

THE RESOURCE MANAGEMENT ACT 1991

APPLICANT:	W.N.CAMERON
LOCAL AUTHORITY:	CANTERBURY REGIONAL COUNCIL
SUBJECT MATTER:	CRC020744 - a water permit to take and use water from bores hydraulically connected to the Wainui Stream
REFERENCE:	CRC020744.1
HEARING DATE:	April 14, 2009

Appearances:

- Dale Lester for the applicant W N Cameron
 - Peter McIlraith
- Maria Bartlett to present section 42A report

DECISION OF THE COMMISSIONERS

Background

In 2002 the Applicant obtained consent to take water from three bores on his family farm at a combined rate not exceeding 225 litres per second. The existence of hydraulic connection between these bores and what is now called the 'Wainui Stream' (a contributory of the Waitaki River) is shown by condition 2 of that consent (CRC020744):

The taking of water in terms of this permit shall cease whenever the flow in the Wainui Stream, at or about map reference NZMS 260 140:2290-9664 as estimated by the Canterbury Regional Council falls below 400 litres per second.

It appears that this consent was granted on the understanding that 700 litres per second reasonably represented the average flow of the stream. It was later discovered, however, that the average flow is about half that – this arising from later gaugings and the installation, by Meridian Energy Ltd, of a flow measuring device in the culvert of a road bridge at about the point at which the Wainui Stream flows into and becomes part of the Pentecotico Stream (downstream of all presently relevant abstraction points)

As a consequence, and at least in the mind of the Applicant, his consent became of significantly lower value and unable to be fully exercised. Accordingly, and in August 2005, he sought to change condition 2 so that the ‘cut-off’ figure became 200 litres per second. That application was swept into the Ministerial calling-in, consequent upon ‘Project Aqua’, of all Waitaki applications. In the meantime the Canterbury Regional Council adopted a ‘non-enforcement’ stance for this consent.

Following its extraction from the calling-in process, it was determined that the present application should proceed on a non-notified basis with Mr Peter McIlraith receiving notification as a person potentially effected. Mr McIlraith holds a water permit to divert 91 litres per second (for the purposes of stock water supply and irrigation) from the Wainui Stream at a point downstream of the bores but upstream of the Meridian flow meter. That diversion occurs by way of an in-bed structure (so as to provide sufficient head) and a pipe. Water flowing through that pipe, the entry point of which is Mr McIlraith’s consented point of diversion, flows to a watercourse known as ‘Parkers Creek’. That creek receives water from the pipe that either Mr McIlraith does not use or which is ‘backwash’ from his irrigation system, and from other sources, and eventually flows to the Waitaki River. Following his receipt of notice Mr McIlraith made a submission supporting the present application in part – he seeks that the ‘cut-off’ point be 270 litres per second.

We (J Milligan and Cr J Demeter) have been appointed as commissioners “to consider and decide [the present application] with the full powers of the Council as a consent authority”. Section 113(1) of the Act requires that our decision be in writing and “state [amongst other things] a summary of the evidence heard”. That summary is attached as an Appendix to this decision – all other required material will be found in the body of it.

Mr McIlraith’s position

Before discussing the merits of this application we need to consider Mr McIlraith’s stance. He says that Parkers Drain is “a real and actual natural resource”, the environmental consequences to which cannot be ignored by decision-makers. In his opinion the present proposal will lead to a significant reduction in the flow of that watercourse, to the detriment of its natural values and to the interests of those whose lands adjoined it (including himself).

This was in contrast to the way the present application was put to the person deciding the ‘notification’ issue. The view then taken (so it seems to us) was that the diversion of water from the Wainui Stream towards Parkers Creek was justified solely on the basis of the McIlraith water permit. If Mr McIlraith is right, the application should have gone – and should now go – to public notification (and with a wider group of affected persons).

We are in no position to determine whether he is right – that can only be done by a Court of competent jurisdiction. We are, however, required to adopt a position with regard to this issue, and accordingly set out what we think that position to be. These are not ‘findings’ as such, but our best understanding of the information that we have been given and of the inferences that we think may properly be drawn from it.

Memorandum of Transfer 142723 records that it was executed in July 1921 as part of the settlement of an action brought in the (then) Supreme Court of New Zealand by R McIlraith against A C Cameron (of whom the present parties are descendants and successors in title).

From the transfer – and from other information provided to us, including the former names of the relevant watercourses – it seems to us that:

- The Plaintiff claimed that the Defendant had, by forming what was then called ‘Swamp Drain’ (now the Wainui Stream) drained upstream swampland to such an extent that the Penticotico Stream (and perhaps other streams) were deprived of water;
- As a riparian owner of (part of) the Penticotico Stream and/or those other streams the Plaintiff claimed redress, and
- The action was settled on the basis that the Defendant would grant an easement to the Plaintiff entitling him to take, through pipes already constructed by the Defendant, a
... continual and uninterrupted flow of not less than [about 31 litres per second] of water from [Swamp Drain, at the point of the present diversion] to [Parker’s Creek] and at such a level that the water will flow down Parker’s Creek ...

The recitals of the Transfer suggest that Robert McIlraith sued as a riparian owner having (at that time) rights in relation to water flowing through, or on the boundaries of, his land. Those rights were ‘natural and proprietary’, but not extensive. They consisted merely in a right to receive the natural flow of a river (in its natural watercourse), to use the water in that flow for domestic purposes and for stock water, and for other “extraordinary” purposes on the proviso that the natural flow was not substantially diminished. This proviso precluded (e.g.) the abstraction of water for spray irrigation.¹

The important point here is that Mr McIlraith was seeking redress for the deprivation of a private right, and he settled his action on the basis that he received a different (and also private) right. Both rights were as to the diversion and use of water. It may well have been that, at that time, other persons could have sought similar redress, but those potential actions have long since vanished behind the veil of limitation periods.

Transfer 142723 operated only to enable the Plaintiff to obtain benefit from the riparian rights of the Defendant. Rights of that sort were, however, extinguished by section 21 of the Water and Soil Conservation Act 1967 and replaced by a system of statutorily authorised grants of right for which application was required. The 1967 Act retained, and extended to non-riparian owners, the ability to take water for the “domestic needs [of the taker] and for the needs of animals for which he has any responsibility ...” Uses of water lawfully existing at the commencement of the Act could continue “to the extent that [they then] had lawfully been happening”.

In 1969 the continuance of an existing water use was made to depend upon registration of it with the appropriate Regional Water Board. On our understanding that was done in the present case, the volume then occurring being registered at 31 litres per second. This is the *least* volume available in terms of the Transfer (apart from those times in which only less was available in the stream), and it is not clear whether the figure recorded represents the extent of the then diversion or was, instead, an (arguably) inexact paraphrase of the grant in settlement.

¹ As to this, see 49(2) Halsbury’s Laws of England (4th Ed.), para 70ff

The Water and Soil Conservation Act 1974 was repealed by the Resource Management Act 1991, the transitional provisions of which deem 'existing authorities' (including registered existing diversions) to be RMA water permits. In 1995, Mr McIlraith obtained a permit (CRC953146) effectively as an extension of that to which he had succeeded, so as to enable a diversion of 91 litres per second. That diversion was said to be at the point within the Wainui Stream where the structure and pipeline intake presently are, so that the authorised diversion occurred via that pipeline.

From this we take the best view to be:

- (i) The rights created by Transfer 142723 were extinguished by statute, except to the extent that they were preserved as an 'existing authority', thereafter converted in to a deemed water permit.
- (ii) Whatever may have been the lawful extent of the existing diversion in 1974, the maximum rate has now been fixed at 91 litres per second as the result of the 1995 application – the consent granted at that time operates in substitution for the previous deemed water permit;
- (iii) The present water permit is in the nature of a private right, and is exercised by means of a pipeline the rights in respect of which are an incident of Mr McIlraith's land ownership;
- (iv) Water from the Wainui Stream may now lawfully enter Parkers Creek only as a result of the exercise, by Mr McIlraith, of his present water permit – that is, Wainui Stream contributes only to the extent that the water that Mr McIlraith is entitled to divert exceeds his actual requirements (as, e.g., through non-use or as the result of bywash)
- (v) For that reason Mr McIlraith is the only 'person affected' by the present proposal, and that only to the extent that the benefit of his right might be lost in whole or in part;
- (vi) There is no need to revisit the 'non-notification' decision.

We proceed to consider the present application on that basis. Section 104(1) reads:

When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

- (a) any actual and potential effects on the environment of allowing the activity; and
- (b) any relevant provisions of—
 - (i) a national policy statement;
 - (ii) a New Zealand coastal policy statement;
 - (iii) a regional policy statement or proposed regional policy statement;
 - (iv) a plan or proposed plan; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Status of the proposal

As an application to vary the conditions of a consent, the present proposal is to be considered as a discretionary activity – s127(3)a – this regardless of the status of the activity in relevant plans.

Effects on the environment

Section 127(3) requires that, in this context, we are to consider only the effects of the change sought. There appears general agreement that the in-stream values of Wainui Stream (below Mr McIlraith's abstraction site) would be protected by a minimum flow of 100 litres per second. That was the minimum flow adopted for the purposes of Mr McIlraith's 1995 consent – a point that supports our conclusion that this consent was not in addition to a preserved existing diversion.

In her section 42A report Ms Bartlett considered actual and potential effects of the present proposal under the heads 'effects on ecosystems', effects on other water users', 'effects on people, communities and amenity values' and 'effects on Tangata Whenua values'. She concluded that, at worst, these could properly be categorised as minor and acceptable. We agree, but note that, on the information presently available, approval of the present application would have the practical result of fully allocating the resource values of Wainui Stream.

For reasons already given we have given no weight to the consequences (such as they may be) to the environmental values of Parkers Creek.

Relevant statutory documents

There are no relevant national policy statements and the area is well outside the ambit of the New Zealand Coastal Policy Statement. Apart from requiring resource consent for takes of the present sort the Transitional Regional Plan contains nothing of relevance. We were not referred to any relevant constraining provision of the Regional Policy Statement or of the Proposed Natural Resources Regional Plan. In any event, the effect of the Resource Management (Waitaki Catchment) Amendment Act 2004 is to exclude the PNRRP in favour of the Waitaki Catchment Water Allocation Plan 2005, for the purposes of allocating water within the Waitaki catchment.

The present proposal appears to comply with all but Rule 2(1)a of the latter plan. That provides that water shall not be taken unless the flow in the relevant river (in this case the Wainui Stream) is above the prescribed 'minimum flow'. No such flow has yet been prescribed for the Wainui Stream – the relevant rule requires a determination of the 5 year 7 day low flow, something that has yet to occur. On her analysis of the Objectives and Policies of that Plan Ms Bartlett concluded that the present application is consistent with them. We agree.

Other matters

It seems to us that the history is of some significance. We accept Mrs. Cameron's evidence that the farm has taken water in a way very similar to that which would have been permissible if the consent had contained a Condition 2 in the form now proposed. We accept also that the nature of, and assumptions behind, the original grant has led the Applicant to adopting farm practices that, if constrained by a strict enforcement of the original condition, will have to alter (to the detriment of farm productivity). While it may well be that the Regional Council's 'non-enforcement' stance was a reasonable response to the delays necessarily occasioned by the Ministerial calling in, it has had the effect of reinforcing the farming decisions of the Applicant.

While we think this to be of some significance so far as the justice of the case is concerned, it might well be outweighed if adverse environmental consequences were a likely result of

approval. There is no suggestion that the Applicant's present practices have been detrimental (either to the environment as a whole or to Parkers Creek). Mrs. Cameron said that Mr McIlraith had never expressed concern about the effect of those practices, and he did not do so when presenting his case to us. This suggests that the Parkers Creek environment has adjusted to a regime similar to that likely to be a consequence of the alteration proposed, and that the approval of the present application is unlikely to alter things much.

Part 2 considerations

The use of the words "subject to Part 2" in section 104(1) makes it plain that the matters in sections 6 – 8 must be considered and given their required weight, and that ultimately the test is whether the purpose of the Act – 'sustainable management' as defined – would be better met by the grant or a refusal of consent. Again we note that, as a consequence of s127(3)b, what is in issue is the change of condition proposed, not the entire (and subsisting) consent.

Section 8 requires us to take in to account the principles of the Treaty of Waitangi. Both Te Runanga o Ngai Tahu and Te Runanga o Waihao have been consulted, and each has indicated that it does not wish to oppose the alteration sought.

Of the matters set out in section 7 – to which we are required to have particular regard – those in clauses (b), (c), (d), (f) and (g) seem to have relevance (there is no suggestion that the habitat of trout and salmon would be affected in any way). In our view none of these matters tell against an approval of the proposed alteration, and we are of the view that to grant approval would aid the efficient use and development of the resource that is the Applicant's farm. Again we record that, in considering matters (c), (d) and (f) we have ignored (for reasons already given) such impacts as there may be on Parkers Creek.

Section 6 contains matters of national importance which must be recognised and provided for in this decision. Of them, only (a) appears to be of significance in the present case:

The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

To a large extent Mr McIlraith's submission rests on this. For reasons already given it is our view that the affected area will retain a natural character not dissimilar from that which it presently has. We are supported in this by the following:

- From the Transfer, it appears that Parkers Creek was in existence as a waterway before the diversion from Wainui Drain occurred;
- The photographs presented by Mr McIlraith suggest that it is a 'gaining' stream – that is, it has sources other than the Wainui Stream diversion; and
- The values that Mr McIlraith seeks to protect (para 3, his formal submission) appear to have survived the Cameron takes.

Accordingly we conclude that section 6 does not stand in the way of approval to the present application. We have no difficulty in determining that the alteration now sought would accord with the requirements of section 5.

Conditions

During the time that this application has been 'on hold' discussions have occurred between the Applicant and officers of the Consent Authority as to the nature of further mitigatory conditions that might be imposed. Essentially these related to improved systems of flow measurement, so as to ensure the maintenance, in practical terms, of the 'low flow' requirement. It seems to us that the fortuitous installation, by Meridian Energy, of an accurate flow measuring device in the road culvert, provides an available and accurate means of checking that the flow in the lower reaches of the Wainui Stream is not being reduced to unacceptable levels by upstream abstraction. If it is, then that fact may well trigger investigation and, in necessary, enforcement action,

Because of this, the precautionary approach taken by Ms Bartlett – based upon the assumption that the Applicant's measurements may be 10% in error – appears of less importance. We were assured that measurement devices currently available can be expected to produce results to a higher level of accuracy than that. We accept the evidence that significant losses to ground are unlikely over the distance between the Cameron measurement point and that of the McIlraith abstraction. We think that a flow of 200 litres per second within that reach will both accommodate the McIlraith abstraction and provide a small but sufficient margin. As we have already indicated, what is required here is a regime that does not interfere with Mr McIlraith's rights (as distinct from one designed to enhance natural flows to Parkers Creek).

As the additional conditions were not in dispute we accept them as they stand.

Formal Decision

For the foregoing reasons the conditions of consent CRC020744 are changed as follows:

1. Condition 2 is to read:

The taking of water in terms of this permit shall cease whenever the flow in Wainui Stream, at or about map reference NZMS 260 140:2290-9664 as estimated by the Canterbury Regional Council, falls below 200 litres per second

2. Existing condition 9 is to be re-numbered as Condition 11
3. There is to be a new Condition 9 reading:

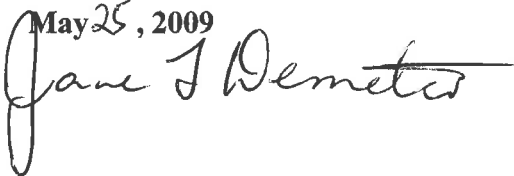
The consent holder shall maintain the minimum flow site specified in Condition 2 for the purpose of maintaining accurate estimates of the flow in Wainui Stream. Maintenance shall include, but not be limited to, keeping a staff gauge in good working order, from which a visual estimate of the flow can readily be made, and keeping the bed of Wainui Stream free from weeds, as far as practicable

4. Condition 10 is to read:

- (a) The consent holder shall utilize a water flow measuring and recording device that has an international accreditation, New Zealand or equivalent calibration or endorsement to continuously measure the flow of water in Wainui Stream, at or about map reference NZMS 260 140:2290-9664, within an accuracy of plus or minus 10 percent to ensure compliance with the minimum flow specified in Condition 2.
- (b) (i) The measuring site shall be gauged once every 12 months in the period 1 October to 30 April in each year, and at any time when determined from a site inspection by a suitably qualified person or requested by the Canterbury Regional Council;
(ii) The measuring and recording device shall be inspected once before and once following the irrigation season to ensure that the flow device is recording information to file. When gaugings are carried out in accordance with Condition 10(b)(i) the consent holder shall ensure that the person carrying out the gauging has verified that the flow exiting the pipe is being measured accurately as specified in Condition 10(a). The flow device depth offset calculation shall be checked before and after the irrigation season
- (c) All data from the measuring and recording device described in Condition 10(a) shall be provided to the Canterbury Regional Council annually by 30 June each year, or within 10 working days of a request for the data by the Canterbury Regional Council.
- (d) Within six months of the commencement of this consent, and at five yearly intervals thereafter, and at any other time when requested by the Canterbury Regional Council, the consent holder shall provide a certificate to the Canterbury Regional Council signed by a suitably qualified person certifying the accuracy of the measurement device installed in accordance with Condition 10(a)

Cr J Demeter
Commissioner

May 25, 2009



J Milligan
Commissioner
May 20, 2009

APPENDIX

Summary of evidence as required by s113

Sandy Cameron

- Significantly involved in issues of water allocation'
- Describes farming operations – dependant upon “self irrigating” soils, where land is supplied by water from springs. This is likely to be reduced as a result of the North Bank Tunnel project
- McIlraith has never indicated that the existing takes – made under the ‘non-enforcement’ regime – have reduced his ability to exercise his right. In recent years the Applicant has taken water at instream flows of between 40 and 200 litres per second – that is, as if the regime now sought was in operation;
- Because of the dry summer conditions irrigation is necessary to maintain production. Without it, or if the terms of the present consent were strictly enforced, the farm would have experienced a significant reduction in productivity and would have lost part of the benefit if its expenditure in infrastructure.

Tim Ensor

- Environmental Planner, URS NZ; experienced in water allocation issues
- Describes the application and its context, discusses additional conditions with which the Applicant agrees and refers to relevant Plans;
- As to the WCWARP: because of the absence of ‘low flow’ any new application would be considered (by the CRC) as non-complying; but as this is a variation it should be viewed as discretionary;
- McIlraith is authorised to divert 91 l/sec from a point some distance below the Applicants ‘minimum flow’ site, and must leave 100l/sec in the stream. In order for him to have the full benefit of his right there must therefore be 191 l/sec at his diversion point;
- There are no suggestions of adverse environmental effects arising from the regime now proposed;
- The amenity values associated with the water-race (Parkers Creek) is a function of his consent – if the protection of those values requires more water then he cannot take it.
- No Tangata Whenua issues have been raised – the relevant Runanga have been consulted;
- There is not enough data to enable an assessment of whether the rules of the WCWARP can be complied with, but the present application is consistent with the objectives and policies of that plan;

- The application is consistent with Part 2 of the Act.

Stephen Douglass

- Senior hydrologist, URS NZ
- Gives an over-view of the ‘environmental setting’ – geomorphology, geology and hydrology, all “significantly modified;
- States that the Meridian recorder shows a median of 371 l/sec, which is consistent with the figures of 390-400 obtained from gauging;
- Discusses the diversion structure used for the McIlraith abstraction – water to irrigation and bywash;
- Refers to a significant relationship between surface and groundwater;
- The water in Wainui Stream is of generally good quality. He considers the quality of aquatic life has not been significantly affected by abstraction. There has been little detailed assessment, but the stream provides fish habitat. None of the known fish species are considered threatened.
- In the absence of a determined ‘minimum flow’ (for the purposes of Table 3) a figure of 200 l/sec has been accepted – following consultation – as appropriate;
- Discusses the measurement device recently installed by Meridian – regards it as providing “a highly accurate measure of the flow in the Wainui Stream in most instances.

Peter McIlraith

- Resident of Glenmac – a certified Hearings Commissioner with Chair endorsement;
- Believes Parkers Creek to be a “real and actual natural resource” which existed prior to the diversion from Wainui Stream;
- The transfer entered in to following the settlement of Court action provides a continuing and enforceable obligation to supply water – this, he says, is in *addition to* the amount available in terms of the consented take, because the effect of the Transfer was to supply Parkers Creek with water that had been diverted from it by the construction of Swamp Drain/Wainui Stream;
- Parkers Creek, as it now stands, depends upon more than the 91 litres consented to (by inference, somewhat more is being diverted through the pipe than that). The Creek has values for wildlife and for the properties that it passes through. The owners of those properties should, he says, have been given notification as persons affected;
- Other matters:
 - (i) He supports, retrospectively, the ‘non-enforcement’ stance;

- (ii) He does not accept the description of Parkers Creek – or at least the commencement of it as ‘his’ water race;
- (iii) In the context of the RMA, Parkers Creek is there in a real and actual sense.