

BEFORE THE CANTERBURY REGIONAL COUNCIL

In the matter of **61 consent applications to take, use, divert and dam water and
51 associated discharge and land use consent applications in
the Upper Waitaki Catchment**

9th Minute of Commissioners

Dated 9 November 2009

Dr Spiegel's Report

1 We have received:

- a supplementary memorandum from counsel on behalf of the UWAG applicants from counsel, Mr E J Chapman dated 6 November 2009;
- a joint memorandum of counsel on behalf of applicants dated 6 November 2009 from legal counsel Mr Christian Whata, Mr Kelvin Reid, and Mr Ewan Chapman; and finally;
- an email dated 4 November 2009 from legal counsel, Mr Philip Page, representing Mr S J B Munro, an applicant.

2 We respond as follows.

Mr Chapman's memorandum of 6 November 2009

3 Mr Chapman for the UWAG applicants while supporting the commissioning of the Dr Spiegel report questions the need for the UWAG group of applicants to contribute to costs of the Dr Spiegel report given that some of the UWAG applicants are renewal applicants.

4 In support of this question Mr Chapman makes the point that the renewal applicants are not reliant to the same degree on the modelled scenario and therefore that the costs attributable to Dr Spiegel's report should appropriately fall on all applicants applying for new water contributing to the Lake Benmore catchment issues.

Response

5 At this particular juncture, the best we can signal is that we are taking a broad view of issues catchment-wide. We had hoped that all applicants would be agreeable to sharing the costs of Dr Spiegel's report, which covers activities such as preparation of his evidence and presenting the same to us.

6 We have utilised section 41C(4) under the Resource Management Act 1991 (the RMA) to found the commissioning of Dr Spiegel's evidence/report.

7 As all legal counsel will be aware, there are three subsections to subsection (4) that all apply and must be satisfied before a report can be commissioned.

- 8 The question of who pays for the report is not one of the matters. The issue of whether the applicant does not refuse to agree to commissioning of the report is the relevant matter.
- 9 As we read Mr Chapman's memorandum, he is informing us that the UWAG applicants are generally supportive of the reasons for commissioning the report. We do not read his memorandum as opposing the commissioning of the report in terms of section 41C(4)(c).
- 10 As an aside, we note that we have power in terms of section 41C(3) to request the applicant to provide further information in any event. That is a route we could have utilised in this circumstance.
- 11 However, we considered that commissioning a report (as we have done) would ensure independence of this material from the applicant group and from the submitter group.
- 12 Thus we conclude on Mr Chapman's memorandum that the UWAG group is not opposed to the commissioning of the report. UWAG understandably have an issue about who is to pay for the report, but that is a matter for all of the applicants to resolve.

Joint memorandum of counsel dated 6 November 2009

- 13 The joint memorandum from legal counsel, Mr Christian Whata, Mr Kelvin Reid and Mr Ewan Chapman traverses a range of issues. However, this memorandum records in paragraph 3 that the applicants generally support the commissioning of the Dr Spiegel report. In paragraph 4 of that joint memorandum there are a number of provisos to the applicants' agreement to the commissioning of the report. They are:
- (a) The scope of the report is to be agreed between all of the parties;
 - (b) The timetable is agreed between the parties for the production of this report so as to not unnecessarily prolong the hearing;
 - (c) An estimate of costs is provided, and is reasonable for the production of the report (the applicants note that they have received a copy of the costs);
 - (d) Dr Spiegel caucuses with the experts (either in person or via teleconference) in advance of the finalisation of the report; and

- (e) Outside the caucusing process, no separate retainer with any party should be entered into in order to ensure the report is independent.

Our response

14 We respond utilising the relevant subparagraph headings.

The scope of the report is to be agreed between all of the parties

15 We consider we have made it clear what we require and need Dr Spiegel to cover in his report. Nevertheless, we have no issue with the parties providing Dr Spiegel with a list of issues or topics they consider he should cover in his report. The parties making such suggestions need to bear in mind the impact upon costs if Dr Spiegel responds. We do not require that the scope of the report be agreed between all parties. It is a report that we as Commissioners are requesting and accordingly we do not require nor do we seek agreement with the applicants as to the content of Dr Spiegel's report.

The timetable is agreed between the parties for the production of this report so as to not unnecessarily prolong the hearing

16 We consider that the following timetable is sufficient taking into account the interests of all parties to the hearing.

16.1 Dr Spiegel's report is to be completed by 30 November 2009 for pre-circulation to all parties and will be circulated as soon as practicable after 30 November 2009;

16.2 Dr Spiegel is to present his report to us on 11 December 2009.

17 Accordingly, it is not necessary to have an agreement between the parties for the production of the report.

An estimate of costs is provided, and is reasonable for the production of the report (the applicants note that they have received a copy of the costs)

18 We asked for a costing and for it to be circulated to all of the applicants. This has been completed. The reasonableness of the costs and how the report is to be paid for between the applicants is a matter for the applicants to address and resolve.

Dr Spiegel caucuses with the experts (either in person or via teleconference) in advance of the finalisation of the report

19 This is a matter for Dr Spiegel. We will leave it to him to determine whether or not he need discuss issues with other relevant experts.

20 Clearly, if through the course of his report he shows that he has considered other experts' views, then his report will be all the more comprehensive for that. Thus, while we do not direct him to caucus with the other experts, we would encourage him to liaise with them to understand their expert views and the basis for the same and thereafter provide us his expert view. We consider this would be comprehensive and most useful approach.

Outside the caucusing process, no separate retainer with any party should be entered into in order to ensure the report is independent

21 Given that we as Commissioners have commissioned the report, we do not see any need for any party to enter into a separate retainer with NIWA and/or Dr Spiegel. We imagine that all of the parties to this process would wish to ensure that Dr Spiegel and his work remain independent; thus they will not enter into any such separate retainer.

22 To be clear, we see Dr Spiegel's report as being an independent report. We acknowledge that Meridian Energy Limited (Meridian), a submitter in this hearing, has engaged other NIWA experts to assist in the presentation of its case; Dr Spiegel is not among them. In addition, we see that Dr Spiegel's speciality is different from that of the NIWA experts engaged by Meridian for its case presentation.

Mr Philip Page's email

23 Like other legal counsel Mr Page records that Mr Munro has no opposition to the Commissioners receiving an additional report concerning water quality modelling for Lake Benmore. However, Mr Page's core point is that Mr Munro is not prepared to fund this additional report.

Our response

24 This is noted. However, Mr Munro's financial position, while noted, is not of such significance in the context of the hearing that the Spiegel report should not be commissioned.

Conclusion

- 25 We read the memoranda lodged on behalf of the various applicants as not refusing to agree to the commissioning of Dr Spiegel's report.
- 26 We read the memoranda as containing some issues and/or suggestions about the scope and manner in which Dr Spiegel's report should be prepared and provided. We have commented upon those matters. We have concluded that the way is clear, in terms of section 41C for Dr Spiegel to complete work he has already commenced.
- 27 If any of the above causes the applicant group cause for concern we refer the applicant group to s41C(3) RMA. That would be the direction we would consider if required to do so by the applicant group.

Dated at Christchurch this 9th day of November 2009



Paul Rogers

Commissioner Chair on behalf of the Committee