

TABLED AT HEARING

Date 23/4/2010

BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER OF the Resource Management Act 1991

AND Water permit applications by Lone Star Farms Limited

CLOSING LEGAL SUBMISSIONS ON BEHALF OF LONESTAR FARMS LIMITED

DATED THIS 23rd DAY OF APRIL 2010

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MAY IT PLEASE THE COMMISSIONERS:

1 INTRODUCTION

- 1.1 These submissions are presented on behalf of Lone Star Farms Limited and will address the following:
- (a) Existing environment;
 - (b) Substantive core issues raised by submitters and the s42A officers;
 - (c) Questions raised during opening; and
 - (d) Conditions
 - (e) The Farm Environment Management Plan (FEMP)
- 1.2 The irrigation proposed by the Applicant is not for large scale development, in fact the existing stock levels for Godley Peaks Station ("Godley Peaks") will vary only marginally with irrigation if at all¹. Irrigation will simply allow more feed certainty and as a result, more efficient management of Godley Peaks, as farming decisions can be cut more finely and resources used more efficiently.
- 1.3 I note that Dr Mike Freeman has placed the Lone Star Farms application in the 'green' category² recommending that the application be granted subject to conditions.
- 1.4 The Applicant supports the 'adaptive management' approach, so far as relevant to Godley Peaks these are:
- (a) **Lockstep** – pre irrigation monitoring to confirm existing environment conditions including current nutrient loading, periphyton levels and fish surveys and establish an environmental baseline and certain 'trigger' levels associated with nutrient levels and the supporting ecosystem.
 - (b) **Staging** –the applicant will adopt the 80% MWRL staging proposal if required.
 - (c) **Ratchet** – a requirement to ratchet back irrigation in the event that the trigger levels have been breached.

¹ Evidence of GR Glover, page 7, paragraph 39

² Section 42A addendum, Table 5, pg 21

- 1.5 These concepts are in line with and satisfy the recommendations from Maria Bartlett³ and Dr Michael Freeman⁴ in their respective s42A reports at a conceptual level.
- 1.6 The combination of the Farm Environmental Management Plan (FEMP) produced for the Applicant and adaptive management demonstrates that the Applicant has a genuine commitment to the sustainable management of Godley Peaks and to improve the economics of the farming operation within those parameters.

2 POINTS OF AGREEMENT

- 2.1 The consultation by the Applicant undertaken has resulted in significant changes to what is proposed. This has substantially narrowed the field in terms of previous issues raised. Changes have included:
- (a) altered their application to allow a more efficient gallery take
 - (b) agreed to a regime of riparian planting (where this has not already been implemented)⁵.

3 EXISTING ENVIRONMENT

- 3.1 Godley Peaks is already a developed pastoral farm. This has been the case since the early 1970's⁶ and the proposed irrigation will be on land already developed over the past eight years⁷. It is submitted that the Applications should therefore be considered in light of the existing developed state of Godley Peaks.

4 SUBSTANTIVE ISSUES

- 4.1 Submitters and Officers have referred to various potential issues associated with the Applications, including:
- (a) *Questions in respect of the OVERSEER model as it was applied to Godley Peaks⁸.*
 - (b) *Questions in respect of the annual volume requested by the Applicant⁹.*

³ section 42A addendum, page 29, paragraph 130

⁴ section 42A report, page 28, paragraphs 63-71

⁵ *Ibid*, page 10, paragraph 57

⁶ evidence of Mr Glover, page 2, paragraph 6

⁷ *Ibid*, page 6, paragraph 27

⁸ Darren McNae, S42A addendum, page 18

⁹ Ms Maria Bartlett, s42A addendum, page 28, paragraph 126

- (c) *The Application is contrary to Policy 32¹⁰.*
- (d) *The potential adverse effects of the Application on fish species¹¹.*
- (e) *Doubt as to the scale and significance of effects of the proposed abstraction on local water quality¹².*
- (f) *Discrepancy between the draft conditions supplied and the common consent conditions agreed with Meridian Energy Limited prior to obtaining derogation approval¹³.*
- (g) *a 1:1 flow sharing above minimum flow regime is the most appropriate method of mitigation¹⁴.*
- (h) *Risks to ground nesting river and wetland birds¹⁵.*
- (i) *The need for landscape buffer zones¹⁶.*

Applicants Response

Questions in respect of the OVERSEER model as it was applied to Godley Peaks

4.2 The following particular areas were highlighted by Darren McNae as requiring clarification in his s42A addendum.

- (i) *No advanced stock reconciliation*
- (ii) *High variation in rainfall*
- (iii) *Olsen P is high for dryland and low P is applied*
- (iv) *There are large differences in relative productivity*

4.3 Mr McNae has highlighted these matters as being of high priority within his s42A addendum. It is worth noting that within his original s42A report, the inputs provided for the OVERSEER model were ranked 'green'¹⁷. In that context, only the issue of stock reconciliation was considered of any significance as the time of the original s42A report. The issues contained at 4.2(iii) and (iv) above were considered of low importance or were included

¹⁰ evidence of Frank Scarf, page 7, paragraph 42

¹¹ evidence of Mark Webb, page 12, paragraph 60; evidence of Dr Richard Allibone, page 18, paragraph 54

¹² Ms Bartlett, s42A addendum, page 28, paragraph 128

¹³ evidence of Richard Turner, page 20, paragraph 78

¹⁴ Ms Bartlett, s42A addendum, page 27, paragraph 117

¹⁵ evidence of David Murray, page 12, paragraphs 34 – 38; evidence of Sue Maturin, paragraph 14

¹⁶ Christopher Glasson, s42A addendum, page 4, paragraph 10

¹⁷ Mr McNae, s42A report, Appendix One

only as a comment and 4.2(ii) above was not mentioned¹⁸. It was a surprise to the Applicant that the addendum converted the application to “red”.

- 4.4 In any event, the questions raised were dealt with within the Applicants evidence, discussed in paragraphs 4.5 to 4.8 below.
- 4.5 *No advanced stock reconciliation:* The current farm practices have been developed by Mr Glover who has over 40 years experience of managing farms, managing Godley Peaks for the last 9 of those years¹⁹. The proposed development on Godley Peaks will represent very little change from current practices and as a result, the advanced stock reconciliation was not required on this property.
- 4.6 *High variation in rainfall:* Godley Peaks ranges from steep high country to lakeside paddocks over which there is a significant variation in rainfall²⁰.
- 4.7 *Olsen P high for dryland and low P is applied:* As explained in the preliminary notes to the FEMP, there are no required nutrient reductions for the receiving environments of Godley Peaks²¹. Mitigation options are discussed to address raised Olsen P levels within the FEMP²². Mr Glover explained his intentions in respect of Olsen P on Godley Peaks as wishing to maintain levels between 18 and 24²³. Fertiliser is applied as recommended by soil testing every year in May²⁴, the ‘less than maintenance’ P application commented on by Mr McNae has the intention that soil P index will be run down and then maintained at the desired level.
- 4.8 *Large differences in relative productivity:* There are large differences shown in relative pasture production, however, in this context the OVERSEER model represents only a small change from current practice on Godley Peaks. Mr Glover will be using OVERSEER as a reporting tool rather than in its predictive mode as the stock numbers driving the relative productivity numbers produced are based on actual farm information inputted by the modeller.

Questions in respect of the annual volume requested by the Applicant

¹⁸ Ibid, page 7

¹⁹ evidence of Mr Glover, page 2, paragraphs 2-3

²⁰ evidence of Ian McIndoe, page 7, Table 1

²¹ FEMP, page 4, paragraph 1.1

²² Ibid, page 23

²³ evidence of Mr Glover, page 9, para 42

²⁴ Ibid, page 9, para 46

- 4.9 Some question still remains as to the correct PET to be used for Godley Peaks, this has been addressed by Mr McIndoe.²⁵

The Application is contrary to Policy 32

- 4.10 Policy 32 is reproduced below:

In considering whether to grant or refuse consents to take, use, dam or divert water from the High Natural-Character Water Bodies, the consent authority will ensure that any taking, using, damming or diverting of water does not, by itself, or in combination with any other take, use, dam, or diversion in the same area, have a more than minor adverse effect on:

- (i) the natural flow variability
- (ii) mauri, and ecosystems of indigenous species, including mahinga kai species
- (iii) indigenous vegetation within and adjacent to the water body
- (iv) natural character and landscape
- (v) sites of wāhi tapu
- (vi) sites of wāhi taonga
- (vii) habitats including those of invertebrates, birds and fish
- (viii) passage and spawning areas for trout and salmon (where these species are currently found)
- (ix) amenity values, including wild and scenic values
- (x) existing water quality.

- 4.11 The Mistake River has a catchment area of 51.2km² draining the Hall Range and is characterised by high flows during spring and early summer. Low flows occur in the Mistake River in mid to late winter, where precipitation occurs principally in the form of snow which accumulates in the form of seasonal snowpack. Peak flows occur in spring and early summer due to the annual spring thaw as a combination of rain and snowmelt²⁶.

- 4.12 Mr McIndoe has concluded that flow variability will be maintained as²⁷:

- (a) The system is 'run of river'; flat-lining the river is impossible due to limitations on irrigator flows.

²⁵ evidence of Mr McIndoe, page 8, paragraphs 22-26

²⁶ Ibid, page 11, paragraph 33

²⁷ Ibid, page 27, paragraph 103

(b) Flows that are taken will vary on a day to day basis depending on crop demands and climate.

4.13 The irrigation period proposed by the Applicant falls during the time of high flow. Out of an abundance of caution, the Applicant has proposed additional mitigation by the use of a stepped take, similar to a flow sharing regime, but tailored to maintain the high flow variability that characterises the Mistake River²⁸.

4.14 In the addendum to his s42A report²⁹, Adrian Meredith noted that flow sharing can be implemented as a stepped series in blocks of water flow. Provided the first block is devoted to the 'River' – as is the case in this instance – management by flow blocks can "be considered to be somewhat more favourable to in-stream flow values than a continuous sharing series"³⁰.

4.15 The regime suggested by Frank Scarf³¹ and as a result, Ms Bartlett³² does not sit well with Mr Meredith's advice as to the best regime to protect in-stream flow values. The proposed stepped take has been produced by collaboration between experts Mr Ian McIndoe and Dr Dean Olsen and has been confirmed by both of them as the correct method to protect Mistake River flow variability³³.

The potential adverse effects of the abstraction on fish species

Trout

4.16 In his evidence presented on 3 December 2009 Mark Webb on behalf of Central South Island Fish & Game Council refers to a "small, vigorous and self-sustaining population of adult Rainbow Trout in the upper reaches of Mistake River"³⁴.

4.17 Dr Olsen assessed the significance of fish stocks in his evidence and concluded:

(a) Mistake River is unlikely to have a significant fishery for resident adult trout and therefore, its significance is primarily as a spawning stream and juvenile rearing habitat³⁵;

²⁸ evidence of Mr McIndoe, page 29, paragraph 111

²⁹ Page 14, paragraph 67

³⁰ Adrian Meredith, s42A addendum, page 15, paragraph 67

³¹ evidence of Mr Scarf, page 7, paragraph 42

³² Ms Bartlett, s42A addendum, page 28, paragraph 122

³³ evidence of Mr McIndoe, page 29, table 10 & paragraph 112; evidence of Dr Olsen, page 26, table 8 & paragraph 58

³⁴ evidence of Mr Webb, page 12, paragraph 60

³⁵ evidence of Dr Olsen, page 16, paragraph 31

- (b) As spawning runs occur outside of the irrigation season at the time of naturally high flows in the Mistake River, the proposed take would not affect the spawning runs³⁶;
- (c) The proposed stepped abstraction take would ensure that there was always sufficient flow variability and volume of water left in the Mistake River to allow for continued fish movement in any case³⁷.
- (d) He did not anticipate that the proposed take will significantly reduce the availability of suitable spawning or juvenile rearing habitat in the Mistake River³⁸.

4.18 Dr Olson concluded that the effects on trout would be less than minor.³⁹

Native species

4.19 In her s42A addendum Ms Bartlett makes direct reference to evidence presented on behalf of the Department of Conservation by Dr Richard Allibone in respect of native species within the Upper Waitaki Basin as a basis for her recommendation to decline the application⁴⁰.

4.20 It is noted that the Department of Conservation did not submit on the Lone Star Farms/Godley Peaks resource consent application⁴¹. Accordingly, the evidence does not directly address Godley Peaks and should be discounted.

4.21 Be that as it may, Dr Olsen investigated the issue and records a mix of Koaro and Canterbury Galaxias were collected at the site upstream of the intake with the following notes:

These two species can be difficult to differentiate in the field, so it is possible that some of the fish identified as Koaro collected from the other two sites may have included some Canterbury Galaxias, since neither of these species is listed as being threatened this uncertainty is of little consequence for these assessments.

4.22 Mr Olsen concluded that the effect of the proposed abstraction on Koaro this species found in the Mistake River would be less than minor, based on⁴²:

- (a) the minimum flow being set at MALF.

³⁶ Ibid, page 17, paragraph 36

³⁷ Ibid, page 26, paragraphs 57,58

³⁸ Ibid, page 17, paragraph 35

³⁹ Ibid, page 17, paragraphs 33-36

⁴⁰ s42A addendum, page 28, paragraph 121

⁴¹ Supplementary table: Applications the Director-General of Conservation did not submit on

⁴² evidence of Dr Olsen, page 22, paragraph 43

- (b) the stepped reduction in take ensuring that flow variability continues to be a characteristic within the River.
- (c) the abundance of similar habitat upstream of the intake and elsewhere in the Tekapo catchment.
- (d) the length of the River that would be effected by residual flows (less than 3.1 kilometres).

4.23 What Ms Bartlett is suggesting is that Department of Conservation general (non site specific) evidence, which was specifically not about the Mistake River, should be used as a basis for questioning Dr Olsen's detailed site specific conclusions, leading presumably to the decline of the Applications. That approach cannot, it is submitted, be correct.

Doubt as to the scale and significance of effects of the proposed abstraction on local water quality.

4.24 Dr Michael Freeman has listed the Applications as 'green'⁴³ indicating they can be granted with appropriate conditions⁴⁴.

4.25 Ms Bartlett has residual concerns regarding water quality⁴⁵.

4.26 Dr Olsen concluded in his evidence that water abstraction would not significantly affect water quality in the Mistake River⁴⁶; mitigation measures suggested by him such as buffer zones from waterways have been incorporated within the FEMP⁴⁷.

4.27 In addition a full FERA for Godley Peaks has been carried out by Dr Melissa Robson and a copy of the updated FEMP (including the FERA) provided for consideration. The FEMP contains details of the location, frequency and parameters for environmental monitoring on Godley Peaks⁴⁸. Water quality baseline monitoring is proposed by way of condition.

Discrepancy between the draft conditions supplied and the common consent conditions agreed with Meridian Energy Limited prior to obtaining derogation approval

4.28 New draft conditions are attached to address this issue.

⁴³ Dr Michael Freeman, s42A addendum, page 21, table 5

⁴⁴ Ibid, page 29, paragraph 71

⁴⁵ Ms Bartlett, s42A addendum, page 29, paragraph 132

⁴⁶ evidence of Dr Olsen, page 24, paragraph 50

⁴⁷ Ibid, page 27, paragraph 62

⁴⁸ FEMP, page 30, table 9

A 1:1 flow sharing above minimum flow regime is the most appropriate method of mitigation

- 4.29 This runs counter to the most appropriate method of flow sharing to maintain in stream values discussed by Mr Meredith⁴⁹ and already covered in paragraphs 4.17 and 4.18 above.

Risks to ground nesting river and wetland birds

- 4.30 David Murray for the Department of Conservation presented evidence in respect of riverbed and wetland birds and Sue Maturin for Forest and Bird expressed concern at the potential effects of the abstraction on the Black Stilt population and other species⁵⁰.
- 4.31 As explained, the Department of Conservation did not submit on the Godley Peaks Applications and Mr Murray's evidence should therefore be discounted. However, again his comments have been incorporated by Ms Bartlett's⁵¹ review.
- 4.32 As explained in opening, the Applicant has agreed with the Department of Conservation that it will allow the use of its infrastructure for maintenance flows to Mick's Lagoon (the habitat of the Black Stilt). The attached conditions also cover the implementation of a fencing programme for those riparian boundaries that have not already been fenced and the protection of river and wetland birds.

The need for landscape buffer zones

- 4.33 Ms Lucas for the MacKenzie Guardians has suggested that a full Landscape Plan is necessary for the Applications to avoid, remedy and mitigate effects on the natural character, natural landscape and amenity values of the lake, rivers and their context landscape⁵², she also agrees with Mr Glasson's suggestion of buffering.
- 4.34 Mr Glasson has recommended that a 100m buffer from the lake and 50m riparian strip on each side of the small rivers is appropriate mitigation⁵³.
- 4.35 These recommendations are despite acknowledgement that the area is 'mostly developed'⁵⁴ or 'extensively modified'⁵⁵.

⁴⁹ Mr Meredith s42A addendum, page 49, paragraph 67

⁵⁰ evidence of Sue Maturin, paragraph 14

⁵¹ s42A addendum, page 27, paragraph 117

⁵² evidence of Ms Lucas, page 23, paragraph 82

⁵³ Mr Glasson, s42A report, page 9

⁵⁴ evidence of Ms Lucas, page 22, paragraph 77

- 4.36 You have already heard Dr Steven's evidence on why a buffer zone is inappropriate in the context of Godley Peaks, namely⁵⁶:
- (a) The historical absence of a natural riparian edge to Lake Tekapo and the Mistake and Cass Rivers. Riparian planting would create more of a difference than the activity proposed.
 - (b) A significant degree of separation between lake and river edge and improved farmland occurs anyway.
- 4.37 Dr Steven's evidence on these points was not directly addressed in either Ms Lucas' evidence nor in Mr Glasson's report.

5 ISSUES RAISED ON 27 NOVEMBER 2009

- 5.1 During opening there was a discussion concerning the effect of the notation.

"No flow sharing regime" – in Table 3 of Rule 2 of the WCWARP.

- 5.2 The issue raised was whether this notation operates as a prohibition on flow sharing regimes for High Natural Character water bodies for the purposes of Rule 2. In my submission for the reasons set out below, this cannot be the way the rule is intended to operate. Having said that, and as noted particularly by Commissioner Bowden, the notation is clearly capable of being interpreted as a prohibition. In my submission the rule should be interpreted purposively⁵⁷ and in accordance with an interpretation which best fits with the intent of the Plan.
- 5.3 In this regard it is noted that the thresholds and limits set out in Table 3 are clearly intended to operate as "first cut", on the basis that there was limited information available at the time. The intent of the draft is that there should be flexibility around the limitations is demonstrated by comments in the section 32 report. The report states:

"it is aware that there is a lack of specific knowledge, or varying degrees of knowledge, regarding the ecological values in many parts of the Waitaki catchment....In the absence of comprehensive investigation and assessment, the Board is conscious....the environmental flow and level regimes could over-estimate the ecological values associated with the environment..."

⁵⁵ evidence of Dr Steven, page 4, paragraph 13

⁵⁶ *Ibid*, page 11, paragraph 44

⁵⁷ *Powell v Dunedin City Council* [2005] NZRMA 175 at paragraph 35

“where resource consents to take water within the environmental flow and level regimes are to be treated as a non-complying activity, a degree of flexibility is provided, depending on the individual circumstances of the resource consent application⁵⁸”

5.4 Plainly, a prohibition on a flow sharing regime would not accord with the type of flexible approach suggested.

5.5 In any event, and as a matter of black letter interpretation, it is submitted that the wording of the rule should not be interpreted so as to set up the notation as a prohibition. Rule 2(1)c. provides:

“the take or diversion complies with a flow-sharing regime such that no more than half of the water above or between the thresholds in Table 3 can be taken or diverted;”

5.6 Table 3 has no relevance to the rule except in the context of providing the “thresholds” for Rule 2 to operate. It is submitted that if no thresholds are provided the rule can have no application. While not strictly necessary according to this interpretation the notation in the Table could, for clarity, have read:

“No flow-sharing regime applicable.”

6 CONDITIONS

6.1 Further draft conditions are attached:

6.2 The key concepts in the conditions will:

- (a) Ensure additional monitoring is carried out in respect of ecosystems and water quality to determine a robust baseline data set to set ‘trigger’ points for action in the future;
- (b) Provide a high level of assurance that if receiving water quality or ecosystems deteriorate, then feedback or trigger responses will apply to ensure agreed standard are not breached; and
- (c) Carry out 6.2 (a) and (b) above by incorporating the final FEMP and FERA for Godley Peaks.

⁵⁸ s32 Report, page 20, paragraph 4.2.6

FEMP

- 6.3 An updated FEMP is provided. This differs from the draft FEMP filed with opening submissions in the following respects:
- (a) Detailed completed Farm Environmental Risk Assessment;
 - (b) Further detailed Management Plans resulting from the FERA in respect of soils, anticipated fertilizer use, stock, water, runoff, chemical risks and construction risks. The result is a completed and updated table of mitigated options for Godley Peaks found at Table 8.
 - (c) Proposed location frequency and parameters for environmental monitoring can be found at Table 9, putting into practice the adaptive management procedures discussed at paragraph 1.4 above.

7 CONCLUSION

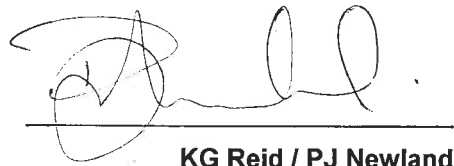
- 7.1 The Applicant has:
- (a) Addressed the majority of concerns raised by Ms Bartlett in her original s42A report by way of expert evidence on:
 - (i) Landscape effects
 - (ii) Farm Management practices
 - (iii) Water use
 - (iv) Ecology
 - (v) Farm Environmental Management Plans
 - (b) Engaged in discussions and reached agreement with Ngāi Tahu, who do not oppose the Applications⁵⁹
 - (c) Engaged in discussion with the Department of Conservation (DoC) regarding the protection of important habitat on Godley Peaks. DoC have not lodged a submission on the Applications as a result.

⁵⁹ evidence of Paul Horgan, page 5, paragraph 11

(d) Engaged in discussion with Fish & Game who indicated at an early stage that they would not oppose the Applications⁶⁰ although they later apparently changed this position.

8 The "decline" recommendation of the reporting officer is, it is submitted, based on a limited extremely narrow consideration, namely alleged residual instream ecological concerns and local water quality. The instream ecological concerns should, it is submitted, be put to one side given Dr Olsen's detailed and comprehensive evidence. Water quality concerns can be covered with conditions.

DATED at Christchurch this 23rd day of April 2010



KG Reid / PJ Newland
Counsel for Applicant, Lone Star Farms Limited

⁶⁰ letter from Fish & Game, 28 April 2003