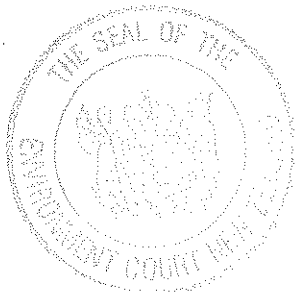
BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No [2019] NZEnvC 196

IN THE MATTER	of the Resource Management Act 1991
AND	of three appeals under section 120 of the Act
AND	an application for declarations under s 310 of the Act
BETWEEN	TE RŪNANGA O NGĀTI AWA (ENV-2018-AKL-000133) NGĀTI TŪWHARETOA (BOP) SETTLEMENT TRUST (ENV-2018-AKL-000134) SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000135) Appellants
AND	SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000166) Applicant for declarations
AND	BAY OF PLENTY REGIONAL COUNCIL WHAKATĀNE DISTRICT COUNCIL Respondents
AND	CRESWELL NZ LIMITED Applicant for consents
AND	TE RŪNANGA O NGĀI TE RANGI IWI TRUST NGĀTI PIKIAO ENVIRONMENTAL SOCIETY TUWHAKAIRIORA O'BRIEN and NGĀI TAMAWERA HAPŪ KIWIRAIL LIMITED RIHI VERCOE s274 Parties



Court:	Environment Judge D A Kirkpatrick Environment Commissioner I Buchanan Environment Commissioner D Kernohan
Hearing:	at Whakatāne on 20 – 24 May 2019
Appearances:	H Irwin-Easthope for Te Rūnanga o Ngāti Awa R Enright and R Haazen for Sustainable Otakiri Inc. and Ngāti Pikiao Environmental Soc. M Hill and R Boyte for Bay of Plenty Regional Council A Green and R Abraham for Whakatāne District Council D Randall, E Bennett and A Garland-Duignan for Creswell NZ Ltd J Gear for Te Rūnanga o Ngāi Te Rangi Iwi Trust T O'Brien in person and on behalf of Ngāi Tamawera Hapū R Vercoe in person
Date of Decision:	10 December 2019
Date of Issue:	10 December 2019

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appeal by Te Rūnanaga o Ngāti Awa against the grant of consent by the Bay of Plenty Regional Council is dismissed in part.

B: The appeal by Sustainable Otakiri Inc against the change or cancellation of consent conditions and the grant of consents by the Whakatāne District Council is dismissed in part.

C: The parties are directed to confer on the draft conditions attached to the closing submissions of counsel for Creswell NZ Ltd and, by 31 January 2020, either to lodge an agreed set of conditions or to file and serve (jointly or severally) a set of conditions that the party considers to be appropriate in light of this decision.

D: The application Sustainable Otakiri Inc for declarations is refused.

E: Costs are reserved.

CONTENTS

REASONS

Judge Kirkpatrick and Commissioner Buchanan

Introduction

[1] Creswell NZ Limited (**Creswell**) applied to the Bay of Plenty Regional Council (the **Regional Council**) and Whakatāne District Council (the **District Council**) for various consents to enable the expansion of an existing water extraction and bottling operation currently operating at 57 Johnson Road, Otakiri and trading as Otakiri Springs.

[2] Creswell is a wholly-owned subsidiary of Nongfu Spring Company Limited, a company incorporated according to the laws of the People's Republic of China which operates a large-scale water bottling and distribution business in that country. In 2016 Creswell entered into an agreement to purchase the land and the water extraction and bottling operation at 57 Johnson Road, Otakiri, subject to consents being obtained to allow for the expansion of the existing operation.

[3] The applications to the Regional Council are to take groundwater for the water bottling operation,[1] undertake earthworks,[2] discharge stormwater and treated process wastewater,[3] and discharge treated sanitary wastewater to land.[4]

[4] The application to the District Council is to vary the conditions applying to an existing land use consent[5] to allow the expansion of the water bottling plant. New land use consents are also sought for earthworks adjacent to the Tarawera River stopbank and for soil disturbance on an identified contaminated site.

[5] The applications were heard and considered jointly in the first instance by a panel of two independent Commissioners on behalf of both consent authorities who delivered their decision on 11 June 2018.

[6] The Commissioners granted the applications for consent to take groundwater and other associated consents. That part of the decision was appealed by Te Rūnanga o Ngāti Awa (**the Rūnanga**), Ngāti Tūwharetoa (BOP) Settlement Trust

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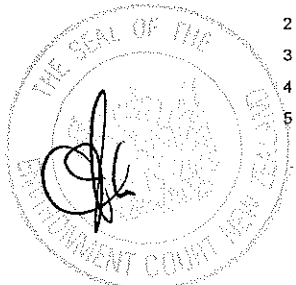
1 RM17-0424-WT.01
2 RM17-424- LC.01
3 RM17-0424-DC.02 and RM17-424-DC.03
4 RM17-0424-DC.01
5 Consent ref. 61/4/817



(**NTST**) and Sustainable Otakiri Incorporated (**Sustainable Otakiri**). NTST and Sustainable Otakiri subsequently withdrew their appeals against the regional consents. NTST remains a s 274 party to the Rūnanga's appeal, which only continues to challenge the groundwater take.

[7] The Rūnanga is the Post-Settlement Governance Entity, the mandated iwi organisation for the purposes of the Māori Fisheries Act 2004 and the iwi authority for the purposes of the Resource Management Act 1991 for Ngāti Awa. The Rūnanga is made up of 22 hapū representatives elected through their hapū together with other groups and entities. Prior to the hearing the Rūnanga confirmed[6] its appeal has been narrowed to seeking refusal of the Regional Council groundwater take consent because of its adverse effects and in particular:

(a) effects on te mauri o te wai (the metaphysical spiritual essence of the water); and

(b) effects on the ability of Ngāti Awa through the Rūnanga to be kaitiaki (guardians) of the water resource.

[8] The Commissioners also granted the applications for the changes to consent conditions for the existing land use consent and for the new land use consents. That part of the decision was appealed by Sustainable Otakiri. Sustainable Otakiri was formed in July 2018 by residents living near the Otakiri Springs water bottling plant following the release of the Commissioner's decision to grant consents for the expansion of the plant. Members of the Society include submitters at the first instance Council hearings and continue their opposition to the expansion of the bottling plant through this appeal by the Society as their successors.[7]

[9] Prior to the hearing before us Sustainable Otakiri refined the outstanding issues from those in the Notice of Appeal to:[8]

(a) The Court's jurisdiction to grant the application under s 104(3)(d) and s 127 RMA;

(b) The definition and status of the proposal under the Whakatāne District

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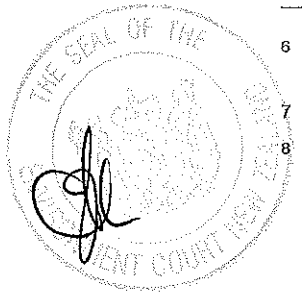
6 Joint Memorandum of Counsel 25 January 2015 and Memorandum of Counsel for the Rūnanga dated 22 March 2019.

7 *Sustainable Otakiri Inc v Bay of Plenty Regional Council* [2018] NZEnvc 207.

8 Joint Memorandum of Counsel, 1 February 2019.



Plan;

(c) The consistency of the proposal with the relevant planning instruments;

(d) The proposal's effects on rural character and amenity, the general wellbeing of the community, and the loss of productive land; and

(e) The extent to which the District Plan identifies alternative locations and zonings for the proposed site.

Section 274 parties

[10] Te Rūnanga o Ngāi Te Rangi Iwi Trust supported the Ngāti Awa appeal. Ngāi Te Rangi are members of the Mataatua Assembly and a party to the Mataatua Declaration on Water.

[11] Ngāti Pikiao Environmental Society supported the Ngāti Awa appeal. Ngāti Pikiao is part of the Te Arawa confederation and the Society represents them on environmental matters.

[12] Mr Tuwhakairiora O'Brien supported the Ngāti Awa appeal. Mr O'Brien represents Te Pahipoto hapū on Te Rūnanga o Ngāti Awa and is currently its deputy chairperson. Te Pahipoto holds the status of kaitiaki in relation to the location of the proposed Creswell operation.

[13] Ms Rihi Vercoe supported the application. Ms Vercoe is Trustee-Secretary of Kokohinau Papakainga Trust.

The Proposal

[14] The property at 57 Johnson Road, Otakiri, is a 6.27 ha site previously owned by James and Donald Robertson. A groundwater water right (number 20595) was granted in 1979 for kiwifruit irrigation from a 230 m deep bore established at that time (ref. BN-932). The water right was modified in 1991 by the Bay of Plenty Regional Council to allow for a water take for horticulture irrigation (158m^3/day), frost protection (1580m^3/day), and commercial bottling of water (1200m^3/day). The current total allowable take of water is 327,000m^3/year. The Robertsons were also granted land use consent in 1991 to establish a water bottling plant at the site.[9]

[9] Consent Number 61/4/817

[15] A business called Kiwi Organics started bottling water on the site in 1994. The business was sold in 1996 to Robertson Industries Limited and on-sold in 2000 to Otakiri Springs Limited, the current operators of the business. James and Donald Robertson are directors and shareholders of Otakiri Springs Limited.

[16] As noted earlier, Creswell has entered into an agreement to purchase the land and water bottling and distribution business at 57 Johnson Road subject to the necessary consents being obtained for expansion of the business. Creswell proposes to expand the existing water bottling plant with the construction of a new purpose-built production plant alongside the existing plant, which is to be retained.

[17] Full details of the construction programme are included in the resource consent application and its accompanying assessment of effects on the environment (**AEE**) and were summarised in the evidence-in-chief of Mr Hamish Joyce, Consultant Project Manager engaged by Creswell to manage the design and development of the project. A new 16,800 square metre building with a 12.9 m high gabled roof running down to a maximum height of 9.4 m is to be constructed. A truck unloading canopy and container loading area are to be established on the southern side of the new building.

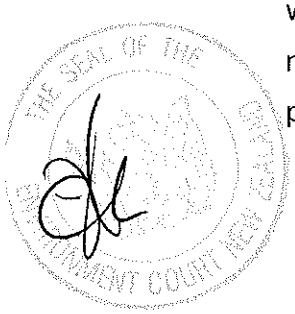
[18] The existing bottling line is to be upgraded from its current maximum capacity of 8,000 bottles per hour to a maximum capacity of 10,000 bottles per hour. The new building will contain a plastic bottle manufacturing plant and two new high-speed bottling lines, each producing 72,000 bottles per hour.

[19] A 30-month construction programme is proposed, including upgrading of Johnson and Hallett Roads, site earthworks and equipment installation.

[20] Internal bottle blow moulding, water bottling and warehousing activity will operate 24 hours per day, seven days per week. No outside activity other than staff car movements is to take place between 10 pm and 7 am.

[21] Outdoor lighting will be required within the site. This will generally be left off with motion sensor activation outside of normal operational hours.

[22] The existing shelter belt that surrounds the site is to be retained and upgraded with replacement and additional planting to provide screening of the buildings. A 2.4 m high noise fence is to be erected in the southern and eastern side of the site and part of the western side.



[23] A peak daily take of 5,000m^3 of groundwater per day has been applied for, reflecting the capacity of the bottling operation. Daily water take is expected to fluctuate between 1,000m^3 and 5,000m^3 per day, with an average daily take of 3,000m^3 per day. The maximum annual volume of water sought is 1.1 million cubic metres.

[24] The water will be extracted from a new bore drilled in 2017 (ref. BN17-0056, referred to as PW2 in the application documents) which is 228 metres deep. The existing bore established in 1979 (BN-932) is to be retained as a backup supply for the plant. The two bores at the site draw water from the Otakiri aquifer in the Awaiti Canal groundwater catchment, which is in the Tarawera Water Management Area.

Surrounding Environment

[25] The site is located approximately 3 km southwest of Otakiri and 8 km southwest of Edgecumbe in the Whakatāne district of the Bay of Plenty region. The 6.27 ha site comprises a kiwifruit orchard, the two consented bores and the Otakiri Springs water bottling plant. The Tarawera River is on the western boundary of the site and the Hallett Drain is located along the eastern boundary. The local landscape character is characterised by both pastoral and horticultural land uses, as well as several smaller rural-residential lifestyle properties. There is a relatively high level of domestication in this location compared to the western side of Tarawera River.

The Planning Framework

[26] The Bay of Plenty Regional Policy Statement (**RPS**) and the Bay of Plenty Regional Natural Resources Plan (**RNRP**) provide the relevant regional policy and planning framework for the assessment of the applications for regional consent. The RPS became operative in 2014.

[27] The RNRP was made in 2017 from amalgamation of Regional Plans, including the Regional Water and Land Plan (2008). The RNRP also incorporates the Regional Plan for the Tarawera River Catchment 2004 as Chapter 13. This is proposed to be superseded by the Regional Council's Water Management Areas (**WMA**) process to give effect to the National Water Policy Statement on Freshwater Management 2014 (amended 2017)(**NPSFM**). Chapter 3 - Kaitiakitanga and Chapter 7 - Water Quality and Allocation of the RNRP are also relevant to these appeals.

[28] Proposed Plan Change 9 (**PPC9**) amends Chapter 7 of the RNRP as the first step in a two-stage approach to give effect to the NPSFM in the Bay of Plenty. PPC9

does not amend the Kaitiakitanga Chapter that provides guidance on addressing matters under ss 6(e), 7(a) and 8 RMA.

[29] Three expert planners presented planning evidence for the hearing in relation to the Regional consents: Ms Mallory Osmond for Creswell, Mr Dillon Makgill for the Regional Council and Ms Bridget Robson for the Rūnanga. The expert planners agreed that, as PPC9 is a long way through its Schedule 1 process (being now at the appeals stage) and is intended to give effect to the NPSFM, PPC9 should be given significant weight in this case.

[30] The site is zoned Rural Plains in the Whakatāne District Plan (**WDP**). This zone has a primary production focus with emphasis in Chapters 2, 3 and 7 of the District Plan on the promotion of activities aimed at increasing employment, income and investment. Chapters 2 and 7 also provide relevant objectives related to minimising environmental effects, retaining rural characteristics and amenity values, and providing for activities that have a functional need to be located in the zone.

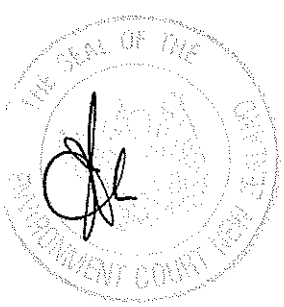
[31] Three expert planners were called to give evidence for the parties, Mr Keith Frentz for Creswell, Mr Craig Batchelor for the District Council and Mr Greg Carlyon for Sustainable Otakiri.

Jurisdictional Overview

[32] In these appeals the Court is considering whether the applications made by Creswell for resource consent and changes of consent conditions should be granted or refused. The scope of the Court's jurisdiction over these appeals is within the ambit of the RMA: it does not have a general jurisdiction. The Court must accordingly confine its reasoning and its decision to the relevant considerations in the RMA and in the statutory planning documents made under the RMA.

[33] The overall framework for those considerations is set out in s 104 RMA. For present purposes we are most concerned with the matters listed in s 104(1) to which, subject to Part 2 RMA, regard must be had:

> (a) any actual and potential effects on the environment of allowing the activity; and
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
> (b) any relevant provisions of—
> (i) a national environmental standard:
> (ii) other regulations:
> (iii) a national policy statement:



(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[34] An issue arises in this case as to the scope of the consideration required or allowed under s 104(1)(a) RMA in regard to any actual and potential effects on the environment of allowing the activities for which resource consents have been sought. The issue is whether, and if so to what extent, a consent authority or, on appeal, the Court, should or may consider matters beyond the particular activity for which consent is sought and take into consideration the end use of whatever may be produced by that activity or the effects of other activities for which consent is not required.

[35] Put simply by Counsel for the Rūnanga,[10] the case against the water take is that the application is "for too much water to be sold too far away". In making this submission Counsel accepted.that the Rūnanga's case was not about the ownership of water or any broader constitutional issues. The focus of the Rūnanga, in her submission, was on the tikanga effects of the proposal in the context of the Mataatua Declaration.

[36] On the issue of control over the end use of something produced by a consented activity, counsel referred to *Gilmore v National Water and Soil Conservation Authority*[11] (the Clyde Dam case) where Casey J held that the end use of electricity from the dam for a proposed aluminium smelter could be relevant to the Planning Tribunal's assessment.

[37] As described by Ms Leonie Simpson, Chief Executive of the Rūnanga, the Mataatua Declaration is an iwi planning document agreed and approved by the tribes of Mataatua in the Bay of Plenty region. The Declaration guides Ngāti Awa's approach to policy development around a holistic view of freshwater. It affirms Ngāti Awa's rights and responsibilities within its own constitutional framework to advocate for mana over water in its rohe. Counsel for the Rūnanga submitted that it is within the context of this declaration that the broad opposition to the Creswell proposal has developed.

[38] On those bases we were urged by the Rūnanga to consider the total nature of the consents applied for, including the take from the aquifer, the bottling of the water

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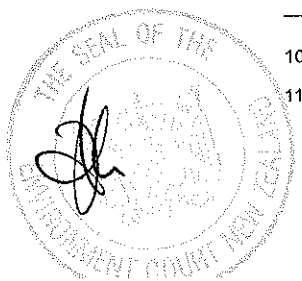
10 Opening submissions at paragraph 8
11 *Gilmore v National Water and Soil Conservation Authority* (1982) 8 NZTPA 298.



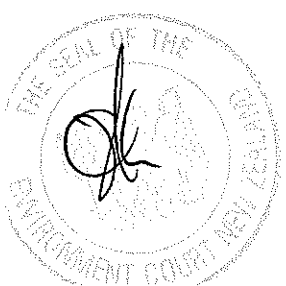
and its export overseas.

[39] None of the other parties raised the issue of end use in their opening arguments. In reply, counsel for the Regional Council submitted that the export of bottled water for profit, without charge, is a political issue at a national level and not a matter for this Court to determine. Counsel for Creswell submitted in reply that both the adverse environmental effects of plastic waste and the foreign ownership of Creswell were not matters for the Court to consider.

[40] The Court is aware that there is growing public concern and increasing political debate about the issues relating to commercial interests, particularly foreign-owned companies, exporting high quality freshwater from New Zealand without having to pay royalties or other charges to do so. There is also increasing concern about the use of plastics in packaging and containers, especially where such plastic products are designed to be for a single use and not recyclable, or where opportunities for and the practice of recycling are limited, leading to significant volumes of long-lasting waste. There is also an ongoing public discussion about the rights and interests of Māori in water separate from or beyond the issues that arise from consideration of Part 2 RMA although, as noted, counsel for the Rūnanga did not advance such matters in presenting her client's case before us. These matters all raise important issues, but the undoubted importance of these issues does not, by itself, confer jurisdiction on the Court.

[41] In considering whether the end use of exporting water in plastic bottles results in relevant effects on the environment to which regard should be had in these proceedings, we start with the definitions of the terms *environment* and *effect*. Both are broadly and inclusively defined in ss 2 and 3, respectively, of the RMA:

> **2 Interpretation**
> (1) In this Act, unless the context otherwise requires, — …
> **environment** includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) amenity values; and
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters
>
> **3 Meaning of effect**
> In this Act, unless the context otherwise requires, the term **effect** includes—
> (a) any positive or adverse effect; and
> (b) any temporary or permanent effect; and
> (c) any past, present, or future effect; and



(d) any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

[42] Within the definition of *environment,* the term *amenity values* is also defined in s 2 RMA as follows:

> **amenity values** means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

[43] As noted above, the relevance of the end use of something resulting from a activity to the consideration of whether to grant consent to that activity was addressed in the Clyde Dam case. There the Planning Tribunal had held that the end use of the electricity to be generated by water rights was not a matter they were entitled to consider.[12] On appeal against that conclusion, Casey J was considering the scope of s 14(4)(1) of the Water and Soil Conservation Act 1967 which included among the Authority's powers and functions:

> To take into account the present and future needs of primary and secondary industry, water supplies of local authorities, and all forms of recreation, and to have due regard to scenic and natural features and to fisheries and wildlife habitats when planning and advising on the allocation of natural water:

[44] Referring to the broad balancing operation in respect of competing interests and the advantages and disadvantages of the use of water identified and described in *Metekingi v Regional Water Board*[13] and *Keam v Minister of Works and Development*,[14] Casey J held that evidence about the end use could be highly relevant to the decision. He accordingly remitted the matter back to the Tribunal for further consideration.[15]

[45] That consideration never occurred as the proceeding became moot on the enactment of the Clutha Development (Clyde Dam) Empowering Act 1982. Respectfully, that outcome, as well as the case being considered under legislation

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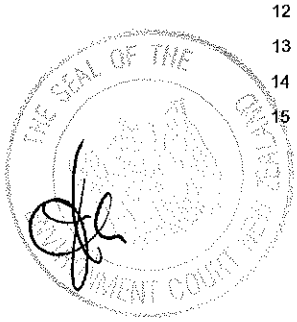
12 *Annan v National Water and Soil Conservation Authority* (1980) 7 NZTPA 417 (PT).

13 *Metekingi v Regional Water Board* [1975] 2 NZLR 150 (Sup Ct).

14 *Keam v Minister of Works and Development* (1980) 8 NZTPA 240 (CA).

15 *Gilmore*, fn 11.



which was quite different to the RMA, renders the decision of reduced value as guidance for the decision we now have to make.

[46] The leading case on the consideration of end use under the RMA in this Court is *Beadle and Wihongi v Minister of Corrections*[16] (the Ngawha Prison case), where the Court reviewed the case law to that point and concluded:

> [88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific. *Lee's case*[17] is a reminder that a decision-maker should not have regard to matters extraneous to the Act; *Ngāti Rauhoto*[18] that an appeal on one topic cannot be turned into an appeal on another; and *Cayford*[19] that consequential effects may be too slightly connected to the consent sought, and too remote.
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> ...
>
> [90] ... the Minister expects the Court, in deciding the resource consent applications, to have regard to the purpose of the earthworks and streamworks to create a site for what he urges is a necessary public facility and one that will provide public benefits in Northland. The submitters must be entitled to challenge those claims. But their rights are not limited to direct denial. They must also be entitled to try and prove that the facility would have adverse effects on the environment that should be offset against its positive benefits, and indeed to prevail over them. To preclude submissions and evidence along those lines would be to deprive the Court of the opportunity to make a judgement based on a more complete understanding of the proposal.
>
> [91] So, for what difference it may turn out to make, we hold that in deciding the resource consent applications we are able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consents sought, to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility.

[47] Turning to the case law which was reviewed in this decision, the decision in *Cayford v Waikato Regional Council*[20] is, on its facts, of particular relevance to the present case. There the Environment Court was considering appeals against a decision granting resource consent to take and treat water from the Waikato River and deliver it through a pipeline to augment the municipal water supply of metropolitan Auckland. The issues on appeal included whether the application for resource

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16 *Beadle and Wihongi v Minister of Corrections* Decision No A 74/2002.

17 *Lee v Auckland City Council* [1995] NZRMA 241, 262.

18 *Ngāti Rauhoto Land Rights Committee v Waikato Regional Council* Decision No. A65/97.

19 *Cayford v Waikato Regional Council* Decision No. A127/98.

20 Fn 19.

consent stated that further resource consent would be required for the discharge of this water to the Manukau Harbour and whether the terms of an agreement between Watercare Services Ltd and the Manukau City Council relating to the treatment of the water should be incorporated in the conditions of resource consent.

[48] The Court considered these issues in the context of three questions of law:

(a) whether the Court had jurisdiction to consider these issues;

(b) whether it had power to impose the additional conditions; and

(c) whether, if it had power, it should refrain from doing so to avoid conflict with the exercise of powers under the Health Act 1956.

[49] The Court noted that the language of s 104(10(a) RMA indicates that it is the effects on the environment *of allowing the activity* which are to be had in regard. After reviewing several decisions, the Court held:

> ... it may be discerned that regard is to be had to direct effects of exercising the resource consent which are inevitable or reasonably foreseeable, and also to effects of other activities that would inevitably follow from the granting of consent, but that regard is not to be had to effects which are independent of the activity authorised by the resource consent.

[50] Applying that to the issues in appeals before it, the Court held that the quality of the treated water and its suitability for various purposes was independent from the activity of taking the water, so that the potential effects of the use of the water would not be adverse effects on the environment of allowing the activity, so that regard to such effects was not required under s 104(1)(a) RMA.

[51] In the context of whether such effects would be other matters to which regard must be had under what is now s 104(1)(c) RMA, and the consideration of Part 2 RMA to assist in deciding what is relevant or reasonably necessary, the Court held that the extent to which the water was to be treated and its suitability were not matters that were relevant or reasonably necessary to determining the application to take the water from the river.

[52] Another particularly relevant case considered in the Ngawha Prison decision was *Aquamarine Ltd v Southland Regional Council*.[21] The applicant proposed

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[21] *Aquamarine Ltd v Southland Regional Council* Decision No C 79/96.

exporting freshwater (coming from the tailrace of the Manapouri power station) from the surface of Deep Cove at Doubtful Sound. The effects in contention did not relate to that export: the concern was about the effects of the passage of the tankers along Doubtful Sound and the potential for discharges, including of ballast water, into the Coastal Marine Area. The Court held that these were reasonably foreseeable effects of allowing the activities for which consent was sought and so were relevant considerations.

[53] Also relevant are the *Buller Coal* cases where the issue of end use was addressed in the context of applications for resource consents. It is important to keep in mind that these cases were decided by the High Court and the Supreme Court in the context of s 104E RMA which prevents a consent authority from having regard to the effects of a discharge into air of greenhouse gases on climate change, and which is not a relevant provision in these appeals. That is obviously a distinguishing feature. Nonetheless, both decisions contain discussions of the issue of end use which are, respectfully, of assistance in the present case.

[54] In the High Court,[22] Whata J addressed the particular issue about the interpretation of s 104(1)(a) as follows:

> [39] I do not consider that the assessment of effects under s 104(1)(a) in this case includes consideration of the effects on climate change of the discharge of greenhouse gases from the end use of coal. My reasons follow.
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> ...
>
> [42] Third, as I have said, jurisdiction under s 104(1)(a) is expressed to be limited to assessing the actual and potential effects of "allowing the activity", in this case coal extraction. Taken literally, industrial discharges of contaminants, including greenhouse gases to air caused by the end use of coal, will not be allowed by the grant of the land use consent. Those discharges will either need to be allowed by an environmental standard, a regional plan rule or by separate air discharge resource consent. The effects of those discharges in New Zealand therefore are presumptively irrelevant to the s 104(1)(a) assessment of the application to extract coal, unless that extraction involves a discharge. (I examine extra-territorial discharges below at [50]-[54]).
>
> [43] I accept that it is common for consent authorities to take into account the effects of downstream activities, for example increased vehicle traffic and associated pollution arising from allowing a development. This type of diffuse or non point pollution is not normally amenable to regulation by way of air discharge consenting. Regional and district policies and rules will often contemplate district level management of diffuse emissions, through urban form planning strategies. This overlapping jurisdiction is

[22] *Royal Forest and Bird Protection Soc. of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156.

> concordant with the Act's promotion of integrated management, with the result that the reach of s 104(1)(a) is extended by the policy framework to consider such effects. ...

[55] This reason focuses on the consenting exercise rather than the activity by itself and may mean that things for which consent is not required do not form part of the assessment of something for which consent is required. Where consent is required to mine the coal but not to export it (where it will almost certainly be burnt), then the question follows as to the extent to which the effects of the burning amounts to an effect of allowing the mining.

[56] In the Supreme Court,[23] William Young J, for the majority, said:

> [117] As Whata J noted in his judgment [at [43]], the effects on which West Coast ENT and Forest and Bird wish to rely are direct consequences of burning coal, rather than mining it. So there would always have been scope for argument that the climate change effects relied on by the appellant were too remote from the activities for which consents were sought to fall within the scope of s 104(1)(a). Indeed what was effectively this argument succeeded in one case in the Environment Court.
>
> [118] The indirectness argument can be taken a little further. For reasons already given, the climate change effects of burning coal are irrelevant to the applications to the extent to which they seek permission to mine coal. The issue only arises because aspects of the projects which are ancillary to the proposed mining are discretionary, controlled or non-complying under the relevant plans. To put this in more specific terms – and to give an example – BCL requires consent to put in roading associated with its mining proposal. West Coast ENT's argument is that such consent should be refused because of, inter alia, the climate change effects of the burning of the coal, the mining and export of which will be facilitated by the roading in question. It might be thought a little odd if climate change consequences which are irrelevant to the application for consent to mine the coal are relevant to an ancillary element of the mining proposal. As well, the eventual burning of the coal overseas is not closely associated with the construction of roading on the West Coast. And finally on this point, allowing climate change arguments to be advanced in relation to roading might be thought to be antithetical to the concept of a restricted discretionary activity and the rules in the District Plan.
>
> [119] We accept that effects on the environment of activities which are consequential on allowing the activity for which consent is sought have sometimes been taken into account by consent authorities. This is particularly so in respect of consequential activities which are not directly the subject of control under the RMA. But questions of fact and degree are likely to arise as is apparent from the judgment of the Environment Court in *Beadle v Minister of Corrections*. In issue in that case was an application for consent for earthworks and streamworks associated with a proposed prison. Those objecting to the proposal wished to raise arguments directed to the detrimental effects on the environment likely to result from the development of the site for a prison facility. This attracted the following comment from the Court: *[quoting from*

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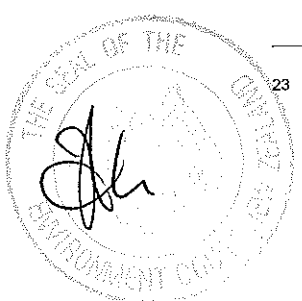
[23] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87.



paragraphs [90] and [91] which are set out above.]

[57] William Young J, for the majority, concluded[24] that a literal interpretation of s 104(1)(a) would produce anomalous outcomes because it would allow outcomes which are off limits in relation to the issues to which they are most closely related (in that case, discharges to air) to come in, by the backdoor, in respect of ancillary issues (such as land use, roading and the like). In light of that analysis, the majority held that:

> [172] ... in s 104(1)(a), the words "actual or potential effects on the environment" in relation to an activity which is under consideration by a local authority do not extend to the impact on climate change of the discharge into air of greenhouse gases that result indirectly from that activity.

[58] In her dissenting judgment, Elias CJ considered that there was nothing in s 104(1)(a) RMA to exclude the effect of the end use of coal,[25] that the effects were not too remote[26] and that the issue of weight was a matter for the decision-maker.[27]

Analysis

[59] Applying the guidance from those decisions, we must have regard to the consequential effects of granting the resource consents sought, or the amendments sought to conditions, within the ambit of the RMA and subject to limits of nexus and remoteness.

[60] The ambit of the RMA in the context of considering an application for resource consent under s 104(1)(a) requires consideration of an effect of allowing the activity. It does not extend as far as considering any effect on the environment which, given the broad inclusive definitions of those words, might be anything at all. There must be a causal relationship between allowing the activity and the effect: if an effect would occur unchanged regardless of whether the activity was allowed or not, then such an effect would not be within the scope of s 104(1)(a) RMA. If the extent or degree of such an effect would be altered by allowing or refusing the activity, then that effect would be relevant at least in terms of that change but its nexus and remoteness would need to be assessed.

[61] Nexus here refers to the degree of connection between the activity and the

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24 *West Coast ENT*, fn 23 at [168] – [176].

25 *West Coast ENT*, fn 23 at [72].

26 *West Coast ENT*, fn 23 at [87].

27 *West Coast ENT*, fn 23 at [94].

effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision. Matters that are *de minimis* are of course excluded.[28]

[62] The purpose and principles set out in Part 2 RMA are matters to which any consideration under s 104 is subject. The effect of being subject to Part 2 is that any conflict between that consideration and a provision in Part 2 must be resolved in favour of the latter provision.[29] That does not make Part 2 a law unto itself: s 5 is not intended to be an operative provision under which particular planning decisions are made and the specific jurisdictional framework of the rest of the RMA and the policy framework of the planning documents under it are not to be circumvented by resort to Part 2 generally.[30] In considering an application under s 104 RMA, there must be a fair appraisal of the relevant objectives and policies read as a whole. Reference to Part 2 should not result in the policy statement or plan provisions being considered only for the purpose of putting them on one side or otherwise subverted. If a plan has been competently prepared under the RMA, then there may be no need to refer to Part 2 because doing so will not add anything to the evaluative exercise, but if in doubt then such reference will be appropriate and necessary.[31]

[63] In this case, a principal activity for which resource consent is required is the taking of water from the aquifer. The regional plan addresses the issues relating to the taking of water from aquifers comprehensively. There is no assertion that the plan has been prepared other than competently in relation to this particular activity.

[64] The end uses of the water, once taken, involve putting the water in plastic bottles, exporting the bottled water and consumption of it by people outside New Zealand. The end uses are ancillary activities which are not controlled under the regional plan. There is no suggestion that control of such activities comes within the

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28 *Bayley v Manukau City Council* [1999] 1 NZLR 568, 576; [1998] NZRMA 513, 521; *Westfield (NZ) Ltd and Northcote Mainstreet Inc v North Shore City Council and Discount Brands Ltd* [2005] NZSC 17; [2005] NZRMA 337.

29 *Environmental Defence Society v Mangonui County Council* [1989] NZCA 17; [1989] 3 NZLR 257; (1989) 13 NZTPA 197.

30 *Environmental Defence Society v New Zealand King Salmon Ltd* [2014] NZSC 38 at [21] – [30], [84] – [91], [130] and [150] – [151].

31 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [71] - [76].

ambit of the functions of the regional council under s 30 RMA. We are not aware of any direct control of such activities by other legislation and accordingly proceed on the basis that such activities are lawful. While such end uses are foreseeable, and while the effects on the environment of using plastic bottles and exporting water may well be adverse, refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported, whether in its natural form or as a component of other exports. We do not have specific evidence on the relative quantities involved, but as far as we understand the position, the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand.

[65] For the purposes of our analysis we accept that the water would not be taken if it could not be bottled, and the proposed volume would not be taken if it could not be exported. Even on that basis, we do not think that on an appeal in relation to a particular proposal to take water we can, by our decision, effectively prohibit either using plastic bottles or exporting bottled water. Such controls would require direct legislative intervention at a national level.

[66] We therefore consider that, in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) RMA.

Regional Consents

Groundwater Effects

[67] The physical effects on the groundwater resource from the proposed take was the subject of expert conferencing by five hydrogeologists engaged by the primary parties, including the Rūnanga. Their joint witness statement dated 1 November 2018 noted agreement that any adverse effects on shallow groundwater, surface water including wetlands, other groundwater users, saline intrusion and groundwater subsidence are expected to be no more than minor. These expert witnesses also agreed that there is some uncertainty about the prediction of the small drawdown effects on the deep aquifer, but that any potential long-term effects can be addressed by requiring appropriate long-term groundwater monitoring and adaptive responses. Conditions to this effect are included in draft conditions before the Court.

[68] Detailed groundwater investigation reports relied on by the experts in

caucusing were provided in the evidence-in-chief of Mr Michael Goff, a hydrogeologist engaged by Creswell. No other hydrogeological evidence was called by the parties. His conclusions were unchallenged that:

(a) The Awaiti Canal Catchment is conservatively allocated;
(b) The applied for take is within this available allocation; and
(c) The biophysical effects of the proposed take will be negligible.

[69] The approach to allocation under PPC9 to the RNRP is to set an interim allocation limit of 35% of the long-term residual average annual recharge: see Policy WQ P5 of, and Schedule 15 to, PPC9. The Regional Council maintains an indicative groundwater availability and consented allocation GIS mapping tool to assist readers of the plan and others to find out what water has been allocated and what, if any, water remains available for allocation.[32] In respect of the Awaiti Canal aquifer the mapping tool provides the following information:

Groundwater Flow	24,093,504 m^3/y
Available Allocation	8,432,726 m^3/y
Allocated Groundwater	6,710,180 m^3/y
Allocated Groundwater	79.6 %
Allocation Remaining	1,722,546 m^3/y

In terms of these figures, this application for 1.1 million m^3/y is 13% of the available allocation and 64% of the allocation remaining, without allowing for any deduction in respect of the portion of the existing take which may be replaced by this application.

[70] We accept the conclusions of Mr Goff. In doing so, we acknowledge, as does Mr Goff, that these conclusions do not include consideration of matauranga Māori (ancestral knowledge), tikanga or te mauri o te wai.

Tikanga Effects

[71] The Rūnanga's opposition to the proposal centred on the tikanga effects of

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[32] The mapping tool can be accessed at https://www.boprc.govt.nz/environment/fresh-water/water-use/ .

taking a large amount of water from the aquifer for bottling and sale overseas. These effects were characterised as "metaphysical" by counsel for the Rūnanga[33] and focused on the diminution and/or loss of te mauri o te wai and Ngāti Awa's ability to be kaitiaki of the water. The Rūnanga's position is that the tikanga effects are of a nature and significance that warrant declining the application. This position was supported in submissions from Te Rūnanga o Ngai te Rangi Iwi Trust and Ngāti Pikiao Environmental Society.

[72] Creswell relies on the evidence of Mr Hemama Eruera of Te Pahipoto hapū, a Ngāti Awa kaumatua and tikanga advisor, who considers that any effects on te mauri o te wai can be restored through tikanga practices and that provision can be made in conditions for an ongoing role for Ngāti Awa as kaitiaki of the water resource. This position is supported by the Regional Council.

[73] Mr Eruera was engaged by Creswell to provide expert evidence on relevant tikanga matters associated with the proposal. A central element of this was the issue of adverse effects on te mauri o te wai, where mauri is considered as the definitive living essence and character of everything. Mr Eruera noted that while mauri can be degraded, depleted or removed by activities, it can also be restored.

[74] In considering the taking of water from the Otakiri aquifer, Mr Eruera expressed no concerns about the potential for adverse effects on te mauri o te wai. Important in this was his understanding that the resource would not be depleted by the Creswell extraction. In his view, when water is extracted it carries mauri with it, but as it is replenished by rainfall the mauri is restored as it returns to its original source. For water that moves away from its source, in this case through bottling and export, the mauri of the water moves within it. Where the water is consumed by a living person the mauri of that person is enriched by te mauri o te wai, irrespective of whether that consumption is local, outside the region or anywhere overseas. Mauri wai and mauri tangata (mankind) are linked and when all things return to Papatuanuku the cycle of mauri continues. It is from this understanding of tikanga that Mr Eruera advised that there will be no adverse effects on te mauri o te wai from the Creswell proposal, either from the extraction from the aquifer or from the subsequent bottling and export of that water.

[75] Mr Eruera went on to express his belief that the beneficial effects of the

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[33] Opening at paragraph 7.

proposal from the employment of local people would have a positive influence on the mauri of those people and Ngāti Awa generally. This was considered by Mr Eruera as a very significant positive effect on mauri tangata.

[76] Mr Eruera did not envisage any diminution on the ability of those with mana whenua, including his hapū and wider Ngāti Awa, to practice kaitiakitanga over the waterbody that remains, particularly as that waterbody is naturally replenished. In the unlikely (in his view) event that any negative effects on mauri or kaitiakitanga are identified, Mr Eurera identified cultural practices that could be employed to address and restore any loss of mauri.

[77] Te Rūnanga relied on the evidence of Dr Hohepa Mason and Mr Te Kei Wirihana Merito, both members of the Rūnanga Tikanga Advisory Group Te Kahui Kaumatua o Ngāti Awa ropu. Dr Mason is of Ngāti Pukeko hapū and represents that hapū on the Rūnanga . He is currently chairman. Mr Merito traces his ancestry through a number of Ngāti Awa hapū, representing Ngāti Rangataua on the Rūnanga .

[78] Dr Mason and Mr Merito prepared a joint statement of evidence for the hearing, but only Dr Mason appeared as Mr Merito was unable to attend due to ill health. Our references here to Dr Mason and his evidence includes the contribution of Mr Merito.

[79] Dr Mason's evidence was that the removal of water from New Zealand as a bottled commodity would erode te mauri o te wai. He linked this to the amount of water being taken from the system and sold, with insufficient opportunity for that water to re-enter the system. The loss of mauri is not able to be avoided. Once lost from the system through the export of the water, the mauri cannot be restored. Only by retaining the water within the water cycle in Ngāti Awa's rohe can the mauri be retained as it would be staying within Papatuanuku.

[80] Dr Mason linked the loss of te mauri o te wai with the export of water from the aquifer with a negative effect on the ability of the hapū to be kaitiaki, saying in evidence: "If the mauri is diminished or gone the kaitiaki are not fulfilling their responsibilities".[34] Dr Mason did not accept that the proposal by Creswell to establish a Kaitiaki Liaison Group would address the issue of adverse effects on te mauri o te wai or the exercise of kaitiakitanga by Ngāti Awa.

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[34] Mason/Merito EIC at paragraph 68.

[81] Dr Mason acknowledged the Mataatua Declaration as confirming the principle that water is a taonga that can be shared with others provided it is looked after, and that Ngāti Awa have this responsibility within their rohe. He considered the amount of water proposed to be sold outside New Zealand by Creswell commodified a large amount of water in a way that is not supported by the tikanga of Ngāti Awa.

[82] Dr Mason concluded that while there may be positive benefits in an economic sense from the proposal these do not offset the negative effects on te mauri o te wai.

[83] Mr Tuwhakairiora O'Brien provided a brief statement of evidence fully supporting the evidence of Dr Mason and Mr Merito.

[84] We record our understanding that Mr Eruera, Dr Mason and Mr Merito agree that all water is a taonga for Ngāti Awa and that no special distinction is made between water in its different contexts and forms, whether in an aquifer, a surface waterbody, river or lake.

[85] These witnesses also acknowledged that:

(a) The explanation of mauri is generally agreed as being "the concept of mauri refers to the definitive living essence and character of everything".
(b) It is the respective hapū who are kaitiaki within the Rūnanga or Ngāti Awa.
(c) The description of kaitiakitanga is agreed as the concept of guardianship.

[86] This evidence highlights two significant issues: the tension between the metaphysical and the physical effects of the proposal and the conflicting tikanga evidence from three acknowledged tikanga experts from Ngāti Awa.

Consultation

[87] Ms Simpson provided extensive detail on the nature and structure of the Rūnanga as the Post-Settlement Governance Entity for Ngāti Awa. Ms Simpson also outlined the Mataatua Declaration as the driving policy for the Rūnanga on freshwater management and responsibilities.

[88] Ms Simpson described the engagement between the Rūnanga and its hapū with Creswell over the project and the involvement of the Rūnanga in the consent process to date. While being critical of some aspects of the engagement with Creswell, including the reliance on dealings with Mr Eruera rather than with the Rūnanga itself, Ms Simpson did not pursue this as an important element of the

Rūnanga's opposition to the project.

[89] We note the extent of the engagement process undertaken by Creswell with all interested parties as set out in the evidence-in-chief of Mr Michael Gleissner, Director of Creswell NZ Limited, and accept that this was a genuine and meaningful attempt to involve the immediate community, hapū and iwi in the development of the project.

Beneficial Effects

[90] Mr Gleissner and Mr Mark Cox, consultant economist engaged by Creswell, described in evidence the nature of the proposed investment in plant and supporting infrastructure including upgrading of a local road, intersections and footpaths. Employment opportunities are forecast to increase from the current 8 fulltime equivalent staff (FTE) to 60, with flow-on effects increasing this to 145 FTEs.

[91] Mr Cox's conclusion that "*in light of the considerable socio-economic deprivation of the area surrounding Otakiri Springs (apart from Otakiri itself) the increase in employment and the potential supply opportunities that the project will bring will have a significant impact on the wellbeing of the local community*"[35] was unchallenged.

[92] Mr Eruera acknowledged that the main reason for his support for the project was the potential for "*creating employment opportunities for the local people of Te Teko and surrounding areas*" and notes that "*through these employment opportunities our people, our children and our mokopuna will be mobilised, empowered and self-sufficient*".[36]

[93] Mr Eruera and Dr Mason agreed that te mauri o te wai and te mauri o te tangata (mauri of the people) are intertwined. Mr Eruera saw the project's contribution in providing employment for Ngāti Awa people as a positive influence on the mauri of the people.[37] He considered that the opportunity provided within the project to protect te mauri o te wai and honour Ngāti Awa's kaitiaki role sits well with the uplifting of the mauri of the people through employment.

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35 Cox, EIC at paragraph 65.
36 Eruera EIC, at paragraph 71.
37 Eruera EIC, at paragraph 51.

[94] Dr Mason and Mr Merito acknowledged that there "*may well be economic benefits of the proposal*",[38] but did not see these as negating the adverse effects they believe will accrue to te mauri o te wai. This was supported by Ms Simpson[39] as representing the Rūnanga's position. During cross-examination Dr Mason was reluctant to engage with the issue of potential benefits of the project to the mauri of the people.[40]

[95] We accept the evidence of Mr Cox that considerable benefit will extend to the local and regional community and make a significant contribution to economic and social wellbeing. Whether the employment opportunities created for tangata whenua at a local level can be categorised as a cultural benefit was of some dispute between tikanga experts for Creswell and Te Rūnanga. We see no need to address these different views here. Our decision does not turn on any potential offsetting of the asserted effects on te mauri o te wai and any uplifting of te mauri o te tangata. We simply acknowledge the differing interpretations of tikanga experts in this regard, while accepting that the economic and social benefits of the project will be significant.

Evaluation of Evidence of Cultural Effects

[96] Dr Mason and Mr Merito have expressed their honestly held belief that taking too much water for bottling and export overseas would result in the un-restorable loss of the mauri of that water. No explanation was provided as to what constitutes "too much" in this context and what differentiates the proposed take from other existing or potential takes, such as for local water supply or horticultural/agricultural support. In answer to questions, Dr Mason said that the main concern was about sending the water away to people whose tikanga are different.[41]

[97] No evidence was adduced to reconcile the asserted requirement for the return of the bottled water to Papatuanuku, at least within Aotearoa, in order for its mauri to be retained, with circumstances where other commodities heavily reliant on water from within the rohe, such as milk, meat and horticultural commodities are exported to all parts of the world. We understand that Ngāti Awa commercial enterprises hold consents for greater volumes and rates of take of water than that proposed by Creswell, taken from highly sensitive and culturally significant surface water resources

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38 Mason and Merito EIC at paragraph 74.

39 Simpson EIC, at paragraph 80.

40 Transcript, p 311.

41 Transcript, pages 315 and 316.

such as the Tarawera and Rangitikei Rivers. We were not provided with any explanation as to the nature of any loss of mauri in these circumstances or how kaitiakitanga is exercised.

[98] Ms Simpson's evidence was that the Rūnanga's position was based on advice from Ngāti Awa Kaumatua and professional advisors.[42] As noted earlier the Rūnanga has a group, Te Kahui Kaumatua o Ngāti Awa (**TKK**), established to advise the Rūnanga of matters of tikanga and the protection of mauri. The kaumatua providing expert evidence on tikanga matters are all members of TKK.

[99] In response to questioning, Ms Simpson confirmed that TKK advice was not specifically sought in this instance and TKK have not formally endorsed the appeal. She was uncertain as to whether there was agreement within TKK on the issue of water bottling.[43]

[100] Customary practices and traditional knowledge are not directly applicable to the export of bottled water. This is a modern-day question in which TKK has a role in applying traditional values and principles. It may have been useful for the Court to have had the benefit of the collective wisdom of TKK applying traditional values and knowledge to this modern issue. In the absence of this we have no evidence of a coherent widely held belief within Ngāti Awa regarding the adverse metaphysical effects of taking water for bottling and export.

[101] Evidence on cultural topics of this kind can present challenges to the traditional approach of common law courts, of which this Court is one, to the assessment of such evidence. Nonetheless, the requirements of ss 6(e), 7(a) and 8 of the Act require this Court to undertake such assessments in a way that is consistent with the interests of justice. In *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council*[44] the Court proceeded according to what was there described as a "rule of reason"[45] to test the evidence on issues raising beliefs about values and traditions by listening to, reading

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42 EIC at paragraphs 10 and 56A.

43 Transcript, pages 353 and 354.

44 *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council* [2002] NZEnvC 421.

45 In the sense used generally in philosophy rather than the specialised sense used in competition and anti-trust law. In *TV3 Network Services Ltd v Waikato District Council* [1998] NZLR 360; [1997] NZRMA 539, Hammond J used the term to distinguish an objective approach from a *per se* objection or veto which is unlawful under the RMA: see *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 63; [1997] NZRMA 553.

and examining:[46]

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By 'external' we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

[102] Dr Mason and Mr Merito believe that in the absence of any opportunity for return to Papatuanuku in the narrow context of the original source of the water, the mauri of the water is lost. The view of Mr Eruera that the cycle of water and the mauri of that water operates at a much broader scale is consistent with the biophysical western science understanding of all water as part of a constant replenishing global cycle as described by Mr Goff.[47]

[103] The evidence of Dr Mason and Mr Merito on the nature and scale of the adverse metaphysical effects was that these effects are so great as to warrant declining consent. We accept these beliefs are honestly held and perhaps are shared by many members of the iwi, but we prefer the evidence of Mr Eruera that te mauri o te wai is retained as water passes through its many forms before returning to Papatuanuku to begin its journey again within the earth's water cycle.

[104] In our view, the water should be considered in the context of the resource rather than simply as any volume of water. Water is essential to life on earth, whether approached in terms of general science or of te ao Māori and according to principles of ecological responsibility or to tikanga Māori and te mana o te wai: it is a universal concept. The essence extends from the immediate needs of each living thing to the entire water cycle which connects the earth and the sky or Papatūānuku and Ranginui. The health or hauora of the environment, the water and the people are connected and inter-dependent.

[105] Using that approach, a taking of water would be too much if it threatened the

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46 *Ngāti Hokopū ki Hokowhitu*, fn 44 at [53].

47 Gough Rebuttal, paragraphs 9 and 11.

sustainable management of its source, so that even local taking and use for domestic purposes and stock could be too much if the source of water were very limited. Both the protection of the water and enabling the use of the water are part of the sustainability of the water resource. We think that such an approach would demonstrate consistency between the purpose of the RMA and tikanga Māori.

[106] We think this approach is also consistent with the approach taken in the Regional Plan and by the Regional Council in assessing the availability and allocation of groundwater. As explained above, we are satisfied on the evidence and in the absence of any disagreement among the expert witnesses that the groundwater resource in the Awaiti Canal aquifer is sufficient to enable the taking of the amount of water sought by Creswell, as well as the existing takings of other entities engaged in the same activity and, perhaps, future takings by anyone for the same or a similar purpose.

[107] Considering the export of this water, we do not find any reason why, if the take is sustainable, the export would not be. Any use of the water, particularly a consumptive use, will have generally similar physical effects. For this aquifer, uses include a range of products, many of which are likely to be taken and consumed or otherwise used outside the district and the region. As noted in our jurisdictional overview, while there is public debate about export of water from New Zealand, there is no legal basis on which we can restrict that activity. In terms of the evidential basis on which we might refuse consent to the increased take because of its intended purpose for export, we do not see any sufficient connection in this case, either in terms of physical or metaphysical effects of export, for basically the same reasons as our assessment of the physical and metaphysical effects of the take.

[108] Creswell presented a set of monitoring conditions for the aquifer to manage any effect on the physical resource and offer linkage to a Kaitiaki Liaison Group to be established to ensure kaitiaki principles are incorporated into the long-term management of the resource. We consider such conditions to be appropriate to help protect the sustainability of the resource and its mauri and mana.

[109] While acknowledging the role of the local hapū as kaitiaki, the Rūnanga have suggested that the extensive nature of the Otakiri aquifer warrants involvement of wider iwi interests through Rūnanga representation alongside the hapū on the proposed Kaitiaki Liaison Group. We see no reason for the conditions not to provide for this.

Planning Evaluation

[110] Ms Osmond provided the only comprehensive examination of the proposal against the relevant national and regional planning instruments. Mr Makgill was in general agreement with Ms Osmond's planning evaluation of the proposal and provided some additional commentary. Ms Robson did not prepare any alternative evaluation against the relevant plan provisions, relying on a critique of the inadequacies of these provisions to present an evaluation of the proposal against the provisions of Part 2 RMA on the basis of first principles. We address this separately below.

[111] The National Policy Statement for Freshwater Management 2014 (**NPSFM**) and its August 2017 amendments set out objectives and policies that direct local authorities to manage water in an integrated and sustainable way within quality and quantity limits set in their regional plans, while providing for economic growth. Ms Osmond described the two-step process being undertaken by Bay of Plenty Regional Council to achieve compliant implementation of the NPSFM. This process will set limits for water quantity and quality for each of the regions nine identified Water Management Areas (**WMA**s).

[112] Proposed Plan Change 9 (**PPC9**) focuses on region-wide quantity issues. Future plan changes will focus on water quality and catchment specific water quantity. Work in the Tarawera WMA, where the application site is located, is scheduled to commence in 2021/2022.

[113] A key element of the NPSFM, set out in Objective AA1 and Policy AA1, requires Councils to recognise Te Mana o te Wai in freshwater management:

> Objective AA1
>
> To consider and recognise Te Mana o te Wai in the management of fresh water.
>
> Policy AA1
>
> By every regional council making or changing regional policy statements and plans to consider and recognise Te Mana o te Wai, noting that:
>
> a) te Mana o te Wai recognises the connection between water and the broader environment – Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people); and
>
> b) values identified through engagement and discussion with the community, including tangata whenua, must inform the setting of

freshwater objectives and limits.

[114] The terms used in this objective and policy are not defined in the NPSFM. There is a statement at the beginning of the NPSFM entitled *National significance of fresh water and Te Mana o te Wai* which says:

> The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management.
>
> The health and well-being of our freshwater bodies is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) and our communities.
>
> Te Mana o te Wai is the integrated and holistic well-being of a freshwater body.
>
> Upholding Te Mana o te Wai acknowledges and protects the mauri of the water. This requires that in using water you must also provide for Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people).
>
> Te Mana o te Wai incorporates the values of tangata whenua and the wider community in relation to each water body.
>
> The engagement promoted by Te Mana o te Wai will help the community, including tangata whenua, and regional councils develop tailored responses to freshwater management that work within their region.
>
> By recognising Te Mana o te Wai as an integral part of the freshwater management framework it is intended that the health and well-being of freshwater bodies is at the forefront of all discussions and decisions about fresh water, including the identification of freshwater values and objectives, setting limits and the development of policies and rules. This is intended to ensure that water is available for the use and enjoyment of all New Zealanders, including tangata whenua, now and for future generations.

[115] We note that the Rūnanga framed their appeal as being about te mauri o te wai. The RPS interprets *mauri* as:

> The essential life force, energy or principle that tangata whenua believe exists in all things in the natural world, including people. Tangata whenua believe it is the vital essence or life force by which all things cohere in nature. When Mauri is absent there is no life. When Mauri is degraded or absent, Tangata whenua believe this can mean that they have been remiss in their kaitiakitanga responsibilities and this effects their relationship with the atua (Māori gods). Mauri can also be imbued within manmade or physical objects.

[116] The RNRP does not purport to define *mauri*, but refers to the following explanation in Chapter 3 in relation to kaitiakitanga:

> Mauri is the life force present in all animate and inanimate objects. The mauri binds one resource to every other element in a natural order, both physical and spiritual. It

> provides Maori a series of formal relationships, which, when recognised in practice and prayer ensures physical and spiritual integrity of the environment for future generations. Mauri may be described as the cornerstone of Maori cosmology. Maori believe it is the vital essence or life force by which all things cohere in nature. When mauri is absent there is no life. Of all taonga tuku iho, mauri is the most precious. Mauri provides unity between the natural order and the spirituality of the gods, and also by providing a series of formal relationships to ensure the physical and spiritual integrity of the environment for future generations. While mauri has a spiritual basis, it also leads to practical application of traditional resource management (kaitiakitanga) by ensuring that the environment is maintained in its natural condition. Kaitiaki are responsible for the mauri of their rohe. Failure of the iwi or hapu to protect, restore, maintain and enhance mauri through the practice of kaitiakitanga has the potential to adversely affect the relationship of the iwi or hapu with their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and the mana of the iwi or hapu in general.
>
> Practices or tikanga were developed and observed to maintain the mauri of parts of the natural world. Observing these tikanga evolved into the ethic and exercise of kaitiakitanga.

[117] In the Court's understanding of these matters, mana and mauri are closely linked, so that for the purposes of our assessment and decision-making in terms of the RMA, if the mauri of a resource is adversely affected, then its mana must also be adversely affected. We also understand that the three healths referred to in the extract from the NPSFM quoted above are not to be read only as aspects of physical health, but, in the context of mana, include metaphysical or spiritual health: *anima sana in corpore sano.*

[118] In Ms Osmond's opinion, supported by Mr Makgill, the approach being undertaken by Bay of Plenty Regional Council is consistent with the direction of the NPSFM and will uphold the concept and principles of Te Mana o te Wai.

[119] Relying on the agreed evidence of Mr Goff and the tikanga evidence of Mr Eruera, Ms Osmond's opinion was that no adverse effects were anticipated on the three healths of te mana o te wai – te hauora o te taiao (health of the environment), te hauora o te wai (health of the waterbody) and te hauora o te tangata (health of the people).

[120] The economic and social benefits of the project, as described in the evidence of Mr Cox, Mr Gleissner and Mr Eruera, the absence of biophysical effects on the aquifer, and the consultation and ongoing commitment of collaborative engagement with tangata whenua led Ms Osmond to conclude that the application to take and use

groundwater was consistent with the NPSFM. Mr Makgill agreed.[48]

[121] Ms Osmond's evidence was that the Resource Management (National Environmental Standards for Sources of Drinking Water) Regulations 2007 and Resource Management (Measurement and Reporting of Watertakes) Regulations 2010 were relevant and the application complied with these Regulations. Mr Makgill agreed and this was unchallenged at the hearing.

Regional Planning Documents

[122] As noted earlier, PPC9 sets interim groundwater allocation limits for the Awaiti Catchment of which the Otakiri aquifer is part. The regional planning experts agreed[49] that PPC9 in general should be given considerable weight, particularly where it provides more guidance than the operative plans on matters such as allocation limits.

[123] Ms Osmond, relying on the evidence of Mr Goff, advised that the proposed groundwater take is within the interim allocation limit for the Waikiki Canal Catchment set by Policy WQ P5 in PPC9. She also noted that the application is consistent with Policy WQ P11 which seeks to generally grant applications to take and use groundwater where the rate of consented take will not exceed the interim limits identified in Policy WQ P5. On this basis, it was Ms Osmond's opinion that the application for groundwater take is sustainable and consistent with Regional Plan Objectives and Policies regarding allocation. This was agreed by the expert witnesses in respect of the regional planning issues.[50]

[124] Policy 73 in Chapter 7 - *Water Quantity and Allocation* - of the RNRP requires the efficient use of water where the efficiency is assessed as defined in Method 168 which, in respect of commercial, trade and industrial purposes, means *sufficient to meet the needs of the use with minimal waste of water.*

[125] Policy WQ P13 of PPC9 requires promotion of the efficient use of freshwater resources by, among other things:

> (a) Requiring the quantity of water granted to be no more than that required for the intended use of water and applying the reasonable and efficient use criteria in Schedule 7.

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48 Makgill EIC at paragraph 64.

49 Joint Statement of Regional Planning Experts 14 March 2019.

50 Joint Statement of Regional Planning Experts 14 May 2019.

[126] Schedule 7 to PPC9 states that *the amount of water taken pursuant to any provision in the plan must be reasonable and justifiable with regard to the intended use and, where appropriate, comply with this schedule.* In respect of uses other than irrigation, municipal water supplies, dairy farms and stock drinking water, the relevant criterion is:

> The amount calculated in accordance with good management practices for efficient use of water in relation to that use or by demonstrating that water is not being wasted, such as by means of a water use audit by an independent party to identify any wastage and any opportunities for reuse for conservation.

[127] It is clear from these provisions that pursuing *efficiency* in the plan in relation to water allocation essentially means minimising waste in the chosen use rather than identifying any higher or better use.

[128] Ms Osmond relied on the unchallenged evidence of Mr Joyce on how the proposed take is an efficient use of water for its intended commercial use with minimal waste of water. It was Ms Osmond's opinion that the project was consistent with Regional Objectives and Policies regarding water use demand and efficient use.

[129] Turning to the effects of the project on the aquifer and other bores, Ms Osmond noted the recorded views of the groundwater experts engaged by the parties that "the effects on shallow groundwater surface water, including wetlands, other groundwater users, saline intrusion and ground subsidence is expected to be less than minor". Relying on this statement and the detailed evidence of Mr Goff, Ms Osmond concluded that the project is consistent with regional objectives and policies regarding the recharge of the aquifer, quality of the groundwater, effects on other users, effects on surface water features, potential saline intrusion and land subsidence. This conclusion was unchallenged.

[130] Provisions in the RPS, the RNRP, and PPC9 direct applicants and the Regional Council to recognise, have regard to and take into account kaitiakitanga and the principles of the Treaty of Waitangi. Consultation with tangata whenua on resource management issues of concern to them is an essential element of this and tangata whenua are encouraged to recommend appropriate measures to avoid, remedy or mitigate adverse effects in relation to such issues. As noted earlier from the evidence of Mr Gleissner and Mr Eruera and acknowledged by Ms Simpson for the Rūnanga , Creswell has attempted throughout the application process to involve tangata whenua having an interest in the Otakiri aquifer, starting at marae/hapū level and extending to the Rūnanga and associated tribes of Mataatua.

[131] Consent conditions are proposed for the establishment of a Kaitiaki Liaison Group (KLG) to provide ongoing engagement with iwi during the development and operation of the plant. This is offered as one mechanism through which hapū and iwi members can exercise kaitiaki responsibilities for the aquifer and its waters according to Ngāti Awa tikanga, in collaboration with Creswell. Ms Osmond's opinion was that the consultation and engagement undertaken by Creswell and the proposed KLG conditions are consistent with the direction of the regional planning documents with regards to recognising kaitiakitanga.

[132] Objective KT 06 of the RNRP seeks to maintain biological and physical aspects of the mauri of the water. As noted, earlier technical evidence, presented by Mr Goff and supported by the other hydrogeologists engaged by the parties, concluded that the biophysical effects of the take on the aquifer will be minimal and that the life supporting qualities of the aquifer and any surface waterbodies will not be compromised in any physical way by the proposed take. Ms Osmond relied on this evidence, and that of Mr Eruera confirming that the take would not adversely affect the mauri of the aquifer, to conclude that Objective KT O6 is being achieved.

[133] In Ms Osmond's opinion the proposed conditions related to the KLG and its ongoing involvement with the monitoring of the aquifer and any management adjustments that may arise, recognises and provides for tangata whenua values and interests, including the mauri of the groundwater resource and the relationship of tangata whenua with that resource as directed by Policy WQ 04(e) of PPC9.

[134] We note here that the Rūnanga did not contest the conclusions of the groundwater experts regarding the biophysical effects of the take, nor did it advance any evidence as to the nature of any adverse metaphysical effects, such as effects on the mauri of the aquifer. The evidence of Dr Mason and Mr Merito focused on the irrevocable loss of mauri from the water resulting from its bottling and export overseas.

[135] Objective IM O7 and Policy IM P8 of the RNRP provide for consideration to be given to the beneficial effects of the use and development of natural resources on the social, cultural and economic wellbeing of people and communities. Recognition of social economic and cultural benefits from the take and use of water is also directed by Objective W8 08 of PPC9.

[136] Ms Osmond relied on the uncontested evidence of Mr Gleissner and Mr Cox on the employment opportunities and economic benefits of the project to the local and

wider community in the Bay of Plenty and on Mr Eruera's evidence on the positive cultural benefits of increased employment in an economically deprived community of largely Māori decent. In her opinion, this evidence supports a conclusion that the project will have benefits in accord with the Regional Planning provisions.

[137] The expert planning evidence of Ms Robson focused largely on the inadequacies of the regional planning framework to provide for the assessment of the efficient use of water, as a matter to which particular regard must be had under s 7(b) RMA, where that water is removed from the area of its source. Ms Robson considered that the reasonable and efficient use criteria of Schedule 7 to PPC9 were designed for the use of water in the location from which it is drawn, such as pastoral, horticultural or municipal use. She asserted that the efficiency tests required under Schedule 7 cannot be applied in a meaningful way to water bottling so any conclusions on the efficiency of that activity are meaningless.

[138] A more meaningful test, in Ms Robson's opinion, would be to *assess whether the scale of water bottling activity at that location will effect te mauri o te wai and whether it would significantly limit the potential for water use for activities that are location dependent, such as horticultural irrigation.*[51] As neither of these tests are required by regional planning provisions, she opined that it is necessary to revert directly to Part 2 RMA and, in particular, s 7(b) RMA.

[139] Ms Robson relied on the evidence of Dr Mason and Mr Merito that removal of water from the local water cycle is different from taking it from and returning it to the same area. As a result, there would be a loss of mauri and subsequently a diminution of the ability of Ngāti Awa to be kaitiaki of that water. The activity must therefore be avoided and the application declined.

[140] In response Ms Osmond referred to the evidence of Mr Goff on how the global water cycle works, where water takes for any use generally move at least part of the water to another location for that use, whether directly for drinking or by incorporation into something else, and then where it ultimately re-enters the water cycle through evaporation to the atmosphere or drainage to the ocean. Consequently, in Ms Osmond's opinion, from a statutory planning perspective there is little to differentiate the Creswell application from any other application to take water in the region for commercial use. The Regional Plan provisions do not specifically provide for every

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[51] Robson EIC at paragraph 23.

type of water use, relying on an outcomes-based approach for managing environmental effects. As such the provisions do not need to provide for water bottling as an activity for an assessment of that activity to be undertaken, nor do they need to provide for "removal of water" from the area in that regard.

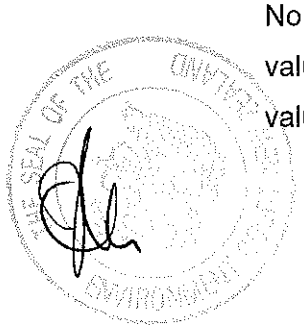
[141] Ms Osmond also responded to Ms Robson's assertion that the planning framework does not provide for assessment of the efficient use of water where it is bottled and exported. Ms Osmond considered the planning framework to be fully adequate in providing for a comprehensive assessment of the environmental effects of the Creswell proposal. This assessment was recorded in the AEE and in her expert evidence before the Court.

[142] The AEE and the evidence of Mr Joyce assess how the amount of water applied for will be efficiently used for its intended commercial use, which in Ms Osmond's view is consistent with the regional planning provisions. In her opinion there were no "gaps" in the planning provisions that prevented full assessment of the efficiency of the take, either as a discretionary activity under RNRP or restricted discretionary activity under Rule WQ R10 in PPC9. On that basis, whether there is complete removal of the water from the local catchment or not is not a relevant consideration in the context of the Regional Plans or the RMA generally.

[143] A further concern of Ms Robson was that the interim allocation limits set in PPC9 do not specifically take into consideration cultural values and these will not be considered until allocations are set for each WMA through the process of PPC 9.

[144] Ms Osmond noted in response that the matters for discretion in WQ R10 allow for assessment of cultural effects, as does the discretionary activity status of the application under both the RNRP and TRCP. Ms Osmond discussed the evidence related to the assessment of the proposal against tangata whenua values, consideration of effects on mauri, and kaitiakitanga in her EIC and we have referred to this earlier.

[145] Ms Osmond noted that the evidence of Mr Goff showed the interim allocation to be very conservative. In her opinion this was likely to provide for cultural values when detailed allocation limits are considered in the second phase of plan changes. No evidence was presented to explain what an allocation limit to provide for cultural values may look like and it was unclear to Ms Osmond how a consideration of cultural values in the allocation limits would address the identified adverse effects on mauri



that arise from the export of the water overseas.

[146] The planning experts identified the following documents as relevant for consideration under s 104(1)(c) RMA:

(a) Ngāti Rangitihi Iwi Environmental Management Plan (**IEMP**).

(b) The schedule of Waahi Tapu sites of Ngāti Awa 2000.

(c) Ngāti Awa and Ngāti Tūwharetoa Statutory Acknowledgements over the Tarawera River, acknowledging their spiritual, historical and tradition association with the River.

(d) The Mataatua Declaration of Water 2012.

[147] Ms Osmond provided an analysis of each of these documents and Mr Makgill's evidence was consistent with this analysis.

[148] In considering the IEMP, Ms Osmond noted that Ngāti Rangitihi have been recognised by Creswell as having an interest in the project and have been included in the consultation and engagement with iwi groups. The effects on the take of the surface water resources of the Tarawera River have been assessed as negligible by the hydrological experts and a comprehensive assessment of environmental effects in the AEE and expert evidence has been presented. It was Ms Osmond's opinion that the proposed conditions of consent will appropriately manage environmental effects to meet the intent of the objectives set out in the IEMP.

[149] The Ngāti Awa and the Ngāti Tūwharetoa Statutory Acknowledgements have been considered by Creswell in the development of the project. These acknowledgements relate to the surface waters of the Tarawera River. The technical assessment that there was little interaction between the Otakiri aquifer, the water source for the application, and surface water elements of the Tarawera River, together with the engagement of Creswell with both iwi during development of the project, led Ms Osmond and Mr Makgill to advise that due regard had been given to the statutory acknowledgements.

[150] The Waahi Tapu sites of Ngāti Awa 2000 document lists over 100 waahi tapu sites, several of which are water related, including Te Waikoukou spring west of Kawerau and Te Wai u o Tūwharetoa spring near the Tasman pulp and paper mill.

[151] No evidence was presented that indicated any potential adverse effects from the proposed Otakiri take on these waahi tapu sites. Mr Eruera and Dr Mason confirmed in response to questions from the Court that no waahi tapu sites were in the vicinity of the application site.

[152] The Mataatua Declaration on Water is signed by the tribes of Mataatua waka, including Ngāti Awa. It affirms the desire of the tribes to *continue to retain full exclusive and undisturbed possession of our ancestral waters* and their *rights to possess and use our ancestral water resources wherever they are gathered, rest or flow.*

[153] The Declaration goes on to confirm that any person interacting with or using the ancestral water resources, requires consent from the tribes of Mataatua under mana whenua principles. Three recommendations are made:

i. The recognition of traditional practices;
ii. Provision for the life supported capacity of water;
iii. Ensuring access to and use of water to Treaty of Waitangi partners.

[154] Ms Osmond and Mr Makgill consider that the Declaration recommendations have been provided for in the Regional Plan documents and the Creswell application is consistent with these provisions.

[155] To the extent that the Declaration includes assertions of proprietary rights and control of consents in relation to the resource, these are not matters that are within the jurisdiction of this Court to declare or confer, as noted earlier.

Overall Evaluation of Regional Planning Issues

[156] In assessing the evidence on the primary issue of the adverse metaphysical effects resulting from the asserted loss of mauri from the water that is bottled and exported, we have accepted Mr Eruera's evidence that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used. In doing so we respect the honestly-held beliefs of Dr Mason and Mr Merito that for some of the people of Ngāti Awa the export of water in bottle form results in loss of the mauri of the water and that this cannot be restored. There is inherent difficulty in assessing the extent of metaphysical beliefs. In our overall consideration of the evidence on this point, we find that any adverse effect that may be perceived by members of Ngāti Awa has not been shown to be of a nature and scale that warrants refusing consent on this basis alone.

[157] The biophysical evidence supports a conclusion that the proposed take would have negligible effects on the aquifer resource or on any ground or surface water resources in the wider Tarawera Catchment.

[158] No evidence was adduced as to the potential for any metaphysical effects on the aquifer resource itself. The establishment through conditions of consent of the Kaitiaki Liaison Group with direct linkage to monitoring of the resource will, on the evidence of Mr Eruera, ensure the ongoing ability of the hapū and the Rūnanga to exercise kaitiaki according to Ngāti Awa tikanga in the future management of the Otakiri aquifer. We accept this evidence of Mr Eruera. We find that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe. As we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe.

[159] Ms Robson introduced the view that as the efficiency criteria in Schedule 7 of PPC9 do not contemplate an associated discharge outside of the local environment, the efficiency of the take for water bottling and export is unable to be assessed. Dr Mason and Mr Merito have connected the loss of mauri of the water when exported with the loss of opportunity for the return of that water to *the local water cycle*. Ms Robson also considered that assessment of the efficiency of the proposed use against other competing uses would need to include the extent to which the use *perturbs the natural water cycle.*[52] Ms Robson appeared to contradict this to some extent by her agreement at conferencing that:

> If there is allocation available and water is allocated on a first-in/first-served basis as it is now the comparison assessment of other uses is not relevant. Under the restricted discretionary criteria of EP C9 a comparison of other users is not a matter of discretion.[53]

[160] Ms Osmond provided a detailed rebuttal to the suggestion that the regional planning provisions did not provide for an assessment of efficiency for the proposed take and we have summarised that response earlier, noting that the uncontested evidence of Mr Joyce established that the amount of water applied for will be efficiently used for the intended commercial purpose.

[161] We find no indication in Schedule 7 of PPC9 or the RNRP that a take of water in this region must be associated with a local discharge to be more efficient than a

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52 Robson EIC at [24]

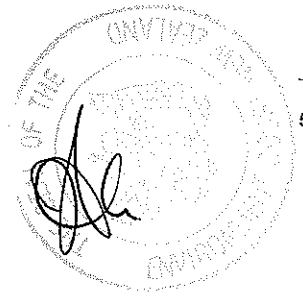
53 Joint statement of regional planning experts, 14 May 2019, p 6

take without an associated local discharge. We are satisfied that both the RNRP and PPC9 require efficiency to be assessed in terms of minimising wastage of water rather than by comparing uses. We accept the evidence that a water bottling operation is efficient at least insofar as there is minimal waste of water. Accordingly, we have placed little weight on this aspect of Ms Robson's evidence and find that there is no "gap" in the regional planning provisions that prevents assessment of efficiency of a water take proposal regardless of the end use of that water. Such an assessment has been prepared by the expert witnesses retained by Creswell and we accept their conclusions that the proposed take represents a highly efficient use of the resource, well within the allocation limits for that resource which were agreed by the hydrologists to be conservative.

[162] The concerns raised by the Rūnanga that tikanga matters have not been considered in the setting of interim limits[54] is elaborated in the evidence of Ms Robson and responded to by Ms Osmond in rebuttal evidence. We note Ms Osmond's evidence that the interim allocations are conservative in relation to the total resource and that tikanga and cultural matters generally have been addressed through assessment against the provisions of the regional planning instruments as directed by those Plans. We have accepted the planning assessment of Ms Osmond in this regard as being thorough and comprehensive and agree with her conclusions that the interim allocation provided by PPC9 is valid and the provisions of PPC9 support the grant of consent.

[163] Like Ms Osmond, we have some difficulty in understanding how any future provision for tikanga Māori in allocation limits would assist in addressing the adverse effects on mauri arising from the export of water, the primary issue advanced by Te Rūnanga for seeking refusal of the application. If that is indeed the principal issue for tikanga, then it appears to us that this must be addressed in the context of future controls on export, which is a matter beyond the Court's jurisdiction.

[164] Ms Osmond's assessment of the proposed take of the water from the Otakiri aquifer against the relevant provisions of the NPSFM, RPS, RNRP, PPC9 and TRCP are thorough and comprehensive. Her conclusions of the consistency of the application of these documents, as summarised earlier in this decision, were supported by Mr Makgill as expert planning witness for the Regional Council.



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54 Te Rūnunga opening submissions, para 20

[165] We accept Ms Osmond's assessment of the proposal against the relevant national and regional planning instruments and find that the application is consistent with these.

Part 2 RMA

[166] Ms Robson attested in evidence that as the regional planning instruments did not adequately provide for an assessment of the efficient use of water that has no associated discharge back into the local system, it is necessary to revert to Part 2 RMA to assess the effects of water bottling.

[167] Ms Osmond and Mr Makgill expressed a contrary view, and we have dealt with this in our evaluation. In accepting the evidence of Ms Osmond and Mr Makgill in this regard, we find that the matters in s 7(b) relating to the efficient use and development of natural and physical resources are fully provided for in the regional planning instruments.

[168] Ms Robson also attested in evidence to the need to give direct consideration to Part 2 and in particular ss 5, 6(e), 7(a) and 8 as the tikanga aspects of the proposed take had not yet been incorporated into the allocation framework for the Tarawera WMA in which the Otakiri aquifer is located. At the expert conference, however, Ms Robson agreed with the others that the regional plans provided adequate coverage of s 6(e), 7(a) and 8.[55]

[169] Again, we have considered the matter of adequacy of the regional plans in providing for tangata whenua values and tikanga to be assessed, finding that such consideration is fully provided for. There is no need for recourse to Part 2 matters to address tikanga concerns.

[170] We find that any recourse to assessing this application directly under Part 2 RMA would not add any value to our decision-making in these proceedings. This is consistent with the approach taken by the Court of Appeal in *R J Davidson*.[56]

Conditions of Regional Consents

[171] Counsel for Creswell addressed the proposed conditions of consent in some detail in closing submissions, outlining a number of amendments to earlier circulated

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55 Joint statement of regional planning experts, 14 May 2019 at p 40.

56 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

draft conditions following consideration of matters raised in expert evidence and at the hearing. We will not address these draft conditions in detail here but make the observation that the conditions set out in Appendix 1 to closing submissions from counsel for Creswell closely align to the Court's view on conditions required to manage the environmental effects of the proposed take as addressed in this decision.

[172] We direct the parties, following issue of this interim decision, to submit an agreed final set of conditions for the regional consents. If any matters within these conditions remain in contention between the parties, these are to be addressed in submissions for consideration by the Court prior to issue of a final decision.

Land Use Consent Variations

[173] We now address the appeal by Sustainable Otakiri in relation to the application by Creswell under s 127 RMA to change or cancel the conditions of the existing land use consent authorising the Otakiri Springs water bottling plant.

[174] In tandem with its appeal on the merits of the District Council decision to grant the variation, Sustainable Otakiri also sought declarations from the Court in relation to the validity of the decision to approve a change of conditions as follows:

1. The activity that was the subject of the s127 RMA decision was:

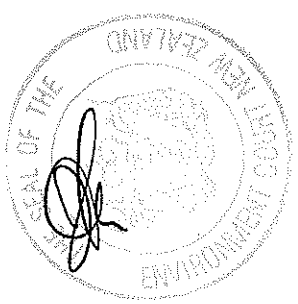
    (a) materially or fundamentally different to the activity approved under the 1991 consent; or

    (b) involved materially different adverse effects to the activity contended under the 1991 consent; or

    (c) outside the scope of s127(1) RMA because it was in effect a fresh proposal.

2. Council acted outside scope, jurisdiction or otherwise unlawfully in granting the s127 RMA consent. The wrong legal test was applied and the consent authority did not consider all relevant effects in its decision to grant approval.

3. The Environment Court has the same limits on scope and jurisdiction as the original decision-maker. As a consequence of the first two declarations sought, the Environment Court has no jurisdiction to grant the s127 RMA application which is the subject of the appeal.



4. The activity for which consent was granted under s127 RMA is an industrial activity under Rule 3.4.1(25) of the District Plan and therefore non-complying under s 104D RMA. There was no jurisdiction to grant consent under s127 RMA.

[175] Counsel for Sustainable Otakiri, Mr Enright, referred to the following statement by the Hearing Commissioners in their decision:

> There was debate regarding whether the primary activity (the expansion of the existing water bottling operation) should be considered a consent change application under s127 of the RMA or as a new activity. We do not find that to be a matter requiring our assessment. An application was made under s127. The WDC accepted the application and proceeded to process it on that basis and that is what is now before us to determine.[57]

Counsel submitted that this was wrong and that the Commissioners should have addressed the issue raised by the submitters. He sought to establish that a legal error by the Commissioners in assessing the application as a variation of conditions under s127 RMA, as opposed to a new activity under s88 RMA, gave advantage to Creswell. The interlinking issues relate to:

(a) the treatment of the existing plant when assessing effects;

(b) the nature, scale and intensity of the project;

(c) the activity status of the application under the WDP;

(d) The extent of notification of the application.

[176] Counsel for Sustainable Otakiri accepted that substance should generally prevail over form. He submitted that substantial prejudice could result from proceeding under s 127 when a new application should have been made under s 88 RMA. He listed as examples:

a) Where the effects would be more than minor and so require public notification beyond those who made a submission on the original application;

b) Where the condition to be changed is integral to the original consent and was deliberately restrictive;

c) Where the changed activity is fundamentally different or has materially

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57 Commissioner's decision at [21].

different adverse effects;

d) Where the change would allow "consent creep" which should be assessed as if there were a "clean slate";

e) Where the activity is non-complying and should be subject to the thresholds of s 104D RMA; or

f) Where relying on substance over form may result in unfairness or inconsistent treatment.

[177] The issues raised in the application for declarations substantially overlap with the issues arising in the appeal against the grant of changes to conditions and other consents, including issues of jurisdiction, scope and the assessment of effects. An issue for the Court is whether it is necessary to exercise our discretion under s 313 RMA to make declarations or whether our decision on the appeal, made under s 290 RMA with the same power, duty and discretion as the consent authority had, is sufficient to deal with the issues in respect of which declarations are sought.

[178] We will examine each of the aspects raised in the appeal and the application in turn before returning to a broader consideration of the matters requiring decision.

The Existing Environment

[179] Counsel for Sustainable Otakiri submitted that s 127(3) RMA plays a deeming function, with effects of the consented activity deemed to form part of the existing environment and therefore disregarded. Similarly, consideration of who may be adversely affected for notification purposes is directed in particular to those people who made a submission on the original application and may be affected by the change.[58] This submission was pursued in questions of Mr Batchelor based on the proposition that Creswell had benefitted from the application under s 127 as the existing consent established the character of the water bottling facility in a rural zone. Mr Batchelor was firm in his view that the assessment of effects reflected not only the greater level of effects but also a greater degree of proposed mitigation.

[180] We are satisfied that the existing water bottling plant is part of the existing environment: it is lawfully consented and has been in operation for many years. The effects of the continued operation of this plant are not in question in these proceedings

58 Opening submissions at [38]

and must form part of any assessment of what is now proposed.

[181] Section 127(3)(b) RMA provides that the consideration of the matters listed in s 104 apply *as if the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively*. We accept that the phrase *as if* indicates that a deeming approach is to be taken, but we do not understand that to mean that the existing environment, including the existing consented activity, is irrelevant to our consideration. There must be an assessment of the effects of the change of condition on the existing environment. What is excluded is the possibility that the existing consent may be amended beyond the scope of the application for change or cancelled.

[182] It is true that if this proposal had been applied for as a new activity under s 88 RMA, then it could be declined in its entirety, so to that extent there is a difference between what can occur in relation to applications under s 88 and those under s 127. The difference is however more apparent than real: if this proposal had been made under s 88 and declined, the applicant would still hold the original consent, so its position would be no different to having an application under s 127 RMA declined. For practical purposes, therefore, the real assessment must be of the effects of expanding the water bottling operation whether the application is made under s 127 or s 88.

Comparison of Nature and Scale of Existing and Proposed Activities

[183] Responding to questions from the Court, Mr Frentz as the co-ordinating author of the AEE confirmed that nothing had been put aside in preparing the AEE on the basis it was an application under s 127 as opposed to under s 88.[59] He said that the AEE was an evaluation of the application as a whole, notwithstanding that consideration of the effects of the existing consented activity was not required. This full evaluation of effects had been done due to the substantial nature of the expansion proposed and the age of the existing consent, which was granted in 1991.[60]

[184] We are satisfied by the evidence of Mr Frentz that, as a discretionary activity, a full evaluation of all the adverse effects of the proposed new bottling plant, including the consented existing plant, has been prepared.

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59 Transcript p 188 – 189.

60 Transcript p 189 – 190.

[185] Mr Carlyon, the expert planning witness called by Sustainable Otakiri, presented a useful comparison table of the existing and proposed elements of the activity, setting out the following information drawn from several sources:

	Existing	**Creswell proposal**
Land use	5.5 ha kiwi fruit orchard plus bottling plant	Bottling plant only (removal of kiwifruit orchard)
Water take (consented volume)	1200 m^3/day, 13.9 l/s **Actual use** (range): 8-26 m^3/day at 0.41-0.94 l/s	Max: 5000 m^3/day at 58 l/s Max: 1,100,000m^3/year
Production capacity	8000 bottles/hr	154,000 bottles/hr
Water bottled (L/yr)	2014/15 1.9 million L 2015/16 1.7 million L	580 million L/yr
Building footprint	1340 m^2	16,800 m^2 plus existing building
Building height	8.4m	12.9 m Chimney stack to 16 m
Impermeable surface	0.27 ha	3.55 ha
Area of versatile soil available for production	5.5 ha	0
Truck movements/day	4	202 (monthly average)
Truck movements/hour	N/A	20/hr (10 hr/day)
Staff	8	60 (30 on-site at any one time, plus contractors)
Containers stored on site	0	234
Container movements	0	462/day, 35/hr (13 hr/day)
Hours of operation	**Consented:** Mon-Sat: 6 am-10 pm Sat: 7 am-1 pm **Actual:** Mon-Fri: 7am- 4:30 pm Sat: sometimes.	**Manufacturing** - continuous **Container operations:** Mon-Fri: 7 am-8 pm Sat: 7 am-5 pm Sun: 9 am-5 pm (no more than 12 times per year) **Truck movements:** Mon-Fri 9 am-7 pm Sat 9 am-2 pm

[186] The other expert planning witnesses, Ms Nicholas, Mr Batchelor and Mr Frentz, agreed that this table was generally correct.

[187] Mr Carlyon considered that the nature, scale, intensity and effects of the proposed water bottling plant, as set out in his comparison table, were so markedly different from those provided for in the original consent as to be inconsistent with the concept of expansion. In his opinion this made the proposal a new activity requiring a fresh examination of its activity status under the WDP rather than as a variation of conditions to the existing consent under s 127 RMA.

[188] Ms Anne Nicholas, the reporting officer for the District Council at the first instance hearing, was called by Sustainable Otakiri. In examination by counsel for Sustainable Otakiri Ms Nicholas confirmed that she had considered the application under provisions of s127 RMA as a discretionary activity. Her evidence to the Commissioners was that if they concluded that it would be more appropriate to consider the application as a new activity, then the proposed expansion of the water bottling plant would fall into the category of an activity not provided for (sometimes called an innominate activity) under the plan, which is a discretionary activity under Rule 3.4.1.1 of that Plan.

[189] Ms Nicholas considered that the footprint and scale of the proposed expansion was not anticipated in the existing consent despite condition (d):

> (d) That the applicant undertake regular monitoring of the activity and inform Council when the following factors are carried out or exceeded:
>
> - Any major expansion or updating of plant and machinery, or;
> - Introduction of a second shift within the bottling plant, or;
> - Number of staff employed within the bottling plant exceeding eight at any one time, or;
> - Regularly more than four truck movements in any one day.

[190] Creswell relied on the planning evidence of Mr Keith Frentz to address these issues. Mr Frentz noted that the application for variation to an existing lawful activity under s 127 RMA was a discretionary activity and therefore subject to all aspects of scrutiny as any other application with the same activity status in relation to the effects of the changes proposed. In this case, these effects are wide-reaching and in his opinion had been fully considered in the AEE.

[191] Mr Frentz confirmed in response to questioning that he considered the

proposal involved a substantial expansion in scale and intensity over what is presently consented, and that the comparison table prepared by Mr Carlyon was an accurate reflection of this.[61] Mr Frentz accepted that the effects of the proposal were consequently substantially greater, but considered that mitigation proposed by way of conditions would result in these effects being no more than minor.

[192] In Mr Frentz's view, little should turn on the distinction between a variation and a new consent in this case. The expert evidence for Creswell established, in his opinion, that a thorough assessment had been undertaken, supporting a conclusion that adverse effects can be appropriately mitigated through an entirely new set of conditions. Mr Frentz's evidence in this regard was supported by Mr Batchelor, the expert planning witness called by the District Council.

[193] The key point of difference between the planners was that Mr Batchelor and Mr Frentz considered that the potential for greater adverse effects of a similar nature to the original operation had been fully assessed in the AEE and conditions of consent developed to mitigate those effects to a level that was considered by the technical experts and planners as acceptable. In contrast, Mr Carlyon considered that the increase in scale and intensity of the proposed activity was so great that it went beyond "expansion" of the existing activity.

[194] In our judgment, the proposal is for the expansion of an existing activity. It involves the continuation of use of the existing building but with the addition of a substantially larger building, extraction of water from the same source but using a new well and at a substantially greater rate, bottling that water in a similar manner to the present operation and then packing, loading and transporting the bottled water with a much greater number of truck movements.

[195] In considering the change in the effects from the existing to the proposed operation, it is helpful to consider that effects may differ in character, intensity and scale. Character generally refers to the nature of the effect, while intensity refers to how often it occurs, and scale refers to the degree of the effect. Changes in the character of an effect clearly have the potential to mean that the activity is different in nature, while changes in the intensity and scale of an effect mean that the activity, whatever its nature, operates in a manner that has greater or lesser effects.

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[61] Transcript p 173 - 174

[196] There was no dispute among the expert witnesses that the character of the adverse effects of the expanded activity would be the same as for the existing activity, being the noise of both on-site operations and traffic movements, traffic on Johnson and the local portion of Hallett Roads, visual impacts and general effects on amenity values. There was also no dispute that the intensity and scale of the adverse effects would change, in some respects to a great degree.

Activity Status

[197] Central to the case for Sustainable Otakiri and the opinion of Mr Carlyon was the proposition that the Creswell proposal is in the activity class of "industrial including manufacturing activities" as found at item 25 in the Activity Status Table that is Rule 3.4.1 in Chapter 3 of the WDP.[62] On that basis it therefore should be assessed as a non-complying activity in the Rural Plains zone. This, counsel for Sustainable Otakiri submits, would require a new application that would be fully publicly notified and subject to the gateway tests under s 104D RMA.

[198] Counsel further submitted that, under this scenario, as a type of business activity the proposal would have much more difficulty demonstrating consistency with the objectives and policies of the WDP in a rural zone than if it were considered as a rural activity.

[199] The planners' joint witness statement identified four categories of activity in the Activity Status Table that could apply to the proposed activity:

3.4.1.1	All activities not specifically provided for in the Activities Status Table or provided for in a Rule in the Plan - discretionary.
3.4.1.1.25	Industrial including manufacturing activities - non-complying.
3.4.1.1.37	Rural processing activities - discretionary.
3.4.1.1.51	All other activities not specifically provided for in other sections - discretionary.

[200] The relevant definitions in Chapter 21 of the WDP of terms used in the Activity Status Table are:

> **Industrial activity** means;
>
> a. the production of goods by manufacturing, processing (including the milling or

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[62] 3.4.1 Activity Status Table, Whakatane District Plan, ch 3 Zone Descriptions Activity Status Information Requirements and Criteria for Resource Consents.

processing of timber), assembling or packaging;

b. dismantling, servicing, testing, repairing, cleaning, painting, storage, and/or warehousing of any materials, goods or products (whether natural or man-made), vehicles or equipment, and

c. depots (excluding rural processing activities and rural contractor depots), engineering workshops, panel beaters, spray painters.

Primary productive use means rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral **farming**, dairying, poultry **farming**, pig **farming**, horticulture, forestry, quarrying and mining.

Rural processing activity means an operation that processes, assembles, packs and stores products from primary productive use. This includes wastewater treatment facilities associated with and within proximity of the Edgewater Dairy Manufacturing Site.

[201] Also relevant because of its use in applicable objectives and policies is the following definition:

Rural production activity means rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral **farming**, dairying, poultry **farming**, pig **farming**, horticulture, forestry, quarrying and mining. Also included in this definition are processing and research facilities that directly service or support those rural land use activities.

[202] The Council's decision recorded that water bottling was not considered to be a primary productive use because it does not rely on the productive capacity of the land and it can be located anywhere in the district that overlies a productive aquifer.[63] The decision went on to record that the activity *does not appear to be otherwise defined in the WDP*, following advice from the s 42A reporting officer that the activity is more appropriately identified as *an activity not specifically provided for*[64] in Rule 3.4.1.1.51 WDP.

[203] Counsel for Sustainable Otakiri submitted that this proposal could not be a rural processing activity because such an activity necessarily relies on another land use earlier in time, He argued that in this case the taking of water is not a land use under s 9 RMA but an activity controlled under s 14 RMA.

[204] We doubt that the premise that the taking of water is not a land use is a valid

63 Consent authorities' decision at [25].

64 Section 42A report, para 7.7.

basis for such an argument. *Use* is broadly defined in s 2 RMA, meaning among other things to place or use a structure in, on or under land or drill land, and the definition concludes with *any other use of land* which appears to be all-encompassing. Walking or standing on land, or wielding a chainsaw, has been held to be sufficient for the purpose of that element of the definition.[65] In this case, the taking involves the drilling of the bore and the construction and operation of a well-head. Even though those things are done to enable a take of water under s 14, they are nonetheless uses of land under s 9.

[205] The provisions in ss 9 and 14, in Part 3 – Duties and Restrictions under the RMA, do not alter the factual basis for the application of the definitions or activity schedules in a district plan. This submission is linked to further submissions of counsel in relation to the bundling of the land use and the water take, which we address below.

[206] Counsel also submitted that each stage of bottling water corresponded to an element of the definition of *industrial* activity. Mr Carlyon considered that all relevant aspects of the water bottling activity proposed, including processing of the water from a new bore and packaging into plastic bottles manufactured on site, fell into the category of industrial activity. The process would take place on production lines, packaged, stored and finally loaded out. Use of the industrial category was supported, in his opinion, by the large scale of the building, the visual and operational characteristics of the bottling plant, the volume of shipping containers on site (now removed) and the number of heavy truck movements.

[207] In Mr Carlyon's opinion, the definition of *primary productive use* implies that functional needs should apply only to the categories of activities referred to in the definition and that a case-by-case analysis of functional need would undermine the purpose of the zone and integrity of the plan. Mr Carlyon expressed the opinion that Creswell had not demonstrated a functional need to establish the plant in this location as:

i. A new bore has been established under a new bore permit replacing the existing permit.
ii. A new factory is being built.
iii. A much larger volume of water is to be processed and exported to China as opposed to being sold in New Zealand.

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65 *Smith v Auckland City Council* [1996] NZRMA 27 (HC); affirmed [1996] NZRMA 276 (CA).

iv. The water is not ideal for bottling.

v. The acceptability of water drawn from other locations, including more suitable zones, has not been demonstrated.

[208] In the absence of a definition of *functional need* in the WDP, Mr Frentz proffered the definition from the Draft New Zealand Planning Standard:[66]

> Means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.

[209] Mr Frentz confirmed under cross-examination[67] that his position on activity status had changed from that set out in his evidence in chief, where he considered "innominate" activity as being the appropriate status, to *rural processing activity* for the reasons set out in his rebuttal evidence. The established cluster of water bottling plants near Otakiri (Orivida Waters Ltd at 157 Hallett Road, Antipodes Water Co Ltd at 106 Lewis Road and the subject site) indicated to Mr Frentz that sound industry drivers existed for locating above this aquifer that do not exist elsewhere in the Whakatāne district, where there are no other water bottling plants. This area includes the municipal supply taken from the bore across road from the subject site.

[210] Mr Frentz expressed the opinion that, as water bottling requires a location in proximity to a targeted water source, it is similar to quarrying and mining which are both listed as *rural production activities* or *primary production use*. The list of activities in both definitions is not exclusive in Mr Frentz' opinion because they are preceded by *such as*. The primary activity of water bottling is the extraction of water at source making it conceptually similar to mining. As such the defined term *rural production activity* most closely aligns with Creswell's proposal, in his opinion.

[211] From a planning perspective, Mr Frentz considered that extracting water from a bore is conceptually indistinguishable from mining or quarrying, which are both included as rural land use activities with a functional need for a rural location. The primary activity in the Creswell proposal is to extract water at a rural site. While this is not mining as such, it is sufficiently similar to qualify as a rural production activity.

[212] It was Mr Goff's evidence that the special conditions needed to access the

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66 Ministry for the Environment 2019 - *21 Definitions Standard – Recommendations on Submissions Report for the First Set of National Planning Standards*, Wellington: Ministry for the Environment.

67 Transcript p 180.

high-quality artesian water from the aquifer at Otakiri relate to fracturing of the Matahina ignimbrite and that this geological characteristic is not known to occur other than in the vicinity of the site and near Murupara.

[213] Mr Gleissner explained the marketing access reasons for bottling water at source and the investment that had gone into establishing the current plant and the two bores on the site. In his evidence he explained that in order to meet the regulations of the European Union for quality assurance, bottlers of water must identify the source and exact location of bottling operations and demonstrate full control of the bottling process. To be described as spring water, it must be bottled at source and the transport of water those authorised for distribution to the ultimate consumer is prohibited.

[214] Counsel for Sustainable Otakiri submitted that these were operational rather than functional considerations and referred to passages in the statements of Mr Frentz and Mr Batchelor that he submitted supported that contention.

[215] It appears from our review of the evidence that the opinions of those witnesses are that not all cases of water bottling needed a rural location, but they both accept a functional need in this case, given the evidence of Mr Goff and Mr Gleissner. It appears from the evidence that not all water is the same, much as not all rocks are the same.

Evaluation of Activity Status

[216] The main issue in determining the activity status of Creswell's proposal, outside of s 127 RMA, is whether it is for an industrial activity or a rural processing activity.

[217] *Industrial activity*, as defined in the district plan, includes the production of goods by manufacturing, processing, assembling or packaging. This implies taking resources and processing or using them to manufacture or otherwise to produce goods that are different from the resource. The principal element of this kind of industrial activity is the processing or manufacturing.

[218] *Rural processing activity*, as defined in the district plan, is the processing assembling, packaging and storing of products from primary productive use. It can immediately be seen that the elements of processing, assembling, packaging and storage can occur in both industrial activities and rural processing activities. This

implies that those elements are not determinative of the type of activity and therefore of the activity status.

[219] The essential difference between the definitions of the two activities is that an industrial activity can involve any type of material, good or product but a rural processing activity must have as its starting point a product from a *primary productive use*. Such a use, again as defined, must either rely on the productive capacity of land or have a functional need for a rural location. The examples given in the definition indicate that farming and extractive activities are contemplated as being within it.

[220] These definitions appear to be consistent with the conventional three-sector model in economics[68] in which an economy is divided into primary (extraction of raw materials), secondary (manufacturing) and tertiary (services) sectors. The model is principally used in analyses of economic development, but to the extent that a plan under the RMA should generally reflect the world being planned, the approach may be helpful in dealing with the potential complexity of very broad terms such as "industry" and "primary production".

[221] Statutory plans in New Zealand have typically identified separate rural and industrial areas, but the broad terms may obscure the overlap of the two and so be unhelpful to detailed analysis. In that context, we accept that the purpose of the plan's definitions is to provide a basis for analysis that is consistent with the relevant objectives and policies of the plan. Overall, the provisions do this to sustain the productive potential of rural land and to prevent the expansion of urban activities onto productive rural land while still enabling appropriate processing activities to occur where the resources to be processed are grown or found. The definitions serve to help achieve these objectives and determine what is appropriate by requiring rural processing activities to have a relationship with the land, either in terms of the land's productive capacity or to serve some other functional need. This approach in the plan is not contradicted or reversed by the fact that these processing activities may also be described as industrial activities: the connection with the productive activities on the land puts such processing in a different category of industry, more closely associated with farming and extractive industry than with urban activity.

[222] In this context the planning approach to rural processing activities is based

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68 See, for example, the works of Allan G.B. Fisher, esp. *The Clash of Progress and Security*, London: Macmillan (1935) and *Economic Progress and Social Security*, London: Macmillan (1946).

less on the segregation of activities due to their effects on amenity values and more on promoting the proximity of activities to promote the efficient use and development of resources. Both are matters to which particular regard must be had under s 7 RMA: the relative weight to be given to such regard will be matters of fact and degree.

[223] The term "functional need" has been included in the proposed Definitions Standard of the draft National Planning Standards.[69] As the discussion of that proposal indicates,[70] the term is best understood in contradistinction to its fraternal twin, *operational need*, now also included in those definitions:

> The need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.

[224] The difference, between only being able to occur in a particular environment and having technical or operational characteristics or constraints which require such a location, can be important. It is usually obvious when dealing with infrastructure; it can be more complex when dealing with higher level activities where the nature of the function and the operational requirements may be less sharply defined.

[225] Counsel for Sustainable Otakiri argued that the location of this water bottling plan reflects operational needs rather than a functional one. In the particular circumstances of this case, we do not agree. We find that the extraction of water from an aquifer is a form of primary production akin to mining or quarrying. While it may be possible to take groundwater from many locations, we are aware that one cannot be certain what one may find underground and that the experience of well-drillers is that finding suitable supplies of water is not a certainty. We accept the evidence of Mr Goff, Mr Gleissner and Mr Frentz that there is a demonstrated functional need for the activity applied for to occur at the Otakiri Springs site given the assurance of access to the resource in this area and the requirements for marketing that resource. In terms of consistent treatment of similar activities, the nature of this activity appears to be no different in nature to the Antipodes operation at 106 Lewis Road or the Oravida operation at 157 Hallett Rd, although the proposal may be larger than both of those.

[226] In the Creswell proposal, the primary resource is the water which is unchanged by any process or other form of manufacture. The water taken from the ground is

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69 Fn 66. It is a term used and defined in the same way in the Auckland Unitary Plan, operative in 2016.

70 Fn 66 at 95 – 97.

stored in a container which is then removed from the site. The principal activity is the extraction of the water. Activities within the bottling plant, such as the blow-moulding of plastic bottles as containers for the water and packaging the bottles on pallets for transport, are industrial activities within the range of the definition but they are ancillary to the principal activity: without the production of the water, they would not occur.

[227] We also find that the subsequent packaging of the water into bottles and the transport of it from the site to be within the scope of a rural processing activity. Providing for a processing activity close to an identified resource serves an operational need for that activity consistent with the nature of a rural processing activity. Undertaking such an operation on-site is both efficient and consistent with other rural processing activities, both in terms of the nature of the activity and the scale of buildings associated with such facilities.

[228] On that basis, if the application were to be assessed as a new activity, in our judgment it should be assessed as a rural processing activity and therefore as a discretionary activity on a site in the Rural Plains zone under Rule 3.4.1.1(37.a) in the district plan.

Bundling of Applications

[229] Counsel for Sustainable Otakiri submitted that the oppositional nature of *land* and *water*, as defined in s 2 RMA, precludes consideration of taking water as a land use akin to other extractive uses. It follows, as we understand his argument, that ss 9 and 14 RMA stand separately and so an application for a water permit cannot be bundled with an application for land use consent. While the activities are linked in terms of identifying the overall water bottling activity, they cannot be merged to form a single land use activity. On that basis, counsel argued that Creswell's proposal cannot be considered as a primary productive use or any other kind of rural land use.

[230] Further, counsel argued that as a district council has no statutory function in relation to the taking of water, none of the land use activities identified in the district plan for control under s 9 RMA are applicable to the water take which is controlled under s 14 RMA. As a consequence, the proposal is left to be considered only as a non-complying industrial activity.

[231] As noted above, we do not accept that the taking of water, while certainly controlled under s 14 RMA, may not also be controlled under s 9 RMA to the extent that there may be controls on the location of the bore and the size and operation of

plant on and in the ground. The issue requires consideration of more than the text of those sections. The definitions of *land* and *water* are written to identify, as clearly as can be done by brief definitions, the boundary between the two, but that boundary does not have the consequence of preventing a broader consideration in any case where both resources are involved. The purpose of the legislation, including other relevant provisions, must be considered, and the context of the proposal is also usually relevant. While the duties and restrictions under Part 3 RMA are generally set out in terms that reflect the division of functions and powers in Part 4, the provisions in Part 4 also reflect the importance of achieving integrated management of all resources and of the effects of their use, development and protection.

[232] In this case, the two consent authorities recognised this and provided for it by combining the matters before them and appointing hearing commissioners jointly to make a single decision. While that decision has led to two separate sets of appeals reflecting the original distinction between the consents under the jurisdiction of the district council and those under the jurisdiction of the regional council, the procedural requirements for the appeals do not result in a split in the consideration of the proposal.

[233] As acknowledged by counsel for Sustainable Otakiri, joint consideration of a single proposal, even where consents are required under different plans, is generally required.[71] Bundling the applications together, even where they may be required under different planning documents, is lawful[72] and appropriate where the effects of the matters requiring different types of consent overlap.[73]

[234] In more general terms, a proposal of this kind should be assessed in terms of its purpose in order to identify the relevant planning unit or units and to determine whether the various activities involved are incidental or ancillary, or a composite of several components, or separate, distinct and substantially unrelated.[74] In this case we are satisfied that the proposal is for a single planning unit which primarily involves the taking of water with an ancillary bottling and packaging operation. On that analysis

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71 *Affco NZ Ltd v Far North District Council (No 2)* [1994 NZRMA 224, 233; *Bayley v Manukau City Council* [1999] 1 NZLR 568, 580; *King v Auckland City Council* [2000] NZRMA 145 at [49] – [50].

72 *Newbury Holdings Ltd v Auckland Council* [2013] NZHC 1172 at [57] – [62].

73 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529; at [18] – [22].

74 *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240, 244; [1972] 1 WLR 1207, 1212; *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702; (1984) 10 NZTPA 340 (CA).

we remain satisfied that the activity, overall, is a rural processing activity.

Notification

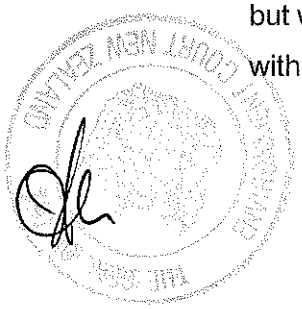
[235] Alternatively, counsel for Sustainable Otakiri argues that if the water take forms part of an overall primary productive use, then the regional and district consents should have been bundled together and fully publicly notified, rather than the latter being notified on a limited basis. On that analysis, the land use applications cannot be granted because of the restriction in s 104(3)(d) RMA preventing the grant of a resource consent if the application should have been notified and was not.

[236] Counsel for the District Council and Creswell both submitted that the decision to separately notify the applications was appropriate as there was little overlap in adverse environmental effects between the taking of water from the aquifer and the expansion of the bottling and transport operations.

[237] Counsel for Sustainable Otakiri submitted that the notification test under s 127(4) RMA is directed at submitters on the first consent that remain affected. The notification assessment and decision under ss 95 – 95G RMA would apply to both a new application under s 88 and an application to change conditions under s 127. The identification of the extent of notification in either case would depend on the assessment of the likely adverse effects of the proposal. If those effects were considered more than minor, as Sustainable Otakiri argue they are, then the application should have been publicly notified.

[238] Counsel for Creswell noted that s 127 can be used where there is a material change in the scale of effects requiring the application to be notified to any affected person. Under s 127, a standard notification assessment is required and this must specifically consider whether original submitters may be affected by the change in conditions. Notification of other affected parties is not precluded under s 127. The case for Creswell was that the adverse effects were no more than minor so limited notification was appropriate.

[239] We accept that a full notification assessment was carried out with the result that the application was notified to all identified affected parties and that no person has been identified who may have wished to make a submission on the application but was not notified. There was no evidence before us that there was any factual error with the Council notification decision.



[240] In saying that, we are mindful that our jurisdiction does not extend to include review of a consent authority's decision about notification of an application under ss 95 – 95G RMA. Without going into such a review, we also note that the definition of *notification* in s 2AA RMA means *public notification or limited notification of the application or matter*. We think that the meaning of *notified* in s 104(3)(d) is to be interpreted consistently with that definition. On that basis, the application to the District Council was notified and so s 104(3)(d) RMA is not applicable in this case.

Section 127 Evaluation

[241] Section 127 relevantly states:

> 1. The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to ...
>
> ...
>
> 3. Sections 88 to 121 apply, with all necessary modifications, as if –
>
> (a) the application were an application for a resource consent for a discretionary activity; and
>
> (b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.
>
> 4. For the purposes of determining who was adversely affected by the change or cancellation, the consent authority must consider, in particular, every person who –
>
> (a) made a submission on the original application; and
>
> (b) may be affected by the change or cancellation.

[242] This provision has been substantially modified over time. Prior to 2005, an application under s 127 could only be made at a time specified for that purpose in the consent or on the grounds that a change in circumstances had caused the condition to become unnecessary or inappropriate. Those restrictions were repealed by s 70 Resource Management Amendment Act 2005. There are now no boundaries in s 127 RMA on the jurisdiction for its application.

[243] Prior to 2003, s 127(3) and (4) included an exception stating that s 93 (which was the notification provision at that time) did not apply where the consent authority was satisfied that the adverse effects of the change would be minor and the written approval of original submitters and affected persons had been obtained. That exception was repealed by s 53 Resource Management Amendment Act 2003 and

the current provisions were substituted in its place. While s 127(4) now requires particular consideration of every person who made a submission on the original application and may be affected by the change, that provision does not limit the application of ss 95 – 95G RMA and the decision whether and to whom an application under s 127 is to be notified must still be made under those provisions.

[244] Those amendments to s 127 mean that the statutory process to be followed in considering a proposal to change or cancel a consent condition is now essentially the same as that for a new application under ss 88 to 121.

[245] The setting of the activity status as discretionary by s 127(3)(a) RMA (enacted by the 2003 amendment), where the activity might otherwise be a non-complying activity, appears to be the principal benefit to an applicant. Even so, the difference in activity status between discretionary and non-complying may not be of great significance where the activity already exists, because of the role that the existing environment plays in any assessment of effects. The context in which the consent authority must assess the degree of additional adverse effects of the activity on the environment and the extent to which such an activity may be contrary to the objectives and policies of the relevant plan will include consideration of that existing activity. In terms of any proposed change of conditions, the degree to which any adverse effects will increase or to which the proposal may be contrary to any relevant objectives and policies will still have to be considered in terms of s 104(1)(a) and (b)(v) for the purpose of the exercise of the discretion whether to grant consent or not under s 104B RMA.

[246] On the other hand, if the change in the adverse effects is sufficiently great and the relevant objectives and policies are sufficiently specific in identifying what may be contrary to them, then the particular restrictions for non-complying activities in s 104D RMA could have the combined effect of preventing the grant of consent. It should not be generally assumed that all plans are sufficiently specific to give assurance that those restrictions can be rigorously applied.

[247] In considering the assessment of the appropriateness of using s 127 as opposed to making a fresh application under s 88, it is well-established that this is a question of fact and degree to be determined on a case-by-case basis. In *Body*

Corporate 97010 v Auckland City Council[75] the High Court said:

> [73] Whether an application is truly one for variation of the condition under s 127 or whether in reality it is seeking consent to an activity which is materially different in nature, is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations to the determination of this issue will include a comparison between the activity for which consent was originally granted and the nature of the activity if the variation were approved. In approaching that question, regard may be had to the form of the original application and the terms of the consent granted. However, I accept Mr Loutit's submission on behalf of the Council that the terms of the resource consent are to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent. The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow.
>
> [74] It is trite that a principal focus of the RMA is the control of adverse effects of activities on the environment. In deciding whether an application for variation is in substance a new application the consent authority should compare any differences in the adverse effects likely to follow from the varied (proposal) with those associated with the activity in its original form. When the variation would result in a fundamentally different activity or one having materially different adverse effects, a consent authority may decide the better course is to treat the application as a new application. That will particularly be the case where application for variation seeks to expand or extend an activity with a consequential increase in adverse effects.

[248] This was upheld by the Court of Appeal,[76] where Blanchard J said:

> [36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks consent to an activity which is materially different in nature is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent. "The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow". ...
>
> [37] Randerson J said that the Consent Authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was a fundamentally different activity or one having materially different adverse effects a consent authority may decide the better course is to treat the application as a new application, particularly where it is sought to expand or extend an activity with consequential increases in adverse effects. ...

[249] The consent authority therefore has discretion under s 127 to decide whether

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75 *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 202 (HC) at [73] – [74].

76 *Body Corporate 97010 v Auckland City Council* [2000] 3NZLR 513; [2000] NZRMA 529 (CA) at [36] - [37].

an application for a variation would result in a different activity with different adverse effects that warrant consideration as a completely new application. It must also be borne in mind that the exercise of this discreton must be undertaken in light of the substantial amendments made to s 127 RMA in 2003 and 2005, after these decisions.

[250] The Council exercised that discretion in accepting Creswell's application under s 127 to vary the conditions of the existing consent. The Commissioners did not consider it appropriate to review that decision and accordingly assessed the application as being for a variation. Sustainable Otakiri considered that the failure of the Commissioners to review the Council decision to accept the application under s 127 was a jurisdictional matter that created a *"scope error"* that could not be fixed under s 104(5) RMA.

[251] As noted by us during the course of the hearing,[77] the appeal proceedings are *de novo* with the merits of the application being considered afresh, and not a review of the Commissioners' decision. In its role in place of the consent authority the Court can exercise its own discretion when considering whether the application should be assessed under s 127 or as a fresh application under s 88 RMA.

[252] The evidence before us confirms that the proposed project is for the same type of activity (water bottling) as authorised by the existing consent, with the same types of adverse effects. The substantial expansion of the activity proposed would result in a corresponding increase in the scale of adverse effects. The varied conditions of consent proffered by Creswell and imposed by the Council are designed to manage these adverse effects to acceptable levels. We consider that the application under s 127 was an appropriate pathway for Creswell to pursue, consistent with the provisions of that section and the criteria established by case law.

[253] The second major focus of Sustainable Otakiri's case was the assertion that Creswell gained advantage in applying under s 127 in that:

(a) this provided a *"head start"* in how adverse effects would be considered; and

(b) if a new application had been pursued it would have had to be assessed as an industrial activity, which is a non-complying activity in a rural zone, with adverse effects that are more than minor triggering public

[77] Transcript p 512 - 513

notification.

[254] We have examined the evidence related to both of these matters. In relation to the starting point for adverse effects assessment, s 127(3)(b) is clear that the focus is on the change to the existing conditions and the effects of that change. This is the same starting point for assessment under s 104(1)(a) RMA that would apply to any new applications for consent. In this case, the effects of the existing water bottling plant are part of the existing environment within which any new proposal for expansion of the plant would be assessed. No advantage was gained by Creswell in this regard and a full assessment of the adverse effects of the expanded plant is contained in the AEE accompanying the application.

[255] We have carefully considered the evidence relating to Sustainable Otakiri's position on the activity status of the proposal. Our conclusion is that the proposed activity is a *rural processing activity* in terms of the WDP. As such it would be a discretionary activity requiring assessing under s 104 RMA if applied for as a new activity.

[256] The information requirements for a s 127 application (discretionary activity) are the same as those that would need to be provided under s 104. We are satisfied that Creswell has provided all of the information necessary for assessment under either pathway and that no advantage has been gained by applying under s 127 in this case.

[257] It follows that the notification assessment and decision made by the independent Commissioner engaged to carry this out was appropriate under s 127(4) RMA. No evidence was presented that any person affected by the application had not been notified through the limited notification provisions of s 95(a) RMA.

[258] We are satisfied that all matters that are required to be considered under this application have been put before us and that we have been able to fully consider the substance of the application. This is consistent with the Court of Appeal's approach in *Body Corporate* that the exact form of an application is not determinative, provided the above conditions are met.

[259] For these reasons we decline to make any of the declarations sought by Sustainable Otakiri.

Land Use Consent Changes - Merits

[260] The scope of Sustainable Otakiri's appeal has been narrowed since it was first filed.[78] The merits appeal is now confined to Creswell's application for variation to consent 61/4/817 under s 127 RMA and within that:

(a) Effects on rural character and amenity.

(b) Consistency with planning instruments.

(c) Effects on the loss of productive land.

(d) Alternative locations and zonings.

Planning Framework

[261] The site is within the Rural Plains zone in the Whakatāne District Plan.

[262] As an application under s 127 the proposal is to be assessed as a fully discretionary activity. Evaluation under s 104 RMA as directed by s 127(3) requires us to have regard to the relevant statutory instruments, subject to Part 2. It was not in dispute that any matters in Part 2 required consideration on any of the grounds explained by the Court of Appeal in *RJ Davidson Trust*.[79]

[263] The district-wide strategic objectives and associated policies managing the growth and development of the district are in Chapter 2 of the WDP. The objectives provide for the encouragement of sustainable growth in a way that minimises environmental effects and does not compromise rural character (Objective 1). Objective 2 controls incompatible uses by requiring separation from other activities.

[264] Strategic Objective 3 and associated policies provide for the stimulation of economic growth and development in appropriate zones within the district.

[265] Strategic Objective 4 promotes the retention of the rural character of the district and the retention of rural productive capacity. We have accepted the Creswell proposal as a rural processing activity anticipated in the Rural Plains Zone.

[266] Chapter 7 of the WDP sets out objectives and policies for the rural zones, including the Rural Plains Zone. Objective Rur 1 is to sustain the productive potential

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78 Joint Memorandum of Counsel dated 1 February 2019.

79 *RJ Davidson Trust v Marlborough District Council* [2018] NZCA 316.

of rural land and provide for rural productive activities.

[267] Objective Rur 2 relates to managing effects on rural character and amenity.

[268] Objective Rur 3 and associated policies contain enabling provisions for rural development within a context of avoiding significant adverse effects and cumulative effects on the surrounding environment and managing other effects through remediation or mitigation.

[269] Relevant objectives in Chapter 11 (General) and Chapter 17 (Landscape and Coastal Environment) contain similar provisions to those addressed above related to the maintenance of rural character and managing adverse effects of activities on communities.

The Hearing

[270] Creswell presented expert witness evidence related to plant construction and operation, noise, landscape, employment and planning matters. Apart from planning matters, none of the evidence was challenged by expert testimony on behalf of Sustainable Otakiri. Primary evidence on effects on rural character and amenity were represented by members of Sustainable Otakiri. The Whakatāne District Council presented expert witness evidence related to landscape and planning only.

[271] As outlined in submissions by counsel, Creswell had attempted to engage in a meaningful way with the local community during the development of the application[80] and attempted to incorporate concerns expressed into the proposed project. This continued after the Commissioners' decision in June 2018, resulting in elements being added to proffered conditions to further mitigate effects on neighbours. At the hearing and in closing submissions Creswell responded to specific concerns on a range of matters raised by Sustainable Otakiri, including further modification to the proposal. We detail this below.

Effects on Amenity Values

[272] The RMA defines amenity values as those natural or physical qualities in and characteristics of an area that can contribute to peoples' appreciation of its pleasantness, aesthetic coherence and cultural and recreational attributes.

[80] Creswell opening submissions at paragraph 45.

[273] Sustainable Otakiri members considered that the expansion of the Otakiri Springs water bottling plant as proposed would markedly reduce the amenity value of the neighbourhood currently experienced by its residents. Of particular concern was construction and operational noise (including truck noise), visual and truck movement effects.

[274] Members of Sustainable Otakiri, being Maureen Fraser, Sarah and Mike van der Boom, Kelvin and Gillian McCartie, Anita Gray, Lee Heappey, Malcolm and Sally Halyar, and Lesley McKeown, presented evidence on the current amenity value of the Johnson Road/Hallett Road neighbourhood in the vicinity of the Otakiri Springs water bottling plant. Without exception, they all expressed the enjoyment of being able to live in a rural landscape subject only to the pleasant and calming sounds of the countryside with good air quality and low traffic volume on their road. Noise from agriculture machinery and trucks servicing the rural area and the existing water bottling plant were intermittent and within their expectations of a rural area. The Otakiri Springs bottling plant as currently operated had minimal effects on the amenity value they associated with their properties.

[275] There was a common theme in the evidence that the adverse effects generated by the proposed expansion to the plant and the truck movements generated by that expansion were of a level that was unacceptable, and that consent should be declined. The effects identified were:

(a) construction activity and noise over up to a five-year period;
(b) external operating noise from on-site truck movements, container stacking, truck loading, reversing alarms and roller door movements;
(c) visual, noise, exhaust fumes, safety and inconvenience effects of 202 truck movements per day along Johnson and Hallett Roads to the intersection with State Highway 32;
(d) noise effects from the constant hum of internal plant activity operating 24 hours per day, seven days per week;
(e) visual effects of the plant building and the proposed security fence around the outside edge of the property; and
(f) the effects of the loss of productive land by the removal of 5.5 hectares of kiwifruit orchard.

Noise Effects

Operational Noise

[276] Creswell engaged acoustic consultant Mr Neville Hegley to undertake a noise assessment of the existing site and of the proposal to expand the bottling plant. Creswell also engaged Dr Stephen Chiles, a second independent acoustic consultant to review and comment on Mr Hegley's assessment.

[277] Mr Hegley supported the adoption of upper limit noise levels consistent with the WDP Standards set out in Rule 11.2.6.1 for the Rural Plains zone. These are:

- 50dB L_{Aeq} Monday to Sunday 7am to 10pm;
- 40dB L_{Aeq} at all other traffic times, including public holidays; and
- 70dB L_{Amax}.

[278] These levels are designed to control noise within reasonable limits at all times for the neighbours. Creswell has proposed a suite of conditions to manage noise generated at the plant that are more restrictive than the WDP Standards. These include:

(a) restricting truck activity to between 9 am and 7 pm Monday to Friday and 9am and 2pm Saturday;
(b) constructing a 2.4 metre noise barrier fence around the perimeter of the site;
(c) no outside activity to occur at night; and
(d) designing the building to ensure that lower night time noise limits are complied with at all times of day and night.

[279] In closing submissions Counsel for Creswell outlined additional actions to provide mitigation of operational noise concerns raised by Sustainable Otakiri members. These involve:

(a) Containerisation (putting filled bottles into containers) off-site, allowing removal of the dedicated container yard from the proposal as shown in Creswell's updated site plan (Attachment 3 to the Decision). A limited number of containers will still be allowed on site.

(b) Containers are not to be stacked on site, removing the need for combi-lifts.

(c) The use of curtain-sided trucks which will reduce the number of roller doors needed at the plant and reduce the number of trucks servicing the site.

[280] These changes are reflected in the proposed conditions of consent. Creswell have also proposed a new condition that limits truck movements to and from the site to a maximum daily number.

[281] Mr Hegley predicted that, with the noise mitigation measures in place, the noise requirements of the WDP will be achieved with the factor of safety at all times and under all operating conditions. Based on this, it was his opinion that the noise effects of the project will be less than minor. This conclusion was reached before the additional mitigation proposed above was proffered by Creswell.

Construction Noise

[282] Mr Hegley assessed the sound power levels for construction machinery at the site, predicting noise levels at the closest dwellings will be up to 61dBA L_{eq} during the daytime. This level will drop to typically 50 to 55dBA L_{eq} following completion of noise and earthworks activity. These limits are well within the construction noise limits in NZS 6803[81] of 70dBA L_{eq} between 7.30 am and 6 pm, Monday to Saturday. This Standard is adopted for the Rural Plains Zone in Rule 11.2.6.2 of the WDP.

[283] A Construction Noise Management Plan is proposed to direct how these standards are to be achieved during the construction phase of the project.

Traffic Noise

[284] Noise on public roads is not controlled by any rule in the WDP. Mr Hegley's opinion was that the best guidance on what may be considered a reasonable level was NZS 6806:2010[82] where the design level is 64dB L_{Aeq} measured at the façade of a dwelling. Mr Hegley's assessment predicted a traffic noise level of 49dB L_{Aeq} at the closest dwelling on Johnson Road, which is set back 35 metres from the road. No night-time truck movement is proposed resulting in no potential for sleep disturbance.

Effects on Residents

[285] Mr Hegley compared the existing noise environment to the protected noise

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81 NZS 6803 *Acoustics – Construction noise.*

82 NZS 6806 *Acoustics – Road-traffic noise* – new and altered roads.

level from the plant. Existing day-time noise is 46dB L_{Aeq} with background at 38dBL_{A90}. The highest predicted noise volume at 62 Johnson Road of 47dB L_{Aeq} is 1 decibel above the measured environmental noise in the area. For all other notional boundaries, the predicted level is at least 2 decibels below that. Mr Hegley advised that a 1 decibel increase would not be noticeable. In considering effects on rural amenity, Mr Hegley noted that although there will be a change to the existing noise environment from the expansion of the water bottling plant, in his opinion this change will not result in unreasonable noise within this rural environment.

[286] In rebuttal evidence, Mr Hegley addressed the major noise concerns raised by Sustainable Otakiri members:

(a) Construction timeframe. This is estimated at 30 months by Mr Joyce[83] with around 120 days of earthworks programmed (the noisiest activity).

(b) Traffic noise not assessed in modelling. Mr Hegley responded that plant and traffic noise had been addressed separately as traffic noise is not included in the WDP Noise Standard. For both sources, noise would be well within levels normally used to provide a reasonable noise environment for residents, in Mr Hegley's opinion.

(c) Sleep disturbance. Night-time noise from the plant at the nearest residence is predicted not to exceed 25dB L_{Aeq} by Mr Hegley. This equates to a level of 10dB inside any dwelling with windows open. In Mr Hegley's opinion this is well within a reasonable level based on WHO recommendations of 30dB in a bedroom to allow undisturbed sleep.

(d) Noise from container movements. Counsel for Creswell advised in closing submissions that container storage on site is to be significantly reduced and no stacking of containers is to be allowed, eliminating a significant source of daytime noise from the plant. This has been proffered by Creswell in response to residents' concerns.

(e) Reversing beepers. Mr Hegley suggested that this sound source could be reduced or eliminated using broadband beepers as opposed to tonal beepers without any compromise in safety. This has been included in a

[83] Rebuttal evidence, at paragraph 8.

proposed condition that prohibits the use of tonal beepers.

(f) Mr Hegley also noted that Creswell has offered to double glaze any windows on the sides of dwellings closest to the plant. He predicted that this would reduce the internal noise level of the dwellings by 9dB, nearly twice that achieved by single glazing. This is a further mitigation option available to neighbouring residents, should they choose to take it up.

[287] Dr Chiles' peer review generally supported Mr Hegley's noise assessment, predictions and conclusions. In considering the noise from the proposed increase in truck movements, Dr Chiles focused on how individual truck movements are likely to be perceived. He proposed conditions of consent to manage truck activity by introducing a speed limit of 40 km/h on Johnson and Hallett Roads, avoiding the use of audible engine braking systems and requiring trucks to exercise steady progressive braking and acceleration on Johnson and Hallett Roads.

[288] Creswell have proposed a condition to this effect. We acknowledge that this condition relies on Creswell using "reasonable endeavors" to achieve compliance as the consent condition cannot itself require a third party to limit an activity that is otherwise lawful. This can be achieved by contractual arrangements, driver education and the like.

[289] With these controls, and those already proposed in conditions to manage truck movements, Dr Chiles considered that the sound of trucks would be heard as part of general ambient sound rather than being individually noticed as discrete events. In his opinion, rural amenity would only be affected in a minor way by the noise from truck movements resulting from the expansion of the water bottling plant.

Landscape and Visual Effects

[290] Mr Wade Robertson, consultant landscape architect engaged by Creswell, undertook an assessment of the local landscape, character and visual effects of the proposed expanded plant. Mr Robertson considered that the wide array of built development within the rural landscape of Whakatāne District, while not directly comparable to the Creswell proposal in terms of scale and location, illustrates that the expanded plant will not be entirely out of context in this landscape. In his opinion, the proposed building will not adversely affect the character of the wider or local landscape to any discernible degree.

[291] Mr Robertson did acknowledge that the proposed plant represented a significant change in rural character at the site level. Except for the retention of the perimeter shelter belts and the relatively small existing buildings, all other aspects of the site will change. However, the low degree of sensitivity of the site to change would result in a moderate level of adverse effects in his opinion.

[292] The visual effects of the new building will, in Mr Robertson's assessment, be largely mitigated by the retention and strengthening of the perimeter shelter belts as visual screening from neighbouring properties and public viewing points. Views of the proposed buildings will be limited to the entranceway and a small part of the apex of the roof. The timber acoustic fence will also screen ground level views of the plant. In his opinion, based on the detailed assessment in the AEE and in his evidence, the overall visual effects of the plant building and associated site activity will be low.

[293] The other aspect of potential visual effects will come from the increased movement of trucks on Johnson and Hallett Roads. Mr Robertson considered that these visual effects were largely limited to 58 and 58A Johnson Road, directly opposite the entranceway to the plant. In his opinion, without mitigation, the adverse visual effects of the anticipated number of trucks entering and leaving the site each day would be significant. There was little screening vegetation on these properties and the dwellings were only 40 to 50 m from the road. The proposed mitigation planting for 58 and 58A Johnson Road shown on the indicative mitigation planting plan (Attachment 3 to this Decision) would, in Mr Robertson's opinion, effectively mitigate the adverse effects on these properties to a moderate degree.

[294] Ms Rebecca Ryder, landscape architect for the District Council, reviewed the evidence of Mr Robertson, concurring that the adverse effects on the local landscape were moderate, but that from a broader landscape perspective the proposal would introduce a low to moderate adverse effect. Ms Ryder agreed with Mr Robertson that visual effects would be adequately mitigated by the enhancement and maintenance of the screening shelter belts, new onsite large tree planting and building colour controls. She did, however, recommend the shelter belts be managed at a height of 12 metres above the ground to provide complete screening of the new building, not 10 metres as proposed.

[295] Mr Robertson in rebuttal evidence acknowledged that a 12 metre maintenance height was achievable except for the eastern site boundary where onsite stormwater infrastructure limited the space available for machinery access to maintain the hedge

above 10 metres. Creswell in revised conditions proposed to maintain the screen height at 12 metres except for the eastern boundary where the maintenance height is to remain 10 metres.

[296] Ms Ryder concurred with Mr Robertson that 58 and 58A Johnson Road would be adversely affected by the increase in truck movements and that these effects could be mitigated to a moderate degree by the proposed planting. Ms Ryder recommended additional avenue planting along the Johnson Road berm to contribute to rural character and amenity values. While Mr Robertson did not consider this would add much to visual mitigation, Creswell have retained this in conditions as an option, subject to roading authority approval and agreement from adjacent property owners.

[297] We note that a landscape management plan is to be prepared and implemented to give effect to the conditions. This will include consideration of roadside planting where relevant approvals have been obtained.

[298] Mrs McKeown raised the matter of security issues inherent in dense screen planting to mitigate visual truck movements from 58 and 58A Johnson Road. Ms Ryder acknowledged that Crime Prevention through Environmental Design (CPTED) principles should be applied to any final design of this mitigation planting.[84] In Ms Ryder's opinion, careful design of the mitigation planting would retain adequate passive surveillance opportunities for security purposes while also allowing for an effective screen between the properties and trucks entering the bottling plant site.

[299] We note that the proposed planting plan is labelled as indicative and that any final plan should include CPTED principles in consultation with the residents at 58 and 58A Johnson Road before inclusion in the Landscape Management Plan. A condition to this effect would be appropriate.

Effects on Productive land

[300] The proposed expansion will result in the loss of 5.5 ha of productive soils currently growing kiwifruit. Sustainable Otakiri did not challenge the Creswell evidence as to the unviability of the existing kiwifruit crop due to adverse soil conditions.[85] Members of Sustainable Otakiri in evidence did, however, suggest that the land was suitable for crops other than kiwifruit and should be protected as high

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84 Transcript, page 478 and 479.

85 Sustainable Otakiri opening submissions, paragraph 29, referencing Joint Memorandum of parties, dated 1 February 2019.

quality rural land.

[301] Mr Batchelor provided a supplementary statement of evidence in this regard and this was explored at the hearing. Counsel for Creswell submitted in closing that the evidence regarding neighbouring sites supported the Creswell evidence that the site itself features inferior quality soil in a frost belt and is therefore not suitable for horticulture. This position was supported by the Council in opening and in the evidence of Mr Batchelor. We note that it was also accepted in the first instance decision where the Commissioners did not place any significant weight on the loss of the existing kiwifruit orchard.[86]

[302] We heard no evidence analysing the relative returns from kiwifruit or other horticultural activities and the sale of water.

[303] We see no advantage in exploring this issue further than this.

Effects Evaluation

[304] During the hearing, we heard members of Sustainable Otakiri describe how the offsite adverse effects of the proposed expansion of the Otakiri Springs water bottling plant would affect rural amenity and the lifestyle they currently enjoy. We also heard expert description and evaluation of the potential effects of the proposal, together with Creswell's proposals to address these.

[305] Expert evaluation of the efficacy of the proposed operational limitations and actions to avoid, remedy or mitigate noise, visual and traffic effects have concluded that each of these potential offsite effects could be contained within acceptable limits and that there will be no significant adverse effects on the character and amenity value of the area within which the site is located.

[306] Without doubting the sincerity of the concerns held by Sustainable Otakiri members or the significance they attach to these concerns, we place considerable weight on the expert evidence on the level of effects on lifestyle amenity likely to be experienced by local residents from the establishment and operation of the expanded plant. The application includes the establishment of a neighbourhood liaison group to encourage ongoing dialogue between Creswell and interested residents. Properly constituted and operated community groups of this type can assist in identifying

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86 Commissioners' decision, at paragraph [126].

operational aspects that may be causing nuisance effects from time to time and provide an opportunity for the bottling plant operation to be adjusted where practicable to meet these concerns.

[307] We find that the noise, visual and traffic effects on lifestyle amenity in the Johnson, Hallett and Moody Road area will be managed within acceptable limits and be no more than minor with the construction and operation of the Otakiri Springs expansion.

[308] We also accept the evidence called by Creswell, supported by the supplementary evidence of Mr Batchelor, that the soil type and climate experienced at the site limit its economic use as productive rural land. We find that the loss of 5.5 hectares of marginally economic kiwifruit orchard at this site will have negligible effect on the availability of quality soils for food production in the Rural Plains Zone of the Whakatāne district. The conversion of a small area of rural land to establish this activity does not detract from the primary production focus of the zone.

Planning Evaluation

[309] In approaching our evaluation of the project against the relevant planning provisions in the WDP, we are mindful of the findings already articulated in our discussion on the activity status of the activity if applied for as a "new" activity, including our interpretation of the definition aspects pertinent to these findings and the effects of the activity on the environment. We have largely accepted the expert evidence called by Creswell and the District Council in finding that the activity fits most clearly in the WDP category of a rural processing activity.

[310] We have also largely accepted Mr Gleissner's evidence, supported by Mr Frentz, that there is a clear functional need for this particular proposal to be located above the source of the water in the rural zones.

[311] Neighbours of the proposed plant have identified the potential for the construction and operation of the plant to adversely affect the current amenity value they placed on their local neighbourhood. The uncontested expert evidence supports a finding that these adverse effects can be managed within acceptable limits, with the exception of the properties at 58 and 58A Johnson Road where visual effects from the movement of trucks at the plant entrance are expected to remain moderate after mitigation.

[312] Adverse noise, visual and amenity effects are likely to be low and the project will not substantially detract from the rural character of the area.

[313] The mitigation measures proposed by Creswell, together with visual separation from neighbouring residents, are consistent with the objectives in Chapter 2 of the WDP for managing development to minimise effects by separating incompatible uses.

[314] The project will achieve economic growth and development without compromising the ability of established activities to operate effectively or causing reverse sensitivity effects.

[315] We have accepted the Creswell proposal as a rural processing activity anticipated in the Rural Plains Zone. The proposal is for a type of rural production activity (rural processing) on soil that is of low versatility in comparison to other areas in the zone. It will provide for growth and efficient operation of a rural production activity consistent with the WDP's rural policies. Our findings on effects are that effects on rural character and amenity will be managed appropriately. We have found that there will be no significant adverse effects generated by the proposal and that identified adverse effects can be effectively managed by implementation of a comprehensive suite of consent conditions.

[316] Our evaluation of the proposal against the district planning framework is consistent with the evidence of Mr Frentz and Mr Batchelor. Mr Carlyon approached his evaluation from the starting point that the activities should be categorised as an industrial activity that is not anticipated in the rural zone, with adverse effects on rural character and amenity that were significant. His evaluation consequently concluded that the proposal does not meet relevant WDP provisions.

[317] The WDP has been prepared in accordance with and to give effect to the Bay of Plenty Regional Policy Statement. Our findings on the proposal's consistency with the provisions of the WDP leads us to accept that it will give effect to the RPS. This is again consistent with the evidence from the expert planners for Creswell and the District Council, although both provided further assessment of specific provisions in the RPS in order to reinforce their conclusions in relation to the WDP provisions. Sustainable Otakiri's expert planner did likewise but coming from the different starting point on activity status and adverse effects noted above.

Conditions

[318] Counsel for Creswell attached a revised set of consent decisions to their closing submissions incorporating changes proffered by Creswell since the close of the hearing. Our preliminary view is that the conditions are generally consistent with this decision, but before finalising these we direct the parties to confer and agree a final set of conditions for the land use consent variations. Should agreement in full not be achieved we will receive and review submissions on any differences before issuing a final decision.

Overall Evaluation

[319] We have found that the take of water from the Otakiri aquifer at the volumes and rates applied for by Creswell will have negligible adverse effects on that water source and that any effects on te mauri o te wai can be managed through an appropriate kaitiaki involvement by local hapū and Te Rūnanga o Ngāti Awa.

[320] The application to vary conditions of the existing land use consent to allow for the expansion of the existing water bottling plant at 57 Johnson Road, Otakiri, was appropriately made and assessed as a discretionary activity. We have found that the adverse effects of the proposal can be mitigated to an acceptable level by the implementation of a suite of consent conditions, with the exception of the effect of truck movements to and from the plant on 58 and 58A Johnson Road where effects may remain moderate after mitigation. Adverse effects on rural character and amenity are within appropriate ranges for a rural processing activity in this location.

[321] For these reasons, the majority of the Court decides that the water take application and the variation to land use consent conditions applied for can be granted with conditions. In both cases, we direct the parties to submit an agreed final set of conditions. If any details within these conditions remain in contention between the parties, these are to be addressed in submissions for consideration by the Court prior to issue of a final decision.

Commissioner Kernohan

[322] My decision is different to that of Judge Kirkpatrick and Commissioner Buchanan. I am of the opinion that the water take application and the variation to land use consent conditions applied for should be declined. I recognise that mine is the minority view.

[323] I understand the position taken by my colleagues and support the general tenor of their decision save for those issues identified below.

[324] My concerns are not about the water take per se but about the adverse effects on the environment of the end use of plastic bottles manufactured on site; and that the activity status for the resource consent application should have been considered as an industrial and therefore non-complying activity with wider public notification.

[325] My reasons are as follows.

Plastic Bottle Manufacture

[326] Creswell NZ Limited proposes to expand the existing water bottling plant located at 57 Johnson Road, to:

- Upgrade the existing bottling line from current maximum capacity of 8,000 bottles per hour, to a maximum capacity of 10,000 bottles per hour; and
- Install two new high-speed bottling lines, each producing 72,000 bottles per hour.

[327] Current production is 8000 bottles of water per hour. The new total will be 154000 bottles per hour. This equates to 3.7 million bottles per day and 1.35 billion bottles per year for the next 25 years.

[328] I set out the purpose of the Act in s 5:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while —
>
> (a) sustaining the potential of natural and physical resources (excluding

minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[329] The planners are agreed that if the Court considers it useful to resort to Part 2 of the Act in order to address a perceived gap in relation to s7(b) matters, that it would be appropriate to consider all relevant Part 2 matters. This includes how the project, considered overall, would meet the sustainable management purposes of the Act.

[330] In addition to s7(b), the efficient use and development of natural and physical resources, I consider s7(aa) the ethic of Stewardship; s7(c) the maintenance and enhancement of amenity values; and s7(f) maintenance and enhancement of the quality of the environment are also relevant.

[331] The adverse effects on the sustainable management purposes of the Act of the manufacture, use, and specifically the disposal of plastic bottles is pollution with widespread environmental damage to fauna and flora. Plastic bottles among other plastic products are almost entirely not bio-degradable and while on occasion they are suitable for re-cycling and re-use, ultimately do not break down beyond micro-plastics. They end up at best in various states in landfills and at worst in eco-systems where they have considerable ongoing adverse effects on those systems.

[332] The Court heard very little evidence from both appellants and respondents about the consequences for the environment of creating 1.35 billion new plastic bottles per year over each of the next 25 years or of any proposed actions to avoid, remedy or mitigate any of the pollution effects on the environment of the production of such numbers of plastic bottles. There appeared to be a general view that as water bottling is a legal activity there was no more to be said about the environmental impact of such production.

[333] Creswell expressed little concern for the life cycle of the new plastic bottles they are creating nor of the final destination of their disposal. When asked, Mr Gleissner made general remarks about re-cycling and the life-cycle of plastic bottles prior to going to landfill or wherever. No information was provided about responsibilities for re-cycling plastic bottles or the potential of bio-degradable or

compostable water containers and any possible future development or use of such. No comment was passed on other methods of delivering water. Apparently Creswell accepts no responsibility for the disposal (or apparently even the re-cycling) of the plastic bottles manufactured by them, once used for carrying their water.

[334] It was remarkable that such a major adverse environmental effect (the pollution caused by plastic bottles) was not considered in Mr Frentz's AEE and was not addressed in any significant way by any one of the parties.

[335] It has been argued that concerns about the production of plastic water bottles is beyond the scope of the Court in determining whether to grant an extension of the resource consent to allow the expansion of the water bottling plant (ref *RJ Davidson Family Trust v Marlborough DC*). In my opinion the Court is responsible for interpreting and determining questions of environmental law as directed by the RMA. Clearly the sustainable management purposes of the Act especially under s7 are under challenge from this proposal.

[336] I accept that trillions of plastic bottles are manufactured world-wide on a daily basis. However, the purpose of the Act is to promote the sustainable management of natural and physical resources. Allowing the creation of products that will clearly add to current pollution in the environment without any commitment to avoid, remedy or mitigate the pollution is against the purpose of the Act.

Activity Status

[337] The manufacturing plant proposed for Otakiri is wholly assigned to the industrial manufacture of new plastic bottles. Although petro-chemicals are used in the manufacture of plastic bottles, my concern is not in this instance with climate change or the carbon emissions created by waste. It is about environmental pollution.

[338] The purpose of the original resource consent of 1979 to take water was changed in 1991 to add the words "and commercial bottling of water for export and domestic sale". It read "For the purpose of orchard and shelter belt irrigation and frost protection and commercial bottling of water for export and domestic sale on the property Robertson Farms, Johnson Road, Otakiri".

[339] The bottling activity was begun in 1994 and the water take for bottling was increased in 2011 through a change in the resource consent. An additional resource consent to drill a new bore was granted in 2016.

[340] The requested variation to the current resource consent will increase the output from the current water bottling activity from 8000 bottles per day (185000 bottles per permitted sixteen-hour day) to 3.7 million bottles per 24-hour day, an increase factor of 20.

[341] In my view it is highly unlikely that the initial granting of the resource consent in 1991 to take water for orchard and shelter belt irrigation and frost protection and commercial bottling of water could or would have anticipated as stated in condition 1(d) of the consent the extent of "a major expansion of the plant or updating of plant machinery" by a factor of twenty (20).

[342] There is no remaining use of water for horticultural activity on site. The kiwifruit orchard, the principal purpose of the original resource consent is now completely gone as has the need for irrigation and frost protection.

[343] Therefore, in my opinion the proposal is not a minor variation of an existing resource consent, it is a substantial change and expansion of one part of the original consent well beyond the scope or reasons for that original consent. A new resource consent is required.

[344] It is only in the last decade that drinking bottled water has become such a ubiquitous and apparently fashionable activity worldwide. It is clear this application to vary the resource consent is a response to this apparently escalating new market opportunity.

[345] Finally, in my opinion, water bottling is not a rural production activity or use per se, nor is mining, or any other extractive activity, rural production per se. The use of manufacturing equipment, pumps and production lines is all industrial. There are no rural productivity benefits from drawing water, bottling it directly and transferring it elsewhere. Water can be available from many locations (as can coal or gold). It is not exclusively a rural production activity.

Conclusion

[346] I find that the pollution created from the production and specifically end use disposal of plastic water bottles does not meet the objectives and policies of the RMA. Creswell has not provided any evidence as to how the pollution effects of their production and disposal of plastic bottles can be avoided, remedied or mitigated.

[347] I find the proposed water bottling plant is a new industrial use and therefore a

non-complying activity. Any new resource consent application for this proposal should be applied for under this activity status and be publicly notified.

By the Court:

D A Kirkpatrick **Environment Judge**	**I Buchanan** **Environment Commissioner**	**D Kernohan** **Environment Commissioner**