

30 January 2012

Dunstan Peaks Applications for Consents
c/- Canterbury Regional Council
P.O. Box 346
Christchurch

Attention: The Commissioners

Dear Commissioners

Dunstan Peaks Limited: Jurisdictional Issues: CRC 011361-3

- 1. In a direction to Dunstan Peaks the Commissioners seek an opinion of whether or not it is within their jurisdiction to grant consent for the new proposal and, if so, why; particularly commenting on the point as to whether or not any parties would be prejudiced in any way if the commissioners concluded that they could proceed and grant consent for the new proposal.**

The original application

The original applications were made six months prior to the expiry of a bundle of consents for irrigation and electricity generation purposes at Dunstan Peaks, Omarama. The applications were made in 2001 and were predicated on the basis of renewing the operative irrigation consents for the properties administered by DPL.

At the stage of submitting the applications, the properties were farmed as one – under the effective control of Mr Peter Patterson and family. Mr Patterson has since deceased – with the properties passing to his son and daughter – but still under the company structure of DPL

DPL is a company owning 3 stations known as Twinburn, Dunstan Peaks and Clifton Downs. DPL was the sole applicant. It owns the following certificates of title: OT386/86, OT386/120 and OT13A/1206.

The application was for the continuation of the then current irrigation systems on the property which may be summarised as follows:

- Border Dyke operations at Twinburn and Dunstan Peaks;
- Wild flood irrigation at Dunstan Peaks and Clifton Downs
- Spray irrigation at Dunstan Peaks.

The take and use consent was incorporated in one consent – with the notification of this consent stipulating:

- The take point (by three digit map reference)
- The instantaneous rate of take
- A daily volume
- In some cases an annual volume
- The number of hectares to be irrigated
- The property (within the DPL Group) on which irrigation is to occur
- The mode of irrigation
- The proposed duration of consent (35 years).

The address of the applicant (at that stage c/- R J Hall Civil and Environmental Consulting) [ref: Public Notification CRC011631]

Notification was made in a two stage process incorporating the original notification together with a post call in notification in 2007. The list of submitters is attached as Appendix A

The application was initially presented to Commissioners as part of the UWAG applications by Ms Begley and others. The relevant plans for determining the application at that time were:

The operative Waitaki Plan; and

The draft NRRP insofar as water efficiency and water quality were concerned.

Following Ms Begley's retirement, the applicant together with its new irrigation advisors sought to change the suite of applications from those that were notified. The applicant advised the Commissioners by Memorandum and further material being submitted on the applications by Ms McCabe. At that stage the hearing had not closed and further information was still to be supplied in the form of amended Farm Environmental Management Plans and draft Conditions. These were supplied but the Commissioners in a 34th minute have sought further information from the Applicant as to whether they have jurisdiction to determine the applications.

Two issues arise in respect of jurisdiction. The first is whether the Commissioners are within their jurisdiction to request further information and determine the issues with respect to the suite of applications made by DPL and lodged in 2001. The second issue relates to whether the scope of changes made to the applications within the course of the hearing are within the scope of the original applications as defined by the RMA and the relevant case law.

The overall issue of jurisdiction

The Commissioners appointed by the Canterbury Regional Council have authority to procedurally regulate the conduct of the hearing of applications CRC011631-3.

The hearing remains adjourned and the commissioners have delivered no decision on the applications to the extent that they are functus officio.

The Commissioners have issued a further minute specifically relating to this applicant to seek further clarity on the applications – and particularly so given that the changes were signalled at a late stage and by a new consultant.

The process of issuing minutes has been the procedural manner for Commissioners seeking further information on applications before them generally and specifically.

The derogation approval by Meridian Energy was originally obtained and then varied following the changes to this application. The revised derogation approval was forwarded to the Commissioners.

Accordingly there is nothing impeding the Commissioners from either seeking this further information – or resuming the hearing, as the case may be, to hear further evidence or question the applicant on the material required to be with the Commissioners by 30th January 2012.

The amended application

The application has been varied by the applicant following notification in a number of respects. These changes have been set out in detail in the Memorandum and accompanying documentation dated 30th January 2012. However, briefly the changes relate to:

- The conversion of the irrigation systems to spray irrigation;
- Amending the take points for the spray irrigation within the DPL boundaries
- Removing some take points and moving take points further downstream
- Seeking a 5 year conversion timetable to spray
- Accepting that flow rates following conversion will be reduced.
- Altering the irrigation locations within the DPL boundaries in line with practical areas available for spray irrigation and to take account of gravity feed.
- Dispensing with electricity generation – which was associated with border dyke irrigation.

Analysis of the Law

2. There are two main lines of cases which consider the question of scope and/or jurisdiction of amendments to an application for resource consent.
3. The first is *Darroch v Whangarei District Council*¹ Judge Sheppard states that:

“It is the original application and any document incorporated in it by reference which defines the scope of the consent authority’s jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However, they are only permissible if they are within the scope defined by the original application. If they go beyond the scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character of effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required”
4. The second, *Haslam v Selwyn District Council*² also a case presided over by Judge Sheppard outlines the extent to which a resource consent application can be altered after public notification without requiring further notification or a new application.

“The test that I should apply in this case is whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment”
5. Both lines of cases are restated by Judge Smith in *Coull v Christchurch CC*³ where his Honour adopts a three part test to assess whether an amendment to the original application is with the scope of the original application and subsequently within the jurisdiction of the consent authority to consider. The three parts to the ‘Coull test’ are:
 - 5.1 Do the amendments increase the scale or intensity of the activity;
 - 5.2 Do the amendments exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the Plan and other superior documents; and
 - 5.3 Would parties who have not made submissions have done so if they were aware of the change.
6. The High Court in *Atkins v Napier City Council*⁴ considered that whether or not there might have been other submitters had the application been notified in its varied form, is a means of applying the first two parts of the Coull test rather than part of the test itself.
7. It is appropriate to apply the three parts of the Coull test to the DPL collective suite of applications to assess whether jurisdiction exists for the commissioners to grant the amended application.
8. We will address each of the three parts to the Coull test separately below.

¹ A18/1993, Judge Sheppard at paragraph [27]

² [1993] 2 NZRMA 628

³ EnvC C077/06, paragraph [11]

⁴ (2008) 15 ELRNZ 84 (HC)

Do the amendments increase the scale or intensity of the activity?

9. The overriding purpose of the applications is to renew the DPL applications in a manner to that will allow it to continue the practice of irrigation of pasture on DPL. In the context of an irrigation consent, “scale” is directly linked to the potential area under irrigation.
10. It may also relate to the end use of irrigation were there a change of use or change in farming system.
11. However in this case neither is proposed. The issue of changing the area where a consent is exercised has been explored in the decisions of *Haslam* and *Brooklands Properties 2000 Ltd v Road Metals Co Ltd*⁵.
12. *Haslam* redefined the application within the property boundaries of the notified consent – whereas *Brooklands* sought to rely on an application publically notified at one location on the Waimakariri River to move the exercise the consent westwards, several kilometres upstream.
13. In that case the Court found that location was the defining factor in determining the altered scale of an application and in the context of a movement of consent **outside** the notified area stated that it would be implausible to imagine that notification of the original application would have alerted potential submitters concerned of a disturbance to the riverbed upstream.
14. In the DPL context it is submitted that the opposite is the case i.e potential submitters were alerted to the overall area on DPL and the fact that it was to occur over all three properties held by the family.
15. The Brooklands decision is characterised by the conclusions that the changed location to a completely separate property was “ a very different application” to that notified. Both on the issue of scale and on the issue of prejudice the Court found that it did not pass the first test.
16. It is submitted that in the context of DPL where location and use are consistent with notification that insofar as scale is concerned there is no impediment to jurisdiction. The adjustment of the placement of irrigation within overall property boundaries is an issue of detail motivated by a change of design as set out in the *Darroch* decision.
17. It also arises from the applicant reacting to factors referred to in the s 42 officers’ reports – and as a matter of fairness the applicant must have latitude to reformat the application to make it more consistent with the planning instruments which were not in place at the time of application.
18. The issue of “intensity” of use in the context of an irrigation consent again focus on the proposed use, the consistency of application of water (the annual volume) and the proposed duration of the irrigation season.
19. On the first and third matters there is no change whatsoever. The Sheep and Beef operations are set out in the FEMP and are unchanged and the irrigation season is defined by summer growth patterns.
20. With respect to the number of passes which a spray irrigator would make in a season in comparison with a wild flood or border dyke irrigation programme, it is accepted that there will be a change – but that it is a matter of detail only – and that fundamentally the applicant’s acceptance of remaining within the annual volume parameters will not change the overall intensity – particularly so since the notified volumes were derived from spray irrigation applications.

⁵ EnvC C164/07

21. On this basis there is no impediment to jurisdiction arising out of changes from either scope or intensity.

Do the amendments exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the Plan and other superior documents?

22. In respect of this test, the particular factual circumstances of the length of processing time of over 10 years will be of relevance. The RMA plan framework changed radically since the application was submitted.
23. In her s42A report Yvette Rodrigo referred to aspects of the original application that she thought were problematic such as water quality issues and lack of efficiency of border dyke irrigation. These “problems” were in effect an invitation to the applicant to realign the application to the expectations of the “newer” statutory framework. Similar approaches were made with other applications before the Commissioners.
24. The decision to convert to spray operations was motivated by the need to meet water quality issues on the property associated with the proposed border dyke operations and the annual volumes would not have allowed border dyking in a manner that meet the water efficiency requirements of the plan.
25. The amended application reflects the applicants wish to align itself with the plan and to ensure that the applications, should they be granted, can be exercised in a practical way within the property boundaries.

Would parties who have not made submissions done so if they were aware of the changes to the original application?

26. The list of submitters is attached.
27. Essentially the submitters on this particular application are opposed in principle to irrigation development within the Mackenzie Basin.
28. However it is submitted that no party would have been prejudiced by the change in the application because:
 - 28.1 The change stipulates a date for conversion to spray systems
 - 28.2 The flow rates for the takes decrease following conversion.
 - 28.3 The point of takes generally move further down the catchment (to the extent that there are alterations).
 - 28.4 The overall derived improvement to water quality issues at DPL.
29. Whether it were a neighbouring farmer, a recreational user, or a submitter fundamentally opposed to irrigation it is submitted that all three groups have either submitted generally or would be better off with respect to the localised catchment issues.

Other relevant case law

30. ***Wakatipu Environmental Soc Inc v Queenstown Lakes DC***⁶ concerned a subdivision plan which was different from that contained within the original application and that which was notified. In this case there were more lots situated closer to the Shotover River than set out in the original subdivision plan and the lot boundaries were completely different.
31. Judge Jackson found that as there was no increase to the total number of residential building platforms contained in the subdivision plan and because there was more extensive landscaping (and related covenants) proposed addressing concerns raised in the submission process, the changes were sufficiently minor to come within the scope of the original application.
32. In *Wakatipu* Judge Jackson permitted substantive amendments to an application and granted the consent on the basis that he had difficulty in seeing that there were other potential parties who may be adversely affected by the amendments.
33. The Dunstan Peaks amended application concerns changes that are less substantive than those outlined above and in addition there are no other parties envisaged as being adversely affected by the amendments to the irrigation system that are not already involved in the submission process.
34. Judge McElrea found in ***Mills v Queenstown Lakes DC***⁷ that a change in the number of people anticipated onsite at two separate sound stages during production, rising from 30-40 at any one time to 80-120 referred to in later evidence, meant that there was no difficulty in seeing that there may be other potential parties (distinguishing it from the *Wakatipu* decision) who could be adversely affected by the changes to the application particularly with respect to noise and traffic concerns.
35. The amended Dunstan Peaks application contains no increase to the substantive components of the original application such as number of hectares to be irrigated, flow rates and volume of water to be taken. This distinguishes the amended application from the facts of *Mills*.
36. ***Shell NZ Limited v Porirua CC***⁸ concerned the grant by Porirua City Council of a resource consent to build a service station over half of the land owned by BP. The Environment Court upheld the Council decision but made the grant subject to BP landscaping the other half of their land. Shell applied to the Court of Appeal to appeal this decision to the High Court on the basis that the landscape condition imposed by the Environment Court was outside the scope of the original application as notified.
37. The Court of Appeal in *Shell* stated that:

“that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit... whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case including environmental impacts as may be rationally perceived by an authority”

⁶ EnvC C135/02

⁷ [2005] NZRMA 227 (EnvC)

⁸ CA57/05

Conclusion

38. The effect of changes to an application is fact specific
39. The application of the Coulls test to the facts and consideration of the relevant case law provides clear grounds from a jurisdiction perspective for the Commissioners to consider the amended application.
40. Should any matters require clarification, please advise.

Yours faithfully

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