Nigel Peter LUCIE-SMITH

METHODS OF MANAGEMENT AND ALLOCATION OF RIGHTS TO WATER RESOURCES

Research Paper for Natural Resources

LLM (LAWS 543)

Law Faculty
Victoria University of Wellington

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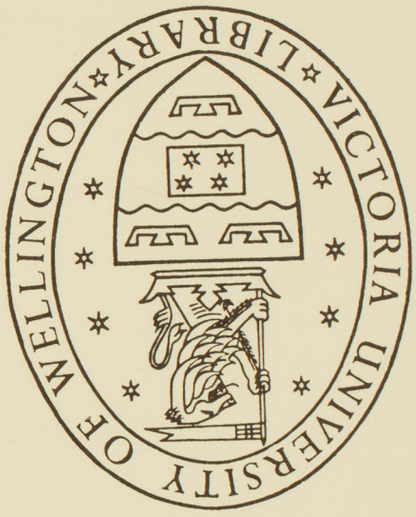
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METHODS OF MANAGEMENT AND ALLOCATION OF RIGHTS TO WATER RESOURCES

C O N T E N T S

METHODS OF MANAGEMENT AND ALLOCATION OF RIGHTS TO WATER RESOURCES

I INTRODUCTION

After the general elections in 1987 the Labour Government on its return to office announced that it would undertake a review of the resource management statutes including the Water and Soil Conservation Act 1967. 1

It is proposed that the review will result in a new structure for resource management in which the Ministry for the Environment will be responsible for setting a policy framework within which local and regional authorities will carry out day to day management of natural resources. 2

The Ministry for the Environment will carry out a monitoring role to ensure that the policy framework is followed by local and regional authorities.

In the review it is proposed that decision making to regulate conflicting demands for resources will be decentralised to local and regional authorities because:

i The local authorities have access to the best information on local matters;

ii They have to live with the consequences of their decisions and therefore have the incentive to get things right. 3

The review will also take account of environmental matters. The Government through the Ministry for the Environment will set the boundaries of environmental control and let local and regional authorities deal with local situations. 4

Because the decision makers are elected they will be accountable to the people whom they represent.

Among the changes proposed for the Water and Soil Conservation Act, the review is to identify the objectives to be achieved by the legislation and the best ways to achieve those objectives. 5

The review will consider whether any reform to the system of allocating water rights is necessary in order to achieve an efficient and equitable allocation of water resources. The review will consider alternative methods of resource allocation and reallocation including compensation to those who are disadvantaged by the changes. 6

Alternative methods of transferring rights to water will be investigated so as to avoid water resources being locked into unwise uses and to take account of changing economic conditions.

The review will also consider the conflicts which arise between competing uses for the same resource and the rights and expectations the Maori people have in relation to New Zealand's natural resources.

This paper will consider the current system of water resource allocation, identify the problems that exist with the system of allocation and suggest possible ways of resolving those problems in the context of the review of the resource management statutes. While acknowledging the major role of the Treaty of Waitangi and the rights and expectations of the Maori people this paper does not propose to cover that aspect except insofar as "instream uses" may include Maori spiritual and cultural values. 7

II THE FRAMEWORK FOR THE MANAGEMENT OF NATURAL RESOURCES IN NEW ZEALAND

A Property Rights

New Zealand is a sovereign state with the right of sovereignty over all natural resources within its jurisdiction. Those rights of sovereignty are exercised within New Zealand through the legal system.

This legal system is based on the rules of common law inherited from England 8 along with legislation promulgated by Parliament in substitution for the common law.

The legal system provides the mechanism for the control and development of natural resources through the concept of property rights. 9 "Property" in this sense means the rights recognised and enforced by the legal system which gives rise to the form of control by the owner of the resource. 10

The law also determines how those property rights are held and gives the authority to the holder of those rights to deal with the substance in which the property rights are held to the exclusion of others.

At common law the right and power to do anything with a particular resource was vested exclusively in the owner of the property rights in the resource. The common law however had no particular concept of natural resources nor did it have any integrated approach to the treatment of natural resources. 11 Instead it defined land to include all substances attached to the surface of the land and all minerals contained in the soil of the land. 12 The owner of the property rights in the land therefore had ownership of all the resources contained on or in the land as part of those rights of property.

At common law the owner of those property rights had the exclusive right to develop the resources contained on or within the land.

The common law also recognised that right of the owner to transfer to others some or all of his rights in respect of the land. The owner could transfer his rights to develop the land while still retaining his property rights in the land. The transfer of some or all of the property rights of the owner could be dealt with through contracts between individuals.

The common law accepted the fragmentation of property rights in land in this way. 13

The common law did not exert any restrictions on the way in which the landowner could exercise his rights of property in the land subject only to the limitation that the exercise of the rights must not infringe on the rights another landowner may have to enjoy his land.

B The Crown

The Crown as owner of all rights in land in New Zealand has the superior right to any interest in land. 14 It has alienated various estates and interests in land to the people of New Zealand but it has not alienated all of those rights so that no absolute right of property is owned by an individual.

The Crown has reserved for itself various rights to minerals and other resources contained in land. It has done this through express reservations in grants and through legislation. 15

Today legislation plays a considerably greater role in the management and development of New Zealand's natural resources and has modified the common law.

This is because the common law could only resolve private disputes involving property rights and had no ability to take account of the wider aspect of the public interest in relation to the development and management of natural resources.

Parliament, through legislation, has used the concept of property as the source of legal authority, to control New Zealand's natural resources. It can change the existing structure of property rights to alter the status quo and take account of interests that are not represented in the prevailing definition of property rights recognised and enforced through the common law. 16 Those rights to natural resources have been vested in the Crown by legislation so that it owns or has the exclusive right to control the resources.

Such legislation has also imported concepts of environmental management into the way in which the Crown is permitted to allow the resource to be exploited. These concepts recognise that man is no longer the centre of the environment which is available for exploitation on a short-term basis but rather man is part of the environment. 17

The Crown is also vested with authority to allocate and distribute the rights to develop those resources and it has the power to control or regulate the exercise of the rights it has distributed.

Legislation conferring the rights of control in respect of natural resources has however been specific to a particular resource so that as with the common law no integrated approach to natural resources has occurred.

The aim of the review of the Natural Resource statutes is to develop an integrated approach to natural resources. 18

The framework of property rights can be used as a basis for the examination of systems of management for water rights.

III SYSTEMS OF WATER ALLOCATION - THE COMMON LAW

At common law rights in respect of water were divided into various categories.

A The Sea

At common law the realm ended at the low water mark. All beyond was the high seas. 19 The Crown had no rights of sovereignty beyond the low water mark. Everyone had a right of free access to use the sea. 20

B Inland Water

Inland water refers to all water inland of the seashore which came within the realm. Inland waters were divided into two categories:

1 Still Water

Water that did not flow but was held in a receptacle was the property of the person in whose possession it was for as long as it remained in that possession. 21

2 Flowing Water

At common law there was no private right of property recognised in flowing water. It was regarded as publici juris or common property available to and exercisable by all persons who had a right of access to it. 23

In Embrey v Owen (1851) 6 Exch. 353 Parke B said: 24

> "... but flowing water is publici juris, not in the sense that it is a bonum vacans (i.e. goods without an owner), to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have

> a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only ..."

The right to take water was therefore based on a right of access to it. 25 The owner of the land on the banks of a river had this right of access which is termed a riparian right.

The extent of a landowners riparian right to take water was determined by the purpose for which he wished to exercise the right.

In Swindon Water Works Co v Wilts & Berks Canal Navigation 26 Lord Cairns LC held that a riparian user may take water for all ordinary purposes of a domestic nature even if the water may be exhausted by his use. He also held that a riparian owner may take water for purposes connected with his use of the land to which the riparian rights attach such as irrigation as long as no material injury is done and the water is restored in a "... volume substantially equal to that which it passed before". 27 Water could also be taken for manufacturing purposes connected with the land so long as the use was reasonable. Whether the use was reasonable depended on the size of the stream and the amount of water taken for this extraordinary purpose. 28

Subsequently in McCartney v Londonderry & Lough Swilly Railway Lord Macnaghten said: 29

> "In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition,

> a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

In Glenmark Homestead Limited v North Canterbury Catchment Board [1975] 2 NZLR 71 Macarthur J accepted that the two cases referred to applied to New Zealand and concluded that: 30

> "... a riparian owner is permitted by the common law to take water for irrigation provided that the user is reasonable as to extent and nature, that the flow of the stream is not perceptibly diminished and the water is not unduly detained by the process of irrigation, and lastly that the owner restores to the stream the water which he takes and uses for that purpose substantially undiminished in volume and unaltered in character."

If a riparian owner permanently abstracts water from a stream for an extraordinary purpose he deprives other riparian owners of the use of the water and infringes their rights. In such circumstances lower riparian users are entitled to sue even without proof of damage. Their right to sue is an incidence of their property rights as landowners. 31

Apart from riparian rights any person had a right of property in still water contained in a receptacle while it was in his possession. 32 Once out of his possession any right of property was lost.

The common law distinguished between surface and underground waters flowing in a known and defined channel and subterranean waters percolating through the ground. 33 It did not recognise any relationship between rivers and streams and ground water systems.

No property rights existed at common law in respect of subterranean water percolating through the ground. However a landowner could sink a well and extract the water for any use without regard to the effect such a draw off may have on another person. 34

C Pollution

The common law also provided that a riparian owner was entitled to receive water substantially undiminished in character and quality from upstream riparians: Young v Bankier Distillery. 35 If anything was added to the water to affect its quality, the lower riparian had a right of action against the polluter on sufficient proof. 36 This right was in addition to rights of action based on the law of nuisance and Rylands v Fletcher. 37 However exceptions could be created by statute or grant.

D The Public Interest

The common law determined and allocated rights in respect of water in accordance with the property rights held by a landowner. Conflicts between competing users were resolved by the common law by reference to the property rights held by individuals. As long as the supply of water exceeded demand there was no competition between users and the system of management created through the doctrine of riparian rights provided an equitable and efficient system of allocating water between users. Because there were sufficient quantities of high quality water available there was no need to recognise and take account of public interest and concepts of environmental management and conservation.

IV LEGISLATION

Increasing demand between competing users reduced the available water both for supply, to assimilate waste and to cater for environmental values. The common law did not provide the mechanisms that could resolve the conflict because it could only adjudicate between private property rights of landowners. It could not have regard to the wider concept of the public interest, resource conservation and environmental protection. There was also a concern about the pollution that was being discharged into streams and rivers.

As a result in 1966 a Water and Soil Bill was introduced into Parliament. The Minister of Works said on its introduction: 38

> "Water is such an essential element that every civilized country finds it necessary to conserve and control its use to provide for the needs of the people today and tomorrow ... At present competition for water is settled by appropriation, without regard for the overall public interest ... Further it is becoming increasingly evident that some industries and communities are facing steadily diminishing margins between demand for water and the available supply. Difficulties are being created by excessive draw off from surface and underground sources with serious consequences."

A The Water and Soil Conservation Act

These concerns gave rise to the Water and Soil Conservation Act which came into operation on 1 April 1967. Over its life it has been subject to a number of amendments however the basic principles of the Act have not changed. The Act set up a structure for the administration and control of water resources 39 and terminated common law rights to the use of water 40 and replaced them with a statutory regime of water rights.

The Act also catered for other interests notably environmental and conservation concepts **41** which had no place under the common law except to the extent the exercise of individual rights prevented pollution of the water system.

The policy of the Act is set out in its long title.

The long title states:

> "An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, community water supplies, all forms of water based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams and lakes."

The Act is administered by the Minister for the Environment and the powers reposed in the Minister under the Act can be delegated to any government department and to regional water boards. **42** Regional water boards carry out the day to day management functions of the Act and their powers functions and duties are set out in detail in the Act. **43**

The Act applies to all "natural water" which is defined to include water in whatever form it may exist. It ends the artificial distinction recognised by the common law between flowing water, still water and percolating water. **44**

The Act cancelled the common law rules by providing in Section 21(1) subject to certain statutory exceptions, that:

> "... the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into natural water, ... or to use natural water is hereby vested in the Crown, subject to the provisions of this Act."

In Glenmark Homestead Limited v North Canterbury Catchment Board Macarthur J said: 45

> "When the Act came into force, therefore, private rights in relation to those matters could no longer be acquired in accordance with the common law."

In the Court of Appeal Woodhouse J went further and said that Section 21(1): 46

> "... effects what may properly be regarded as a transformation of the law. Common law rights are extinguished and statutory rights where appropriate take their place."

The Act provides three exceptions to the new statutory regime.

The first exception is contained in the first proviso to Section 21(1). Nothing restricts the rights to divert, take or use seawater. 47

The second exception is in respect of the ordinary right of a riparian owner to take water for domestic purposes. This right is preserved and extended to include fire fighting. The exception goes further however in that it covers all natural water not just riparian waters, and gives the right to any person regardless of whether they own the land from which the water is taken. 48

It was initially thought this exception was limited to the former riparian owners. Macarthur J in Glenmark Homestead Limited had said in an obiter dictum that the exception: 49 "... preserves one of the major common law rights of riparian owners ... that is, use of natural water for domestic needs and the needs of animals."

However in Clark v Duckworth 50 a situation arose where water from a bore on the defendant's farm was shared by the plaintiff for the purpose of watering stock. The predecessors in title of the defendant had granted the plaintiff an unregistered easement in respect of the right to use water from the bore. The issue was whether such a use by the plaintiff was a lawful use pursuant to the exception in Section 21(1) of the Water and Soil Conservation Act. The defendants argued that only the ordinary rights of a riparian owner were preserved by the exception and that as a result the plaintiff's use was unlawful.

The court did not accept the defendant's argument. Thorp J said: 51

> "The changes to the law as to the user of natural water made in the 1967 Act were so profound and basic that in my view one is not justified in assuming that any exception to the vesting in the Crown of the power to control such water necessarily implies the continuance or reintroduction in that area of the old common law provisions."
>
> I conclude that the second provision operates as an exception to and limitation upon the general vesting of control over the use of natural waters in the Crown. The fact that the boundaries of that exception do not coincide with those of any of the rights recognised by the common law seems to me to point against the likelihood that it was intended that the old rules would apply without amendment within the area of that exception.

> Rather, it seems likely that the proviso should be read in the light of the pre-existing law but without straining its language in order to permit the precise restatement of the old law."

The judge excluded distinctions between riparian and non riparian water and ordinary and normal uses of riparian water and recognised the proviso as "a legislative endeavour to ensure that the law should not hinder the fulfilment of such essential needs for natural water as its provision in reasonable quantities to the home and for the watering of livestock and its use for firefighting." 52

The third exception is provided by Section 21(2) which permits existing lawful uses of natural water that had been occurring in the 3 years prior to the 9th of September 1966 to continue provided notice in writing of that use is given to the Regional Water Board.

The Act then provides in Section 21(3) for applications to be made to the relevant regional water board responsible for the area for a right to "... dam any river or stream, or to divert or take natural water or to discharge natural water or waste into any natural water or to discharge natural water containing waste on to land or into the ground or to use natural water."

A right to discharge waste granted under the Act entitles the holder of the right to pollute natural water to the extent of the right. Any right at common law that a riparian owner had to receive water undiminished in quality can not be maintained under the Act as long as the discharge of waste is in compliance with the terms of the right. Although a landowner may still sue under the law of nuisance for actionable pollution or water damage or on the basis of the rule in Rylands v Fletcher. 53

B The Water Classification System

The Act creates a structure for natural waters in a region to be classified. 54 The purpose of a classification is to be a "declaration of the minimum standards of water quality at which the natural water so classified shall be maintained in order to promote in the public interest the conservation and best use of the water." 55

The procedure commences with an investigation of the water quality of the natural waters within a region, the types and extent of discharges of waste and what can be done to control and abate the waste. 56

After investigations are complete a preliminary classification is prepared, publicly notified and subject to public comment and criticism. Objections are heard and then a final classification is prepared by reference to various classes of natural water specified in the Act. 57 Those classifications specify varying levels of purity of water. 58

In general terms the objective of the classification procedure is to regulate the types of uses of natural water and to provide a broad framework for the grant of rights to discharge waste into particular classes of water.

Problems have arisen over the classification procedure and as a consequence very few areas of water have received classifications. Some preliminary classifications and final classifications were withdrawn as a result of the approach some authorities took to the classification process.

The Water Resources Council 59 classified coastal waters in Southland in such a way that unless there was a special reason for putting waters into a specific class they were all given a general classification of S.D. (the scale runs S.A., S.C., S.B., S.D., S.E. in decreasing order of purity) irrespective of the existing standard of quality of the water. The result of such a classification would allow existing high quality waters to be reduced in quality. Such an interpretation was the antithesis of a national policy of conservation and best use of water. 60

In Water Resources Council v Southland Skin Divers 61 Cooke J analysed the requirements of the classification process. He noted that a final classification was a declaration of the minimum standard of quality at which water so classified could be maintained in order to promote in the public interest the conservation and best use of the water. 62

He said that in determining the minimum standards that are appropriate "... regard must be had to the two fold object of promoting in the public interest, 'the conservation and the best use of ... water."' 63

He then defined the meaning of conservation with reference to the dictionary definition and said: 64

> "The words 'best use' speak for themselves. They must call for the consideration of the use or uses which should reasonably be provided for, in the light of such factors as competing demands, other available water resources, and modes of waste treatment and their cost. And in determining the minimum standards to be maintained for those objects, it will obviously be necessary to consider what is practicable: which naturally involves some consideration of existing water."

Cooke J then proceeded to define factors relevant to a classification.

He held that in preparing a classification it is not sufficient for a regional water board to have regard to the existing water quality as the sole basis of a classification. When classifying, existing and future uses of the water and discharges are relevant considerations and a final classification can only be made after having regard to all the relevant considerations. He then said: 65

> A classification should not be lower than existing water quality save for good reason; and that a classification should set higher standards than those existing if they are reasonably needed and reasonably attainable."

The result of this decision was to stop the classification process in its tracks. No further classifications were carried out for over 10 years and it is only now with responsibility devolved from the now defunct Water Resources Council to Regional Water Boards that an attempt has been made to commence classifications.

This failure to classify water has had an effect on the administration of applications for rights to discharge waste. In Pikarere Farm Limited v Porirua City Council 66 the Planning Tribunal said:

> "We would observe that the lack of water classifications and in particular the lack of such classifications in coastal waters likely to be subject to urban pressure is making administration of the Water and Soil Conservation Act difficult at appellate level. The object of the Act is to have the waters classified and at that stage all interested parties have a chance to be heard and appeal if necessary. Once the classification becomes a final classification, applications for discharge rights would be reasonably easy to control.

> The minimum standards are set forth in the Act and potential dischargers know that they cannot drop below the minimum but that a higher standard maybe imposed in respect of any particular discharge. We were virtually invited in the present case to embark upon a study of potential classification (which is not our function) and to then fit the discharge within some form of national classification..."

The classification system has been criticised: 67

i It fails to identify long-term goals and objectives to guide the management of New Zealand's water resources;

ii The use of vague terminology 68 in the Act does not help the enforcement of water rights to the extent that the statutory language is imported into the wording of a water right nor does it help water right holders understand what obligations they have to meet in order to comply with the conditions imposed on the grant of a right.

Once a final classification is made it imposes a duty on regional water boards to ensure that in granting rights conditions that result in the standard of water quality required by the classification are met. 69

Classification also requires all persons who already discharge water and waste (whatever the basis for their right to do so) must notify the regional water board of the discharge. 70 All discharges other than those authorised pursuant to a right granted under Section 21(3) of the Act then terminate 3 months after the classification is made final. 71

Rights granted under Section 21(3) may also be revoked or varied by a regional water board in order to comply with a classification and maintain minimum water quality standards. 72

C Concepts of Environmental Planning and the Public Interest

The Water and Soil Conservation Act introduces mechanisms of environmental planning into the management of the water resource. It does this from the perspective of the public interest. 73 Some aspects of that environmental planning concern the quality of water while others concern the conservation of physical characteristics of the environment.

All of the provisions have been introduced to prevent the water resource from being over-exploited and to protect the public interest. These mechanisms are:

i The provision of a system of water classification to achieve a minimum standard of water quality to promote in the public interest the conservation and best use of water; 74

ii Regional water boards are required to have regard to the "... promotion of works and projects for the conservation of natural water ..." and to have "... due regard to recreational needs and the safeguarding of scenic and natural features, fisheries and wildlife habitats." 75

iii The Regional boards have powers to fix minimum acceptable flow and minimum standards of quality of the natural water of any river or stream. 76

iv The Water and Soil Conservation Amendment Act 1981 introduced provision for conservation orders in respect of natural water in a river, stream or lake because of its wild, scenic or other natural characteristics. The object of the Amendment Act was set out in Section 2 to "... recognise and sustain the amenity afforded by waters in their natural state."

D Conservation Orders

An application for a conservation order is made to the Minister for the Environment by any public or local authority or body constituted by any Act and any Minister all of whom must have some function power or duty which relates to water or soil conservation. 77

On receipt of an application the Minister can refer it to an appropriate regional water board or deal with it himself. 78 If he does proceed with the application a hearing is notified with rights of objection. 79

In considering the application the Minister is required to take into account: 80

i All forms of water based recreation, fisheries and wildlife habitats;

ii The wild, scenic, or other natural characteristics of the river, stream or lake;

iii The needs of primary and secondary industry and of the community; and

iv The provisions of any relevant regional planning scheme and district scheme.

After hearing objections the Minister can either decline the application or prepare and publicly notify a draft national conservation order. 81

Any objections in respect of the Minister's decision are dealt with by the Planning Tribunal. 82 If the Tribunal recommends that a conservation order should be made the Minister then either advises the Governor General to make a national conservation order, 83 or if the Minister declines to advise the Governor General, he must lay before Parliament a written statement setting out reasons for his decision. 84

The result of a national water conservation order is to prevent the grant of a water right that would be contrary to any provision of the order or any condition or restriction made under the order. 85

The Planning Tribunal dealt with a draft national conservation order in respect of the Rakaia River and made a recommendation to the Minister confirming that an order be made. The Tribunal also refined the terms of the draft order. An appeal against the Tribunal's decision was made to the High Court alleging errors of law. The High Court found the Planning Tribunal had erred in law in a number of respects. The decision of the High Court was subject to an appeal as well. In the Court of Appeal, 86 Cooke P found that the provisions of the Amendment Act relating to conservation orders formed a self contained code. 87

He said: 88

> If Section 20B(6) of the 1981 Amendment Act had been enacted without anything in the nature of an accompanying guide, it is conceivable that the Authority and the Planning Tribunal would have been left with ... very open, discretionary choices or value judgements.

> Choices between values might have been necessary, since economic advantages such as water supply and irrigation would have had to be weighed against largely non-economic ones, such as irrigation and scenic wildlife protection.
>
> In that situation Parliament reduced the difficulty by taking the unusual step of declaring a special object for the 1981 Amendment Act: the object of this Act is declared by Section 2 to be to recognise and sustain the amenity afforded by waters in their natural state. A statutory guideline is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light."

Cooke P held the emphasis in Section 2 is on conservation. He said: **89**

> "Although certainly not to be pursued at all costs, it has been laid down as the primary goal; and this must never be lost sight of. On an application for a national water conservation order, the matters listed in Section 20B(6) are to be weighed, but the effect of Section 2 is to require this to be done bearing in mind that the primary object is conservation of waters in their natural state. In particular cases the needs of industry or other community needs or planning schemes may demonstrably outweigh the goal of conservation."

The effect of this legislation is to alter the presumption under the Water and Soil Conservation Act that there is no in built preference for any particular use of natural water. **90** The 1981 Amendment Act creates a preference in favour of conservation which imposes a higher onus on an applicant for a right to show that the public interest is best served by displacing the presumption for conservation and granting a water right. **91**

In this sense the provision for national conservation orders represents an alteration in the status quo entitlement structure from that of multiple use of

water with no preference as to type of use to a restricted use of water where there is a presumption in favour of compensation.

E Ecosystems

One area where there is inadequate provision for the conservation of environmental features is in the context of a particular ecosystem which is deserving of protection. The Planning Tribunal has declined in many cases to grant a water right to allow development where there is competition between the conservation of a particular ecosystem which may be harmed if a water right is granted and the grant of that water right. **92** But it is possible that an application will be made where the benefits of granting the right are not outweighed by the detriment to the ecosystem. In such a case the Planning Tribunal will have to make a difficult value judgment. In Royal Forest and Bird Protection Society v Bay of Plenty Regional Water Board **93** the Planning Tribunal was faced with deciding between the grant of water rights for damming and diversion of a river and the destruction of a trout fishing stream and a unique habitat for a certain species of duck. The Tribunal granted the application on the basis that the greatest good to the greatest number would be achieved but indicated it was reluctant to make value judgments on behalf of the community "without guidelines bearing on these matters." It is inferred that the Water and Soil Conservation Act 1981 was promulgated to provide for National Conservation Orders as a result of the Tribunals Comments. **94**

However, a national conservation order only applies in respect of rivers, streams and lakes. **95** It has no application to a particular ecosystem except indirectly insofar as a conservation order prevents the grant of a right for a development which can affect the ecosystem.

Although the refusal to grant a water right can provide a real degree of protection to a particular ecosystem because one of the matters a Regional Water Board is required to have regard to is "... safeguarding ... wildlife habitats ... and fisheries" every case must be considered on its merits **96** and therefore no absolute protection can be given. Furthermore there is no provision to grant water rights in respect of "instream uses" in order to protect those environmental aspects from subsequent development. **97**

F Allocation of Rights to Water

1 Balancing Test

Under the Act Regional Water Boards are given authority to grant applications for water rights. These applications are subject to rights of objection "... on the ground that the grant of an application would prejudice the objector's interest or the interests of the public generally." **98**

Rights of appeal also lie from a decision of a Regional Water Board to the Planning Tribunal. **99**

The Act provides no assistance to Regional Water Boards by expressly stating the considerations and criteria relevant to assessing whether to grant a water right. Only general guidance is given by the long title and the provisions of the Act.

Consequently the Planning Tribunal has developed a balancing test which "... has become the lynch-pin of water allocation decisions at both water board and appellate level." **100**

The Tribunal has said: **101**

> "We infer that any proposed use of natural water should be a beneficial use, and that the loss which might follow from the taking of the water should be weighed against the benefit which might result from its use."

In arriving at its balancing test the Tribunal has had regard to the long title of the Act and sub sections 20(3)(a) and 20 (6). It has said: **102**

> "Those provisions are not expressly declared to be the principles to be applied in the exercise of the discretion by Regional Water Boards to grant or refuse rights to take and use natural water, but clearly they ought to be applied."

The Court of Appeal endorsed this balancing test in Keam v Minister of Works and Development. **103**

Cooke J (as he then was) said: **104**

> "As to the criteria to be applied to an application, the 1967 Act while profuse in its long title and its enumeration ... of the functions and powers of the ... regional boards, does not specify any list of relevant considerations for deciding applications ... Parliament has pointedly refrained from tying the hands of the administering tribunals by hard and fast requirements. Clearly it would be wrong for the courts to do so. But to give effect to the broad purposes of the legislation, general working rules or guidelines can be evolved, as long as they are not elevated into something inflexible.
>
> It is a useful general test of that kind that I understand the Planning Tribunal's proposition in this case that any proposed use of natural water should be a beneficial use, and that the loss which might follow from the taking of the water should be weighed against the benefit which will result from its use.

> In some cases where some adverse effect may follow from the exercise of the right applied for, during the term of the grant, the kind of balancing envisaged by the tribunal appears to be only a matter of common sense and thoroughly in accord with the purposes of the Act."

2 Competing Demand

However the balancing test only applies in a situation of competing demand. **105** This is because while Section 20(3)(a) of the Act requires a board to promote "... the conservation and most beneficial uses of natural water in the region", it is prefaced by the words "so far as may from time to time be necessary to meet in full all demands for or in respect of natural water within that region ..."

Competing demand exists where:

i Some adverse effect may follow from the exercise of the right applied for; **106**

ii Both advantages and disadvantages fall to be weighed; **107**

iii Conservation requirements presently exist or can be foreseen within the term for which the grant may extend. **108**

If no competing demand exists or is foreseeable and no other relevant reason exists why the right should not be granted for a lawful purpose the balancing test is not required. However, it is still necessary to have due regard to "recreational needs and the safeguarding of scenic and natural features ..." **109**

3 Competing Beneficial Users - Is There a Statutory Preference?

Where there are competing beneficial uses to be considered the Act gives no guidance as to which uses should have any priority, however "... it is implicit in the balancing test that as a matter of law no one factor has precedence over another." **110**

This has been accepted by the Court of Appeal in Auckland Acclimatisation Society Inc v Sutton Holdings Limited **111** where it was suggested "... the safeguarding of fisheries and wildlife habitats is not to be overlooked, but that promoting soil conservation and promoting the drainage of land are to be given greater general importance."

The Court of Appeal held, **112** "We are unable to read into the Act any inbuilt preference for farming interests over conservation interests, or vice versa. Where there is a conflict, each has to be weighed on the particular facts, without any general presumption."

There are however two practical priorities created by the Act because no application for a water right is necessary. Those are:

i Statutory rights to use water for domestic purposes, feeding stock and firefighting; **113**

ii Existing or riparian uses in existence prior to 9 September 1966 that were lawful and are registered with a regional board. **114**

4 What Constitutes Competing Demand?

To apply the beneficial use test Keam v Minister of Works and Development requires there be a situation of competing demand but it did not give any guidelines as to what constituted competing demand and the two judgments that considered "competing demand" differed on their interpretation.

Cooke J (as he then was) stated: 115

> "On the tribunal's findings of fact, which were open on the evidence the present case was one where both advantages and disadvantages fell to be weighed. In a broad sense there were competing demands."

Somers J held, 116 "There was nothing to suggest any competing claims." He was of the view the case concerned an application for a beneficial purpose against the possible detriment to scenic and natural features if the right was granted.

Significantly however the Court of Appeal accepted that competing demand did not have to "presently exist". It could be a foreseeable competing demand. 117

5 Factors Relevant to the Balancing of Competing Interests

Where the Planning Tribunal is faced with competing demands in respect of a water resource, in carrying out its balancing test, in accordance with Keam v Minister of Works and Development, it must weigh up the considerations for and against the application. This involves an assessment of the benefit that will result from the grant of the right as against the detriment that will be suffered if the right is granted.

This assessment raises the issue of what factors are relevant to the balancing test. This issue was considered in the Annan v NWASCA 118 which involved an appeal against the grant of a right to the Minister of Energy to construct a high dam on the Clutha River for the purpose of generating electricity. The application was opposed because it would result in the flooding of valuable farm and orchard land in the Clutha Valley upstream of the dam. The objectors advised they did not oppose an alternative proposal for a low dam which would not cause the inundation of large areas of land.

The objectors claimed the high dam was only needed because of a proposal to construct an aluminium smelter which was unlikely to proceed.

The Planning Tribunal refused to consider what the end use of the power generated from the dam was because the Tribunal considered it was not permitted to do so.

On appeal the issue before the High Court in Gilmore v NWASCA 119 was whether the Planning Tribunal was correct in refusing to consider the end use of the power proposed to be generated and for which the water right was needed.

Casey J noted there was nothing in the Act expressly forbidding such an approach. 120 He observed that the only justification must be that end use is a factor made irrelevant by the nature and extent of the matters required to be taken into account in granting a right.

However Casey J found that the case involved competing demand and therefore evidence about the likelihood of the aluminium smelter proceeding could be highly relevant. This was because the need for the greater production of power and therefore the need for the high dam as against a low dam was occasioned solely by the aluminium smelters need for power. 121

If the aluminium smelter was not going to proceed the justification for the high dam no longer existed.

He then went on to consider whether the Tribunal's refusal to consider evidence of end use was a failure to take account of a relevant consideration expressly or by implication.

He noted: 122

> "On the Tribunal's conclusions the future existence of the [aluminium] smelter is at the very heart of the decision favouring a high dam with its widespread inundation. The question of whether the smelter will proceed could therefore be of critical importance in the balancing operation between the interests affected by the grant of the water rights. In failing to consider that question (through its refusal to consider the end use of the power) the Tribunal deprived itself of the ability to take fully into account the promotion of soil conservation (i.e. land use) and the other interests it was required to consider under the Act, and which will be prejudiced by the extra flooding caused by the high dam."

Accordingly Casey J found the Tribunal was wrong in deciding it could not consider end use of the power but it was up to the Tribunal to consider whether end use was a factor that was relevant consideration.

He said: 123

> Ultimately it is for the Tribunal to decide whether the end use of the power and the evidence bearing on it are in fact relevant, and what weight (if any) they give to those matters in their deliberations."

It is therefore open to the Tribunal to determine, in respect of a particular application involving competing demand, what factors are relevant but it can not fetter its discretion by refusing to consider admissible evidence.

The Tribunal is entitled to consider all relevant factors when there is competing demand.

The Tribunal 124 on rehearing the appeals considered end use to be a relevant factor and granted the appeals and refused the rights because it found there was no evidence to show the smelter was likely to be built and therefore no reason for the high dam to be build with its consequently inundation of valuable land.

6 Onus of Proof

A lack of competing demand does not necessarily mean the applicant is entitled as of right to the grant of a right to use natural water. There is an evidential onus on the applicant to show that the proposed use is for a legitimate purpose which is of beneficial use to the applicant. The test for whether a use is beneficial or not would appear to be subjective to the applicant. 126

However, there is no onus of proof on any party to a water right application so that even if an objector can not produce any evidence to support an objection the application need not necessarily be granted.
The over-riding question to be asked in any application is what is in the public interest.

In Minister of Works and Development v Keam, 127 Davison CJ discussed the question of onus. This issue did not arise in the Court of Appeal. Davison CJ said: 128

> "The matters to be considered by a Board are set out in Section 20[(3)(a)] and (6) of the Act and it is only after considering all such matters as are relevant that the Board has eventually to arrive at a decision as to whether or not, having regard to the competing interests, it is in the public interest that a water [right] be granted."

The Chief Justice then went on to consider the nature of environmental legislation.

He said: 129

> "Where environmental legislation places emphasis upon public interest and community benefit above private rights then the mere fact an applicant may have established some prima facie evidential justification for a grant of water rights does not impose any burden on an objector to displace any justification so that in the event of his failing to do so the grant must be made as of course. The over-riding consideration must always be as the Act itself states, what the public interest requires. Public interest must be determined by a consideration of the totality of the evidence available to a Board or Tribunal."

Accordingly it is only appropriate to grant a right if it is in the public interest to do so. In this sense the grant of a water right may be seen as the grant of a privilege rather than something the applicant is entitled to as of right. 130

In contrast to the common law, the grant of a water right does not involve the adjudication of a dispute involving private rights of property. The public interest is of paramount concern. If the grant of a right is not in the public interest it will not be given.

As a consequence, a series of cases has developed involving applications for water rights where there has been the possibility of detriment to a particular ecosystem or some scenic and natural feature. In almost all these cases where conflict has arisen the private rights of the applicant have given way to the safeguarding of the particular resource. 131 The public interest has been in favour of safeguarding against the possibility of detriment.

At common law this was not a consideration relevant to the adjudication of a dispute involving private rights.

7 The Nature of a Water Right

(a) Water rights are valuable

The grant of a water right can be vital to the applicant. Without a right, unless a statutory exception applies, no legal right to take or use water exists. Rights to develop or use land in a particular way may hinge on the grant of a right. In Sowman v Nelson Regional Water Board 132 the applicant's right to subdivide a rural property into horticultural units was conditional on obtaining a water right for each unit. Water rights were refused because of the possibility of detriment to other lawful users with the result that the applicant could not subdivide the property.
The grant of a water right was something of considerable value to the applicant yet without a right the development could not succeed.

In this sense although there is no charge for the supply of water the water rights do have a value which is reflected in the value of the property to the applicant if the rights are granted.

(b) Water rights create no legal priority

However, at the same time the Act gives no right of priority to any user of natural water authorised under the Act. 133 For instance an existing or riparian user authorised under Section 21(2) of the Act has no longer any enforceable right to receive the flow of a stream substantially undiminished in volume. 134

No right of compensation exists for any user adversely affected by the grant of subsequent rights to take water from a stream and no guarantee or priority to take the quantity of water specified in a water right is given by the Act. 135 A user must "accept the possibility that the source of water from which he is entitled to draw may be diminished from time to time by the actions of other persons for the time being entitled to take water therefrom." 136

The corollary of that is that the grant of a right to take water does not give a guarantee that the quality of the water will remain the same. Riparian rights entitling a holder to receive water substantially undiminished in quality no longer exist to the extent that rights to discharge waste into water have been granted.

Existing users will have to rely on their objection rights if they consider they will suffer any detriment by the grant of further rights. 137

The result of this treatment of water right holders has been that a resource can be diminished by the grant of subsequent rights to the extent that the benefit to existing users is negligible. This result happens more so with artesian or ground water systems. As use increases the ground water level may become lower, water pressure reduce and the time taken to recharge a well increase. Existing users may find their wells are of insufficient depth and must be sunk lower and pumping equipment replaced to cope with the greater pumping distances required by a lowered water level.

In such cases the debate revolves around: 138

i Whether the resource is being depleted to the extent that the detriment resulting from any

further grants of water rights to use the resource outweighs the benefit; or

ii Whether the objector has an inefficient method of ground water extraction.

In Napier City Council v Hawkes Bay Catchment Board **139** evidence was given that the grant of a further right would result in a considerable drop in ground water pressure to existing users. However the Appeal Board held: **140**

> "The Act envisages multiple use of natural water and it is the function of the respondent to apportion the available water between users and/or potential users thereof. There is nothing in the Act to indicate the necessity for the maintenance of well pressure as opposed to the availability of the water itself. If as a result of multiple use of available water, users are required to install pumps this does not in any way infringe their right to make use of that water. It simply governs the method by which it is made available."

The Tribunal justified its decision by relying on the emergency powers in the Act if the resource was depleted to the point where continued supply was imperiled. **141** However, the legality of that approach is now in doubt as the emergency powers should only be used in unforeseen circumstances. **142** Granting further rights when a resource is in danger of depletion would seem to be an abdication of the responsibilities for wise management of resources by regional boards under the Act, but as a result of the Napier City Council decision regional boards have interpreted "this statement as preventing them from refusing or restricting a water right merely on the grounds that its grant would cause draw-down or loss of pressure to neighbouring users." **143**

In contrast to this approach, Jordan v Marlborough Catchment Board **144** while accepting as a fact that the objector's problems of supply were caused by defects in her well and that there were adequate supplies of ground water for all, held: **145**

> "We agree with [the decision in Napier City Council v Hawkes Bay Catchment Board] that there is nothing in the Act which necessitates the maintenance of well pressure, as opposed to the availability of natural water itself. But in allocating water resources, it may be necessary to have regard to the rate at which that water should be drawn off to avoid adverse effects on other users. We agree with the Board that the effects must be considered in any particular case."

(c) Practical priorities

Practical priorities are however created in the sense that an upstream holder of a right will not have access to water impeded by downstream users. **146**

Similarly the first applicant for a right to discharge waste may exhaust the assimilative capacity of a body of water so that no subsequent rights can be granted. **147**

In addition the Planning Tribunal has a de facto policy of protecting existing users. In Stanley v South Canterbury Catchment Board the Tribunal, while granting further rights, said: **148**

> "... the Board is of the opinion that when granting the right to take water from a river or stream the grant should be in such a form that provision is reserved for the reasonable needs of those already lawfully entitled to take water from points lower down in the river or stream than the proposed point of taking; and that due regard should be given to such future demands upon the waters of that river or stream as are reasonably foreseeable."

In McKay v Otago Catchment Board **149** a right to use a stream for an emergency discharge of waste was granted subject to the provision of a free and continuous supply of potable water to downstream farms for stock purposes.

However in general, to be assured of priority an existing user will have to exercise his objection rights and, on the basis of Keam v Ministry of Works, prove there is competing demand so that the beneficial use test can be applied. An objector will then need to show that the benefit to be gained by granting the right is outweighed by the detriment caused to existing users so that the public interest lies in declining the right applied for.

V MANAGEMENT AND ALLOCATION OF WATER

A Problems of Management

The Water and Soil Conservation Act because of its lack of specific criteria for allocation of water has created difficulties in allocating the resource. Water is allocated solely on the basis of water rights without the provision of other management tools such as water management plans and the setting of minimum acceptable flows and maximum range of flows.

The Planning Tribunal through the use of the balancing test has endeavoured to assist where competing demand for resources has arisen but its decisions have involved individual applications and objections which are decided on the basis of evidence submitted at a hearing. Because the balancing test necessarily involves a value judgment in deciding between competing uses some decisions are made on an ad hoc basis which does not assist the wider goals of resource management and conservation.

In addition many regional boards grant water rights on an ad hoc basis without regard to resource management. **150**

As a result a number of problems have arisen:

i Rights to water resources have been allocated to the point where the benefit derived by individual users is minimal. **151**

ii Over allocation of a resource results in existing users bearing the costs of upgrading extraction systems to accommodate subsequent users. **152**

iii Resources have been allocated to the point where there is no room for potential future users. 153

iv Rights to a resource have been allocated to a point where the resource is detrimentally affected. 154

v Rights are allocated for long terms and without conditions which prevent regional boards from controlling and managing the resource. 155

vi Valuable property rights are given to users. 156

vii No incentives exist to encourage conservation of water and to ensure efficient useage once a right is granted.

B Examples

In Napier City Council v Hawkes Bay Catchment Board 157 the Tribunal did not have regard to resource depletion but was prepared to grant further water rights with the knowledge that such grants would have a detrimental effect on ground water pressures resulting in access problems for existing users. The Tribunal felt that if the resource became depleted the board could use emergency powers to reduce consumption but that was a question of fact and a matter of degree that could only be assessed at an appropriate time in the future.

In its view if existing users had to upgrade their pumps to extract water as a result of subsequent allocations that did not infringe their right to use the water.

The result of the decision has been that regional boards have felt obliged to continue to grant water rights to extract ground water when ground water levels and pressures have dropped through continued water allocation. 158

In Jordan v Marlborough Catchment Board 159 the objectors claimed their well would be affected by the draw-off of water by the applicant if the right was granted. Although the Tribunal considered that prima facie it was a case concerning competing demands which called for a balancing test, the adverse effects suffered by the appellants resulted from deficiencies in their well rather than the depletion of the resource to the extent that there are existing competing demands. To prove the resource was in fact being depleted would impose a considerable burden on the appellant. The result was that the objectors incurred the expense of the grant of additional rights.

Regional boards can be shortsighted in granting water rights to particular resources without considering long term management and control.

In Whitford Residents and Ratepayers Association (Inc) v Auckland Regional Board 160 a grant of a water right was made to an applicant to take 1000 m3 a day of geothermal fluid from a bore on the land owned for 12 years by the applicant. The right was granted because the regional boards attitude was to permit the first suitable applicant to exploit the resource without consideration of the possible needs of any future users. Its attitude was expressed "first come, first served" and it would allocate the whole of the available resource if there happened to be no competing applicant at the time.

The grant would effectively preclude others from making any substantial use of the hot water resource for at least a period of 12 years.

The Tribunal found as a fact that the proposed taking would affect the resource by lowering the temperature of the water over a period of time, that there was a possibility a shortage of ground water would be created for other uses and that there were potential competing demands for the resource.

Any multiple use would be entirely under the control of the grantee for the length of the term. The regional board was effectively dispensing with its duty to manage and control the use of the resource.

The Tribunal had regard to the beneficial use test referred to in Keam v Ministry of Works and held the proposed use had to qualify as a legitimate purpose or beneficial use. Having decided it had passed that threshold the Tribunal considered whether there were: **161**

> "... any countervailing considerations, of which possible shortages, competing demands, and conservation requirements were ... examples ... It is only if there are such considerations that it is necessary to pass to the evaluation of benefits and losses, and the comparative balancing process."

The Tribunal's main concern was that the right to take natural water is a right vested in the Crown by Section 21(1) of the Act. The Tribunal said: **162**

> "It is not a right which attaches to ownership of the land where the water can be taken. To allocate the whole of the available supply of natural water of a particular quality (in this case thermal water) to the owner of the land who first makes application, without leaving any available for other foreseeable users, is inconsistent with that public dominion over the resource which is symbolically represented by vesting in the Crown the right to take natural water."

The Tribunal found that the proposed taking coupled with the rate of abstraction because of its possible adverse effects on the resource, possible detriment to water supplies to primary industry and the fact that none of the resource would be available for other potential beneficial uses mitigated against the grant of the right and therefore upheld the appeal.

In effect the regional board was proposing to give the entire resource to one individual to the exclusion of all others regardless of what effect the proposed use may have had on the resource or other considerations. The board had abdicated its management role.

VI REFORM

A The Use of Management Tools

1 Water Management Plans

The Planning Tribunal has had regard to water management plans in deciding appeals in respect of disputes over water rights. In Sowman v Nelson Regional Water Board **163** the Tribunal had regard to diminishing resources and the possible adverse effect the grant of further rights would have. It applied the balancing test set out in Keam v Minister of Works and Development **164** and upheld the Regional Board's decision to refuse the right. It accepted that when there was a doubt as to the sufficiency of a natural resource the Regional Board may be faced with having to refuse a water right rather than rely on emergency powers to restrict water use in the event the resource is depleted.

The Regional Board was able to satisfy the Tribunal (despite conflicting evidence which the Tribunal was unable to reconcile, and the difficulties in proving hydrological details about the state of the ground water system) that a further water right should not be granted to the applicant.

In that appeal the Tribunal was influenced by a Water Management Plan prepared by the Regional Board. The Tribunal noted that it was on the basis of the Water Management Plan that the Regional Board had refused to grant a right.

The Tribunal stated: 165

> "We cannot overlook the detailed work done by the respondent in establishing its management plan and the evidence of [the board's water resources officer] concerning that plan. We bear in mind that a management plan under the Water and Soil Conservation Act 1967 is indicative only. It is the duty of the respondent and, on appeal, this Tribunal to treat each case on its merits."

It has been suggested that the Sowman decision is only distinguishable from Jordan on the basis that a water management plan was in existence and in both cases the Tribunal was faced with similar fact situations and issues. 166

A possible solution to the problems of equitable and efficient resource allocation is to make greater use of water management plans as a management tool, together with the setting of minimum flows and levels on rivers and streams along with a greater use in water rights of conditions governing the use of water.

Water management plans provide information on the size of the water resource, the quantity of water required to protect in stream interests such as fish and wildlife habitats and the quantity of water available for allocation to consumptive users. 167 At present such plans have no legal status as they have no statutory back and are not binding on the Tribunal. 168 The information contained in the plans has to be proved on each occasion. Hence the need for the Water Resources Officer to give evidence in respect of the Water Management Plan in the Sowman decision. 169

In order to improve the management tools available to regional boards it would seem appropriate to give a Water Management Plan for a region the status of a regulation similar to that of a district scheme under the Town and Country Planning Act 1977. 170

After the decisions of the Planning Tribunal in EDS v NWASCA and Sowman v Nelson Regional Water Board it is clear they are a useful management tool yet there is no provision for public input into the preparation of them. By giving them a status similar to that of a district scheme rights of objection can be provided to allow public input to be made so that the plan can take account of collective desires. 171 Provision should also be made to allow objections to be dealt with at appellate level in the Planning Tribunal which could then assess the acceptability of a management plan in the same way that a district scheme is able to be tested before the Planning Tribunal under the Town and Country Planning Act. In addition by giving water management plans the status of regulation, Tribunals can have regard to them without the necessity to have evidence adduced. 172

In EDS v NWASCA 173 the Town and Country Planning Appeal Board was referred to a water management plan that had been prepared and on the basis of which a water right was granted. The Board, on hearing an appeal against the grant of a right, stated: 174

> "The Board cannot, however, recognise the allocation plan as having any binding effect upon it, but can of course give due weight to technical evidence showing the desirability of such a plan and the desirability of adherence thereto. The danger of course lies in the plan being subject to test at any time in the future when an applicant for an individual right might again choose to attack it and adduce evidence substantiating such attack. Were such an attack successful the whole balance of water useage which forms the basis of the allocation plan could be destroyed."

If a water management plan is a useful management tool which aids in the conservation and allocation of the water resource in an efficient and equitable manner it should be given a status that is recognised by the Planning Tribunal.

The Ministry for the Environment can have input of a policy nature in the preparation of a water management plan by:

i Directing factors to be taken into account;

ii Nominating scenic and natural features that merit preservation, including particular ecosystems;

iii Providing for the protection of instream uses.

A water management plan would set minimum water flows for particular rivers and streams to ensure water flows do not fall below the minimum necessary to sustain wildlife and fish habitats. 175 Any rights to take water would then be subject to minimum flow requirements.

In EDS v NWASCA the Board said: 176

> This Board is of the view that the allocation system [based on a water management plan] is one which could lead to certainty because interested parties would be able to mount a case on appeal based on the total potential withdrawal of water from any particular natural resource. Once the total had been set the competing non consumptive users of the natural resource would no longer be interested parties in any application for withdrawal by consumptive users, because the plan would prevent the withdrawal of water in excess of that allocated by the plan. Therefore, at the stage where withdrawal rights were being considered the only contest would be between existing and/or potential consumptive users of the water."

Failure by a regional board to produce a water management plan for those rivers and streams within its jurisdiction within a given time frame would allow the Ministry for the Environment to take control and prepare a water management plan of its own for the particular region. In addition if the particular regional board does not act in compliance within the management plan there should be provision for the Ministry of Environment to exercise its powers instead.

A water management plan should work in conjunction with a district scheme to institute a system of zoning defining how waters in a river or stream may be used in a particular area so that incompatible uses can not occur. As an example, having a waste discharge near a place of scenic beauty would be incompatible.

There should also be provision for a review of a water management plan to take account of changing developments and matters affecting the resource. 177 These are already provided for in respect of district schemes which are subject ot review every five years, but with a power to amend individual parts of the scheme within that time frame.

2 Foreseeable Demand

Regional boards are entitled to take account of foreseeable demand and potential future uses. 178

This allows a regional board to take a longer term approach to resource use and anticipate future demand when considering an application for a right even if water is currently available and there is not actual competing demand.

In Hawken v Northland Regional Water Board 179 the Planning Tribunal held: 180

> "Consideration of foreseeable future claims to water from the same source, which would compete with the applicants claim, may be relevant to the allocation of water between competing demands and the most beneficial uses of the water."

The Planning Tribunal in Whitford Residents and Ratepayers Association Inc v Auckland Regional Water Board 181 overturned the regional boards decision to grant a right partly because the board had failed to have regard to potential future uses and had allocated the resource on a first come, first served basis.

In preparation of a Water Management Plan regional boards should take a long term approach to development and allocation of a particular resource in conjunction with a district scheme under the Town and Country Planning Act to ascertain what future demands are likely to arise. This can ensure that water is allocated between existing and future potential uses in a fair manner on the basis of the total withdrawal permitted under the water management plan.

B Rivers

In respect of rivers, the water management plan would specify the quantity of water available for allocation to consumptive users.

The plan would also define how much water can be allocated at various levels of a river to ensure that downstream users are left with an adequate supply of water after taking account of instream uses. 182

This could be achieved by providing that a water right guarantees to a user:

i a right to divert a given quantity of water;

ii a right to use a specified percentage of the water diverted.

Diversion rights would be allocated along the length of the river on the basis of minimum flows determined at particular places and the total number of consumptive users along the river.

In times of low water flow regional boards would need the power to reduce the quantity of water consumed by individual users to ensure minimum flows are maintained and a fair allocation is available for all users.

This type of system will allow a framework for allocation between consumptive uses and instream uses to be established and to ensure that a resource is not depleted beyond its capacity.

However, it will not encourage efficient use of the resource once a water right is granted to a consumptive user. For example, there is no incentive once the right is granted to employ efficient irrigation systems so that water is conserved.

Furthermore once the rights to consume water are all allocated, there is no provision to allow potential users water rights at a later stage. They are locked out. Existing users are granted a valuable property right. This right can only be transferred on sale of their land. 183

At present water rights are granted for 5 to 10 year periods. If an existing user has invested a significant sum of capital in some development he will have

expectations either of obtaining a grant for a sufficient period to recover the investment 184 or of having the grant renewed. Potential users may be locked out for a long period. Such an obstacle can prevent development of the resource especially when the new use is a higher valued and more efficient use of water resources than existing uses.

C Allocative Efficiency and Equity

One way of achieving allocative efficiency on an equitable basis between competing consumptive users is to allow transfers of water rights between individuals. 185

The first thing that the ability to transfer water rights creates is an incentive to conserve water through efficient useage and avoidance of wastage. If the excess rights to water can be transferred for profit there will be an incentive to improve techniques of useage and avoid wastage.

Secondly, transfers allow future potential users the ability to buy their way in to the resource and use water for a higher valued use. They are not locked out of the resource.

Thirdly, transfers of water rights do not increase the quantity of water draw-off because they do not increase the quantity of water used. Therefore further pressure is not exerted on the system creating pressure for change.

The creation of a system of transferable water rights (a market) would require all users to be placed on the same footing.

They would need to have their rights defined precisely so that a purchaser can be sure that what he is acquiring for value is legally enforceable.

To the extent that the Water and Soil Conservation Act recognises three different types of right:

i Existing or riparian rights, protected by Section 21(2) of the Act;

ii Rights granted pursuant to Section 21(4) with poorly defined controls (such as quantity) for substantial periods; and

iii Rights granted under Section 21(4) with controls well defined and for short to medium term periods of operation (5 - 10 years).

Of these i and ii represent long term and valuable property rights over which regional boards have little or no control, limiting options and reducing potential for management of the resource. They also give an unfair advantage as against those holders of rights for shorter terms which are subject to controls.

Consideration has been given to the abolition of existing notified uses as they are not consistent with the policy of water management. **186** such cases, because the owners have a valuable property right which is being removed it would seem appropriate that they be compensated for their loss. **187**

As current water rights expire they should, along with new rights which replace the existing notified uses, be auctioned or tendered to the users.

This does three things:

i It will enable a value to be put on use rights which the market sets; 188

ii It will generate funds for regional boards which can be used to compensate:

(a) the holders of existing notified uses when the rights are terminated;

(b) to pay for flood protection works; 189

(c) to purchase existing rights to improve "instream uses".

iii It will ensure that people will only purchase the rights they reasonably need them for their operations.

The market for water rights will take effect when the demand for rights exceeds supply. At that point those with higher valued uses will be prepared to pay to purchase rights from existing holders. Holders who no longer need their rights may wish to dispose of some or all of them.

In addition those holders of rights whose needs are seasonal may wish to lease them for short term periods to some other user whose needs arise at a different time.

D Administration by Regional Boards

There will still be a role for regional boards in the administration of the market. In order to ensure that transferable water rights are controlled properly it could be compulsory to sell or lease all rights through the board. The board could be responsible for bringing

buyer and seller together as it is most likely to be aware of the information necessary to operate the market.

Regional boards will also need to be sure that transfers of rights do not result in an uneven distribution of demand at various points of the river so that water allocated to instream uses and other right holders is exhausted. 190

This can happen when a downstream user transfers his rights to an upstream user resulting in an insufficient flow to satisfy both the demands of other downstream users and the minimum flows and levels required for instream uses.

Such rights could also be purchased by groups interested in particular instream uses 191 for which no specific provision has been made in a management plan or for which no statutory protection exists, or if the interested group is not satisfied with the level of protection provided.

E Ground Water Basins

Ground water basins present difficulties in determining the size and amount of water available for extraction because the resource is located under ground and is not visible. However in recent years it has been possible to create water basin models that plot demand for water in the resource against the available supply and project long term consequences of use and quantities of water available for future allocation.

The problems with a ground water basin are:

i A ground water reservoir is a basin that water 193 travels into but is trapped by impervious geological structures.

The water will have a discharge at some point. To maintain equilibrium in the reservoir the rate of recharge must be the same as the rate of discharge. To maintain the reservoir the rate of draw-off through wells must not exceed the rate of recharge otherwise the quantity of water stored in the reservoir will drop and impose costs on users by:

(a) requiring sinking of deeper wells;

(b) increasing pumping costs by increasing the distance water must be lifted.

ii The shape of the basin is likely to be such 194 that as water levels drops through extraction those users situated on the edge will find available water depleted quickly by overall draw-off.

iii If one user decides to defer extraction to preserve the resource for later use, that saving can be taken advantage of by another user. Consequently in an uncontrolled system there is no incentive for individual users to defer extraction. Water is a fugitive resource that can be captured by anyone. 195

iv Because water moves through a medium in a ground water reservoir, it does not have a constant equilibrium. When water is extracted at one point a cone of depression is created at that point which is recharged at a rate which depends on the density of the medium through which the water must travel to reach equilibrium.

> As a result an individual user can affect his neighbouring uses by both the quantity of draw-off and the rate of draw-off. 196

To resolve depletion problems it is necessary to clearly define individual rights to use the resource. 197 By doing this the rate of extraction can be controlled. In addition, clearly defining individual rights to the resource will allow a market to be developed once quantities available for allocation are known.

Initial allocations of rights to ground water should be auctioned or tendered rather than allocated on the basis of prior use. The rights available for allocation should equate with the closest approximation available to the state of equilibrium of the resource so that rate of recharge equals rate of discharge through extraction.

There will still remain two problems:

i The reduction in rate of recharge in dry years. In such a case it will be necessary for the regional board to reduce total consumption to ensure some users are not denied access to the resource.

ii Individual uses will still be affected by "cones of depression" associated with individual draw-off. One solution is to create a system of unitisation where individual right holders contract with each other to extract water through a common strategically placed well. The costs of extraction are distributed in proportion to use with the costs of setting up and maintaining the system shared and offset against the increased individual cost associated with pumping over a greater distance caused by the cone of depression. 198

Water management plans will still be required in respect of a ground water resource to determine the hydrology **199** of the resource and to ensure the rate of extraction does not exceed the extent of the resource.

Transfers of water rights could take place between users of the resource to provide incentives for efficiency in resource use and to ensure that potential beneficial uses of the resource can be taken into account. However the considerations necessary to ensure that rivers and streams are not depleted causing damage to downstream users and instream uses do not arise with a ground water system to the same extent.

The consent of a regional board would still be necessary to ensure that the interests of all users are taken account of when a transfer is negotiated. Aggregation of rights to draw off large quantities of water at a particular location in the reservoir at a high rate could create localised effects which are detrimental to other users.

The creation of a system for transfer of rights to use ground water would be of benefit to those areas where ground water supplied irrigation schemes operate such as the Wairau, Waimea and Heretaunga plains because the users are homogenous and therefore have the same interests which a market can satisfy.

In Sowman v Nelson Regional Water Board **200** the applicant was denied a water right with the consequence that he could not develop his land to a higher valued use. The opportunity to purchase rights to the ground water resource would have allowed the development to proceed.

Again with the geothermal water resource in Whitford Residents and Ratepayers Association v Auckland Regional Board 201 the opportunity to use the resource could have been negotiated on the basis of the value placed on it by individual potential users. A management plan could have provided that so much of the resource was to be reserved between various types of use so that any "instream" uses that may exist were accounted for and protected (i.e. the maximum amount of draw off that could be tolerated by the resource to ensure conservation).

F Waste Discharges

Various methods have been proposed for regulating the discharge of waste into natural water.

Currently where waste is discharged into natural water, whether or not it has been classified, a water right is required. 202 The terms of the right must ensure that after a reasonable mixing of the discharge with the receiving water, the quality of the receiving water as a result of the discharge does not fall below the standards specified in the classification of the receiving water. 203

It is also necessary to ensure that the cumulative effect of the discharge being authorised and of all other existing discharges and authorised discharges will not result in a failure to maintain the minimum water classification standard.

Once the water reaches the level of the classification no further users can be accommodated into the system unless existing users are prepared to improve the quality of waste treatment and reduce the effect the existing discharges have on the quality of receiving waters.

G Incentives

Existing users have no incentive to improve the quality of waste treatment once a water right to discharge waste is granted. In some cases these water right holders may have spent large capital sums on construction of waste treatment plants to comply with the provisions of a water right. If the terms of the right to discharge a specified quantity of waste are altered by a reduction in quantity the discharger will have to spend further capital on increasing the amount of waste processing in order to comply with the alteration to the terms.

The present legislation contains no provision for variation of the terms of the right by regional water boards to take account of future circumstances for instance the effect of the waste discharged on water quality and future possible uses. **205**

In those circumstances because of the perceived deficiency in the Water and Soil Conservation Act, the Planning Tribunal has permitted rights to discharge water to be granted for a specified period subject to the right of the regional water board to cancel the right on notice but reserving the right to the holder to re-apply. **206** In such a way a variation can be imposed through further conditions being attached to the grant of a new right.

This method of imposing a variation should not be allowed to remove the priority a water right holder has over new applicants and in any case where a discharger has engaged in a large capital investment in reliance on a right to discharge waste the discharger is entitled to some security of tenure.

In Rotorua District Council v Bay of Plenty Regional Water Board **207** the Planning Tribunal noted that a right to take and use water while not giving any guarantee or protection for the holder against grants of rights to others which may result in an insufficient supply can where a right to discharge waste is concerned confer on the holder a form of priority where the discharge takes up the whole of the assimilative capacity of the receiving waters.

Therefore once a right is granted to discharge waste, unless the right is varied through cancellation and the grant of a new right no provision exists for an overall reduction in waste discharged into a particular water way to make room for new comers to discharge waste.

H Methods of Regulating Waste Treatment

Some alternative methods of reducing the quantity of waste discharged are: **208**

i Regulation requiring all dischargers to reduce the quantity of waste discharged by a given percentage.

ii Subsidies to assist with the cost of improved treatment facilities.

iii Taxation based on quantities of waste discharged.

These systems can be imposed on a case by case or an across the board system regardless of each individual operation.

1 Control by Regulation

Regulation on an across the board basis requiring total waste discharged by a stated percentage would be unfair as it does not take account of the efficiency of individual waste treatment operations.

Regulation on a case by case basis would place enormous burdens on an administrative system to tailor regulations to each individual circumstance based on the efficiency of a particular discharge. It is suggested that such a system would have difficulty policing and enforcing regulations. 209

Control by regulation was not considered to be an effective system. Yet in the sense that the Water and Soil Conservation Act requires a right to be granted before waste can be discharged legally and each application is dealt with individually and conditions are imposed on the operation of the right, we have in effect a system that controls through individual regulation. This is not able to be amended except through the procedure already described and subject to the requirement for security of tenure.

The system can probably operate reasonably effectively because of the limited number of dischargers operating on a scale which require water rights. In such circumstances a right to discharge may be tailor made for the particular situation for example the discharge of sewerage into Lake Rotorua by Rotorua District Council 210. When industrialisation increases though there may well be difficulties in coping.

2 Subsidies

Subsidy schemes have been criticised for similar reasons to regulation, i.e. unfairness to efficient waste dischargers, and costly to administer. 211

3 Pollution Charges

The most favoured solution suggested by some commentators 212 has been a system of pollution charges imposed on a cross the board basis where a charge calculated on each ton of waste discharged is imposed. An across the board system of charging is favoured rather than a system of charging by location which allows individual circumstances to be taken into account because if some places are already polluted it is better to allow them to remain polluted rather than provide incentives for polluters to move to an unpolluted area where high levels of water quality exist and reduce that quality because pollution charges are lower.

I Management of Waste Through Pollution Charges

Once the charging system is in place, if it is desired to reduce the overall quantity of waste discharged into a regions waters, the level of charges is increased. As the cost of discharging the given quantities of waste increases, individual waste dischargers will find it more economic to increase expenditure on waste treatment and reduce the quantity of waste discharged. 213

The system is attractive because it requires very little administrative input to manage the operation and therefore is low cost. It does not require the regional water board to determine how the costs of pollution control should be spread over the individual dischargers as each discharger will decide what level of charge should be borne by it.

The only decision the regional water board would be faced with is the problem of setting the rate of levy or charge to be imposed on each unit of waste discharged in order to achieve the desired level of pollution.

If it was necessary to take into account future potential users who might wish to discharge waste into a water way that has already reached its level of assimilative capacity the regional water board may increase the rate or levy for waste discharged to reduce the quantity of total waste discharged by existing users to make room for future potential users. This would avoid the need for a value judgement to be made by the regional water board or Planning Tribunal in deciding how to allocate a water right between competing beneficial users. However, it would also result in existing users paying the costs of a subsequent user.

J Rights to Discharge

Another alternative suggested is to issue a limited number of rights to discharge a given quantity of waste but allow those rights to be transferable between competing users. **214** If the demand for rights exceeds the supply an individual discharger will be prepared to pay a higher amount to acquire a right to discharge until the cost of a right equals or exceeds by a given margin the cost of alternative methods of waste treatment and disposal. An efficient waste treater may then be able to sell those rights to a less efficient treater for a profit.

A market for rights to discharge waste would allow groups interested in "instream" uses to acquire discharge rights for particular stretches of river or lake to increase overall water quality above the minimum allowed by the particular classification for that water.

Alternatively if instream users do not have the means of buying rights to discharge waste, regional water boards may be able to purchase rights and retire them. With day today administration of natural resources decentralised to an elected body, the electors of a

regional water board may be able to convince the board that it is in the public interest that rights to discharge waste in a particular stretch of river should be purchased and retired. The funds to purchase rights could be provided through the sale, auction or tendering of other rights to take and use natural water.

K The Role of the Planning Tribunal under a Market System

If transfers of rights to take water and discharge waste are allowed through a market mechanism to deal with competing demand by individuals is there still a need for the Planning Tribunal?

1 Rights to Take Water

It will still be necessary to allocate the resource between consumptive and non-consumptive instream uses. Water management plans can determine allocation between these different uses by being publicly notified and subject to objections.

The Planning Tribunal would then be able to deal with appeals from those persons dissatisfied with the allocation of water between consumptive and non-consumptive uses. 215

The Planning Tribunal's function would then be expanded under this system however because the Water Management Plan determines the minimum flows and levels of a river, stream or lake for instream non-consumptive uses those non-consumptive uses will no longer be an interested party to applications for consumptive rights. 216

The dispute will take place between consumptive users only.

The Tribunal would also have a role in hearing appeals regarding transfers of water rights between upstream and downstream users which affect other users (both consumptive and instream) who are not parties to the transaction. In such a case the issue before the Tribunal would be one of determining those who are affected by the transaction and what is required to protect those persons. 219

Where new rights to take water are granted over and above existing rights, the Tribunal would have a role in adjudicating any appeals against the grant of such further rights but any further grants would imply that the supply of water had not reached the stage where a market for transfers of water rights existed and therefore there was no competing demand.

The Tribunal would still retain its role in undertaking inquiries in respect of Conservation Orders as well.

2 Rights to Discharge Waste

The Tribunal already has a broad function in hearing appeals in respect of classifications of water.

This function would continue as it is important that the community have some say in the standard of water quality in its region. The Planning Tribunal by hearing appeals will ensure the community has a right to have its views taken into account.

The Tribunal will also continue to deal with appeals in respect of applications for individual discharge rights.

As the right to discharge waste into water is not a matter of quantity so much as receiving quality (although quantity affects assimilative capacity) the grant of a right to discharge waste will always need the Planning Tribunal to adjudicate where conflict arises

because so many interests can be involved, some of which are irreconcilable such as Maori values in relation to water. 220 Therefore it is necessary for the Planning Tribunal to decide where the public interest lies to the extent that the competing demands or values are relevant.

The Planning Tribunal will have a role of ensuring that the procedural requirements of the Water and Soil Conservation Act are complied with.

Similarly in overseeing any transfers of water rights to discharge waste the Planning Tribunal will have a role of ensuring that the interests of all users are taken into account and to balance those interests where conflict arises.

The location to which a right to discharge is transferred to may create conflict with other users. Aggregation of discharge rights in any one area may result in a concentration of waste beyond the assimilative capacity of the water. The Tribunal should therefore have an overseeing role in adjudicating between the interests of competing users in respect of a discharge right.

VII CONCLUSION

The Water and Soil Conservation Act altered the status quo in respect of property rights in natural water by vesting those rights in the Crown and providing for multiple uses of natural water. In order to have access to natural water it was no longer necessary to be a landowner although it still require the grant of an easement to transport water over another persons land.

The Act also implemented concepts of environmental management through the introduction of regional boards to conserve natural water and have due regard for recreational needs and the safeguarding of scenic and natural features, fisheries and wildlife habitats. These powers have been supplemented by provisions of Conservation Orders to protect wild and scenic rivers streams and lakes from further development.

However at the same time the system of management has failed to allocate rights to use natural water efficiently and equitably between competing consumptive users. The existing system of allocation has been based solely on the grant of rights between competing beneficial uses on an ad hoc basis without regard to management and control of the resource and without any provisions to improve efficiency of use amongst existing users. Neither does the system allow for new and higher valued uses of the existing resource once it is allocated. It does not allow allocation on an equitable basis once the resource is allocated to the point where it is in danger of depletion. Allocation is on a first come, first served basis. Any potential future users are locked out of the resource.

A possible solution to problems of efficient and equitable allocation of the resource between competing uses is to provide for:

i Water management plans to ascertain the extent of the resource and allocate water between consumptive uses and instream non-consumptive uses. The plan would ensure the allocation of the resource is carried out in a planned and structured manner.

ii Minimum water flows and levels to ensure the resource is not allocated to the extent that damage occurs to non-consumptive instream uses such as fisheries and wildlife habitats.

iii The ability to transfer and trade f rights to use natural water to:

(a) encourage efficient use and conservation of the resource by individual users of the resource;

(b) allow a market to develop for rights between competing consumptive users;

(c) to make provision for instream users to buy up and retire rights to take water from particular locations if they have the ability.

iv National Conservation Orders should provide for the protection not only of rivers, streams and lakes of wild and scenic beauty but also individual ecosystems.

v Rights to discharge waste can be regulated through a system of charges relating to the quantity of waste discharged.

Rights to discharge waste could be transferred but subject to oversight by regional boards and the Planning Tribunal to ensure instream uses and other third party interests are not affected detrimentally within the classification allowed for an area of water.

A Consumptive Users

The Planning Tribunals role would be expanded to deal with appeals in respect of Water Management Plans which will deal in broad terms with water use within a region and resolve disputes involving allocation of water between non-consumptive uses.

The Tribunal will deal with appeals in respect of disputes between competing uses of water involving an application for a water right where a market is unable to operate between individual users of the resource.

The Tribunal will have a role in resolving conflict which may arise with third parties out of the operation of a market for water rights where transfers of rights between individuals affect those third parties.

B Discharge Rights

The water classification process would require the Planning Tribunal to exercise its appellate function. Additionally the Tribunal would deal with appeals between competing uses of the resource involving an application for a right to discharge of waste.

The Tribunals role would extend to subsequent transfers of rights to discharge waste to resolve third party conflicts which may arise between incompatible uses and to ensure that aggregations of discharge rights do not affect the assimilative capacity of a particular stretch of water.

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1 The Dominion, Wellington New Zealand 2 March 1988.

2 Ibid. This has already existed to some extent under the Water and Soil conservation Act as regional water boards have always been responsible for day to day management by granting water rights. However on 1 April 1988 the Water Resources Council and National Water and Soil Conservation Authroity were abolished and their functions are now carried out at a regional level.

3 Speech by Dr Roger Blakely to the New Zealand Planning Institute Conference 6 April 1988.

4 Supra n1.

5 Speech by the Rt Hon Geoffrey Palmer, Minister for the Environment 4 May 1988.

6 Ibid

7 See Huakina Development Trust v Waikato Valley Authority 12 NZTPA 129 for a discussion of Maori Cultural and Spiritual values in the context of the Water and Soil Conservation Act.

8 Section 2 English Laws Act 1908.

9 D E Fisher Natural Resources Law in Australia (The Law Book Company Limited, Sydney) Pg 39.

10 Ibid pg 40.

11 Ibid pg 39.

12 Ibid pg 37.

13 Ibid pg 41.

14 Ibid pg 51.

15 For example S.21(1) of the Water and Soil Conservation Act 1967. Vests the sole rights to natural water in the Crown.

S.3 of the Petroleum Act 1937 declares petroleum existing in its natural condition below the ground to be the property of the Crown.

16 Legislation vests property rights in some natural resources contained within land in the Crown rather than in the individual owner of the freehold estate in the land. The legislation can then create and take account of interests other than those of the landowner in controlling how the particular resources are dealt with.

17 D E Fisher Environmental Law in Australia: An Introduction (St Lucia: University of Queensland Press 1980) pg 96.

18 Supra n3 pg 1.

19 Halsbury's Laws of England (4 ed Butterworths, London 1980) para 284 pg 154.

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26 Swindon Water Works Co v Wilts and Berks Canal Navigation Co (1875) LR 7 HL 697.

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38 New Zealand Parliamentary Debates Vol 348 1966 pg 2591.

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42 Section 16.

43 Sections 20, 21 and 24.

44 Section 2 Water and Soil Conservation Act 1967.

45 Glenmark Homestead Limited v North Canterbury Catchment Board [1975] 2 NZLR 71 at 84.

46 Glenmark Homestead Limited v North Canterbury Catchment Board [1978] 1 NZLR 407 (C.A.) at 413 per Woodhouse J.

47 Section 21(1) first proviso.

48 Section 21(1) second proviso.

49 Supra n45 at pg 87.

50 Clark v Duckworth [1984] 2 NZLR 58.

51 Ibid at 63.

52 Ibid.

53 D A R Williams Op Cit supra n36.

54 Sections 26A - K A.

55 Section 26H(1).

56 Section 26A.

57 Section 26C.

58 Schedules 1 to 9.

59 This body no longer exists. Its functions have been taken over by regional water boards since 1 April 1988.

60 Water Resources Council v Southland Skin Divers [1976] 1 NZLR 1 at 10.

61 Ibid.

62 Section 26H(1).

63 Supra n62 at 8.

64 Ibid.

65 Ibid.

66 Pikarere Farm Limited v Porirua City Council (1979) 6 NZTPA 545 at pp 573-574

67 D A R Williams Op Cit n31 at para 430 pg 113

68 Whether a dicharge "Is substantially free from suspended solids ... " (the phrase used in S.21(3A)(c) of the Act) is a question of fact and degree. The words are not precise - see N Z Paper Mills v Southland Regional Water Board 11 NZTPA 75.

69 Section 21(3A)(a).

70 Section 26J.

71 Section 26K.

72 Section 25K A.

73 Rights to water are allocated in accordance with what the public interest requires: Minister of Works and Development v Keam 7 NZTPA 289 at 297.

74 Supra n55 and text.

75 Section 20(3)(a) and (6).

76 Section 20J.

77 Section 20A(1).

78 Section 20A(3)(a) and (b).

79 Section 20B(1).

80 Section 20B(6) (a)-(d).

81 Section 20B(7).

82 Section 20C(1).

83 Section 20D(1).

84 Section 20D(6).

85 Section 21(2B).

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87 Ibid at 299.

88 Ibid.

89 Ibid at 300.

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91 Supra n86 at pg 300.

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(i) Keam v Minister of Works [1982] 1 NZLR 319 - completion between conservation of Waimangu Geothermal reservoir and testing and development of geothermal resource. Right refused.

(ii) Auckland Acclimatisation Society v WVA 11 NZTPA 168 - completion between preservation of a wetland area and the grant of a right to divert and drain a swamp to extgend farmland. Right refused.

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96 Ibid at 97.

97 South Canterbury Acclimatisation Society v National Water and Soil Conservation Authority (C 37/83; 30/5/83) - The Society applied for water rights in respect of instream uses but it was held rights to manage a stream were not rights to use natural water as that term is used in the Act.

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99 Section 25(1).

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101 Keam v National Water and Soil Conservation Authority 7 NZTPA 11 at pg 13.

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108 Ibid at 327 per Somers J.

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131 Supra n92.

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