TABLED AT HEARING
Date 16|10|2009

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing by Environment Canterbury of resource consent applications by Southdown Holdings Limited, Five Rivers Limited and Killermont Station Limited to take and use water in the Upper Waitaki Catchment.

SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF SOUTHDOWN HOLDINGS LIMITED, FIVE RIVERS LIMITED AND KILLERMONT STATION LIMITED

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1. INTRODUCTION

1.1 These submissions address a number of matters that have arisen during the week of the hearing.

2. AHURIRI WCO

2.1 As set out in opening legal submissions[1] and in the evidence of Ian McIndoe, both the Killermont Station and WHL Killermont applications seek to abstract water from the Ahuriri River.

2.2 There has been some discussion and uncertainty during the course of the hearing around how the WCO should be interpreted when assessing whether the applications comply with the minimum flow restrictions in the WCO. This stems from the Council officers' opinion that the proposed takes could represent an over allocation based on the assumption that the takes cumulatively exceed the maximum quantum allowed under the WCO. In short the reporting officer for WHL Killermont observes:[2]

> 62. In regards to allocation, the WCO allows for a maximum of 3 cubic metres to be abstracted from the main stem of the Ahuriri. Given the allocation ahead of this application, I calculate that there are only 0.7466 cubic metres of allocation available.
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> 63. Applications CRC041788 and CRC073115 seek to **take** 750 litres per second from the Ahuriri River. This would result in the total allocation of three cubic metres per second being exceeded by about three litres per second. This would be acceptable as is likely to be within the margins of error in calculating the total allocation.
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> 64. However, the additional 200 litres per second sought to be **diverted** under CRC073115 would bring the total allocation to 3.2067 cubic metres per second. Given this, I consider CRC073115 seeks water to be diverted in excess of that allocated for abstraction in the WCO.

2.3 I contend that the WCO establishes minimum flows to be retained in the river and does not refer to maximum takes. The reasons for this position are set out in the opening legal submission and are expanded on below.

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[1] Opening Legal submissions, paragraph 9.17

[2] Section 42A Officer's Report of Susannah Vesey Applications CRC041788 and CRC073115 by Southdown Holdings Limited, for a Water permit to take & use surface water from the Ahuriri River

Wording of the WCO

2.4 The WCO establishes minimum flows which must be retained in the Ahuriri River in order to protect its fishery, wildlife and recreational values.

2.5 The minimum flows set in clause 5 of the WCO are calculated by reference to the "gorge flows". The "gorge flow" is defined as follows:

> "Gorge flow" means the daily mean flow of the Ahuriri River as estimated by the department of scientific and industrial research from measurements at the south diadem recorder site maintained by that department at the Ahuriri River (map reference NZMS 1 S108 458406)

2.6 Clause 5(5) provides:

> Because of the outstanding characteristics and features specified in clause 3 of this order and for their protection, the minimum flow (as defined in subclauses (1) to (4) of this clause) shall be retained in the Ahuriri River; and, while the flow does not exceed that minimum flow, the flow in the Ahuriri River shall not be reduced by abstraction or diversion.

2.7 Clause 8(1) provides that water rights shall not be granted in relation to:

> Any river or stream forming part of the protected waters, if the effect of the grant or authorisation would be to prejudice the maintenance of the rates of flow specified in clauses 5 and 6 of this Order.

Interpretation of the wording

2.8 As set out in the clauses above, the key issue to be considered in relation to any application to take water from the river is whether the take will result in the flows in the river falling below the proscribed minimum flows in the WCO. For example Clause 5 states:

> **Partial retention of natural waters**
>
> (1) At all times when the gorge flow exceeds 25 cubic metres per second, the minimum flow in the Ahuriri River shall be 3 cubic metres per second less than the gorge flow.
>
> (2) At all times when the gorge flow exceeds 15 cubic metres per second but does not exceed 25 cubic metres per second, the minimum flow in the Ahuriri River shall be 2 cubic metres per second less than the gorge flow.

2.9 So, provided that the flow in the river meets the minimum threshold, water may be taken. Conversely if the water in the lake falls below the threshold water may not be taken. Priority applies when the cumulative take causes the threshold to be breached. But there is no such thing as a fixed maximum take.

2.10 Calculating the flow in the river at any point can be undertaken by a number of methods including:

- Monitoring the flows at various points along the river;
- Deriving the flows at various points along the river by taking into account factors such as:
  - (i) The flows at the gorge;
  - (ii) The volumes and location of takes;
  - (iii) The surface water inflows from tributaries; and
  - (iv) Any losses for example from groundwater drawdown.

2.11 Further, this interpretation is consistent with the findings of the Planning Tribunal in its recommendation relating to the WCO.

> As originally worded, the WCO referred to "the flow not being reduced by abstraction or diversion" below the limits specified. The Planning Tribunal amended the wording as there was concern that:
>
> ...[R]eferences to reductions by abstraction or diversion might create an expectation in the minds of those seeking to abstract or divert in the future, that their rights to do so would be secure by reason of the terms of this order (page 37).

Overall purpose

2.12 The purpose of water conservation orders is to ensure minimum flows are established to protect various values associated with the particular water body. Similar minimum flow requirements apply under other water conservation orders.[3]

2.13 The implication is that provided the minimum flows are retained in the river in accordance with the rules of the WCO, applicants will be able to take the water sought in their applications.

2.14 Of course, all applicants will need to be able to demonstrate that the identified minimum flows are in fact maintained in the periods they wish to take. This will be assessed by including all other takes and any natural losses. If the minimum flow falls below the required level then priority of the takes will determine who is able to take from the river.

2.15 The applicants will establish gauging sites at suitable locations to enable monitoring of flow to ensure that any take complies with the WCO.

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[3] For example the Rakaia, Rangitata and the Mohaka orders.

3. NON-COMPLYING STATUS

3.1 For completeness I want to clarify the planning consequence, for the Frosty Gully, Ohau Downs and Glen Eyrie Downs applications, of not complying with Rule 6 of the Waitaki Catchment Water Allocation Regional Plan ("**WRP**") in terms of allocation.

3.2 In short the limits set out in Rule 6 are not absolute. Rather, non compliance with Rule 6 simply triggers the non-complying gateway test.

3.3 As set out by John Kyle, the applications are non-complying as the allocation limits in Rule 6, Table 5 of the WRP have been exceeded.

3.4 Table 5 in Rule 6 of the WRP sets out the annual allocation for water abstraction, in particular for water takes from Lake Ohau the following section of the Table applies:

> **Agriculture and horticultural activities**
>
> 275Mm^3 except that:
>
> ... no more than 12Mm^3 can be taken upstream of Lake Ohau.

3.5 Rule 16 of the WRP provides that any activity which contravenes Rule 6 is a non-complying activity, not a prohibited activity. This was a specific outcome of the WRP process.

3.6 Further as set out in explanatory notes to the WRP, specific assessment matters have been identified for consideration:

> Policies 4 and 5 identify the matters considered when setting environmental flow and level regimes and these should be addressed when considering any application for a resource consent that is a non-complying activity in respect of the environmental flow and level regimes established in this Plan.

3.7 I also note that in the decision on the WRP the Allocation Board stated:

> Some submitters sought amendments to the rules so activities that do not comply with the environmental flow regimes or the allocations to activities are either discretionary or prohibited activities. The Board did not accept either alternative. The environmental level and flow regimes, and the allocations to activities, are two key components of the allocation framework established by this Plan. They should be binding except in specific cases where it can be established that the adverse environmental effects of the proposal are minor, and where the activity is not contrary to the objectives and policies of this Plan. The Board cannot be confident that such circumstances will never arise, so it did not make these prohibited activities. It retained the non-complying activity classification, which

requires that one of those conditions be satisfied before such an application can be granted.

3.8 As you have heard from the expert evidence the applications satisfy both tests under s104D.

4. ADDITIONAL RESOURCE CONSENTS

4.1 The Committee has sought clarification of the basis upon which it can consider the present applications, while other applications related to the proposed farming activity are on hold.

4.2 Mr Kyle's supplementary evidence sets out the additional consents that have been sought and the current status of these applications.[4] The applications outstanding are:

- Effluent disposal applications for Ohau Downs, Glen Eyrie Downs and WHL Killermont.
- Fertiliser and agrichemical applications for Ohau Downs, Glen Eyrie Downs and WHL Killermont.
- Intake structure application for Ohau Downs.

4.3 I note that Ohau Downs, Five Rivers and Killermont Station also seek minor variations to their notified application. I addressed you on these in my opening.

4.4 These outstanding applications have been sought out of an abundance of caution. For the reasons to follow, additional consents are either not strictly required, or you can proceed to assess the current applications without waiting for these applications to catch up.

Ohau Intake: Common sense approach

4.5 Firstly I submit that a common sense approach should be applied in relation to the application for an intake structure for Ohau Downs. The Ohau Downs application was drafted over 6 years ago by the applicant's water consultant, Aqualinc.

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[4] These additional applications are referred to in the Section 42A Officer's Reports of Claire Penman in relation to application CRC061154 by Five Rivers Limited at para 11, Claire Penman in relation to applications CRC040835 and CRC040836 by Southdown Holdings Ltd at para 12 and Susannah Vesey in relation to applications CRC041788 and CRC073115 by Southdown Holdings Limited at para 18.

4.6 The application stated:

> **2.0 DESCRIPTION OF THE PROPOSED ACTIVITY**
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> The applicant is seeking consent to take and use water from Lake Ohau, between map references NZMS 260 H38:6566-535a0n d H39:6298-5280at a rate of 950L/s.
>
> It is proposed to carry out the activity under the following conditions:
>
> 1. Water shall be taken from Lake Ohau between map references NZMS260 H38:6566-535 and H39:6298-5280 at a rate of 950L/s.
>
> 2. Water shall be used for the irrigation of up to 1500 hectares of pasture as described in the Application on the area of lands shown on accompanying plan" Ohau Downs- Area to be irrigated'.
>
> 3. A fish screen with a mesh size of 5mm shall be installed and maintained on the intake to prevent fish passing through the intake or being trapped on the screen.

4.7 It is clearly implicit in the above that the activity described in the application included an intake, going so far as to describe the mesh size of the fish screen. I submit that such an interpretation is consistent with common sense and the longstanding authority of *Sutton v Moule*[5].

> It is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. Substance is to be preferred to form.

4.8 Nevertheless, after discussion with the planning consultants for Ohau Downs, it was considered prudent to make application for the intake structure. For the reasons set out below, I submit you are able to complete this application process given that you will have all necessary information to assess the effects of the proposal.

Storage of Effluent - Mitigation of Effect

4.9 The storage of effluent from the cubicle stables and the controlled spray application of that effluent onto land is a mitigation measure. It is a direct response to concerns raised by submitters (eg Ngai Tahu) about dairy conversion.

4.10 As the evidence has shown this method reduces the nutrient discharges associated with conventional dairy farming by 50-70% over conventional dairy farming. While not quite the equivalent of a native forest, this is a

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[5] (1992) 2 NZRMA 41

remarkable result. It is certainly well within the level of potential loading associated with the activities described in the notified applications.

4.11 There is ample authority for the proposition that an applicant may change the consented activity, without the need to re-lodge, if the purpose of the change is to mitigate the effects of the activity.[6]

4.12 Further, the Supreme Court has affirmed that, within reasonable limits, a consent authority may grant additional consents provided there is no substantial prejudice to the applicant or other parties. Given the very comprehensive nature and form of the proposals, and the very detailed description of the activities and their potential effects, it is my submission that no other person will be prejudiced from granting the effluent applications.

4.13 While the consents were not specifically referred to in the applications before you, they fall within the three tests enunciated in *Coull v Christchurch City Council* (C77/2006):

- Does it increase the scale or intensity of the activity? No, the farming operation remains the same and the scale of the operation will not be increased.

- Does it exacerbate or mitigate the impacts of the activity, both in terms of adverse effects and in terms of the Plan and other superior documents? As outlined above, the effluent disposal consents form part of the mitigation package so will reduce potential adverse effects.

- Would parties who have not made submissions have done so if they were aware of the change? No, the activity of dairy farming has not been changed and therefore it is unlikely that any other submitters would have submitted on the application.

4.14 Nevertheless as with the Intake for Ohau, out of an abundance of caution separate consent has been sought for the application of effluent. This is currently held up (on hold) while a dispute over whether an additional consent relating to air discharges is ventilated.

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6 *Royal Forest and Bird v Manawatu-Wanganui Regional Council* [1996] NZRMA 241, at 246; *Estate Homes Ltd v Waitakere City Council* CA210/04, 11 November 2005 at [115].

4.15 For the above and below reasons, you are able to complete this process without waiting for these applications to catch up or you may decide to simply include within this grant (if you get that far) the effluent management activities.

Consents supplementary / sufficient information to make decision

4.16 If you do not accept that the consents are within the scope of the current applications, you are not precluded from granting the current consents in front of you.

4.17 Section 91 of the RMA gives the consent authority the power to defer notification or hearing of an application if further consents are required in respect of the proposal.

4.18 Two important points to note:

- This is not a mandatory direction. The consent authority has a discretion as to whether to defer the application. The Environment Court has considered when it will be appropriate for a consent authority to exercise that discretion and has acknowledged that it is not always practical to apply for all resource consents concurrently. For example in *Re Ngai Tahu Property Ltd* the Court noted that:[7]

> Counsel for Environment Canterbury submitted, relying on the decision of this Court differently constituted in *Kett v Auckland Regional Council* (A86/2000), that it is not always practical to apply for all resource consents at the same time, especially for large-scale projects. We agree. What amounts to good practice in general may have to yield to what is practical and reasonable in the individual case. It is not without significance that s.91(l)(b) speaks of "any one or more of those other consents" without stipulating a need to apply necessarily for all other consents. Plainly, there will be cases where the nature of a proposal (emphasis added) will be "better understood" in a sense of adequacy for the occasion, without the need to require all consents to be applied for. It is for the consent authority to determine whether that is the case in the exercise of its discretion to defer under the section, and, if it is, to indicate which other consent applications it has in mind. In this instance, the consent authority decided that all other consent applications needed to be lodged for it to obtain a better understanding of the nature of the proposal.

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[7] *Re Ngai Tahu Property* C104/2006, see also *Kett v Auckland Regional Council* A86/2000 where the court said:

> [W]e accept that it is not always practicable, in civil engineering works of the type and scale proposed, to make all resource-consent applications at once.

As noted by Mr Kyle in his supplementary statement, there is sufficient information to assess the effects of the water takes. In addition, without the irrigation water it is highly unlikely that the applicants pursue these supplementary consents.

- These consents are not "required" in order to implement the irrigation consents. There are other options for the effluent disposal (for example it could be transported off site - though unlikely unless necessary).

4.19 This is consistent with the approach adopted by Commissioner Skelton in the North Bank Tunnel case. In that case a two stage process was adopted, with water consents being processed first in Stage 1, followed by further landuse consents associated with infrastructure construction in Stage 2.

> Meridian applied to the Canterbury Regional Council for water permits on or shortly after 20 December 2006:
>
> To take water from Lake Waitaki - called CRC 071903
>
> To use water from Lake Waitaki for hydroelectricity generation
>
> To discharge water from the outfall
>
> To discharge water from the outfall to land (the riverbed)
>
> In its applications Meridian acknowledged that the concept would require works for the establishment of the intake and outfall structures, the building and operation of the tunnel, the power station and other associated infrastructure, and detailed consents for the construction process itself. It advised the CRC that those matters would be subject to a separate process of investigation, assessment and application mainly for land use consent form the relevant territorial authorities.

4.20 The rationale behind this approach was that the applicant, Meridian Energy, did not wish to embark upon the detailed planning that would be required for applications in stage 2 until it was known whether the water permits would be granted.

4.21 In a minute dated 21 December 2006 Commissioner Skelton concluded that:

> I record here that for the purposes of section 91 of the RMA I am satisfied that the current applications including the comprehensive Assessments of Environmental Effects contain sufficient information to enable a consent authority to understand the nature of both the proposals and in particular the takings and uses of water associated with each of them.

4.22 This approach was endorsed by the Environment Court in its interim decision on the North Bank Tunnel project:[8]

> At first sight that approach offends the principle that all resource consents should be applied for at the same time so that all effects can be considered together - see *Affco NZ Ltd v Far North District Council No. 25.* However, Mr P R Skelton, the very experienced Chairman of the Hearing Commissioners appointed by the CRC, held that in the circumstances facing Meridian its approach was in order. That procedural decision was generally supported by submitters and was not appealed since all parties see the granting or declining of the water consents as the critical matter for determination.

4.23 The key point is that the further applications are not necessary for you to have an overall understanding of the proposal. The comprehensive information supplied allows you to understand and assess the current proposals.

4.24 I also understand that the reporting Officer has accepted that a two step approach is appropriate.

5. OTHER MATTERS

Thresholds

5.1 Commissioner Bowden suggested that the thresholds should be reduced so that they are 18/25ths at each nodal point if the thresholds have been set to include an additional 7000 ha of beef and sheep farming, because any exceedance of nodal threshold implies a much higher nutrient loading than projected.

5.2 With respect the logic is impeccable, but should be tempered by the following:

- In setting the threshold limits, the WQS assumes all projected nutrient inputs in a Node (i.e. a conservative approach);
- Assimilative capacity in the Node is allocated to offset these inputs;
- Applicants are then required to mitigate the balance of nutrient loading on a per hectare basis.

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[8] *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* C80/2009 at [6]

5.3 As a consequence, the mitigation requirement assumes an amount of assimilative capacity has been lost (where relevant) to the 7000 Ha of activity that does not in fact exist. Accordingly, if the 7000 ha of activity is not assumed to exist, the corresponding amount of assimilative capacity remains in the system to offset the balance of the projected loading.

5.4 The effect of this that if the thresholds are reduced to 18 / 25ths, additional assimilative capacity must also be available to offset the mitigation requirement. In the result, the mitigation and nodal thresholds reduce if the 7000ha is removed.

5.5 Further:

- All of the Pukaki catchment has been allocated (so there is no more to be allocated)
- All but a small amount has been allocated in Ahuriri Catchment.

5.6 The upshot of this is that these applications are already meeting the equivalent of a 18/25 threshold.

Re-allocation to Killermont Station

5.7 For completeness, I wish to re-iterate the reasons for the re-allocation of part of WHL Killermont's nutrient discharge allowance ("**NDA**") to Killermont Station's NDA will be undertaken.

5.8 As set out by Dr Robson:

- The mitigation requirements set WHL Killermont's NDA at 35,262 kg N per annum and 551 kg P per annum and Killermont Station's NDA at 7,940 kg N per annum and 179 kg P per annum.
- While Killermont Station is proposing to undertake significant farm management measures to meet their threshold under developed settings they will not able to do so without acquiring additional N from WHL Killermont.
- Accordingly, WHL Killermont has reallocated 1,500 kg of N to the remainder of the Killermont Station which reduces WHL Killermont's NDA to 33,762 kg N.

5.9 The experts have confirmed that there are no environmental impacts of this reallocation to Killermont Station.

Effluent Management

5.10 There has been considerable discussion around the proposed effluent management on the properties. To clarify the details of the proposed effluent systems, Mr Neil Borrie from Aqualinc Systems Limited has produced a statement on how the effluent management systems proposed for Ohau Downs, Glen Eyrie and WHL Killermont will operate.

Manuka Creek / Frosty

5.11 Commissioner Bowden queried the basis for excluding Manuka Creek and Frosty Gully from the application of the WCO.

5.12 The WCO applies only to protected waters or tributaries of the Ahuriri. As neither Frosty Gully or Manuka Creek are within 400m of the Ahuriri River, they are not a protected waterways.

Further conditions

5.13 The applicants are happy to offer the following additional conditions:

- in-stream baseline monitoring approved by Dr Greg Ryder as part of a pre irrigation FEMP process; and
- farm managers attend a course on the operation of the FEMPs (whether through the WQT or otherwise) and on Ngai Tahu Values.

Section 42A Reports

5.14 We have **attached** to these submissions a table which sets out the issues raised in the s42A Reports and identifies the relevant passages from the evidence which addresses each issue. This is to assist the Officers in their updating.

Christian Whata / Stephanie Bond

Counsel for Southdown Holding Limited, Fiver Rivers Limited, Killermont Station Limited.