

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of applications for water permits to abstract water, land use consents to excavate and disturb the bed of the Homestead Stream, the construction and operation of a dam and discharge of water from a dam for the proposed Forevan and Winterberg activities

BY ROBERT HAY ROBERTSON
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TO ENVIRONMENT CANTERBURY
Local Authority

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. Mr Robert Robertson seeks a number of resource consents for the irrigation of arable land on Foveran Deer Park (“Foveran”) and Winterberg Farm (“Winterberg”).
2. Foveran is located approximately 10km up the Hakataramea Valley from the Waitaki River. Winterberg is located another 5km up the valley from Foveran. Foveran and Winterberg predominantly operate as deer farms. Together they are recognised as being one of the leading deer studs in New Zealand. Merino sheep are also run on the two properties.¹
3. The Robertson family has owned Foveran for three generations. Mr Robertson purchased Winterberg in 1988 to compliment the Foveran deer farm operation.²
4. Mr Robertson has invested heavily in the aesthetic and ecological values of both properties through extensive tree planting and the provision of riparian fencing and wetlands. These efforts were recognized in 2005 when Foveran was awarded the Fish & Game New Zealand Environment Award for excellence in riparian management.³
5. Foveran and Winterberg presently take surface water from the Hakatamarea River for irrigation under two existing resource consents. These takes respectively enable 26 l/s to be taken for the irrigation of 65 ha on the Foveran property (CRC950601.2), and 45 l/s to be taken for the irrigation of 136 ha on the Winterberg property (CRC950602.2).
6. The Foveran application seeks to increase the existing rate of take by 26 l/s (CRC031592). It is planned that the proposed application will be used in conjunction with the existing application (CRC950601.2) to take a total of 52 l/s for the irrigation of 130 ha of land. This area is within the existing deer fenced area and will enable all the land on the property suitable for K line irrigation to be irrigated. This will in turn improve pasture and winterfeed supplements for the existing deer herd.
7. The Winterberg applications will enable the construction of a dam, the harvesting of water during high rainfall events and the irrigation of 690ha of new irrigable land at a rate not exceeding 320 l/s (CRC032220, CRC032221 and CRC032222). These applications will enable Winterberg farm to increase its deer fenced area and

¹ Barry Gard's Evidence, paragraph 7.

² Ibid, paragraph 5.

³ Ibid, paragraphs 18 and 19.

guarantee winterfeed supplements for its Merino sheep. It will also enable Winterberg to augment the existing water take permits during times of restriction (CRC950602.2 and CRC950601.2).

SCOPE OF SUBMISSIONS

8. For the Panel's ease of reference I note that my submissions are set out under the following headings:
 - (a) Evidence
 - (b) Description of activities
 - (c) Status of activities
 - (d) Sections 104, 104B and 104D of the RMA
 - (e) Environmental effects
 - (f) Relevant planning documents
 - (g) Other matters – precedent
 - (h) The exercise of discretion under section 104B

EVIDENCE

9. The following witnesses will provide evidence for Mr Robertson:
 - (a) Mr Barry Gard, the Farm Manager, on the history of the farms and why the resource consents are sought;
 - (b) Mr Dave Stewart, a Hydrologist, on the proposed takes, environmental flows and annual allocations;
 - (c) Mr Bob Hall, a Structural Engineer; on dam design and the effects of the proposed dam on the environment;
 - (d) Mr Tom Heller, an Environmental Scientist, on water quality and cumulative water quality effects;
 - (e) Dr Wayne Donovan, a Freshwater Ecologist, on the ecology of the Hakataramea River and Homestead Stream; and
 - (f) Mr Alan Cubitt, a Planner, on activity status, environmental effects, relevant planning documents and Part II of the Resource Management Act 1991 ("RMA").

DESCRIPTION OF ACTIVITIES

10. The proposed activities are described in the resource consent applications, the Foveran and Winterberg Summary AEE⁴ and the Section 42A Officer's Report.⁵
11. In summary, Mr Robertson has applied for resource consents to:
- (a) Abstract water from the Hakataramea River at a rate of 26 l/s for irrigation of 65 ha of crops and pasture adjoining McHenry's Road, Hakataramea Valley (CRC031592);
 - (b) Abstract 320 l/s from a dam for irrigation of 690 ha of crops and pasture located in the vicinity of McHenry's Road and Table Top Road, Hakataramea Valley (CRC032220);
 - (c) Excavate and disturb the bed of Homestead Stream to place a 28 metre high dam between Frasers Road and Meyers Pass Road, Hakataramea Valley (CRC032221);
 - (d) Dam up to 5.5 million cubic metres of water in a 28 metre high and 2.2 kilometres long dam between Frasers Road and Meyers Pass Road, Hakataramea Valley (CRC032222); and
 - (e) Discharge water from a dam into Homestead Stream and the Hakataramea River between Frasers Road and Meyers Pass Road, Hakataramea Valley (CRC084057).
12. The water take for the Foveran property (CRC031592) is partly required because of a miscalculation by the Council made in respect of the current consent (CRC950601).⁶ The current consent entitles Mr Robertson to take water to irrigate up to 80 ha but it restricts the take to 26 l/s. This restriction only enables Mr Robertson to irrigate up to 65 ha of land.
13. The water take application seeks to increase the rate of take to match the original area to be irrigated (80 ha) as well as an additional 50ha. The application therefore seeks to take an additional 26 l/s from the Hakataramea River for irrigation of 65 ha of land. The consent, if granted, will be used in conjunction with the existing consent to enable a total take of 52 l/s of water from the Hakataramea River for irrigation of a total of 130 ha of land.

⁴ Foveran and Winterberg: Summary AEE for Resource Consent Applications, pages 18 to 23.

⁵ Section 42A Officer's Report (Report 14), paragraphs 17 to 20.

⁶ Foveran and Winterberg: Summary AEE, page 18 section 3.1.1.

14. The water take for the Winterberg property (CRC032220) will permit the irrigation of 690 ha of new irrigable land at a rate not exceeding 320 l/s.⁷ It is proposed to construct a dam in Homestead Stream up to 28m high and 2.2km long to hold up to 5.5 million cubic metres of water (CRC032221 and CRC032222).
15. The Winterberg dam also requires consent to discharge up to 8.6 million cubic meters into the Hakataramea River (CRC084057).⁸ The discharge is proposed to occur during the following five situations:
- (a) During low flow periods of the Hakataramea River, water may be discharged to reduce low flow restrictions for the surface water takes on the Foveran and Winterberg properties;
 - (b) During low flow periods of the Hakataramea River, augmentation may be used to buffer any potential increase in nutrient flux resulting from an additional 690 ha of land to be irrigated, around the dam;
 - (c) During high flows, where the storage capacity of the dam has been exceeded;
 - (d) During high flow events, where flushing of sediment and debris may be required to maintain the dam outlet; and
 - (e) Under circumstances where a small amount of leakage may result from water stored behind the dam.
16. The duration of 35 years is requested for the water and discharge permits and 6 years for the land use consent.

STATUS OF ACTIVITIES

17. Mr Cubitt will provide evidence of the status of the various applications under the Waitaki Catchment Water Allocation Regional Plan ("Water Plan") and the Natural Resources Regional Plan ("NRRP").⁹
18. In summary, the applications have the following status under those planning documents:
- (a) The Foveran application to take 26 l/s water relates to a direct take from the Hakataramea River (CRC031592). It is therefore subject to Rule 2 (minimum flow) and Rule 6 (annual allocation) of the Water Plan. The application

⁷ Dave Stewart's Supplementary Evidence, paragraph 15.

⁸ Ibid, pages 21 and 22.

complies with the minimum flow and annual allocation. Consequently the application is for a **discretionary activity**.

- (b) The Winterberg application to take 320 l/s (CRC032220) does not have to comply with the minimum flow requirements of Rule 2 (Table 3(xix)) of the Water Plan because it is not a take from the main river stem. It does, however, have to comply with the minimum 1 in 5 year 7 day low flow. Mr Stewart provides evidence that the 1 in 5 year 7 day low flow is 4.4 l/s.¹⁰ The Summary AEE states that design leakage through the dam will be in the order of 5 to 10 l/s,¹¹ and that this will more than offset any existing natural flow.¹² Mr Allan will provide evidence that the proposed dams design leakage provides a minimum flow that exceeds the 1 in 5 year 7 day low flow under Rule 2 (Table 3(xxii)) of the Water Plan.¹³ It would appear, however, that the proposed take is a **non-complying activity** because it exceeds the annual allocation limits under Rule 6 of the Water Plan.
- (c) The application to excavate and disturb the bed of Homestead Stream (CRC032221) does not comply with the permitted level of earthworks under the NRRP and accordingly requires consent as a **discretionary activity**.¹⁴
- (d) The application to dam up to 5.5 million cubic metres of water (CRC032222) also fails to comply with the annual allocation rule under the Water Plan and therefore requires consent as a **non-complying activity**.
- (e) The Officer's Report states that the discharge permit (CRC084057) requires consent as a **discretionary activity** under the NRRP.¹⁵

SECTIONS 104, 104B AND 104D OF THE RMA

- 19. It is necessary to consider sections 104 and 104B of the RMA in respect of the three discretionary activities (CRC031592, CRC032221 and CRC084057). The correct procedure to follow is to identify the relevant matters for consideration under section 104, assess those matters and then exercise the discretion as to whether to grant or refuse consent under section 104B.

⁹ Allan Cubitt's Evidence, paragraphs 11 to 18.
¹⁰ Dave Stewart's Evidence, page 4 Table 1.
¹¹ Foveran and Winterberg: Summary AEE, page 21.
¹² Ibid, page 25.
¹³ Allan Cubitt's Evidence, paragraph 15.
¹⁴ Ibid, paragraph 18.
¹⁵ Section 42A Officer's Report (Report 14), paragraph 33.

20. It is also necessary to consider section 104D of the RMA in respect of the two non-complying activities (CRC032220 and CRC032222). The correct procedure for considering a non-complying activity is to:
- (a) Identify the relevant section 104 matters for consideration;
 - (b) Consider whether the jurisdictional hurdles of what is now section 104D(1) are met having regard to the relevant matters in section 104; and
 - (c) Exercise the discretion, if either of the jurisdictional hurdles are satisfied, as to whether to grant or refuse consent under section 104B in order to achieve the purpose of the Act.¹⁶

ENVIRONMENTAL EFFECTS

21. The key environmental effects that have been identified by Mr Robertson's experts include:
- The impact on water quality within the Hakataramea River and environs;
 - The impact on the ecology of the Hakataramea River and Homestead Stream;
 - The potential effects of the proposal on flows within the Hakataramea River and Homestead Stream;
 - The effects related to the construction of the Winterberg dam; and
 - The potential effects of dam failure.
22. Mr Robertson's experts have all concluded that with appropriate mitigation and conditions the environmental effects of the applications will be minor. For the most part, the section 42A Officer's Report agrees. There are some key points of difference, which are addressed below.
23. For the Panel's ease of reference these submissions will follow the same (or similar) headings as those set out under the Section 42A Report.

¹⁶ *Baker Boys Limited v Christchurch City Council* C60/98. In respect of sub paragraph (c) above it is noted that the Court held that, in exercising its discretion, it had to make an overall judgment to achieve the purpose of the Act (paragraphs 14 and 109).

Water takes - Foveran take (CRC031592), Winterberg take (CRC032220) and dam (CRC032222)

Adverse effects on ecosystems - Hakataramea River

24. Dr Donovan identifies that the key concern for the Hakataramea River is the potential for irrigation to increase nutrient levels in the river. Dr Donovan will provide evidence that because the Foveran and Winterberg water takes will result in a negligible increase in nutrients they will not have a significant effect on the ecology of the Hakataramea River.¹⁷
25. The Section 42A Report agrees stating that setting of minimum flows within the Hakataramea River will protect instream ecological values.¹⁸

Adverse effects on ecosystems – Homestead Stream

26. Dr Donovan acknowledges that the location of the proposed dam in Homestead Stream may have an effect on the movement of certain species of fish. He recommends, however, that the provision of a roughened surface on the dam for eels, and the restriction of the intake velocity of abstracted water together with fish screens, will adequately mitigate any potential adverse effects.¹⁹
27. The Section 42A Report likewise concludes the water permits will only have a minor effect on the stream because:
- (a) The effects of the dam on fish passage would be minor;²⁰
 - (b) The effects of damming the Homestead Stream on instream values are acceptable;²¹ and
 - (c) The effects of damming Homestead Stream on flow variability are acceptable.²²

¹⁷ Wayne Donovan's Evidence, paragraph 37.

¹⁸ Section 42A Officer's Report (Report 14), paragraph 55.

¹⁹ Ibid, paragraphs 50 and 51.

²⁰ Ibid, paragraph 48.

²¹ Ibid, paragraph 51.

²² Ibid, paragraph 51.

Adverse effects on other water users - Hakataramea River

28. Mr Stewart's evidence will show that proposed 26 l/s take from the Hakataramea River would only have a minimal impact on other water users during periods of low flow in the Hakataramea River. In particular, the low flow trigger point of 1000 l/s would only be reached one day earlier if the Foveran water take was granted.²³
29. It is also significant to note that water can be released from the dam to augment flows in the Hakataramea River during low flow periods.²⁴ This means that the take could continue to operate during periods of low flow without any effect on other users, provided 26 l/s or more water was released into the river from the dam.
30. The Section 42A Report concurs with Mr Stewart that the Foveran take will only have minor effect on other water users.²⁵

Adverse effects on other water users – Homestead Stream

31. Mr Stewart will provide evidence that the Winterberg dam will be filled mainly during high flow or flood events and from snow melt in late winter and early spring. At these times the flows in the Hakataramea River will be high. Mr Stewart concludes that the effects of the Winterberg dam on flows (and by inference other users) in the main stem of the river will be less than minor.²⁶
32. The Section 42A Report accepts Mr Stewart's analysis and consequently agrees that any effect from the dam on other water users will be no more than minor.²⁷

Adverse effects of dam failure

33. The adverse effects of possible dam failure have been assessed by Mr Hall.²⁸ He has recommended a range of conditions to ensure that the risk of failure is low.²⁹ The Section 42A Report concludes that the effects of dam failure will be minor provided these conditions are included in the consent.³⁰

²³ Dave Stewart's Evidence, paragraph 20.

²⁴ Ibid, paragraphs 30 and 31.

²⁵ Section 42A Officer's Report (Report 14), paragraphs 65.

²⁶ Dave Stewart's Evidence, paragraphs 24 and 25.

²⁷ Section 42A Officer's Report (Report 14), paragraph 68.

²⁸ Bob Hall's Evidence, paragraphs 15-23.

²⁹ Ibid, Appendix 1. Also see Updated version of proposed conditions of consent dated 21 August 2008: Foveran and Winterbrug Summary AEE for Resource Consent Applications dated 11 June 2008 (pages 37 to 49).

³⁰ Section 42A Officer's Report (Report 14), paragraph 77.

Adverse effects on people, communities and amenity values

34. The Section 42A Report notes that a number of submitters raised concerns with regard to natural character and amenity values. The reporting officer goes on to state that they are not satisfied the adverse effects on people, communities and amenity values will be minor.³¹ Mr Cubitt will show, however, that the report writer has not undertaken any actual assessment in support of this view.
35. Mr Hall's evidence acknowledges that the dam will be visible from McHenrys Road, Table Top Road and Meyers Pass Road.³² Mr Hall states, however, that:
- Whilst the construction of the dam un-questionably alters the natural character of part of the Homestead Stream catchment the reach of the river affected in this way is a relatively small proportion of the total Homestead Stream river bed as such. I have not attempted to assess in a quantitative sense with any accuracy what the true percentage is but a first approximation suggests that it is likely to be of the order of 1%. Against this is the fact that a short section ephemeral steep gravel reach is to be replaced by standing water which will provide some aquatic and riparian habitat.³³
36. Mr Cubitt will also provide evidence that landscape, natural character and amenity values will not be compromised merely because the dam will be visible from some public places.³⁴ Rather, he considers that the irrigation reservoir will contribute in a positive manner to the rural environment and natural character. Reservoirs are an accepted part of the rural landscape and a critical element of many rural activities.³⁵ With appropriate rehabilitation the reservoir is likely to provide an attractive feature in the landscape particularly given the proposed riparian planting.³⁶
37. The Section 42A Report also expresses concern that the Winterberg proposal will require the relocation of a neighbouring landowner's access.³⁷ It is submitted that the relocation of access to the neighbouring property is not an issue with which the Panel needs to concern itself. There are no submissions on this issue from the affected landowner. More importantly, granting consent will not affect the neighbour's property rights. Rather, the relocation of the access is a property matter to be negotiated between the landowners.
38. It is submitted that, in the absence of any contrary assessment, that Panel should accept the evidence of Mr Robertson's experts that the proposed dam may have a positive effect on amenity values (rural and landscape), and at the very least that it will not have a more than minor adverse effect.

³¹ Ibid, paragraph 83.

³² Bob Hall's Evidence, paragraph 24(d).

³³ Ibid, paragraph 31.

³⁴ Allan Cubitt's Evidence, paragraph 40

³⁵ Ibid, paragraph 41.

³⁶ Ibid, paragraph 42.

³⁷ Section 42A Officer's Report (Report 14), paragraph 83.

Adverse effects on inefficient use on other users

39. The Section 42A Report author is not satisfied that the allocations sought for the proposed irrigation areas on the Foveran and Winterberg properties are appropriate.
40. This is because the reporting officer relies on PAW figures (PAW 90mm) that show that the ability of the soil to retain water is higher than the PAW figures (PAW <75mm) initially relied on by Mr Stewart.
41. Accordingly, the Section 42A Report recommends significantly lower annual takes for Foveran and Winterberg than those recommended by Mr Stewart.³⁸
42. Mr Stewart addresses this matter in his supplementary evidence where he states that he obtained his initial PAW figure (PAW <75mm) from Environment Canterbury.³⁹
43. Upon receiving the Section 42A Report he contacted Mr Jeromy Cuff, Environment Canterbury's soil scientist, to question the figure relied on in the report. Mr Cuff has advised that the Section 42A report figure is incorrect and that the figure is likely to be closer to that relied on by Mr Stewart. However, Mr Cuff was unable to give a precise PAW figure.⁴⁰
44. Mr Stewart has therefore instructed Mr Trevor Webb, a respected soil scientist, to identify the PAW ratings for Foveran and Winterberg. Mr Webb will be undertaking sampling on 22 and 23 August 2008.⁴¹ A final report identifying PAW will be made available to the Panel at the time of Mr Robertson's reply on 12 September 2008.

Adverse effect of use on water quality

45. The Section 42A Report identifies that no assessment had been made by the applicant in respect of the cumulative effects of water quality on the catchment.⁴²
46. This matter has been rectified by Mr Heller who provides a detailed assessment of the cumulative effects of Foveran and Winterberg in his evidence.⁴³ Mr Heller concludes that:

... based on the work I have completed for Hakataramea catchment water quality and in the assessment of cumulative and specific on-farm impacts of proposed irrigation, I believe that the Foveran and Winterberg applications will have minimal impact on water quality, and in some instances will improve water quality. Any possible (degrading) effects on the water quality of the Hakataramea River as a result of Foveran and Winterberg proposals will be mitigated by the works undertaken pursuant

³⁸ Section 42A Officer's Report (Report 14), paragraphs 83 and 90.

³⁹ Dave Stewart's Supplementary Evidence, paragraph 2.

⁴⁰ Ibid, paragraph 5.

⁴¹ Ibid, paragraphs 10 and 11.

⁴² Section 42A Officer's Report (Report 14), paragraph 97.

⁴³ Tom Heller's Evidence, paragraphs 74-95.

to suggested conditions of resource consent(s), as previously outlined in this evidence.⁴⁴

47. Mr Heller's water quality experience and his experience in the Waitaki Catchment should provide the Panel with confidence that water quality will at least be maintained as a result of the Foveran and Winterberg irrigation proposals. Mr Heller also recommends a number of adaptive management techniques that could be implemented on the two properties if any adverse effects become evident as a result of the ongoing water quality monitoring programme for the Hakataramea River.⁴⁵ These measures could be implemented by changing the conditions of consent after a review under section 128 of the RMA.
48. It is submitted that Mr Heller's evidence clearly addresses the concerns raised in the Section 42A Report with regard to cumulative effects and demonstrates that the actual and potential effects of the proposed takes on water quality will be positive to less than minor.

Dam – land use consent (CRC032221)

49. The Section 42A Report identifies a number of areas where the officer considers that the applicant has not provided sufficient information in respect of the proposed Winterberg Dam. These areas are:
- (a) The works required to construct the proposed dam in terms of managing surface flows including flood waters during construction;⁴⁶
 - (b) The effects of dam construction on water quality;⁴⁷
 - (c) The effects of dam construction on riparian plants and animals;⁴⁸
 - (d) Whether works in flowing water will be required.⁴⁹

Design and construction of the dam

50. Mr Hall's evidence indicates that the dam will be designed, constructed, commissioned and operated in accordance with accepted New Zealand industry standards. He also indicates that a peer review of investigations, design, construction and commissioning procedures, surveillance and operating procedures

⁴⁴ Tom Heller's Evidence, paragraph 118.

⁴⁵ Ibid, paragraphs 103 to 108.

⁴⁶ Section 42A Officer's Report (Report 14), paragraph 110.

⁴⁷ Ibid, paragraph 117.

⁴⁸ Ibid, paragraph 119.

⁴⁹ Ibid, paragraph 119.

will be undertaken to ensure that the dam does not cause adverse effects on the environment.⁵⁰

Adverse effects of the works on flood-carrying capacity and erosion

51. Mr Hall will address the works required to construct the proposed dam in terms of managing surface flows including flood waters during construction. In particular, he proposes two conditions which will ensure that the dam has flood bypassing capability.⁵¹
52. The construction of the dam will require the opening of burrow pits, the cutting of spillways and the excavation of the dam footprint.⁵² Some channel adjustment is also expected as a consequence of dam construction. Mr Hall confirms, however, that the geotechnical investigations of the river bed at (and below) the dam suggest that sufficient coarse materials are present to minimise any re-adjustment. Nevertheless, conditions are proposed to avoid erosion and instability of the bed and banks of Homestead Stream.⁵³

Adverse effects of the works on man-made structures

53. Mr Hall anticipates that the Homestead Stream Bridge would be damaged or destroyed in the event of dam failure. There would also be some damage to the lower western end of Meyers Pass Road and parts of McHenry's Road in the vicinity of Homestead Stream. However, sufficient warning would be able to be provided of impending failure to ensure lives and stock were not put at risk.⁵⁴
54. The Section 42A Report concludes that, given that the possibility of dam failure is unlikely, the potential effects of the dam construction on man-made structures would likely be minor.⁵⁵

Adverse effects of the works on water quality

55. Mr Hall provides further information in relation to the effects of dam construction on water quality. He recommends conditions that prevent the discharge of sediment, oil, fuel or cement into the Homestead Stream.⁵⁶ He also suggests that:
- (a) Fuel and lubricants should not be stored in or within 50m of Homestead Stream; and

⁵⁰ Bob Hall's Evidence, paragraphs 27 and 38.

⁵¹ Ibid, paragraph 35.

⁵² Ibid, paragraph 24(d).

⁵³ Ibid, paragraph 36

⁵⁴ Ibid, paragraph 22.

⁵⁵ Section 42A Officer's Report (Report 14), paragraph 116.

⁵⁶ Bob Hall's Evidence, paragraph 32.

(b) Machinery and vehicles should be refuelled or lubricated within 50m of Homestead Stream.

56. There is potential for the construction activities to generate dust, but Mr Hall advises that good construction practice will minimise dust generation.⁵⁷ In particular, a condition is proposed requiring measures to be taken to minimise soil disturbance and erosion.⁵⁸

Adverse effects on riparian plants and animals

57. The Section 42A Report expresses concerns that applicant has not assessed the effects of dam construction on riparian plants and animals.

58. Dr Donovan has assessed the effects of the dam on the stream in his evidence.⁵⁹ He is of the opinion that only longfin eels will be affected by the construction of the dam and states that:

Even though the number of these fish attempting to access the Homestead Stream is in my opinion, likely to be low, given that the surface water in the stream only flows into the Hakataramea River on a couple of occasions a year, and that no eels have been recently recorded in the stream, I consider that access for these fish, in the form of roughened surface on the face of the dam, be provided to enable these fish to move upstream over the dam during periods of high flow when the surface water from Homestead Stream is flowing into the Hakataramea River.⁶⁰

59. Mr Hall has confirmed that Dr Donovan's proposal by can be included in the conditions of consent for dam construction.⁶¹

60. Dr Donovan also acknowledges that the potential exists for fish to be removed from the reservoir in the abstracted water. To prevent the entrainment of fish and their removal from the reservoir, he proposes that the intake velocity of the water being abstracted is restricted and the intake screened.⁶²

61. Dr Donovan will provide you with evidence that the construction of the dam will not adversely affect riparian plants.⁶³

⁵⁷ Ibid, paragraph 33.

⁵⁸ Ibid, Appendix 1 (CRC032221) condition 9.

⁵⁹ Wayne Donovan's Evidence, paragraphs 42 to 49.

⁶⁰ Ibid, paragraph 50.

⁶¹ See Condition 7, Dam Winterberg (CRC032222), Updated version of proposed conditions of consent dated 21 August 2008.

⁶² Wayne Donovan's Evidence, paragraph 51. Also see Condition 5, Water Permit – Winterberg (CRC032220), Updated version of proposed conditions of consent dated 21 August 2008.

⁶³ Ibid, paragraphs 46-48.

Discharge consent - (CRC084057)

62. The reporting officer has recommended that the discharge consent be granted and has proposed a number of conditions.⁶⁴ The officer makes this recommendation on the basis that:

- (a) The effects on flood-carrying capacity and erosion are minor;⁶⁵
- (b) The effects on water quality and ecosystems are minor;⁶⁶ and
- (c) The adverse effects on downstream users and amenity values are minor.⁶⁷

63. Mr Heller will provide evidence on the potential effects on the Hakataramea River as a consequence of discharge. He concludes that the modelling results show a less than minor effect on the Hakataramea River.⁶⁸ Importantly he states that:

As part of the proposed activities for the Foveran and Winterberg properties, land use management and riparian management will be undertaken to effectively maintain or enhance water quality within the Hakataramea catchment.⁶⁹

64. In any event he proposes a number of conditions of consent.⁷⁰ These conditions are the same as those that are proposed by the reporting officer.

65. Dr Donovan also assesses the effect of the discharge on the ecology of the Hakataramea River. He concludes that the discharges will not have a significant adverse effect on the ecology of the River.⁷¹

Conclusion – environmental effects

66. In conclusion, the evidence of Mr Robertson's experts clearly shows that the actual and potential effects of the proposed Winterberg take and dam (CRC032220 and CRC032222) are no more than minor. Some effects, such as those associated with the dam, are in fact likely to be positive. That means that the two non-complying elements of the proposal satisfy the effects based limb of the section 104D jurisdictional test.

64 Section 42A Officer's Report (Report 14), paragraphs 202 and 207.

65 Ibid, paragraph 125.

66 Ibid, paragraph 133.

67 Ibid, paragraph 137.

68 Tom Heller's Evidence, paragraph 73.

69 Ibid, paragraph 96.

70 Ibid, paragraph 102.

71 Wayne Donovan's evidence, Paragraph 40.

67. Furthermore, the actual and potential effects associated discretionary elements of the proposal, including:

- (a) The Foveran take (CRC031592);
- (b) The dam land use (CRC032221); and
- (c) The discharge (CRC084057),

are also predominantly no more than minor. Furthermore, where the effects are potentially more than minor the proposed conditions will adequately avoid, remedy or mitigate the adverse effects of the proposal to the extent required under section 5 of the RMA.

RELEVANT PLANNING DOCUMENTS

68. Mr Cubitt will provide evidence that all the activities under consideration achieve the policy outcomes sought by the various relevant planning documents. Rather, than dealing with the entire suit of policies Mr Cubitt is of the opinion that it is more efficient to merely deal with the issues raised in the Section 42A Report.⁷²

Discretionary activities – Foveran take (CRC031592), land use (CRC032221) and discharge (CRC084057)

69. Mr Cubitt and the reporting officer both agree that the proposed discharge permit is consistent with the relevant planning provisions.⁷³

70. The Section 42A Report raises a concern that the proposed land use consent that is contrary to the NRRP on the basis that insufficient information was provided with the application to assess flood carrying capacity and erosion. Mr Cubitt considers that Mr Hall's evidence addresses these concerns and that the conditions proposed by Mr Hall achieve the outcomes sought under the NRRP.⁷⁴

71. The Section 42A Report indicates that the Foveran take may not satisfy the water quality requirements of the NRRP. This concern is also held in respect of the Winterberg take (CRC032220). Mr Cubitt concludes, however, that Mr Heller's evidence demonstrates that both applications to take water are consistent with the relevant water policies.⁷⁵

⁷² Allan Cubitt's Evidence, paragraph 58.

⁷³ Ibid, paragraph 59.

⁷⁴ Ibid, paragraph 60.

⁷⁵ Ibid, paragraph 61.

Non-complying activities – Winterberg take (CRC032220) and dam (CRC032222)

72. Mr Cubitt and the Section 42A Report writer concur that that the Winterberg take and dam are consistent with the environmental flow policies under the Water Plan.⁷⁶
73. Although not mentioned in the Section 42A Report, Mr Cubitt is of the view that policy 8 of the Water Plan is of special significance to the proposed dam insofar as it promotes water harvesting by allowing the damming of water bodies to enable the capture of a portion of high flows for use when flows are low.⁷⁷
74. Mr Cubitt notes that the section 42A Report contends that the Winterberg application has not addressed the wider effects on the community in respect to Policy 12 under the Water Plan and annual allocations. This policy describes the approach adopted in determining allocation limits. The explanation states that for activities falling outside the allocation limits the effects on the entitlements of other activities must be taken into account.⁷⁸
75. Mr Cubitt responds, however, that Mr Stewart’s evidence illustrates that Homestead Stream makes a limited contribution to the flows in the Hakataramea. This combined with the fact that the water harvesting activity operates predominantly during high flows, and maintains a base flow, indicates that the impact on other entitlements would not be measureable. Consequently the proposal is not contrary to Policy 12.⁷⁹
76. Mr Cubitt concludes that the Winterberg take and dam are not contrary to the objectives and policies of the relevant planning documents. He therefore, considers that they satisfy the policy limb of the section 104D jurisdictional test.⁸⁰

OTHER MATTERS - PRECEDENT

77. Section 104(1)(c) requires consideration of other matters that may be relevant and reasonably necessary to determine the applications. Mr Cubitt identifies the key “other matter” as the precedent that might be created by granting consent to the non-complying activities.⁸¹
78. He determines that the only area that precedent is a possible issue is where the Winterberg take and dam exceed the annual allocation limits for agricultural activities. Mr Stewart’s evidence is of particularly significance here, as he shows that the dam will be mainly filled during high flow or flood events and from melting snow in late

⁷⁶ Ibid, paragraph 64.

⁷⁷ Ibid, paragraph 66.

⁷⁸ Ibid, paragraph 44.

⁷⁹ Ibid, paragraph 67.

⁸⁰ Ibid, paragraph 71.

⁸¹ Ibid, paragraph 72.

winter and early spring.⁸² The simple point here is that the Winterberg take will have little if not effect on other users because the water is harvested during high flow events and not over a more sustained period, which the annual allocations have been designed to protect. Mr Cubitt concludes that the Winterberg take and dam will not create an undesirable precedent or undermine the Water Plan. On the contrary, this is the very kind of activity that water harvesting policy 8 seeks to promote.⁸³

DISCRETION UNDER SECTION 104B

79. The Panel is required to exercise its discretion as to whether to grant or refuse consent under section 104B in order to achieve the purpose of the Act.
80. It is submitted that the Foveran and Winterberg applications will promote the sustainable management of the natural and physical resources of the Hakataramea Valley. Granting consent to the applications will enable the applicant, and those employed by the applicant, to provide for their social and economic wellbeing without compromising the ability of others to provide for their wellbeing.
81. The evidence indicates that the potential of the water resource will be sustained to meet the reasonably foreseeable needs of future generations and that the life supporting capacity of the water and its associated ecosystems will not be compromised. The evidence has also indicated that adverse environmental effects can be avoided, remedied or mitigated to the extent that they will be no more than minor.
82. In all the circumstances it is submitted that the Panel can, on considering these applications, grant them under section 104B of the Act, such grant to be subject to the conditions proposed by the applicant and any others that the Panel may wish to impose.

Dated this 21st day of August 2008

Robert Makgill
Counsel for Robert Hay Robertson

⁸² Dave Stewart's Evidence, paragraph 24.

⁸³ Allan Cubitt's Evidence, paragraph 74.

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