessment of the effects –

A. Yes.

Q. – for the entirely of the duration sought would be required?

A. Yes.

EXAMINATION CONTINUES: MR MAW

Q. Okay we then move on to the definition. And the definition of a water management plan has been set out and again my understanding is that this definition pulls through the drafting from Mr Twose, that was previously in the rule and / or the policy but seeks to capture the wording in a definition to reduce the length of the policy and /or rule. Are there observations about the language used within the now definition, that catch your eye?

A. I was querying a little bit about the words where climatically appropriate, but it just leaves me a little bit at odds.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Where did you find that? Climatically appropriate.

A. D and E.

Q. We're looking at – what are we looking at now?

A. The definition of the water management.

Q. Oh, definition.

A. So, it's in brackets in D and here in E as well, not in brackets.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. I thought they might have been your outcomes for the water management plan which would be a really strange place to put it.

A. But I think, it captures the idea of looking efficiency both within the network and by the end users, and I think that's really good.

EXAMINATION CONTINUES: MR MAW

Q. Irrespective of climate, should this be occurring anyway?

A. Are you talking about water storage?

Q. No, I had my eyes on D.

A. Yes.

Q. In that instance.

A. E?

Q. D.

A. Oh yes, I see that the words climatically appropriate are in both D and E. Yeah, I believe so.

Q. So, you'd delete out the words in the brackets in D?

A. On D and E.

Q. Any other matters that leap out?

A. I wonder whether you could take out the words "for the purpose of identifying end users" or just simplify that clause just to state an analysis of water use patterns for different end users or types of end users. Because, I mean, if the value is not in identifying the end users, it's to get an understanding of what are their patterns of use.

Q. And then the final two matters set out are the proposed schedules first for community water supplies and secondly for the relevant hydroelectricity

infrastructure covered, and I wonder whether in terms of the tracking still on for deep stream. I wonder whether that the tracking should come off because it's not a change being recommended by the witness simply on the replacement document. So, those are the questions such as they are that I have, I will hand you over, how are we tracking? When did the Court want to take their lunch break?

THE COURT: JUDGE BORTHWICK

1 o'clock.

MR MAW:

Very good. I'll hand you over to my friends.

MR WINCHESTER:

Ma'am, sorry, excuse me. I was preparing to catch a flight this afternoon, possibly even about 3.15. I don't anticipate I'll have a lengthy cross-examination for Mr de Pelsemaeker, so I'm happy for my learned friend to go first. I am, however, just, I have a reservation about the materiality of some of the provisions advanced overnight, and certainly, given my client's interests, I might just want to take some instructions about that.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. When you say materiality, you mean?

A. The exceptions for hydro and community water supplies and the extended durations in particular, which I guess have been signalled, but not put in writing until now, in terms of a joint witness statement.

Q. I don't know that's right, actually.

MR MAW:

In terms of the community water schemes, the TAs pursued this relief, and including in closing submissions, likewise, Mr Welsh pursued this relief, it's simply being pulled through, it's not new relief in that regard, in fact, it's more constrained in both examples or both situations.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Yeah, so I don't think that's quite right. In saying that, though, there is such a tremendous amount of information or evidence that the Court is awash with, so this is new drafting, reflecting relief which TAs and hydro sought in their closing submissions, so it's not inconsistent with the nominated project approach, which they've both adopted. This, of course, is Mr Maw's thinking, which he may or may not have tested with his witnesses, but, you know, it's like, well, the difficulty with it is that the Court could just, as I said, it could do one of three things. The Court prefers, always, for everybody to put their best foot forward and for decisions to be made on that basis, and, you know, if this finds merit and can be saved with some tweaking, then the Court should be considering the final version of the wording, as opposed to saying that won't work and making its decisions to reject or decision to do something else.

A. Ma'am, possibly, I wasn't particularly clear with my reservation. I've got no issue in terms of scope and the fact that the relief has been advanced. It's really a question, I suppose my concern is what's the status of this, and I think you've identified that in terms of it's being advanced through Mr de Pelsemaeker.

Q. Well, not really, it's really being advanced through Mr Maw.

A. Yes.

Q. But looking at it, we went golly, there's some drafting issues here, and it's appropriate for the Court to ask drafting issues of Ms King and Mr de Pelsemaeker.

A. So I guess what I'm signalling is that some of my questions are probably more about the underlying merits.

Q. Yeah, which you're agin this approach.

A. Oh, indeed, yes, very strongly.

THE COURT: COMMISSIONER EDMONDS TO MR WINCHESTER

Q. Yes, yes, and you advanced that yesterday in closing.

A. The question is would the Court be assisted by questions around the underlying merits being put to Mr de Pelsemaeker, particularly in terms –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. If looking at this drafting reveals problems with the on a merits approach, then yes. I mean, from the discussion this morning on hydro, I mean, I've made a note, I can see maybe this drafting could work for replacements, can't see how it could work for new, where none of the effects of the proposed new take are in contention, until such time as – oh, no, they are in contention under the operative plan, and so then there's a question of duration, and then what in relation to those effects, do you look at ground up or durational effects from six years onwards? I'm still a bit confused, and I think what you might be signalling is actually, anyway, the High Court's going to decide that, would that be right, on Clutha District Council, amidst other matters?

A. Oh, no, this question of top down or bottom up.

Q. Top down, bottom up.

A. Yes.

Q. So what would you call this approach, then, is it top down or is it bottom up or is it sideways?

A. Upside down. I conceptually look at this as duration is still live here.

Q. Yeah, duration's live. Top down would say you're doing what in relation to long-term consents, you're looking at all or some of the –

A. All of the effects.

Q. All of the effects.

A. Although, to be fair, when the drafting was being done, I had partitioned in my mind the first six years, said that those effects can occur if the controlled activity pathway's taken, but all effects, as if the activity was being assessed from the point in time six years later for the balance of the 14-year term, all of those effects would be considered with a view to determining whether, in light of those effects, that extended duration was appropriate, in light of the purpose of the Act, which was the top-down approach.

Q. Yeah, but, oh, I don't know, I need to think.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So that was in terms of the replacement and the new. Did you differentiate that?

A. No.

Q. You didn't?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. No, because I'm thinking – I mean, I don't know anything about Trustpower's new applications, or much about Trustpower's new applications, but, you know, so they've applied for a new take and use. It'll all be assessed under the operative plan, so effects on the environment will be assessed under the operative plan, and then, for duration, and then what in relation to duration? You know, just say they've got significant adverse effects as assessed under the operative plan. Do you just say that's okay for the first six years, and we're only looking at the balance?

A. No, actually, not for the new.

Q. I mean, I only mean the new. So just say the result is significant adverse effects under a full assessment. How does –

A. That wouldn't, well, it shouldn't get through –

Q. It shouldn't get through.

A. – the operative plan, so that's a decline in those circumstances, because all PC7 is doing is saying duration can, at most, be through to 2035 on this drafting.

Q. Okay, so the answer is just adverse effects, but with no strong policy direction as to the consequence of those adverse effects, so there's adverse effects.

A. Yes, and that, reflecting what PC7 is and what it isn't, there's no policy outcome from an effects perspective, against which –

Q. So this is still new?

A. Yes.

Q. Still under the operative? So just adverse effect, no policy direction as might inform a grant or decline, or he could go both ways, just depending on the –

A. Yes. PC7, in that context, is only speaking to duration, so what are the circumstances where a duration longer than six years might be appropriate? Because if you take out all of this drafting, all of the accommodation for hydro, and ask, well, what is then the position, new applications processed under the operative plan, the policy in plan change 7 simply says no more than six years if consent is to be granted.

Q. So this is your, I guess, and it is, it's the replacement policy for the policy in the operative plan that has the wonderful explanation, how to look at –

THE COURT: COMMISSIONER EDMONDS

(inaudible 12:58:53) 35 years.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah, you know, that leads to a 35-year conclusion. So that's what this – I think – I don't know.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Okay. Sorry, this is taking time, and we're definitely going tomorrow. Unless you want to ask questions now, we'll take the luncheon adjournment and you can take clients' instructions as to how you want to proceed with this or do this.

A. Yes, thank you, Ma'am. I think I'll ask the questions in any event because they go to both drafting and substance, and I will endeavour to be as efficient as possible. I do have another engagement in Wellington tomorrow which (inaudible 12:59:35) we can't avoid. Possibly if we take a slightly shorter luncheon adjournment, perhaps.

Q. Luncheon, yeah, that's fine, okay.

A. If that's convenient to the Court, maybe through to 1.45.

Q. Happy to do three quarters of an hour, that'll be, yeah, and we'll think about that with this in mind. So now I'm reading this, I'm reading all of

this as being the articulation of the relevant considerations for a policy that is for a duration that is longer than six years. Okay, okay, all right, good. We'll take an adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2:04 PM

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. I'm not sure where we're at. Oh, no, I know. Mr Winchester's questions, yeah.

A. Thank you, Ma'am, I should just preface the commencement of questions with I suppose a degree of concern that some counsel have about the potential for prejudice of parties who are not here today.

Q. Oh, I no. yeah.

A. Okay.

Q. I agree.

A. What is essentially appears to be before the Court is a drafting option proffered by counsel and obviously Mr de Pelsemaeker has given evidence about his –

Q. His own.

A. Yeah, what he would do with that drafting option. I guess I am just signalling that as soon as we start cross-examining on Mr de Pelsemaeker on that, we potentially create prejudice for the parties not here, and I'm thinking of possibly Mr Welsh.

Q. Yeah.

A. And I know it's possible to simply characterise this as yet another drafting option before the Court. I suppose what I am signalling is that I'd prefer not to cross-examine Mr de Pelsemaeker if it can be clarified that he simply abides by his evidence as per the statement of evidence in reply and the JWSs before the Court. That of course is my position and I suspect that my learned friend, Ms Irving may not have exactly the same position in terms of willingness not to cross-examine.

Q. Okay, well. So, I don't understand that Mr de Pelsemaeker has seen Council's suggested amendments or seen them in detail.

A. Yes.

Q. And so, he may very well the evidence that he has already given on this topic and would prefer it to remain there and if that's the case, Mr de Pelsemaeker should say so. As with other options which have been

advanced by other parties, and say for example, OWRUG is a clear example, so Ms Dicey advances a discretionary policy and rule which the Court has accepted, considered drafting's not perfect, as reveal in cross-examination, but if it had merits, we would take it back to the office, assess it, if it has merits and wanted to pursue it, then we would probably put that out as an interim, was how we have been approaching virtually every other party, and I suppose Mr Welsh's party to first step aside from that and say, but here are some corrections that we could pursue. Then TAs have done – attempted to do that though cross-examination but didn't get very far and I asked Ms Irving, what have you got in mind? And it probably opened it up from there. So, what can you do? If Mr de Pelsemaeker sticks with his original evidence, that's fine, and the Court can take this and reflect back to parties to make some very basic observations about this drafting approach and reflect that back to parties and if there is something to be saved then the Court can release an interim and on that basis have parties comment on it, but, you know, it's problematic. So, how do you want to proceed? Because we actually have been pretty clear that if there's merits, we weren't expecting people just to endlessly send in iterations of these things just simply because of the prejudicial issue, it's easier to manage that by an interim.

A. It is, and in a sense, Council's hand had to be played in response to that which was put up in closing. So, provisions having been put up in closing, that the Council considered was worthy of consideration, but the wording put forward now is sort of to capture those. So, if you start from the objective down, that developed from the joint witness statement. Mr Anderson had a go at it, part of that seemed sensible. So, that has been further developed and put forward into a version that is now put up by the Council and I think the same approach had then been adopted to a relief on the two topics and I viewed the case for the TAs and the case for Trustpower as having been sustained cases with direct factual evidence, in the TAs case, specific schemes, in Trustpower's case, its interest in hydroelectricity generation, such that there was perhaps merit in continuing to explore whether the draft being pursued was appropriate

and on that basis the drafting was proffered as a suggestion of how that might come down. Obviously the drafting is not perfect in terms of either of those matters, but it was put forward, in a sense, on the same basis as drafting by other counsel has been put forward. I think the difference that arises here is that it just so happens that Mr de Pelsemaeker and Ms King are here, possibly for other and –

Q. And not for this.

A. – the Court has been assisted by hearing essentially an independent planner's view on drafting that has been put forward so.

Q. Yes okay. So, Mr Winchester's suggestion is if Mr de Pelsemaeker prefers, his relief is over this version he may say so that will obviate the need for any cross-examination. Is that what you're suggesting? Court then may take the reply in and consider, is there something there that the Court can work with? If you like and if you can work with it and then issue an interim.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

A. I think that is my position subject of course to the fact that everyone else agrees but because as soon as someone crosses, I'm going to want to cross.

Q. Yes. Would it assist, in coming to your eventual – you position, say, if you have what the Court's views are on this?

A. Yes I think it would so, in so far as the Court can use Mr de Pelsemaeker as the testing ground to express some thoughts.

Q. Not going to test it with Mr de Pelsemaeker.

A. No? All right.

Q. I'll just give you my thoughts. How about that?

A. Yes.

Q. Where this fails, is plan architecture. That just soberly fails on the plan architecture and I can put up the notes that we've played with it, we can't get it to work. But that's – well, we haven't had enough of a play because we've been looking at other things as well. So I can put up those notes and you can tell me what you think. There's to be – it's more an issue for

community water supply than it is an issue for hydro. Somewhere along the line I think we can see a route through for hydro at least for existing permits but that is agin what Ngāi Tahu says, which is "no". And we may get to a no result. If we cannot make any of this work and it just becomes far too difficult, it will probably a six-year consent, new and replacement. That's what it's going to be. So we can give you what – we can reflect back on the architectural issues and then you can tell us how you wish to proceed. How about that? Okay, so I'm not quite sure whether I send that. Did I send that to you?

LEGAL DISCUSSION – POLICY NOTES ON SCREEN (14:12:32)

THE COURT: JUDGE BORTHWICK

Q. First issue with what's been written here. So, firstly this is a policy 2.2 which applies to extend duration – a policy applies to an extended duration consent. How an application and in particular, how an application which is to consider an extended duration – how an application to extend duration is to be considered, that's as I understand it in terms of the exception. Applications for community water supplies merits-based assessment for new community water supplies, a merits-based assessment under the operative plan. There's no presumption that effects of the activity and the environment are acceptable in terms of that operative water plan, that I think they're fully discretionary or an RDA, they could be declined for a new permit. So, that's your context, it's a policy applying for an extended duration and how the application for the extended duration is to be considered, that's the context. So the first issue with your matters in paragraph one is that these don't actually address *how* the extended duration is to achieve the exception of the objective. The matters read as if they were entry conditions to an RDA rule or if they were matters, particularly relevant to working up some consent conditions I thought, so they look like entry conditions. It's not policy, it's not telling me anything about the *how*. So issue two is dealing with that related issue, is the policy addressing the circumstances where they may be an increase in scale and duration of the take and use of freshwater and it's

probably redundant, I've also said, and if so, what are those circumstances? So is that policy actually addressing the circumstances where there may be increase and how is that increase to be addressed, or is this policy just simply that there is – sorry, I've actually done this in a rush. Are the circumstances simply that the application – are the circumstances which you're driving at here is that you've got an application that is addressing all of those matters of discretion and the RDA rule and is proposing a management plan that sets out procedures to secure the outcome of those discretion matters which outcomes can then be picked up by condition of consent. So, you've got a bunch of matters in the RDA rule, things that have to be done by an applicant. If this was to work at all – and I just, I really am struggling with this, but how you look at an application for extended duration, there's no – you've got the outcome – an extended duration for community water supplies, how is that achieved, that is achieved because we have a policy requiring, at least in relation to replacement consents, a lot more work to be done by Territorial Authorities that has been done in the past. All of that work presently set out in the matters of discretion. So, you still don't have anything in this policy about what are the outcomes in the increase of scale or the increase in duration. More, it's to do with you've got a policy that is about of importing a bunch of new considerations which are not in the operative plan. Anyway, all that work is done, and there are outcomes from that, or recommendations made as a consequence of that work which then get picked up in a management plan, water management plan, which then is setting, which is the water management plan itself is going to be saying how those outcomes which are arising out of matters of discretion are going to be achieved, I think is what it's doing. Anyway, that's as best as I could come up with what it's actually doing. The architecture is presently, there's no architecture. We don't know how you're going to secure a duration of extended duration, other than we think you're going to be doing a lot more work than hither to has been done under the operative plan, that work is set out in the matters of discretion. Whether they're correctly set out in the matters of discretion

and should it become matters of policy, that's probably where that might go, which I know was one of the ideas that Ms Irving, you had, but you hadn't actually worked up any provision to have a look at, but it was certainly I think one of the ideas that you flagged. So, as best as we understand it, it's a plan architectural problem, but it's problematic, and it's a novel approach in as much as we don't actually know what the outcomes for the environment are but why if it – why it's more palatable than new is at least with replacement, you know probably from long-term consents exactly what the effects of those activities are including down into the end use which is where Regional Council is pursuing it. So, you already know that, and in a way by increasing duration, what you're actually doing is not increasing the scale of things but limited it, because you are no longer just saying 35 year consent, do with it what you like, you are now addressing the matters of discretion that start to say, look Territorial Authorities, you're not going to get these long-term consents and do with it what you like, you are going to have to start your population to adopt water saving measures, for example. So, the duration is actually going potentially to a lesser scale of effects, and that seems to me as what those matters of discretion are doing, even though they might be a greater population basis. Surely, you picked up here, I don't know, certainly it should be thought about somewhere in the land water plan, because the thinking by Mr Twose, and it was imitated by the Court is great thinking, but the architecture is not here yet. Can it be? Don't know. That was my thinking.

A. Well, Ma'am, on that basis, I'm content provided Mr de Pelsemaeker answers in the affirmative about the evidence before the Court to not question him on this drafting exercise.

Q. And if that's – you can do that, and if it's an indication of the Court that that the Court's not minded to go in this direction in a surprise final decision, I think that you're firmly no. No, I think there are some architectural issues here. Some fairly significant ones.

A. Well, that does assist and provide considerable reassurance, your Honour.

Q. And maybe that the Court thinks that it can be saved, but, yeah, that, that would be an interim, and it wouldn't be…

A. Yes, and I guess, in that respect, parties would then have the opportunity to comment. So…

Q. I wasn't redraft, but anyway. It would be a – maybe we do, maybe we don't, but it would be an interim.

A. I see. Okay. Well, I guess it's too early to tell what that would look like and indeed what procedures the Court would build in around that. So, I'm content possible because it's Mr Maw who has been asking questions for him to ask the questions on Mr de Pelsemaeker about his evidence.

Q. Ah, yeah, whether he is happy with this approach or whether he prefers his own, earlier.

A. It's a pretty simple question, and I'll always be able to object to the question, but I think it's appropriate that Mr Maw asks it, given that he's been asking the questions, and if I ask it then it potentially runs the risk of prejudice.

Q. Oh, I see what you mean. Anybody else want to be heard before we throw it back?

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Do you wish to cross-examine or not on this?

A. I'm in two minds. In some ways, I feel that it would be useful to for the Court I suppose to undertake its analysis, if is there an outcome here, and an interim decision on that, because I think we could spend a considerable time today going backwards and forwards with witnesses, running the risk of prejudice to other parties and extending the hearing and it will be for nought. So, that conversation, if it were to take place, might be more efficient, having had an interim decision from the Court saying, yes there could be a carve out here, we need some drafting, so, you know, I'm just conscious that hearings gone on.

Q. I know, it has, and this is –

A. And at what point do we just stop.

Q. Yep, and I agree, and yeah, and community, I think, community takes are causing all sorts, are causing legal issues for the Court in terms of how they are advanced and are causing drafting issues for the Court, but as a matter of interest, do you agree with the proposition that matters of discretion are actually going to reduce the scale of potential effects?

A. Yes, I think cause the first policy up there 10A2.2 is of course directed at the applications for new consents which would be fully discretionary. So, the matters of discretion which flow out of the restricted discretionary rule would only apply in relation to those replacement permits, and I think in that context, yes, the matters of discretion are focused on reducing –

Q. Scale of effects.

A. – scale and encouraging efficiency and all of those things. The genesis of the problem is, I think as we talked about before where the as was set out in the evidence from Ms Muir and Ms McGirr where they're existing schemes that are effectively being augmented.

Q. Yes. And I know exactly what the problem is.

A. Yes.

Q. I know what the problem is but we just haven't got any – we've yet to get a solution.

A. Yes and I suppose for – so if we take the Luggate example, I think that we talked about previously. There's sort of two parts to it. It's the relocation of the take of the water which would get a…

Q. From a water body to water body, yes.

A. Say from a surface water body to a ground water body in that instance. And that would be discretionary application. So the effects of that move get considered fully. The idea of incorporating a water management requirements in there, are as you say to try and reduce and improve the efficiency and all of those types of things. So there's a combination of things happening in that context. Perhaps, loath to suggest another option but maybe consideration needs to be given to consents that are replacing a scheme so that – but that still creates a difficulties around assessing effects from a potentially different water body.

Q. Yes it does and I don't know.

A. I think that in the drafting that I suggested for the policy, I had tried to bring the elements of water management in to the policy itself, to try and give that steer around efficiency and so on and that being the outcome that the policy was seeking to achieve and then the conditions follow from that.

Q. So you prefer your own drafting is what you're saying?

A. Yes.

Q. Fair enough, I mean you can.

A. And the challenge that I have with what's being proposed by Mr Maw is, I mean it's an extremely narrow carveout focussed on the schedules.

Q. Well they're entitled to do that. It's a different issue.

A. Yes. And that was going to be some of the questions that I would have answered but I think yes, there's perhaps an earlier question that needs to be answered perhaps by the Court. We now understand the different positions, I think.

Q. Yes. None of this is easy.

A. No, it's not.

Q. It's not been made any easier but anyway for replacement consents at least, and I know that I've just bundled all of the notes under the 10A2.2 and some of the notes do more better –

A. Yes, it does.

THE COURT: COMMISSIONER EDMONDS

It doesn't relate to both of –

THE COURT: JUDGE BORTHWICK

It relates to both.

THE COURT: COMMISSIONER EDMONDS

Doesn't matter where you've put your notes, it doesn't apply to both of them..

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So, for replacement consents and this is perhaps the take home message, is that you might be wanting a longer duration but you're proposing is a lesser scale of effects.

A. Yes.

Q. A lesser scale, yes. Now none of that been picked up anywhere. Yes. That sounds like an outcome. Well it actually sounds like it's a different objective, an increase in scale. It sounds like actually starting at the starting board.

THE COURT: COMMISSIONER EDMONDS

Well maybe but there's always that problem about what sort of reduction are we talking about here and we had that over degradation at one point.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. There's no reduction per se, it's all about the communities doing better themselves in terms of water storage and so forth and more efficient use.

A. They're really hard issues.

Q. Yes they are hard issues but yes – I won't say anymore.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. So, Ms Dixon?

A. Your Honour I don't think I've got anything to add. The conversation you've had with Mr Winchester very much reflects the discussion we were having outside over lunch, and I think we are heading in the right direction.

Q. Where are we heading, sorry?

THE COURT: COMMISSIONER EDMONDS

Yeah, where are we heading?

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. In the right direction?

A. I don't mean substantively, but I mean in terms of the procedure that we're adopting, which is that we don't cross-examination on this.

Q. Well, yeah, but yeah. If there's something that we can make of it, we will issue an interim, but that then throws the whole drafting issue back on the Court, to even conceptualise that there might be a route through, and if there's a route through, say what that route is, and then say draft it this way, or the Court might just say can't see the wood for the tree, can't actually see the route, which, in that case, the answer's likely to be no.

A. I'd be concerned that the Court substantially wanted an outcome but felt that that couldn't be achieved because the drafting was getting in the way. We must be able to achieve a drafting outcome that fits with the position the Court wants to adopt.

Q. Well, you think that you must, but we've been at this two and a half months, and we're not there yet.

A. Yes, but that is how we end up with interim decisions and another round of –

Q. Can you afford an interim decision, I wonder?

A. I agree. I was a little interested in the proposal that you floated this morning of a minute of some kind with some direction for a response.

Q. What's that? What did I say? What'd I say?

THE COURT: COMMISSIONER EDMONDS

(inaudible 14:31:41) one of your options.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Oh, (inaudible 14:31:44), oh, yeah. Well, then, yeah, yeah, I mean, that was when we were thinking it was easy.

A. That was before all the questioning started.

MS DIXON:

I was wondering if the Court wanted to discuss this.

THE COURT: JUDGE BORTHWICK TO MS DIXON

Q. That then throws the drafting back on the Court.

A. Well, no, I was actually thinking that if the Court wanted to discuss Mr Maw's drafting further with Mr de Pelsemaeker, given –

Q. No, we don't need –

A. – there are some – no? Okay.

Q. We've satisfied ourselves that there are architectural issues.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. We're not satisfied, we are not satisfied with Mr Twose's drafting because, for replacement consents, well, that's just business as usual. You know, there's no, that we could see, there's very few things that require district councils to do differently, or maybe we just haven't got down into the tin tacks of it. They just had to be operating within the historic use, however that's defined. Yeah, not business as usual?

A. No, I picked up on a query from the Court about that, I think, was it on Friday – I'm losing track of time – and checked that with Mr Twose, and the matters of discretion that he'd set out in that rule were to apply to all permits, replacement and new, so the water management regime was to apply to the replacement permits as well.

Q. In our reading, we haven't picked that up, but anyway, that's good to hear, because it was like what?

A. I think in paragraph E, it was, it talked about four replacement permits. There were a list of things, but those were to pick up on existing conditions in existing permits that perhaps needed to be rolled over, the likes of participating in an allocation committee, if there was one, and so on, so those were extra requirements.

Q. I'm not bothered by that stuff. Okay, all right. We'll think about it, and we'll think about issuing a minute, but it won't be – because we could pick up the minute and then have people do something to coincide with the proposed RPS timetable, not that anyone wants to come back, but it'll give, at least, everybody a breather to be thinking about what is the outcome. There's an exception for, at least, maybe replacement consents, but maybe not, you know, because some parties are opposing that, but if there was something for replacement consents, there's an outcome there, that they can have a longer duration. How are you going

to achieve that? You're going to achieve that because you are going to start to work on lessening the scale of your effects and your demand for water. That's what some of the Twose matters is dealing with, and I haven't gone further than that, and I suppose if there is outcome about lessening the scale of effects generally, well, that's your outcome for your water management plan.

THE COURT: COMMISSIONER EDMONDS

I think there may be a disjunct between the drafting that you sent out originally and how it ended up landing in terms of what we now have in front of us, and that, I think, may have been an issue, because this has all gone on in a very short timeframe, and a lot of work being done at night and on weekends, and I think that's potentially a problem of what we're now dealing with for the drafting.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Is that Mr Twose? Mr Twose, or somebody else?

A. No, no, document that you sent to the council and everybody else, presumably –

Q. I haven't read that. I wasn't meant to read that, was I?

A. – on Friday night, which we got on Monday.

MS IRVING:

I think, yeah, it was the circulating of the options that we talked about in the Court on Friday.

THE COURT: COMMISSIONER EDMONDS

Yeah, started out with evolution and then it sort of carried on from there, so I think some of this may, you know, some of the things that we're grappling with now may have been people trying to get something together in a very short period of time without, perhaps, checking back with planning witnesses and things like that too.

MR MAW:

I wonder whether sufficient evidence has been given in order that the Court can make a decision or an interim decision on the substantive issue before we dip back into drafting again, because it strikes me we are quite some ways apart as between the council and its limited exception for scheduled community water supply schemes, and my friend, who is, as I understand it, seeking a broader response to community water schemes more generally, and in terms of landing the drafting for each of those two options, in light of the challenges which have been highlight this morning, it may well be that the my council says, actually, that's a step too far in terms of the challenges it's now presenting.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Fair enough, because there's the Ngāi Tahu no.

A. Yes, Fish and Game, no to both.

Q. To both, so there's a no response that needs to be decided.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. There is, on the other end community water supplies, TAs want at least 15-year consents for both new and replacements, and not limited to schemes, it could be anything that's new or to be replaced, that's what you're wanting? Not listed to any schedule that's been put up, it's the whole lot.

A. Yeah, I mean, that's the position that was advanced in closing, and what I can say is there are concerns about how very limited the council's final position is.

Q. Sorry, there's concerns about what?

A. How very limited the scheduling option is, and that really goes to, I think, the issues that I did raise in closing submissions around the obligations of existing NPSUD and so on, and in order for this plan change to give effect to that NPS to the extent that it can, the need for a pathway to be available, and so the council's position is that a pathway needs to be available. What I suspect is that if the only thing on the table was the schemes that had been specifically discussed in evidence, they would rather that than nothing.

Q. Well, I don't know. You need to take instructions about that, but am I right in thinking that the three options for the Court are as follows: TAs want 15-year consents for all permits, including both new and replacement permits, so that's one. Fish and Game, and Ngāi Tahu, want six-year durations for all permits, which is new and replacements, that's two.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER

Q. Mr Winchester, that's right, isn't it?

A. Yes, ma'am, yes.

Q. And then the alternate, or alternative course – no, it's actually four courses – there's another course which is six years for new and 15 years for replacement, so that's another course, and we're differentiating between the effects that we know and the effects that we don't know, and then the last one seems to be the one from the regional council, which is 15 years, all permits, provided those permits are on a listed schedule. Schedule 10A.5. so, whether they are replacement or whether they are new, if they are on the schedule, that's what the provisions are limited to. Have I got it right?

A. I believe so, yes.

Q. Then in that case, I guess we'll make a decision and it may well be an interim unless I get the all or nothing position.

THE COURT: COMMISSIONER EDMONDS

When you were going through them, you did point out that Ngāi Tahu were opposed to, I forget what option it was the one below.

THE COURT: JUDGE BORTHWICK

Oh yep, Ngāi Tahu's below.

THE COURT: COMMISSIONER EDMONDS TO MR WINCHESTER

Q. My understanding of your closing yesterday was you were opposed to visit the third option.

A. Yes. Yes, so it's essentially any – the only carve out is stranded assets for a six-year duration, otherwise it's just a duration issue.

Q. Okay, thank you, and I don't know where Fish and Game are, where they were sitting on.

THE COURT: JUDGE BORTHWICK

It doesn't matter, but we've the – it seems to me we've got the four corners of the decisions which are being asked and we'll release a decision on that basis. All right.

MR MAW:

A. And perhaps just to round that out, I do address in my closing submissions the issue of scope to capture new within plan change 7 and that may inform the available options, and for reasons I'll come to submit there isn't scope to regulate new within the body of plan change 7.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, so even though you've put up the wording.

A. The wording was only controlling the duration of new rather than the –

Q. Oh okay, that's a slightly different issue.

A. – and that's – yes. Which may not be able to be overcome by the drafting.

Q. Yeah.

A. And that I'm very alive to that issue.

Q. Yeah, okay. All right. Not a problem. All right. No that's fine.

A. I wonder whether I should still ask Mr de Pelsemaeker the question that my friend is awaiting me to ask.

THE COURT: JUDGE BORTHWICK TO MR WINCHESTER:

Q. I don't – is it necessary, If the Court's just going to make a decision?

A. Probably not, Ma'am. Given the lack of appetite from various counsel to sort of go down that path I don't think it really matters anymore.

Q. Okay. All right, so we'll turn now to deemed permits.

MR MAW

Yes, tentatively one step forward. Right. Now, you've each participated in the joint witness conferencing that took place on the 2nd and the 5th of July and

produced the joint witness statement with respect to priorities. Now, do you want me to take them through this document or proceed to questions on this?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Just proceed to questions unless anybody prefers to do otherwise. Nobody? Okay.

A. So, I don't have any questions.

Q. Good, and have you had them confirm the documents?

A. They did confirm that document.

Q. They did? Okay, sorry, I wasn't paying attention, sorry. All right, anybody got any questions for the witnesses on their provisions? Ms Page, Ms Dixon?

CROSS-EXAMINATION: MS WILLIAMS

Q. Sorry, your Honour, I just have one matter of clarification only, I think, your Honour, and that is simply that, if we can turn please to appendix 1 and if I look at the controlled activity, rule 10A311, it's actually over on the third page of the controlled activity. So, it's the matter of control D sub para – it's actually on the top of the third page, where we've got the continuation in blue little (ii) and we've got reference there to a contact management and I'm just assuming that plan should be inserted after that.

A. **MR DE PELSEMAEKER:** That is correct.

Q. And I think there is a similar error. So, the full phrase should be "requiring the provision of a contact management plan to the consent authority," and the same over the page, two pages top of, again D, little (ii), again that should be contact management plan.

A. **MR DE PELSEMAEKER:** That is correct.

Q. Thank you, that is the only matter that I wanted to clarify.

THE COURT: JUDGE BORTHWICK

Q. So, my questions are in relation to your policy. Now, you've got the policy appearing as under policy 10A.2.1 and it is matter number E. now, as I

understand it, deemed permits may or may not include rights of priority, correct?

A. **MR DE PELSEMAEKER:** That is correct.

Q. But if they don't contain a matter of priority, nonetheless, people are going to be applying to replace those deemed permits.

A. **MR DE PELSEMAEKER:** That is correct.

Q. And when I read this and I'm sure this is not intended, but where I read this policy, you've got a policy which is to avoid granting resource consents that replace deemed permits or water permits except where the application is to replace a deemed permit that was subject to a right of priority, and so when I read it, it seemed to be particularly interested, the policy is particularly interested with a deemed permit that is subject to a right of priority, in other words it was actually narrowing the group of deemed permits which are going to be up for replacement and that's not correct.

A. **MR DE PELSEMAEKER:** That is not correct and initially the clause was written – clause E was written where the application is to replace a deemed permit that was subject to a right of priority, we've removed the "where" because it's in the chapeau of the policy, if I recall well.

Q. It is.

A. **MR DE PELSEMAEKER:** By removing it we actually gained the meaning of the policy, so…

Q. So, what I thought – cause you don't want a subset –

A. **MR DE PELSEMAEKER:** No.

Q. – of deemed permits. This is actually a stand-alone policy, it's easier addressed as a stand-alone policy which is how I conceived it in the first place and I reflected back the Court's drafting.

A. **MR DE PELSEMAEKER:** You're right, yes. In this case it's essential that you sort of put the "where" or the "if" in there, but it would work not very well with how the rest of the policy is set up.

Q. Yeah, yeah. Agree, it's a separate policy?

A. **MR DE PELSEMAEKER:** It would ready better, yes.

Q. It would read better, okay.

A. **MR DE PELSEMAEKER:** And you actually – it would be more accurate.

Q. And more accurate. So, it reads better and is more accurate as a separate policy. That's good, because then I looked at it again, and my policy starts where, so, that's the first thing. The second thing is, the words that read: "cease take and water upon receipt of notice" and it's particularly the latter words, "receipt of notice"; that's a method which you would leave for a rule. So it's not a policy as to how to achieve an objective but it's more a method, and then in the rules you would actually pick it up again and again which is fair enough because it's a method, rules are methods. But I was thinking that it actually makes easier sense or it's easier to read without introducing methods into your policies. Do you agree?

A. **MR DE PELSEMAEKER:** I agree it's – it is in the rule itself and so…

Q. Which is where you'd expect it to be?

A. **MR DE PELSEMAEKER:** Yes.

Q. Yes, and then because I still quite like the Court's drafting and Mr Page's drafting. I wanted to reflect back another version of the policy which achieves what you want it to achieve in terms of having the word "insufficient" and the focus being on the downstream permit holder and the flow at the downstream permit holder's point of take. So, I'm just – I've got some suggested wording which maybe just easier on the eye to read but still achieving what you want.

LEGAL DISCUSSION – HOUSEKEEPING – PUT ON SCREEN (14:51:55)

THE COURT: JUDGE BORTHWICK

Q. And so when the Court puts up its suggested wording, think about also the active and inactive language. I think you're using the passive and inactive language and the Court's trying to use more active language which, in part is why I think our version is easier to read and understand. And what we're putting through requires just slightly different definitions but again without affecting the – it should not change what you're wanting to achieve but you may disagree with us. So, that's okay. So that's yours which I've made some notes to myself about and then Court's alternative.

And instead of saying, "a downstream permit", you might say "the downstream permit". We're not talking about the applicant agrees because, I mean it's an (inaudible 14:55:00) provision. I don't know that the policy necessarily has to be (inaudible 14:55:03) but it gets picked up in terms of what the application's about.

A. **MR DE PELSEMAEKER:** I think yes, it kind of works. I kind of looked at what are the elements?

Q. Mhm yes, elements.

A. **MR DE PELSEMAEKER:** That are in the policy that we drafted and they're all there except the reference to "upon receipt" but we already discussed that so that can be taken out.

Q. Okay.

A. **MR DE PELSEMAEKER:** Yes, but I think it words.

Q. Okay. Then no change to your entry conditions and no change to matters of control, they looked fine. And then your definitions and in actual fact, I didn't know what you were trying to achieve other than perhaps surreptitiously say that 124 applies. I didn't actually know what you're trying to achieve here and I got a bit lost and so I have my own definition but you might want to talk about your definition, "a water permit with a higher right of priority". I really did not know what – like you say, placeholder either date of the decision, is that like the Court's decision or some other decision? I wasn't sure what you were getting at. And then you had this random "that", which I suspect is an editing issue.

THE COURT: COMMISSIONER EDMONDS

Q. Yes I think this is mistake.

A. **MR DE PELSEMAEKER:** Yes, sorry. That needs to be taken out. So there's a few elements, one was it would be – we thought it would be good to define what a right of priority is as well and we encapsulated that in the first sentence. The other thing that we tried to do was to have in the definition, reference to a date because a date is important.

THE COURT: JUDGE BORTHWICK

Q. For what reason because we've moved away from the 18th of March date which I thought was a really clever solution to a potential problem under section 124, so now we've gone to a different date and I just didn't understand the explanations.

A. **MR DE PELSEMAEKER:** So the date has moved to either the date of the decision from the Environment Court.

Q. Oh, so it our decision? Okay.

A. **MR DE PELSEMAEKER:** Yes or the 30th of September because if you work with a date in the past it doesn't actually achieve anything because under the notified, any decisions that would be granted prior to the decision of the Environment Court, you wouldn't be able to bring down the priorities. So, we wanted to get the date as close as possible to either 30th of September or the decision. Putting it in the past, creates a risk that you're reactivating priorities where they no longer exist or where they haven't been brought down into previously issued consents. Putting them past the expiry dates of deemed permits, the 31st of October, that also does not work.

Q. So, put the date in the past, you've got a risk to reactivate.

A. **MR DE PELSEMAEKER:** Yes.

Q. Our priorities on a resource consent?

A. **MR DE PELSEMAEKER:** Yes.

Q. And then what was your second reason?

A. **MR DE PELSEMAEKER:** And the second reason is that until we have a decision from the Environment Court on this plan change we cannot actually bring down any priorities that are...

Q. Of course you can because why could you not? What would preclude an applicant right now going, what would preclude that? This is not statute, this is creating a new method under a plan. What would preclude all of Pig Burn, I'm meaning their applications and saying, "don't worry about the Court", you get the general drift of, of where this might go if there's a controlled activity, "we'll amend our applications and we propose this condition". What would preclude that?

A. **MR DE PELSEMAEKER:** Well my thinking was because the policy isn't in the notified version. So it doesn't have any legal…

Q. Well it doesn't but nothing would stop a person doing it.

THE COURT: COMMISSIONER EDMONDS

Q. Couldn't you just do an (inaudible 14:59:59) volunteering?

A. **MS KING:** And you've got the operative plan which have those matters which I think Mr Page discussed. So, you have got the ability to bring them in.

Q. Yeah, because this is this – stands in the shoes or stands in steel or a minimum flow and allocation regime as you traditionally know it. So, but it is doing its regulating, it's regulating the, taking us between abstractors, that's what this is doing and it has an incidental environmental benefit. So, you don't have to wait for our – I wouldn't have thought you would need to wait for our decision.

A. **MR DE PELSEMAEKER:** I'm happy to stand corrected, but that was just my reasoning for putting it there.

Q. Okay.

A. **MR DE PELSEMAEKER:** In light of that, as an alternative date, I still think the 1st of July or something close to the current date would be probably better than going back in time to the notification date because none of the permits that have been issued since or before up until now have actually had priorities brought down.

THE COURT: COMMISSIONER EDMONDS

Q. So, the rationale for the 1st of October, is that tied in with the three months?

A. **MR DE PELSEMAEKER:** That as well –

Q. Six months thing, is that –

A. **MR DE PELSEMAEKER:** – yeah, well the majority of the applications would come in the 1st of July as well to make use of section 124.

THE COURT: JUDGE BORTHWICK

Q. I didn't understand your explanation, paragraph 28(a)(i), if a deemed permit has been replaced with a new permit. So, by that I understand that to be a new resource consent. By the date of the Court's decision or the 30th September and the old permit has been surrendered. Why would you surrender an old permit, the old deemed permit? So, I'm applying for replacement consent, what? Because it's still got time to run, so you'd have to surrender it? What's the story there? You're replacing it instead.

A. **MR DE PELSEMAEKER:** So, under (i) the deemed permit has been replaced an the old deemed permit has been surrendered, that's the scenario there.

Q. And it has been surrendered?

A. **MR DE PELSEMAEKER:** Yep. In some cases, people ask for replacement or have a new consent, but they hold onto their current deemed permit.

Q. Right and use it.

A. **MR DE PELSEMAEKER:** And use it until the 1st of October.

Q. Right, I'm with you there.

A. **MR DE PELSEMAEKER:** And that's why I made a distinction between those two. So, that's the second scenario, (ii) –

Q. Yeah, okay.

A. **MR DE PELSEMAEKER:** – where people have, I think an example might be the Lindis, where – no.

Q. Yeah, no, Lindis is a good example of what you're saying, and then your (iii) is – your assumption is 124 applies after 1 October. That's what that's about?

A. **MR DE PELSEMAEKER:** Correct. Yeah.

Q. Well, I mean, I don't know, yeah, I understand – I know what you're saying, I didn't particularly follow it. I'm going to put up a couple of suggested edits. So, if you just keep going down or go back up maybe. So, court's version, downstream – so, in our edits, which we just put up on the screen, sorry, Jaron, can you just go back up to get the sub title, yeah stop there, deemed permit, downstream permit with a high right of

priority is defined as a deemed permit that is subject to deemed conditioning entitling the permit holder to require a number deemed permit holder to cease taking water was kind of what I thought you were getting at, and deemed permit has the same meaning in section 413 including any rights of priorities. I don't get your date thing. So, I just don't get it. So, then I avoided dates all together.

A. **MR DE PELSEMAEKER:** We did discuss the date quite a bit, and the starting point for a date was we need to replicate –

Q. No, you don't. I know your hanging on the language of replication but it's not helpful.

A. **MR DE PELSEMAEKER:** We need to carry over the system as it existed now.

Q. But it's a different system, all you're doing is requiring people to cease. Anyway, that's aside, neither here nor there. If you didn't have a date, what's the problem?

A. **MS KING:** I was just thinking of that and the test I did, you just remove any that have been replaced. So, in the test I did under, I think, 35, I just removed any deemed permits –

Q. That had been replaced.

A. **MS KING:** – that had been replaced. So, I'm not sure if, maybe be correct by Mr de Pelsemaeker whether a date is relevant.

A. **MR DE PELSEMAEKER:** Sometimes it is useful to look at it with a fresh set of eyes as you have done.

Q. If you had no date you could just round off what you've got by saying a right under deemed permit, where that deemed permit has not been replaced by resource consent. I don't know. Look, I'm just – you're – it's confounding me what the date is doing. The fact that you have a date does not mean that section 124 therefore applies. Neither applies or it doesn't apply. You either want the Court to make a decision on that point or you don't, you stay out of it.

A. **MR DE PELSEMAEKER:** I actually like what you were saying about where you make reference to the fact that it hasn't been replaced by resource consent.

Q. Okay. All right. So, you can get – you don't need the date and Ms King's tested it without a date.

A. **MS KING:** Yes, I hadn't realised I had.

Q. Okay, and you could either redefine it, I'm not sure if we've got a perfect definition, or you could redefine it without the date, just the reference to the resource consent. The policy needs to be a separate policy not a sub policy because it won't capture everybody that you're needing to capture. All right, and you could use more active language than passive language, and you're okay in principle with the Court's drafting, it may or may not need improvement, that is with the policy which we – up, Jaron up, sorry a bit further. More, keep on going. All right, stop.

A. **MR DE PELSEMAEKER:** We're looking at policy. Yeah, yeah.

Q. That's the policy, yeah. Okay, all right, thank you.

A. **MR DE PELSEMAEKER:** Maybe can I add one thing?

Q. Yeah, sure.

A. **MR DE PELSEMAEKER:** Just a definition of downstream.

Q. Yeah, my definition was actually downstream permit holder with a higher right of priority. I actually defined that.

A. **MR DE PELSEMAEKER:** Yeah, I just don't know if the downstream aspect was captured in the definition itself. If you could scroll down.

Q. No, it's probably got it in the reverse. No, it is. Well, it was meant to be. So the downstream permit with a higher right of priority is defined as a deemed permit that is subject to a deemed condition, entitling the permit holder, so that's the downstream permit holder, to require another to cease taking. So the focus there is all on the downstream rights.

A. **MR DE PELSEMAEKER:** Yeah.

Q. That's my thinking. Thoughts?

A. **MR DE PELSEMAEKER:** Could I have a look at it?

Q. Yeah.

A. **MR DE PELSEMAEKER:** Yeah. Can you scroll down a little bit? A bit more? Bit more? Bit more? Almost there. Yeah.

Q. That's it?

A. **MR DE PELSEMAEKER:** Yeah.

A. **MS KING:** Could you say to require another upstream deemed permit holder to cease taking water?

A. **MR DE PELSEMAEKER:** Yeah.

Q. Could say that.

A. **MR DE PELSEMAEKER:** Yeah, that was a bit that was –

Q. No, you could say that.

RE-EXAMINATION: MR MAW

Q. I just wondered whether I might test the witnesses' understanding of the Court's drafting in relation to two points that occur. The first relates to the policy, so if we can scroll up to the Court's suggested policy, scroll down just a fraction, the Court's alternative. Thank you. Now, the concept of notice has been taken out of the policy. The agreement to cease taking doesn't occur every time there's insufficient supply. It's only if there's insufficient supply and a notice has been given, so I had understood there were two quite important elements to the policy.

A. **MS KING:** That is covered off in the entry condition for notice and insufficient supply.

Q. Might there be circumstances where the policy applies absent the entry conditions into the RDA and the controlled activity?

A. **MR DE PELSEMAEKER:** Noncomplying, yes.

Q. My question simply is: is the lack of reference to notice within the policy likely to cause any concerns when, for example, a noncomplying activity application is being processed?

A. **MR DE PELSEMAEKER:** Well, in that case, you do miss the guidance, or the direction, given in the entry condition, or, yeah, in the matters of control of discretion, so in those cases, it might be useful to have it in.

Q. So that would be the only situation, because the RDA and the controlled activity are picking up the notice requirement on entry?

A. **MR DE PELSEMAEKER:** Correct.

A. **MS KING:** Yes.

Q. Might that entry condition be added to the noncomplying activity to resolve that problem, rather than bringing the concept of notice into the policy?

A. **MR DE PELSEMAEKER:** As an entry condition into the noncomplying activity.

Q. You'd then need a prohibited activity dropdown, though. It gets clunky at that point.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Sorry, I'm just at a loss to know why you'd even need it anyway. Given that it's a method, why is it important in this policy?

A. Because an applicant for a noncomplying activity might then be subjected to a condition that requires them to stop taking whenever there is insufficient supply, irrespective of whether notice has been given or not.

Q. Just pause there a second.

THE COURT: COMMISSIONER EDMONDS

(inaudible 15:16:36)

THE COURT: JUDGE BORTHWICK MR MAW

Q. No, no, it was just it was so repetitive, we were just repeating, repeating, repeating, and it's like (inaudible 15:16:46) drafting.

A. I understand that it's not, but it's –

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. No, but it doesn't matter, I suppose, what's the mischief.

A. We struggled, grappled with the drafting of where to put the notice, and it's been in and out and in and out of the policy.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, I understand what you're saying.

A. But it's that, and it's only at the noncomplying activity that the risk arises. The second question relates to the Court-suggested definition, and it comes back to this question of timing, and whether a date's useful or important or neither, and my question is: is the consequence of the Court's drafting that all previous rights of priority that may have been surrendered will be resurrected and brought down onto replacement

permits, so is that, perhaps, what the reference to a date, or it was one of the mischiefs that the reference to the date was seeking to avoid?

Q. How can you resurrect, if you've already replaced your deemed permit with a resource consent, how can you resurrect your deemed permit?

A. If you scroll down to the definitions.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. And I think there's always been a bit of an issue about the surrendering and the new permits that they might try and resurrect, so in the *Lindis* decision, we made a prohibited activity category that didn't allow them to decide they were going to use the races that were to be disestablished over time. That's just one example I can remember.

A. So does it matter when the deemed permit condition was in place? So looking at this definition, let's say you had a deemed permit that was surrendered in 2010 and replaced with an RMA permit, would this definition pick that up? Because, of course, the deemed permit being replaced will still have been subject to potentially that priority. I guess the concern that –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You can have concerns, but I don't understand the drafting as is. That's my problem. So how are you going to resolve that?

A. Perhaps in the first instance, by understanding the effect that the date was having, which is –

Q. But we've received – yeah, look, I don't understand it. At least in part, it was a workaround to say that the Court is wrong on 124, which is not impressive, putting it in this way.

A. Yeah. My understanding is that that was not the purpose of the date having been inserted.

THE COURT: JUDGE BORTHWICK

Q. Right, well, if it's not the purpose, I still don't know what the purpose is. I just don't understand it.

A. **MR DE PELSEMAEKER:** The purpose was to have the priorities or the system of priorities continue at a certain day and make sure that we're not working backwards, not carrying over rights of priorities where consents have been – sorry where deemed permits have been replaced. So it might well, yes, I'm just thinking out loud that instead of using a date, we bring in the notion that the deemed permit must – that it can only apply to deemed permits that have not been replaced yet by a resource consent. But I'm not sure if that's captured in now.

A. **MS KING:** Could that be in the current definition as in the JWS at 27, where you just take out the placeholder section and just say, "replaced by a resource consent" which I think was brought up earlier.

Q. Mmm.

A. **MS KING:** Which entitled and then you don't need a date but you refer that you can't assess anything that's already been replaced or bring forward anything that's been replaced.

Q. Well that's what we discussed earlier.

A. **MS KING:** Yes.

Q. And then the question then becomes, well, what, for example, if you're Lindis, and so you have been replaced but you haven't yet surrendered those consents, you're still able to use them until 1 October of this year. Is there a problem?

A. **MR DE PELSEMAEKER:** Well, in those cases, in the Lindis, if the consents that would have been replaced, if those consents were subservient then you wouldn't be able to impose that right of priority on any new consent that is granted. I'm not sure if I made myself clear here. Sorry. In the Lindis those – because the consents have been replaced but the deemed permits are still exercised, we cannot continue those priorities. Does that make sense? We cannot make those permits, those new consents subject to a higher right of priority.

RE-EXAMINATION CONTINUES: MR MAW

Q. But there there'd be no applications before the council to do that so...

A. **MR DE PELSEMAEKER:** From recollection there were one or two still that were outside – or maybe not deemed permits, no. But if there were, that would be the effect of that.

Q. Okay, that's probably as far as I can explore that.

THE COURT: JUDGE BORTHWICK

Q. I don't, sorry say that again. I didn't understand the answer.

A. **MR DE PELSEMAEKER:** Sorry, I'm just –

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Just wondering is there a problem that you need to be sorting? I mean like that the improbable Lindis doing something else now, coming in as controlled activity say. So, Lindis has applied and has secured replacement resource consents, hasn't surrendered its deemed permit and won't as I understand it from the 1st of October. Is that right Mr Page?

A. Yes, they will just expire.

Q. So they don't even need to surrender them, they'll just expire. So that's one point of difference. Don't need to surrender, may just expire. In the unlikely event that Lindis comes in and wants a controlled activity, well could Lindis, having got its replacement consent then apply for a controlled activity instead, you know all of them? It could.

MR MAW:

It could.

THE COURT: COMMISSIONER EDMONDS

But they would have had to have applied by the 1st of July, wouldn't they?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I know it's a preposterous example but then they would actually have yes.

A. I wonder whether I can describe the situation that I had in mind when I was thinking about the dates and why they might and might not be important. So let's say you had a deemed permit and that deemed permit was replaced with an RMA consent, two years ago and that deemed

permit previously had a right of priority but as part of its replacement application, it agreed – the consent holder agreed not to pursue its high right of priority. So then other permit holders in the catchment that were historically subservient to that deemed permit will have to put forward applications now saying that they will be subservient to that permit holder because they were the holder of a permit and…

Q. You mean the one who's got the resource consent?

A. Yes.

Q. Not subject to anything?

A. Correct, well it might now have a minimum flow attached to it but they didn't have a right of priority.

Q. So why do you think they're going to be subservient to, why you think they're – so the deemed permits, whoever's are left will be subservient to a resource consent, former deemed permit.

A. Yes, because the subservient one being replaced is a deemed permit.

Q. Yes.

A. And it is subject to a deemed condition, the subservient permit still has the condition on it.

Q. No, it doesn't. Sorry, you've got a deemed permit? Yes.

A. So the one that's been replaced, think of that and I'm going to use the "dominant" but I'm not suggesting we bring that language…

Q. Is it upstream or downstream?

A. It will be dominant downstream.

Q. So it's a downstream permit, yes.

A. Yes. So that's been replaced with an RMA permit.

Q. Yes, has been or will be?

A. Has been.

Q. Has been replaced.

A. Yes.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So the person isn't going on the deemed permit, it's been surrendered or?

A. Yes.

Q. So they don't have any option to go back to a deemed permit.

A. Hasn't been surrendered yet because they…

Q. So they might have an option to resurrect their deemed permit for another application process?

A. I'm not so worried about what the dominant downstream person does, it's the subservient upstream deemed permit holder, that when they come to replace their permit would have to agree that the dominant downstream permit holder still has priority over them.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Why? If I am and I suppose this is some of the problems that perhaps Ms King was saying, if person A was formerly a deemed permit holder and had, with priority over everybody else in the catchment has applied successfully for a replacement consent, has gained a replacement consent subject to whatever conditions. Then they're out of the ranking tables and so then the next person – they're just out, they're taken out as it were.

A. Yes, but they are – that's the dominant.

Q. Yeah.

A. But this definition is applying to subservient.

Q. Oh, you mean the Court, sorry, I thought I think Tom, Mr de Pelsemaeker was calling it something else. So, you're talking about – Mr de Pelsemaeker is actually talking about his own definition and how to make it better.

A. Sorry, I was working with the Court's one which I think is still picking up.

MR DE PELSEMAEKER:

I think we were looking at the definition in paragraph 27. Sorry, and I think where we landed was that perhaps we could take out the words "by" and then "place holder" blah blah blah which up until the closed brackets, take that out and I'm happy to stand corrected on that but I was just drawing out the scenario

that you just talked about and I could not see an issue with just having "replaced" there.

THE COURT: JUDGE BORTHWICK TO MR DE PELSEMAEKER

Q. By resource.

A. By resource consent.

EXAMINATION CONTINUES: MR MAW TO MR DE PELSEMAEKER

Q. Replaced would resolve that issue.

A. Yes.

Q. And you could achieve the same outcome with the Court's wording by adding some words to the end of deemed permit, such as that has not been replaced by an RMA permit.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, this is on – this my definition of deemed permit.

A. Yes.

Q. And then you're suggesting that you could do the same thing as by saying –

A. So, you'd add some additional words at the end.

Q. A resource consent.

A. Where that deemed permit has not been replaced by a resource consent.

Q. You're – sorry, are you doing the first the definition or the second?

A. Second, deemed permit.

Q. So, deemed permit has same meaning as 413 and includes any rights of priorities that are deemed conditions of the deemed permit.

A. And then add where that deemed permit has not been replaced by a resource consent.

THE COURT: JUDGE BORTHWICK

Q. Okay. So, very good. All right. So, I think whether it's Mr de Pelsemaeker, your edit to paragraph 27 is to delete the words after commencing with placeholder to the end of the sentence, is that right? Delete all of those words and replace it with by a resource consent.

A. **MR DE PELSEMAEKER:** From replace by resource consent on the second line.

Q. Full stop.

A. **MR DE PELSEMAEKER:** Yeah. Yes, if it's – well, it depends on what you want to capture within the definition. If it's just a definition of a right of priority, then you would stop there. If you –

Q. It's the higher point of take.

A. **MR DE PELSEMAEKER:** – if you want the higher in there, then you have to go a little bit further and add, which entitled the permit holder to exercise the priority to water over the applicant.

Q. Yeah, which I guess, we were, rather than using the words exercise a priority, we had replaced those words by talking about what the priority did which is in our definition which was to require another upstream deemed permit holder to cease taking water. So, it can't have been very express about the nature of the priority that you're talking about. So, that's why we've, rather than just say priority, because you know, it's got more than one element which we're not replicating because we don't like that word, and actually we're not doing it, so then we try to express it in English what it was, what element you were capturing.

A. **MR DE PELSEMAEKER:** Yes.

Q. Yeah.

A. **MR DE PELSEMAEKER:** Now, I'm following that, and I'm in my mind, working with the definitions on the screen.

Q. Do you want me to flick through what I've written up? And then we'll have a cup of tea.

A. **MR DE PELSEMAEKER:** Yes, and then I – there's one final concept that I want to explore on that which I've signalled, such that you might fleet on it. If you do add in the words that hasn't been replaced by a resource consent.

Q. Is this to ours or is this to Mr de Pelsemaeker's?

A. **MR DE PELSEMAEKER:** Well it applies to both in terms of the concept, but if you don't have a date at which it's been replaced, might the last priority – the last deemed permit that comes in to be replaced, so lets say

lets all of the other ones have been replaced by RMA permits up to that point. Does that mean that the last one doesn't have to give effect to or bring down the priority? And that's where the date might be important.

Q. Well if you're last cab off the rank.

A. **MR DE PELSEMAEKER:** Yes.

Q. And all of the other deemed permits have been replaced already, resource consent subject to conditions and presumably your independent commissions did think about this issue of rights and impact on other people's rights.

A. **MR DE PELSEMAEKER:** I think of permits issued under plan change 7.

Q. Okay, under plan change 7, not hither to today.

A. **MR DE PELSEMAEKER:** Yes.

Q. Okay, so under plan change 7, if you are the last cab off the rank.

A. **MR DE PELSEMAEKER:** The last application and let's say you had previously been the subservient permit to 10 other ones in the catchment.

Q. So, are you talking there about rights of priority, first in first served? Now, that's what you're talking about?

A. **MR DE PELSEMAEKER:** No, just the wording of that: "hasn't been replaced by a resource consent," because by that point in time, every other deemed permit would have been replaced by a resource consent, issued under plan change 7.

Q. True, but as I understood the process with the Council is to, for all those who wish to do this, look at catchment, waterbody by waterbody, and whatever those priorities are, they must be written up somewhere else, like on somebody's deemed permit or some other record and we're told and we have to rely on this so that it's easily accessible. So, it's not as if, if I'm the last application to be processed, my neighbours can gain me in some way that is inconsistent with those rights. It can't be done that way.

A. **MR DE PELSEMAEKER:** It shouldn't occur.

Q. It shouldn't be done that way.

A. **MR DE PELSEMAEKER:** I agree with that proposition, and my question, is adding that wording on the end there actually have that effect? Without a date, so that hadn't been replaced by a resource consent by, and I'll

say 1 July 2021. So, that's the date at which anything that had previously replaced by a resource consent falls away. It's the date by which all replacement applications needed to have been lodged if 124 is to apply.

Q. Yeah, well, that's why the original drafting of deemed permit was just simply echoing what was in the Act. So, it's a deemed permit, including any rights of priorities that are deemed conditions on the permit, that's it, and then you've got the order or ranking relative to each other secured under the Act.

A. **MR DE PELSEMAEKER:** It may ultimately be that the date and also reference to replace consent proved to be too difficult and everything that exists, exists on the face of the permit simply as bought forward.

Q. But I think that's what – isn't that what people are trying to do? Everything that is as on the face of the permit. Mr Page, is that not right? So, we're recreating or doing any fancy footwork here.

A. **MR DE PELSEMAEKER:** It's the question of whether that has the effect of resurrecting priorities on permits that have been replaced in proceeding few years.

Q. Well, let's just use Lindis as the example and the probable example that they do actually want to come along, and they do want to replace everything as controlled permits.

A. **MR DE PELSEMAEKER:** Maybe think about Lindis but pick say one permit holder comes in.

Q. Yeah, okay.

A. **MR DE PELSEMAEKER:** So, the dominant permit holder or one pathway in the range.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. So, one of the Lindis group breaks ranks and thinks, can't afford that gallery ball, and I don't want to do this anymore, I want to do something different. Why would that not occur – could that occur, why would that not occur? So it's a question for Mr Page.

A. The answer to the first question's easy because the honourable Court made it a prohibited activity.

THE COURT: COMMISSIONER EDMONDS

But say it hadn't done that, (inaudible 15:40:14) to one side.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Yes, say it hadn't done that.

A. But second would be no, it couldn't because we're only dealing with the point, past the 1st of October and all priorities cease at the 1st of October unless they've been replaced by some other species anyway. So, it seems to me that the critical question is what priorities exist at the time that the consents being considered by the consent authority and that's simply a matter of fact at the time and whether that gets carried forward past the 1st of October. I can understand my friend's concern and I don't –

Q. So what do you understand by the concern. What's the mischief?

A. If I go back to Lindis for a moment, one of the things that the Court observed in the Lindis was a strange aspect to the way that primary application is defined.

Q. Mmm.

A. And the risk that if permits started before the expiry of the deemed permits there might be some primary allocation overhang that somebody else could swoop in and apply for, and so the Court's workaround for that problem was to say, the consents that we grant don't commence until the 1st of October 2021 so that there would be no spare head space in the definition of primary allocation. And I think my friend's concern is, well, given that the replacement consents have been granted but have not yet commenced, as at where we are right now, the priorities still exist and someone could sweep in and seek to obtain a benefit from the fact that they may have a higher priority over somebody else as at today. But I just don't see how that's going to affect a decision that gets made. I mean, here we are in July and by the time you get to issue your decision, we're so close to the 1st of October anyway. I just can't see how practically the concern would arrive.

Q. So was it a mischief about primary allocation and the availability because –

A. No, it's the – in the example I explained of the person who had replaced their permit, say two years ago, who had the benefit of the priority. So they had the higher right, they were essentially – they've obtained their replacement RMA permit in circumstances where they weren't going to keep that right, moving forward.

Q. Yes.

A. Suddenly they do keep that right, it's resurrected because each of the subservient permit holders now has to agree to cease taking upon receipt of notice from them. So it's perpetuating their rights.

Q. And so your concern and actually you, I think had a question about that, what then happens to the person who is King of the North, with highest right and whether a condition comes down on them or not come down on them. And we didn't have in mind that they had already been replaced but okay, yes…

A. Yes, so that's the situation where that person.

THE COURT: JUDGE BORTHWICK

Q. So you need to, yes – what would you do Ms King, so then you've got Pig Burn is your example and we know that the King of the North is a deemed permit number 3, I think you've – in your map, that is your permit. The proposition is, permit number 3, that has been replaced by resource consent. Does permit number 4 and permit number 5, I think in your map are they sort of somehow subservient to permit number 3? Who's been replaced, doesn't have a right of priority, has whatever the conditions or does it next fall to the – you know the jostling just happens between permit 4 and permit 5 and permit 4 becomes the permit with the highest priority. So, that's your question, isn't it?

A. **MS KING:** It is and my question through the lens of the definitions that don't have a date in terms of how far they reach back.

Q. And so, the date that you think it should reach back into is either a court decision, or – it doesn't sound like it's a court decision, it's the date of the actual replacement.

A. **MS KING:** It could be. The date that I had in my mind was 1 July as a date by which all the replacement applications had to be in.

Q. Except that, don't we know that a number of replacement applications –

A. **MS KING:** There's still a number to come –

Q. – are yet, yeah.

A. **MS KING:** – is the problem with that, which is why the date was stretched in that window through to the 30th of September, to provide those people the last opportunity to get an application for a controlled activity in.

Q. Yeah.

A. **MS KING:** It might not have the benefit of section 124, even if it applies.

Q. And so, in that case, does Mr Page – what Mr Page says make sense, which is by the time you get a decision out of this court, which we thought we were going to be terribly efficient, but now have some doubts about, you know, it's looking like 30th of September anyway.

A. **MS KING:** Yes, so that just might be the date.

Q. That just might be the date. Because after that date they've expired anyway and then you've got some argument about 124, and we won't –

A. **MS KING:** Yeah, there's no suggestion that should be anything after that date, cause at that point it's known whether an application – sorry, it's known whether there was a deemed permit that had been replaced.

Q. Yeah, well after the 30th of September, if you have not applied to renew or one way or the other, section 104 cannot apply because you just haven't got your application in. So, that's pretty easy, yeah.

A. **MS KING:** Yes. it may well be the answer.

Q. Do you want to think about that Ms King now, in terms of that application and how that would work out in relation to Pig Burn? And in fact, permit number 3 already has resource consent. So, how does this then get worked out between the remaining two. Any chance of somehow – just four and five, I know you call them four and five, their rights are relative – go back to three or do five just simply take subject to fall of superior right.

A. **MS KING:** Yes. So, the key is that P3 or king of the hill have been replaced but their deemed permit hasn't yet been surrendered, which as

I understand it, these things haven't been surrendered necessarily. But anyway, the factual scenario is now the thing I'm worried about.

Q. Okay, understood.

COURT ADJOURNS: 3:48 PM

COURT RESUMES: 4.06 PM

THE COURT: JUDGE BORTHWICK

Q. So where did you get to?

A. **MS KING:** I have to say, I did get a bit confused. I'll try talk it through as easily as possible. So I've got three scenarios, which might be easier to talk through. So if the date were to be the 1st of July, and the third had been replaced, then the third priority would not go on the appendix of the fourth and fifth priorities, so therefore, they would not need to cease taking on receipt of notice from the third, because they weren't listed in the appendix of the fourth and fifth.

Q. And is that so, even though third had not replaced or not surrendered the permit?

A. **MS KING:** Yes, because it had been replaced by the 1st of July, so then scenario number two, if the date was the 1st of July, and the third hadn't been replaced, it would go –

Q. Just writing the note, (inaudible 16:07:33).

THE COURT: COMMISSIONER EDMONDS

Q. So when you're talking about the 1st of July, you mean that's the commencement date for the new consent, the replacement consent?

A. **MS KING:** No, I'm meaning if the 1st of July was in the definition at paragraph 27.

THE COURT: JUDGE BORTHWICK

Q. Your scenario two.

A. **MS KING:** Scenario two. So if the date was the 1st of July in that definition, and the third hadn't been replaced, it would go on the appendix of the fourth and fifth, and therefore, the third could exercise its priority over the fourth and fifth.

Q. Mhm.

A. **MS KING:** The third scenario is if there was no date, it would be based on what applications had been replaced at the time the conditions were being imposed on the consent being considered.

Q. Say it again, so if no date, then?

A. **MS KING:** It would be based on the applications that had been replaced when the conditions were being imposed on that consent, so say the third had been replaced a month earlier, it wouldn't go in the appendix of the fourth and fifth

EXAMINATION CONTINUES: MR MAW

Q. Now, that third example, was that taking into account that wording which is on the screen, so that hasn't been replaced by a resource consent?

A. **MS KING:** Yes.

Q. So the effect of that wording may have unintended consequences in the absence of the date?

A. **MS KING:** Yes. I did consider what date would be better, but it's dependent on the wording of the definition, if it (inaudible 16:09:41). If you want more consent priorities to be listed in the appendix of the lower, it's better to have a date further in the past.

THE COURT: JUDGE BORTHWICK

Q. Not in the future?

A. **MS KING:** Not in the future. If you have a date in the future, you'll have less priorities in the in the subservient. Does that make sense?

EXAMINATION CONTINUES: MR MAW

Q. And that's because more permits will have been replaced between your date in the past and the 30th.

A. **MS KING:** Yes.

Q. So, if you're thinking about the date options we had, we had the 18th of March 2020, I think is an option, might have that wrong.

A. **MS KING:** Yes, I think that would be the better option to get the most amount – or, bad English, of priorities on the subservience in their appendix.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. And so, where would you stick, insert the date?

A. That hasn't been replaced by a resource consent on or by date X. sorry, that hasn't or hadn't been replaced – sorry, by 18 July – sorry, mixing my dates, was it the 18th of March? So, that by 18 March 2020 hasn't been replaced by a resource consent. Should be "a" deemed permit, perhaps, instead of "the."

MS KING:

I wonder whether I might have you think about a fourth example if there was no date and there was no additional wording in terms of the replacement, would it pick up all historic priorities?

MS KING:

So, if it said, all deemed permits and nothing about replacement or date, then that would include all priorities on all permits that were within that catchment.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, what is important regardless of which definition is used is that it have four elements as definition. So, it seems the four elements that you're defining deemed permit as having the same meaning in section 413 RMA, that the definition refer to rights of priority. Definition refer to – the deemed permit is a permit that has not been replaced by resource consent, and the fourth element being, honour it by 18th of March or whatever the date is. I know how to do it. Okay, right. No, I don't. it's not that easy. But it has those four elements. Reference to the RMA, reference to the rights of priority, and I went on to say, which are conditions of a deemed permit, and you may or may not need that if you've got three and four there, reference to the thing not being replaced by a certain date. It has those four elements, very important to get out. That's for the definition of a deemed permit.

A. Yes.

Q. And the idea that somebody has a higher right of priority was being rolled into your definition of water permits, you had both things, what is a water permit and then with a higher right of priority, and I separated those out.

A. I take no issue with the separation, and again, as long as those essential elements come through.

Q. Yeah, that you are dealing with a higher right of priority, so in my case, the upstream deemed permit holder.

A. Yes, downstream.

Q. Yeah, oh, well, what I've written here, and it's been slightly amended, but the amendments aren't up on the screen, but the downstream permit with a higher right of priority, that's the phrase being defined.

A. Yes.

Q. Now, that is a deemed permit that is subject to a deemed conditioning entitling the permit holder to require another upstream permit holder to cease taking water, or to require another upstream deemed permit holder to cease taking water.

A. An upstream deemed permit holder?

Q. Yeah, upstream deemed permit holder, yeah.

A. Because it's past tense or it's reflective of a point in time when it was the deemed permits that were in play.

Q. Mmm, all right, tell you what, we thought this was something we could issue a minute about. We also thought we could issue a minute over the schedule because we won't have enough time, and it just might be easier to do it that way.

A. Now, which schedule?

Q. The methodology schedule.

A. Yes, Commissioner Bunting's schedule, not the TA or the hydro schedules.

Q. No, no, no, that's just subject to –

A. Decision on merit.

Q. Yeah, it is, so that requires technical issues as to law to be worked through, and they are complex the way they've been presented, and we haven't heard your scope argument, your legal response argument.

A. Yes.

Q. So that has to be resolved, and that also has to be resolved in a broader argument, and the broader argument of the three NPSs as well, and the

fact that they've been brought down, picked up by RPS for the first time, and so it's not just about understanding the law in relation to TAs. You might have a perfect understanding, but how does that then sort of rub against the other two NPSs? It has to be understood in that, so you're looking at the substantive decision for that, but that then starts to describe our four corners, if you like, of potential decisions, and then making a decision, and, if required, and it may not be necessary directing amendments, or, yeah, directing amendments.

A. Yes.

Q. But that's much, much later, but the minute we think we can get out by the end of the week. Yeah, yeah, yeah.

THE COURT: JUDGE BORTHWICK

Q. Okay, so I understand what's important for you, Ms King. So you think a later date, not a forward date, is important when it comes to making this all work?

A. **MS KING:** Yes, I think that gets more priority holders in the appendix than a further forward (inaudible 16:19:20).

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah, and you understand that?

A. Yes, I do.

Q. Do you agree with it?

A. It may –

Q. You don't know?

A. Not entirely.

Q. Not entirely.

A. I wonder whether the date's actually closer to now, as in, 1 July is the date I've had in my mind, and the reasons there is that it will ensure that permits that have been replaced up until that or up that date, resurrected in terms of the priority tree, because they've been replaced on their own terms up to that point, with no expectation that they would be retaining priority.

Q. Yeah, so even though they're not surrendered, there was no expectation, that'd be fair.

A. Yes.

THE COURT: JUDGE BORTHWICK

Q. There was no expectation, and so there cannot be any reaching back into that pool of potential persons, you know.

A. **MS KING:** And I do agree, and I think there is a slight issue that the conditions won't match, so you'll have a subservient condition, which states what a notice needs to look like, but if you have, for lack of a better word, a dominant permit holder that is listed in that appendix and doesn't have the advice note with what a notice needs to look like, it might get a bit complicated.

EXAMINATION CONTINUES: MR MAW

Q. Yes, so if the date was 1 July, any dominant permit holders renewing would have the advice note coming down onto their permit.

A. **MS KING:** Yes.

THE COURT: JUDGE BORTHWICK

Q. If you're a dominant, though, presumably, would there be a need for a condition on your resource consent? Would the condition be that I'm entitled to tell the subservients to turn off?

A. **MS KING:** Yes, I think that's outlined in the JWS as an advice note.

Q. As an advice note?

A. **MS KING:** Because it's voluntarily.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. But is an advice note enough? Because these things don't actually have a life and actually give them some statutory force, do they?

A. The submission I'd make on that is that the right arises by virtue of the condition on the subservient permit as opposed to the dominant, so there doesn't need to be a condition on the dominant, but it's helpful to have

the advice note, which is the machinery to capture the contact and the notice requirement provisions.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So what would help me, because there's quite a bit of text in all of this, and I don't think it's actually captured the issue that you're wanting to close out, so it would help me, if you capture the issue, you want to close out?

A. Mhm.

Q. And the mischief, what is the mischief? If you put that to us, then we can at least think about that in terms of drafting and come back in a minute, does that make sense? Yeah, because I sat there and thought oh, no idea why we're doing what we're doing.

A. Yes, and having spent a little bit of time thinking about it, I keep coming back to the point that there is a need for a date, and there are reasons for the date, but there are different consequences depending on when the date chosen is, and the examples, the three examples Ms King stepped through, I think, highlight the differences in effect of having a different date.

THE COURT: COMMISSIONER EDMONDS

So you've got sort of policy choices that we need to be informed about, really.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Well, they're yet, why policy choices?

A. Well, they're choices in terms of the rule framework –

Q. Oh, yeah, that's true.

A. – and the way you want to have it exercised and what's the principal basis for picking whatever date or no date or whatever it is you're doing. I think that's what I'm struggling with.

MR MAW:

It's the explanation. Well, there's two explanations. One is why a date might be required, and then two, why is a particular date required.

THE COURT: JUDGE BORTHWICK

Yes, I think that's right.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. It may be (inaudible 16:23:55) sort of a costs and benefits kind of side of the equation as well, isn't there, and how it relates to the objectives and policies.

A. Ultimately sitting in the background, yes.

Q. Thinking about section 32.

A. Yes.

Q. The efficiency and effectiveness and all those other good things.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, okay, so you'll come back to us, perhaps tomorrow or Thursday, with a precise articulation as to the matter in relation to the date. First, why a date is needed at all, and secondly, why a particular date might be chosen, and I've noted that the mischief that's thought to be avoided by putting a date into the plan change is that you don't want a subservient consent-holder being subject or being required to turn off or cease taking water or being subservient to a resource consent that formerly had priority but no longer has priority. That's the thing that you wish to close out.

A. Spot on, yes.

Q. Yeah, so I think I understand it, should remember it tomorrow morning, so complex, should remember it tomorrow morning, but I think it's going to be really important just to capture it for us, and then we can reflect back what we think might work, either your wording or our wording or both, you know, and if you had any ideas about that wording too, you should come back to us about that. Yeah, not wedded to anything except making something which is effective, yeah, yeah.

A. Yes, I think we are all aiming at that outcome. It's a complex issue is the reality of it. Some days it seems really simple in terms of just the concept of it comes down.

Q. Conceptually, it seems really, really simple.

A. But the drafting of it's challenging, but surmountable, I would say.

Q. It's surmountable, yeah. It's a bit like this plan. Conceptually, it's really, really simple.

A. Yes, yes.

Q. But it's actually not in terms of the implementation.

A. It's unusual is the plan, but it's simple in terms of what it is seeking to do, but it's, you know, when you come to the drafting through the lens of how one might normally go about drafting a plan, it's a unique specimen.

Q. Well, it's like nothing I've encountered in the last 12 years, or anything that I'm familiar with. Yeah.

THE COURT: COMMISSIONER EDMONDS

Nor me neither.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. You thought it was the hardest decision that you had to make.

A. Yeah, (16:27:15).

Q. In terms of the degree of difficulty, this is at the outer edge of it in terms of the cases that we encounter, even though there are a few provisions.

A. And it's not like the New Zealand Coastal Policy Statement where it was just policy. That board that I was on was (inaudible 16:27:35). Officials got another go at that.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All right, so do you think you could do that by tomorrow or Thursday?

A. Yes.

Q. And we'll be thinking about it, along those lines that we've discussed, yeah.

A. Are you happy for me to pick that up in our closings submissions, if that's a place to drop that?

Q. Sure, only if you have time, yeah.

A. Yes.

Q. Yeah, because I don't want you to rush it, and, you know, that's, I guess, in part why we sort of pushed pause, I think is your phrase in community water, yeah, and we will.

A. Yes, yes. Okay.

Q. That's probably all we can do from us, because we won't have time to go through – oh, we could if you wanted to – go through the schedule.

A. So is the plan to issue a minute, just with some further questions of clarification, or –

Q. Yes. I think the way that – I haven't actually seen what the edits are, but I thought you could issue a minute, and either attaching, you know, the provisions with comment boxes, but it could get quite full, or a table. Comment boxes, you know, alongside the schedule, with edits into the schedule, or you could actually have a table like the witnesses have it, saying replace this by that and reason, you know. So there seems to be, as far as I understand it, inconsistent use of terms, but it may not be, they may be deliberate, but they haven't actually been explained, so we're just trying to nail that one. That's actually the easiest task, or should be.

A. Mmm, which does make me wonder whether it would actually be more efficient for those questions to be put to Mr de Pelsemaeker in the first instance.

Q. Well, you can do, you're ready for that.

THE COURT: COMMISSIONER BUNTING

Yeah, we can do.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I haven't seen the questions.

A. Right.

Q. I've been busy with other things.

A. It may narrow down what – Mr de Pelsemaeker will be able to say whether he could actually answer it or not, which may then inform whether –

Q. Yeah, I mean, it does occur to us that this might be for another expert, like Mr Leslie, but on the other hand, if Mr de Pelsemaeker and Ms King do not know what is in the schedule, then we've got real problems, you know, because either they have explained it in plain English, or they haven't.

A. I see some benefit in the questions being put to the witnesses.

Q. All right, we may as well do that then.

A. You may not thank me, but we'll see how we go.

THE COURT: COMMISSIONER BUNTING

Q. I sort of apologise coming at the last minute. I thought I had my head around this but going through and some other things that occurred to me. The first thing one is 10A.4.1.

A. **MR DE PELSEMAEKER:** Yes.

Q. You'll see, and I've had a go at editing this, but perhaps not correctly. There's a term called measure maximum rate of take and it's in caps. Can you see that?

A. **MR DE PELSEMAEKER:** Yes.

Q. Then I went across to step 4. Have you got that there? Step 4G, and it refers to the maximum typical rate of take. My question was, are they the same thing? Cause it would appear to me they are, and the wording is slightly different. You'll see at the start, it just says maximum rate of take, and in G it says the maximum typical rate of take. I'm not sure, maybe it requires the, you know, Mr Wilson or someone.

A. **MR DE PELSEMAEKER:** They are the same thing.

Q. They are the same thing?

A. **MR DE PELSEMAEKER:** They are the same thing, yes.

Q. And if so, should – I wondered why in the start of the document why it's shown with caps. Was that really necessary?

A. **MR DE PELSEMAEKER:** They're not really necessary. I think why we are referring under the heading 10A.41 to maximum rate of take is because it's a historical – it's a sentence that was put in there before we actually arrived at the removal of atypical data.

Q. Okay.

A. **MR DE PELSEMAEKER:** Now, there is one issue with that, is that the procedure for removing atypical data does not apply to all uses, so it does not apply to community water supplies or hydroelectricity.

Q. That's okay. I think that's covered.

A. **MR DE PELSEMAEKER:** So, I don't think it's appropriate to change wording "maximum rate of take" to "maximum typical rate of take."

Q. At the start?

A. **MR DE PELSEMAEKER:** At the start.

Q. Should it be in caps? Or can it just be in lower-case.

A. **MR DE PELSEMAEKER:** It can be in lower-case, yes.

Q. Yes.

A. **MR DE PELSEMAEKER:** So, the maximum rate of take is the same as maximum typical rate of take for any takes other than community water supply and hydroelectricity.

Q. So, for consistently, should the word typical be removed? Because – or included in both places.

A. **MR DE PELSEMAEKER:** No, I think it's fine as it is, to be honest. Because what you end up with when doing step 4A-G – yeah step 4A-G does not apply to hydroelectricity generation. So, you still need to calculate the maximum of rate for those uses, but you don't apply step 4. So, I think there is a deliberate difference.

Q. I understand now, okay, but you take out the caps and the –

A. **MR DE PELSEMAEKER:** Yes, that can be done, yes.

Q. And my next question was, the relationship between that and the rate of take limit which is in the five. Is the relationship between the maximum typical rate of take, is that the same thing as the rate of take limit, or is it something different?

A. **MR DE PELSEMAEKER:** Because the – my understand is that they're different, because the maximum rate of take applies to a water year, whereas the limit is the maximum of that. Yeah, the limit is what goes on the consent; is the allocated volume. Yeah, I think it might be best that I clarify it to make sure with Mr Wilson.

Q. Could you do that overnight? Is here around to do that?

A. **MR DE PELSEMAEKER:** Yeah.

Q. And then the next was – it's a sort of similar theme through 10A.4.2.

THE COURT: COMMISSIONER EDMONDS

Q. Could I just go back to 5 in 10A.4.1?

A. **MR DE PELSEMAEKER:** Yes.

Q. So, where it says, "will be determined as the maximum or remaining value after steps 1-4 have been completed." Wouldn't it just be the maximum value? What does that word remaining add?

A. **MR DE PELSEMAEKER:** I think that the word "remaining" just refers to you need to go through all the steps.

Q. Yeah, gone through the steps. I've found that a little misleading.

A. **MR DE PELSEMAEKER:** You could take it out, yeah.

THE COURT: COMMISSIONER BUNTING

Q. And hence, it was my question, is it the relationship between the maximum typical rate of take and the rate of take limit, anyway, you're going to check on that.

A. **MR DE PELSEMAEKER:** Sorry, is that…

Q. You were going to check with Mr Wilson on those.

A. **MR DE PELSEMAEKER:** Yep.

Q. So, in 10A.4.2, again, it's just in the first couple of lines, the maximum daily volume shown in caps, again, should that be – should that be just lower-case?

A. **MR DE PELSEMAEKER:** You could make it lower-case, yeah. We just kind of put it in caps just to kind of, yeah.

Q. To encapsulate it.

A. **MR DE PELSEMAEKER:** Encapsulate that it's a concept.

Q. And then you come down to G, which is in 4, and again this is sort of a mixed use of capitals. Well, maybe that was deliberate.

A. **MR DE PELSEMAEKER:** No, that's an oversight probably. It should either all –

Q. It would be consistent with what's in H, wouldn't it?

A. **MR DE PELSEMAEKER:** Yeah.

Q. And it was just the question there again, the relationship between maximum typical daily volume and the daily volume limit. So, it's the

same question really, and then 10A.4.3, the same in heading, it's just used that caps term.

A. **MR DE PELSEMAEKER:** Yes.

Q. And where I got a bit confused was in the methodology under 1, the authorised monthly limit, it should say "consented," think there's an "ed" missing after consent. Is it?

A. **MR DE PELSEMAEKER:** Consented? No, it should be authorised.

Q. No, authorised is okay, but the use of the term consented in brackets, it just says consent.

A. **MR DE PELSEMAEKER:** That is correct, yeah.

Q. What confused me, instead of consented daily volume or calculated daily volume – which one is it?

A. **MR DE PELSEMAEKER:** The calculated daily volume applies when you have a deemed permit that does not have a daily volume on it.

Q. Okay.

A. **MR DE PELSEMAEKER:** So, there's no consented daily volume. So, my understanding is that daily volumes are calculated using what's on the deemed permit which is often litres per hour or heads.

Q. See, that didn't seem – I couldn't find how that was calculated. How do you calculate the daily volume?

A. **MR DE PELSEMAEKER:** That needs to be explained, yeah.

Q. And is it, how do you determine which applies? Because it just says "or."

A. **MR DE PELSEMAEKER:** Sorry, is that in the same formula?

Q. No, it says the authorised monthly volume is the consented daily volume or the calculated daily volume.

A. **MR DE PELSEMAEKER:** Yes.

Q. Now, how do you decide which it is?

A. **MR DE PELSEMAEKER:** It depends on the nature of the permit. If you have a consented – sorry, if you have a resource consent, the consented daily volume applies. If you have a deemed permit that does not state a daily volume, it is being calculated by whatever rate of take is stated on that permit. So, the "or" is okay, but I agree that it needs to be made explicit or there needs to be some kind of explanation around that.

Q. Okay, thank you, and again, the question, the relationship between the authorised monthly volume and the monthly volume limit which is it.

A. **MR DE PELSEMAEKER:** Yep.

Q. I think I lost it, and when we go to annual volume, just the same thing in the heading.

A. **MR DE PELSEMAEKER:** Yeah.

Q. And again, that is a term, that calculated daily volume which is in the, you'll see there, yes. and the question, the relationship between the authorised annual volume and the annual volume limit. What we did wonder was whether some little table of definitions might assist? Do you think?

A. **MR DE PELSEMAEKER:** Within the plan change? Or within this…

Q. Within this schedule.

A. **MR DE PELSEMAEKER:** Plan change, yeah.

THE COURT: COMMISSIONER EDMONDS

Q. At the beginning. Then all the language be consistently used and the concepts thereafter.

A. **MR DE PELSEMAEKER:** Yeah, we tried to do that as much as possible already, but yeah.

THE COURT: JUDGE BORTHWICK

Q. You do. So, what terms are missing that you think – it's the inhouse calculation of daily volume, isn't it? That's an inhouse calculation which you're doing already on a replacement consent. So, that's missing, but anything else missing? Or has everything else been picked up on the way?

A. **MR DE PELSEMAEKER:** I think so, but it might be good to spell out those terms, though.

Q. Just got to be careful, you don't rewrite what they've written.

A. **MR DE PELSEMAEKER:** No.

Q. So, if things have been defined as in the schedule, we don't them to be defined somewhere at the top or somewhere at the bottom. The only

thing that's not been defined is the mathematical to derive the daily volumes. So, that's about it. Is that right?

THE COURT: JUDGE BORTHWICK TO COMMISSIONER BUNTING

Q. So, that's about it. Is that right?

A. Yeah, yeah, that…

THE COURT: COMMISSIONER BUNTING TO COMMISSIONER EDMONDS

Q. Commissioner Edmonds, do you have a view on that?

A. I haven't had a chance to go through that yet, so…

THE COURT: JUDGE BORTHWICK

Q. Okay. So, just ask yourself when thinking about this – or we'll ask you, or you can tell your lawyer. If there – do we have all the terms now defined, with perhaps that one exception? Or are you using language which would warrant, or terms that would warrant a definition?

A. **MR DE PELSEMAEKER:** My understanding is that all the terms have been either defined or that the process for every single term is set out.

Q. Yeah.

A. **MR DE PELSEMAEKER:** But it might be that some terms actually are the same, and I think that would be useful to make clear in there, either with a note at the start, for example, the rate of take limit. It might just be that it's simply referring to what goes on the consent. So, I think there would be merit in having a little note at the start.

Q. So, in that way, the rate of take limit is both a defined term in a particular way as well as an expression of something outside of the definition. Is that what you're saying?

A. **MR DE PELSEMAEKER:** Sorry?

Q. When you're saying the rate of take limit, that is a defined – it is defined and used in a particular way, but it could be used in a second way. Is that what you're saying?

A. **MR DE PELSEMAEKER:** The rate of take limit is defined.

Q. Yeah.

A. **MR DE PELSEMAEKER:** But for example, with daily volume limit and maximum daily volume, it might be better for those terms to be stated more clearly what they actually mean and what the difference is between them.

Q. Just got to be careful not to address anything that your technical bolts won't like.

A. **MR DE PELSEMAEKER:** No.

Q. And everybody else's…

A. **MR DE PELSEMAEKER:** My suggestion was, as well, whatever we do, we look in the other experts, which we've done with this one as well, and it could be, it was achieved within a very short timeframe.

THE COURT: COMMISSIONER BUNTING

Q. I guess my concern was while we're here, these things are fairly clearly, everyone's together, they understand, but in a year's time, could there be some misunderstanding or differences of view as to what these things mean? Or some of them mean, some of the terms, and I sort of apologise for bringing this to play at the 11th hour.

A. **MR DE PELSEMAEKER:** No, no don't… if you have that concern then it's probably valid. That means that things aren't crystal clear. a

Q. So, I think my suggestion would be, if I may make a suggestion to clarify these matters to another statement or, yeah…

THE COURT: JUDGE BORTHWICK TO COMMISSIONER BUNTING

Q. How do you want to do that?

A. Two thoughts occur. One is as little as possible by way of additional explanation at the risk of upsetting the way in which this schedule flows, but as I look at it, it's the words in the bracket, the consent to daily volume or calculated daily volume, that's the part where I think there might be a benefit from some further explanation that might then also necessitate either some further text in the table or an advice note referring to what it is that each of those is and then which of the two should be used. I think the experts will know what it is.

Q. I think they'll know which one is which. Yeah.

Q. Yes, and it strikes me as it's a reasonably straightforward explanation.

A. Yeah.

THE COURT: COMMISSIONER BUNTING

Q. And it was given by the witnesses that consented daily volume if that's thing in your – you're got a permit which has that on that. In the absence of that, it's a calculated daily volume and according to formula XYZ, that's the bit that's missing.

A. **MS KING:** We just don't want to be in the situation where someone says the calculated is higher than the consented, so they want to use that one.

Q. Correct. So, it would be if – yes, which can be explained with some additional text, but at the moment, that issue, that argument could be run and simply as I read it, it's an either or, and I'm not sure who gets to pick which one to use.

THE COURT: JUDGE BORTHWICK

Q. Although, isn't it self-selecting? Well, is it self-selecting? One will arise, first one arises for resource consent the second one arises for a deemed permit, or do you have resource consents that also have these sort of broad brush.

A. **MR DE PELSEMAEKER:** So, yeah. The issue might arise where you have a resource consent where you have the rate of take and the daily volume stated, but the daily volume is not the rate of take that you would get by applying that rate of take throughout the entire day, and then there's, I guess, a risk there that it opens up the debate. It's clear in my mind what it does, but I don't know if it –

Q. It's clear in everybody's.

A. **MR DE PELSEMAEKER:** – is clearly stated in there.

Q. You just tell us what's in your mind and then everybody will know because one of the benefits of the schedule were the plan change to be approved is that you've actually now got repeatable, transparent and repeatable methodologies. So, that's one of the criticisms. Objectively ascertainable. So, that's one of the benefits of the schedule, which people are – I mean, I understand how new methods emerge and

Council's which are not in their plans, but it's one of the criticisms that at the moment that methodologies being employed are not that transparent to applicants, so we're wanting to ensure that this is the case here. So, whatever you think it is, is a good starting point, I guess.

A. **MR DE PELSEMAEKER:** Yeah, and in my view, consented applies to – you take the consented daily volume where it is stated on the consent and you apply the calculated daily volume where it's at, if it is an old consent, or your permit does not state the daily volume, and you just calculate it by multiplying the rates of take on a daily basis, but that is not clear here.

Q. Yeah.

A. **MR DE PELSEMAEKER:** Because it gives a choice to people – or people could read it as like, we have a choice as to which daily volume we apply, the one on the consent or the one that we get by calculating the rate of take, or multiplying the rate of take.

Q. So, it's whatever it's stated on the permit document, and the method to calculate a daily volume is X.

A. **MR DE PELSEMAEKER:** It might just be as simple as just stating consented daily volume or where no daily volume is stated on the permit, the calculated daily volume.

EXAMINATION CONTINUES: MR MAW

Q. And then the calculated daily volume, presumably there's a formula for that calculation. That's one of the pervious.

A. **MS KING:** Yeah, it's steps 2 to 4 in methodology, 10A42.

Q. Okay, so, perhaps the wording, and I think just as you've read out, Mr de Pelsemaeker, the words I was playing with was consented daily volume if shown on the permit being replaced, or calculated daily volume, which is the thing from the previous part of the schedule which would then provide that clarification as to when you could rely on the calculated.

A. **MR DE PELSEMAEKER:** Yeah.

THE COURT: COMMISSIONER EDMONDS TO MR DE PELSEMAEKER

Q. So, I do have another point which is perhaps in your – more in your bailiwick and that's when you look at things like the controlled activity and the entry conditions, they at the moment say, "calculated in accordance with the method in schedule 10A.4." I think all of those of should read "with the methodology."

A. **MR DE PELSEMAEKER:** Yes.

Q. Because that's what the schedule is about. It's a methodology. So, there's several of those that need fixing.

A. **MR DE PELSEMAEKER:** We sanitised the schedule in that regard by taking out all the references.

Q. Yes, I know. That was one of the problems I identified, but it hasn't carried forward into the actual road where the rubber hits the road in terms of the sort of plan entry conditions.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. We could leave that for our decision, though. There's no problems with that in principle. We could note it up in the minute –

A. Oh, sure. Well, we could.

Q. – after then, if we've got a problem, and the pick it up, yeah –

A. – I guess I'm just saying that's another thing that needs fixing.

Q. That's all right.

THE COURT: JUDGE BORTHWICK

Q. So, how about we just note your answer, yep, that's you prefer methodology, not method.

A. **MR DE PELSEMAEKER:** Yeah.

Q. In the rules.

A. **MR DE PELSEMAEKER:** Correct.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Is it just the rules?

A. I imagine so –

Q. I imagine so and we'll note that up in the minute and if anyone's got a problem with that, they'll let us know, and then we'll just release that as part of the decision if the thing is confirmed. Yeah, okay.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER BUNTING

Q. Anything else Commissioner?

A. No, no, it's great that we've got a schedule that everyone agrees to. It's something.

Q. It's a huge effort. Huge job. All right. Okay. So, that's that. I think.

MR MAW:

Yes, there's three minutes to start my closing which I probably shouldn't do.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah. So, your closing, you want to see where you can land the priorities provisions.

A. Yes, I will do some thinking about that tonight whilst it's fresh of mind.

Q. Okay, and you might – yep, no, that's fine.

A. And I shall be reflecting on the community water supplies part of the submission in light of the discussion today. That's been helpful and it's something that I'll have to reflect on in terms of the appropriateness of the provisions which had been punted up.

Q. Yeah, that's okay, so you may not – in order words, you may not continue to lead with those.

A. Correct.

Q. You might actually just wait for a decision to come in.

A. Correct.

Q. About which there are at least four or more, but at least four major approaches, different approaches on community water supplies and hydro less so in terms of what the options are there.

A. Yes. now, I should signal in my closing, a reasonable chunk, almost a disproportionate chunk is stepping through the legal issues associated with the community water supplies questions and that will take us a bit of

time to go through but there are important legal issues sitting underneath of the Court's decision.

Q. No, there is. So, I think parties completely right when they say, look hold off suggesting any drafting, further drafting, because all of this is underpinned by a proper legal understanding of the community water supply issue not just under the NPSUD, but actually we've got three others as well and we've got Justice Palmer's decision which, he's obviously never written a Resource Management Act decision (16:58:42) bring down the (inaudible 16:48:42) of the NPS and reconcile them under an RPS and bring them down under – oh, yeah.

THE COURT: COMMISIONER EDMONDS

Q. Never mind attaching on all those various thing document provisions (inaudible 16:58:55). What if we did that in our decisions? They're long enough now.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. We said this would be a short one, we thought, because we had to get out. But, that sort of planning framework is both extraordinary important, particularly with TAs, particularly with hydro, but then having a look at the issues around the TAs concerns because it then informs perhaps – it will inform where the four corners, which are those four choices are the choices before us, or are we going to go with one. Are some of the choices in fact not choices because you've got the scope and then where the Court lands. Okay, that sounds good. Right. Don't think there's anything else. Don't think you need to address the law on priorities. You've already done that?

A. No, there's only one paragraph which encourages the Court to not have to address the issue on section 124.

Q. All right, so encouraged. All right, no, that sounds good. Okay, so what time do you want to start tomorrow?

A. 10 o'clock tomorrow morning.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. You said about three hours (inaudible 17:00:21).

A. Yes, although I said that we'd only be an hour with the witnesses today and we'd be done by 4 o'clock, so I have no credibility with time estimates. Yeah.

THE COURT: COMMISSIONER EDMONDS

Because (inaudible 17:00:35) to fly out.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. No, yeah, we need you to land it, so 10, I mean, even if it's three hours, that's fine, and it probably will be three hours because, you know, we'll just be taking away your submissions and pondering those, as opposed to quizzing you on the hard end, and it is right of us to reflect that this is really actually very difficult, and we get that.

A. Yes, yes. One sometimes wonders whether it is or it isn't, but it is difficult, and I think there have been a lot of people grappling with these issues now for the duration of this hearing, and they're not straightforward.

Q. They're not straightforward, yeah, I mean, they're not straightforward. Like, the deemed priorities, just thinking that you could just somehow cite the word "priorities" and everything will be sweet is not straightforward, as your questions about surrendering consent and so forth actually demonstrate, they're not straightforward, it required one heck of a lot of thought, and then to work those up into appropriate policy, yeah, and just, yes, slowing the juggernaut. Consenting is easier said than done, because some activities – and that's your client, I guess, would say it can't be slowed, not just like that, and so that requires a lot of thought as well.

A. Yes.

Q. All right, nearly there, though.

A. We're close.

Q. Very close. We are. Perhaps with the exception of TAs and hydro, it's not often the case that a plan has been totally rewritten, so that's not what we're faced, that's not the job we're faced with. You're now faced with what more do you put into it, not rewriting what is there.

A. Yes, it's the carve-outs, if I can describe them that way, that are presenting perhaps the greatest challenges, both from the legal perspective, but also from a drafting perspective, because the simplicity of the drafting was done in a way that didn't envisage carve-outs occurring, it was a fairly simply, lock it down, six years, tight policy, tight objective, but to then unpick that with some exceptions, actually, that's where we're finding the complexity to arise.

Q. Yeah, and that's fair.

THE COURT: COMMISSIONER EDMONDS

And so often, the carve-outs are the major challenge, even if you're not dealing with a very refined plan change, in my experience.

THE COURT: JUDGE BORTHWICK

Yeah, well, that would be true too.

THE COURT: COMMISSIONER EDMONDS

Including how NPSs fit in with all of that.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. But, you know, even so, they were just two complex things, that's still often a lot better than what we usually get in terms of the Court then having to grapple with the drafting and, you know, back editing and then reflecting, and, you know, so we are unusual inasmuch as so much work has been achieved and done, you know, should the plan change be confirmed, then it is just adding into that what else we think needs to go in, or rejecting that.

A. Or not.

Q. Or not, yes, but it's not about the Court having to redraft and reflect back in endless cycles, it's not that, with the exception of TAs and hydro, but I assume we'll get there.

A. Very good.

Q. Okay, very good, thank you, and we're adjourned through to 10 o'clock tomorrow.

COURT ADJOURNS: 5.04 PM

COURT RESUMES: 10:01 AM

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. So, good morning. I've asked Ms Irving to come back so we can just ask some very confined questions about the memo that Ms Irving filed dated 5 of July, because it's where – it represents the Council's latest thinking and we've not had the benefit of evidence and really the purpose of the questions is not to talk about the actual wording of any provision that you have in here but really try to understand the relief now sought by the Territorial Authorities and to, yeah, what is the relief now sought and what are the potential pathways for that relief. Bearing in mind that there is at least one scope challenge to part of the relief that is there and that needs to be decided and we don't need to talk about that because there's some submissions on it, and bearing in mind that other parties also have a view on the matters as to do with duration. So, again we don't need to debate on that, but we are just simply trying to get a handle on the relief pathways through your provision. So, that's it, and I wanted to turn to the second rule which, which is the new second rule, which is the rule for new takes only, and I know this is the – yeah, new takes only. Okay. In your first line – in your second line of rule 10A.3.1A.3, so the second rule in the second line, it states there that the rule is to apply for the purpose of a community water supply not previously authorised, but in the matters of discretion, matter A, here the rule is, Council is limiting its discretion to where the permit is to provide an existing water scheme, and we were unsure whether the two were in conflict. A new water supply, a community water supply not previously authorised vs something that is authorised but you need a new take, whether they were in conflict or if not in conflict then what was endeavoured to be sought here is both permits to new permits as in the case of Luggate which is a good example to supply an existing water scheme and together with new water schemes not yet imagined but which may be over the duration of the plan. So, we weren't sure what was the scope.

A. So, the intention of the rule is to provide a pathway for new consents, and that is potentially schemes that have not yet or don't yet exist, and so, that is in part a response to the potential requirement for a Council to respond to a new development that they hadn't anticipated, but also be a response to the Luggate type scenario, and where the matters of discretion A would be relevant, would be in that Luggate type scenario. So, my understanding is that A wouldn't apply in relation to an entirely new take for a new scheme but is there to ensure that there is that analysis of an existing scheme if it is a new take to supply an existing scheme.

Q. And so, if it is a new take for a new scheme then only the matters in B and C, D, E, and F would apply. Under that rule, as matters of, you know –

A. Yes.

Q. – in terms of restriction or discretion.

A. Yes.

Q. So, in relation to matter B, and – yeah, matter B. what is the policy that that matter of discretion implements? So, that's the matter, and this we're dealing, the extent to which the supply is used for purposes other than drinking water.

A. Well, I don't think there is an obvious policy hook in plan change 7. Probably the closest that there would be in the proposed 10A2.2 would be one of the topics identified for the water management plan, but it's probably – and that would be (vi).

Q. So, how could this matter of discretion – is this truly a matter of discretion. So, as a matter of policy your required to do an analysis of water use patterns for different sectors for the purpose of identifying end users, and then as a matter of discretion, the extent to which the supply is used for purposes other than drinking water. How would go about exercising that discretion?

A. It's a good question. I think what that particular matter of discretion is seeking to respond to is effectively the priorities in te Mana o te Wai, and providing an opportunity to ensure that community waiter supplies don't

become a trojan horse for wider uses, recognising that plan change 7 is seeking to put in place that holding pattern to allow a full allocation regime to be developed through the land and water plan, but I would accept that that matter of discretion is not – it's a little opaque in that respect.

Q. Does it make more sense or any sense if Mr Twose' definition of community water supply, which I think he had in his third supplementary – his second supplementary at the third brief, is included in this, or was there a reason for not including it.

A. There wasn't a conscious decision not to include it. There's obviously been quite a lot of conversation about the definition and the potential challenges with it. I'm just going to, if you don't mind, just bring that up. I mean, I think the definition would provide some further context to that matter of discretion as its drafted now.

Q. Is it context that we're after, or certainty in a definition?

A. For a definition, you prefer certainty although I think community water supplies are particularly fuzzy by their nature. So I think there's always going to be a degree of grey area in relation to community schemes and I think that's effectively what B is driving at and I would anticipate that discretion exercised under B might see conditions that result in different levels of control in relation to uses that were not drinking water for example. So, during periods of low flow, the uses that are not drinking water and if we use the Stirling example. You know there might be controls on access to water for dairy shed supply, say. Although I'm not sure that flows in the Clutha probably subject to low flow conditions to the same extent as other catchments in Otago. So, I think that would be the type of thing that the matter of discretion in B is opening the door for.

Q. When you said earlier that discretion, matter B in the second rule reflects priorities in Te Mana o te Wai and that community water schemes not be a trojan for wider uses, what did you mean by that?

A. Well, that effectively they don't provide an opportunity for large-scale tier 3 activities to obtain longer-term consents. Effectively the territorial authorities' position is that by virtue of its obligations to provide water supply, its recognition as a tier 2 priority within the NPS, there is I suppose

a justified exception to the six-year timeframe and B is about, I think providing an opportunity for the council to ensure that the community water supplies don't broaden their focus beyond that purpose.

Q. Okay, so I've noted the TAs position is that by virtue of their obligation to provide drinking water for human consumption, that's what you mean in terms of the reference to tier 2, it's the objective in the NPS for freshwater management and the second-level objective or tier 2 objective which is to provide that freshwater meet human needs.

A. Yes, health needs of people.

Q. Health needs of people and specifically here, you are saying TAs have an obligation or a duty to provide drinking water for human consumption, it accepts that is the case but and B is about not broadening that out to other uses – and I take it, specifically other uses which are covered by the objective in freshwater management, tier 3?

A. Correct.

Q. Yes.

A. If I could perhaps just add there, the tier 2 priority is of course the health needs of people such as drinking water and I'm thinking of Ms Muir's evidence in relation to the Cromwell supply where she highlighted that one of their reasonably large uses of water for that supply was to provide water to their wastewater treatment plant. In my view that would fit within that second order priority given the importance of those types of treatment systems to a healthy community.

Q. And again with reference to the second rule, sub-paragraph (c)(vi), what is the policy that this is implementing, 6, a description of patterns of water use?

A. I think my answer to that question would be the same as previously. That it is a link to the matters described in the proposed policy. The intention there being to provide essentially an opportunity or require a consideration of how the territorial authorities are working to improve the efficiency of their schemes, and of the people utilising the water being delivered by the schemes, and that's, I think, as we talked about yesterday, effectively the, for lack of a better word, the quid pro quo, the

longer terms necessitating the councils to do better in terms of their water use efficiency and more closely managing that so that they're effectively, one would hope, reducing the amounts of water being taken, or, alternatively, being able to cater for growth by virtue of efficiency gains, and I think that would be consistent, I think, with the expectations of all water users in the context of the NPS.

Q. In relation to those applications for takes which are truly new, so there's no existing infrastructure for a community water supply in ground, the policy and rules to not address the effect of the proposed taking on the environment.

A. These ones don't, no, and that is because in both of the options, it is intended that the discretionary rule in the operative plan would continue to be applicable, so by virtue of that, there would be full discretion in relation to the effects. Of course, if it is an entirely new take, there is likely to be associated consents required for the establishment of intake infrastructure and/or installation of a bore where those effects would be captured. So the purpose of the second rule in plan change 7 was to really introduce the water management efficiency obligations. Now, I think as I alluded to in the memorandum, I think if the policy is broadened –

Q. If the policy is what, sorry?

A. If the policy was broadened to include those water management obligations, and that applies, of course, to an application for a new permit under the operative plan, then that is possibly a neater way than the dual rule solution.

Q. That's your option two?

A. Yes.

Q. Option two has a backstop date of 2035. It applies to replacement applications under PC7 only, and by that I mean I understand you to say replacement applications proceed under PC7 only, aren't going under both plans.

A. Correct. So that's essentially the plan change 7 status quo option.

Q. So that's in relation to both duration and effects?

A. Correct.

Q. For replacement application?

A. Yes, and I was reflecting this morning on whether the rule, and I think the conversations that we were having yesterday about the need to assess effects for consents that may achieve a longer duration, and the rule that is proposed, given it is restricted discretionary, perhaps doesn't go far enough in that regard for the replacement consents, but in terms of the new consents, whether it be for a new take location for an existing scheme or an entirely new scheme, it was my view that, by virtue of the discretionary rule in the operative plan, that there was essentially full scope for those effects to be considered in that circumstance.

Q. So for new permits, and that's either for a new scheme or in relation to an existing scheme, proceed under the operative regional water plan, plus the policy on duration under this plan?

A. Yes, which is effectively what occurs under the – I don't know what version of plan change 7, but the notified one, if we start there, is that new permits proceed under the operative rules subject to the policies in plan change 7.

Q. And you said the RDA doesn't going far enough for replacement consents, and what did you mean by that?

A. Well, I was just reflecting on the discussions (inaudible 10:27:35) that took place yesterday around what effects are relevant to an assessment. I think we were talking particularly in relation to the proposed drafting for hydro, and is it simply the effects of the longer duration? Is it the effects of the whole activity? And the rule that I had included in my memorandum for the replacement consents has been really picked up from Mr Twose's draft, and, considering that this morning, in light of that conversation yesterday, there really perhaps isn't a matter of discretion that captures the effects of the longer duration in the same way as Mr Welsh had proposed.

Q. And is it your submission there needs to be?

A. Yeah, look, I think that would be appropriate.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. Well, those are my matters of clarification, have you got anything, Commissioner?

A. No, no, I think you raised all the ones that I had, thank you.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, good, so they're questions for clarification, so thank you very much, thank you. Over to you, Mr Maw.

A. Thank you and good morning. Two matters to address before the closing submissions. The first relates to the description I provided yesterday in relation to the Trustpower assets, which require new permits. Mr Welsh was diligently listening to the audio last night and must have been having trouble sleeping.

Q. Yeah, because at 1 o'clock in the morning –

A. Yes, he pointed out to me that my description of the two new applications might not have been entirely accurate. So, just for the record I would like to just reflect back that which he has reflected to me in terms of the two replacement – sorry, the two new. So, the first was in relation to the Beaumont bypass.

Q. So, I've got Blackrock Race, Beaumont Race, Shepard's Race, Crystal's Race, and deep stream. You are wanting to edit something?

A. No changes necessary to the schedule, it was my description of the two new applications which are both covered by the schedule. So, in relation to Beaumont, there is a bypass application, and that application is an application relating to diverting water way from being captured in the Beaumont Race, which allows water to continue to flow down an ephemeral pathway, and that was to stop excess water being taken into that race and causing the race to blowout, which had caused some issues in the past, and so, the bypass races and has been designed to ensure that the underlying race doesn't receive more water than it can handle in high flow events. The second new was the deep stream enhancement, and there the scheme does not require or involve the undertaking of a new intake infrastructure. There's no change to an existing residual flow

requirement which was a 50 litres per second, rather that application is essentially a flood take when flows exceed a certain threshold. So, it is taking more water, flood harvesting essentially, but the minimum flow – minimal residual of 50 litres per second is to remain in place.

Q. And that can be taken with the existing intake infrastructure?

A. I'm not sure about that, if more a greater a volume is to be taken maybe that additional infrastructure is required, I don't know.

Q. Okay. Very good.

A. So that was the first matter. The second matter relates to schedule 10A4. You will recall that Mr de Pelsemaeker had some homework to do in relation to the clarifications that had been discussed. Now, there's perhaps two ways we could deal with that issue. Mr de Pelsemaeker could be sworn or re-sworn and could give his answers orally in relation to those matters, or alternatively, he suggested that the matters of clarification could be tracked into the version attached to the joint witness statement for clarifications which was one of the two filed and essentially a final joint witness statement with all of the corrections tracked in signed by all of those technical witnesses could be provided later this week.

Q. That sounds much better. Yep, no, that sounds much better. But, we just need them captured somewhere in a document so we can take that one off our desk.

A. And happy to handwrite.

Q. Oh absolutely, as it didn't seem – even though maybe a definition is required for one of those formulas, from what I understand, that doesn't seem particularly contentious.

A. No, not as I understand it. Not contentious at all, and there will be some further text explaining which of those two options applies.

Q. Yeah, so it's not a pick and mix.

A. No.

Q. No.

A. And then there's a series of correction to capitalisation. So, that can be picked up in there.

Q. Yep. No, that sounds good. So, even the beginning of next week is fine to have that JWS tracking to the schedule – the completion of the updating of the schedule having in relation to review of it's terms and confirming what it's terms are and the use of language. All right.

A. Yes.

Q. Oh, is that all right? Next week? It's not – it's one of those jobs that has to be done.

A. Has to be right, as well.

Q. And it has to be right, but I'm not busting a boiler to get it even next week, you know, as long as it's done.

MR DE PELSEMAEKER TO JUDGE BORTHWICK

A. Yes, Monday should not be a problem at all.

Q. Okay, and if it is just let us know. Yep, all right.

THE COURT: COMMISSIONER EDMONDS TO JUDGE BORTHWICK

Q. Got to get everyone else to sign up to it. So, Monday might be tricky.

A. Monday might be tricky.

Q. Do your best.

A. Yeah, do your best.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. But the only thing I can do at the end of your reply is, generally cause we've got other things to come in –

A. We've got other mattes

Q. – so, it's not as if we're actually closing the hearing.

A. Yes.

Q. Okay, very good.

A. That brings me onto the closing legal submissions for the Council.

Q. Yep.

A. Copies of which will be handed up. Now, we've managed to get them single sided for the Court, but I haven't managed to get an index in. That was beyond our technical capability.

Q. That's all right.

A. So, these submissions are filed in closing on behalf of the Otago Regional Council, and I'll set out at my paragraph 1, just the structure. I don't propose to read through that.

Q. No.

MR MAW:

But in broad terms, I'm dealing with the superior policy instruments as a topic towards the beginning. I then deal with matters where the Council considers there should be some further adjustments to plan change 7, so the likes of the priorities, hydro and community water schemes, and then I deal with a range of issues that have arisen through submissions and have been pursued by some parties but where the Council doesn't support that relief that has been pursued. I'm hopeful that there are some parts of the submission that might be able to be taken as read, but we'll see how we go. So, the first topic to address is the question of whether an interim planning framework is required. Counsel addressed the need for PC7 in its opening legal submissions and has tested this with witnesses throughout the hearing where many have acknowledged the inadequacies of the operative Regional Plan for water, including that operative plan is ill equipped to consider the effects of land use on water quality, it does not give effect to Te Mana o Te Wai or enable sufficient consideration of cultural values, and contains a flow and allocation regime that is non-compliant with the NPSFM 2020. The deficient state of the operative planning framework presents a significant risk that long-term resource consents will be granted that will preclude the Council from effectively phasing out overallocation of water resources across the Region, in accordance with the NPSFM 2020.

The risk presented by long term consents is the undermining of the new integrated planning framework that will put into action the paradigm shift required to manage fresh water in accordance with Te Mana o Te Wai. All planning witnesses appearing before this Court have accepted the need for PC7, including Ms Dicey for OWRUG who acknowledged that there does need to be an interim framework, and I've set out the relevant evidence there. Despite this acknowledgement, OWRUG still seeks the deletion of PC7 and

considers it appropriate to grant long term permits under the RPW with a reliance on review conditions. The Council's position is that a case has been made that an interim planning framework is required. A change to the current planning framework is necessary while the Council's land and water regional plan is being developed. The key issue for the Court's determination is what that interim framework should look like. In terms of the mandate for the development of plan change 7, it was that it was to be developed in accordance with the following principles. The focus must remain on the bigger picture, the Water Plan review. The Water Permit plan change should be as concise as required to achieve a fit for purpose management regime. Second, water allocation should be based on water use not paper allocation. Third, consideration of potential impacts on existing water abstractors, and existing priorities in deemed permits which was interesting to see that in the list in terms of the drafting capturing the element of priorities where the abstraction as between existing abstractors was to be considered.

Efficiency of time and cost for both Council and applicants and other parties, and opportunities for data gathering that will inform the Water Plan review should be pursued. It became clear early in the hearing that the effectiveness of the plan change in achieving its purpose as a process plan change had been diluted through the inclusion of certain environmental outcomes. The Council reviewed the 2 March 2021 version of PC7 and proposed amendments to ensure that the purpose of plan change 7 could be achieved. This purpose has been front of mind for the Council throughout the hearing and when confirming the Council's position in these closing submissions. So I turn now to the superior planning instruments, that is National Policy Statements. I've set out at paragraph 12, the three key national policy statements that are potentially in play in this proceeding. There is the potential for these policy statements to pull in different directions, the outcome of which might be that the provisions of PC7 need to be adjusted to accommodate different interests (such as hydroelectricity generation, or community water supply schemes). The Supreme Court's decision in *King Salmon* remains the leading authority for interpreting superior planning documents.

I've set out the relevant passages from that decision. In the light of the Supreme Court's decisions it submitted that the correct approach to interpreting the relevant national policy statements in play in PC7 is as follows: First, the relevant provisions of each policy statement should be identified. Careful attention should be paid to the way in which the provisions are expressed. Second, a thoroughgoing attempt should be made to reconcile any apparent conflicting provisions, again paying careful attention to the way in which the provisions are expressed. Recourse to Part 2 of the Act is permissible if it assists in a purposive interpretation if there is uncertainty as to the meaning of any provision or the document being interpreted does not "cover the field". Only after that analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. Now, Counsel has carefully considered the recent High Court decision of Palmer J in *Tauranga Environmental Protection Society Inc v Tauranga District Council*. It is submitted that that decision (which involved an application for resource consents as opposed to a plan change) does not alter the way in which the assessment and reconciliation of planning documents is to be carried out. I've worked back through that decision again last night to see if it was shirting or changing but in the context of a plan change I don't see that decision is changing the approach that the Supreme Court has set out in terms of how the reconciliation process when those documents can, maybe pulling in different directions is to occur.

THE COURT: JUDGE BORTHWICK

Q. No, I haven't read it. it's been about two to three weeks since I read it but it seem to me that Justice Palmer would have been emphasising the reconciliation exercise and its importance and the need to do this very carefully.

A. Very much so, and when actually see how he went about that exercise and it was done in quite some level of forensic detail as to the meaning of the words and for reasons that I'll come on to submit, this is, I say a particular moment when considering the words of the NPSUD and

whether infrastructure, as that term is used throughout that document might be read to include water takes and without spoiling the surprise my submission is, it doesn't, it doesn't include or extend to the water takes. So that's the relevance again of the need to really carefully analyse the words.

Q. Okay, also heard this morning that decision's now been appealed.

A. Happy days.

Q. Probably no surprises there but it's been appealed. But I haven't looked at the notice of appeal to see what grounds it's actually appealing the decision on.

A. No. I mean, in a sense put that decision – I say that decision can be put to one side –

Q. Yes.

A. – it doesn't change the Supreme Court's description of how that process of reconciliation should occur and if anything my reading of it just was a demonstration of the reconciliation in action.

Q. Yes.

MR MAW:

So, turning now to the NPS for freshwater management, the opening legal submissions of the Council noted that plan change 7 is required to give effect to the NPSFM 2020. It is required to do so, where there is scope available within submissions, and where it is reasonably practicable to do so, and I set out further submissions on what reasonably practicable means and the extent to which the document could be given effect to an opening. Having reviewed those submissions there's nothing further that I would add at this point, but I rely on them.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So re-read your opening?

A. Yes.

MR MAW:

"The relevant provisions of the NPSFM were set out in those submissions. In addition to the policies expressly referred to at paragraph 48 of those submissions, it is submitted that Policy 4 of the NPSFM is also relevant in the context of considering whether some further provisions might be appropriate for hydroelectricity generation, and I've set out Policy 4 below, and Policy 4 wasn't a policy that I had identified in opening but having heard the evidence and the connection between climate change and renewable electricity, my submission is that policy is in play, and again, that's perhaps one of the policy's that can be looked towards when trying to reconcile the NPS REG with the NPSFM. In my submission, the single objective of the NPSFM 2020 is of particular relevance with respect to plan change 7. It is this objective that sets out the hierarchy of priorities with respect to freshwater. What is clear from reading the hierarchy, is that the health needs of water bodies and freshwater ecosystems must be provided for first, before other uses are provided for, as in the tier 2 and tier 3 uses. In the absence of having determined what levels of flow are necessary to sustain the health needs of water bodies and freshwater ecosystems (by following the implementation steps in Part 3), the allocation of water for tier 2 or tier 3 uses by long terms consents has the potential to frustrate the achievement of the tier 1 priority. Counsel for OWRUG advanced an argument that plan change 7 should be rejected on the basis that it fails to give effect to the NPSFM because there are better options available to give effect to Te Mana o te Wai. Instead, OWRUG would prefer to rely on the existing planning framework, with the overlay of the NPSFM and the recently notified proposed Otago Regional Policy Statement. In my submission, this argument fails for the following reasons the existing planning framework is deficient. and has been acknowledged to be deficient by planning witnesses before this Court.

It does not give effect to the NPSFM 2020, or any of its predecessors. The existing planning framework does not manage land and water resources in an integrated way – ki uta ki tai. The activity status for considering replacement consent applications under the existing planning framework is restricted discretionary, with the matters of discretion insufficiently wide to enable an

effective assessment of effects on the environment. Now, I should acknowledge that the activity status does change depending on whether there's primary allocation available or not but the submission that I make there is that there is insufficient ability to have recourse to a comprehensive set of objectives and policies that seek to management land and water resources in an integrated way within that planning framework. Given the limited matters of discretion, only limited regard might be had to the higher order planning documents, such as the NPSFM and the proposed RPS. Now I make that submission because the policies that are engaged in or when considering a restricted discretionary activity limited to those touching on the matters to which the discretion is restricted. The legal test for considering the NPSFM in the context of an application for resource consent is to have regard to. As such, applications for replacement consents do not have to give effect to the provisions of that document. In my submission, the risk that exists is that applicants might argue that limited weight should be placed on the NPSFM until such time as the highly prescriptive implementation process set out in part 3 has been completed, and again the risk there is one of the objective and policies being argued to be expressed at a level of generality that can't really be applied in the context of an individual resource consent application.

THE COURT: JUDGE BORTHWICK

Do you want to make a note of that? So, be expressed – so being argued that the O and P of the NPSFM is expressed at a level of generality that what in relation for the resource consent process?

MR MAW:

That is not readily able to be applied when considering an individual resource consent application. As in the flow and allocation regimes necessary to achieve both the objective and those policies won't necessarily have been set and it's that context which is of particular relevance when considering individual applications to deal with cumulative effects. Similarly – well, not similarly – the proposed RPS is in its infancy and the legal test is that regard must be had to it, and whilst that document does signal a significant change in direction, there is a potential for arguments as to weight to arise, such as there is a risk that

despite the clear change in policy, a little weight may be placed on its provisions when considering individual resource consent applications. Further, it is submitted that the provisions in the proposed ORPS that were brought to the Court's attention by Counsel for OWRUG are not representative of the full suite of provisions, including in particular, other objectives and policies requiring the integrated management of resources, such as Objectives IM-01 to IM-04, and the 15 associated policies, essentially an entire chapter on integrated management. The risk of continuing with the status quo is that the water resources in the Otago Region will be locked up for a period of time or for an extended period of time. In my submission, the key question for the Court to answer is whether PC7 better gives effect to the policy direction signalled in the NPSFM than allowing the status quo to continue. The word "in" should be inserted next.

So, in the light of the risks set in, should now be paragraph 21 above, I submit that PC7 is the most appropriate option, and provides the best opportunity for Te Mana o Te Wai to be given its full expression and implemented through an NPSFM 2020 compliant planning framework within an acceptable timeframe. For completeness, I also note that on 5 June this year the Council publicly notified Amendment 3 to the operative plan to insert the NPSFM polices I've listed there. As set out in legal submissions for the Council dated 16 March, the provisions can only be inserted into an operative plan. Therefore, once PC7 becomes operative, the Council will need to insert cross-references in Chapter 10A to Objective 8.3.5 and new Policies 5.4.2A and 10.4.8 so that these provisions can be considered when considering an application for a non-complying activity. These further changes can occur without the need to follow the process set out in Schedule 1 to the Act.

I turn now to the NPS for urban development, and the question I pose is, is that document relevant to plan change 7, and so, the question is – well, the legal obligation is that PC7 must give effect to the NPSUD to the extent that it is relevant. In my submission, the NPSUD has limited, if any relevance to the Court's determination on PC7. The primary focus of the NPSUD, to the extent

that it touches on matters relevant to the supply of water, is on the integration of local authority decisions on urban development with infrastructure planning and funding decisions and the provision and funding of network infrastructure for water supply to support the development of land. In my submission, its relevance does not extend to planning decisions regarding the supply of water. The NPSUD applies to all local authorities that have all or part of an urban environment within their district or region, that is the tier 1, 2, or 3 local authorities, and planning decisions by any local authority that affect an urban environment. Dunedin and Queenstown are identified in the NPSUD as tier 2 urban environments, which means that ORC, Queenstown Lakes District Council, and Dunedin City Council are all classed as tier 2 local authorities. Now, in the very recent case of *Eden-Epsom Residential Protection Society Incorporated*, and I will hand a copy of that up.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Is that Judge Stevens?

A. Judge Newhook.

Q. No, Newhook. Okay. Right.

8th of June, 2021. The Environment Court considered which provisions of the NPSUD may be considered in a planning decision on the merits of a requested plan change including an appeal to the Environment Court. The Court interrogated Part 2 of the NPSUD containing the Objectives and Policies and found that reference to planning decisions was quite limited among the eight Objectives and 11 Policies, being found in only Objectives 2, 5, and 7, and Policies 1 and 6. Looking at the relevance of those Objectives and Policies in this context, it is submitted that those objectives and policies have no relevance to the decision of this Court on plan change 7 or of the Regional Council on an application for a water permit by a Territorial Authority, save for the requirement that planning decisions relating to urban environments take into account the principles of the Treaty of Waitangi, Te Tiriti o Waitangi, and that planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum include the matters set out in Policy 1.

The Court in *Eden-Epsom* considered that Part 4 of the NPSUD, which sets out the timeframes for implementation is important. In that case the Auckland Council was required to promulgate a plan change in respect of intensification under Schedule 1of the RMA by 22 August 2022. The Court held that it was not required to and would not be giving effect in that case to Objectives and Policies in the NPSUD that are not requiring planning decisions at this time. It acknowledged the promulgation and operative status of the NPSUD overall but could not pre-judge, let along pre-empt, schedule 1 processes yet to be undertaken by the Council in implementation of it. In light of this finding, to the extent that any other objectives and policies in the NPSUD are relevant to PC7, it is submitted this court should not pre-judge or pre-empt the processes that the territorial authorities and regional council are required to undertake under the NPSUD, including the preparation of housing and business capacity assessments and future development strategies. Having said that, it is submitted that the other objectives and policies in the NPSUD are not relevant to the Court's decision on plan change 7 or a decision on a water permit. Policy 2 of the NPSUD requires that tier 1, 2, and 3 local authorities at all times provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term. Development capacity is defined as I've set out at paragraph 37.

THE COURT: JUDGE BORTHWICK

If you could just pause there. I did actually, for my sins, reread the NPSUD last night, together with all of the TA's relief, but I just need to reread this again as we track along. Mhm.

MR MAW:

In order to be sufficient to meet expected demand for housing, the development capacity must be, among other things, infrastructure ready, and I've set out the relevant clause which deals with what infrastructure ready means in this context.

THE COURT: JUDGE BORTHWICK

And I'll just reread that again. Mhm.

MR MAW:

Now, I might just interpolate here. As I understood the submissions from my learned friend, Ms Irving, for the TAs, her submission was that water needed to be available for at least the short term and somewhere into the medium term, and when you look at the dates here, the short term is the next three years, and then into the medium term, which was between three and 10 years, if you think about the plan change 7 provisions as notified, which essentially provided a six-year rollover permit, even if these provisions are found to be relevant, my submission is that the six-year term actually responds appropriately to the timeframes set out in terms of development capacity, infrastructure being infrastructure ready. Development infrastructure is also defined, and I've set that out at para 40, and the submission I make there is that it's reference to infrastructure, and, on a close analysis of the wording used, my submission is that infrastructure does not extend to the water that is taken into that infrastructure. Therefore, the obligations in the NPSUD for Tier 1, 2 and 3 local authorities to provide sufficient development capacity in the short term, one to three years, require that there is adequate network infrastructure for water supply. It is the pipes used to convey the water for supply to support the development of land. In the medium term, three to 10 years, the funding for adequate network infrastructure to support the development of land needs to be identified in a long-term plan. There is no reference in the NPSUD to the need to ensure that water is available or that a water permit or any other authorisations are required or to be held.

Development capacity for housing and business land must be plan enabled. Plan-enabled means that the land is zoned in a district plan or identified by a local authority for future urban use or urban intensification in an FDS – or, if the local authority is not required to have an FDS, any other relevant plan or strategy. Again, there is no requirement for water to be allocated in a regional plan or a water permit to be granted. For these reasons, it is submitted that the requirements in the NPSUD do not relate to a regional council's functions that are exercised through a regional water plan or the processing of water permits.

This is further supported by Clause 4.1 of the NPSUD. Tier 1, 2 and 3 local authorities are only required to amend their regional policy statement or district plan to give effect to the provisions of the NPSFM. There is no requirement for a regional council to amend a regional plan.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. And I know that we've discussed with, but my initial understanding of the NPSFM and UD, and, for that matter, REG, was that the reconciliation exercise, in providing, is to be done in relation to the RPS. That's where it starts and how –

A. Yes.

Q. – those different strands are reconciled, and I thought that because if you are in a water-short catchment, somewhere in a catchment which is water short, can it be that the district council can plan for, say, population growth without actually understanding how the regional council itself is managing a freshwater resource. I mean, the two completely go out of sync, I thought. They need to be synchronised, or put in phase, is how I said it, and the place to do that was the RPS.

A. Yes, and viewed through the lens of integrated management, that must be what is contemplated, so that exercise, I would accept, is intended to occur in the regional policy statement, and that's what part 4.1 of the NPSUD contemplates.

Q. All right, mhm, all right, 44.

MR MAW:

In my submission, the NPSUD does not anticipate a planning decision on a regional plan or a water permit to be a planning decision to which the NPSUD applies, and again, I refer back to the analysis set out earlier and reply on the decision which I handed up in *Eden-Epsom* in terms of that analysis. If the Court were to find that the NPSUD is relevant, it is submitted that the provisions of the NPSUD and NPSFM are not inconsistent and can be reconciled, Mr Twose and Mr De Pelsemaeker addressed this question in supplementary evidence. They both concluded that the two documents could be read and

applied in a manner that avoids inconsistency, but equally acknowledged the lack of direction with respect to the integration of both documents. Now, just for completeness, I did reread last night the section 32 report in support of the NPSUD to see whether there was any consideration of water takes and allocation of water when the efficiency and effectiveness assessment was carried out, and I could find no such reference. Again, my submission is if it was contemplated that the NPSUD was to apply to water takes and water allocation, there would have been at least some reference within the section 32 report. I next turn to the provisions of the NPSREG. They were set out in my opening legal submissions. While there is the potential for the provisions of the NPSREG to conflict with the provisions of the NPSFM, it is my submission that the provisions can be reconciled in the context of PC7. Context is important in this regard, and only limited exceptions have been sought and recommended for hydroelectricity generation assets, those being limited to Trustpower's Waipori and Deep Stream scheme

Insofar as limited provision is made for hydroelectricity generation assets in PC7, it is submitted that the provisions of each of these two NPSs are not in conflict and can be reconciled, and I do address this issue a little further when I'm dealing with that topic. Perhaps one observation that I would make, though, is that the NPSREG and the language it uses is perhaps a function of the time at which it was promulgated, 2011. When you compare that language to the very directive language that you now see in both the NPSFM and the NPSUD, it would be my submission that the directive nature of the language in, particularly, the NPSFM would assist with the reconciliation exercise insofar as provisions might pull in a different direction. The second submission I would make is that the NPSFM does contemplate hydroelectricity uses, and there are perhaps two relevant parts. First, the tier 2, possibly tier 3 use, so again, hydro is contemplated, and second, the NPSFM does specifically exclude listed large-scale hydroelectricity generation schemes from the requirements in the national policy – what's it called – the framework, the appendix 1, 2, the national objectives framework. Just whilst I'm on that, my friend, Mr Welsh, put to a series of witnesses the s 32 report in support of his argument that hydro was,

in fact, a tier 2 or possibly a tier 2 consideration, when you closely examine the s 32 report, reference to hydro perhaps being tier 2 was made in the context of an assessment of the provisions seeking to carve-out the NOF framework for the large-scale schemes. Now, the Trustpower scheme at issue in plan change 7 is not one of the listed large-scale schemes, so in my submission, the Court would need to be careful relying on that s 32 assessment as justification for finding that hydro, in this context, was tier two or three.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I thought that was one of the decisions you didn't want us to make.

A. For reasons that I will go on to explain, that's a decision you don't have to make, but I just wanted to respond on the record to –

Q. This would not be a good case, I think, make it.

A. No.

Q. Particularly if there's an exception recognised for Trustpower.

A. Yes.

Q. Okay.

A. And that's the direction of travel I've taken in these submissions, to avoid, hopefully, the need for a decision to be made, but even if a decision had to be made, I would say that it would only respond in this context to the particular assets that were at issue on which you had evidence. It wouldn't necessarily by a finding that –

Q. All hydro.

A. – all hydro.

Q. Mmm, okay.

A. What time did you want to take the morning break? I'm happy to keep – we started a little later, so –

Q. I don't mind. We've been working hard, actually, since 8 o'clock, so probably could take a break now, yeah.

A. I've finished now with the high level.

Q. You're about to move on to quite a different – yeah.

A. Yes.

Q. All right, so we'll take a break now.

COURT ADJOURNS: 11.14 AM

COURT RESUMES: 11.31 AM

THE COURT: JUDGE BORTHWICK

We're in your hands.

MR MAW:

Great. I had made it through to paragraph 48 and the next topic I shift to is the objective in plan change 7. The planning experts have considered the drafting of the Objective in Plan Change 7 throughout the hearing. In the 9th JWS, the planning experts were agreed on Objective 10A.1.1. The Council supports this objective, and it's copied below. The planning experts were also largely agreed on part of a second objective to enable activities authorised by deemed permits or water permits for takes and uses of freshwater expiring prior to 31 December 2025 to continue operating at their existing scale and consistent with historical use. Those planners supporting Version B supported that the operation of existing activities continue during the transition period, which is to be defined. The Council agrees that there is merit in referring to the period within which existing activities can continue to operate. Counsel considers that the reference to the transition period could be replaced by 'for an additional period of six years, and that change is tracked in immediately below and simply avoids the need for a definition to be read together with the objective.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Was there one proposed, I don't recall now.

A. Yes, there was.

Q. Okay.

A. And the six period will be a different period of time depending on whether it's a deemed permit being replaced or whether it's a water that's expiring at some time up to 2025.

Q. Yeah.

MR MAW:

It's capturing that, it's a six-year period. It is submitted that this provides clarity and avoids any confusion resulting from the use of a separately defined

transition period and reference to the transition in Objective 10A.1.1. Where the planners diverged in their opinion and supported substantially different versions was with respect to enabling activities where there is an increase in scale or duration. It became clear through questions put to the experts that there were drafting issues with both Version A of Objective 2 and Version B of Objective 3. In particular, the purpose of the drafting was not clear. For example, whether it was the intention to open the door for increases in scale and/or duration of takes. The Council has considered the objective further, including the alternative drafting suggested by Mr Anderson in his legal submissions. He considers that reference to the limited exceptions identified in PC7 has merit and would be a useful addition to Objective 2 as follows.

Now, the drafting there captures three elements, first the stranded assets and the limited viticulture and orchid uses, but also picks up on the community water supply schemes but only those listed in the schedule and likewise for hydroelectricity generation. From a drafting perspective, if either or both of those further exceptions aren't to be proceeded with, the drafting could simply be struck out, as could the stranded assets if that doesn't find favour either. It is submitted that this objective would provide an anchor for limited exceptions for stranded assets, hydroelectricity generation and community water supplies but does not otherwise open the door for activities seeking a longer duration, an increase in the rate of take or volume water from historical use or an increase in irrigation area. It is the Council's position that no other increases in scale or duration should be contemplated by the objective. I turn next to the polices. The discussion around the planners Version A and B of the Objective has raised questions around the policies in PC7 and how they are intended to operate. The Council envisages that the non-complying activity pathway would be available to those applicants who do not meet the conditions of the controlled and restricted discretionary activity rules but still meet the requirements of the avoid policies.

For example, an applicant who seeks a duration of 6 years and does not seek to increase their rate of take or volume from historical use or their irrigation area

but has no water meter data. Essentially, the non-complying activity is the dropdown in that situation for example. In those circumstances, an application could make it through the gateway of 104D as it would not be contrary to the avoid policies and the adverse effects on the environment may be no more than minor, and so, here an activity does not meet the avoid policies, the Council's position is that the door is firmly shut, as it needs to be. It is not anticipated that the non-complying activity pathway is to be used for an increase in consent duration, historical use or irrigation area, except in relation to stranded assets. Alternative drafting has been suggested to the policies to open the door for a merits assessment of those true exception activities. Counsel was grateful to have the opportunity to test the drafting that was put forward by parties, the result of which was that in seeking to provide for limited exceptions, the door was not just left ajar but rather was blown wide open, and that submission is relating principally to the drafting that had been put up by Ms Perkins and Ms Dicey, that was tested through cross-examination.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. This is in Cromwell or this is the new objective?

A. Ms Dicey in the third week of the first Dunedin block.

Q. Yeah, all right.

A. And Ms Perkins in Cromwell.

Q. Yep.

A. And certainly, in the context of the stranded assets drafting that Ms Perkins had suggested, I did explore with her, what else might fit through and transpired that lots of activities including pastural uses might come through. Mr de Pelsemaeker recommends the consolidation of Policies 10A.2.2 and 10A.2.3 in his evidence in reply. Policy 10A.2.2 relates to consent duration for applications for new activities whilst Policy 10A.2.3 relates to consent duration for activities already authorised. Counsel has reflected on this given the amendments proposed to accommodate limited exceptions with respect to Community Water Supplies and hydroelectricity generation which are discussed later in these submissions. From a drafting perspective, if these situations are to be

accommodated within the policies, there would be benefit in keeping the policies separate. I would also add to that submission, given that the policies are dealing with different categories, as in replacement of existing or new, from a clarity and a plan user perspective, I would submit that there is utility in keeping the policy separate, even though the wording is very similar across each of them. I also make that submission in relation to the words that are used at the beginning of the plan that describe how the plan operates in terms of new activities continuing to be processed under the operative plan, except in so far as they relate to duration. Now, we'll come back to that in the context of the scope questions as well.

Q. Yep.

A. So, I turn now to priorities. The Council accepts that PC7 must contain provisions reflecting the effect of the existing priority arrangements.

THE COURT: JUDGE BORTHWICK TO MR MAW

A. I ought to have been more careful with my wording there.

Q. Well, you didn't use the word "replicate". Of that I am grateful.

A. I didn't use replicate and I picked up a different phrase as well somewhere but I acknowledge that it's not simply bringing down the existing regime.

Q. No it's actually creating something new.

A. It is. Yes. Now this is important.

MR MAW:

Where those arrangements have not been superseded by replacement consents already granted. It is submitted that reflecting the effect of priorities falls within the Council's functions, including under section 30(1)(e), and responds to the two resource management issues that I've set out. First the access between water users and second, the incidental environmental benefit. Whilst at a conceptual level the replication of priorities presents as a simple task, the reality is somewhat different. Counsel has been assisted by the efforts of the planners and technical witnesses who have all played a role in distilling out the essential elements of the current priority regime that need to be reflected in the provisions of PC7. Counsel has also been assisted by the drafting

suggestions provided by the Court. The provisions have been further refined, with input from various Counsel, by the planners and Ms King through further joint witness conferencing. The output of that conferencing is set out in the JWS on the 2nd and 5th of July. The Council supports the further progression of the drafting set out in that JWS that was discussed at the hearing yesterday. It is submitted that the refined drafting appropriately recognises the essential elements of the existing priority regime that need to be reflected in replacement RMA permits issued under PC7.

As signalled yesterday, one issue that may require further consideration is whether a date should be inserted into the definition of deemed permit. Counsel have been asked to address, why is a date required and why is a particular date required? This issue is relevant to the following definitions of downstream permit with a higher right of priority and deemed permit that were discussed yesterday. In many cases where a deemed permit is replaced by a resource consent, the deemed permit is not surrendered and therefore will still be in existence until it expires on 1 October 2021. While the deemed permit is still in existence it would meet the definition of deemed permit. The words where that deemed permit has not been replaced by a resource consent were suggested to be included in the definition of deemed permit to avoid inadvertently resurrecting the rights of priority for permit holders who have previously replaced their deemed permit with an RMA permit in circumstances where they did not expect to rely on the higher order priority. If the words where that deemed permit has not been replaced by a resource consent are not included in the definition of deemed permit there is a risk that a subservient permit holder will be required to include a condition on their permit that they cease taking upon receipt of notice by the permit holder that has already replaced their permit prior to plan change 7 and had never intended to continue with their right of priority. The inclusion of where that deemed permit has not been replaced by the resource consent has the inadvertent consequence that if a deemed permit with a higher right of priority is replaced under PC7 before the subservient permit is replaced, then the subservient permit would not be required to include a condition on their permit that they cease taking upon receipt of notice as the

deemed permit with a higher right of priority that has been replaced would no longer meet the definition of a deemed permit.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yes. Can I re-read that because that's the sort of set actual circumstance which we didn't really talk about yesterday. We talked about 68 and this is another factual matter –

A. Yes.

Q. – that you're closing out. And I just want to read that to myself. And in paragraph 69 are you talking about – so I need to re-read it for a third time. So the deemed permit has been replaced under PC7, so that's key. So it's a PC7 replacement, not some other and they've now got…

A. It could be either on the drafting but let's stay with the replaced under PC7.

Q. Yes. So you've got the higher priority, has been replaced – say it's under PC7, now has a resource consent, servient comes along – servient's yet to be replaced would come along but they would not be required to include a condition on their permit that they seek, cease taking upon receipt of notice because the deemed permit with the higher has been replaced. And when you are looking at the words, "where that deemed permit has not been replaced" in speech marks, is that an edit to your version or my version? Might not matter but just so I have that clear.

A. It doesn't but I'm working with the Court's versions in terms of separating out, that was preferable.

Q. Are you going to get to a point where you say, Court's version just not helpful, we're going to do something else?

A. No.

Q. You're not.

A. No I'm simply –

Q. Okay, because I would just move to, what are you going to do?

A. No, it's relevant as to why I submit there needs to be date.

Q. A date, okay, so. Okay so if you go on to the date.

A. So I say at paragraph 70: “The issue can be resolved by the inclusion of a date in the definition of deemed permit,” and the date would simply be inserted at the end.

Q. So you got a date. Yes?

MR MAW:

Now, there are different implications depending on which date is used. Now in an attempt to help we have set out some scenarios in Appendix 1 to these subs using the priority regime in the Pig Burn catchment where Priority 3 on the Pig Burn replaces their deemed permit prior to Priority 4’s application being processed under PC7 to illustrate the differences in outcomes associated with a different date being used.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Priority 3 being the downstream priority?

A. Yes.

Q. The furthest downstream. Yes and under your scenario 1.

A. So if I can take you to the appendix, the…

THE COURT: COMMISSIONER EDMONDS

Go back to that map.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yes?

A. The first example given is that priority 3 replaced their deemed permit on 1 November 2019 and Priority 4’s application is processed under PC7 and granted on the 25th of September 2021, and the question is, does the P4 in priority 4 need to cease taking upon notice from P3, and then there are four scenarios set out against which that is tested. The first is the no date option and then inserting a range of different dates, and then I’ve tracked through whether the priority would then come down, and then in that situation, or all of those situations, the answer is no, it wouldn’t, given the dates involved” The second example is where the priority 3 replaced

their permit on 1 November 2020 and Priority 4's application is processed and granted again on 25th of September. So the key factual difference here is that, P3 was replaced after the 18th of March date. Which was one of the dates that had been floated and there the priority comes down, if that is the date used but it…

Q. So, if the 18th of March is the date used?

A. Yes.

Q. Okay. I see what you're doing, okay, mhm.

A. Now, we track through then to the third example. Here the priorities three was on the 20th of August 2021. So, after the 1 July date was the critical difference and the new permit for P4 is issued on the 25th of September. So, it would come down if either the 18th March or the 1st July date is used, but it wouldn't come down if the date was the 30th of September, and then final example is one where P3 replaced their permit on the 1st of November 2021 and P4's application was granted shortly thereafter on the 15th of November. So, the critical difference is the earlier one was replaced after the 30th of September, in which case it would come down irrespective of the drafting or the date used.

Q. Okay, and the dates that you've got there are the three potential dates, 18th of March, which I think is plan notification and perhaps a work around for 274 which was proposed a couple of joint witness statements ago, 1 July which is the date by which everybody should have got their application in for renewals for deemed permits, and then the 30th September, being the day before deemed permits expire.

A. Yes.

Q. Yep. All right, and so you're plugging for the 30th of September as the date to be include, you're not?

A. No, well, my submission is that the 1st of July is the –

Q. 1st of July. Okay.

A. – the date, and on the basis that parties should have had their applications in by that dat.

Q. Except. 1st of July.

A. There are some that haven't is the problem.

Q. And I thought there that was a large pool. For some reason I think 85 –

A. 88 was the number I had in my mind.

Q. 88. It's a large pool of people, and we don't know what they're going to do. Maybe they'll apply, maybe they'll let them go, so we just don't know, but if there not covered, why would you wanted to go, why would you let them go out of step, given the environmental outcomes and also the importance of the matter as between abstractors?

A. So, the two things at play here as between 1 July and 30 September is happens to permits that are being processed before the 30th of September.

Q. Yeah.

A. So, those priorities, the higher priorities won't come down over that period.

Q. What happens now? Activities processed before the 30th of September, is that right?

A. Yes.

Q. And this arrangement, unless I have announced to suggest this, it's not going to come down.

A. No, so, those are the two things are plan. So, what do we do with the, I'll call them the laggards those who have not yet lodged their replacements, and who won't necessarily have benefit of section 124 even if it does apply vs the risk of applications being replaced between now and the 30th of September, the outcome of which is if they are high priority holders, they then would lose the benefit of that high priority.

Q. Well. So, they are quite separate issues, aren't they? The laggards –

A. They are.

Q. – and the, what to do with the Regional Council processes and applications and processes and grants and applications before the 30th of September.

A. Yes. Now, there are, I haven't been able to find a solution in the drafting that doesn't make it super complex again, but those are the two things at play.

Q. In so far as we don't want to make things complicated. What would be the policy considerations for those applicants that region are accepts, region accepts, between 1 July and the 30th of September, an application for renewal. It's exercised its discretion.

A. No.

Q. Whether it has time to do it or not.

A. It doesn't have discretion in the three months.

Q. In the three months. So, what happens then? Remind me, what happens there? If I apply within the three months, then…

A. You can apply but you don't have the benefit of 124. So, the Council's discretion is between months three and six, so that's the period of time by which – at during which there is discretion. So, if you lodge more than six months before it expires, you automatically have protection of 124. If you lodge between three and six months before expiry, the Council has the discretion as to whether section 124 will apply.

Q. And then between…

A. Zero and three months out.

Q. Yeah.

A. On the plain and ordinary reading of section 124, there's no protection to be afforded.

Q. Okay.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So, if we could just take the next step then, and forget about 124. Somebody out there suddenly thinks, oh deer, I need to apply for water, does that mean they are in the new water category?

A. Not, not –

Q. Or will the plan still allow them to trundle down –

A. Yes, it does.

Q. – which route, Mr Maw.

A. It would stay – they are still protected by plan change 7, but they are not protected by section 124 if that is found to – if that applies in this context.

Q. So, can they apply for control then?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, they're still protected by plan change 7 because they are regarded as an application.

A. Yes, up until 1 October. After that date, not so.

Q. After 1 October, they are definitely not, and then because their permit has now fully expired, then…

A. And it's not – you may recall there was a definition of valid permit that did refer to section 124.

Q. Yeah.

A. And I thought about whether that reference does need to stay in or not and where I got to was that I thought that it did need to stay in.

Q. And we'll get to that – just park that up for a second before we move onto a different question. Zero to three months, you would regard a permit holder still has a valid permit up until the 1st of October at which point that permit then expires. It just does.

THE COURT: COMMISSIONER EDMONDS MR MAW

Q. Which is the first part of your valid permit definition.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You can't have the benefit – under your understanding, you couldn't take advantage of section 124 and that would be regarded as a new permit and so be regarded as new water. They would fall to be assessed under the operation regional plan with a six-year duration.

A. Yes, and there would be, it may be adding a layer of complexity as to whether in the light of the permit having expired, it still falls within the primary allocation available or whether the sinking lid concept would then make it even more difficult for that person to seek to enliven or renew a permit that had actually expired.

Q. Okay. But, the problem more than not taking advantages of 124 and court can't write in to the operative plan which is the thing, one of the things the Court's been very concerned about with the reject solution is that it doesn't have advantage of the policies that we're trying to craft the

priorities, although one answer to that is while everybody can just propose minimum flow, I suppose in theory you could, but…

A. Whether they would, it's a –

Q. Whether they would.

A. – question of risk.

Q. It depends on which catchment and so forth and the resourcing. Okay, so, I understand that. okay, so there's a problem – what's to be done about this, though?

A. They have all been written to, they have all been phone, they are all aware, now some of them will simply not replace the permits. They will just be left to expire. At the very best for those permit holders, if they actually do intend to keep using water, they will get an application in and ask that the Council process it before the 1st of October.

Q. Yes, but the only practical way to do that is by the control group would be via a controlled activity route.

A. Yes.

Q. And before the 1st, I mean hopefully we get a decision before the 1st of October but if they're asking for that to be processed ASAP, I suppose they could draft with these provisions in mind.

A. This in mind.

Q. Yes. Would the council say, well, both plans apply so therefore you've got to go under the operative, or –

A. An assessment still needs to be made but my understanding is that council has in the past granted a very short-term permit in those circumstances. So much short, as in a one-year permit. Now that may not address or fix the problems here in that, to then replace the one-year permit in a year's time might become more difficult under PC7 because you wouldn't then be replacing a deemed permit.

Q. No, you'd be replacing something new – well you'd be looking for, yes.

A. So at best for those consent holders still wishing to renew, put in an application, I would suggest that looks and complies in its entirety with the controlled activity framework –

Q. Yes.

A. – as to where it's now landed despite it not being in the notified version, but the direction of travel is perhaps more clearly signalled.

Q. Yes.

A. And ask very nicely of the council to process before 1st of October.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So Mr Maw then, what about the up to 25? Because that's got certain existing things that travel on under controlled and RD.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. What do you mean up to 25?

A. So, if the council gave them a water permit under the RMA, the short-term, don't they then still have the possible pathways.

A. **MR MAW:** Might be.

Q. What's up to 25?

A. Well in terms of duration. You know, you've got the two categories. You've got the deem but you've also got the water permit consents up to '25 and I was just wondering whether if the council did that, in fact these other channels were being left open.

Q. Sorry I'm not sure what you mean by up to 25?

A. 2025.

Q. Oh, 2025.

A. Sorry in duration.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. I'm just trying to…

A. I think the answer to that is yes. I think that door might be opened but let me just. It would seem to fit within limb B of the controlled activity.

Q. And similarly to the RD if you – yes.

A. Yes, if you track that through. So, that, yes, that maybe how it plays out with a very short-term permit and then considered through the lens of plan change 7, if that is approved in some form.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, you again you'd probably be doing that the day before the expiry date for the 2025 year, wouldn't you? And hoping that they would get their applications in to renew a permit expiring in that year.

A. I would have thought it might be actually one year, as opposed to the date before 2025 because then that person could then apply for another six years.

Q. Oh, I see. Yes, I see what you mean. So it doesn't matter 2021 and 2025, they could apply for a resource consent for a short-term even shorter term duration but they would be a permit that's, it's expiring before 2025 and then they could seek to avail themselves under the 2025 route. Yes.

A. Yes.

Q. Under resource consents expiring before 2025. Yes, you could probably do it that way. And folk that do have some intention of replacing their permits, but they haven't got the application in yet, has there been any sense as to how many might be caught out here? As opposed to folk who's just going to let it lapse.

A. I asked the question a couple of days ago and the answer was, some of them will and still do plan on filing applications but no real number from a quantitative perspective of how many of the 85 or whatever the magic number was.

Q. Okay.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So what does that mean in terms of this on priorities?

A. So then we wind come back, say well what do we do with the date? So that's the tricky bit because there are different consequences as to whether it's the 30th of September or the 1st of July.

THE COURT: JUDGE BORTHWICK

Yes, right.

LEGAL DISCUSSION – COUNSEL TALKING – NOT RECORDED (12:05:04)

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All right. So in relation to the date, you were thinking 1 July because you should have got your application in by then, if you wanted the council to exercise its discretion and accept it and then have your rights rolling on under 124, assuming 124 applies –

A. Yes.

Q. – so we are assuming that. Right and you're still thinking 1 July?

A. The piece – the factual information I don't understand is how many applications are likely to be granted between 1 July and 30 September. If that answer to that question is zero, then the date could be the 30th of September. If the answer is more applications than laggard applications, if that makes sense then the later date would bring down more of the priorities.

Q. So the question that you're not sure about in terms of a factual context is how many applications are granted between 1 July and 30th of September. If zero then, what?

A. The date could be the 30th of September because there won't have been any deemed permits replaced.

Q. And that would give us the fullest record in terms of bringing down those rights on everybody?

A. As between 1 July and 30 September, yes, it wouldn't enliven priorities that had been the subject of permits already replaced up to that time. So that would just happen, say before now.

Q. Sorry, you've lost me there.

A. If a permit's already been replaced, say today, 7 July, then, and the date in the definition was the 30th of September, the priority that was previously held by the permit replaced on the 7th of July would not come down on to a subservient permit, granted in the future.

Q. So the priority previously held in relation to a, what's that again subservient? No –

A. Dominant.

Q. Held by the dominant?

A. Yes. So I think.

Q. Would not come down?

A. Yes. Because the dominant permit had been replaced before the 30th of September.

Q. Okay so is the fixed to that, to do what Lindis did and just grant those permits and not surrender the deemed permits until the very last day?

A. That comes down to what the phrase, has been replaced by an RMA permit means because a deemed permit can be replaced without having been surrendered, which is, I understand, what happens principally because of the compensation provisions which might otherwise be triggered.

Q. Okay, so then you're looking at what does replaced mean, is it the word "replaced"? Maybe it has its own particular meaning in this context and you need to define it. I mean, nobody – well, nobody – the region doesn't – no, that's not true either – you want those priorities to continue until the 30th of September, the region does, so as for people to take full advantage of this priority regime, either before, or certainly afterwards, and for there to be no muck-ups.

A. I think there could be a drafting solution that says the date's 1 July for all applications lodged by that date, but if an application is lodged between 1 July and the 30th of September, then it includes the permits replaced during that window, or something to that effect. I think you'd have to separate out the two pieces, because the mischief or the difficulty with the 1 July date is applications that haven't yet been lodged.

Q. Mmm. I obviously need to give this a lot more thought, but it's already taxed me enough, but I need to give it a lot more thought, but I don't suppose, in practice, you can say, well, you're not to surrender your deemed permit, because if they want to surrender it, they can.

A. They can.

Q. But really, you don't want to be surrendering your deemed permit.

A. I wouldn't have thought so.

Q. And they may not want to – I mean, in practice, they may not want to because they want to take advantage of, you know, the take. In practice, you don't want them to because you need to have a new regime, so what

can you do about that? I mean, somehow, the simplest solution might be the non-surrender, because you could make that a noncomplying activity if they attempt to surrender their deemed permits. How about that? That would be like it's prohibited, you cannot surrender your deemed permit until the 30th of September.

A. Yeah. My mind is actually whether the definition can have two elements to it, dependent on when the application was lodged. To me, that might be the best place to focus on a fix.

Q. Yeah. I was just struggling with the mental gymnastics of paragraph 69 in your appendix.

A. Yes, and I guess the key point form the submissions is that it's important not to enliven or resurrect priorities that have existed on what I'll describe as old deemed permits that had been replaced under the RMA with no intention of a priority continuing.

Q. And that's what 69's dealing with. I mean, you can't somehow go, well, I want them back for whatever.

A. Yeah, but then the challenge is, or the need, I submit that there is a need for a date because of the differing consequences if no date, for example, is used, or if one of those dates is used, so I'm highlighting there the need for a date. What I haven't, to be fair, landed is which date and why, and how you might otherwise deal with the competing or conflicting outcomes for those who haven't yet lodged an application. So in terms of what to do about that.

Q. There'll be a solution.

A. There will be a drafting solution, I foresee a drafting solution, and whether the parties can assist with that or whether, now seized of the issue in perhaps a better understanding of the problem, the Court has sufficient to work with in terms of putting the collective thinking hat on the bench.

Q. Yeah, because whatever else we've been driving at is to keep farmers on their water.

A. Yes.

Q. And that's been a primary concern since the get go. All right, so I understand the particular problem posed by laggards who are not

bothering to apply for resource consent and they intend to do so, that is problematic, but that is in addition to you've got outlined in 68 and 69. They are different issues. Is that right?

A. Yes, in terms of they are not resurrecting a…

Q. Yeah, not resurrecting something that's already being replaced.

A. Yes.

Q. Okay, and there the issue is that the Council may resurrect it. It's not necessarily that the consent holder wants it resurrected, but that's just the operation of the provision will cause it to be resurrected inefficiently.

A. Yes.

Q. Okay. The solution to that is a date, but then there's a problem with the date because folk haven't got their permits in.

A. Yes.

Q. All right. Better write that out neatly, and I don't suppose we'll go slow in processing in a non-statutory sort of way is the answer, probably not if somebody insists.

A. Yeah, the simplest answer to it was 1 July and process nothing after the 1st of July – sorry, 30th of September was the date, but don't grant anything between now and then, is the…

Q. Yeah, the go slow on processing is the practical answer, but that would perhaps not be a statutory approach.

A. That's the conundrum, if I can describe. Yeah, there will be a drafting solution available to that in my solution.

Q. That's okay. Lucky that it's just an adjournment, but we will put our thinking caps back on again.

A. So then, we continue, and the next question is one which the Court posed in its minute of 31 May, whereby counsel were invited to address the Court on – requested to address the Court on whether there is scope for the proposed solution to priorities.

Q. And I think the answer was yes to that, wasn't it?

A. Now, I step through in some detail here as to why I say there is scope. I'm not proposing to take the Court through that, short of saying that the submissions of – no, the first question I submit is clearly on plan change

7 and it was fairly and reasonably raised in submissions and in particular, the submissions of the director general OWRUG and Marion Weaver were set out in analysis of those submissions from paragraph 82.

Q. Okay.

MR MAW:

So we then move to community water supplies. The Council has considered the evolved relief of the TAs in relation to community water supplies and in particular Option 2, which was set out in the Memorandum of counsel, 5th of July 2021. The Council has been assisted by the Supplementary Evidence of Ms McGirr and Ms Muir, which detailed the nature of water use within the QLC and Central Otago Districts, together with the expiring permits and planned upgrades likely to be captured by PC7. The evidence indicates that the number of projects planned within the life of PC7 is limited. The projects involve the consolidation of existing schemes and treatment or intake upgrades rather than new takes to support the development of land. For the most part the consented daily take volumes are expected to meet demand. Therefore the proposed amendments to Schedule 10A.4 to use typical maximums rather than average maximums, together with amendments to Policy 10A.2.1 and the RDA rule to provide for population growth within existing water permit volume and rate limits largely address the TAs concerns regarding its ability to provide sufficient development capacity under the NPSUD, noting my earlier submissions, and apologies for a very long sentence. I did note in there typical maximum for TAs, that should be read in light of the schedule which doesn't remove the atypical spikes by using the step 4 in the process. So, a single peak reflective of an event, so an AMP show or something of that nature will still be captured. However, the Council does note the outstanding concerns of the experts for QLDC and CODC regarding the planned upgrades which may affect the Council's ability to provide a safe drinking water supply.

The Council has been assisted by the Supplementary Evidence of Mr Twose and his suggestion of a Water Management Plan and has further reflected on Mr de Pelsemaeker's alterative pathway for the six schemes identified in his

Schedule, which were described in detail in the evidence of Ms McGirr and Ms Muir. On balance, given TAs authorities obligations to provide safe drinking water under other legislation, the Council considers that a limited exception could be made for those identified schemes. Whilst, the Council does consider that there may be some merit in a limited exception this would need to be constrained to those schemes identified in the schedule on which evidence has been given and the drafting challenges would need to be overcome, and there I'm referring to the discussion that we had yesterday in terms of the challenges of the drafting of these provisions. It may well be that even if the case is made out, the drafting is simply an impossible task, and when thinking about the issue at this point, we don't have wording which in my submission perhaps gives confidence that the issue can yet be solved from a drafting perspective.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Now, in relation to – you heard the conversation this morning between myself and Ms Irving, and in particular, the new rule, or second rule for new takes, which is to both detail with community water schemes not yet in existence and also those water schemes that are in existence, but in relation to which a new take is required, and so the good example of that would be Luggate, because there they would consolidate, I think they are consolidating sub take arrangements, now taking water from ground water not surface water, something like that, so it's a big change in waterbodies there. What's the Council's position where you are actually dealing with new takes in relation to in ground infrastructure, so the infrastructure is essentially there and there is a provision of water to the community.

A. Yes. So, the region is of the view that changing, for example, the take point, which would perhaps require a new application should be accommodated in terms of a longer duration being available but only for those schemes listed in the schedule. So, broadly speaking, if it's a new take for a community water supply beyond that schedule then it's a six-year duration, processed under the operative plan.

Q. Okay, so with that in mind, in the case of Luggate, and it may or may not be the case for the other schemes listed, you've got to take from a different water body, which immediately, in my mind, if it's, say, ground water it imports considerations as to drawdown effects to other users within the area and then maybe additional effects in terms of water quantity in particular. How then is that picked up – it's not merely a change of location for take, it's actually a new water body. How is then is that addressed under the Council's provisions?

A. That's the drafting challenge.

Q. That's the drafting challenge.

A. Because in my submission it's not covered at present, and the machinery in plan change 7, and for reason of scope that I'll come to, and I say that they can't be bought in for the full-merits based assessment under plan change 7. The only issue is duration for what otherwise is new.

Q. And so, for those, you would still have to go under the operative.

A. Yes.

Q. Together with –

A. The policy for –

Q. A policy for new takes in relation to existing schemes.

A. Yes. As far as my mind had reached, a policy could require a full assessment of effects to be taken into account when determining the appropriateness of a longer duration. The challenge then is what is the activity status under the operative plan. If it's a scheduled community water supply, and I don't know whether Luggate is or it isn't, but let's say it is, that's a controlled activity, and then the question is, and the matters of control don't themselves suggest –

Q. Look at effects.

A. Well, no, apart from – in general, yes, but could you require from the drafting of the policy a full assessment of effects to access a longer duration, and the answer to that, in my submission is maybe, but it's an atypical way of drafting in terms of requiring a full assessment of effects relevant to the question of duration only, not the matters on which control have been reserved.

Q. So, you're understanding is that if you do need a new permit in relation to community water supply, which I think is described in schedule 1B and 1(3) of operative plan, that would – presently that is a controlled activity, and so, the – and the matters of control may not be broad enough to deal adequately with the environmental consequences of that including any issue as to water quantity and draw down effects, in the case of Luggate, effects onto other water users. So, it's – it doesn't encompass a full range of normal considerations.

A. No, it's deficient.

Q. It's deficient in the operative plan, and so, even if you were to asses there and bring in a range of other matters which Mr Twose has identified in the PC7, with or without a rule, there's still that lacuna, if you like, in terms of environmental effects. So, you could introduce that, you're thinking, well, yeah, you possibly introduce that in PC7 then the plan starts to become something it wasn't intended to be.

A. Yes.

Q. Which is a plan now looking at environmental effects and put that in a rule then there's no guidance in policy terms.

A. Correct.

Q. What the outcomes are. Then, this is a long-winded way of saying, I was really surprised version A being promulgated by Mr Twose and others and did not know for what purpose, because the only purpose mentioned was stranded assets of which this could be one, stranded asset together with a non-complying activity pathway was the stated purpose, but Mr Twose and Ms Styles and Perkins and Dicey all said that actually that objective, which now is actually dealing with additive effects on a baseline environment was to support their outcomes under a different rule regime other than non-complying, which is what I thought they were say. Oh, no, no, Mr Twose had this in mind or something in mind all along. That would introduce an environmental component to this plan change.

A. Yes, which, in my submission, that's taking plan change 7 into a place it was never designed to go, and so at best, the question or the issue of how you take into account the effects of new for longer than six years, is

whether the policy saying well you can have longer than six years if you've done a full assessment of effects, but against what objectives and policies do you assess those effects, and that's where the problem arises, because we know that the objectives and policies that would apply are those in the operative plan, which we know to be deficient.

Q. Yeah.

A. So, the case, I understand the perhaps the reasoning and the thinking as to why there might be a need and the region says, it's only because of the requirement to provide safe drinking water, that's the need. It doesn't arise under the NPSUD or the NPSFM as a second water priority, or third in some cases. That's why there might be a need for more than six years, but the drafting to achieve that within the confines of plan change 7 may not simply be there, and that's not very helpful in terms of the solution, but it does highlight the challenges with seeking to provide a longer duration.

Q. So, the Council's position is that it's prepared to (inaudible 12:32:30) a longer duration for those activities or those takes noted up in the schedule for replacement only or for new takes in relation to those activities?

A. Well, yes, for replacements only -

Q. For replacements only.

A. – in a sense that the effects are in the environment.

Q. Because they are in ground effects, if you like, anyway.

A. Yes. in principle, yes, to the second category for the two schemes that we've had evidence on, Luggate, and was it Ophir or Omakau. Yes, in principle, but question mark over that can actually be achieved through the lens of the – through the drafting.

Q. Yeah.

A. And I haven't yet seen a solution that would achieve that purpose that is considered to be within the scope and with sufficient machinery around it in terms of how you would go about assessing the effects.

Q. Okay, all right.

A. So, helpfully or unhelpfully that's as far as I can advance that.

Q. Okay, no, that's fine.

A. That is where we are. Now, in relation to the issues for determination with respect of CWSs, we were required to identify what we thought the issues were and this was a while ago, but we hadn't filed the response to those issues, Ms Irving has filed a number of responses, including picking up in closing submissions. Now, it may well be that we don't need to go through all of those, so, the first question is the question of end use, and the effects of the consequential end use relevant? Now, this is the matter that's before the High Court.

Q. Yep.

A. I don't intend to take you through these submissions, they're there should you be interested in reading them and answer that question. My submission is and was in the High Court that yes, they are relevant.

Q. Well, certainly the environment in relation to which the – in relation, I mean, even Mr Twose said as much, he said, well, of course you've got to have an expiry date, because at some point you're going to have to check what is going on in the environment, the state of the environment, and then replace it with that in mind.

A. Yes. So, in short, the argument put to the High Court was that these effects are directly connected to the activity and the example in that decision was the dairy shed wash down. There were not sufficient intervening steps such that those effects were too remote. In contrast if for example the coal burning cases or the plastic bottles into which water is bottled, where there are in my submission, a number of intervening steps. Here you have the water in the scheme and the tap turned on to wash down the dairy shed, a direct connection. So, I say and said the remoteness question is, indicates that it's not too remote to take into account, and I also drew the Court's attention to the question of how consent duration is dealt with which I described as a top down approach where the cases say when you're looking at duration, you look and start at the sustainable management purpose of the RMA and you work down from that point. That's given colour through things like the NPSFM which of course requires integrated management, and so, for the integrated management reason there was a need to take into account those end-

use effects. It was relevant and not too remote. We'll see what Justice Nation has to say about all of that in the fullness of time. Which may or may not help but what I would say and you will have seen some drafting that had been suggested with sub-paragraph (c) I think it was which was an attempt to require assessment of effects including consequential end-use effects to deal with whatever the outcome of that decision might be. Now the drafting I accept, things have moved on and there are complexities but, in my submission, they are relevant effects and should be considered if a longer duration is being sought. If you think about plan change 7, it's about ensuring that the plan to come cannot be frustrated and that plan is the plan that will achieve integrated management or start that process. Longer term consents where actual effects are occurring can't be taken into account would seem to me to be potentially undermining that very outcome. And that's the difficulty with the argument being put forward by my friends that you've just got to pretend that's not happening. You can't take it into account. It undermines the argument, I say for a longer duration so they would need, in my submission to be assessed through a full assessment of effects, if a longer duration was to be sought.

Q. And in terms of the matter that you were referring to in terms of the end-use and then, that's picked up again in the water management plan provisions. That is to what outcome though? That's what I was not clear about in terms of what's the policy telling us about that?

A. Nothing is the short of it unless you read into the first objective about transitioning into a NPFSM-compliant planning framework whether it's implicit there that you have to then look at the integrated management of resources and not undermining that concept. But there's not a clear hook at all in the policy and either the policies or the objectives.

Q. I had wondered whether that matter of discretion and the matter in the water management plan was simply another way of looking at how end-use, how efficient end-use water is, so I understand there's all sorts of formula which are applied by the regional council to estimate stop water needs etc. Was it just about that or was it saying, look I'm only going to

supply to an irrigator. If they switch and border-dyking to sprays. So I wasn't sure about that, yes.

A. As I read it, it was the former. It was only really driving at the efficiency of those uses. It wasn't dealing with any consequential effects of discharges –

Q. Effect of the use per se.

A. – into environment.

Q. And that has been – council's practice has only been to look at, well, in terms of quantum is this an efficient use of water? And there's a formulae that gets applied.

A. Yes.

Q. And that's all it's done and it hasn't had regard to the end-use of that. If you're supplying say to the dairy sector, what is the water trends within that area pertaining to dairy. Yes.

A. Historically that appears to be the case.

Q. But going forward into a land and water plan, there would be integration between the take and supply and the land activities themselves and thus be hopefully because you'll have all sorts of land use controls.

A. Yes, so what's missing in this region compared to others is the requirement to – well, the control of the use of land for the purposes of managing water quality.

Q. Yeah, and it's both use of land and the discharge. That's the total absence or near total absence of any controls there.

A. Correct.

Q. Yeah.

A. In contrast to – I mean, if I look at the Canterbury region, for example, you have significant land use controls, you also have controls on discharges in terms of the direct dairy effluent discharges, together with the rules controlling the take and use of water and controlling the use.

Q. Mhm.

A. And even against that planning framework, applications to take and use water, the end uses are being considered, and, in simple terms, the use

of water for irrigation, questions are asked about, well, what's the underlying use for that water.

Q. So that's in terms of a council wishing to take and distribute water through a network.

A. Oh, no, this is just, in simple terms, an application to take and use water for irrigation.

Q. Okay, yeah, yeah, yeah.

A. So again, hence, plan change 7 is really designed to allow this region to get its planning house in order.

Q. Okay, all right. Well, no, you don't need to go through that, but we will read everything that you say there.

A. Should the High Court make its decision before your decision, we will of course make that available.

Q. Well, even if the High Court disagrees with you, Mr Twose says you've got to have a 15-year permit so that you can do the stocktake on the environment, which may very well actually impact on how much quantum, if there's no quantum, how much quantum you're seeking, say, for population growth.

A. So two things: in light of that evidence, there is an evidential foundation for putting something in the plan, and in my submission, even if the High Court says, in terms of the question of remoteness considered under the existing planning framework and PC7 as it then was, the effect was too remote. Doesn't mean to say that this court can't put in a policy requiring an assessment of that effect.

Q. Which effect? The effect of the end use?

A. Yes, the consequential end use, and my friend will take a different view on the legality and lawfulness of that.

Q. I still, yeah, come back to what Mr Twose said, which is that at some point, you actually have to have a durational limit, and he recommended 15 years, so that you could have regard to the state of the environment, which will be impacted by subsequent use of that water, and other activities happening within the environment, and it may well be the view of Ms Muir and others, well, it's intolerable to change our resource

consent conditions. That may well be their view, but nevertheless, if you are to achieve tier 1, there may well be a sinking lid in terms of allocations for different sectors, one of which is TA, which might discourage population growth in certain areas.

A. It may, yes, expansion in areas where there's simply insufficient water, one looks elsewhere.

Q. Okay, all right.

A. And so we move on to page 30. The question above paragraph 124 is do the TA's have a statutory duty to supply drinking water, or water, including safe and wholesome drinking water to a range of uses?

Q. Yeah, and what was the answer?

A. I'm just seeing if there's a simple answer that I can quickly get to.

Q. Yeah.

A. This is the section of the submissions where I was dealing with Ms Irving's submissions that once water was treated, it's all drinking water, and I disagree with that proposition.

Q. Okay, you might as well take me through that, because I do need you to.

MR MAW:

Counsel for the TAs has submitted that the National Planning Standards definition of drinking water, being water intended to be used for human consumption, covers all water taken by the TAs, as it is all treated to a level intended for human consumption, and impractical to separate volumes of water actually consumed when it is all delivered via the same system. In the Council's submission, this is a broad reading of the definition that does not capture its underlying purpose. The Council submits that the various definitions of drinking water that refer to water intended for human consumption could not have meant all water taken by territorial authorities for all purposes, when it is known that it will not all be used for drinking water or domestic purposes, whether or not it is treated. The Council largely agrees that the definitions of drinking water in various legislation are as set out in the legal submissions and supplementary evidence for the territorial authorities. However, the Council submits that the plain meaning of the word "intends", along with the purposes of the definitions,

leads to a different result. The definitions, other than the Health Act, all refer to water intended to be used for human consumption or other domestic uses. "Intended" can be defined as "expected to be such in the future." In this case, counsel for the territorial authorities has suggested that as some of the water taken is intended to be used for these purposes and it is all treated as such, then this is sufficient to meet the various definitions of drinking water. However, I submit that this is contrary to the plain meaning of "intended," as it is clear that the territorial authorities do not expect that all of the water taken and treated will actually be used for drinking water.

The purposes of the Health Act, Drinking Water Standards for New Zealand 2005, revised 2018, and Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007, are all to ensure that drinking water supplied for consumption and domestic use actually is safe for humans to consume. The definition of drinking water must be interpreted in that context. In addition, while counsel for the territorial authorities submitted that it would not be practical to separate the provision of water that is actually consumed by humans from water delivered via the same system and used for other purposes, the supplementary evidence of Ms McGirr and Ms Muir confirms that the territorial authorities are aware of the percentage of water used for different uses. Based on this evidence, it is apparent that while a territorial authority may choose to treat all of the water it supplies through the community water supply, it is aware, generally, of the percentages or volumes of water that are supplied for human consumption and domestic uses, compared to other uses that do not fall within the definition of drinking water. In this context, it would be artificial to suggest that all of the water taken for a community water supply is intended to be used for human consumption, if the territorial authority is aware that 80% of that volume is actually supplied for other uses, and there I'm referring to the Stirling example. The context of referring to drinking water in PC7 relates to allocation, to ensure that territorial authorities are allocated the quantity of water that they require to supply their communities with safe drinking water, but that obligation does not extend to supplying other uses, such as water for dairy shed washdown.

THE COURT: JUDGE BORTHWICK

Just pause there a second. Mhm.

MR MAW:

The next question was does the RPS or RPW allocate water for territorial authorities? As Mr de Pelsemaeker and Mr Twose confirmed, the RPS does not allocate water to specific activities or uses and does not set allocation or take limits. The RPS provides policy direction, particularly through Policy 3.1.3, for the setting of allocation and take limits in the Regional Plan Water, and the allocating of water under the RPW through permitted activity rules or resource consent applications. The RPW generally sets allocation limits for both surface water and groundwater without allocating water to specific uses. While the Regional Plan Water does provide for the supply of water to communities as a human value, the allocation limits in the RPW generally do not allocate quantities of water through permitted activity rules or the granting of resource consents to specific activities, uses, or users. In Mr de Pelsemaeker's opinion, with one exception, the RPW's policy and rule framework allows for any water available within the RPW's allocation limits to be allocated regardless of the purpose of end use or its end user.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Welcome Creek. Yeah, okay.

A. And just in contrast, there are plans, and the Waitaki Water Allocation Regional Plan is an example of a plan that does allocate water to different uses. There are quantities for irrigation use, there's quantities for four different categories, so that is an option, and when you're thinking about the planning framework to come it may well be that water is allocated to particular classes of uses and that's relevant to the argument I make in relation to section 128, in that, on a review of consent, whilst you can reduce down the volume to meet a limit, as in a minimum flow limit set in a plan, you can't reduce allocation to allocate to a different use. Only a regional plan can do that.

Q. In terms of, I mean obviously we read the newspaper just like everybody else and we've read the discussion at least in context of Manuherikia five flows and ranging I think from 12,000 cumec flares per second, something two-3,000. They seem to be minimum flows which kind of bundle up the health needs of water and their re-allocative interest if you like together with recreation amenity. There's other ways of imagining that space or is this the only way of imagining the space or what's required for the health need of water? And then the allocation requirements for those who would use it, bearing in mind values attributed to water – other than is attributed to water.

A. Yes, there are multiple ways to skin the cat, so to speak. There are in my view always two essential components. One is a minimum flow and that may vary depending on the time of the year. There may be high flows for recreational activities required at certain points but the really important – as an importanter [*sic*] part is the allocation of blocks. So how much water above a minimum flow is then available for allocation? Which then brings on to the question, to whom? So three cumecs are available for allocation, is it purely first in first served or is some of that flow to be set aside for cultural purposes? And some plans now have instream flows being retained for mahika kai purposes, for example. So that's the question of how the allocable water after the needs of the water body have been met are then to be allocated. So there's a level of sophistication beyond simply the minimum flow, that my submission is important. Now back to the minimum flows that are currently being, I was going to say, consulted on, the ones that are in the public domain. That's only addressing as I see it, the first of those questions, it doesn't get into the –

Q. Allocative issue.

A. – doesn't touch that yet.

Q. Yes.

A. Well that's certainly going to be something to be considered and reflecting on previous planning processes, iwi is expressing an interest with respect

to the allocation and water flows that are available for uses including for mahika kai.

Q. Yes. So the minimum flow there is providing for various states of health, if you could put it that way for the river and various other values which are not allocative values. So, say recreation amenity, mahika kai and there may be other values. Is that what that's doing at the moment, or don't know?

A. I don't know enough about that and given the range of different options, whether they achieve all of those things and in my submission it's not just as simple as the minimum flow to answer all of those questions, the allocation block part is also –

Q. Is important in it's, yes. Okay.

A. – part of that.

Q. Thank you that helps in terms of what you were discussing and what's possible under 125.

A. Yes, 128? 1?

Q. 128.

A. 128, great. Right. We move on to scope for the relief sought by territorial authorities and I should signal that the underlying legal submissions on this point apply equally to the new rule that Fish and Game are seeking for all new applications to be non-complying activities.

Q. Yes.

A. And is also relevant to the relief or some of the relief Trustpower was seeking to control the applications for new activities under plan change 7.

Q. Yeah.

A. And it may well be that that relief has moved on, but those are the three situations where I understand parties were seeking to bring in new rules which should probably also include WISE Response in that list as well. I'm a little unclear about what precisely what WISE Response was ultimately seeking, but it struck me as a new planning framework within PC7 to manage or to provide a flow allocation regime. So, in terms of the TAs, the Council maintains its position that New Rule 10A.3.1A.2 proposed in Mr Twose's supplementary evidence is not on PC7. So, that

was, as I understood, his rule controlling new takes, and I saw, the first question is does it address the resource sought to be managed by PC7. As Counsel have previously submitted, PC7 as notified intended for applications for new water to continue to be assessed in accordance with the relevant provisions of the Regional Plan Water, with the exception that the duration of any water permit will be determined in accordance with the policies in PC7. Now, I've set out there, the introductory text for plan change 7 on which I place some weight about what PC7 was intending to capture, and there it draws that distinction in my submission very clearly. In the notified version of the "how to use the Regional Plan Water" section, it's stated that applications for new water permits that are not replacing either a deemed permit or an existing water permit will be assessed in according with the provisions in chapter 6, 12, and, 20, except that the duration of any water permit will be determined in accordance with the policies in chapter 10A, and so, again, a clear signal that it was only duration for new permits that PC7 was seeking to capture, and again, I say that was submitted or reflecting in the public notice on the EPA website, which I've set out at paragraph 140. The limited scope of the plan change reflects PC7's nature as a process plan change. The focus of PC7 remains on the bigger picture: being the implementation of a new freshwater planning framework. The Council does not agree with the TA's submission that Policy 10A.2.2 provides a hook for the inclusion of New Rule 10A.3.1A.2. It submits that policy guidance on the duration provided by Policy 10A.2.2 is of a different nature to a rule which proposes to directly regulate new community water supply takes. Taken to its logical extent, the TAs submission would mean that the addition of any further rule regulating the new takes would be within scope of PC7, as Policy 10A.2.2 provides directive guidance on the duration on all applications for water permits, whether they be new permits or "replacement" permits. The pragmatic approach urged by the TAs has the potential to broaden PC7 far beyond its intended role. The Council submits there is a significance difference in how the RPW manages replacement community water supply takes in contrast to new CWS

takes. This different approach is reflected in the classification of those activities as controlled and discretionary activities respectively. Fundamentally, new water permits are seeking to take water that has not previously been taken, meaning the potential adverse effects of new takes are less certain and require a more fulsome assessment. Accordingly, the Council does not agree that New Rule 10A.3.1A.2 represents a change to the status quo advanced by PC7. The Council acknowledges the TAs statement that the new rule integrates the types of considerations that may form part of a fully NPSFM-compliant regime. However, it submits that PC7 is not the correct forum to deal with broader concerns regarding new community water supply takes. A fully integrated rule framework for CWS is more appropriately dealt with as part of the new LWRP, as opposed to being tacked on part-way through the PC7 process.

Q. So, that's okay. We'll take half an hour for lunch.

A. We'll get food and come back as soon as possible.

Q. Yeah.

A. So, yeah, half an hour, 35.

Q. Okay, we'll do that for lunch and then come back and see if we can't finish, which isn't a criticism of the length, as I said, this is to stop and then turn a juggernaut around, it takes a huge amount of thinking, so no, that's fine.

A. Very good.

Q. Thank you.

COURT ADJOURNS: 1:00 PM

COURT RESUMES: 1:34 PM

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Natural justice. Unless there's something else you want to raise over lunch.

A. No, not at this particular juncture.

Q. Okay, just in case there was a solution to priorities. You tell me that when you're ready to tell me that.

A. Yes, there will be a solution in terms of the date, explore a little with Mr de Pelsemaeker, some thinking, but I don't have a solution to proffer just at the minute. Right, the second element to consider in the context of scope. So, we're dealing with scope for potentially new rules in the plan change. The TAs have argued that New Rule 10A.3.1A.2 passes the second limb of the Clearwater test because it has been analysed in the section 32AA assessment carried out by Mr Twose, that no person would be affected by its inclusion as the full spectrum of interests are represented in the PC7 proceedings. CWS takes are afforded a higher priority than other takes under the NPSFM. The Council maintains its position that there is a risk of other persons being affected by the addition New Rule. As set out above, applications to take new water involve increased uncertainty of potentially adverse effects on both water bodies and other persons. This uncertainty being the genesis of the fully discretionary activity status for new CWS takes under the operative plan. The restriction of matters proposed by the new rule that can be considered when deciding applications for new community water supplies takes that has the potential to affect the water body in question, and determination of those matters is something that other persons may have wished to participate in. The Council does not consider that the prioritisation of CWS in comparison to other water uses addresses the natural justice issues posed by the inclusion of New Rule. The second limb of the Clearwater test is focussed on the ability of persons to participate in planning processes. An automatic assertion of a higher priority should not trump the participation rights of persons potentially affected by the new rule.

Further, not all uses of water supplied through a community water scheme may be considered a second priority under the NPSFM. It is further submitted that the assessment of New Rule 10A.3.1A.2 in the section 32AA assessment carried out by Mr Twose does not any bearing on the second limb of the Clearwater test. The assessment was carried out long after the period for making submissions and further submissions closed. This being the timeframe within which potentially affected persons could have submitted on the new rule. At its core, plan change 7 aims to ensure that implementation of the LWRP to come is not undermined by an increased reliance on water. The provision of an additional rule providing for new water has the opposite effect, and accordingly the potential to affect other water users. For these reasons, the Council does not consider that New Rule 10A.3.1A.2 meets either limb of the Clearwater test, and accordingly, it submits that New Rule is not on or about the plan change.

Q. Okay, just one matter of clarification. Paragraph 147. Here you're talking about the Regional Water Plan and if you were to make an application for a new permit that has a fully discretionary activity status under that plan. Earlier in the day you were talking about a controlled activity status, and so, what was the controlled activity status in reaction to new community water schemes. What did that pertain to?

A. So, what I had in mind was where it was a scheme listed in the schedule, but for which a new take point, perhaps from a different water body. My understanding is that that would be the controlled activity. Maybe not, says Ms Irving.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Do you mind if Ms Irving can clarify the rule?

A. I double checked that and the rule, the controlled activity rule refers you back to the schedules in the operative plan and those schedules specifically list a location, a take point location which is a co-ordinate, and so, in my view if you are not applying for a take from that specific location,

then you wouldn't fall within that controlled activity rule, in which case the discretionary activity rule would apply.

Q. So, if you're not applying for a take at that location, and that's the location defined by co-ordinates.

A. Yes, in the schedule.

Q. In the schedule.

A. To the operative plan.

Q. Co-ordinates in the schedule, then you are a what?

A. Then it defaults to discretionary.

Q. I know this issue came up in Sterling, didn't it?

A. Yes.

Q. How was it argued in Sterling?

A. I don't know the answer to that, I'd have to ask Mr Page to address that.

THE COURT: JUDGE BORTHWICK TO MR PAGE

Q. Mr Page wasn't counsel. Where there was a change in take, the point of take changed. Definitely the scheme remained the same but there was a change in take location, a move from a co-ordinate might not have been very far but there was something there.

A. Yes, I think that my recollection is that that was resolved between the planners as didn't require a discretionary consent as part of what you were dealing with.

Q. I'm not sure that that's correct.

A. I don't remember quite why.

Q. I didn't have any bearing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. According to Ms Mehlhopt's submission on duration and that is the consideration of the duration therefore a decision not required from the Court.

A. Yes. So, my understand, your Honour, was there was a change in the take location. I think we were talking about sort of 50 metres.

Q. Yep.

A. And there was an issue with the co-ordinates that were listed in this schedule in the plan because I think the way they operate, they are not necessarily true to what's happening on the ground necessarily, and by the Council dealt with that in its original decision. I think it treated it as a transfer as part of the application, but looking at the transfer provisions the planners took the view that it was a controlled activity following the conferencing they had that it did met the requirements for controlled activity in the way that the schedule operated and the uncertainty around the co-ordinates.

Q. And is that that 100-metre grid that somebody referred to yesterday. So, you could be anywhere at the co-ordinates, well, you could be within 100 metres of the co-ordinates actually given in the plan, or is that different issue all together?

A. I'm not sure if it's exactly the same issue but that was an issue then in terms of the realm in which those co-ordinates applied.

Q. Your submission, if I remember rightly though was that – I thought your planner was actually running an argument that the Court did have to look at this as if it was a new take, but that your submission was pragmatic, it didn't have a varying on the duration.

A. Yes, and in Mr Bell's evidence, he did explore the issue but then they addressed it through conferencing, and he agreed that it wasn't a new location or a transfer and then the submission was that it wasn't relevant to duration in terms of the activity status.

Q. Okay, but ordinarily – yeah, and I don't recall what the planners said in their JWS, whether they actually gave reasons.

A. Yeah, but the way this schedule in the plan is that it is the schemes that are listed in the schedule and the schedule does have those co-ordinates.

Q. Those co-ordinates, and if you were change, move, yeah, okay. So, controlled if you're wanting a new take in relation to that co-ordinated point, but it becomes discretionary if you're actually shifting from the co-ordinates.

A. That would be my view, and if you were shifting from surface water to ground water, you wouldn't fit within that controlled activity rule.

Q. So, you'd be discretionary.

A. Yep, that would be my understanding.

Q. Okay, everyone happy with that?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. All righty. Hydro.

A. Oh, no, I had two more things to note in relation to scope.

Q. Yep.

A. And I don't – it's not in the written material, but I flagged that the analysis applies equally to the argument put forward by Fish and Game with respect to its new non-complying activity rule for all existing take – sorry, for all new takes, and in my submission the prejudice argument is even stronger with respect to the Fish and Game rule than it is with the TAs rule and that is because in my submission would all potential future new users of water have appreciated that plan change 7 was going to change the activity status for such applications to non-complying.

Q. But – and I haven't checked, but I thought it was Fish and Game's submissions that it was always there in their original submission.

A. So, the question is not a question of whether it was fairly and reasonably raised in the submission, it's the second limb, it's a question of whether it's on plan change 7, and the prejudice arises in the context of determining whether the submission is on plan change 7.

Q. And on plan change 7, you're saying it is not on plan change 7, because plan change 7 is not seeking to introduce new rules in relation to new activities, just a policy change on duration, and then of course, Ms Irving has responded directly to that in terms of there being a functional relationship between the policy and subsequent rules.

A. Yes.

Q. Yep, okay.

A. And just in terms of the policy argument, in my submission is you can't just read the policy in isolation from the explanatory material that sets out what plan change 7 is addressing.

Q. Yep.

A. So, that was the… the second matter on scope that Council had raised an issue with the submission on the position being advanced by Mr Ensor on the part of the Minister, and my friend addressed that in her closing submissions on, I'm going to say Monday. The approach that the Council had taken to raising issues of scope was one of looking only at the submission of the party themselves. We didn't go and then look for where else there might be scope for the issue, we simply flagged there was an issue on the face of the party's own submission, and if the party could then respond to say, well, there's scope within other submissions, then that's fine, but we simply shift the onus back onto them at that point. What I do take issue with in terms of Ms Dixon's submission though was her submission that the carves out for hydro and Territorial Authorities did fit within the scope of the Minister's submission on account of the Minister seeking prohibited activity status. Taking that argument to its fullest extent, if one was to lodge a submission on a plan change saying all activities should be a prohibited activity and then turning up at a hearing and arguing for a whole range of controls or carve outs for activities beneath of that, parties simply would not have been put on notice that that was the case. So, my submission is there is no scope within the Minister's submission with respect to community water supply or hydro, but that those issues are fairly before the Court through other parties' submissions, but not in so far as new activities are concerned.

Q. Okay. So, provided that some other party may make submission that is on the plan change, that is sufficient, even if the Minister did not themselves.

A. Yes.

Q. And that would also true for OWRUG. If OWRUG is not left with a reject only submission, but if another party sought to introduce a merit-based discretionary rule, that would be sufficient.

A. We had a look a pretty good question, and it's an interesting question. There's no authority to say that you can't rely on somebody else's submission nor was there any affirmative authority to say that you could –

Q. Well, that's what I was wondering about, because that's why I sort of stopped and paused and it's not as if I've actually turned – I have not turned my mind to this issue, but is it sufficient that somebody else made a submission and you can rely on it.

A. The provision for the Minister is different for the reasons that my friend gave yesterday. So, put that to one side.

Q. Section –

A. 274B, I think.

Q. – 2B or something. They can do whatever they like.

A. That's what it appeared. But can OWRUG then pursue a case relying on the relief sought by let's say land priorities.

Q. Or WISE.

A. Or WISE Response, oh whoever.

Q. Yeah.

A. Now, I could find no authority answer in that question.

Q. No authority for that proposition.

A. And where I got to in the end was thinking of the duties of independent planning witnesses before the Court and my view was that they shouldn't be constrained on assisting the Court within areas of their expertise, and they shouldn't be so limited to the relief sought by their own, for the party that had engaged them. Now, that doesn't fully answer the question. That simply means that the independent expert's going to provide evidence on the full range of matters, but whether OWRUG –

Q. That creates scope relief.

A. – could pursue the relief.

Q. Yeah.

A. And I couldn't find any authority to say they could, but in terms of how I've understood this to play out in the past, once the bookends of scope are before the Court and parties can work within those bookends, but whatever it is they're seeking needs to fit. The risk that is run if a party is relying on an underlying submitter is if that underlying submitter withdraws their submission but their submissions are still before the Court, so my submission would be that OWRUG could pursue the relief

sought by another party, as that is the scope before the Court. I couldn't find a reason or a case that said that wasn't the outcome. Perhaps the only additional point I'd note is that the mechanism of the Act through the further submission process might be seen as the machinery to clearly signal or to enlarge the matters originally submitted on, and so if a further submission in support hadn't been lodged, it could be argued, well, that's then the end of the matter, it couldn't be pursued, but again, I could see no authority either way on the point.

Q. Mmm, okay.

A. So I can't answer the question, but that was as far as the research took us.

Q. Okay.

MR MAW:

Hydro, 152. The Council has carefully considered the relief sought by Trustpower in relation to hydroelectricity generation. The Court has only heard detailed evidence from Trustpower in respect of its scheme. Whilst there was some limited evidence given by Ms Perkins with respect to the Earnslaw hydroelectricity generation scheme, Ms Perkins confirmed that she did not provide any relief in her evidence with respect to that scheme. I've gone back and read the transcript when that evidence was given to see whether any further information could be distilled, but that, from an evidential perspective, is as far as matters were recorded. The Council's position is that some limited exceptions should be made for those Trustpower schemes identified in the schedule. For those activities authorised by a deemed permit, the Council would support a restricted discretionary activity pathway providing these limited applications with a consent duration up to 31 May 2035, where the volume and rate taken is in accordance with the historical use and the effects on the environment arising from the activity are considered. Now, there's been an adjustment made to that paragraph from yesterday's rendition of it, because we had the six-year period in there originally, but, following the discussions yesterday and the complexities of assessing effects beyond the six-year period

only, the position is that the effects of the activity for the longer term in its entirety should be assessed.

THE COURT: JUDGE BORTHWICK

Q. To ’35 or ’38, as they want it?

A. We’ll come to that. ’35.

MR MAW:

Where applications are sought for ‘new’ water in respect of the Waipori and Deep Stream, insofar as they’re identified in the schedule, they would be considered under the rules in Chapters 6, 12 and 20 of the operative plan. So again, the new is considered still under the operative plan, but with the overlay of the policy on duration. However, access to a longer consent duration up to 31 May 2035 is available, provided that the application includes an assessment of any environmental effects. The Council has carefully considered whether the consent duration available for new water for the Waipori and Deep Stream HEPS should extend to 31 May 2038 to align with the existing consents for that scheme. However, on balance and for the reasons set out in Mr de Pelsemaeker’s reply evidence, it prefers the slightly earlier date. Further, whilst Ngā Rūnanga have made it clear that they do not consider any exceptions or exemptions should be made, in legal submissions ,Counsel for Ngā Rūnanga submitted that: “It is entirely necessary for the consents granted under the PC7 provisions to be considered within the life of the new regional planning framework.” The earlier expiry date proposed by Mr de Pelsemaeker fits within this window, noting the 10-year life or a regional plan. Now, I’m not intending to detract from the submission made by Ngā Rūnanga that no extensions should be appropriate, but that was one of the reasons given, and hence the slightly earlier date. All other hydroelectricity generation activities, both the replacement of existing and new, would be subject to Policies 10A.2.2 and 10A.2.3, requiring short-term six-year consent durations.

In respect of determination of historical use, the new restricted discretionary pathway agreed to by the experts following expert conferencing enables

hydroelectricity generation activities to determine historical use using synthetic and other records. It is also proposed that Step 4 of the Schedule will not apply to hydroelectricity generation activities. Step 4 is intended to remove atypical data. However, atypical data is of importance to hydro-electricity generation activities as a single peak rate of take might best reflect actual use. For completeness, it is submitted that the accommodation now being supported would give effect to the requirements in the NPSREG, as set out in opening submissions for the Council. That accommodation would also appropriately take into account the benefits that hydroelectricity generation provides with respect to New Zealand's response to climate change, and I have in mind their policy for the NPSFM, together with the provisions within the NPSREG itself, in terms of the contribution that renewables make.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah, and your operative, I think it is, RPS?

A. RPS.

Q. Yeah.

A. Which also has objective and policies, or provisions.

MR MAW:

For these reasons, it is submitted that the Court does not need to determine issues relating to the preamble of the NPSREG, and whether the NPSREG applies to allocation of water, and whether renewable electricity generation is a second or third-order priority under the NPSFM 2020. The key reasons I say that is to be the case is that, with respect to the NPSREG, a limited accommodation for Trustpower's schemes would give effect to the policy direction in that document without relying on the preamble, and, with respect to the NPSFM 2020, irrespective of whether the activity is a second or third order priority, the first priority under the hierarchy of obligations needs to be addressed first. Any potential effects on the relevant water bodies themselves will need to be assessed if any such application is to be granted consent for a term of more than six years.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okay, and the provisions that you handed out yesterday for hydro are the provisions that you would support?

A. There are drafting challenges with those provisions as well, and I acknowledge those.

Q. Yeah, this is true. So what's happening?

A. So as far as I can take the submission, it is simply that the council supports the accommodation. In terms of the actual provisions, the council hasn't provided further drafting on that issue.

Q. Okay, so you support the accommodation of Trustpower in terms of the actual provisions. There may be difficulties with the provisions handed up on the 6th and the 7th.

A. Yes, and that would extend, also, to the provisions handed up by Mr Welsh, on which the version handed up yesterday was largely based, albeit more restrictive.

Q. Right, okay, and just remind me, what was the specific difficulty? So much stuff surging around in this case.

A. There was some further drafting, you may recall, with the policies, to make sure that the dropdown or the cross-referencing in policy 10A.2.3 was picked up. So Mr de Pelsemaeker, when asked questions, remember, we were tracking in some modifications. Perhaps the question of how the effects get assessed in relation to an existing activity for which longer-term consent is sought fall to be assessed through the lens of the policies, and perhaps the objective. There may be a lack of clarity around that.

Q. So is this activity affects assessment? There's a lack of clarity around that?

A. Yes, and that's for existing. The new applications, of course, fall to be assessed, I understand as discretionary activities under the operative plan, and so, that same issue doesn't present with respect to the two new examples in new situations, but there could be a policy for considering a longer duration for existing in the absence of policy support for the environmental outcome it is put to be assessed.

Q. All right, so new, Trustpower – yeah, new applications, fixed assessments under the operative plan and then Mr Welsh was doing something about that. He had an edit, but for existing activities, how do you assess effects? You are saying that the provisions as supported by Regional Council, there's a lack of clarity around that.

A. Yes.

Q. And there's a lack of clarity, I recall that in relation to the discretionary, restricted discretionary activity – oh, no, maybe that's wrong.

A. F.

Q. Right, I'll have to check the transcript. Okay. So, this has got – So, Trustpower wants longer consents to 2038 and that's fine except, well, how do you assess the effects? And there's no resolution for that. Yep. Trustpower had a suggestion.

A. Trustpower's suggestion from recollection didn't answer the policy question in terms of the acceptability.

Q. Of those effects?

A. Of those effects.

Q. And is that again, one of the things that Ms Styles' was seeking to achieve with her edit to the objective, which is looking at the additive effects from a baseline.

A. Yes, it could have been that, but there were, and are in my submission, significant problems with that in terms of who else and which other activities might rely on. That concept of additive effects, and it takes off the table of an existing activity. Given the additive nature, it seemed to be only looking at effects beyond that already occurring in the environment which goes counter to the Ngāi Te Rangi approach.

Q. Yeah, which is why I thought it was a Ngāi Te Rangi fix but that was denied.

A. Whether, and I'm just thinking about where the home for the effects outcome might properly rest, and I was going to submit that the policy might be logical place if the policy is going to accommodate these longer durations. The risk, of course, is that PC7 then starts to become the thing it was never supposed to be which is an environmental plan change

Q. Yep.

A. And that's the drafting conundrum with respect to both CWS and in this context, hydro.

Q. Unless you were to make hydro an exception to Ngāi Te Rangi.

A. Yes. So, in that wording, in my submission would be better reflected in the policy than the objective. I foresee some danger in the objective whereas in the policy strictly speaking to hydro, could and should only ever be read as an exception providing to hydro.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. It's a limited exception, hydro. Not all hydro –

A. It's not all – yes, that is important and correct.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, anyway, food for thought, a limited exception for hydro to the effect of the Ngāi Te Rangi decision, but if it is made it's to be made in the policy. You are also saying the Council would accept in principle new permits subject to again, a limited expectation, it's whatever written in the schedule. Those permits would have to be assess under the operative regional plan.

A. Yes.

Q. Okay.

A. So, we turn next to the discretionary activity rule being pursued by OWRUG and Land Pro, and so, in supplementary evidence, experts for OWRUG and Land Pro proposed a new consenting pathway incorporating a new objective, amended policy 10A23 and a new discretionary activity rule which was intended to allow the consideration of an application for consent duration of up to 20 years. It is noted that Ms Perkins amended her view to recommend a 15-year duration at the hearing with no ability for consents longer that 15 years to be granted. However, the Council's position remains that there are a number of significant issues with this proposed consenting pathway. These are summarised by Mr de Pelsemaeker in his evidence in reply, but include the grant of consents for a 20-year term would preclude their

reconsideration within the lifespan of a new land and water plan, contrary to PC7's intent to facilitate a transition towards a new freshwater planning regime, and could compromise achievement of the environmental outcome set in the land and water plan. The Council considers that review conditions are not an effective or efficient means of implementing the changes that will be introduced as part of the new plan. It appears the 20-year timeline is not firm, with Ms Dicey suggesting that it should be lined up with any timeframes included in the new RPS. However, any rule in this process is likely to be operative before the proposed RPS, with the proposed RPS not given significant weight when assessing resource consents at this early stage. A 20-year consent duration is also an extension beyond what is happening at a national level, where 10 to 15 years is a more traditional duration.

Q. Traditional.

A. That's a strange word, there. More common would be.

Q. Common.

MR MAW:

Where a long term consent is granted with a review condition, and the review is discretionary, rather than mandatory, it is the environment that bears the risk of the outcome of the review, if a review takes place, given the difference that will exist between the new plan limits and what is codified in the permits. The risks associated with the activities that would be consented under a longer-term consent pathway are the very risks that the new plan is going to be considering, so it is appropriate to allow that plan to come into being and set out the allocation framework so that all activities are consented under the same set of rules. The suggested discretionary pathway objective essentially excludes consideration of cultural values. Although the discretionary activity status allows consideration of a wide range of effects, putting in place a flow regime for the next 15 years would push out the consideration of cultural values and Te Mana o Te Wai for at least 15 years, and the discretionary rule proposed could have unintended consequences by allowing consent holders to increase their irrigable area and claim that that is substantial investment required to be

had regard to when re-consenting. It is also noted that it was considered by Ms Perkins that the wording put forward for the proposed discretionary rule is flawed as it does not effectively limit the persons who could use that consenting pathway. Now, in relation to those two pathways, I also rely on the cross-examination of both Ms Dicey and Ms Perkins where the drafting and the detail of the drafting was explored. The net issue is the submission of Ms Scott on behalf of OWRUG raised the alternative concept of phasing in expiry dates of resource consents on a catchment, sub-catchment or FMU basis. This concept was raised to address her concern about the practicality of reconsenting water permits if they all expire on the same date. Ms Scott is concerned that the Council, applicant and planning consultants do not have the resources to address this volume of consenting work and the associated complexity that comes with a new planning framework. The Court questioned whether any further thinking had occurred in respect of the timing and sequencing for catchments or sub-catchments in relation to the phasing in of expiry dates of resource consent. Ms Scott advised that she had not given further consideration as to the details for the timing or sequencing for a catchment or sub-catchment phasing approach. Additionally, the Court questioned whether the issue of scope had been considered in relation to a phasing approach. Ms Scott advised that this issue had not been discussed. Conceptually, Counsel considers that a phasing approach of expiry dates for resource consents has merit. However, no evidence has been adduced to support such an approach in relation the timing or sequencing of expiry dates for catchments, sub-catchments or FMUs, and the proposed RPS provides no clear guidance on this matter, and so whilst conceptually, I can see where it was coming from and it seemed to have some merit, we just don't have the evidence before us to deal with that. Onto damming. Counsel for ORC, OWRUG and Falls Dam Company Limited identified a number of issues for the Court's determination in respect of large dams in a Joint Memorandum, the first question of which was are reservoirs created by the exercise of damming permits a water body for the purpose of Objective 2.1 of the NPSFM? And I agree with my friend on that point, in that yes, they are water bodies, so I don't propose to take you through the reasoning.

THE COURT: JUDGE BORTHWICK

All right, that's fine.

MR MAW:

The next was should deemed permits to dam and discharge water be excluded from the operation of plan change 7? Counsel for OWRUG has suggested that dams should be excluded from the provisions of PC7 as they are of a fundamentally different nature to permits to take water and have different effects, are subject to Objective 2.1 of the NPSFM in any event, and the complexity of the reconsenting of dams and what forms part of the existing environment. Mr de Pelsemaeker has set out in detail the merits in a planning sense for including dams within PC7. The Council's position is that in imposing a six-year term on new damming permits to replace deemed permits will allow for the damming to be considered under the new plan and the new RPS, which will provide a more holistic consideration of the affected catchments and give effect to Te Mana o Te Wai. This includes the ability to consider the interconnected effects of damming activities, discharges and water takes, which it is submitted is consistent with the principle underpinning the NPSFM of ki uta ki tai. While counsel for OWRUG has raised concern regarding the assessment on reconsenting in terms of what constitutes the existing environment, it is submitted that there is some discretion in being able to consider the existence of the dam as part of the Ngāti Rangi approach, as it is qualified by the phrase: "Unless it would be fanciful or unrealistic to assess the existing environment as though the structures authorised by the consent being renewed did not exist." Further, on OWRUG's own evidence, it is submitted that there are no imminent dam safety issues that necessitate longer term consents. Rather, there are separate legal obligations imposed on dam owners and operators through other legislation, including, for example, the Building Act. The Council does not propose any further amendments in respect of dams.

The next matter to consider is the presumptive flow standards pursued by Fish and Game. The evidence on behalf of Fish and Game recommended that presumptive flow standards should replace the wording of "no more than minor

cumulative effects on the ecology and the hydrology of the surface water body," as had been set out in Policy 10A.2.3 of the notified version. The purpose of these standards has been stated as "applicable for signposting what is likely to constitute a more than minor adverse effect on the ecological health of a water body." The Council's position is that the standards in the table are ambiguous and uncertain for plan users. Dr Hayes accepted that there is a need for clarity when it comes to implementation of the plan provisions if these thresholds were intended to be read as limits, and as drafted, they do not currently provide that certainty. The Council considers the table would be inappropriate to include in PC7 for the following reasons: the figures in the table rely on the seven-day MALF being capable of being calculated in all of the circumstances where the table might be applied other than for intermittent streams. Dr Hayes accepted that the practicalities of this approach would be a considerable challenge, and that it is simply not possible to estimate MALF in all locations in Otago. It does not identify whether the table is in relation to a cumulative allocation rate or block. It does not identify whether total allocation is from a tributary, or all water bodies in a catchment, which would be required to be incorporated into a regional plan. While the table has been proposed as a proxy for more than minor effects, it is only dealing with a subset of the potential adverse effects that might occur in relation to the take of water, and significant care would need to be taken when allocating in accordance with the thresholds not to preclude natural and development values attributed to a water body by Māori and the wider community. There is a risk that the way in which the policy only focuses on the ecological assessment that may result in other values, for example, cultural, amenity and recreational, not being appropriately considered

I just want to pause on that point. As I listened to my friend's submissions on Monday, the language that she was using was all about no more than minor effects, and it did, in my submission, miss the point that it was only a subset of the effects being considered, it's only ecological, the only focus is on the ecological and not other values, and I did put to the witnesses that those flows do not take into account those other effects, which they all accepted, and the risk that exists here is that these ecological thresholds might become or be seen

as the standard at which all adverse effects are considered to be less than minor, which is only painting part of the picture when it comes to setting in place flow and allocation regimes, and so my final point is that the thresholds recommended 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.

THE COURT: JUDGE BORTHWICK

And that was the problem – well, I thought that was the problem with the notified version of the third policy, you had two self-selecting values, ecology and hydrology, and it was about the rest?

MR MAW:

And that, I accept, was the case, and I explored that with the witnesses, particularly the Fish and Game witnesses, about those values only being a subset, and that's recognised within the document that was being relied on, which was the draft NES standards for ecological flow, as not necessarily being appropriate or reflective of cultural or amenity or recreational values, and so, for those reasons, the Council opposes the inclusion, either as policy or as a method of this aspect of the relief sought by Fish and Game, but I would say that I acknowledge and understand why the relief was being pursued in light of the notified version of plan change 7, and it was, in a sense, an effort to address some of the challenges with that drafting. It was just, in my submission, the cure could be – I was going to say more fatal than the cause, but that's not quite the right expression. The next issue that I touch on, determination of historical use.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Don't think you need to read?

A. I'm not planning to take the Court through this because this is simply picking up on the changes that have been recommended to the schedule, and my only submission would be that it's excellent that I don't have to make more lengthy submissions on which version of the method the Court should be preferring. The experts have done a good job –

Q. They have.

A. – in that regard.

MR MAW:

So on to stranded assets next, at para 183. As notified, PC7 restricted the size of the area that can be irrigated under a new consent to take and use water to the maximum size of the area that was irrigated in the 2017 to 2018 irrigation season. The intent of the restriction was to reduce the risk of further environmental degradation and reduce financial risk for water users in the absence of certainty around water availability by discouraging further investment in irrigation infrastructure. Amendments have been recommended to expand the date range to 1 September 2017 to 18 March 2020 for determining the maximum area under irrigation. This will capture any expansion in irrigation area that has occurred after the 2017-2018 irrigation season, but before PC7 was notified. The amendment has been met with support by a number of submitters giving evidence through the Cromwell weeks, in particular, of the hearing. Ms Dicey had expressed concerns that farmers would find it difficult to provide proof of and identify what land was being irrigated during a particular period of time. Counsel asked all farming witnesses whether they would be able to identify on a map of their farm where they have been irrigating, particularly between 1 September 2017 and 18 March 2020, and each witness confirmed that they would be able to do this. Concerns have also been raised by submitters that the restriction on the irrigation area does not provide for any investment in planned irrigation expansion that has occurred, but where the expansion has not been realised. This has been referred to during the hearing as being an issue of stranded assets. Mr de Pelsemaeker initially recommended a restricted discretionary activity pathway to address this issue but withdrew support for this following questioning from the Court and counsel, and I've acknowledged the reasons why he at that stage withdrew support. The Council has had the benefit of hearing from individuals whose investment was affected by the notified version of PC7. The expansion in date range to 1 September 2017 – 18 March 2020 has addressed the concerns of a number of people who might have otherwise been captured. In

evidence presented to the Court by, it should be Dr Davoren, Mr Paulin and Mr Webb we have heard that there are horticultural and viticulturally businesses that have invested in irrigation expansion prior to 18 March 2020 but have not fully utilised the expansion. The planners have sought to address this issue of stranded assets through expert conferencing and have recommended a new restricted discretionary activity pathway that may be utilised in the situations I've set out at paragraph 188. The key outstanding issues for the Court with respect to stranded assets are in my submission, what is the appropriate activity status, and second, should the alternative pathway apply to horticulture and viticulture only or pastoral land uses as well? The Council supports the position reached in the 9th JWS. In particular, it supports the restricted discretionary activity status and limiting the alternative RDA pathway to horticulture and viticulture only, for the reasons set out in the JWS and Mr de Pelsemaeker's evidence. Evidence presented to the hearing showed that where modelling had been undertaken, each of the scenarios modelled showed an increase in nitrogen loss compared to a dryland farming system, and that was Dr Crystal's evidence, from recollection. Therefore, the effects of irrigation of pasture, particularly in respect of nitrogen loss, are greater than viticulture or orchards, and as such the Council considers the stranded assets pathway would not be appropriate for these activities. Whilst Mr Reid made the submission that the proposed amendment would not resolve the stranded assets issue for Strath Clyde, McArthur Ridge and Mount Dunstan because his client is a small shareholder in the much bigger Manuherekia scheme and the scheme may be reluctant to go down that pathway, it is not clear whether the Manuherekia scheme would need to go down the RDA pathway in any event due to the existence of hydro electricity generation within the scheme, or gaps in data or needing to use other methods to determine historical use. Further, it is not clear how many other irrigators are at risk of having stranded assets and what the nature of their operations are.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. I don't really understand that last submission. I understand Mr Reid's concern was that the Manuherekia scheme might have a choice whether

to go down a controlled pathway and not make provision for an increased area on his client's land, and that's simply because they were going down a controlled pathway, they'd get their consent, or they could seek to go down an RDA pathway for some small concession in relation to him. It would seem unlikely if there was some uncertainty as what perhaps, there might be some uncertainty. So, you're saying he's wrong, they would not need to go down an RDA.

A. No, I'm saying that the Manuherekia scheme might have to go down the RDA pathway anyway.

Q. Anyway, yeah, no, because it's got a –

A. It's got a hydro pioneer.

MS IRVING:

May I?

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Yeah, sure.

A. The pioneer – well, I suppose if you took the whole catchment then the pioneer generation is an adjunct to Falls Dam. If it's the Manuherekia irrigation co-op, which McArthur Ridge get their water supply from, I don't believe the Manuherekia co-op scheme has a hydro component. So, yeah, the hydro wouldn't apply to that particular scheme, but to the catchment as a whole if they were to progress as one consent, which seems unlikely under controlled pathway.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah, so that's hydro, and was the other reason or gaps in data? You're thinking it's improbable for that matter.

A. For that many parties that there wouldn't be somebody else who may need to take advantage of the RDA pathway.

Q. Now, in terms of how this works and here I'm – it may be in evidence and if it's not we'll have to search for something. If you are a scheme and you apply to take water do you also apply to use that water. So, it's take and use, or is the use is effectively the supply to a bunch of other entities

hanging off you, just say, for arguments sake, farmers. So, you take in supply to farmers and is that how this works?

A. I had understood it was both the take and use.

Q. Take and use.

A. The use was the end use, if I can use that phrase. Not just the supply.

Q. So, it's actually the farmer. Oh, okay, and so, farmers aren't required to also have their own –

A. They're not required to get a separate use permit.

Q. – use consents. Yeah, okay.

THE COURT: JUDGE BORTHWICK TO MS IRVING

Q. Ms Irving, is your understanding any different?

A. Short answer is no. I think the permits that I've seen are the schemes it would be for the take and use for irrigation.

Q. Okay, and so then the irrigation is actually in there.

A. Yeah. So, I'm thinking of Luggate being an example where there was a scheme, but the use doesn't kind of get them to any more fine grained area than that, and then in those consents, the consents have had essentially a command area map attached to them identifying the area of land that would be irrigated with that permit.

Q. And the farmer who is the beneficiary of the schemes water, does he or she have to also have consent?

A. Not a take and use consent. No.

Q. What sort of consent if they had any.

A. Effectively, none, unless they breached any of the rules around discharger and so on.

Q. Yeah.

A. Yeah.

Q. Which is a different story all together, perhaps.

A. Yes.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. So, is that different from Canterbury. Canterbury schemes have use – irrigation scheme takes that water for the purpose of supply. Farmers have their own consents in terms of using that water.

A. It depends on where in the region, but for the most part, the schemes either hold a take and use for irrigation and then the land use, the farming land use is a permitted activity if water is taken from an irrigation scheme, so it's the scheme that's holding the more comprehensive consent.

Q. So, it's take and use?

A. Yes.

Q. And it too is also looking at the command area and the assortment of activities.

A. Yes, so the theory of the structure was that the schemes would be the ones responsible for managing the effects and reporting on the effects of the use of that water for whatever use it was being put, rather than having individual farmers having the full suite of consents and each individually having to report.

Q. That might change with the land and water plan?

A. Yes. The situation here at moment, there's no requirement for a land use consent for farming activity at all, and there are multiple ways you can draft that depending on whether you're regulating the discharge or permitting the discharge if a land use consent is required or held, but certainly from an integrated management perspective it will be something that will need to be considered, and again, schemes may then start transitioning into the place of also holding global consents in terms of managing discharges within catchment areas, such that individual farmers don't need to take them, or it may be that the schemes say, no, that's your responsible as an individual

Q. You sort it. No, that's fair enough, and so, with that in mind, is that the key difference between an irrigation scheme, if you like, and a Council permit to take and supply. So, the Council permit to take and supply, at the moment, they're saying we're agnostic to how we use it.

A. Whereas irrigation schemes have –

Q. Yeah.

A. – at least in my experience been required to assess the effects to which the water is being used, and if I think back to the Central Plains cases that proceeded, I think as far as the Supreme Court, the leave was granted, but it wasn't argued. There, one of the issues was could you apply for the take and get certainty of supply of water before you had to put in the application for the use which assessed all of the effects, and the Court said, well, yes, you could, and what the Court didn't say was that you didn't have to assess the effects of the use, so irrigation schemes typically do assess the effects of the end use.

Q. Sorry, so that again? Central planes, and I'm thinking Meridian has tried the same on the Waitaki, I suspect, in relation to some of its bigger power schemes. Just give us a take, yeah.

A. Yes, so give us the certainty of the take –

Q. We've got the supply, yeah.

A. – and then we'll invest all of the money in figuring out what are the effects of the use.

Q. Yeah.

A. We don't want to do that until we know we've got certainty of the take, but implicit in that is that the effects of the uses are going to be considered as part of the use component. It's not that the irrigation schemes are simply saying take and use, but the effects are somebody else's problem.

Q. Yeah, so, yeah, probably not quite following what you're saying there, but anyway, the irrigation schemes, they do apply for the take and use. They, on a very global way, are looking at the command area, the assortment or arrangement of activities within that command area, and are looking at effects of the same?

A. Yes, and back to the Canterbury schemes, a number of them have a global tonnage of nitrogen that can be discharge within the scheme area, and so that's requiring the scheme to be managing and reporting the uses to fit well under the global cap.

Q. And presumably, the scheme itself would divvy up that nitrogen bundle –

A. Yes.

Q. – if that's what you call it, to all of –

A. The shareholders.

Q. – their shareholders.

A. Yes, yes.

Q. Yeah, okay. Insofar as it doesn't happen here, it's because there's no guidance as to what it is that the schemes could be doing in this space.

A. Yes, and the schemes, I think, have evolved, at least in Canterbury, from water supply companies to water supply and nutrient load managing companies –

Q. In Canterbury, yeah.

A. – in reflection of the planning framework that had shifted forward.

Q. Yeah.

A. That shift hasn't yet happened in Otago because the plan underpinning it hasn't required, for example, the nutrients to be managed in that type of a way.

Q. But is that how, is that at least one of the reasons why you argue end use – well, because it's not dissimilar to an irrigation scheme supplying a command area, where there needs to be consideration of the end use, the various activities, which farming activity is taking place, so why should water schemes be no different if they know to whom they're actually supplying?

A. Yes, and when you find the time to read the submissions on the end use, I do draw the analogy between irrigation schemes where the use to which the water is put is considered as part of those applications, so I don't see any reason to strike a difference in terms of community schemes.

Q. All right, well, that's helpful.

A. So we were on the stranded assets, and whether it should be a controlled activity or not to deal with Mr Reid's clients, and I do understand where he's coming from there. The other thought or thoughts that I had had were ones around bundling, and whether you could unbundle the Dunstan Creek component of the scheme, such that it was just that part that was considered as a restricted discretionary activity, and other parts.

Q. But then that really is for the Manuherikia scheme itself to drive.

A. Is for the scheme to determine, yes.

Q. And I guess how much influence Mr Reid has in relation to that scheme.

A. Yes.

Q. Yeah.

A. Which brings me onto the second point, as to whether those companies could actually pursue their own permit.

Q. Those what?

A. They could pursue renewal of their own part of the permit.

Q. Yeah, but I think what you've just said is that in Otago, farmers who take water from the scheme don't obtain resource –

A. There are – and my friends will know more than me about this – but from what I've seen, there are a range of different circumstances where some permit-holders had transferred their underling deemed permits to the scheme, or they've authorised the scheme to use and distribute their rights under a deemed permit. Now, I don't know what the situation is with Mr Reid's clients, in terms of whether there was an underlying permit. There may have been one permit that was in the name of McArthur Ridge, and additional water was taken from the scheme.

Q. Oh, I see, transfer their permit to the scheme, and the scheme –

A. Then essentially exercises it globally with the other –

Q. Well, that might be a sweetener for the scheme, but you're only suggesting insofar as a sweetener for the scheme, the scheme might go RDA route.

A. Yes, or they might say, well, okay, we'll finish our contractual arrangements, rely on our underlying permit, and renew it, but it will depend on the existence of an underlying permit, and we don't have evidence before us about that.

THE COURT: COMMISSIONER EDMONDS

We don't have evidence on any of that, do we?

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. The only other thing that's been troubling us is – I will speak myself – I was troubled by mainlines being installed, which would, as Dr Davoren

said, could then be subsequently rolled out for centre pivots, which then picks up the farming activities more likely to result in contaminants than, say, viticulture and horticulture, so it's that part that I was particularly concerned about.

A. Yes.

Q. Here we've only got viticulture and horticulture, so in terms of your RDA, matters of discretion, if you don't like what is proposed, you're not going to turn it down, you're just going to say do better in terms of your nutrients, aren't you?

A. Just impose some conditions to that effect.

Q. Yes, so if you're not going to turn them down, you're just going to impose tighter conditions, why I do not think it controlled?

A. Go into the controlled.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. Yeah, because they probably can just pull up some of those guidance documents and have certain and enforceable conditions. What else are you going to achieve in terms of the matter of discretion?

A. Whether it clutters up the controlled activity rule or not, I'm not sure. I think there would be an extra component to it, and the matters of discretion would need to come down and be done, and that's a drafting –

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. That's a drafting issue.

A. I don't foresee a drafting difficulty with that.

Q. So I think that's where we're thinking about it, we thought you're not going to turn them down, so, in that case, you know, you perhaps ought to be thinking about a lesser restriction, impose the same control.

A. Yeah, and, I mean, in reality, the council position has been informed by the joint witness statement there, so, I mean, I understand where the Court's coming from on that, and I understand that the issue that Mr Reid's clients have.

THE COURT: COMMISSIONER EDMONDS

(inaudible 14:37:30) at the beginning, I think we did question whether an RD might be more appropriate.

THE COURT: JUDGE BORTHWICK TO COMMISSIONER EDMONDS

Q. We did, but that was where it's centre pivots, taking into dairy and sheep and beef.

A. But given it's more limited now.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. You've brought it back now to viticulture, and the same concern does not arise. It's not to say that there is no contaminants, there will be, but it's unlikely that you're looking for a turndown. All right, so anyway, you don't see any great difficulties if the Court were minded to go that way?

A. No.

Q. No, okay, just the drafting exercise. Okay, all righty.

A. Section 128. We're getting close.

Q. That's good, because I've got to leave at 3. Is that right, 3? Yeah, 3.

A.

MR MAW:

It has been submitted at various stages throughout this hearing that a review clause on a longer term consent would be a suitable, or even preferable, alternative to a short-term consent. The Council's position remains that review conditions are not sufficient, as they do not allow for the cancellation of a consent, and in any event, they are likely to be ineffective in addressing substantial overallocation when it comes to implementing the NPSFM. As such, the Council's position is that: a consequence of a review may be to change the flow in allocation regime in such a way that it impacts upon the reliability of any grant of water to an individual farmer, and therefore, there is no benefit of increased certainty in respect of a review condition rather than a short-term consent. Consent reviews have not been tested in heavily allocated catchments. There is a difference between conditions that may be able to be imposed on a review compared to a reconsenting. While section 128(1)(b) of the RMA would allow the Council to review consents to implement new

minimum flows, a minimum flow is a temporary restriction, whereas a change in allocation is an ongoing limitation. Resource consent reviews, particularly on a region-wide basis, are a challenge for a council, and resource-intensive, so it is unlikely the Council will be able to review all consents as soon as the new plan is made operative. Therefore, the environment bears the risk in terms of the time it might take to put in place an NPSFM compliant-flow regime, and a short-term consent is more likely to be effective in terms of achieving the outcomes for a new plan than a review condition, because a review condition does not allow cancellation, which may need to happen in some cases as a result of the NPSFM framework.

Counsel for OWRUG has contended that the section 131(1)(a) viability consideration on a consent review also carries with the test of have regard to, and that's not the right word there. Which is the same standard required as for the value of the investment under section 104(2A). Counsel for OWRUG contends that this is therefore neutral to the risk of acting or not acting. However, in the Council's submission, weight must be given to the fact that case law is clear that on a consent review, the review, or any new conditions imposed as a result, cannot prevent the activity for which consent has been granted. To the contrary, under section 104, while the existing investment must be had regard to, the option to decline the consent, if required in the circumstances, remains available. In the Council's submission, it is more appropriate to allow full consideration of the activity once the new plan is operative, rather than being restricted to the starting point of having to ensure that the conditions do not prevent the activity, and I would perhaps interpolate there, as this issue was tested with witnesses throughout the hearing, the issue of economic viability was considered to be unique to each and every one, depending on the underlining circumstances, and that perhaps highlights some of the very real challenges with embarking on a consent review, because the outcome is going to be necessarily informed by the individual position of a consent holder as opposed to what is the state of the environment.

In addition, counsel for OWRUG submits that section 128 is equipped to deal with any issues of allocation created by the new plan. However, a section 128 review can only consider allocation for the purpose of determining how much water is able to be allocated above a limit, rather than allocating water to other classes of abstractive use. This would amount to re-allocation of water between uses, and that I submit is the function of a regional plan, rather than a consent review process, and that was the point I was making earlier on the in submissions at different classes of use. Next, I turn to the uncertainty of short-term consent durations. It has been submitted during the hearing by a number of parties that short-term consent durations create uncertainty around the long-term availability of water or uncertainty on the condition on water abstraction and use that may be imposed after 2025. The Council's position is that it is in fact the new land and water plan to be notified, the NPSFM 2020 and the RMA Act reform that is creating this uncertainty, not short-term consent durations under PC7. During the hearing, a number of witnesses acknowledged that it was this future planning framework, to some extent, that was creating the uncertainty. Additionally, the Council has signalled through PC7 that further investment in infrastructure should be discouraged given this uncertainty in the future planning framework. This is because under the future planning framework, water allocation is uncertain. A number of witnesses acknowledged the signal PC7 is sending and, in some cases, it acknowledged it was better to be aware of the uncertainty under the future planning framework for water allocation now, rather than invest in new infrastructure and find out later that water might not be available. Paragraph 200, we get to section 124. Counsel has presented legal submissions on the application of section 124 and in response to the submissions from Dr Somerville. Counsel does not seek that the Court makes a finding on section 124 as it relates to deemed permits if the Court does not consider it needs to. In my submission it is not necessary for the Court to make a finding on the application of section 124. What is relevant for the purposes of PC7 is what is the most appropriate solution to respond to the expiry of deemed permits. It is submitted that the application of section 124 is not relevant to the Court's determination on the proposed solution set out

above. Now, the last part of the submissions, I'm hoping might be able to be taken as read until we get to the end.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yeah.

A. And I'm just stepping through how the Act controls timeframes for processing consents.

Q. You want us to read it to ourselves?

A. You can just –

Q. Yeah, we could. I suppose to the extent that you making a point is that the applicants will need to amend their applications which is perhaps the point that Ms King hadn't contemplated when she had filed her brief. They would need to be substantial changes if you want to avail yourself or a controlled or even an RDA pathway.

A. Yes, the purpose of putting these, well, the underlying mischief was that applicants couldn't simply lodge an application and then sit on their hands and rely on section 124 beyond the timeframes of the Act.

Q. Oh, right, sitting on their 124. They do around the country.

A. Which is why the timeframes have been progressively been tightened and tightened in success of iterations in the Act, I rather suspect, and the timeframes are, I step through, far more directive than they once were. In the good old days, you put an application in and said please place it on hold and hour years you'd dust it off.

Q. So, you're saying to the extent that the region hasn't processed any application, it is within the – those decisions not to process any application this far is as far as the Act.

A. I would hope so. I haven't analysed them.

Q. But not us, don't ask that question. Yeah, okay.

THE COURT: COMMISSIONER BUNTING TO MR MAW

Q. So, the decision about taking them off hold and doing something with them. Is that something the Council as totally under its control? So, things can't just sit around.

A. Yes, is my answer to my question. The way these timeframes now operate. Very difficult to put on hold an application at an applicant's request for an indefinite period. Timeframes need to be specified when responding to section 92 requests and the –

Q. Yes, but we have a whole lot on hold at the moment.

A. Yes.

Q. So, what unlocks the hold?

A. The question of how they are on hold is one that this court perhaps need not trouble itself with.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Yes, he hasn't asked the question, sort of, plausible denial, isn't it?

A. Yes.

Q. Right.

A. Yes, but if you think about the end of the equation, can applicants control how long they remain on hold? My submission is no, the Act has machinery within it to avoid that outcome occurring.

Q. Yeah, okay.

THE COURT: COMMISSIONER EDMONDS TO MR MAW

Q. So, we're relying on the Council to do the right thing?

A. Absolutely.

Q. The right proper thing.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. And there was a question by me about the indefinite hold.

A. Yes, and that was the question that I was seeking to answer.

Q. Yeah, because if you're on an indefinite hold and you presuming that you have a 124 right then you can continue to increase the irrigation area and expand the take.

A. Correct. There are risks there.

Q. And that's the mischief.

A. Yes.

Q. Of an indefinite hold.

A. Yes.

Q. Okay.

MR MAW:

So, I then come to my concluding paragraph, and that is a response to the prayer for relief, which my friend for OWRUG concluded his submission with, and this is an important point, the Council is extremely conscious of the impact that imposing six-year permits will have on communities throughout Otago. It was clear to me from listening to the evidence that the concerns were very real and the challenges, particularly confronting for the rural community. The Council's approach with respect to PC7 is that it is better for water users to know now that there may be insufficient water available in the medium to long term to justify significant investment in infrastructure in the short term. Further, the Council acknowledges that the rural community has expended significant funds on preparing replacement applications for resource consent. If this court approves PC7, the investment in better understanding the environment from which water is to be taken and used will not be wasted. The information obtained in support of those applications will be equally valuable when informing the content of the new land and water regional plan to come.

THE COURT: JUDGE BORTHWICK TO MR MAW

Q. Okie dokie.

A. Those are my submissions, may I please the Court.

Q. Thank you. So, we've still got an unresolved issue in relation to priorities which we need to put our thinking caps on in relation to, and unresolved – is it unresolved in relation to hydro about the effects issue.

A. Yes.

Q. And you mentioned something about yesterday, said, oh, because there was some questioning yesterday, and I'm thinking, oh, heck.

A. No, that was the – and it was context of the TA provisions yesterday, but I thought the same issues potentially arose with respect to –

Q. I see.

A. – hydro provisions. So, just, that'll need to be closed out, but it was in terms of the effects that I had in mind.

Q. Yeah, the effects, okay, and then we've got big issues in relation to community water supplies, because we've got your provision and I think they're problematic, and we've got Ms Irving's provisions.

A. Yes.

Q. And then we've got everybody else's relief as well.

A. Yes. I mean, I am in no position and don't –

Q. No.

A. – pursue the Council's drafting on that and in a sense, it was an 11th hour trying to see if the provisions could be pulled in, but then they were tested and it just doesn't work from a drafting perspective.

Q. But Ms Irving's provisions weren't tested –

A. No, they weren't, again.

Q. – and it may well be that there was a few things that we could knock into shape.

A. So, there are still challenges.

Q. Yeah, and the challenge is always not so much for new, because could always go under the operative plan, but for replacements, it's that extended period of time for replacements and how one is managing effects.

A. Yes.

Q. Yep, okay.

A. And there was a joint witness statement on the schedule to follow –

Q. To come

A. – so, that will need to get squared away.

Q. Which hopefully, that's going to be… yep, good. And then we've got evidence and submissions on –

A. The proposed RPS.

Q. – the RPS.

A. Yes.

Q. And that worries me only in so far as parties will say, I've got no question for the other witness, so excepts it as read, and if there are significant

differences as between them, then it's like, for the Court to discover what they could be, and therefore how it might roll out, and I just really do no like that when that approach is adopted because the Court may well overlook something which is of importance, and of course, parties always have access to those witnesses to chat things through, but we don't, and so, from time to time we just simply miss some importance or some nuance of something which has been placed before us because we are not talking, and we're just having documents handed up, sometimes on the JWSs with little explanation, it's unsatisfactory explanation.

A. Yes.

Q. And no doubt that's frustrating for everybody, but it's frustrating for us too.

A. Understand.

Q. Be wasting time because we don't understand something. Okay. All right, anyway, it's an adjournment because we've got that coming, and a big thank you, also, cause it is also actually easier said than done to attempt to do what the region has attempted to do in relation to plan change 7. So, it's been a mighty task and credit to the region for being prepared to examine its position on the plan change after the first week, I think, full credit to the Council for doing because whilst that has undoubtably resulted in yet more work for persons responding to that change in position, in so far as perhaps their first drafting – drafting of evidence especially is not actually, you know, may be redundant in parts, yeah, I'm grateful that the Council did that. I think it's far easier to work up from a process only plan and backfill what you need to backfill in than it is a larger plan in this context. So, it's a much simpler process, in theory.

A. Yes, and the hearing that played out in those first two weeks.

Q. Yeah. So, thank you very much for the cases presented, and, so, we're adjourned thank you.

COURT ADJOURNS: 2:54 PM

MINISTRY OF JUSTICE
Tāhū o te Ture

Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	Indicates interruption: Q. I think you were – (*Interrupted by A.*) A. I was – (*Interrupted by Q.*) Q. – just saying that – (*First dash indicates continuation of counsel's question.*) A. – about to say (*First dash indicates continuation of witness' answer.*) This format could also indicate talking over by one or both parties.
Long dash (within text)	Long dash within text indicates a change of direction, either in Q or A: Q. Did you use the same tools – well first, did you see him in the car? A. I saw him through – I went over to the window and noticed him.
Long dash (part spoken word)	Long dash can indicate a part spoken word by witness: A. Yes I definitely saw a blu – red car go past.
Ellipses … (in evidence)	Indicates speaker has trailed off: A. I suppose I was just… *(Generally witness has trailed off during the sentence and does not finish.)* Q. Okay well let's go back to the 11th.
Ellipses … (in reading of briefs)	Indicates the witness has been asked to pause in the reading of the brief: A. "…went back home." 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. A. "At the time…called me over."
Bold text (in evidence)	If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the *first* instance only of the interpreter speaking headed up with the word "Interpreter": Q. How many were in the car? A. **Interpreter: There were six.** Q. So six altogether? A. **Yes six** – no only five – **sorry, only five.** *(**Interpreter speaking** – witness speaking – **interpreter speaking**.)*
Bold text in square brackets (in evidence)	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: Q. So you say you were having an argument? A. Not argue, I think it is negotiation, ah, re – sorry. **Negotiation, bartering. [I think that's what he meant]** Yeah not argue.