

A New Start for Fresh Water: Allocation and Property Rights

Robert Makgill*

INTRODUCTION

Water is used for a number of competing activities in New Zealand, which contribute to economic, social and cultural well-being. Yet demand for use has grown to the point where it is expected that “the majority of the catchments that support New Zealand’s main population centres and agricultural production ... [will] be fully allocated by 2012”¹

Hydroelectric generation followed by irrigation are by far the largest users of water in New Zealand.² Hydro is considered to be a non-consumptive use because the water re-enters the river system down stream. Irrigation is considered to be a consumptive use because the water does not re-enter a water body. Water allocated for irrigation has been estimated to be as much as 77 percent of water allocated for consumptive uses.³

Competition for allocation is fierce and often litigious. The main competition not surprisingly occurs between hydroelectric power schemes and irrigation, or between irrigators themselves. This has been in evidence on the Waitaki River where Meridian Energy Limited’s Project Aqua hydroelectricity application and numerous irrigation applications prompted a Ministerial call-in, which was followed by special legislation requiring the promulgation of a water allocation plan.⁴

Meridian subsequently shelved Project Aqua and lodged new applications to take up to 260 cumecs of water for the North Bank Tunnel Project. This proposal was recently granted provisional consent by the Environment Court.⁵ Meanwhile, decisions on some 160 irrigation related applications in the lower and upper Waitaki River have yet to be made.

This is a source of contention amongst those irrigators whose applications predate the North Bank Tunnel Project. These applicants point to a priority decision made by Canterbury Regional Council in 2007 confirming that many of the irrigation

applications had priority over Meridian’s North Bank Tunnel project.⁶

Yet it is argued in some quarters that the national importance of securing renewable electricity supplies outweighs the economic and social value of further irrigation. According to this argument even though irrigation applications may have priority they do not represent the most valued use of the water resource to society.

This is the basis of the present government’s approach to water allocation under its New Start for Fresh Water (NSFW) strategy, which was initiated in June 2009. That is, faced with a growing scarcity of supply, water should be allocated to its most valued use.

The degree to which permit holders exercise property rights over water may also assist “most valued use” outcomes. Research undertaken by various government departments has indicated that providing water permit holders with rights to put their allocation to another use, or sell an interest in their allocation, would enable water to be put to more valuable uses as new opportunities present themselves. In response, another policy direction promoted by the government, under the NSFW, is to increase the flexibility and transferability of water permits.

The purpose of this article is to consider water allocation and property rights as presently governed under the Resource Management Act 1991 (RMA), canvass the key problems associated with the present regime and then discuss the manner in which these problems might be addressed in Phase Two of the amendments to the RMA.

WATER ALLOCATION UNDER THE RMA

Regional councils (and unitary authorities) have the power to establish rules in regional plans to allocate the taking and use of water under the RMA.⁷ Generally, regional plans allocate water by establishing minimum flows and the maximum amount of water that can be taken from the water body.⁸

¹ Bright, J; Rout, R and Rouse, H. Sustainable Freshwater Management – Towards an Improved New Zealand Approach (August 2008), Report prepared for the New Zealand Business Council for Sustainable Development, at pages 1 to 2.

² Ministry for the Environment: Water Programme of Action – Water Allocation and use, Technical Working Paper, June 2004, at page 4.

³ Ministry for the Environment: Information on water allocation in New Zealand, report prepared by Lincoln Environmental for the Ministry for the Environment, April 2000, at page 8.

⁴ Resource Management (Waitaki Catchment) Amendment Act 2004.

⁵ Lower Waitaki River Management Society Incorporated v Canterbury Regional Council, unreported, Environment Court, (C80/2009).

⁶ Decision of Commissioner Skelton on Waitaki Catchment Priority Issues, dated 8 April 2008. It is noted that irrigation and hydroelectric generation should not be in competition for water allocation in the Waitaki River as Rule 6 of the Waitaki Catchment Water Allocation Regional Plan makes separate allocation for these activities. However, Rule 6 allocates hydroelectricity generation all water not allocated to other activities, except for water required to maintain minimum environmental flows. During the priority hearing irrigators essentially argued that the large volume of water sought by Meridian would render their applications for water allocated to irrigation under Rule 6 in breach of minimum environmental flows. In essence irrigators claimed that determining the NBTC application first was putting the horse before the cart.

⁷ RMA, s 30(1)(fa).

Councils may also establish rules that allocate water among different types of activities.⁹ For example, the Waitaki Catchment Water Allocation Regional Plan makes separate annual allocations for a number of different activities including town supply, agriculture and hydro-electricity generation.¹⁰

In cases where regional plans establish minimum flows and maximum takes, water permits are generally granted subject to conditions that require the maintenance of water flows in the water body, a limit on the volume of water that can be abstracted and relative priority amongst permits holders when there is insufficient water for all to take their full allocation.¹¹

First-in, first-served

While the power to establish rules in plans enables regional councils to regulate flows and volumes, these rules generally do not regulate how water is to be allocated between applicants competing for access to the same resource. Rules that regulate allocation between different types of activities are an exception.¹² However, even where these rules are present different activities may still find themselves in competition.¹³ Moreover, these rules clearly do not assist where there is competition between the same types of activities.¹⁴

Allocation between competing applications for the same resource is presently determined by the first-in first-served rule established in the Court of Appeal's decision in *Fleetwing Farms Ltd v Marlborough District Council*.¹⁵ This case involved two applications for coastal permits to establish mussel farms in the same area of water. Granting consent for one proposal would necessarily exclude the other.

The Court of Appeal found that the consent authority was required to decide each application on its merits "without regard" to any competing application. The Court stated that if the sustainable management purpose of the RMA is satisfied in a particular case:¹⁶

⁸ For an example of minimum flow and maximum take rules refer to Rules 2 and 6 of the Waitaki Catchment Water Allocation Regional Plan.

⁹ RMA, s 30(4)(e).

¹⁰ Waitaki Catchment Water Allocation Regional Plan, Rule 6, table 5: Annual allocations to activities.

¹¹ Priority conditions usually specify different bands of water flows between which consent holders will be able to take water. For example, A band consent holders will be able to take water at a lower flow than B band consent holders.

¹² For example, see the Waitaki Catchment Water Allocation Regional Plan, *Supra*, footnote 9.

¹³ *Supra*, footnote 6.

¹⁴ For example, where there is competition between irrigators, as opposed to competition between hydroelectric generation and irrigation.

¹⁵ [1997] 3 NZLR 257 (CA).

¹⁶ [1997] 3 NZLR 257 at 264 per Richardson P (CA).

... there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard than the Act specifies ... if another application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits without regard to the other.

Rather, the Court of Appeal held that "where there are competing applications in respect of the same resource before the council, the council must recognize the priority in time."¹⁷ The Court ventured that "receipt and/or notification" of an application by the consent authority appeared to be the "critical time" for determining priority between competing applications, but preferred not to make a conclusive ruling in the absence of extended argument.¹⁸

The Court of Appeal was required to return to the issue of priority between competing applications in *Central Plains Water Trust v Ngai Tahu Properties Ltd*.¹⁹ In this case Central Plains had applied for a "water take", but processing of the application was deferred by the regional council pending applications for additional "water use" consents required for the proposal.²⁰ Some four years later Ngai Tahu applied for consent to take a smaller volume of water from the same river. This application was also deferred pending the receipt of additional applications. Ngai Tahu's applications for the additional consents were lodged three months prior to Central Plains' applications for additional water use consents.

The Court of Appeal was required to determine which application should have priority. Ngai Tahu argued that it should be accorded priority because it had been first to lodge all the additional consents, which meant that its application was first ready for notification. Central Plains pointed out that the consent authority had confirmed that its water take application was sufficient to be notifiable, and this had not been contested. Central Plains argued that receipt by the council of the water take application was the more appropriate test for priority.

The Environment Court and High Court had ruled in favour of Ngai Tahu citing *Geotherm Group Limited v Waikato Regional Council*²¹, an earlier the High Court decision that held that the point at which an application became notifiable established priority. The minority decision of the Court of Appeal concurred with this approach reasoning that councils and the public ought to have the benefit of all relevant information before such applications go to hearing.²² However, the majority reversed the decisions of the lower courts.²³ Looking to the statutory pur-

¹⁷ [1997] 3 NZLR 257 at 267 per Richardson P (CA).

¹⁸ [1997] 3 NZLR 257 at 268 per Richardson P (CA).

¹⁹ (2008) 14 ELRNZ 61 (CA).

²⁰ Pursuant to s 91 of the RMA.

²¹ [2004] NZRMA 1 per Salmon J (HC).

²² (2008) 14 ELRNZ 61 at 104 per Robertson J (CA).

²³ Baragwanath J and Hamond J.

pose of the RMA the majority determined that priority between applications should be decided in a way that achieves sustainable management:²⁴

[59] There is an obvious public interest that the law should not frustrate a proposed development in the course of undergoing the statutory processes. At least where the whole resource being sought is the subject of an application, there should be no risk of a major development being trumped or significantly interfered with by later, smaller, simpler inconsistent proposals that are able to be made comprehensively without needing to be processed in stages.

The majority went on to find that this was not a case where an insubstantial application should be brushed aside in favour of a later more comprehensive application.²⁵ Bearing these matters in mind the majority decided that a large application to take water, although requiring subsequent use applications, takes priority over a smaller application filed later in time albeit complete in itself.²⁶ Some commentators have observed that, in practical terms, the majority decision means that the initial step of lodging an application to take water (even without the accompanying use applications) may well be sufficient to secure priority over another application which relates to the same resource.²⁷

The arbitrariness of first-in, first-served

The Court of Appeal's decision in *Central Plains* has been described as an attempt to provide "a neat and tidy response" to the practical question as to which application should have priority when consent authorities are required to decide competing applications regarding access to freshwater resources.²⁸ However, both the majority and minority decisions have been criticised for the level of arbitrariness involved in picking winners based on a particular conception of first-in first-served.²⁹ To be fair this is not actually a criticism of the Court of Appeal's decisions, but rather the priority rule itself upon which the Court heard extensive argument from both parties. The limitations of the priority rule are indeed referred to in the majority decision:³⁰

[91] The differences in point of view which have emerged may well be thought to be a salutary reminder of the difficulties which can be created by an unduly doctrinaire approach to a problem which is highly contextual, and which may require a more nuanced yardstick. Indeed the problem is one which may be thought to require rethinking, in a more fundamental way.

²⁴ (2008) 14 ELRNZ 61 at 79 per Baragwanath J (CA).

²⁵ (2008) 14 ELRNZ 61 at 81 per Baragwanath J (CA).

²⁶ (2008) 14 ELRNZ 61 at 85 to 86 per Baragwanath J (CA).

²⁷ Crawford, J and Moynihan, R. *Fleetwing Revisited*, August 2009 RMJ at page 11.

²⁸ Whata, C and Minhinnick, D. *The Issue of Priority Re-emerges*, August 2008 RMJ at page 11.

²⁹ Whata, C and Minhinnick, D. *The Issue of Priority Re-emerges*, August 2008 RMJ at pages 11 to 12.

³⁰ (2008) 14 ELRNZ 61 at 88 per Hamond J (CA).

[92] This is not the place to undertake that task. And we do not have a distinct proposition, let alone argument on it, in front of us. I would however observe that what is essentially a "bureaucratic" solution to the problem is problematic ...

To put it another way, the present priority rule employs procedure to make substantive decisions about who gets access to allocation of water resources and who does not. However, the purpose of procedural law is to provide the means by which substantive law is administered. While procedure is a good way to maintain administrative order, it wholly fails to provide a satisfactory basis upon which to answer substantive questions of law which involve value based decisions. Despite stating that this decision was not the place to rethink the priority rule, the Court of Appeal felt compelled to go on and observe that:³¹

[97] My short point is that this priority issue is one which it may be thought will unlikely be solved by a simplistic bureaucratic yardstick such as "first in, first served".

Judicial disquiet about the first-in first-served rule was given further voice when the Court of Appeal's decision was appealed to the Supreme Court in *Ngai Tahu Properties Ltd v Central Plains Water Trust*.³² Here the Supreme Court ruled that it was not bound by the decisions of the lower courts in *Fleetwing Farms Ltd* and *Geotherm Group Ltd*. On this basis it indicated a wish to hear argument on "whether priority should be decided by a rule or through the exercise by consent authorities of a discretion and, if the latter, on what principles should the discretion be exercised." Argument on these points was never put to the Court because the principal parties reached agreement on the matters subject to the proceedings.³³ Nevertheless, the Supreme Court's decision reflects a judicial unease in using procedure to determine substantive matters.

One commentator has described the current dilemma as resulting from the fact that while there are "traffic" rules under the RMA to determine the order in which applications should be considered based on "receipt and/or notification", there are no substantive rules under the RMA to determine the basis on which competing applications should be decided.³⁴ In Californian statute this is solved by making provision for a public interest approach where priority is based on substantive criteria such as the benefit to the applicant, economic effect of the activity, opportunity cost and ability of the applicant to complete the project.³⁵

³¹ (2008) 14 ELRNZ 61 at 89 per Hamond J (CA).

³² [2009] NZSC 24.

³³ Crawford, J and Moynihan, R. *Fleetwing Revisited*, August 2009 RMJ at page 12.

³⁴ Daya-Winterbottom, T. *New Zealand Sustainability Laws and Freshwater Management*, Paper delivered at the New Zealand Environmental Law Centre Conference 2009: *Property Rights and Sustainability: The evolution of property rights to meet ecological challenges*, 16-18 April 2009, The University of Auckland, at page 28.

³⁵ Sax, J. *Our precious water resources: learning from the past, securing the future* [2009] *Resource Management Theory & Practice*, at pages 42 to 43.

The previous government recognised that there are problems with the first-in first-served system and in 2003 the Sustainable Water Programme of Action (SWPA) was established. Work undertaken during this initiative found that where there is insufficient water for all demands, the first-in first-served system does not guarantee that water is allocated to the greatest environmental, social, cultural or economic values. Further, the first-in first-served system can also make it difficult to manage the cumulative effects of numerous small water takes or discharges to water bodies. When the amount of water already allocated from a catchment comes close to the allocation limit, there is the potential for "gold-rush" situations which exacerbate the aforementioned problems.³⁶

Phase Two reforms likely to remove first-in, first-served

The work under the SWPA has been carried on by the present government through the NSFV strategy. Water allocation under that strategy is prioritised in the following order:

- setting ecological bottom lines;
- making allocation to public purposes (including Treaty considerations); and
- maximising the economic return from the remaining water available for consumptive use.³⁷

Cabinet papers on the strategy indicate that allocation beyond ecological bottom lines is likely to involve a two stage model. The first stage will provide for public values through a planning based process. The second stage will look to use other tools (such as economic instruments) to enable allocation and transferability of the remaining water to its most valued uses.³⁸ The "most valued use" approach seems likely to result in the removal of the first-in first served-rule as the mechanism for determining priority to water allocation. Indeed, cabinet has already signalled that work undertaken on better allocation regimes will focus on alternatives to the first-in, first served-rule,³⁹ and that there is likely to be legislative change.⁴⁰

Work on the government's water strategy is being undertaken in hand with Phase Two of the resource management reforms. This is a collaborative process whereby work by the Land and Water Forum (a stakeholder group) and a Technical Advisory Group (representing key government departments) will feed into the Phase Two work stream directed at implementing a fairer and more efficient water management system.⁴¹ Neither

³⁶ Ministry for Environment, Water Programme of Action: Water Allocation and Use – Technical Working Paper, June 2004, at page 9.

³⁷ Cabinet Office, New Start for Fresh Water, at paragraph 26.e.ii.

³⁸ Cabinet Office, New Start for Fresh Water, at paragraph 37.

³⁹ Cabinet Office, Implementing the New Start for Fresh Water: Proposed Officials' Work Programme, at paragraph 37.

⁴⁰ Cabinet, Implementing the New Start for Fresh Water: Proposed Officials' Work Programme, Appendix 1: Likely deliverables from projects.

⁴¹ Cabinet Office, Setting the direction for phase two of the resource management reforms, paragraph 41 to 42. Cabinet Office, Progress of phase two of the resource management reforms, paragraph 84.

the Land and Water Forum nor the Technical Advisory Group (TAG) is due to report to the government until July 2010, and there is presently little information on the exact direction that "most valued use" legislative change might take.

Nevertheless, it seems reasonably clear from recommendations made by the TAG set up to work on aquaculture reforms that the days of the first-in, first-served rule are numbered. The TAG has recommended that where councils are faced with high levels of demand that they be provided with a power to temporarily suspend applications, and the ability to use allocation mechanisms other than first-in first-served. The suggested choice of mechanisms includes preferential allocation, combining applications to hear them together, tendering and balloting.⁴² It is unlikely that policy on these issues is fermenting in isolation. Indeed the mix of regulatory based approaches and economic instruments recommended by the aquaculture TAG reflects strategies recommended under both the SWPA⁴³ and NSFV.⁴⁴ It is therefore likely that its report foreshadows work being undertaken by the TAG working on water allocation.

PROPERTY RIGHTS IN WATER UNDER THE RMA

The rights conferred under water permits

The degree of certainty that the holder of a water permit enjoys is crucial because it enables investment decisions to be made about expenditure on such things as increased production or improved efficiency. At one end of the spectrum, certainty of allocation will help decide whether new plant will pay for itself, while at the other, a permit may serve as security against loans for further investment. This brings into question the rights that are conferred under a water permit and what certainty exists that those rights are free from the claim of a third party.

In simple terms, a water permit confers a right to take, use, dam and/or divert water subject to the availability of water.⁴⁵ It does not constitute ownership of, or property rights in, the resource.⁴⁶ Nevertheless, when we consider the nature of resource consents that confer rights of allocation and use under the RMA, we find a number of characteristics that we would otherwise identify as belonging to the bundle of private property rights including (amongst others) the right to possess, use and transfer.⁴⁷

⁴² Report of the Aquaculture Technical Advisory Group, Re-Starting Aquaculture, 15 October 2009, at pages 40 to 41.

⁴³ Ministry for the Environment: Water Programme of Action – Water Allocation and use, Technical Working Paper, June 2004, at pages 20 to 22.

⁴⁴ Cabinet Office, New Start for Fresh Water, at paragraph 37.

⁴⁵ Clearly water cannot be taken if it is not available. In most circumstances this situation will present itself where the minimum flow of the river is lower than a minimum flow condition in a water permit.

⁴⁶ RMA, s 122(1).

⁴⁷ Makgill, R. Public property and private use rights: Exclusive occupation of the coastal marine area of New Zealand, Paper delivered at the New Zealand Environmental law Centre Conference 2009: *Property Rights and Sustainability: The evolution of property rights to meet ecological challenges*, 16-18 April 2009, The University of Auckland, at pages 25 to 26.

The “right to possess” is the right under which one may exercise control over something to the exclusion of all others.⁴⁸ In *Aoraki Water Trust v Meridian Energy Limited*⁴⁹ Aoraki sought a declaration that water permits, held by Meridian entitling it to the full allocation of water from Lake Tekapo, did not operate as a legal constraint on the ability of the regional council to grant others consents to the same water under the RMA. However, the High Court held that where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the RMA.⁵⁰

The Court found that Aoraki’s argument overlooked the fact that a water permit confers a right to use the subject resource. Indeed the fact that Meridian’s consents were of considerable value was seen as explicable only on the basis that such value derives from the holder’s right to use the property in accordance with its permit. It followed that granting a permit to Aoraki would reduce Meridian’s ability to make full use of the water thereby devaluing its grant. The Court held that:⁵¹

The principle of non-derogation from grant is applicable to all legal relationships which confer a right in property.

The Court held that the principle of non-derogation is based on an implied obligation on a grantor not to act in such a way as to injure property rights granted by the grantor to the grantee. It considered that Meridian must have assumed that the council would not take any steps during the term of the consents to interfere with, erode or destroy the valuable economic right which the grants had created. Granting Aoraki consent to the water “would either frustrate or destroy the purpose for which Meridian’s permits were granted.”⁵²

The principle that consent holders should be able to hold an economic right free of derogation is further enshrined in the recently introduced sections 124A to 124C of the RMA, which create priority for renewal applications for existing permits.

Nevertheless, the economic right of consent holders is not sacrosanct under the RMA and existing consents may be reviewed and adjusted to reduce allocations. The general position is that a consent cannot be reviewed unless there is a review clause in the conditions of consent.⁵³ In the case of water, however, the RMA enables councils to review the conditions of consent where a plan is made operative which sets minimum levels or flows.⁵⁴ This has led regional councils to warn irrigators to use

their full allocation or risk losing it under review, a situation commonly referred to as “use it or lose it”.

Lack of flexibility and transferability

Irrigation permits tend to include specific conditions that impose constraints on things such as irrigation type and location. These are normal mechanisms for limiting the adverse effects of irrigation on the environment. However, a report prepared for the previous government found that these types of condition may also introduce constraints on change to land uses that use less water, and the transfer of water to more valuable uses.⁵⁵

The report looked at the case of land being converted from pasture to vineyards. Changing the specified use requires a variation or even a new consent, and opens the existing consent up to review as to allocation. It found that in some areas this was managed by the landholder extending pastoral irrigation to elsewhere on the property. This was achievable in these cases because the consent was rarely sufficient to irrigate the whole property. However, the report observed that in properties where most of the available land is irrigated extra land to manage the change may not be available.

The report raised the concern that in the long run lack of alternative irrigable pasture could distort moves into alternate higher value land uses that have lower water use (i.e. vineyards), because this would result in loss of a water right that could not be regained. In support of this concern the report cites an example of where the combination of “use it or lose it” conditions of consent, an over allocated resource and the desire by the council to claw back a large proportion of allocations appeared to be encouraging landholders to irrigate where otherwise they may not in order to retain use rights.

Concerns have also been raised as to barriers to the transfer of water rights. Water permits do not run with the land but are personal to the consent holder at the specified site. They may be transferred to a new owner or occupier of the site on application by the consent holder. However, the extent to which the water can be transferred to another person depends on the terms of an irrigator’s consent.

Furthermore, transfer of water to another site also depends on whether the transfer is expressly allowed by a regional plan.⁵⁶ The provision to expressly allow the off-site transfer of water permits had not been included in the vast majority of plans at the time of the last government report, and such transfers had only been allowed in a limited number of circumstances.⁵⁷ In addition, claw back provisions in regional plans had caused irrigators to be suspicious of councils’ desire to encourage transferability.⁵⁸ This led to a situation whereby spare capacity

⁴⁸ Blacks Law Dictionary (8th ed, 2007) at 1201.

⁴⁹ [2005] 2 NZLR 268 per Chisholm and Harrison JJ (HC).

⁵⁰ [2005] 2 NZLR 268 at 282 per Chisholm and Harrison JJ (HC).

⁵¹ [2005] 2 NZLR 268 at 279 per Chisholm and Harrison JJ (HC).

⁵² [2005] 2 NZLR 268 at 280 per Chisholm and Harrison JJ (HC).

⁵³ RMA, s 128(a)(i).

⁵⁴ RMA, s 128(b).

⁵⁵ Report Prepared for MAF Policy and Ministry for the Environment, Property Rights in Water: A Review of Stakeholders’ Understanding and Behaviour, Harris Consulting, The AgriBusiness Group, November 2003, page 23.

⁵⁶ RMA, s 136(2)(b).

⁵⁷ Ministry for Environment, Water Programme of Action: Water Allocation and Use – Technical Working Paper, June 2004, at page 8.

in the water system (e.g. from unused allocation) had not been transferred or reallocated. Rather, irrigators tended to hold on to their allocation leaving question marks over whether the resource is being put to its most valuable use.

Phase Two reforms may increase flexibility and transferability

There are signs that legislation will be introduced under Phase II of the reforms that will: increase flexibility as to the use of allocation under water permits; and make the use and transfer of water permits more flexible, so that the most efficient use of allocation is encouraged. Admittedly, the NSFW is largely silent on the issue of flexibility and transferability. However, as discussed above, the strategy does focus on maximising the economic return from water available for consumptive use.⁵⁹

Furthermore, the NSFW specifically envisages providing for the allocation and transfer of water to its most valued use.⁶⁰ As with the NSFW's approach to priority, this is consistent with work undertaken by the previous government under the SWPA. This is because the SWPA looked towards introducing greater flexibility to the use and transfer of water rights in order to facilitate allocation to most valued uses. Flexibility and transferability were recommended as mechanisms for providing for such things as a financial incentive for greater technical efficiency.⁶¹ The rationale is that irrigators are more likely to improve efficiency of use if value can be derived from water savings.

Once again the report of the aquaculture TAG can be used as a barometer of the government's direction. For example, the aquaculture TAG has recommended that regional plans enable flexibility of consent use (e.g. the ability to apply for a variation to change species, technology or respond to changing environmental requirements).⁶² It is not too difficult to imagine similar recommendations to enable flexibility for different irrigation uses under water permits. This is particularly the case where the environmental effects of such changes in use are no greater than the consented use. It is worth noting that transferability issues do not seem to have arisen in respect of aquaculture. This may be because aquaculture is dependent on the occupation of space, whereas irrigation generally involves extraction and use of the resource in different locations.

CONCLUSION

Regional councils control water allocation by establishing rules concerning minimum flows and allocation limits. Allocation between competitors for the water available under those rules

⁵⁸ Report Prepared for MAF Policy and Ministry for the Environment, Property Rights in Water: A Review of Stakeholders' Understanding and Behaviour, Harris Consulting, The AgriBusiness Group, November 2003, page 24.

⁵⁹ Cabinet Office, New Start for Fresh Water, at paragraph 26.e.ii.

⁶⁰ Cabinet Office, New Start for Fresh Water, at paragraph 37.

⁶¹ Ministry for Environment, Water Programme of Action: Water Allocation and Use – Technical Working Paper, June 2004, at pages 31 to 32.

⁶² Report of the Aquaculture Technical Advisory Group, Re-Starting Aquaculture, 15 October 2009, at page 35.

is presently determined by those first in time. This system of allocation does not enable an application for allocation to be refused on the basis that a later proposal meets higher environmental or economic standards. The government is signalling that the first-in first-served approach is to be replaced by a system that enables water to be allocated to its most valued uses. This looks likely to include a market based system for allocation.

Research has shown that a lack of flexibility over allocation and transfer has discouraged efficient water use. Irrigators, for example, are fearful that moving to more efficient forms of irrigation will result in the loss of water rights. This is because restrictions on the kinds of use, and location of use, make it difficult to use water for other purposes under existing consents. Restrictions over use and location similarly make it difficult to transfer water rights to other parties either in full or for short periods of time.

Work undertaken by successive government departments has indicated that greater flexibility and transferability of water rights would provide a strong financial incentive for greater efficiency. The NSFW says little about flexibility and transferability, but the government is committed to maximising the economic return from water. Considering this policy background and current recessionary environment it is likely that reforms to flexibility and transferability will be introduced in order to both encourage more efficient water use and stimulate new economic activity.

There is presently little detail on how any of the potential changes to water allocation and property rights might work. The Land and Water Forum and water TAG are to report to the government on this by the middle of 2010. It is unclear at this stage whether there will be an opportunity for public submissions prior to the report being delivered. This is because the Land and Water Forum is supposed to represent all key stakeholders. However, the NSFW does anticipate wide public consultation before major policy decisions are made. It is worth noting in this vein that the aquaculture TAG's initial report was open to public submission. In any case, there will be an opportunity for wider public submissions once any proposed legislative reforms reach the select committee stage.

** Robert Makgill LLB, LLM Environmental (1st Hons), is a director of North South Environmental Law Limited, a specialist environmental law firm with offices in both the North and South Islands. He is the firm's principal litigator and specialises in environmental and public law. In 2005 he was awarded a doctoral scholarship in coastal and ocean resource use at the Ghent School of Public International Law, Belgium, and he is presently completing a PhD through that University. Rob is also a Fellow of the Leisure Activity and Well-being research theme of LEaP, <http://www.lincoln.ac.nz/Research-Centres/LEaP/Leisure-Activity-and-Well-being/People/>.*