

TABLED AT HEARING

Date .. 4/2/2010

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

applications for resource consents to take and use
water in the Upper Waitaki Catchments

**SUBMISSIONS ON BEHALF OF SOUTHDOWN HOLDINGS LIMITED,
WILLIAMSON HOLDINGS LIMITED AND FIVE RIVERS LIMITED IN
RELATION TO JURISDICTIONAL / PROCEDURAL ISSUE**

4 FEBRUARY 2010

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1. I refer to the Commissioners' 15th minute of 28 January 2010 relating to the hearing of these applications.
2. I also refer to the decision of the Minister dated 27 January 2010 to call in the Applicants' effluent management applications to be heard by a Board of Inquiry.
3. The purpose of this memorandum is to state the position of Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited ("**Applicants**") in relation to the processing, hearing and determination of the water permit applications:
 - Williamson - CRC041787, CRC041788, CRC073112, CRC073113, CRC073114 and CRC073115
 - Southdown - CRC040835 and CRC040836
 - Five Rivers - CRC061154
4. Given that the Board of Inquiry will now hear the effluent applications, the Applicants submit that:
 - there is no good reason to defer any further these very longstanding applications;
 - it is clearly in the public interest to hear and determine the water applications in advance of what are now likely to be very protracted hearings on the effluent applications; and
 - it would be unjust to leave the Applicants in a procedural "no man's land" and for the Committee to effectively just sit on any final consideration of the current applications until the Board of Inquiry process is completed.

Background

5. These applications were first lodged many years ago, namely on:
 - 27 February 2004 - WHL Killermont (Williamson Holdings Limited)
 - 24 October 2003 - Glen Eyrie Downs (Southdown Holdings Limited)
 - 6 October 2005 - Ohau Downs (Five Rivers Limited)
6. The Applicants have since committed to a cumulative effects assessment (the Water Quality Study) at very significant cost to them so as to assist ECan in assessing the full effects of all applications.
7. This has resulted in the proffering of nutrient thresholds and related nutrient discharge allocations per farm. This has enabled consideration and, if appropriate, the grant of consents having regard to the full potential Basin wide effect of nutrient loading associated with proposed farming.
8. The Applicants have tabled a significant amount of evidence not only on the intended use for the water, but also to show that in respect of nutrient

loading effects, they can meet the thresholds and allocations relating their farms.

9. In accordance with the directions of the Committee in its 8th Minute dated 6 November 2009, the effluent applications to enable intensive dairy farming were joined to the water applications.
10. The effluent applications have now been called in with the effect of severing the water rights applications from the effluent applications. This is directly contrary to the intent of the Committee to have them heard together. That is now beyond the Committee's and the Applicants' control.
11. The Committee are now confronted with the task and with respect, the duty under section 21, to hear and determine these applications without unreasonable delay.
12. The Applicants strongly submit that they ought not to be further prejudiced by any procedural quagmire or greater delay resulting from the call in decision and that the Committee should now complete processing of these applications and issue its decisions.

Just and reasonable, public interest

13. The history and treatment of these applications is the exemplar of what many people would say is wrong with the RMA:
 - up to a seven year delay in processing the applications, in part because of an earlier call in of the water applications for the Waitaki Allocation Plan process;
 - no regional effects assessment, objectives, policies or rules from ECan specifically directed to nutrient loading so as to provide guidance to applicants in terms of management of Basin wide effects;
 - an incomplete regional plan process, spanning 10 years and with no clear end point in sight; and
 - resource management application costs including background reports and processing fees that are now in the millions of dollars.
14. To further delay the processing of these water applications on the basis of the decision to call in applications dealing with effluent management would be palpably unjust:
 - the Applicants have cooperated with both the Council, other applicants and submitters to produce the Water Quality Study at significant expense;
 - the Applicants have worked hard to produce evidence to satisfy you of the effects of their proposal – including state of the art cubicle stables and farm management systems, representing the most effective way to manage the nutrient loading caused by dairying;
 - the Applicants have worked diligently to respond to further information requests;

- they have not been dilatory in any way that would warrant the ire of this Committee;
- this process is nearly complete, with only the right of reply to be completed;
- any deferral may adversely affect the priority established by the applicants (an issue I return to below); and
- a seven year delay is long enough.

Decision

15. Ultimately the task of this Committee is to be satisfied that the proposed irrigation for which the water permits are intended will not lead to undue adverse effects on the Basin's waterways that are contrary to the sustainable management of those waterways.
16. That task can be satisfied through the identification of appropriate thresholds and nutrient allocation, and by requiring any applicants to demonstrate that they can meet these thresholds and operate within the allocations. The Applicants we represent have presented such evidence. Conditions can be imposed to secure the requisite outcomes.
17. The Applicants have to this point focused on demonstrating that they can meet the Water Quality Study thresholds and allocation via the cubicle stable dairy farming option. The Applicants maintain that it is appropriate to process and determine the applications on that basis as this Committee can, through conditions, insist on measures that achieve that outcome.
18. Nevertheless, having come this far, and at great expense, the Applicants do not want the water applications derailed were the Committee (contrary to our evidence) to consider itself constrained to grant consent on the basis of the dairy farming option.
19. To assist the Committee and the Applicants, should the Committee have any significant concerns around the dairy farming option with the effluent applications having been split from the water applications, the Applicants seek leave to adduce limited further evidence about a cut and carry and cropping operations. Additional evidence in relation to sheep and beef farming on Ohau Downs would not be necessary as that has already been presented. In a nutshell, farming activities of that type can be carried out on the land within well established parameters, but would require amended management plans (etc) than those put forward for dairying, and the use of the water for the more limited farming operations (including sheep and beef) are clearly within the effects already addressed for dairying. Such evidence can be produced in short order (two weeks) and as just mentioned is already subject to the extensive assessment of effects within the existing Applicant and MWRL evidence.
20. In terms of cut and carry and cropping options, these simpler and less costly forms of farming provide you with an ability to make a decision without concern about effluent management should you have any overriding concerns about the dairying issue. Dairying still remains the preferred option for the Applicants. The recent public reaction to the cubicle stables has been well-intentioned but lacking factual basis and many of the submissions received are on grounds quite unrelated to the RMA. The cut and carry and cropping options (and sheep and beef) provide at least some form of use for their properties that is sustainable

over the long term, should the dairying option for the use of the water and land prove problematic.

21. At that point the Committee would, subject to any replies, be able to make a decision on the applications, hopefully to grant the permits based on the dairying-related effects (and we consider you have more than sufficient evidence), but at least on the basis of cut and carry and cropping (or sheep and beef) for which the land would otherwise be utilised for.

Priority

22. As to priority, recent Court of Appeal decisions have affirmed the first in time principle.¹ Any deferral of the current water applications could have either substantive or procedural implications, as the Water Quality Study allocates cumulative capacity across all the applicants to this hearing and a delay or deferral could create uncertainty.
23. If the Committee determined to defer consideration of these applications, it would need to preserve the current priority of the applicants. This could involve conditional decisions to the other parties (ie grants subject to the determination of these applications).
24. With respect, this type of procedural quagmire must be avoided. It is far simpler to determine these applications now, if necessary with suitable conditions as to effluent management. That way the applicants know where they stand. It is noted that ECan legal advice also supports making a decision without delay
25. As a final point while it may possibly suit some of the submitters to see this process further delayed, it does not represent the public interest. The effluent applications hearing before the Board of Inquiry will be lengthy and costly with some 4500 submissions having been received across the applications. This will likely involve a hearing of several months at great cost to all concerned; the Applicants, the agencies, the public and other submitters.
26. It makes absolute planning sense to hear and determine these water applications first as this will set the frame for the effluent applications, including those matters that must be addressed in order for the water to be used. If the consents are ultimately declined in terms of the dairying option, whether by this Committee or by the Environment Court (which would be asked to hear any appeals before the Board of Inquiry sits with its much longer process), the Applicants will not proceed with the effluent applications, avoiding the costs of those processes for everyone.
27. The Board of Inquiry will also need to know where the Applicants fit within the matrix of consents and cumulative effects in the Upper Waitaki. If the Committee has not made a decision on that aspect uncertainty is created.

Directions sought

28. The Applicants therefore respectfully seek the following directions:
- that the Committee will determine the water applications as sought by the Applicants;

¹ *Central Plains Water Trust v Synlait Limited* [2009] NZCA 609, *Central Plains Water Trust v Ngai Tahu Properties Limited* [2008] NZRMA 200.

- that the Applicants are given leave to file further evidence in relation to an alternative farming options; and
- such additional evidence and any response to it shall be heard in the week beginning 15 March 2010 which was previously set aside to hear the effluent consents.

Dated 4 February 2010

Derek Nolan / Christian Whata

Counsel for Southdown Holdings Limited, Williamson Holdings Limited and Five Rivers Limited