

# The Politics of Science in the Land the Law Forgot

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Photo: Alice  
Moss-Baker

## Nothing is apolitical

There are few areas more  
political and conflict-  
ridden than the ability of  
individuals and  
corporations to  
  
exploit,  
  
use,  
  
modify, or  
  
destroy natural resources



## Politics loves a vacuum

- \*ambiguous enough to please all parties,
- \*vague enough to be difficult to enforce,
- \*and ill-defined enough so that failures to implement the goal will be difficult to detect and impossible to litigate.
- \*sound lofty but accomplish little.



**Problem – encroachment**

**Cause – forgotten**

**Solution – opportunity**





Over the line: Rivers being whittled away



LINZ/SUPPLIED

**Problem – encroachment**  
**Cause I -- UCL**



LINZ/SUPPLIED



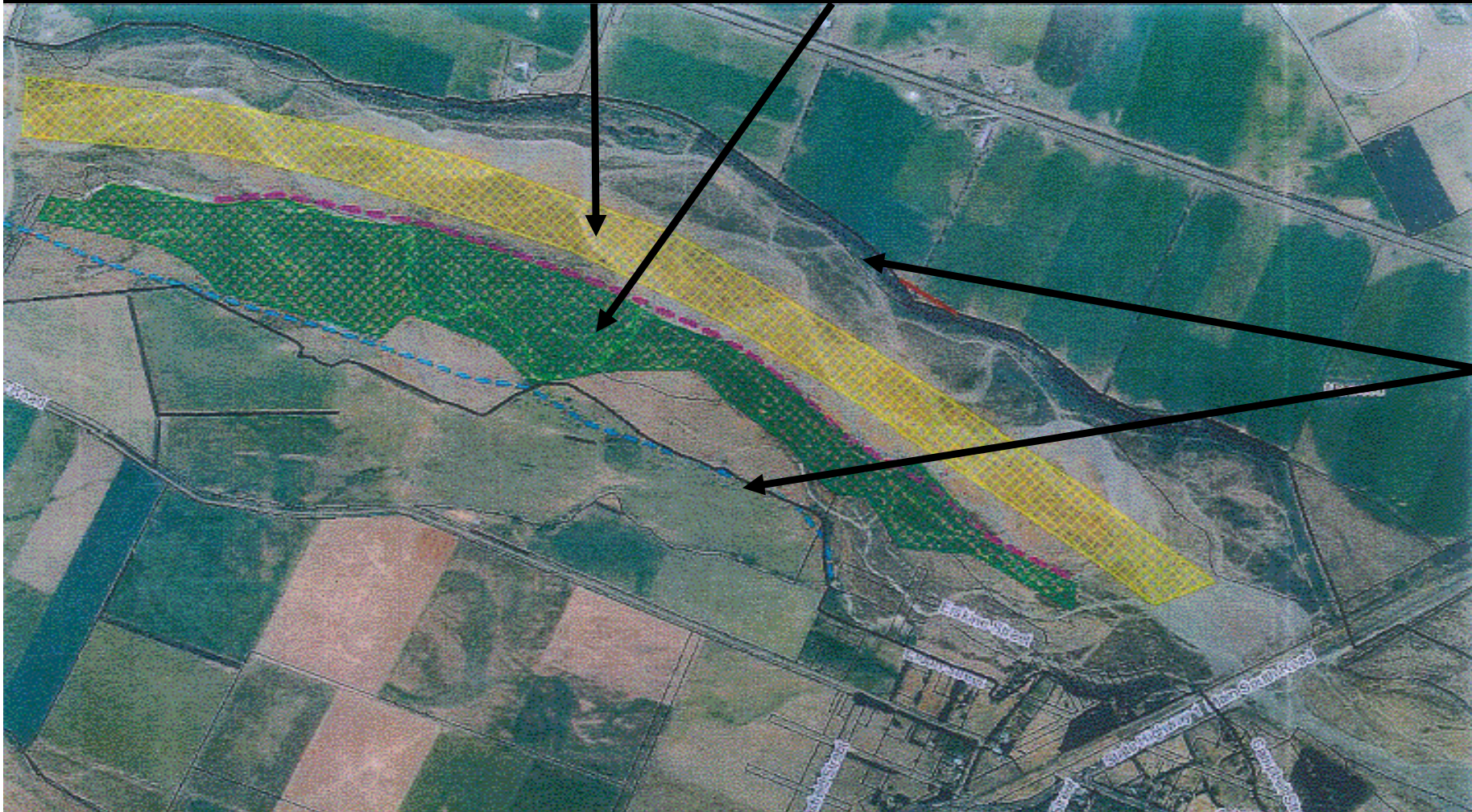
## Cause 2 -- *ECan v Dewhirst*





# 2016

***Please can I clear and dig?***



**No.  
Flood  
protect  
zone.**



# Ecan's Flood protection boundaries



**Dewhirst**  
**Gravel**  
**Bund**  
**Veg**  
**Track**



DEWHIRST:  
PLEADS GUILTY,  
DISPUTES FACTS,  
HIRES QC

Location and extent of river bed  
(murky at best)

Interaction between "fullest flow"  
and "overtopping banks" in RMA  
definition

Relevance of Selwyn flow rate in  
determining banks

Flood channels or braids?



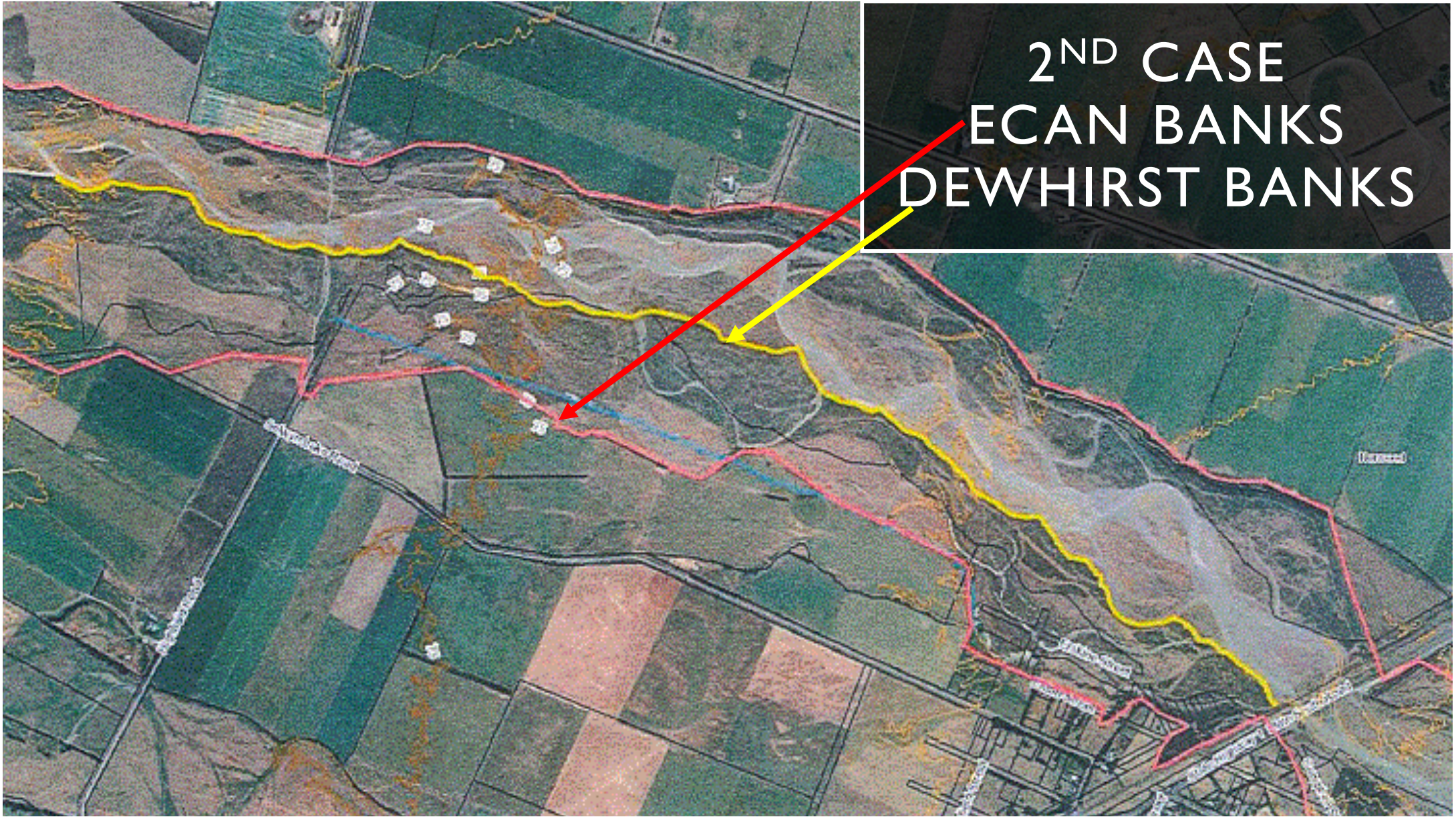
## FIRST DECISION – DISTRICT COURT AUG. 2018



- Acknowledges role of science in defining river bank
- Favours ECan method
- Braid, not flood channel
- Expansive braidbed, narrower freehold, definitions mean earthworks were in bed of the river Selwyn/Waikirikiriri

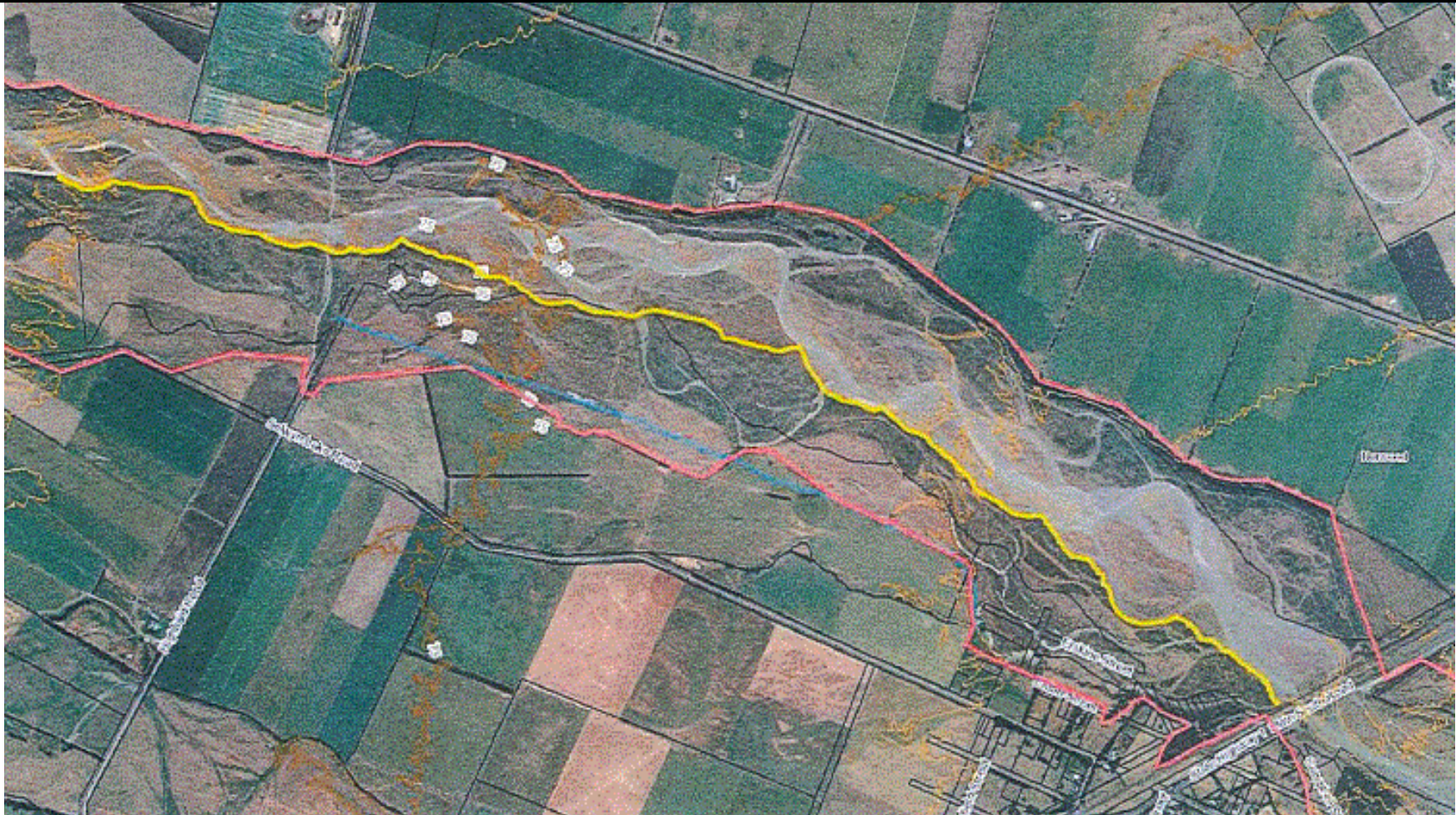


2<sup>ND</sup> CASE  
ECAN BANKS  
DEWHIRST BANKS



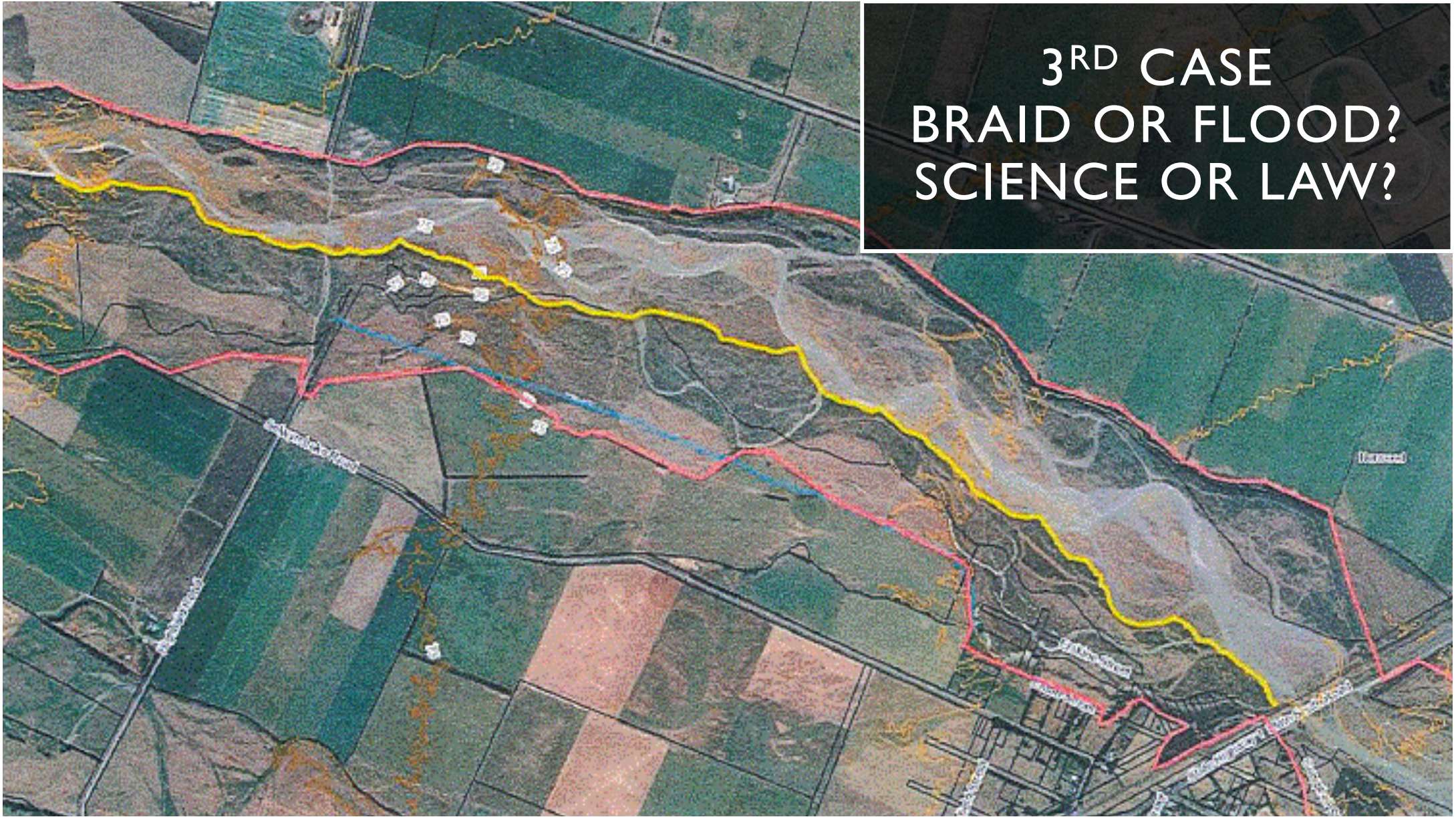


COURT DECISION: "IT IS SIMPLY NOT APPROPRIATE TO MAKE FACTUAL FINDINGS ABOUT WHAT CONSTITUTES THE BED OF A RIVER HERE BASED ON THE EVIDENCE PROVIDED BY EXPERTS."





3<sup>RD</sup> CASE  
BRAID OR FLOOD?  
SCIENCE OR LAW?

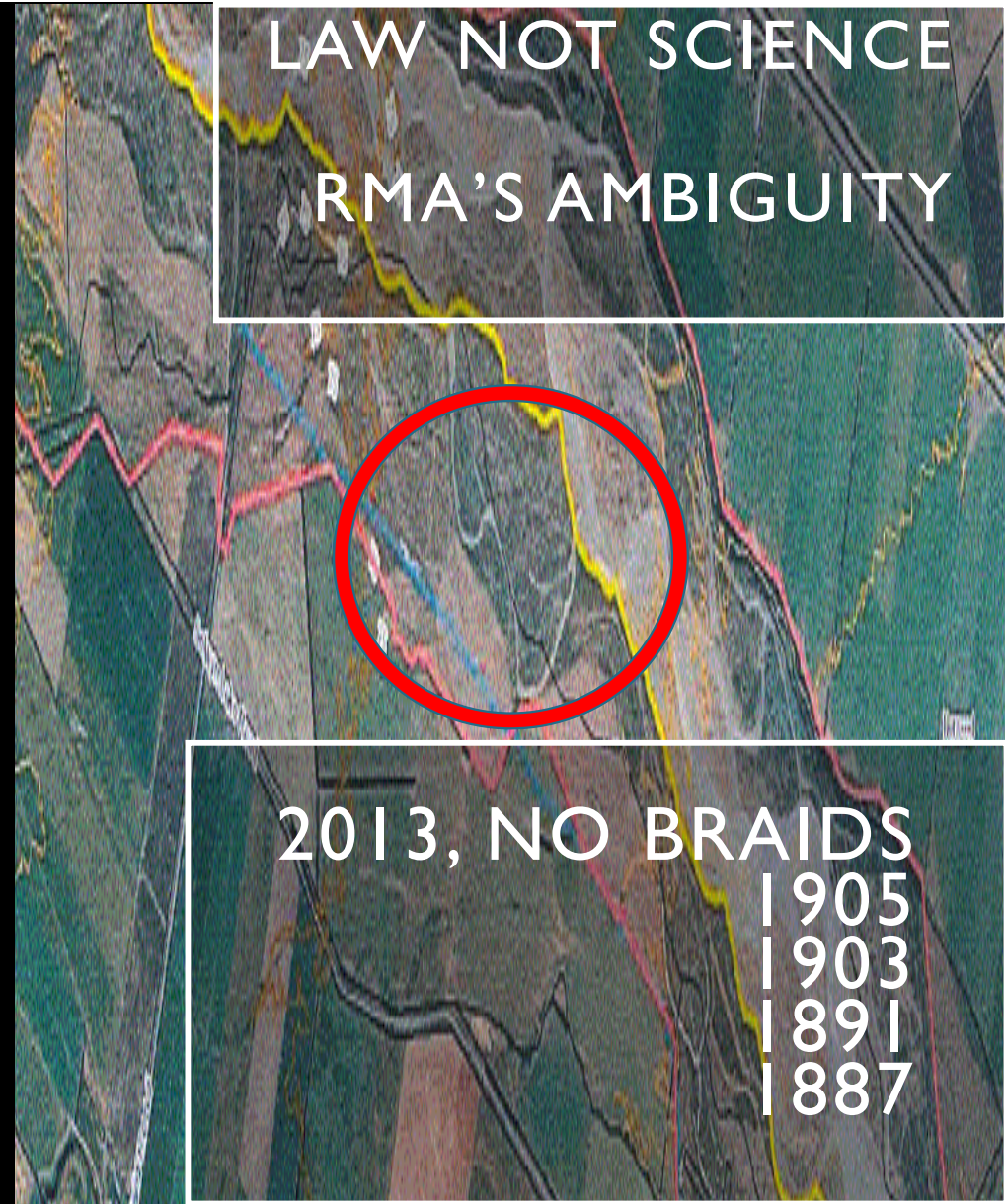




3<sup>RD</sup> DECISION  
FLOOD NOT BRAID  
NARROW BED



LAW NOT SCIENCE  
RMA'S AMBIGUITY



2013, NO BRAIDS  
1905  
1903  
1891  
1887

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## OPPORTUNITY

ADD A DEFINITION TO THE RMA FOR  
THE LAND THE LAW FORGOT?

WHAT SHOULD IT SAY?



EXTRAS



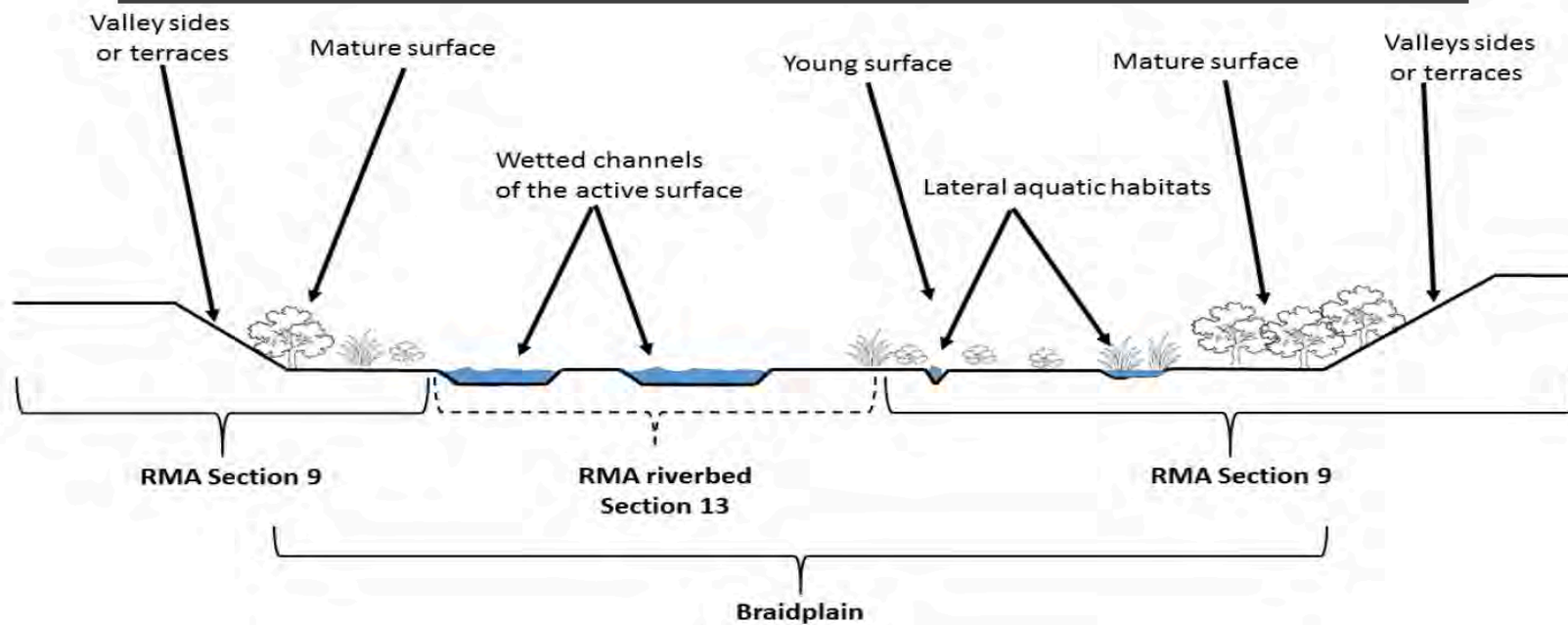
## WHAT THIS MEANS FOR BRAIDED RIVERS

The latest decision from the court of appeal endangers braided rivers. The Court of Appeal has stuck with a narrow definition that while it works for many rivers such as straight channels, it is not easily applied to braided rivers.

The approach used to fulfil the definition in the RMA allows for many features to be mistaken as banks, constricting the river bed. In this case a large side braid, which returns to the main channel is discounted due to the the identified bank. This issue will continue to arise in other areas of braided rivers.

As entire braids are at discounted from being included as river bed, the Regional Council has less control over the area which will now be deemed as river margin or floodplain. As the land surrounding the now river margin is already established as farmland, further encroachment is likely to occur.

## COUNCIL'S ABILITY TO PROTECT BRAIDED RIVERS IN LIGHT OF THE NEW DECISION





“ONE IMMEDIATELY THINKS OF THE SELWYN RIVER IN  
CANTERBURY. MANY CANTABRIANS HAVE NEVER SEEN WATER IN  
THAT RIVER BED. IT DOES NOT MEAN THAT THE RIVER DOES NOT  
HAVE A FUNCTION AND A NEED FOR IT TO BE PRESERVED” –  
FOGARTY J CARRUTHERS V OTAGO REGIONAL COUNCIL

## WHAT NOW?

- With a overhaul of the RMA in sight, it may be wishful thinking to hope that a separate interpretation for braided rivers may be included in the amendment
- Regional Councils are forced to changed their rules and regulations in order to clarify land use surrounding braided rivers, namely the newly labeled river margins.
- In some instances the best Regional Councils can hope for is that landowners will express their plans to develop their land adjacent to a river margin. Canterbury Regional Council expressed caution in changing land use such as further intensification for farming or constructing buildings



## WHAT NOW?

- Legislation in place to protect these areas now falls under s9 of the RMA and there are many exceptions which allow land use and development.
- More collaboration is needed between Regional Councils, Department of Conservation and Land and Information New Zealand which all monitor and protect different areas of rivers to best facilitate protection of braided rivers