
in the matter of: the Resource Management Act 1991

and

in the matter of: applications for resource consent by applicants in the lower Waitaki River Catchment under the Waitaki Catchment Water Allocation Regional Plan

Synopsis of submissions on behalf of Meridian Energy Limited as submitter in conditional support

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SYNOPSIS OF SUBMISSIONS ON BEHALF OF MERIDIAN ENERGY LIMITED AS SUBMITTER IN CONDITIONAL SUPPORT

Introduction

- 1 Meridian Energy Limited (*Meridian*) appears at these hearings in three distinct capacities:
 - 1.1 as the holder of the consents to operate the Waitaki Power Scheme and, in particular, the consent to dam the Waitaki River and use water at Waitaki Power Station;
 - 1.2 as co-applicant for the taking and use of water associated with the Hunter Downs Irrigation Scheme (*HDI*); and
 - 1.3 as applicant for the taking, use and discharge of water associated with North Bank Tunnel Concept (*NBTC*).
- 2 These applications by MRNAG, Waihao Downs Irrigation Limited (*Waihao Downs*) and others raise issues which are of interest to Meridian in all of the three capacities I have outlined. In order that these submissions can be seen in context therefore, I will, where appropriate, indicate in which capacity Meridian raises particular matters.
- 3 Meridian has lodged submissions in relation to all applications. Meridian's position at the time of the lodging its submissions was to conditionally support the grant of consents in most instances. Meridian's support is conditional on the conditions of consent being considered by Meridian to be appropriate with respect to:
 - 3.1 minimum cut-off conditions and flow sharing in times of low flow;
 - 3.2 the installation and maintenance of a water metering system/telemetry; and
 - 3.3 addressing any water quality effects from land use intensification including the adoption of best management practices.
- 4 However, to put this in context, at the time the applications were notified most of the applicants seeking to take water from the main stem had responded to a request for information under section 92 of the RMA stating that they seek a minimum cut-off condition of 100m³/s. Waihao Downs Limited also sought the 100-190 pro rata

sharing regime proposed by HDI and the application was specifically notified on this basis.

- 5 Since that time a number of new issues have emerged and, particularly since the beginning of these hearings, some applicants have amended their applications in a manner that invites a response from Meridian. In particular, Meridian is now aware that the MRNAG applicants:
- 5.1 do not support HDI's proposed pro rata sharing regime between 100m³/s and 190m³/s;
 - 5.2 now only seek a 100m³/s minimum cut-off condition if Meridian enters into an agreement to guarantee 100% reliability to existing and new abstractors;
 - 5.3 as their Option B the MRNAG applicants seek a varying monthly minimum cut-off condition which mirrors the minimum discharge provisions in the NBTC application (but does not adopt other aspects of NBTC's alternative flow regime);
 - 5.4 despite Objective 5 and Policy 25/26 do not propose any sharing with other abstractors, either existing or new, as they rely on there being sufficient flows at all times from tributaries above BlackPoint to dispense with any need for sharing between users;
 - 5.5 do not propose any ramping conditions, i.e. the point at which takes should begin to reduce so that the taking of water has completely ceased by the time a minimum flow is reached;
 - 5.6 propose that compliance be determined by 72, 48 or 24 hour averaging;
 - 5.7 propose that non-complying activities be granted on the basis of an analysis either that the 90m³/s allocation cap in Rule 2 or the total annual allocation between Waitaki Dam and BlackPoint for agricultural and horticultural activities in Rule 6 is not exceeded; and
 - 5.8 seek to some, as yet not clearly defined, extent to adopt the HDI evidence in support of the minimum cut-off conditions in both Option A and Option B but not all of the mitigation recommended by witnesses who appeared at that hearing.

- 6 For the record, Meridian's position is to continue to support a grant of consents to the MRNAG applicants but there are issues which have emerged, particularly since the beginning of this hearing, that Meridian submits need to be addressed either by the applicants or at the very least recorded in the decision as acknowledgements given by the MRNAG applicants. Meridian also wishes to comment on the conditions proposed.
- 7 With respect to Waihao Downs Meridian's understanding is that they seek the MRNAG Option A but in the event that no agreement with Meridian is reached they do not adopt MRNAG's Option B and still seek a 100m³/s cut-off condition. They acknowledge the need for a mechanism for users to share water in times of low flow but were not specific about the particular form of flow sharing that should be adopted, e.g. banding or HDI's all sharing. Meridian continues to conditionally support Waihao Downs.
- 8 With respect to the Chalmers application, Meridian continues to conditionally support and notes that presumably MRNAG's Option B does not apply to that application but it takes the view that the conditions of consent need to recognise the need for flow sharing in times of low flows.
- 9 Clarkesfield Holdings (1996) Limited applied to have its hydro application subject to a 100m³/s cut-off condition relying on the evidence given at the HDI hearing and without the need for sharing with other users given that there is sufficient inflows from tributaries to meet Clarkesfield's peak demand and the water taken will be returned to the river above the major downstream abstractors and is not counted in the 90m³/s allocation total so does not deprive downstream abstractors of flows in times of low flows. Meridian supports that application.
- 10 As outlined by Mr Williams yesterday under the current situation the reality is that the flow at Kurow will not be less than 120 m³/s because of the current minimum discharge on the Waitaki Dam consent.
- 11 If NBTC were commissioned the minimum discharge would be the AFR varying monthly flows plus a peak rate total for other abstractors above BlackPoint. Clarkesfield would continue to rely on tributary inflows but again the flow at Kurow would not be less than 110 m³/s being the lowest winter month.

- 12 Meridian continues to conditionally support the applications to take water from the tributaries including the Hakataramea including the RH Robertson applications. Its comments with respect to those applications are largely limited to a concern that the conditions of consent need to reflect best management practice with respect to managing the effects of changes in water quality.

HDI relationship with Waihao Downs

- 13 Waihao Downs' application is to take water at a maximum rate of 3.06 cumecs. They no longer propose to use the same intake as HDI.
- 14 Waihao Downs propose to use water on 6,800 of land. The HDI command area is obviously much larger than the Waihao Downs area but it includes all of the Waihao Downs command area.
- 15 The proposed HDI take of 20.5 cumecs incorporates the 3.06 cumecs applied for by Waihao Downs because of the overlap in command areas.
- 16 To clarify, HDI is not amending its application to take 20.5 cumecs because Waihao Downs no longer wishes to rely on HDI intake. The reason for this is that there is no certainty Waihao Downs will actually commission its scheme even if it obtains the consents it seeks here. If it did not proceed, Hunter Downs would wish to have the option of taking the 3.06 cumecs and irrigating in the Waihao Downs area.
- 17 The current proposed conditions of the HDI consent explicitly state that in the event both consents are operating, the combined rate and volume of water taken from the Waitaki River will not exceed 20.5 cumecs or 251 million cubic metres per year to prevent double dipping.
- 18 The issue of which irrigation scheme actually supplies water to the farmers is a contractual one between the farmer and the choice of (potentially) two providers.

Diverts v take debate

- 19 Meridian supports the position taken by Ms Johnson for the MRNAG applicants that diverts should not be included in assessing the total amount of water allocated to existing consent holders. This is consistent with the submissions and evidence given at the NBTC and HDI hearings.

- 20 I do not wish to repeat the submissions I made at those hearings but one matter that may assist the Commissioners in resolving this issue is a reference back to the basic principles of plan interpretation which might help you to find a way to deal with this issue in a practical way.
- 21 The first and most basic principle is that any form of legislation is to be interpreted in a purposive manner.
- 22 In the context of interpreting a Plan the Court of Appeal in *Powell v Dunedin City Council* said at para [35]:

[35] In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Ratray*, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it maybe necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in *Ratray* or with the requirements of the Interpretation Act.

- 23 In a later case *Foster Family Trust* the Environment Court referred to *Powell* but then set out its preferred approach which was to consider a list of factors, including:

[12] In *Brownlee v Christchurch City Council*¹⁷ the Court listed:

... the relevant factors to consider in interpretation of a plan prepared under the RMA [as] includ[ing]:

- (1) the text of the relevant provision in the plan;
- (2) the purpose of the provision;
- (3) the context and scheme of the plan;
- (4) the history of the plan;
- (5) the purpose and scheme of the RMA being the statute under which the plan is prepared and under which it operates;
- (6) any other permissible guides to meaning (including the common law principles or presumptions of statutory interpretation).

As we pointed out in *Lando*¹⁸, *Powell* seems to have added a gloss to factor (1) so that it should now refer to the “text and immediate context of the relevant provision”.

¹⁷ [2001] NZRMA 539 at para [25].

¹⁸ Decision A101/2005 at para [19] referring to *First Light Holdings Limited v Thames Coromandel District Council* Decision A130/2004.

24 In the unique circumstances that surround the development of the Waitaki Allocation Plan there are a number of matters in this list that can be referred to aid with interpretation:

24.1 Unlike most Plan hearings the evidence was all recorded under the heading of Plan history in this circumstance the Commissioners can take into account that the only evidence the Board heard on the then existing allocation was from Mr Potts and Mr Potts did not include divers in his assessment. There does not seem to be any argument that the Board was relying on some evidence other than Mr Potts.

24.2 The Plan itself (which here unusually includes Annex I) gives us insight into what the Board’s intention was. The Board clearly intended to allow existing consents to be replaced and to allow some (limited) growth in irrigation in the area above BlackPoint.

25 I accept that this analysis does not go as far as assist you in determining how much additional allocation the Board intended to provide to enable future irrigation above BlackPoint as they did not adopt Meridian’s suggested relief on this point but at the very least it does assist you to reach the conclusion that the rule should not be interpreted in a way to include divers because that would have the clearly unintended result that even existing consents could not be replaced, let alone any new consents granted.

26 Overall, it is open to the Commissioners to conclude that adopting literal interpretation would not be consistent with established principles of plan interpretation and the purposive approach to statutory interpretation.

27 This leaves open the question of how much additional growth the Board intended to allow but it appears to be universally accepted that it was for limited incatchment use above BlackPoint. I make this point because the Waitaki Water Allocation Board heard from INO who sought a large allocation from above BlackPoint. It is apparent that whether you include the divers or not the Board was

not intending to enable additional out of catchment irrigation on the scale contemplated by INO.

Non-complying activities – annual allocation

- 28 Regardless of whether diverts are included or not, it is apparent that some of the applications by members of MRNAG are non-complying as they exceed the Plan's allocation of 150Mm³ pa to the activity of agriculture and horticulture above BlackPoint.
- 29 Whilst Meridian supports all these applications above BlackPoint being granted, it does not agree that the legal and planning analysis presented by MRNAG to date provides an appropriate basis for the grant of consent.
- 30 The starting point is the Waitaki Act. Under the Waitaki Act the Board was specifically required to provide for:
- “13(b) water to sustain the intrinsic values and amenity values that the Board identifies and determines should be sustained in the Waitaki River and associated beds, banks, margins, tributaries, islands, lakes, wetlands, and aquifers; and
 - (c) the allocation of water to activities, as appropriate; and
 - (d) the management of allocated water, including methods that provide for dealing with periods of time or seasons when the level or flow of water is low.”
- 31 Looking specifically at the methods the Board used to fulfil its functions in my submission it sought to achieve section 13(b) through the setting of the environmental flow and level regimes in Rule 2. For the Lower Waitaki River this was the combination of a minimum flow, flushing flows and an allocation limit of 90m³/s.
- 32 By contrast, the method used to achieve section 13(c) was Rule 6. That rule is specifically stated to be the “*Rule on the annual allocation to activities*” and it cross refers to policies which relate to how the pie has been sliced up amongst various categories of competing uses.

- 33 I therefore disagree with Ms Borthwick's analysis that these applications can be granted because "*15.5 cumecs of surface water remains available for allocation on the lower Waitaki River*"¹.
- 34 In my submission the 90m³/s cap is expressly part of the mechanism to protect the values of the river. The best that can be said therefore is that because the applications comply with that part of Rule 2, it is not expected there will be adverse effects on the river from the granting of a non-complying activity. However, the 90m³/s cap is not relevant to the allocation of water amongst competing activities and it doesn't assist the Commissioners to determine the fundamental issue recognised in Policy 12 whether by granting these non-complying activities the needs of other categories of activities will not be met?
- 35 Mr Boyes in his evidence properly raises the issue which is of concern to Meridian here, namely the potential precedent effect of granting non-complying activities with the resultant potential effects on plan integrity and public confidence in the WRP document.
- 36 In summary, Meridian's concern is that these applicants have not identified a point at which the precedent effect of granting applications which do not comply with the annual allocation above BlackPoint or worse still the argument appears to be that another 15.5 m³/s of consents could be granted to take water from the area above BlackPoint.
- 37 The reason for Meridian's concern should be readily apparent. It does not want to encourage a proliferation of applications in the reach affected by the NBTC diversion who will then look to Meridian to release water to ensure reliability over and above the commitments already made as part of NBTC.
- 38 This is not a fanciful concern. As the Commissioners are aware, at the reconvened NBTC hearing we heard evidence from Gravity Limited that they intended to lodge an application in the near future to take 12 cumecs of water in the reach above BlackPoint notwithstanding that the annual volume limit in that area is already exceeded whether one includes diverts or not. If Ms Borthwick's analysis is adopted then the current applications may be difficult to distinguish from Gravity Limited's as there is sufficient flow on an

¹ Paragraph 38 and 39 Borthwick submissions.

instantaneous basis not to breach the 90m³/s limit if an additional 12 m³/s take is granted.

- 39 Mr Boyes adopts a different analysis to Ms Borthwick to argue that there will be no precedent effect of granting these applications. In my opinion, he correctly identifies that the key policy is Policy 12 and its explanation which states that:

“Any activity that falls outside the annual allocation set under this policy in Rule 6 will be a non-complying activity and must demonstrate the effect of granting the entitlements to other activities over the timeframe of the consent.”

- 40 However, he says that the differentiation above and below BlackPoint is “*arbitrary*” and then argues that consents can be granted because the applications “*comply with the 1250 Mm³ set out in the WRP*”.²
- 41 In my submission that analysis raises exactly the same issues from Meridian’s perspective as Ms Borthwick’s analysis. If the line between BlackPoint is to be disregarded and surplus allocation below BlackPoint can be moved upstream then how does Meridian argue against one of the existing lower Waitaki irrigators moving their take point up into the reach affected by NBTC and how does it resist the application by Gravity Limited both of which would comply with the overall allocation to the activity of agriculture and horticulture from the Dam to the sea if you ignore the line drawn at BlackPoint.
- 42 If either of these scenarios occurred and an interpretation adopted that the hydro-allocation is limited to all other flows after agricultural and horticultural takes then the whole purpose of the Board drawing a line at BlackPoint would be undermined.

A way through

- 43 All of the above aside, Meridian submits that if the case for the applicants is properly analysed then these applications can be granted without an impact on the integrity of the Plan.
- 44 As a preface to my submissions below I draw attention to the cases which develop the theme that a non-complying activity is less likely to have an effect on the integrity of the Plan where it is unique in some way and does not offend the objectives and policies of the

² Paragraph 10, Boyes evidence

Plan.³ Other cases refer to looking for an “unusual quality”⁴ or “true exceptions”⁵.

- 45 The Draft Plan did not include separate allocations for the reach above and below BlackPoint. That concept was introduced through relief sought in Meridian’s submission whereby Meridian asked the Board to adopt the concept of spatial sharing of the lower Waitaki River, i.e. include an allocation to enable a large scale hydro generation proposal above BlackPoint together with a realistic allocation to meet the current and foreseeable in catchment needs for irrigation above BlackPoint and by contrast to enable relatively larger scale irrigation (including out of catchment takes) but very little hydro generation potential below BlackPoint.
- 46 Meridian’s submission included a suggested redraft of Table 5 with the separation above and below BlackPoint shown albeit with different annual allocation numbers than eventually adopted by the Board.
- 47 In considering these applications, Policy 12 and its explanation directs you to consider the effects on parties’ entitlements to water for other activities if additional water is effectively to be allocated beyond the Table 5 allocation limit.
- 48 It is Meridian’s submission that above BlackPoint all the water above the amount that must stay in the river to maintain the environmental flows is allocated. This is because each activity is given its own specific allocation and hydro electricity generation has “all other flows”.
- 49 Therefore the implication is that an increase in the amount of water for the activity of agriculture and horticulture above BlackPoint must come from some other allocation to another activity.
- 50 Meridian accepts that the water in the hydro generation category is not allocated to it personally. However, in the circumstances which arise here, Meridian (and Clarkesfield) are the parties who have come forward with specific proposal(s) which they assert are a credible use of the allocation for hydro generation and they can be

³ *Design 4 Ltd v Queenstown Lakes DC* (1992) 2 NZRMA 161

⁴ *Harris v Papakura DC*, EnvC A060/05 and *Olive Branch Investments Ltd v Central Otago DC*, EnvC C045/05

⁵ *Dunedin Ratepayers & Householders’ Assn Inc v Dunedin CC*, EnvC C39/2004

said to collectively represent the “entitlements of others” who might seek to make applications to utilise the allocation.

- 51 The effect of granting these applications therefore is that there is less water available as “all other flows” to any proposal seeking to utilise the hydro generation allocation including NBTC. This is evidenced by the proposed NBTC conditions of consent which provide for additional flow to be provided over the minimum discharge to meet the total peak take needs of these applicants and some future applicants to the cap proposed by Meridian.
- 52 The Commissioners are able to form the view that the party who has come forward with a proposal to utilise the water allocated to hydro generation has, for all practical purposes, agreed to a reduction in the allocation which equates to electricity production foregone through NBTC. The fact that this has been formally proffered through the NBTC conditions is a unique factor distinguishing these applications from any future ones.
- 53 Meridian has also signalled where the limit of that agreement is, i.e. an additional 3 cumecs and in my submission that caps the point at which precedent implications stop. I remind the Commissioners that the 3 m³/s is linked to Mr Potts’ assessment of foreseeable **incatchment** demand.
- 54 The only residual concern the Commissioners need to have then is to consider the impact on other as yet unknown applicants who could come forward to utilise the hydro category allocation in the event that NBTC is not granted or never commissioned.
- 55 If the Commissioners were not minded to accept the above analysis then Meridian would have real concerns about the ability of the Regional Council to distinguish future applications such as Gravity Limited from those at this hearing and taken to its logical conclusion the Board’s whole purpose in providing for an allocation for hydro generation above BlackPoint is undermined. Meridian would then be forced to adopt the position that applications which fall outside Ms Johnston’s 150M m³ per annum, i.e. excluding diverts, should be declined as to grant them would be to undermine the very basis on which the Board decided to draw a line above BlackPoint, i.e. to enable a large scale hydro project (see Annex I, paragraph 67, of the Plan).

What minimum cut-off condition is being applied for by MRNAG applicants

- 56 Although the picture has become clearer as this hearing has progressed, Meridian is still not completely sure of what cut-off condition the applicants proffer.
- 57 At the time Meridian lodged its submissions the MRNAG applicants had by and large stated that they sought a minimum cut-off condition of 100m³/s. Meridian supported this as consistent with the expert evidence it had obtained in preparing its application associated with HDI and as consistent with its proposed 100m³/s-190m³/s pro rata sharing regime or any variation of it as discussed at the hearing, e.g. banding to give higher reliability to existing abstractors.
- 58 On the first day of this hearing the applicants' position was to continue to seek 100m³/s as a minimum cut-off but this was explicitly stated to be conditional on Meridian agreeing to provide sufficient water over Waitaki Dam to ensure 100% reliability for new applicants as well as existing users. This was also to apply to all users from the Dam to the sea (potentially up to 90m³/s).
- 59 Meridian's current understanding based on the legal submissions and evidence produced is that the MRNAG applicants do not propose a 100m³/s minimum cut-off condition even in an amended form if agreement with Meridian is not reached.
- 60 Meridian seeks to have this position made explicit, i.e. are these applicants still reserving the ability to fall back to a 100m³/s minimum cut-off condition in some form even if Meridian's agreement is not forthcoming or is a 100m³/s cut-off condition totally abandoned if Meridian's agreement is not obtained?
- 61 At this juncture I express some concern at the way in which a without prejudice proposal which was put to Meridian shortly before this hearing began and which Meridian had not even considered when this hearing began is now being negotiated before the Commissioners here. This means that Meridian considers it necessary to respond through Mr Eldred's evidence to a proposal which in my submission is largely irrelevant to the Commissioners unless and until final agreement is actually reached.
- 62 The present situation is that no agreement has been reached between Meridian and MRNAG and whilst there is a willingness to continue with discussions, it is unlikely that an agreement can be

reached in the time frame between now and when this hearing finishes. Therefore, it is submitted that the Commissioners should make a decision on the MRNAG applications absent Meridian's agreement.

63 Therefore Meridian is presenting its case on the basis that Option B is the only live option before the Commissioners. Option B seeks a minimum cut off condition which mirrors the monthly varying minimum flow which was presented as part of Meridian's NBTC case.

64 The following issues arise:

64.1 It is unclear whose evidence, beyond the evidence presented at these hearings, the applicants rely on in support of the Option B varying monthly minimum cut-off. Is it Meridian's NBTC witnesses or is it Meridian's HDI witnesses, i.e. is the case pitched on the basis that the flow each month will be somewhere between HDI's minimum cut-off of 100m³/s and the minimum flow in the plan of 150m³/s so as to place reliance on the evidence presented at the HDI hearing as being conservative? This appeared to be Mr Boyes' position.

64.2 Identifying which specific witnesses are relied on is important because each witness called by Meridian at both NBTC and HDI hearings recommended specific mitigation which was needed to deal with the effects of the proposed minimum cut-off. Unless the witnesses are identified and in relation to whether they appeared at NBTC or HDI, it is difficult for the Commissioners to determine which mitigation might be appropriate here.

64.3 The varying monthly flow was but one component of the NBTC flow regime in the context of a specific proposal where in general terms two thirds of the river is diverted into a tunnel. It is supported by a vast amount of mitigation proposed. The applicants here have not identified any NBTC witnesses they intend to rely on and nor have they indicated which parts of NBTC's proposed mitigation, if any, is relevant. Obviously the abstraction is significantly less than NBTC but that just leaves the Commissioners with a problem of trying to ascertain how much if any of the NBTC mitigation is relevant to these applications?

64.4 If the applicants are relying on the Hunter Downs evidence (as appears to be suggested by Mr Boyes?) then Meridian's

position is that it is not appropriate for applicants to simply adopt the minimum flow recommendations arising from the various experts who gave evidence without also adopting the HDI witnesses' recommended mitigation. **[Refer to evidence road map.]**

64.5 The varying minimum cut-off spans the entire year. In the context of an application to take water for irrigation, some months should not be included. This is particularly so if the applicants are relying on HDI evidence which only assessed the effects of minimum flow cut-off less than the Plan's 150m³/s in the context of low flows occurring during the irrigation season.

Minimum cut-off higher than Waitaki Dam

65 As the Commissioners are aware, the minimum discharge specified on Meridian's consents relating to Waitaki Dam is 120m³/s. This means that the applicants' Option B minimum cut-off flows are higher in all months of the irrigation season than the minimum discharge flow set out in the minimum discharge condition relating to Waitaki Dam.

66 Meridian is concerned that there may be a misconception amongst the MRNAG applicants that in the future the discharge from Waitaki Dam will never be below 150m³/s.

67 At both the NBTC and HDI hearings Meridian witnesses stated that whilst in the past flows had rarely been below 150m³/s, the reason for this is that Meridian had historically applied a 30m³/s buffer. Meridian specifically stated that existing abstractors and new users should not rely on this practice always continuing. At times over the past 12 months Meridian has operated at less than 150m³/s discharge and, as time goes by, it may well operate at closer to its allowable minimum at times albeit this is only expected to happen on rare occasions.

68 Therefore Meridian, in its capacity as the owner of the consent to operate Waitaki Dam, seeks specific acknowledgement from the applicants or it recorded in the Commissioners' decision that:

68.1 The applicants are aware of the existing minimum discharge condition;

68.2 they are applying for a higher cut-off condition with the knowledge of the 120m³/s minimum discharge;

- 68.3 they acknowledge the evidence given at both the NBTC and HDI hearings and re-iterated in this hearing that they cannot rely on Meridian always operating with a 30m³/s buffer; and
- 68.4 Meridian has advised that it is likely to resist all attempts to have the minimum discharge condition on its existing consent changed at the review of its consents. In particular, it will be relying on the dicta in *Aoraki Water Trust* (which recorded the comments of the Minister at the time the Waitaki Act was passed that consent conditions cannot be changed on a review for the purposes of reallocating water amongst resource holders and that the purpose of the review is for the maintenance of in river values).
- 69 To put this another way, Meridian would be concerned if the effect of granting consents with a higher minimum cut-off than the minimum allowable discharge at Waitaki Dam were to lead to pressure on Meridian as a legitimately established prior consent-holder to always operate within the historical buffer. Its position is analogous to the concerns expressed in "Reverse Sensitivity" cases where the concern an existing consent holder expresses is that the new applicant will become established and then complain about his neighbours' operations. The cases have said that consent authorities have a duty to consider the effects of new activities on other activities, particularly by leading to restraints on the carrying on of those other activities. The Court has noted that complaints can be the first sign of a groundswell of opposition that can chip away at a lawfully established activity.⁶
- 70 In its capacity as applicant for HDI, Meridian also seeks acknowledgement from the applicants, or for it to be recorded in the decision, that:
- 70.1 the applicants are aware that Meridian/SCIT (and Waihao Downs) are continuing with their application to have a cut-off condition of 100m³/s;
- 70.2 if Hunter Downs was granted on this basis it would obtain more favourable conditions than the MRNAG applicants under Option B, i.e. at times of low flows MRNAG applicants could be required to cease taking water and HDI could still be taking some water until the river flow reached 100m³/s; and

⁶ *Auckland RC v Auckland CC* [1997] NZRMA 205

- 70.3 Meridian's analysis which will be presented by Mr Potts is that reliability under MRNAG's Option B is less reliable than HDI's 100-190 pro rata sharing regime because of its higher minimum cut off conditions.
- 71 With respect to its position as applicant for NBTC, Meridian notes that the MRNAG applicants propose that no minimum flow condition should apply in the event that NBTC is commissioned. Meridian agrees that the conditions of consent should state specifically what is to occur if NBTC is commissioned as this will avoid the need for Meridian to later apply on behalf of applicants for changes to consent conditions. Meridian supports the suggestion of MRNAG that as responsibility for maintaining the minimum discharge plus sufficient water to allow the applicants peak rate of take will lie with Meridian that no minimum cut-off should apply. In other words, Meridian itself accepts the responsibility for ensuring that the river flow is maintained.
- 72 Alternatively, if the Commissioners do not accept that it would be appropriate to have no minimum cut-off condition in the event NBTC is commissioned then Meridian's suggestion is that the varying flow regime shortened to the irrigation season should continue to apply and it will ensure that the minimum discharge from Waitaki Dam is the varying monthly flow plus the specified peak rate discharges.
- 73 In short, Meridian concurs that it is appropriate for each consent to take water in the main stream above BlackPoint (that would exclude Mr Chalmers) to have a specific condition added to it stating that "*in the event NBTC is operating...*" and setting out what the minimum cut-off will be in the circumstance or stating that the minimum cut off conditions do not apply.
- Waihao Downs and Chalmers**
- 74 As its Option B Waihao Downs is seeking a 100m³/s cut-off condition.
- 75 It also recognises the need for the conditions to express the point at which the take should begin to reduce and for some form of pro rata sharing in times of low flows although it has not adopted a specific sharing option.
- 76 Mr Chalmers is seeking a 150m³/s cut-off condition and has been silent on the requirement to share water in times of low flow.

- 77 The issue as to the need to share water in times of low flow applies to Waihao Downs and Chalmers and potentially also the MRNAG applicants in the event the Commissioners do not accept Mr Stewart's evidence as to the availability of sufficient tributary flows at all times to meet the peak rate needs of these applicants or the Commissioners conclude that the benefit of tributary flows should be shared by all abstractors.
- 78 As I said in closing at the HDI hearing it is submitted that the issue of how a new consent would be integrated with existing consents in terms of sharing flows, whilst complex, is not unique to the Waitaki catchment. In the absence of a Regional Plan setting out a specific banding system describing how users are to share water above a minimum flow, the issues faced here routinely arise when considering applications to take water from a water body.⁷ Whilst it would have been desirable if the Board had devised a clear system setting out a sharing regime, they did not, and left the development of sharing regimes to future decision makers hearing resource consent applications albeit guided by the provisions of the Plan.
- 79 Furthermore, in the absence of Rule 7 being operative (and even then the sharing regime is not clear as the required releases do not match the total 90 m³/s allocation) a decision needs to be made on a sharing regime regardless of what the minimum flow is. For example, Mr Chalmers seeks a 150m³/s minimum flow that complies with the Plan but it still needs to be determined how he shares with existing users between flows of 150m³/s and 190m³/s. As the Rakaia NWCO experience shows, the mere setting of a minimum flow doesn't give any guidance of how users share water above that flow. Nor does it imply that all applicants will seek, or be subject to a condition specifying a requirement to cut-off at the same flow.
- 80 In short the sharing issue needs to be determined whether an application is non-complying or discretionary and the determination of that issue is required even though there is an inability to rely on Rule 7.
- 81 Meridian's position here is the same as that at the HDI hearing, namely:

⁷ e.g. Rakaia River where the WCO does not operate to determine sharing between users, and the Waimakariri River where under the relevant Plan an A permit band (not limited to existing users is determined) but the limits to Band B are not

- 81.1 There is nothing in the Plan that indicates that absent Rule 7 being implemented, existing abstractors are entitled to continue to expect 100% reliability as the Plan also enabled new users.
- 81.2 Similarly with respect to new abstractors the Plan does not contemplate 100% reliability even with Rule 7 implemented.
- 81.3 Under Objective 5 the Plan provides for a practical and fair sharing of allocated water during times of low water availability.
- 81.4 The Plan contemplates "sharing" that is "practical". It does not state that 100% reliability is to be preserved for existing users come what may. Others may argue that it does not imply equal sharing either but what is clear is that sharing is contemplated and the question is how much?
- 81.5 Policy 25 provides for water to be "shared" between consent holders within a water users group.
- 81.6 Policy 26 applies to the parts of the catchment other than the main stem but provides some guidance to the Commissioners as to how priority banding was to be achieved in subcatchments which do not rely on Rule 7. This does not provide for 100% reliability for existing users.
- 81.7 Policy 46 and its associated method of implementation Rule 7, are not able to be given practical effect at this time absent Meridian's agreement. As described in opening all of the elements of Policy 46 are a package. This includes:
- (a) the minimum flow and flushing flows; and
 - (b) the aggregate of:
 - (i) actual requirements of existing and new consents for activities other than agricultural and horticultural.
 - (ii) actual requirements of new consents up to 95 percent of the peak rate of taking.
- 81.8 The analysis of MRNAG that under Rule 2 no flow sharing between users is contemplated is wrong. The draft version of

the Rule 2 proposed 1:1 sharing between the river and users. It was a rule about maintaining flows in the river. The reference in the Rule to no flow sharing refers to the situation as between the river and users, not between users. See the specific definition of flow sharing in the Plan and the numerous instances where this applied in other waterways (e.g. Rule 2 Table 3 vii. (d), viii. (d), xi. (c) (xii) (c) etc). In addition to say otherwise is contrary to Policy 25/26.

81.9 I refer the Commissioners back to paragraphs 39-45 of Ms Dawson's Hunter Downs evidence which describes what the Board anticipated (putting aside the actual numerical values specified in Policy 46 which can't be achieved at this time).

Reliance on HDI witnesses - conditions

- 82 In Mr Boyes' evidence the MRNAG applicants have sought to rely on some of the witnesses called at the HDI hearing. There are some notable exceptions including Mr Henderson, Mr Potts and Mr Ford.
- 83 With respect to Option B, it is assumed that the argument is that, as the HDI witnesses conclude that a 100m³/s cut-off condition is acceptable, by implication the higher monthly varying condition must also be acceptable.
- 84 Waihao Downs Limited have sought to adopt HDI evidence although it is not yet clear which witnesses in particular they adopt.
- 85 Meridian raises a general issue with this approach that all applicants seek to selectively rely on the HDI witnesses but none have acknowledged that certain key witnesses recommended a grant of consent on the basis certain mitigation is adopted and then translate that to conditions, e.g. Ms Robertson. In some cases the mitigation was recommended even if the cut-off condition equalled the Plan's 150m³/s.
- 86 Therefore, Meridian asks the Commissioners to carefully consider the extent to which the mitigation discussed at the HDI hearings needs to be reflected in the conditions of any grant of consent to those applicants, e.g. financial contributions.
- 87 With respect to Waihao Downs' use of water for irrigation, it should be recalled that the HDI evidence assessed the effects of the use of water in the Waihao Downs area as HDI seeks consent to also irrigate this area in the event Waihao Downs never proceeds.

88 Meridian is concerned at Mr Attewell and Ms Jorgenson's approach which appears to be to abandon much of the mitigation proposed at the HDI hearing via the scheme plans and farm management plans. Meridian does not accept that the conditions proposed by Waihao Downs are adequate and asserts that many of the Hunter Downs conditions are equally appropriate to the Waihao Downs proposal.

Summary - Option B condition

89 In summary, Meridian supports a grant of consent to MRNAG. There are some issues that arise from the wording of the Option B condition:

89.1 Whilst 24 averaging might be appropriate, the effects of 72 hours would be much less certain.

89.2 The varying monthly cut-off condition needs to exclude the winter months.

89.3 Meridian does not agree that the part of the condition referring to it is appropriate. The wording appears to imply that Meridian will become the party responsible for "predicting" compliance and that in the event they are wrong in their predictions then the irrigators can absolve themselves from any liability for breach of minimum flow requirements and resulting impact on river values. That section should be removed.

89.4 The reference in the condition to Kurow gauge including tunnel flows is appropriate to include in a consent condition for a party below BlackPoint, e.g. Chalmers and Waihao Downs, but not for those in the stretch between the Dam and BlackPoint. This was a condition proposed by Meridian at Hunter Downs to deal with the situation that if water is diverted to the tunnel for those below BlackPoint compliance needed to reflect that river flows would be river flow plus tunnel flow. That does not apply above BlackPoint where compliance with be determined by reference to river flow at Kurow.

89.5 If the Commissioners do not accept Mr Stewart's evidence about the sufficiency of tributary flows to meet peak rate needs at all times then there needs to be ramping conditions and conditions that set out how existing and new users share water in terms of low flow.

89.6 Meridian agrees that it is appropriate to remove the requirement to comply with a minimum cut-off condition if NBTC is commissioned. Alternatively, the varying monthly flow condition can remain as the minimum discharge will always exceed that flow given the requirement under NBTC to release additional flow during the irrigation season.

89.7 Other conditions of consent need to be included, e.g. financial contribution.

Summary – Waihao Downs

90 Meridian seeks that the minimum cut off and flow sharing conditions mirror the Hunter Downs proposed conditions.

91 It also seeks that Waihao Downs be required to meet the same standards as Hunter Downs with respect to mitigation, particularly in relation to dealing with the effects of water quality in the command area through the scheme plan and farm management plans.

Summary - Chalmers

92 Meridian seeks that Mr Chalmers be required to participate in sharing with others when Kurow flows are between 150 m³/s and 190 m³/s.

Summary - Tributaries

93 Meridian seeks that conditions reflect Mr Norton's recommendations as to best management practice.

Conclusion

94 Overall, it is my submission that resource consents can be granted to applicants – however, this is subject to a number of considerations that will need to be developed or provided during the current hearing.

Dated: 2 September 2008

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