

BEFORE THE BOARD OF INQUIRY

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of a Board of Inquiry appointed
under section 146 of the Resource
Management Act 1991 to consider
an application by Mighty River
Power Limited for resource
consents to construct, operate,
and maintain a wind farm at
Turitea.

**SUBMISSIONS OF COUNSEL FOR MIGHTY RIVER POWER LIMITED
REGARDING THE SURRENDER OF MOTORIMU RESOURCE
CONSENTS**

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1. INTRODUCTION

- 1.1 Ma'am, yesterday you asked counsel about what does surrender of the consents mean. Specifically, "*does it mean that the Palmerston North City Council holds them for the duration of the consent and could in fact pass them on to another interested party*". As you know, section 138 of the Resource Management Act 1991 allows the holder of a consent to surrender it to the consent authority by giving written notice. In this case, the liquidator PriceWaterHouseCoopers stands in the shoes of the consent holder Motorimu Wind Farms Limited. It has given the requisite notice to all three relevant councils.
- 1.2 Notice of surrender having been given, the surrender takes effect pursuant to section 138(4) when the holder receives the notice of acceptance from the consent authority. The consent is then no longer "live". That is, it ceases to exist, and the bundle of rights it comprised have evaporated. In addition, up until the time the surrender notice is received, and the notice of acceptance issued, the consent authority can and must only 'hold' a copy in an administrative and regulatory capacity.
- 1.3 At no time can the consent authority 'pass a consent on to another party' because it has no lawful capacity to do so in the first instance, and there is nothing "live" to pass on in the second.
- 1.4 There is no opportunity for the consent authority to simply 're-issue' a surrendered consent to a new applicant, based on assessment and applications filed, considered and decided upon some years prior. There is nothing in the Act that countenances, let alone supports that occurring. It is submitted that such a scenario would be an abdication of statutory responsibility, in that it would not allow the 'application' to be considered on its merits; particularly as against the environment then existing. On that point, if there was a later 'application' for Motorimu "2", that would now also properly need to consider effects that are cumulative on the grant of consents for Turitea and the recently notified expansion of the Te Rere Hau wind farm.

- 1.5 In addition, there is no ability for a consent authority to reject the surrender, except in the case of a partial surrender as set out in section 138(2), which does not apply here. The consent authority has no power of decision, because the consent holder (or here the liquidator) does not apply for surrender, they give notice of it. The issuing of the 'notice of acceptance' is therefore an administrative formality. The word 'acceptance' does not also connote 'rejection' because it is only used descriptively. That is, it is the name of the notice provided by the consent authority in response. The consent authority has no lawful right to withhold that notice.
- 1.6 In terms of the case law, *Fordyce*¹ confirms that the purpose of s138 is "so that a consent holder can give up its rights if it wishes" (para [11]. Other cases merely note submissions made for one party or another that "the subject consent remained "live" until surrender... ." ² and that "there is no legal basis for distinguishing between a loss of rights on expiry and a loss of rights on surrender, lapsing or cancellation of a consent... ." ³.
- 1.7 In summary, a resource consent is permissive – it is a bundle of rights (in relation to which conditions only become mandatory upon implementation) – it can be surrendered by the consent holder. The surrender (dictionary definition "to relinquish or forego") of those rights results in the extinguishment of those rights. They then no longer exist, and the consent authority has no discretion to decline to accept surrender except in the case of partial surrender (which we do not have here).
- 1.8 Should some notional third party approach the same consent authority and request the 'reissue' of a surrendered consent, there is no statutory basis for that request to be granted. Rather, a fresh application for consent(s) would need to be made, processed, and decided, in terms of

¹ *North Ridge (Queenstown) Developments Limited and Fordyce Farms Limited v Queenstown Lakes District Council* C208/01

² *K & J Rolinson v N C & S Chesterman* C113/06, para [7]

³ *Otago Water Resource Users Group v Kakanui Ratepayers and Improvement Society* C88/2003, para [9]

its actual and potential effects on the environment then existing, and with reference to the plans and policies then in force.⁴

KR Price

Counsel for Mighty River Power Limited

25 August 2009

⁴ cf para [19] of *P A & C F Bayly v Waitakere City Council* A1/2001

