Decision No. W04312004

IN THE **MATTER** of the Resource Management Act 1991

AND

IN THE **MATTER** of an appeal under section *325* of the Act

BETWEEN **IAN DONALD ALEXANDER**

(RMA165/03)

Appellant

AND **THE WELLINGTON REGIONAL COUNCIL**

Resoondent

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F *G* **Sheppard**
Environment Commissioner W R Howie

HEARING at **Wellington on 23 and** 24 October 2003
(Final affidavits received **2** April 2004.)

COUNSEL

J J Cleary for *the* appellant
H **A** Atkins and M **A** Stirling for the respondent

DECISION

Interpretation

[1] This case turns on whether a farmer needs resource consent to take water from a water supply race **at** a rate exceeding that which is a permitted activity under a regional plan.

[2] Mr I D Alexander has a farm at Hughes Line, Carterton, through which a tributary of the Parkvale Stream passes. A Regional Council enforcement officer gave him an abatement notice requiring him to stop taking water at a rate greater than 20,000 litres per day or greater than 2.5 litres per second, on the ground that he did not have the required resource consent to do so. (Taking at those rates is permitted by rule 7 of the Wellington Regional Freshwater plan.)

[3] Mr Alexander appealed against the abatement notice. His notice of appeal cited several grounds. At the appeal hearing he did not dispute that he is taking water in *excess* of the rates set in rule 7, but contended:

i. That he did not need resource consent to take water, because he was taking it from the Taratahi 'Water Scheme.

ii. That the water taken by him had already been taken for the Water Scheme, and could not be 'taken' again within the meaning of the word used in section 14 of the Act.

iii. That he has a consent within the meaning of that section.

iv. That he is not damming or diverting water. (As the abatement notice contained no assertion that he was, this is immaterial.')

[4] In respect of the first ground, the Regional Council responded:

(a) That it has not found evidence that Mr Alexander is entitled to take water from the Taratahi Water Scheme.

(b) That the water that Mr Alexander is taking in respect of which the abatement notice was served is not water from the Taratahi Water Scheme race, but from another source, being a combination of the water in the tributary of the Parkvale Stream and seepage of spring water (although the water in the tributary may include overflow from the Water Scheme race upstream of Mr Alexander's propert). In short, the Council contended that the water he is taking is not Water Scheme water, and he is not entitled to take it.

(c) Even if the water he is talung is from a Water Scheme race, to the extent that he is taking more than the limit prescribed by rule 7, he needs to have resource consent, and does not have it.

The extent of the water race

[5] Despite efforts by both counsel, regrettably the evidence was confused on the extent of the Water Scheme race, and whether the water Mr Alexander is taking, or some *of* it, is from that Scheme. Mr M D Pike, the Carterton District: Council official who is in charge of the Taratahi Water Scheme, had the understanding **that a map** of the water races of the scheme **was** on deposit at the office of the District Court at Masterton. However a search of the records at the District Court revealed no such map, and the Court Manager was not able to **find any** reference to it having been filed in that office. **A** search was then made of the Carterton District Council records for the water-race **map** of the Taratahi Scheme required by section 425 of Local Government **Act 19'74** to be open for public inspection at the Council's public office, but it was not found there either.

f6] If necessary we would make findings on the conflicting oral evidence about **the** extent of the water-races. However a finding on evidence of that **kind** would not be as reliable **as** one in which the oral evidence could be interpreted by reference to an officiaI water-race map.

[7] However if *the* Regional Council's submission summarised in point (c) of paragraph [4] is correct **as** a matter of law, then **a** finding **on** whether the water being taken from a water race would be immaterial. So, in order to provide **as** sound a decision as we can, we will consider that question first.

Is resource consent needed to take water from *a* water race?

[8] At the time the abatement notice was served on Mr Alexander,' the legislation governing the water race was Part XXV of the Local Government Act 1974.[2] Section 421 provided that nothing in that Part of that Act derogated from *any* of the provisions of the Resource Management Act.

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10 February 2003.

[2] The corresponding provisions of Local Government Act 2002 did not come into force until 1 July 2003 – see s 2(2) of that Act.

[9] We quote the material provisions of section 14 of the Resource Management Act:

> *14. Restrictions relating to water– (1) No person may take ... any–*
> *(a) Water (other than open coastal wafer);*
> ...
> *unless the taking ... is allowed by subsection (3).*
> ...
> *(3) A person is not prohibited by subsection (1) from taking ... any wafer,, if–*
> *(a) The taking ... is expressly allowed by a rule in a regional plan ... or a resource consent; or*
> *(b) In the case of fresh water, the water is required to be taken ... for–*
> *(i) An individual's reasonable domestic needs; or*
> *(ii) The reasonable needs of an individual's animals for drinking water,–*
> *and the faking or use does not, or is not likely to, have an ac'verse effect on the environment;*
> ...

[10] The meaning to be given to the word 'water' in the Act is defined in section 2(1) as follows:

> *"Water"-*
> *(a) Means wafer in all its physical forms whether flowing or not and whether over or under the ground:*
> *(b) Includes fresh wafer, coastal water, and geothermal wafer:*
> *(c) Does not include water in any form while in any pipe, tank, or cistern:*

[11] Mr Cleary argued that at common law, the water-supply water is 'artificial water'. Even if that is so. it does not influence the application of section 14, which has to be decided according to whether the water taken by Mr Alexander is within the definition of the word adopted for that Act. That meaning of water may be broader than the common Iaw meaning of the word. It may be broader than the meaning ascribed to the term 'natural water' by the Water and Soil Conservation Act 1967. But that is the meaning intended by the use of the word in section 14 of the Resource Management Act.

[12] We hold that water taken from a water race of an irrigation scheme is water within that definition, and that section 14(1) applies to it. Mr Alexander did not assert that the water being;takcn by him was required for domestic needs for drinking water for his animals, and there was no evidence that it was There is no exemption for taking water from a water race. So we find that to the extent that the rate at which Mr Alexander was taking water exceeded the rate expressly allowed by rule 7 of the regional plan. the taking is prohibited unless expressly allowed by a resource consent.

[13] Counsel for Mr Alexander submitted that the law leans against a statute taking away established rights, and that clear, unequivocal language is needed before such a conclusion is reached.

[14] We will consider, in a later section of this decision, the question whether Mr Alexander has a deemed consent or existing use right to take the water. At this point we address the submission that the Resource Management Act should be interpreted as not limiting Mr Alexander's established right to take water. As counsel remarked, that presumption applies except where the contrary is clearly indicated.

[15] The presumption is one of interpretation, to apply where Parliament's intention is not clear from the text. We do not accept that Parliament's intention is unclear in respect of rights to take water that were established prior to the Resource Management Act 1991. On the contrary, Parliament included a whole Part of that Act (Part XV, sections 364 to 433) providing in detail for the transition from previous regimes, and the extent to which existing instruments and permissions were to continue. We will consider later whether any of them applies to Mr Alexander's taking of water prior to the Resource Management Act. It is sufficient for the present purpose that if the provisions of this Act are clear, there is no scope for imputing any exceptions by invoking a presumption of interpretation.

[16] Counsel for Mr Alexander also contended that at least so far as water is concerned, the Resource Management Act is not a code, but merely a dominant Act, citing section 363.

[17] Section 363 provides:

> **363. *Conflicts with special Acts*** – *Every local* authority *or* other *public body shall be* guided, *in the exercise of* any function, *power, or* duty in relation to *natural or physical resources imposed or conferred by any of* the *enactments specified in* the Ninth *Schedule, by the provisions of this Act,* and *where* any conflict *arises between any such* enactment *and* this Act, *the provisions of this* Act *shall prevail.*

[18] For the present purpose it is immaterial whether the Resource Management Act is a code or a dominant Act. What is significant is that if Mr Alexander had any right under any of the enactments specified in the Ninth Schedule (and it is not evident that he did), to the extent that such a right conflicts with the Resource Management Act, the provisions of that Act prevail, so he would need resource consent as well.

[19] That is consistent with the provision of section 421 of Local Government Act 1974 (already mentioned) that nothing in that Part of that Act derogated from any of the provisions of the Resource Management Act.

[20] Therefore even if, on analysing the evidence, we felt able to find that Mr Alexander is entitled to take water from a water race of the Taratahi Water Scheme, **and** that the source of the water Mr Alexander was taking; was such a race, that **would** not affect the requirement that he have resource consent to take at a rate greater than allowed by rule **7.**

[21] So we proceed to consider Mr Alexander's other grounds of appeal.

Can water be ***taken*** **twice?**

[22] Mr Alexander's second contention was that the water taken by him had already been taken for the Water Scheme, and could not be 'taken' again within the meaning of the word used in section 14 of the Act. His counsel (Mr Cleary) contended that the water is taken from a river by the District Council pursuant to a resource consent for the purpose of supplying it to farmers by the water-race scheme; **and that** in granting that resource consent the **Regional** Council must have intended to allow each of the customers such amount of water **as** the District Council decides.

[23] The Regional Council responded that the District Council's water permit does not by its terms provide permission for others to take the water.

[24] We accept the Regional Council's submission. **There** was no evidence that the District Council's resource consent expressly authorises farmers to take water in excess of the permitted rate from the supply scheme. Such a **right** cannot be inferred. We hold that any customer of the scheme who takes from the water race **at** a rate greater than allowed by rule *7* requires a resource consent.

Does Mr Alexander already have consent?

[25] Counsel contended that Mr Alexander already has consent from the Carterton District Council to take water from its race, arguing that there in nothing in the Act that prevents a territorial authority, in the course of controlling **and** operating a water scheme, from consenting to a person taking water from it. Counsel added that there is a territorial authority which Parliament has seen fit to trust with a large and

complex scheme for over 100 years, and argued that the interpretation that the Regional Council urged on.the Court is that this is to be set at naught without even a section saying so.

[26] The Regional Council responded that any permission granted by the Carterton District Council to Mr Alexander to take water from the scheme would not be resource consent under the Resource Management Act; the only authority with power to consent under section 14 to taking water is a regional council; and a territorial authority does not have power to do so.

[27] Section 88(1) provides that a person may apply to 'the relevant local authority' for a resource consent The definition of 'local authority in section 2(1) is that it means a regional council or territorial authority.. The functions of a regional council prescribed by section 30(1) include the control of the taking of water,[3] and include the function of considering and deciding resource-consent applications.[4] The functions of territorial authorities prescribed by section 31 do not include control of the taking of water.

[28] It follows that the relevant local authority to decide resource consent applications for the taking of water is the regional council, not the territorial authority. So we accept the Regional Council's contention that *the* Carterton District Council does not have power to grant Mr Alexander resource consent to take water.

[29] That does not preclude the District Council, as *the* territorial authority in which the Taratahi Water .Schemeis vested, from consenting to Mr Alexander taking water from its water race. But any such consent is not resource consent under the Resource Management Act. It would not relieve him from the effect of the prohibition on taking water in section 14(1).

Is the appellant entitled to continue previous practice of taking water

[30] Although not directly addressed in his counsel's **submissions,** it **was** evident that Mr Alexander considered that he should be entitled to continue his long-standing practice of taking water.

[3] Para (e).
[4] Para (h) and *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [1996] NZRMA 241.

[31] Section 20[5] provides for continuation of existing lawful activities that require resource consent in certain conditions. However one of the conditions is that the person carrying out the activity has applied for a resource consent within 6 months after the date the regional rule becomes operative. As Mr Alexander did not apply to the Regional Council within 6 months after rule 7 of the regional freshwater plan became operative in December 1999, he is not entitled to the benefit of that section.

[32] We have also considered whether, if Mr Alexander's practice of taking water prior to the commencement of the Resource Management Act had been lawful, the transitional and savings provisions of Part XV of that Act might authorise its continuation, If Mr Alexander had held a right to take water under the Water and Soil Conservation Act 1967 (in one of the classes described by section 386(1) of the Resource Management Act) that was in force immediately before the commencement of the Resource Management Act, it would have been deemed by that section to be a water permit, which is a class of resource consent. However Mr Alexander did not assert that on 30 September 1991[6] he held a right to take water under the 1967 Act, and there was no evidence that he did.

[33] We have found no other provision of Part XV that might authorise continuation of his previous practice. The provisions of sections 20 and 386 define the extent to which Parliament intended that existing rights to take water could lawfully be continued after the Resource Management Act 1991 came into force.

Conclusion

[34] We have held:

(a) That even if the water Mr Alexander is taking is from a water race of the Taratahi Water Scheme, to the extent that the rate being taken exceeds the rate classified by rule 7 of the regional freshwater plan it is prohibited without a resource consent expressly authorising it.

(b) Resource consent held by the Carterton District Council to take water from a river for the Taratahi Water Scheme does not authorise taking of water from the Scheme's water race at a rate greater than is a permitted activity under the regional freshwater plan.

[5] As in force at the time the abatement notice was served; now section 20A.
[6] The day before the Resource Management Act 1991 came into force.

(c) Any consent granted by the Carterton District Council (in which the water race is vested) to Mr Alexander to take water from the race is not resource consent under the Resource Management Act 1991.

(d) Mr Alexander is not entitled to take water as a continuation of his practice of many years of doing so, without obtaining a resource consent expressly authorising him to do so.

[35] Consequently, we hold that the abatement notice was soundly based, and that his challenge to it does not deserve to succeed. We are not aware that the time that has elapsed since the notice was served, or any change in circumstances since the regional freshwater plan was approved, make confirmation of the notice inappropriate.[7]

[36] The only exception is that an extension of the time for compliance stipulated by the notice is appropriate. In our judgement the time for compliance should be extended to 1 August 2004.

[37] Accordingly the Court makes the following determinations:

(a) The **appeal** is disallowed:

(b) The time for compliance with the abatement notice is extended to 1 August 2004.

(c) The abatement notice, as so amended, is confirmed.

(d) The question of costs is reserved. Any application for costs is to be made in writing and lodged and served within fifteen working days of the date of this decision. Any submissions in reply are to be made in writing **and** lodged **and** served within 10 working days of the date of this decision.

DATED this 18th day of May 2004.

For the Court:

D F G Sheppard
Alternate Environment Judge

[7] S 325(6) as added by s 84 **RMAA** 2003.