

TABLED AT HEARING
Date 3/3/2010

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 Foveran and Winterberg activities

BY ROBERT HAY ROBERTSON
Applicant

TO ENVIRONMENT CANTERBURY
Local Authority

LEGAL SUBMISSIONS OF COUNSEL FOR ROBERT HAY ROBERTSON
IN REPLY TO COMMISSIONERS' MINUTE DATED 3 DECEMBER 2009

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. Mr Robertson seeks a number of resource consents for the irrigation of arable land on Fovern Deer Park (Foveran) and Winterberg Farm (Winterberg).¹
2. These submissions are on behalf of Mr Robert Robertson in response to the Minute to the Parties issued by Chairman of the Hearings Panel on 3 December 2009.
3. The Chairman's minute sought a response from Mr Robertson and the other applicant parties on the following issues:
 - (a) The Panel's view that Policies 43 and 44 and Rule 2 Table 3 rows xix and xxii should be interpreted as applying a "whole of catchment" approach to applications for consent to take water in the Hakataramea Catchment; and
 - (b) The Panel's view that a minimum flow of 4.5 cumecs in the main stem of the Hakataramea River and mean flows and flow sharing within tributaries both apply to applications to harvest water from tributaries of the Hakataramea Catchment.
4. The Panel's "whole of catchment" approach (Para 2(a)) mainly concerns the Foveran application to take 26 l/s from the Hakataramea River.
5. The Panel's approach to water harvesting (Para 2 (b)) solely concerns the Winterberg applications to dam (CRC032222) and take water (CRC032220) from Homestead stream.
6. I address each of the views expressed in the Panel's minute in turn.

¹ Including CRC031592, CRC032220, CRC032221, CRC032222, and CRC084057. Legal submissions dated 21 August 2008, paragraph 11.

CATCHMENT APPROACH: FOVERAN APPLICATION

7. I have had extensive discussions with Ms Steven, legal counsel for the other main stem applicants, concerning the Panel's "whole of catchment" approach.
8. I have reviewed Ms Steven's legal submissions and concur that the Waitaki Catchment Water Allocation Regional Plan (WAP) does not make provision for a "whole of catchment" approach within the Hakataramea Catchment. My reasons for agreeing with Ms Steven are that:
 - (a) Even though Policy 1 generally promotes a "whole of catchment" approach to the Waitaki Catchment, this must be read against more specifically worded policies and rules that do not promote a catchment based approach in the Hakataramea including Policy 43 and Rule 2 Table 3 rows xix and xxii.
 - (b) While the heading to Policy 43 refers to the Hakataramea Catchment, this is most likely a poor choice of heading given that:
 - (i) the specific wording of policy 43 provides for "... *setting an environmental flow regime in the Hakataramea River ...*" and
 - (ii) the reference to the statutory acknowledgement under the Ngai Tahu Claims Settlement Act 1998 refers to the Hakataramea River. As discussed in my earlier submissions, the definition of river under that Act specifically excludes tributaries.²
 - (c) Rule 2 Table 3 row xix does not include any reference to tributaries. It must be given its plain meaning, which is that it does not apply to tributaries in the Hakataramea Catchment.
 - (d) Where any row in Rule 2 table 3 only applies to a river (as in the case of Rule 2 Table 3 row xix), Rule 2 Table 3 row xxii applies to the tributary.
9. Ms Johnston's evidence shows that in addition to above issues of interpretation, there is a very practical reason why Rule 2 Table 3 row xix only applies to the Hakataramea River. Ms Johnston shows that the Water Allocation Board was aware that there was an existing allocation of 1.1 cumecs within the Hakataramea Catchment at the time that it set the .5 cumec allocation limit under Rule 2 Table 3 row xix.³
10. It simply does not make sense to establish a rule that reduces the existing allocation by more than half, especially given that .6 cumecs is no small quantity of water.

² Legal submissions (in reply) dated 2 October 2008, paragraphs 42 to 45.

Surely the Board would have made reference in the WAP, or at least its decision, that it thought the Catchment was over allocated by more than half the amount that was sustainable if this was the case.⁴

11. It is submitted that the .5 allocation limit only makes sense if it is applied, in accordance with the wording of Rule 2 Table 3 row xix, to the Hakataramea River.
12. If the Panel accepts that interpretation, it is submitted that there is enough water available for both the renewal applicants and Mr Robertson to be allocated water in the A band.⁵

WATER HARVESTING: WINTERBERG APPLICATIONS

13. I submitted during the first hearing that the Winterberg take did not have to comply with the minimum flow requirements of Rule 2 Table 3 row xix, as it is located in the Homestead tributary. This is consistent with the interpretation Mr Cubitt and myself that this rule only applies to the river and not the whole catchment.⁶
14. Nevertheless, I acknowledged that the minimum flow requirements of Rule 2 Table 3 row xxii applied. Mr Stewart's evidence showed that the design leakage for the proposed Winterberg dam would meet the 1 in 5 year 7 day low flow under that rule.⁷
15. Mr Stewart's latest evidence shows that it is practically impossible to measure the flows within the tributaries of the Hakataramea Catchment to ensure that the minimum flow for tributaries is satisfied.⁸
16. He proposes that more accurate readings can be taken from the Hakataramea Bridge. He is of the view that these readings employed together with a "de facto" 4.5 cumec minimum flow is the best mechanism for ensuring that the minimum flows in the tributaries are retained.⁹ I note here that my use of the term "de facto" is intended to signal that Mr Stewart's proposed 4.5 cumec minimum flow on the Hakataramea River would be used in place of the minimum flow under Rule 2 Table 3 row xxii.

³ Supplementary Statement of evidence by Keri Joy Johnston in reply to Commissioners' minute dated 3 December 2010, paragraph 41.

⁴ Supplementary Statement of evidence by Keri Joy Johnston in reply to Commissioners' minute dated 3 December 2010, paragraph 44.

⁵ Supplementary Statement of evidence by Keri Joy Johnston in reply to Commissioners' minute dated 3 December 2010, paragraphs 43 and 45.

⁶ Legal submissions dated 21 August 2008, paragraph 18(b).

⁷ Legal submissions dated 21 August 2008, paragraph 18(b).

⁸ Supplementary Statement of evidence by David William Stewart in reply to Commissioners' minute dated 3 December 2010, paragraph 33.

⁹ Supplementary Statement of evidence by David William Stewart in reply to Commissioners' minute dated 3 December 2010, paragraph 27.

17. Because the Winterberg dam is an in-channel storage dam, Mr Stewart has also recommended that the dam should provide a residual flow of 60 to 80 l/s.¹⁰ I confirm that Mr Robertson would be prepared to accept this as a condition of consent.
18. I note that non-compliance with Rule 2 Table 3 row xxii technically makes this aspect of the Winterberg application a non-complying activity. I do not consider this of any moment, as the application is already rendered non-complying because it exceeds the annual allocation limits under Rule 6 of the Water Plan.¹¹
19. Notwithstanding the non-complying nature of the application it was the evidence of Mr Robertson's experts during the original hearing, and in their evidence in reply, that the Winterberg application satisfies both thresholds of section 104D of the Resource Management Act 1991.¹²

DISCRETION UNDER SECTION 104B

20. 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 3rd day of March 2010



Robert Makgill
Counsel for Robert Hay Robertson

¹⁰ Supplementary Statement of evidence by David William Stewart in reply to Commissioners' minute dated 3 December 2010, paragraph 29.

¹¹ Legal submissions dated 21 August 2008, paragraph 18(b).

¹² Legal submissions dated 21 August 2008, paragraphs 26 to 27, 31 to 32, 33 to 38 and 49 to 65 (effects), and 72 to 76 (objectives and policies). Legal submissions (in reply) dated 2 October 2008 and further evidence of Mr