

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

17th Minute of Commissioners in relation to jurisdiction and procedural issues

Dated 10 February 2010

17th MINUTE OF COMMISSIONERS IN RELATION TO JURISDICTION AND PROCEDURAL ISSUES

Introduction

1 On 28 January 2010 we received a memorandum from Counsel for South Down Holdings Limited, Williamson Holdings Limited, and Five Rivers Limited (the Applicants) requesting we issue an urgent determination as to whether or not the Committee can and will now make a determination on the Applicants' water right applications without resolution of the effluent applications. This request was made in light of the Minister for the Environment calling-in what are now known as the effluent resource consents, being some of the resource consent applications relating to the Applicants dairy farming proposal as fully described in our 15th Minute dated 29 January 2010.

Context

2 It is necessary to place this request from Counsel for the Applicants in its proper context.

3 The Applicants had applied for resource consents to take and apply irrigation water in the Upper Waitaki catchment (the water applications) some considerable time ago.

4 In August of this year the Applicants applied for a range of additional resource consents relating to the discharge of effluent onto land (the effluent applications).

5 This hearing commenced to consider the water applications of the Applicants along with a large number of other applications relating to the use of water in the Upper Waitaki. These applications have been presented to us on the basis of a catchment-wide assessment of the environmental effects of all of the applications, particularly to address the cumulative effect issue.

6 However, when we became aware of the Applicants' effluent applications we determined, after hearing from the Applicants, those applications should also be before us. We dealt with this matter and our reasoning for the same is contained in our 8th Minute dated 6 November 2009, in particular paragraphs 17 through 38. As matters turned out, the Applicants did not object to orders being made in relation to their effluent applications being formally joined to these proceedings and that is precisely what we did.

7 On 27 January 2010 the Minister for the Environment exercising his "call-in powers" under the Resource Management Act 1991 (the RMA), called in the effluent applications and appointed a Board of Inquiry to hear these applications.

8 The hearing in relation to the water applications before us is almost complete.

9 It is against this background that Counsel's memorandum of 28 January 2010 and, in particular, the request as to the urgent determination from this Committee as to

whether or not we can and will make a determination on the Applicants' water applications – without resolution of the effluent applications – is to be considered.

Process

- 10 We determined because of the critical importance of this issue in terms of jurisdictional and procedural issues for our hearing and also because of public interest leading to confidence in processes, we should provide an opportunity for all parties to this proceeding to be heard on the question raised in Counsel for the Applicants' memorandum of 28 January 2010.
- 11 Accordingly, we issued directions and sought submissions from parties to the proceeding on the Applicants' request. We convened a hearing for those parties to present verbal submissions in support of their written submission. This occurred in Christchurch on Thursday, 4 February 2010.
- 12 A list of submissions received is attached as **Appendix 1** to this Minute. We do not propose to traverse and discuss the content of all of the submissions made in the course of this decision. Nevertheless, we make it plain that we have carefully read and considered all of the written submissions received as we have carefully considered and weighed the verbal submissions presented to us at the hearing on 4 February 2010.
- 13 The focus of our considerations was obviously the question raised in Counsel for the Applicants' memorandum of 28 January 2010 and also our own 8th Minute.
- 14 In particular, insofar as our 8th Minute was concerned, we concluded that the effluent discharge consents were part of the dairy farming proposal. Expressed another way, we concluded that there was one proposal, that proposal being to establish dairy farming operations on the individual sites owned or operated on behalf of each applicant. That proposal involved dairying, dairy sheds, effluent holding ponds and the discharge of irrigation water and effluent to land. We concluded that there were a range of resource consents that the single proposal required to enable its operation. We also concluded that it was sound resource management practice to have all of the applications before one decision-making body to enable all interested parties to fully understand and comprehend what the proposal was about, the potential effects, both positive and negative, of that proposal. It would allow a comprehensive consideration of all of the resource management issues pertaining to that proposal by one decision-making body.
- 15 Notwithstanding our view of the matter, the Minister determined (for reasons as set out in his media statement of 27 January 2010) that it was appropriate for him to exercise his call-in powers under the RMA in relation to the effluent discharge consents. That has resulted in the circumstance where different resource consent applications for the same proposal will now be considered and determined by two separate bodies. The effluent applications will be heard by the Board of Inquiry and the water applications remain before this Committee.

The hearing

- 16 At the hearing held on 4 February 2010 in relation to this matter we heard from Counsel for the Applicants, Mr Derek Nolan. He presented written submissions, spoke to them and he also presented a short reply in relation to matters raised during the course of the hearing.
- 17 We also heard from Dr Freeman, and Marie Dysart, legal counsel for Canterbury Regional Council. In addition, we heard from Mr Paul Horgan on behalf of Ngai Tahu. Mr Euan Chapman for the UWAG group addressed us, as did a representative from the Blue Family Trust.
- 18 It was the Applicants' submission that we had sufficient information both for the intended use of water but also to show that the nutrient loading effects for each and every applicant in the entire catchment were capable of being met.
- 19 It was the Applicants' strong submission that we should not delay or adjourn the water applications pending the outcome from the Board of Inquiry on the basis that we did not have all relevant information before us to make a determination.
- 20 To assist us, particularly in dealing with the issue as to whether we had significant concerns around the dairy farm farming option with the effluent applications having been split from the water applications, the Applicants proposed to do two things.
- 21 First the Applicants volunteered to provide us with the further information as identified in Dr Freeman's Memorandum of 3 February 2010, particularly paragraph 11, where he refers to specific s92 further information requests (copies which are attached to his memorandum as Attachment 1). He particularises the further information as being items 6, 9-16 inclusive and item 18 as contained within Attachment 1. The Applicants volunteered to provide this further information on or before the end of this month, which we took to be on or before Friday, 26 February 2010.
- 22 The second matter that arose on behalf of the Applicants was that if we should have any significant concerns around the dairying farm option with the effluent applications having been split from the water applications, the Applicants sought leave to adduce limited further evidence about a 'cut and carry' and cropping operation. We were told that additional evidence in relation to sheep and beef farming on Ohau Downs would not be necessary as that had already been presented.
- 23 We were told that farming activities of that type (i.e., 'cut and carry' and sheep and beef, could be carried out on the land within well established parameters, but would require amended farm management plans different from those put forward for dairying and the use of the water for more limited farming operations, including sheep and beef are) are clearly within the effects already addressed for dairying.

- 24 We were told that such evidence can be produced in short order, within two weeks of 4 February 2010.
- 25 We were also told that the 'cut and carry' and cropping options are simpler and less costly forms of farming. They would provide us with an ability to make a decision without concern about the effluent management should we have any overriding concerns about the dairying issue.
- 26 We were told nevertheless dairying still remains the preferred option for the Applicants.
- 27 The Applicants addressed us in relation to priority issue and also addressed us in relation to prejudice they would suffer if this matter was further delayed. They argued that it was just and reasonable that the matter proceed with all due dispatch and to do so would best serve the public interest.
- 28 Dr Freeman in his memorandum of 3 February 2010 was of the view that we had sufficient information before us to determine the water applications. In particular, at his paragraph 8 he noted:
- "It is important to appreciate that even though the three dairy farm dairy effluent discharge permit applications have been separated out, nutrient and components of these proposed discharges are included in the overall cumulative water quality effects assessment."*
- 29 He was also of the view that if the specific further information referred to above relating to the nutrient loads associated with the dairy effluent discharge is provided, then he was of the very clear view that there was an adequate information base to make determination on the water applications.
- 30 Ms Dysart for the Canterbury Regional Council made it clear for us that there was no provision of the RMA that would allow us to defer the completion of the water applications or the issuing of a decision.
- 31 Mr Chapman on behalf of the UWAG group made it clear that his clients wished to remain unaffected by the call-in. He also again submitted that the UWAG applications should be separated from the Applicants' applications, as remaining in a combined hearing with the Applicants was causing, he considered, the UWAG group unwarranted delay.
- 32 He considered that the best position would be for the water consents for the Applicants to join the call-in procedure so that the decision-making body (the Board) could make a decision on the overall proposal or activity of 'cubicle farming' in the Mackenzie Basin.
- 33 Mr Chapman reminded us that we had already made a decision (as set out in our 8th Minute) in relation to effluent applications being intimately related to the principal applications and that it was necessary to hear all applications together.

- 34 He raised the priority issue with us, noting in particular that the Applicants cannot preserve their position to nutrient bank when the whole suite of applications is not before us so that all parties can have a full understanding of the proposal.
- 35 He raised the issue of delay and said any further delay is unacceptable to UWAG.
- 36 The other Minute we wish to specifically reference in this decision is that received on behalf of Waitaki First Incorporated (Waitaki).
- 37 Waitaki strongly oppose any deviation by us from the determination we had made in our 8th Minute.
- 38 Waitaki put the issue this way:
- "The issue becomes whether the fact that the effluent applications have been "called-in" and will be determined by a different process invalidates the Commissioners' interpretation of the RMA s103 issues raised by legal counsel for the above-named applicants"*
- 39 And further:
- "Whether the fact the discharge applications will now be heard and determined by a review panel appointed by the Minister for the Environment will complicate, impinge on, and/or influence the determination of the water take applications".*
- 40 Waitaki also raised the issue of delay in that, in essence, they did not want the applications to be further delayed in any respect.

Consideration

- 41 We acknowledge that it is the case that in our 8th Minute we determined it was necessary to enable us to fully understand the Applicants proposal that all relevant resource consents for that proposal be before us. This is in accord with sound resource management practice.
- 42 Since that date, as is well known, the Minister for the Environment has exercised his 'call-in' power with the result that two separate bodies will hear a range of resource consents relating to the Applicants' proposal.
- 43 First and foremost for us, we must now consider whether or not we have available sufficient information for us to determine the water applications that remain before us given the Minister's 'call-in' action.
- 44 We conclude that we have sufficient information to proceed and make a determination. This outcome is based upon our evaluation of information received to date. It is also fortified by the submissions and information provided to us by Dr Freeman, and also the Applicants offer to provide us with the further information referred to in Dr Freeman's submissions.

- 45 The second point is that the Applicants have signalled an intention to modify their farming systems away from dairy to beef and sheep and also a cropping option with no stocking. The Applicants have told us that they can provide updated and amended farm management plans and other relevant information in short order, within two weeks.
- 46 It is up to the Applicants to determine whether or not they wish at this late stage to amend their proposals. We took their offer simply put forward an alternative with the dairying option remaining as the Applicants' preferred option. We do not think that allowing the Applicants to put forward alternate farming systems will unnecessarily lengthen the hearing; nor would it cause any disadvantage to any party to the hearing provided they have the opportunity to comment upon these changes. We are thus minded to grant the Applicants' request. However, we still have some level of uncertainty as to the basis of upon which the Applicants proposed these differing farming systems. We will return to this matter subsequently.
- 47 Legal counsel for the Applicants submitted that we must take a pragmatic approach to this new circumstance, which has arisen as a result of the exercise of the Minister's power. He acknowledged that it would be the preferred course that all applications for the one proposal were heard by one body, but that is now no longer available. He made the point, which we accept, that it is now impossible for all of the resource consent applications for the proposals made by the Applicants to be heard by a single body. That is because, as he pointed out (and as the Minister referred to in his press release of 28 January 2010), the water applications cannot be heard by the Board of Inquiry. Similarly, the effluent applications cannot be heard by us. Thus, a pragmatic approach must follow.
- 48 Legal counsel for Canterbury Regional Council expressed the opinion that we had no option but to continue and advance matters based on the information we had.
- 49 In any event, we have concluded that we have sufficient information to hear and decide the water applications before us, particularly with the provision of the further information as described by Dr Freeman.
- 50 We note that in terms of s142 of the RMA, the Minister may 'call-in' a matter that is or is part of a proposal of national significance.
- 51 Giving those words their plain ordinary meaning, it seems to us clear that the Minister does have the power under the RMA to call-in a part of a proposal. Thus, the Minister's call-in power can be exercised in a manner which perhaps provides an exception to the generally accepted good resource management practice that all applications for a single proposal be heard by the one decision-making body.
- 52 We can answer the Waitaki submission as to whether or not the fact the effluent applications have been called-in and will be determined by a different process invalidates our earlier interpretation of the s103 issues as per our 8th Minute in this way:

- 52.1 Our position on the 103 issues has not changed. What has changed is the Minister has exercised his power to call-in part of a proposal. In that context we must pragmatically proceed and deal with the issue that remains before us, namely the water applications. We have not changed our minds: rather we are simply responding in a pragmatic way to a circumstance that is beyond our control.
- 52.2 Also, while we acknowledge the "call-in" does complicate the matter, the complication is such it will not and does not prevent us from making a decision on the water applications that remain with us.

Decision

53 For the reasons set out above, we determine that:

53.1 We can and will proceed with the hearing and ultimate determination of the Applicants' water applications because:

- (a) We have information available to us upon which to found such a decision, particularly taking into account the Applicants' offer to have further information as identified within Dr Freeman's memorandum before us on or before Friday, 26 February 2010;
- (b) We accept Dr Freeman's view that even without this further information we have available information to make a decision on the Applicants' water applications;
- (c) The Minister's call-in powers under the RMA contemplate a splitting of proposals and consequently a pragmatic approach must be applied to those applications that remain before us.
- (d) We do not consider that such an outcome contradicts our earlier decision contained within our 8th Minute, but this decision simply reflects a pragmatic response to matters beyond our control.

54 We direct that:

- 54.1 the Applicants are to provide to us and circulate to all parties in this proceeding the further information as described in Dr Freeman's memorandum at paragraph 11 (being Attachment 1 and items 6, 9-16 inclusive and 18 thereof), on or before Friday, 26 February 2010;
- 54.2 the Applicants are given leave on or before Friday, 12 February 2010, to determine if they are to change and/or amend the applications before us in relation to their farming systems;
- 54.3 if they are to do so, the Applicants are to provide and circulate all relevant information to all parties to this proceeding on or before Friday, 19 February 2010.

- 55 It is understood that changes to the farming system will result in the applications being presented on the basis of alternative farming systems as opposed to being presented as a substitute for and in the place of a dairying farm system. The Applicants are to confirm this as soon as possible;
- 56 Any party who receives the above-described information as set out in paragraphs 54.1 and 54.3 and wishes to be heard on the new information or lodge further submissions is to advise us via Ciana Cerri at Environment Canterbury no later than 4.00pm on Friday, 5 March 2010;
- 57 We will thereafter make further directions as to the orderly disposition of the balance of the hearing;
- 58 At this point in time, all applicants should proceed on the basis that their right of replies will be required and heard as per the current timetable, which provides for such replies to be delivered in the week commencing 8 March 2010.

Dated at Christchurch this 10th day of February 2010



Paul Rogers

Commissioner Chair on behalf of the Committee

Enclosure: Appendix 1 – List of submissions received

List of submissions received

1. Blue Family Trust (Howey) (28 Jan 2010)
2. Memorandum of Counsel (Whata) for SDHL, WHL, 5RL (28 Jan 2010)
3. Memorandum of Counsel SJB Munro (Page) (1 Feb 2010)
4. Memorandum of Counsel (Whata) for SDHL, WHL, 5RL (2 Feb 2010)
5. I F Willis (2 Feb 2010)
6. Ohau Company Trust (Ryan) (2 Feb 2010)
7. Benmore Station (Sutherland) (2 Feb 2010)
8. Canterbury Aoraki Conservation Board (Lowndes) (2 Feb 2010)
9. Mackenzie Guardians (Zusters) (2 Feb 2010)
10. Ohau Snow Holdings Ltd (Neilson) (3 Feb 2010)
11. Central South Island Fish & Game Council (Graybill) (3 Feb 2010)
12. Snoyink (3 Feb 2010)
13. Department of Conservation (Hunt) (3 Feb 2010)
14. Memorandum of Counsel (Dsyart) for CRC (3 Feb 2010)
15. Memorandum of Counsel for Simons Hill Station, Simons Pass Station, Pukaki Irrigation, Rosehip Orchards, High Country Rosehip Orchards, Lone Star Farms (Reid) (3 Feb 2010)
16. Memorandum of Te Runanga o Ngai Tahu (Horgan) (3 Feb 2010)
17. Waitaki First Inc (Brookes) (3 Feb 2010)
18. Memorandum from ECan: Freeman (3 Feb 2010)
19. Submissions from SDHL, WHL, 5RL (Whata) (4 Feb 2010)
20. Memorandum for UWAG (Chapman) (4 Feb 2010)
21. Meridian Energy (Chapman Tripp/Appleyard) (3 Feb 2010)
22. J.F. and A.K. Smithies