2005 SALMON LECTURE

Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*

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Last year's decision in *Aoraki Water Trust v Meridian*[2] related solely to the water in Lake Tekapo, however, the Court's views as to the nature and effect of permits are relevant to the allocation of all public resources managed under the RMA. In particular: surface and ground water, geothermal resources, coastal space, the assimilative capacity of air and water for absorbing pollutants, navigation rights on the surface of rivers, lakes and in the sea and river and coastal marine area ("CMA") materials (e.g. gravel and sand).[3] The decision has not been appealed, however the Court's conclusions will inevitably be considered by the higher Courts at some point and have already been reflected to a limited degree in amendments to the *Resource Management Act* 1991 ("RMA").[4]

Whatever the ultimate interpretation of the decision, it has immediate implications for how Regional/Unitary Councils and the Environment Court manage the allocation of public resources. Whilst the decision is not binding (because no declarations were made) it must be regarded as "highly persuasive". The "scope" and effect of the decision are however somewhat

unclear and it will therefore require careful interpretation and application.[5] Care will also need to be taken in attempting to apply some aspects of the decision to contexts other than water in a lake. In this paper, I consider the place of allocation under the RMA, the findings and reasoning of the High Court in *Aoraki*, some previous case law, some points of debate and residual uncertainties. I will also discuss the practical implications of the decision for resource managers.

SOME BACKGROUND

Lake Tekapo is a natural lake which was dammed to provide enhanced storage for hydro generation purposes. The Orders-in-Council which preceded the 1991 resource consents gave virtually exclusive rights to all waters upstream of the Waitaki Dam to Meridian's predecessors (subject to an express allocation for irrigation during the term of the Orders).[6] The 1991 consents granted under the *Water and Soil Conservation Act* 1967 ("WSCA"), replaced the Orders-in-Council (which had by then expired) and became deemed water permits under the RMA. They did not and probably could not include an allowance for irrigation.[7]

The consents provide for the control of the levels of Lake Tekapo and the taking and diversion of waters from Tekapo in the vicinity of the control structure which dams the natural outlet to the Tekapo River. The consents for taking diversion and use do not limit average rates of take, or set a maximum annual or seasonal volume of take. There is no limit on how often the maximum rates may be reached. They prescribe maximum rates of take/diversion/use well in excess of mean inflows. Accordingly, if those rates could be utilised 365 days per year, this would result in taking/diversion well in excess of the annual inflows into the lake.[8]

Neither the Consent Authority decision or the permits are expressed as granting exclusive rights to the waters in the lake or upstream. Nor is there any consent which expressly provides a right to use the water in the lake for the purpose of storing latent energy to be later used for generation. The consents to *use*, are to use water **from** the lake at the power stations downstream of the lake, rather than to use the waters **in** the lake itself.

Aoraki applied for consents to take and divert water from Lake Tekapo via Burkes Pass, to another catchment for irrigation purposes. Meridian submitted in opposition and had also resisted earlier applications by others (downstream of Tekapo) to take ground water for irrigation. It claimed that the resource was already fully allocated to it and that accordingly, no more consents could be granted. It also claimed that there was no water for the Waitaki Allocation Board to allocate upstream of the most downstream of its stations (Waitaki) because all contributing waters upstream of that point are fully allocated.[9]

THE ISSUES

Aoraki inter *alia* sought a declaratory judgment that further permits could be granted to take and divert water from the lake. It argued that the potential effects on Meridian needed to be weighed through the consent process, but were not an absolute barrier to the grant of consent. It also sought a declaration that the permits did not prevent the Waitaki Allocation Board (or the Regional Council) from making provision in its Allocation Plan/Regional Plan allowing for further permits to take water from the lake to be granted as controlled, discretionary, or non-complying activities.

Underlying both questions, was the critical issue of whether Meridian's permits provide it with a legal upstream priority (legal allocation) as well as a practical (downstream) priority. That is:

> Do Meridian's permits give it an exclusive right to all of the waters in Tekapo or simply a right/permit to take/divert waters from Tekapo and then use that water downstream?[10]

The Court in *Aoraki* referred to the author's submission that "the distinction between the concept of a right and a permit lies at the heart of this case". In reality however, the critical issue was not right versus permit, but "*A right to what?*" and "*What sort of right?*" An exclusive right to property, or a right to use or interfere with the commons? A right to take water **from** Lake Tekapo at the point of take, so as to use it downstream, or a right to the water **in** Lake Tekapo and upstream? A right to take and use thereby depriving others at and downstream of the point of control, or a conditional guarantee to the waters in the lake?

Clearly a water permit provides a permission and therefore a right to interfere with the resource and clearly that results in a practical downstream priority for the holder over **downstream** users or potential users. The issue for the Court was whether it also provides a legal entitlement to exclude others from taking water elsewhere within the same water body and **upstream** (i.e. at points other than the point of control).

KEY FINDINGS

The Court found that Meridian's permits are not just permissions, privileges or bare licences, and provide *rights* not only to use and take the *property* (the water **from** Lake Tekapo) but also a right to *exclude* others from taking the "same" water from the lake. It found that they provide a right in priority to the water **in** the lake [seemingly] up to the maximums specified in the permits.[11]

The Court's finding that a water permit provides an exclusive right in

property, led to an apparent finding that the effect of the permits was to *allocate* the waters **in** the lake rather than just what arrives at the points of control specified in the permits. It also implicitly proceeded on the basis that in this case, the particular permits "fully allocated" all of the water in Lake Tekapo for the term of the permits. In doing so, it presumably found that the extent of the allocation was defined by the maximum rates specified in the permits.[12]

The Court then reached its second critical conclusion that:

> Where a resource is fully allocated in a physical sense … the consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered …[13]

It concluded that the RMA does not include such specific power.[14] It also found that Regional Plans cannot provide for further grants of a "fully allocated" resource except via ss 68(7) and 128 (the review of consent conditions to enforce minimum flows, maximum rates of abstraction etc, incorporated in a rule in a Regional Plan).[15]

The nub of the *Aoraki* decision, is the Court's primary proposition that a **permission** to take **from** a lake creates a **legal right of priority** (conditional guarantee) to the waters **in** the lake. (Some will undoubtedly argue that the decision also implies a right to contributing waters upstream of the lake.) The secondary proposition, that where a resource is fully allocated a Consent Authority cannot later reduce the availability of the resource to existing consent holders (by granting further consents or through rules in a plan), depends upon the first.

The proposition that one shouldn't grant more consents when a resource is fully allocated is uncontentious (and indeed was not in dispute) The aspect of the decision which I suggest remains open for debate, is the founding

proposition that a water permit brings with it an exclusive right to property in water from the same source other than at the point of control (the point of damming, taking diversion and use). Leaving that debate aside, the other critical question is what the Court meant by "full allocation" and how these words will be interpreted in other cases and in other contexts (e.g. a river, an aquifer, assimilative capacity of air or water etc).

POINTS FOR DEBATE

The Court's conclusions will undoubtedly be further litigated in other contexts. Some key questions which arise are:

- Did Parliament intend water permits to provide exclusive legal rights in property as well as a practical right priority?
- Is there property in water?
- Does a permission to take water from a lake and use it downstream "necessarily" assign exclusive rights to that volume of water in the lake?
- Was it intended that consents (other than coastal occupation permits under s 122(5) and (6)) could provide a legal exclusion?
- If so, should such exclusion be by implication (as the Court found here), or must/should it be expressly provided for in the consent?[16]
- Can permits to take or use a public resource ever restrict exclusivity?[17]
- Given that it was not in dispute that there should be no further grants of a fully allocated resource, was it necessary for the Court to resort to common law principles of non-derogation of grant and legitimate expectation?
- If the principle of non-derogation of grant is to be applied, how "*substantial*" must the interference be before the prohibition comes into play? (Is there any discretion left to the Consent Authority to

determine acceptable/sustainable interference?)[18]

- Is it only effects on availability which trigger the principle or is it any effects on the value of the consent.[19]
- Is the allocation (rights in property) limited to waters from the same immediate source (in this instance the lake) or does it extend to all (upstream) contributing waters?
- How is a particular allocation defined and measured?
- How does one define and measure "full allocation"?
- Is the principle of non-derogation of grant applicable outside of the context of "full allocation", or is any "substantial" effect on the availability of the resource to existing consent holders prohibited?

PREVIOUS CASE LAW AS TO THE NATURE OF RIGHTS AND PERMITS

Surprisingly, the nature and effect of water rights and now water permits has never been conclusively determined by the higher courts. In my 2003 paper *Allocation of Water Between Productive Uses*, I outlined case law under the WSCA, relating to the nature of water rights under that Act and some subsequent decisions as to the effect of permits under the RMA.[20] The effect of those decisions can be summarised as follows:

- Water is not property[21].
- "Water rights" were privileges[22].
- Permitted users also enjoy a privilege not a right[23].
- Water rights provided a practical, not a legal priority.[24]
- They were not a guarantee of the quantity specified in the permit.[25]
- They were subject to the subsequent grant of consents to others to take from the same source.[26]

- They provided a right to object to later applications to use up stream/up gradient water, but were not a legal right to exclude others from using the resource.
- The grant of consent has not previously been held to create a legitimate expectation or to create a fiduciary duty or quasi contract.
- There was no legitimate expectation that a Regional Council would not impose minimum flows or maximum rates of use thereby reducing the amount of water available to an existing consent holder.[27]
- A distinction has been drawn between effects on the availability of a resource to existing users, versus effects on the cost or ease of obtaining the resource.[28]
- Where there are competing *applications* they must be processed on a first come first served basis and the applications must not be compared.[29]
- A later consent cannot interfere with the conditions of an earlier consent[30].
- The effect of a new proposal on existing consent holders must be considered as an effect on the existing environment[31].

WHAT CHANGED IN 1991?

Much of the case law cited above, was established under the WSCA, which had as its focus the multiple and most beneficial use of water.[32] Except for the greater emphasis on meeting environmental bottom lines, I suggest that the sustainable and efficient management focus of the RMA is little different from the pre 1991 position. The restrictive presumption applying to public resources, along with very limited existing use rights is also essentially the same approach as before. Indeed, the only significant changes are that: *water rights* have become *water permits*, sustainable management and efficient use has replaced multiple use and most beneficial use, s 122 sets out the

"nature of a resource consent" and Regional Councils now have the ability to implement statutory plans to guide allocation decisions. [33]

Although the basic regime applying to water is, fundamentally the same under the RMA as under the previous legislation, the Court in *Aoraki* adopted a rather different approach from that signalled in previous decisions by the Courts. It is not entirely clear whether it based that approach solely on the scheme of the RMA or whether it was of the view that this was also the position under the WSCA.

ALLOCATION UNDER THE RMA

Unlike the fisheries legislation and the *Crown Minerals Act* 1991, until recently it was not clear whether the RMA involved allocation at all. Its purpose is "sustainable management" and there was, until 2003, no express power to allocate or (with one exception) to provide for exclusive use of public resources.[34]

Indeed, until recently the word "*allocation*" did not appear anywhere within the RMA. Since 2003 it appears in relation to Aquaculture Management Areas and since 2004 in relation to the special procedure and powers of the Waitaki Allocation Board. (That body has been tasked with preparing an *allocation* plan.) Most recently, the *Resource Management Amendment Act* 2005 ("RMAA 2005") has made it clear that Regional Plans may "allocate" between types of activities and also acknowledges indirectly, that resource consents allocate.[35] There is however no definition of allocation, and I suggest a degree of confusion between "allocation" and "privatisation" .[36]

Notwithstanding that allocation was not expressly referred to in the Act, the duty of local authorities to sustainably "manage" public resources, to

"control" their use and to grant permits to use and/or appropriate resources, inevitably results in at least a physical allocation and practical priorities. However, allocation between private users has not, until now, been an express function or power and has been more of a by product than an objective of the management of natural resources.

As Associate-Professor Skelton has said, the consent process "is not and never was intended to be a resource allocation process".[37] It is I suggest, about management of the use of resources rather than the allocation of rights in property. The allocations which do occur are practical rather than legal in nature.

The consent process has undoubtedly become the principal mechanism of *prioritisation* between private users. Until now, Plans have largely focused on setting sustainable limits to use (e.g. by minimum flows and minimum quality rules). Most have provided little guidance on allocation between private users of public resources and few have even prioritised allocation of resources between types of use.

Regional Plans can determine how much of a public resource is available to be allocated after bottom lines are met and can establish policies and rules to guide the allocation between private users of public resources. They can now *allocate* (or prioritise) between **classes** of activity. They do not however, and probably cannot, allocate between **persons**. It is the resource consent process which establishes the final allocation between persons.[38] Whilst Plans can now allocate between classes of activity, in practice they can probably only do so by making classes of use, permitted or controlled activities. Accordingly, to a large degree, Plans will not allocate, they will only guide allocations (prioritisation rather than allocation). The consent process will remain the allocation mechanism for discretionary and non-complying activities, but that will be guided by policies which prioritise.

WHAT IS ALLOCATION AND HOW DOES A PERMIT ALLOCATE?

I suggest that a permit allocates by providing a legal ability to prevent others (e.g. downstream) obtaining a resource, rather than by providing a right to property in the resource, or a guarantee that the resource will be available. There is a practical rather than a legal priority. The distinction is fundamental.

Allocation must logically be for a defined quantity of a resource (area, volume, and/or rate of use) at a particular time or situation and at a particular place or area (e.g. at particular flows in a particular part of a river). Permits authorise and define the extent of interference (physical allocation) by particular persons for a particular duration and may limit the interference to particular times or seasons, or particular situations of flows or receiving water or air quality.

There is no doubt that a permit results in a practical allocation of resources and the creation of practical priorities. A permission to use a resource provides a legal permission/right to physically interfere with or prevent use by others. In that sense, there is a physical allocation of the resource and a practical priority. For example permits to take water from a lake and/or to store water in it, provide a practical and very valuable priority over those **downstream**, who cannot take what has already been taken, or use what has been delayed by storage. Similarly, a coastal permit may provide a permit/right to occupy an area with a marine farm, which thereby in practical terms excludes others from marine farming in the same space. This is the case even though the permit may not provide for legal exclusion in terms of s 122(5).[39]

The significance of the *Aoraki* decision, is the Court's implicit conclusion that in addition to the practical (downstream) priority provided by a water permit, there is also a legal right to the property in water **in** the lake, and

a resultant allocation of **contributing** waters up to the rates or volumes specified. In other words in the Court's view, the allocation is not just a practical allocation but involves the allocation of a right to property, not just at the point of control or interference, but also in respect of water elsewhere in the water body (and potentially upstream).

THE COURT'S RATIONALE FOR EXCLUSIVITY

The Court's conclusion that water permits provide exclusive rights in property (water) in the lake and therefore allocate property in the water in a water body, was not implied from interpreting the particular permits, but from considering the scheme of the RMA.[40] Indeed, neither the details of the permits in question, nor the decision granting them, were analysed in any detail in the decision.[41]

The Court in effect found that treating water permits in this way was required for sustainable management and efficient use and development of resources. It noted that permits are for a fixed term and allow the holder to remove/use/impede property (water). It observed that permits are "granted" and concluded that this was the language of *rights*.[42] The fact that permits are assignable and have value also weighed with the Court.[43] The Court found that a water permit was similar to a "profit à prendre".[44]

The Court also relied on Richardson P's obiter comments in *Fleetwing* as justification for the conclusion that permits to take and use water *necessarily* exclude others from taking or using the **same** water.[45] Finally, citing an Australian decision it concluded that the resource consent system was a resource licensing system akin to a fishery quota system – "What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licences".[46]

IS WATER PROPERTY?

The critical issue is whether a permit provides an exclusive right to property in the contributing waters (as the High Court concluded) or whether it is simply a very valuable but non-exclusive right to utilise or interfere with a public resource at the point of control (practical or legal priority?). The key to this, is firstly whether water is *property* and secondly, whether a *permit* necessarily provides *exclusive* rights to that property, in **contributing** waters.

Section 122 provides that a permit is neither real nor personal property[47] as Justice Potter observed in *Hume v Auckland Regional Council*, the sections referring to the effect of resource consents "merely refer to the manner in which resource consents may be dealt with in certain situations, which reflect some of the [incidents] of real or personal property rights, subject to the express limitation of the subsections, **but do not confer property rights**".[48]

Ian Miller observes that "Parliament's object in legislating that consents were neither real nor personal property seems to have been to exclude any common law baggage and to provide itself with a clean slate that it would fill by other features in the Act … It is the Act, the provisions of any relevant plans and the terms and conditions of a given consent that determine its legal incidents."[49]

The Court in *Aoraki* sidestepped s 122 (and the conundrum of finding permits to be property which is neither real or personal) by finding, not that a water permit was a property right, but rather that it provided a right to the property in the water "owned" by the Crown.[50]

I respectfully suggest, that water (and other public resources) are not "property" which are "owned by" the Crown.[51] Rather, they are a public resource (the "Commons" if you like) which the Crown has control and stewardship of. That control has then been delegated to Regional and

Unitary Councils under the RMA, to manage the resource sustainably and efficiently.

Halsbury Laws of England referring to the position at common law states that:

> Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only a public right in the sense that it is public or common to all who have a right of access to it.[52]

Section 21 of the WSCA, vested the sole right to take, use, dam and divert water in the Crown and thereby extinguished previous common law rights to water.[53] I suggest however, that this vesting did not convert water into property, nor make the Crown the "owner" of the water. The Crown has the sole right to interfere with, use and manage the resource. It has delegated that right under the RMA to Regional Councils, enabling them to allow others to temporarily interfere with or utilise the public resource for private purposes. In doing so, Parliament has used the language of permissions rather than property rights and in 1991 further made it clear that those permissions are not real or personal property. It has required Councils when granting these permissions, to *inter alia* provide for "the reasonably foreseeable needs of future generations" and to have particular regard to "the efficient use and development of natural and physical resources". I suggest that none of this is indicative of an intention to treat water (or the assimilative capacity of air or water) as property. In my respectful opinion, the RMA is about sustainable management of resources, not the allocation of property, or the granting of rights in property.

IS LEGAL EXCLUSION NECESSARILY IMPLIED?

The High Court in *Aoraki* placed considerable reliance on comments by Richardson P in the Fleetwing decision where he noted that "the applications were not identical, but they applied to **essentially the same area of water** and [therefore] the grant of one **necessarily** excludes the other".[54] These comments reflected earlier comments by Barker J in *Auckland Acclimatisation Society v Sutton Holdings Ltd* who stated that "In the absence of a water management plan, it is a necessary consequence of the statutory arrangement that a grant to one person may deny the expectation of a subsequent grant to another applicant".[55]

In *Aoraki* the High Court found that "where there are competing claims **for the same water** flowing out of a lake the grant of consent to one necessarily excludes the other".[56] But is it really the "same water" and is the exclusion necessary? Underlying the Courts conclusion is an implicit assumption that a right to control and/or take or divert what flows **out** of a lake at the point of control, must *necessarily* provide a right to what is **in** the lake. Indeed, I suggest that this is the only way that one can find that a permit to interfere with the resource at one point, provides a legal right to exclude later applications for the resource at another point.

I respectfully suggest, that a right to take, use and interfere with the flow of water does not *necessarily* or logically include a right to exclude others from using water from the same source. It remains my view, that a permit to take, does not allocate contributing waters, but rather allocates what arrives at the point of control (a practical priority not a grant of a right to upstream property). I also suggest that a party seeking to take water elsewhere in a lake (or aquifer) is not seeking to take the *same* water as the consent holder. Rather, each is taking or seeking to take, different water out of the same source (same storage). If there is any "necessary exclusion", then in my view it (like the water) flows downstream.

This may be contrasted to the situation with coastal occupation permits, where the grant to one does necessarily exclude a grant to another in a practical sense. One cannot have two marine farms occupying the same space. However even in that situation, whilst there is undoubtedly a practical exclusion, there is no "necessary" **legal** exclusion. Indeed, for coastal permits, s 122(5)(b) make it clear that any legal exclusion must only be where that is **necessary** and where that is **expressed** in the consent (i.e. where there is clear evidence that this was what was intended).

Even where a coastal permit does not provide for a legal exclusion, the practical exclusion remains, insofar as one is dealing with the **same** water space. I suggest that this is the reason why "the grant to one necessarily excludes the other" and this is why coastal occupation is effectively a first in, first served regime. With respect, that is what I believe Richardson P was referring to in *Fleetwing* when he referred to "necessary exclusion".[57] I also suggest that this is what Barker J was referring to in *Auckland Acclimatisation Society v Sutton*. His Honour was I believe, referring to the necessary practical exclusion of later applicants, who may find that it is more difficult to obtain consent because the resource is already being used by others. [58]

A permit to take water from a river provides a right to prevent water flowing downstream and thereby a right to deprive other potential users (a legal right creating a practical priority). There is however no practical exclusion **upstream** of the point of taking or control, since usually the permit does not (and probably cannot) provide the ability or right to influence what arrives at the point of control (water tends to flow downhill). Accordingly, unlike the *Fleetwing* situation, there is no "necessary exclusion" in a physical sense and therefore cannot be any "necessary" exclusion in a legal sense. If there is now a legal exclusion as a result of the *Aoraki* decision, then I respectfully suggest that it is a creation of judicial policy rather than necessity or Parliamentary intention.

The Court found that such exclusion was implicit in the scheme of the

RMA.[59] However, it remains unclear just what is it in the scheme of the RMA which implies that the grant of a permit to one person to take water **from** a lake (or aquifer) *necessarily* excludes others upstream from preventing some of that water arriving. The alternative interpretation (rejected by the Court as being "chaotic")[60] is that Parliament intended Consent Authorities to define the sustainable limits to a resource and then, guided by Part II of the RMA, to decide through Plans and consent hearings, how much effect (if any) a later applicant for water from the same source should be permitted to have on existing users in relation to that particular resource.[61]

The existing user (whether consented or permitted) does of course have rights of submission and appeal in terms of Plan provisions and other persons applications. It is also clear, that the effects of a later proposal on existing users must be taken into account as an effect on the existing environment. With respect, if this discretionary system, is "chaotic" (and I don't accept that it is), then that chaos is inherent in the legislation. [62]

Underlying all of this, is a higher level philosophical/political debate as to whether the RMA is about management of resources or allocation of property rights. Should it provide (or be interpreted to provide) the highest possible level of protection of existing investment and "property rights", or should decisions about the efficiency and effects of later applications or existing users be left to Councils and the Environment Court applying the purpose and principles of the RMA? The High Court in *Aoraki* has sided firmly with the protection of investment[63] based on implied rights in property, implemented by an implied restriction on the exercise of discretionary judgment.[64] However, I for one remain unconvinced that this is what Parliament intended in 1991, or in 2004 when it passed the Waitaki amendments.[65]

In essence, the Court implied to Parliament an intention to provide water permit holders with exclusive rights in property upstream of the points of control. The Court then used that to imply to the consent authority an

intention to grant Meridian's predecessor an exclusive right to all of the water in Lake Tekapo and to fetter its own future discretions.

The Court viewed a consent as quasi-contract between the grantor and grantee. It referred to [an implied] "shared purpose" and "common intention" of the consent authority and the applicant. It also speaks of the "assurance"/"commitment" provided by the Consent Authority (Canterbury Regional Council ["CRC"]) when it granted the consents and a "common assumption" that it would not later erode the value of the right, by granting consents to others. In particular, it concluded that the Council's purpose in granting the permit: "was to secure to Meridian the right to use all the available water in Lake Tekapo".[66]

This purpose and the assurances and commitments must have been implied into the consents, since there was certainly no express indication in the decision or the consents themselves of any "common intention" to that effect.[67] There is no indication that the Council intended to grant exclusive rights to all the waters in Lake Tekapo for 25 years. The alternative explanation (implicitly rejected by the Court) is that CRC simply intended that later applications in respect of the waters in the lake or upstream waters would be dealt with on their merits, ultimately guided by an Allocation Plan.[68] Indeed, I suggest that it is very debatable whether in 1991 (pre RMA) the Council even understood that it **could** grant exclusive rights to upstream waters. Indications in case law until then had not suggested such an approach.[69]

THE COURT'S RATIONALE FOR THE NON-DEROGATION PRINCIPLE

The conclusion that subsequent consents should not be granted in situations

where a resource is already "fully allocated" is not contentious and indeed was not in dispute. The more difficult questions are: *What does a permit allocate and what is full allocation*? As outlined above, the critical part of the decision is the founding conclusion that the permits in issue allocated the waters in the lake, not just at the points of take and use. In other words, that they allocated the source of the water, not just what arrives at the point of control.

The Court based its "non derogation"[70] approach on a number of propositions. Firstly, as discussed earlier, it found that a grant of consent to one "necessarily excludes the other".[71] Secondly, it found that where a resource is "fully allocated", the grant of further consents would amount to "over allocation" and would be unsustainable (that was not disputed).[72] Thirdly, it referred to case law to the effect that one must not interfere with a "validly granted right of exclusivity".[73] Fourthly, it found that because in its view the permits conferred a right in property, the property law principle of non-derogation of grant applied. It found that the grant of further consents to utilise a fully allocated resource, would frustrate the implied purpose of the earlier grants.[74] Finally, it concluded that further grants would be in breach of the principle of *legitimate expectation*. It was of the view that the grant of consents to Meridian's predecessor to take and use water from the lake (and control its levels) necessarily created an *expectation* which Meridian was entitled to rely upon.[75] It rejected arguments that such an approach would be an unlawful fetter on the Consent Authority's discretion in relation to later applications. [76]

HOW DOES ONE MEASURE THE ALLOCATION

Having decided *what* the permits allocated (the waters in the lake) the Court then accepted Meridian's submission that the resource was "fully allocated"

to it.[77] In reaching that conclusion it needed to determine how much of the resource had been allocated by the permits. The decision however provides no guidance as to how the Court determined the extent of what had been allocated or how it determined that there had been "full allocation".

What apparently persuaded the Court, was the fact that the maximum rates of take diversion and use, exceeded the mean inflows to the lake by a very large margin. The Court seems to have been of the view, that this necessarily entailed an intention by CRC to allocate **all** of the waters in the lake to Meridian's predecessor.

Whilst the decision leaves the point open, there seems to have been an unstated assumption, that a permission to take or divert up to a maximum rate or volume defines the extent of the allocation in a permit (a "face value" or theoretical maximum volume approach). On this approach, one simply multiplies the maximum daily rate by 365 to determine the annual volume allocated. Presumably the "total allocation" would be defined as being the sum of all of the theoretical maximum volumes that could be taken over any one period of time, if all permit holders took up to their maximums at all times.[78]

WHEN IS A RESOURCE "FULLY ALLOCATED"?

The Court expressly (and repeatedly) limited the concept of "non-derogation of grant" to situations where there is a "full allocation".[79] This makes sense if one relies on the principle that one should not further allocate a fully allocated resource, since one cannot over allocate a resource at times or places when it is not fully allocated. However, as Trevor Robinson points out, if one takes a property rights approach (as the Court did), then there seems no logical reason to limit the non-derogation principle to situations of full allocation.[80]

In any event, whether the property rights based approach is followed, or whether one simply adopts the approach, that over allocation is contrary to sustainable management,[81] the key question is: *What is full allocation*? Perhaps fortunately, the Court did not provide any clear explanation as to what it understood by the concept of "allocation", let alone "full allocation". Nor indeed did it provide an explanation as to why it considered Lake Tekapo to be fully allocated. The Court seems to have been of the view that if the maximum possible take exceeds average flows, then that necessarily implies that the resource is fully allocated. However, that is not entirely clear from the decision and accordingly this point remains to be decided by the Council and the Environment Court in other cases.

When one is dealing with coastal space, identifying "full allocation" is easy. Usually, two or more persons cannot occupy the same area of coastal space at the same time for the same or similar purpose. Accordingly each coastal permit will usually fully allocate (in a physical sense) that part of the CMA referred to in the permit. (A practical priority created by a legal permission/ right to interfere.)

Defining full allocation in relation to flowing and variable resources such as water and air is more problematic. Is the point of "full allocation" (in time, space, quantity and quality) a matter of fact and law to be implied from the terms of all the relevant consents, or is it a matter of policy to be defined by Plans and the consent authority? Does "full allocation" occur at the point at which (substantial) interference with existing users begins to occur, or is at the point (in time, place, flow, level or quality) at which the resource reaches its sustainable limit?

Undoubtedly, some will argue that the *Aoraki* decision implies the former. In my view, the latter is preferable and the former interpretation is not required by the decision. I also suggest, that what amounts to full allocation should be determined on a case by case basis and will depend upon Part II of the RMA,

the particular nature of the resource concerned, the terms of the consents which have been granted and the policies and rules in the relevant Plans.

On this view, full allocation occurs at the times/flows/places when further use/abstraction would be unsustainable. The point of "full allocation" is (or at least should be) a matter to be determined by the Consent Authority guided by the provisions of the relevant plans. In my opinion a regional plan can and ideally should define what a Council regards as full allocation at various times, places, flows or situations. That will then determine the allocatable volume of the resource. Where the Plan does not provide such guidance, the Consent Authority will need to sort those issues out in the context of consent applications. At some point it will need to decide that "enough is enough", but in my opinion there will seldom be justification for deciding that this is the point at which interference begins to occur.

For example, a Council could determine through its Plans that it will not grant any further consents to take water from a river or aquifer at the point where existing irrigators would be left with less than X% reliability of supply. On this approach the Council (and the community) determine via the First Schedule process what amounts to full (sustainable) allocation. The Council/community may determine full allocation to be at the point where interference first occurs (100% reliability) or beyond that point (less reliability for existing and new users).[82]

The difference between full allocation as being the point of interference between users versus the point of unsustainability (as defined by policy and consent decisions) is fundamental. If the first approach is adopted, then the principle of non-derogation becomes a universal principle.[83] This approach would have the effect that Regional/Unitary Councils will find that they have already unwittingly, over allocated, many resources for long terms.[84]

The "no interference"/no derogation approach introduces a prohibition,

often well before that is required in sustainability terms and thereby results in an inefficient use of the resource. It precludes, or at least minimises the prospect of sharing the resource between the most efficient users. To provide an illustration, in *Opiki Water Users v Manawatu/Wanganui Regional Council* the Court found that the aquifer in question had substantial capacity available for further takes, notwithstanding that further takes would interfere with existing permitted users (by requiring some to install deeper bores and/or pumps).[85] What this illustrates, is that if one regards the resource as fully allocated at the point where interference occurs, then it may be impossible to achieve the maximum possible sustainable and efficient use.

Under a "no interference" approach there will usually remain a volume of resource which could be sustainably used, but which will be unavailable because it will be deemed to be fully allocated well before it reaches it sustainable limits[86]. In my view a "no interference" approach cannot result in efficient use of the resource (this was implicitly accepted in the *Opiki Water Users* case).

DOES OR SHOULD THE NON DEROGATION PRINCIPLE APPLY OUTSIDE THE CONTEXT OF FULL ALLOCATION?

Assuming that the non derogation principle is upheld, it will undoubtedly be argued that the "principle" of non derogation of grant should apply even where a resource is not fully allocated.

Trevor Robinson suggests that "it is by no means obvious that the reasoning of the High Court is restricted to that scenario" (full allocation). He suggests that:

> … one can readily foresee other situations where, although a resource is not fully allocated, the subsequent grant of a water permit would

> devalue or otherwise erode the efficacy of an existing permit. … Take the hypothetical situation of a typical Canterbury braided river. A water permit application to de-water one braid of the river might effectively deprive an existing water permit holder downstream of the water it has previously accessed. **(Does it really matter that the whole river is not fully allocated?)**[87]

I agree that interference with existing consents can occur where there is less than full allocation. However, the "non derogation" principle was and in my view should, be limited to situations of full allocation. I also suggest that if the principle of "non derogation" is to be applied at all, then full allocation and full allocation should be defined by the relevant resource manager on the basis of the sustainable limits and efficient use of the resource, rather than being the point at which interference begins.

IS A RIGHTS BASED, FIRST COME FIRST SERVED SYSTEM EFFICIENT?

The High Court concluded that a system which leaves Consent Authorities with a discretion to decide the degree of acceptable effect on existing users, would result in a "chaotic" situation which would be "the antithesis of management".[88]

With respect, I suggest that a rights based, first come first served system, whilst orderly, simple and maximising investment certainty, is the antithesis of sustainable and efficient management and use of public resources. Quite simply, this sort of rigid first come first served approach, is an inefficient basis on which to give away a public resource for up to 35 years. It excludes later potentially more efficient uses for the term of the consent and minimises the prospect of equitable and efficient sharing of the resource and sharing of

the risks which come with the resource (e.g. the risk of drought years). It removes the resource manager's discretion and flexibility to properly manage the resource and replaces that with a near absolute protection of private rights. It means decisions made years ago (often without future needs in mind) will be "locked in" and new users locked out. How can such a system provide for the reasonably foreseeable needs of future generations, or allow for more efficient future uses?[89]

It goes without saying that there is a need to provide some degree of protection from existing investment, however in my view that can be achieved without prohibiting any "derogation" from the value of what has been granted. Adequate protection of expectations can be achieved by allowing the resource manager (the Council) to determine what amounts to full allocation in a particular instance (preferably guided by its plans). That decision will in turn require judgments about the degree of acceptable effect on existing users, the sustainable limits to the particular resource (full allocation) and the most efficient use of resources (including the physical resource represented by the existing investment). There are of course also rights of submission and appeal for existing users who feel that their needs are not adequately protected.

I suggest, that the removal of such decisions from local authorities, by reference to concepts founded on permits being rights in property, is neither necessary nor what Parliament intended when it introduced the RMA. Treating permits as giving first come first served rights of exclusion, as opposed to first in first served practical priorities, cannot in my view lead to the most efficient or beneficial use of public resources. Nor can it allow the needs of those communities closest to the resource to be properly taken into account. Thus, in the Waitaki situation, a rigid application of this approach would deprive the Waitaki Allocation Board of the opportunity to assess the equity, efficiency and sustainability of the existing use of water upstream of the Waikaki dam.

HOW WILL THE DECISION BE APPLIED?

Caution is required in interpreting and applying the decision. Firstly, no declarations were made. Secondly as discussed above, there are a number of critical points which (with respect) the Court has not clearly explained or which remain debatable. Thirdly the case was only about the waters in the lake, not the waters downstream or upstream of the lake. Fourthly, as set out earlier, Meridian's permits are rather unique (one might say spectacularly generous). Finally, the conclusions relating to legitimate expectation and non-derogation of grant, may be regarded as *obiter* (given that the High Court could have and did reach the same conclusion based on the undisputed notion that "over allocation" is contrary to sustainable management).

It remains to be seen whether the higher courts embrace the "exclusive property rights" and "non-derogation of grant" approach adopted in *Aoraki v Meridian*. In the meantime, the Environment Court will undoubtedly regard the *Aoraki* decision as being at least highly persuasive as to nature of permits to utilise in public resources. I have set out some issues the Court will have to grapple with. Far be it for me to attempt to predict the outcome of those future deliberations.

IMPLICATIONS FOR RESOURCE MANAGERS

The full implications of the *Aoraki* decision are unclear, however at least in the interim, Regional and Unitary Councils would be wise to adopt a cautionary approach and notwithstanding the views expressed herein, proceed on the basis that (unless and until decided otherwise):

- Water, coastal and discharge permits grant exclusive rights and create legally enforceable expectations of priority.

- Water permits to take from a confined water body such as a lake or aquifer provide a conditional but exclusive right to the waters **in** that water body up to the rates and volumes expressed in the permit.
- That notion **may** potentially be extended to all contributing "same source" waters which would otherwise be available to the permit holder.[90]
- The same logic may be applied to discharge permits for discharging to air or water. [91]
- The extent of the entitlement under a permit may be defined by the maximums in the permit.
- The Courts **may** find that total allocation of any particular resource, is the sum of all of the maximum rates or volumes of take authorised by existing consents at any particular point in time and place.
- Once a resource is fully allocated no further consents can be granted to take the resource at those times and places.
- It can be argued that the principle of non derogation of grant applies outside the situation of full allocation (however the, decision is not authority for that).
- It can be argued that "full allocation" occurs at the point (in time, place, flow or quality) that interference begins to occur. Again however, the decision does not require that.
- Councils may be (and in my view are) entitled to define full allocation as being at some different point.
- If the relevant regional plans do not provide guidance as to what the Council considers amounts to full allocation of a particular resource, that will fall to the consent authority and Environment Court to determine in the context deciding individual applications.

In short, Regional and Unitary Councils can no longer assume (as most previously did) that a permit is a mere permission which is subject to the later grant of consents to others. Nor can they assume that they will necessarily have the opportunity through the consent process, to later determine the degree of acceptable effect on existing consent holders, or to

allow more efficient uses to take place. The *Aoraki* decision may or may not be interpreted as removing or at least limiting that discretion. A cautious approach calls for efficiency and future needs to be addressed before or when consents are granted, rather than being left to later planning, later applications, or later litigation.

TIME FOR SMARTER MANAGEMENT

Given the potential implication of the *Aoraki* decision and given that it may be some time before it is re-litigated in the higher courts, how should resource managers react? The *Aoraki* decision provides a clear wake up call. Decisions made over the last decade or so may now come back to haunt! Given how the decision may potentially be applied, there is now an even more urgent need for much smarter management of public resources. I suggest that it is no longer acceptable (if it ever was) to allocate substantial quantities of public resources, for substantial periods without making proper provision for future needs.

There is case law to the effect that when granting water rights "due regard should be given to such future demands upon the water of that river or stream as are reasonably foreseeable"[92]. That approach is also implicit in section 5 of the RMA.

If the principle of "non-derogation" is confirmed in the RMA context, and/or if "full allocation" is defined as being the point at which interference with existing permit holders occurs, then consents once granted will lock up resources on a first come first served basis for many years. A resource, including contributing water or air, may also potentially be regarded by the Courts as being allocated to the extent of the sum of the maximums of all of the consents in effect. Accordingly, Consent Authorities will need to be vigilant to ensure that plans

are made and consents granted in a way which makes appropriate provision for reasonably foreseeable future needs.

I suggest that there are a number of management tools which Regional and Unitary Councils should be considering with some urgency, namely:

- Councils should determine for each particular resource under their management what is available for allocation after environmental bottom lines (minimum flows, minimum air quality standards etc) have been set and met.[93]
- Plans should be used to guide allocation through the consent process. For example Councils should establish through Plans what they regard as being the limits to allocation.[94] In particular what amounts to "full allocation" for a particular segment of resource at a particular time, flow or state of quality.[95]
- Plans should where possible prioritise between different classes of use of a resource.[96]
- Other options such as tradable permits, rostering systems and charges for water should be considered.[97]
- When granting permits for the use of public resources, Consent Authorities should take care as to how much of the resource is granted and for how long.
- Closer attention will need to be given to the maximum rates and volumes specified in consents. Consent Authorities should relate maximum rates, volumes/areas to proven needs and to efficiency.[98]
- Consent Authorities should make their intentions clear. Decisions and consents should specify whether *exclusivity* is intended and limit exclusivity where that is not intended.[99]
- Consideration should be given to shorter term consents to allow for potential later reallocation to more efficient uses or to reallocate as new needs come on stream. [100]
- Consideration could also be given to review conditions[101] which expressly provide for review of the allocation and for review of the relative efficiency of the use as compared to other later proposed uses.[102]

- In some cases it may be appropriate to grant consents on a "step down" basis (progressively limiting the right to use the resource as other uses of it come on stream).

CONCLUSION

Some of the key characteristics of "property" are definition, identification, transferability and exclusivity.[103] In *Aoraki* the Court found the missing link, "exclusivity" and also found water to be property. It was therefore able to find that a permit grants an exclusive right in property. That in turn enabled it to apply the property right concept of non-derogation of grant. Everything depended upon the Court's initial findings, that water was property, that a water permit *necessarily* incorporates a legal right to exclude others from using the same property, and that the water elsewhere in a lake is the *same* water as that at the point of take/control.

I have suggested that we are left with the following key questions:

- Is there property in water?
- Was there really any "*necessary exclusion*" in relation to waters upstream of the point of control?
- Was it intended by Parliament, that a water permit should provide a legal right of exclusion as opposed to a practical priority?

We come full circle: A right to what and what sort of right? Water from the lake or water in the lake? An exclusive right to property, or a conditional right to interfere with a public resource at the point of control?

With respect, I suggest that it is doubtful whether the intention which the Court implied to Parliament is in fact consistent with, let alone necessary for, *sustainable management* and *efficient use and development* of natural and physical resources. Indeed, in my opinion a property right based approach

and a consequent rigid, first in first served regime, is the antithesis of sustainable and efficient management of resources.

As Ian Miller has observed, the *Aoraki* decision "reveals the deficiencies of a system that allows an authority to allocate all water in the system without a plan that addresses all interests in water … [and he notes that] there is also now a growing dissatisfaction with the first come first served allocation principle".[104]

It is time that Parliament should make its intentions clearer. Does it want resources allocated on the basis of a rights based system or on the basis of sustainable and efficient management? Does it want the investment certainty provided by a legalistic rights based approach, or the flexibility provided by leaving the key decisions to resource managers (including the Environment Court)?[105] Or will it introduce a new market based system as it has done with AMA's?

The other critical debate will revolve around what "full allocation" means and how it is to be determined in different contexts. The *Aoraki* decision (and the RMAA 2005) provide a useful stimulus for these debates, however a lot more water will flow over the spill ways before we have any certainty.

1 The paper reflects and expands upon the 2005 Salmon Lecture delivered by the author in Auckland in July 2005; it has been updated to reflect the Resource Management Amendment Act 2005 ("RMAA"); the author was counsel for Aoraki in the proceedings; he notes that there are arguments advanced in this paper which the High Court rejected and aspects of the decision with which he respectfully disagrees; these personal views are presented to stimulate debate and are not intended to be disrespectful of the Court

2 ***Aoraki Water Trust and ORS v Meridian Energy*** CIV 2003 476 000733, High Court (Harrison and Chisholm JJ) 30 November 2004

3 Note however that the "allocation" amendments in the RMAA are limited to Regional Plans and do not include gravel and sand, use of the surface of water (except for CMA occupation) or assimilative capacity in relation to noise

4 In particular, ss 30, 67, 75 and 124A of the RMA as amended or inserted by the RMAA

5 See also the discussions by Trevor Robinson in RMJ March 2005 and by Ian Williams in NZLJ June 2005

6 There is a more detailed discussion of the background to this case and a discussion of allocation as it was prior to the ***Aoraki*** decision, in the author's article in RMJ November

2003, there is also a short summary of some of the background at the commencement of the *Aoraki* decision

7 It is difficult to see how a condition on a consent could provide for later upstream use by other persons; probably for that reason, the 1991 consent hearing did not result in a review of the adequacy of the irrigation allocation as would have otherwise occurred on the renewal of the Orders in Council; that was left to a proposed Allocation Plan

8 As the Court observed at para 15, it is impossible to take that volume, since as soon as the maximum rate of take/spill in a permit exceeds the mean rate of inflow, more water can be theoretically taken/spilled in any year than is actually available; in this instance, having maximums much higher than mean inflows is necessary in order to allow wet weather inflows to be fully utilised for generation and/or diverted to Lake Pukaki or Benmore for storage, but that ***permission*** does not I suggest imply, or require an allocation of any, let alone all of the water ***in*** the lake

9 Meridian's views were accepted by the Regional Council's Commissioners in a decision which is currently under appeal (***Grays Hill Partnership v Canterbury Regional Council*** RMA 842/03); the Environment Court also made obiter comments in declaration proceedings which lent some support to Meridian's argument (***Re an application by Meridian Energy Ltd*** C125/2003); see the discussion of that decision by the author in RMJ November 2003.

10 The Court did not express the issue in this way, however this was the essence of Aoraki's argument

11 See paras 26-31 and 46

12 The Court did not however make a clear ruling on any of these points (see paras 15, 30, 38, 47, 51)

13 Para 46

14 Paras 47-55 (Aoraki had argued that there needed to be an express power such as that in s 122, before a Consent Authority could fetter its future discretion by granting an exclusive right to upstream waters)

15 Paras 56-66

16 As must be the case with coastal occupation and sand and gravel extraction in the CMA – see s 122(5) and (6)

17 The Court of Appeal in ***Tram Lease Ltd v Croad*** [2003] 2 NZLR 461 (CA) at para 24 applied the principle of non-derogation of grant to situations where there is a "***substantial interference with the right of property which has been granted***"; leaving aside the question of whether water is "property", the *Aoraki* decision did not address what amounts to a "***substantial interference***"; is it an effect on availability of the resource which is more than de minimus, or more than minor, or must it be a significant effect?

18 That is: may a consent specify that it does not provide exclusive use and that it is not intended to give rise to any expectation that later upstream consents will not be granted if they would affect the availability of the resource to the consent holder?

19 Is the interference limited to effects on availability of the amounts specific in the permit, or does it extend to effects on **value** of the resource or cost of obtaining it? - as to the latter see ***Jordan v Marlborough Regional Water Board*** (1982) 9 NZTPA 129, 132 which distinguished between effects on availability and effects on accessibility, and see also ***Opiki Water Action Group Inc v Manawatu Wanganui District Council*** W 064/2004

20 RMJ November 2003; and see also the author's summary in ***The Water Regime*** chapter of Brookers Resource Management Volume 1A

21 Halsburys Laws of England, 2004 Reissue, Volume 49(2) para 47

22 *Auckland Acclimatisation Society v Sutton* [1985] 2 NZLR 94, 99 (CA)
23 *Opiki Water Action Group Inc* (supra)
24 *Auckland Acclimatisation Society v Sutton Holdings Ltd* [1984] 10 NZTPA 225, 334 (HC); *Stanley v South Canterbury Catchment Board* (1971) 4 NZTPA 63; and *Rotorua District Council v Bay of Plenty Regional Water Board* (No 2) (1984) 9NZTPA 453
25 *Stanley* supra
26 *Stanley* and *Jordan* supra
27 *Electricity Corporation of New Zealand v Rangitaiki Wanganui Catchment Board* W70/90 upheld in the High Court, Wellington, AP 302-90, June 1992, Jeffries J
28 *Jordan* (Supra) and *Opiki Water Action Group* supra
29 *Fleetwing Farms Ltd v Marlborough* DC [1997] 3 NZLR 257, 261 (CA)
30 *Dart River Safaris v Kemp* [2000] NZRMA 40, 447
31 *Contact Energy Ltd v Waikato* RC A4/2000
32 *Keam v Minister of Works and Development* [1982] 1NZLR 319
33 There is a certain irony, that under the Water and Soil Conservation Act 1967 there were "*water rights*" which the High Court (in *AAS v Sutton*) concluded were privileges, now under the RMA we have *water permits* which the High Court has concluded provide exclusive rights in property
34 Section 122(5) and (6)
35 New ss 30(4)(a) and 124A
36 New s 124A requires summing of allocations under consents, to calculate total allocation of a resource, however the RMA remains silent as to how the extent of allocation under individual permits is to be determined
37 Skelton, P *Project Aqua reveals flaws in Regional Planning* NBR 19 September 2003
38 The amendments to s 30 provide that Regional Plans may allocate certain public resources including water "*in any way*" but expressly refer to allocation between *activities* or types of *activities*, and they also preclude allocation of what has already been allocated by consents, except in anticipation of the expiry of the consent
39 This distinction between practical and legal priority was first drawn in the *Stanley* case (supra) and followed in *Rotorua District Council v Bay of Plenty Regional Water Board (No. 2)* (supra) where the Planning Tribunal found that while water rights do not give a legal priority to the grantee they may confer a practical priority: "*On the other hand a right to discharge waste into natural water does confer upon the holder a form of priority. The discharge might take up the whole of the assimilative capacity of the receiving waters; in any event the exercise of this right to discharge means that any other applicant for a right must necessarily take or use water of the quality which results from the discharge*"; this approach was confirmed by the High Court in *Auckland Acclimatisation Society v Sutton* supra; in both instances, as in *Fleetwing*, the reference to "necessary" priorities appears to be referring to practical rather than legal priorities
40 Paras 26-30, 34, 47, 55
41 The permits are discussed at paras 12-15 of the decision; the application, the decision and permits were all before Court as agreed facts and no party objected to the Court interpreting the permits
42 The Court obviously did not regard the change from "rights" to "permissions" in 1991 as being significant
43 I note however, that all of these characteristics would also apply to statutory permissions/ bare licenses, or to non exclusive rights to interfere with the resource; in particular, a permission (or right) to take whatever water arrives and thereby deprive others downstream

is a very valuable and usually transferable permission; one does not need to also imply an exclusive right to contributing waters in order to find value

44 Paras 28-30

45 Cited at paras 31-32

46 *Harper v Minister of Sea Fisheries* (1989) 168 CLR 314 at 325 cited at para 29 (I note however, that water permits unlike fisheries quotas, AMA permits, Crown minerals licences are not auctioned or sold nor is there a rental)

47 Therefore it is not property (there being no other class of property)

48 [2002] 3 NZLR 49

49 NZLJ June 2005 at 178

50 Paras 26 and 36

51 Para 26

52 Halsburys Laws of England, 2004 Reissue, Volume 49(2) para 47

53 Continued by s 354 of the RMA; *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1978] 1 NZLR 407, at 412 (CA); also see the discussion in *Environmental and Resource Management Law in New Zealand* DAR Williams QC (2nd ed) at 7.16 and 7.17

54 The *Fleetwing* decision was concerned with first in first served in terms of the processing of consents rather than priority of a consent holder over later applicants; it is also of note that these comments were only part of the "background" to that decision not part of the reasoning

55 Barker J also noted that: "*It may well be that the Act does implement a system of "first come, first served" which has the side-effect of* ***making more difficult*** *the task facing those who apply for a water right later. It may well be that such a system is the antithesis of orderly planning*" (I again suggest that he was referring to first come first served in the sense of a practical priority … "making more difficult" … rather than a legal right of exclusion)

56 Para 31

57 The same sort of "necessary exclusion" applies in relation to permits to take gravel or sand from a beach or river; these are akin to a profit à prendre and in relation to the CMA such a permit may be expressed to be exclusive by virtue of – s 122(6)

58 He upheld the Tribunals comments that: "*We are aware that in having rights granted to them now,* ***the appellants are in effect being given priority*** *over other owners of parts of the swamp, who may apply for similar rights in the future. The more the swamp is reduced in size, the more compelling the case of preservation of the remainder and the refusal of further rights. But that consequence is inherent in this kind of regulatory system*"; this reflected the comments by the Planning Tribunal in *Rotorua District Council v Bay of Plenty Regional Water Board* (No. 2) (supra); this part of the High Court decision was not appealed

59 Paras 28-30, 34, 52, 55

60 Para 30

61 It is of note that there is no equivalent of s 122(5) and (6) in relation to water and discharge permits; I suggest that this is because water and assimilative capacity (unlike Seabed and Foreshore) are not property and it was not intended that there be a power to grant a permit which excludes others in a legal as opposed to physical sense

62 Adverse effects on existing users along with efficiency arguments will in some instances require later consents to be declined not as a matter of law, but in order to achieve the purpose and principles of the Act

63 See para 41

64 The Court concluded [at para 33] that: "*The fact that it necessarily excludes the exercise of a statutory power on a later occasion is merely consequential*"; I suggest however that if Parliament

had intended permits to provide a legal exclusion and resultant fetter on consent authorities' future discretions, it would have specified and restricted that, as it has for coastal occupation permits

65 Whilst Parliament has been quick to confirm that Regional Plans can not interfere with existing "allocations" under consents, it has still for the time being, left it to the Councils and the Courts to determine what has been "allocated" under each consent as a matter of fact and law (there is no definition of allocation) it has also (rightly) left resource managers to define what amounts to "full allocation" for any particular resource

66 Paras 33, 38, 41

67 The application did suggest that the applicant's intention was to maximise its opportunities for utilising the storage capacity for the purposes of generation, however that purpose was not incorporated into the consents

68 The agreed material before the Court included some indications that the Council had undertaken during consultation over the applications, to introduce an Allocation Plan under the RMA to deal with future allocations to irrigation

69 In particular, the ***Auckland Acclimatisation Society, Stanley, Rotorua District Council*** and ***Jordan*** decisions

70 I use the term loosely to refer to the Court's general proposition (summarised at para 46) that where a resource is fully allocated no more consents may be granted

71 Paras 31-32

72 Para 30 and 46(a)

73 Para 33

74 Paras 36-39

75 Paras 39-41

76 Paras 24, 33 (clearly it is a fetter, the issue was whether the (implied) creation of such an expectation would have been ***ultra vires*** the consent authority as being an unlawful fetter)

77 Paras 15, 23(b), 35, 41

78 The difficulty with this approach is that the assumption that all holders will take to their maximums at all times will usually not reflect reality

79 Paras 27, 30, 41, 46, 47, 62

80 Which I suggest indicates another problem with that approach

81 Paras 30, 46(a)

82 This is the (still to be tested) approach adopted in Environment Canterbury's Proposed Natural Resources Regional Plan which allows for later water permits to be granted up to the point of 95% reliability for existing users

83 If full allocation is regarded as the point at which interference occurs then there can never be any grant of consents which reduce the availability of the resource to existing consent holders; that is because if interference occurs it indicates the resource is fully allocated at the time and place where the interference occurs; on this view you cannot have interference unless there is full allocation; accordingly on this approach the Court's limitation of the principle of non derogation to situation of full allocation is no limitation at all

84 All resources where interference is already occurring would be deemed to be fully allocated at those times of places

85 W 064/2004); in that case the exiting users were permitted and were found to have ***privileges*** not rights

86 In the Tekapo situation for example, it can be argued that the resource is not fully allocated except at times when the lake is at the minimum level fixed by the consents

87 RMJ March 2005 at 23

88 Para 30; contrast this with Barker J's observation in ***Auckland Acclimatisation Society,*** that

first in first served (first in practical priority) may be the "antithesis of orderly planning"

89 Such a system might have more merit if there was a meaningful rental for the resource, then a consent would be more akin to a profit à prendre and there would be a stronger argument for certainly based on a quasi contractual relationship

90 That is, water permits may be interpreted as allocating contributing water upstream/up gradient of the point of control

91 Contrary to prior case law, discharge permits may potentially be regarded as "***licences to pollute***" to the maximum in the permits; that may then exclude the later grant of "upstream" permits which have the effect of causing minimum air quality standards (national or regional) to be reached more often

92 ***Stanley v South Canterbury Catchment Board*** (supra)

93 For a fluid resource such as a river, those 'allocatable volumes" will of course be different at different flows, different times of the year and different parts of the river

94 The latest amendments to the RMA do not preclude plans from defining full allocation; whilst there is a prohibition on plans allocating what has already been allocated by consents, the RMA remains silent as to how such allocations are defined

95 In doing this, Councils will need to make decisions about the degree of acceptable effect on existing consent holders (e.g. 100% reliability or 95% reliability?); these involve decisions of equity and efficiency

96 The RMAA puts a greater emphasis on "prioritising" (although that term is not used); some councils are introducing variable priority permits; for example, permit holders have to reduce their take first, followed by B permits and then A permits as minimum flows or minimum standards are approached; Plans could provide for priority on the basis of first in gets highest priority or by way of higher priority to particular classes of use

97 Water charges do not of course allocate and do not appear to be authorised on a retrospective basis; they would need to be imposed as a financial contribution on new permits which would serve to enhance the value of existing permits

98 Relying on maximum rates, without having limits on average rate of use or maximum volume of use per period, has the obvious risk that courts may later regard the allocation as being the total theoretical volume of take, if the consent was exercised to its maximum at all times (as the ***Aoraki*** decision illustrates)

99 It can be argued that it is not possible to limit the exclusive nature of a permit

100 The trade-off for obtaining an ***exclusive*** right to a significant portion of a resource, may be that the permit will be granted for a shorter term and/or that the allocation will be reviewable; that may be the only way to provide for reasonably foreseeable future uses of the resource (note the new ss 124B and 124C which provide a limited degree of priority for existing consent holders when their consents come up for renewal/replacement)

101 Under s 128(1)(a)(iii)

102 There will inevitably be debate as to whether such conditions are reasonable; if such reviews occur then s 131 requires the consent authority to have regard to the ongoing viability of the activity allowed by the consent

103 See Fisher, DE ***Rights of Property in Water: Confusion or Clarity*** (2004) 21 EPLS

104 NZLS June 2005

105 Unfortunately, the RMAA does not provide that clarification; providing that Plans can allocate, but can not allocate what has already been allocated by consents, gives little guidance; how does a plan allocate? how does one determine what has already been allocated? does a consent allocate only at the point of control or does the allocation extend to all contributing resources? can a plan define "full allocation" in a way which allows for the grant of consents to others where that would interfere with availability to existing users?