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.

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

12 OCTOBER 2009

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1. INTRODUCTION

Applicants

1.1 These submissions are presented on behalf of three applicants:

- Southdown Holdings Limited ("**Southdown**");
- Five Rivers Limited ("**Five Rivers**"); and
- Killermont Station Limited ("**Killermont Station**")

Background

1.2 Dan and Kerryn Thomas live and work on their farm at Killermont Station. Kees Zeestraten actively manages his farm at Ohau Downs, and works and resides there from time to time. Richard Peacocke has been managing the conversion of the farm at Glen Eyrie from wilding pines to productive use for several years. All four are experienced farmers with more than 70 years of collective experience in sheep, beef, crop and dairy farming.

1.3 They have combined their resources so as to present a coherent case for approval of overlapping applications for takes from Lake Ohau and the Ahuriri River.

1.4 They are committed to best practice. As you will see their farm management proposals are cutting edge. They fully appreciate the need to avoid adverse effects. Importantly, best practice combines with high productivity to make the farms viable.

1.5 Their applications cover relatively large irrigable areas[1] (though small within the context of the Basin as a whole). They should not be penalised for this. They should be judged on their merits:

- More efficient and productive use of land and water resources;
- Comprehensive management of resources to agreed standards on an integrated basis so as to avoid effects of significance;

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[1] It should be noted that the Killermont Station application areas are relatively moderate in size, refer Tab 1, Core Bundle.

- Better enablement of both people and communities through long term sustainable and viable use of resources, and

- Enhancement of stream and terrestrial environments, and protection of valued areas, through uniform farm management practices across large land holdings.

- Greater ability to respond to and mitigate unanticipated adverse effects through the application of entire farm management systems over large irrigable areas.

1.6 Some applicants have expressed concerns about the level of mitigation required to meet the WQS thresholds. They claim it is inequitable. The starting point however is that all applicants need to engage in farm management practices that minimise the effects of their activities irrespective of the allocation methodology. This is exactly what Southdown, Five Rivers and Killermont Station are doing, with the result that the nutrient loading associated with their farms is well below the WQS thresholds for N and have bettered them for P.

1.7 The counterfactual is grant (if at all) based on priority. This can lead to arbitrary results, and there is no presumption in favour of smaller applicants. Like all applicants they take the environment as they find it. It is for this reason that Southdown, Five Rivers and Killermont Station joined with other applicants to find a whole of catchment approach to the allocation of water and nutrient discharges.

1.8 In any event, Southdown, Five Rivers and Killermont Station will continue to work with them to find a solution that fits all applicants. In reality, with the mitigation employed by them, there should be ample capacity to accommodate applicants who apply best practice.

The applications

1.9 The applicants have applied for a number of water permits as set out below:

- Southdown:[2]

  (i) To take water from Lake Ohau to irrigate 2,068 ha of Glen Eyrie Downs Station ("**Glen Eyrie**");

[2] Refer pages [5] and [6] of the Core Bundle.

(ii) To take water from the Ahuriri River to irrigate 1,100 ha of Killermont Station ("**WHL Killermont**").[3]

- Five Rivers:[4]

(i) To take water from Lake Ohau to irrigate 1,493 of Ohau Downs Station (**"Ohau Downs**").

- Killermont Station[5]:

(i) To take water from the Ahuriri via the Tara Hills water race to irrigate 216 ha of Killermont Station ("**Pebbly Block Application**");

(ii) To take water from the Ahuriri River to irrigate 300 ha of Killermont Station (**"Woolshed Application**");

(iii) To take water from Manuka Creek to irrigate 75 ha of Killermont Station ("**Manuka Creek Application**"); and

(iv) To take water from Frosty Gully dam to irrigate 28 ha of Killermont Station ("**Frosty Gully Application**").

1.10 The key elements of the applications include:

- Mitigation measures will protect and improve the instream and terrestrial environments;
- New infrastructure will be sympathetically located to minimise impacts on landscape;
- There will be no more than minor adverse impacts from nutrients through implementation of state of the art Farm Environmental Management Plans ("**FEMP**");
- A collaborative approach to cumulative water quality effects will ensure that overall the water quality in the Upper Waitaki Catchment is maintained.

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3 The Southdown Holdings Limited company undertaking the WHL Killermont irrigation is Williamson Holdings Limited. Williamson Holdings Limited has a contract to purchase the WHL Killermont block of land and will settle the purchase on gaining consent to take water for irrigation.

4 Refer page [7] of the Core Bundle.

5 Refer page [27] of the Core Bundle.

The evidence

1.11 The evidence to be presented is summarised below:

- The applicants, Mr Peacocke, Mr Zeestraten and Mr and Mrs Thomas will present evidence on:
  - (i) reasons for the applications;
  - (ii) the existing and proposed farming systems; and
  - (iii) the practicality of achieving the mitigation measures contained in the FEMPs.
- Mr McIndoe, Principal Engineer Aqualinc Research Limited will outline the proposals and address compliance with the WRP water allocations, irrigation efficiency and drainage calculations.
- Dr Bright, Managing Director Aqualinc Research Limited, will explain the WQS thresholds which apply to the properties and how compliance will be achieved with these thresholds.
- Dr Robson, Senior Environmental Consultant Ryder Consulting Limited, will present evidence on the FEMPs for each property and provide an overview of the monitoring proposed.
- Mr Engelbrecht, Farm Management Consultant, will explain the importance of farm management in New Zealand and provide a peer review of the practicality and feasibility of the FEMPs.
- Dr Ryder, Dr Bartlett and Dr Goldsmith will provide evidence on the ecological implications of the proposed irrigations and the significant mitigation measures which will be implemented.
- In terms of ecological evidence:
  - (i) Dr Ryder, Director Ryder Consulting Limited, has a PhD in Zoology and has 24 years experience in freshwater ecology and water quality work throughout New Zealand.
  - (ii) Dr Goldsmith, Associate Environmental Scientist Ryder Consulting Limited, has a PhD in Zoology and over 5

years experience assessing the environmental effects of various developments on freshwater ecosystems.

(iii) Dr Bartlett, Partner, Mitchell Partnerships, has a PhD in Botany and has undertaken ecological investigations and assessments of the effects of developments on the ecology of coastal, forest, wetland and subalpine areas for over 19 years.

- Mr Brown, Managing Director, Stephen Brown Environments, will present evidence on his assessment of the potential landscape effects of the applications.

- Mr Mikaere, Principal, Buddy Mikaere and Associates, will present evidence on his peer review of consultation undertaken with iwi and on the cultural issues associated with the applications.

- Mr Kyle, Partner Mitchell Partnerships Limited, will provide an assessment of the planning instruments relevant to the applications.

2. DESCRIPTION OF THE PROPOSALS

Location

2.1 Pages 5 and 6 in the Core Bundle contain a map showing:

- The location of each station;

- The key elements of the local environment; and

- The areas of irrigation proposed.

Key elements

2.2 Page 1 in the Core Bundle contains a table setting out the key elements of the applications.

2.3 Mr Kyle details those aspects that have been consented or are subject to certificates of compliance.

2.4 Additional consents have been sought by Southdown and Five Rivers in relation to proposals for the management of effluent which forms an integral part of the FEMPs. These are currently on hold.

2.5 In addition, some aspects of the current proposals were not signalled in the notified applications:

- Southdown are seeking to use gallery intakes to mitigate effects on fisheries;
- Killermont Station has proffered an alternative location for irrigation in response to landscape concerns raised about Pebbly Block (though this is not a preferred option);
- Ohau Downs is now proposing a dairy operation (with cubicle stables) as this best achieves the requirements of the WQS.

2.6 I address jurisdictional issues below.

Description of farming activities

2.7 Dr Robson and Mr Engelbrecht describe in full the farming activities proposed once the irrigation is implemented. Pages 1 and 2 in the **Core Bundle** contains a table summarising the key components.

3. STATUTORY FRAMEWORK/THRESHOLDS

3.1 The statutory framework set out in the MWRL submissions are adopted (refer sections 10 and 11 of the submissions).

3.2 In the context of these applications, the following statutory criteria are relevant:

- **Section 104D:** Non complying activities - gateway test;
- **Section 104:** Evaluation;
- **Part II:**
  - (i) Sustainable management;
  - (ii) Section 6 and 7 matters; and

(iii) Section 6(e), 7(a) and 8.

3.3 Each of these matters is dealt with in turn below.

4. NON-COMPLYING ACTIVITIES - SECTION 104D

4.1 Non-complying activities must pass through the gateway tests of section 104D.

4.2 Under section 104D, a consent authority shall not grant a resource consent for a non-complying activity unless it is satisfied that:

- The adverse effects on the environment will be minor; **or**
- The application is for an activity which will not "be contrary to" the objectives and policies of relevant statutory instruments.

4.3 While section 104D(1)(a) and (b) are disjunctive conditions (ie only **one** of the alternative conditions in section 104D(1) needs to be fulfilled),[6] it is submitted that in this case, both are satisfied.

4.4 The requirements under s104D(1)(a) and (b) are considered further below.

"Minor" - s104D(1)(a)

4.5 As to the proper legal tests:

S104D(a)

- As with the general assessment, the Committee must assess the scale of effects following a realistic appraisal of the existing and future environment (*Arrigato*[7], *Hawthorn*[8]; *Living Earth*[9], *Eco-Park*[10]);

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6 *Batchelor v Tauranga District Council* [1992] 1 NZRMA 266, *Royal Forest and Bird Protection Society of New Zealand Inc v Manawatu-Wanganui Regional Council* [1996] NZRMA 241, ("***Royal Forest and Bird***"), page [269]; *Kennett v Dunedin City Council* (1992) 2 NZRMA 22.

7 *Arrigato Investment v Auckland Regional Council* [2002] 1 NZLR 323, ("***Arrigato***").

8 *Queenstown-Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 ("***Hawthorn***").

9 *Auckland Regional Council v Living Earth Limited* [2008] NZCA 349 ("***Living Earth***").

10 *Rodney District Council v Eyres Eco-park Limited* [2007] NZRMA 1.

- The Committee may have regard to the permitted baseline of effects and disregard the effects of the applications that are similar to effects of permitted activities (*Eco-Park*);

- The Committee is required to have regard to proposed mitigation (*Bayley*[11]);

- The Committee may have regard to positive effects that offset adverse effects (*Elderslie Park*[12]);

- The Committee may have regard to remedial measures (*Alexandra*[13]*, JF Investments*[14]);

- The Committee may disregard effects that are remote (*Bayley*);

- Minor means lesser or comparatively small in size or importance and the judgment is to be made taking the adverse effects as a whole (*Aley*[15]*, Living Earth*[16]);

- The Committee may have regard to the duration of an effect in determining whether overall the effect is more than minor (*Living Earth*).

S104D(b)

- Contrary means "repugnant", "opposite", "antagonistic" having regard to the overall purpose and scheme of the plan;[17]

- If the applications are consistent with the objectives and policies or if they comes within the very limited circumstances contemplated as acceptable, it cannot be said to be contrary to them (*Living Earth, NZ Rail*[18]*, Elderslie Park, Arrigato, Gould*[19]).

4.6 Dealing with each component in turn.

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11 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA), page [4].
12 *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433, ("***Elderslie Park***").
13 *Alexandra Flood Action Society Inc v Otago Regional Council,* C102/05, ("***Alexandra Flood Action Group***").
14 *JF Investments Limited v Queenstown Lakes District Council,* C134/2004, paragraphs [30] and [31].
15 *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC).
16 *Living Earth,* paragraph [513].
17 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC), ("***New Zealand Rail***"); *Monowai Properties Ltd v Rodney District Council* A215/03.
18 *New Zealand Rail*, paragraphs [9] and [10].
19 *Rodney District Council v Gould* [2006] NZRMA 217, paragraph [59].

5. EVALUATION: ASSESSMENT OF EFFECTS

5.1 As set out in the MWRL submissions, the assessment of effects must commence with a realistic appraisal of the environment:

- Consideration must be given to the effects on the environment as it **actually exists** at the present time, overlaid by (non fanciful) permitted activities; [20]
- Consideration must also be given to the potential future environment;[21]
- The environment is dynamic:[22]

> We emphasise that the environment should never be regarded as static in any case. At the least the description of the existing environment should be regarded as a snapshot of existing elements and activities with some future activities superimposed on them under the principles set out by the Court of Appeal in *Hawthorn Estates Ltd v Queenstown Lakes District Council.* In many cases the description of the environment needs to have regard to the dynamism of many of its elements. That is particularly so in relation to a braided river like the Waitaki as it is a very complex and dynamic hydrological and ecological system.

The Environment

5.2 The existing environment on the four properties is not a pristine natural environment and reflects the reality of dryland farming in a tough environment. All four properties are currently farmed and these activities have an impact on the environment:

- Existing farming activities generate nutrients.
- Some waterbodies on the properties are currently not fenced from stock.
- There is little or no riparian planting adjacent to the waterbodies on the properties.
- Significant soil erosion is occurring on all four properties and this soil erosion contributes significantly to the nutrient loadings in adjacent waterbodies. For example, according to the Department of Conservation two tonnes of topsoil is lost

[20] *Arrigato*.
[21] *Hawthorn*, paragraphs [34] - [84].
[22] *Lower Waitaki River Management Society v Canterbury Regional Council* C80/2009, paragraph [10].

annually from per hectare from all farms in the Mackenzie Basin as a consequence of poor ground cover, winter frost heave and spring and summer windblow of the fragile fine topsoils. Glen Eyrie has suffered a serious recent wind blow event, the quantum of which is still being determined but indicatively in excess of 150-200,000 tonnes of top soil has been lost.

5.3 More broadly, existing activities are affecting the sub catchments:

- As set out in the evidence for MWRL, while surface and groundwater quality is generally high, existing land use activities are impacting on the water quality. For example, surveys undertaken by Dr Ryder and Dr Goldsmith found some water bodies are subject to significant periphyton growths at certain times of the year. [23]

- Existing consented activities employ practices such as border dyke irrigation that unnecessarily exacerbate nutrient impact (eg P).

- Consents have been granted historically with little apparent forethought about nutrient loading – though this will be reversed as consents come up for review.

The future environment

5.4 The permitted baseline in terms of the relevant NRRP rules include:

- Minor takes or diversions for activities such as stock water outside the water bodies identified as being of high natural character.

- General farming activities such as intensive pastoral grazing, fertiliser application, dryland cropping and ancillary activities.[24]

5.5 In terms of land use activities the District Plan permits:

- All farming activities.

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[23] Evidence of Ruth Goldsmith, paragraph [3.6] and Evidence of Greg Ryder, paragraphs [4.14] and [10.14].

[24] Evidence of John Kyle, section 5.

- Irrigation, except in Outstanding Landscape Areas in the Waitaki District.

5.6 The applicants hold a number of resource consents and certificates of compliance that permit certain farm related activities as set out in detail in the evidence of Mr Kyle.[25] In summary:

- All four properties hold certificates of compliance for farming activities which relate to a variety of activities associated with establishing, running and maintaining a farm. The certificate of compliance is essentially a list of farm related activities that are permitted under the District Plan and includes the likes of cropping, application of fertiliser, irrigation, grazing and construction of various farm infrastructure;

- Glen Eyrie, Ohau Downs and WHL Killermont hold resource consents for intensive farming and earthworks. This permits the intensive use of the land, 180,000m^2 of earthworks (60,00m^2 at any one time), and the establishment of the cubicle stables.

- Glen Eyrie and Ohau Downs have certificates of compliance for crop production which would, for example, allow the properties to be planted in canola. Canola cropping is a significant generator of nutrients.

- Ohau Downs has a certificate of compliance for an intake structure. The permitted structure is a completely submersed irrigation intake, a pipeline and two pump stations. Because these are all underground the Waitaki District Council accepts that they fit within the scope of a 'utility' and are a permitted activity.

- Killermont Station is re-consenting their take from Frosty Gully.

5.7 I note that ECan has recently refused to issue certificates of compliance for the application of fertiliser on the basis that the regional plans do not currently permit the application of fertiliser. ECan has said therefore that consent is required for the application of fertiliser under section 15 (as a discharge of contaminant to land that enters water).[26]

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[25] Evidence of John Kyle, paragraph [4.15].

[26] **15 Discharge of contaminants into environment**

5.8 I submit that consent for fertiliser is only required if it enters water or causes contamination of water, emanating as a result of natural processes from that contaminant. This is a question of fact not law. If it can be shown that it will not enter water, in the absence of a rule to the contrary, it is a permitted activity. In reality it is cultivation of crops that might cause increased loading, not best practice fertiliser application. Section 15 is not directed to this activity.[27]

5.9 Accordingly the permitted baseline contemplates a range of activity that may in the future (with or without irrigation) affect the quality of the environment. I accept that the intensity of for example dryland use is constrained by the viability of such use. But the key point is that you are not examining a static environment. It could be subject to some change irrespective of the grant of consents.

5.10 It is against this context that the scale of the effects of the proposed applications should be assessed.

Onsite ecological effects

5.11 The applicants have undertaken an assessment of how the ecological values of the properties will be affected by applying water to the land.

5.12 The evidence from the applicants' experts confirms that:

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(1) No person may discharge any
(a) Contaminant or water into water; or
(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
(c) Contaminant from any industrial or trade premises into air; or
(b) Contaminant from any industrial or trade premises onto or into land
Unless the discharge is expressly allowed by a rule (in a regional plan and in any relevant proposed regional plan), a resource consent, or regulation.

[27] For the following reasons:

(i) best practice for fertiliser application avoids direct discharge to water;
(ii) fertiliser is, in effect, consumed by crops;
(iii) fertiliser does not directly or indirectly discharge to water;
(iv) crop cultivation may lead to additional nutrient loading, but this is not a 'discharge', anymore than mowing the lawn or gardening is a 'discharge';
(v) accordingly s15 does not apply to fertiliser application unless there is evidence of a discharge of fertiliser leading to contamination; and
(vii) Refer Carter Holt where the Court refused to declare that crop cultivation was regulated by section 15.

- There are areas of significant ecological value on all properties (except WHL Killermont) however the irrigation systems have been designed to avoid these areas. [28]

- The land is not in an "untouched" condition:

> The ecological values and effects of the Killermont Station area are similar to those for WHL Killermont. The cultivated crop and grazing land has already lost almost all of its indigenous vegetation and the grazed "Pebbley Block" supports a very sparse vegetation cover also almost completely dominated by exotic species[29]

- Irrigation provides an opportunity to significantly improve terrestrial values. The application of water and nutrients to the land will result in an improved vegetation cover which will increase soil conservation on the properties. [30]

- Exclusion of stock from sensitive areas will regenerate and improve the sensitive areas:

> The provision of a fenced, planted and unirrigated five metre buffer along the watercourses and the cessation of grazing in these areas will encourage regeneration toward an indigenous cover in the long term [31]

Lakes

5.13 The potential effects on lakes arise in relation to:

- Abstraction of water from the lakes; and

- Intake structures

Abstraction

5.14 The proposed abstraction from Lake Ohau for irrigation of Ohau Downs and Glen Eyrie will result in a de minimis effect on the lake:

- The takes will comply with the minimum lake levels set out in the WRP [32]

- The proposed Glen Eyrie rate of the water take is only 0.5% and Ohau Downs take 0.3% of the natural annual inflow into Lake

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28 Evidence of Ruth Bartlett, paragraph [11.1].
29 Evidence of Ruth Bartlett, paragraph [7.16].
30 Evidence of Ruth Bartlett, paragraph [11.4].
31 Evidence of Ruth Bartlett, paragraph [11.5].
32 Evidence of Ian McIndoe, paragraph [401].

Ohau.[33] Given this minor abstraction there will be no measureable or meaningful effect on the level of Lake Ohau.

5.15 Similarly, the proposed abstraction from the Ahuriri River will have a de minimis effect on the river as both Killermont Station and WHL Killermont will comply with the minimum flow restrictions in the Ahuriri WCO.[34]

5.16 Overall, therefore takes from Lake Ohau and the Ahuriri River will have no discernable effects.

Construction of intakes

5.17 The experts have addressed the potential effects of the intake structures on all waterbodies. The evidence confirms:

- Lake Ohau:
  - (i) The intake will safely screen a wide range of fish sizes, including adult and juvenile salmonids.[35]
  - (ii) Works in the lakebed will be carried out over a short period of time so potential effects on instream values or aquatic ecosystems are expected to be minor. [36]
- Ahuriri River:
  - (i) Any potential adverse changes to the riverbed will be mitigated by ensuring that the riverbed is returned to its natural state. [37]
  - (ii) Fish passage will be maintained through the duration of the proposed works. [38]

Rivers and Streams

5.18 The evidence of Dr Ryder and Dr Goldsmith has addressed the potential effects on the key waterways on the properties. Their evidence confirms that:

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33 Evidence of Greg Ryder, paragraphs [6.2] and [12.2].
34 Evidence of Ian McIndoe paragraphs [37], [54] and [331].
35 Evidence of Greg Ryder, paragraphs [6.3] and [12.3].
36 Evidence of Ian McIndoe, paragraph [440].
37 Evidence of Ian McIndoe, paragraph [96].
38 Evidence of Ian McIndoe, paragraph [102].

- On WHL Killermont:

  (i) Manuka Creek - is a small waterway that will not be passed over by irrigators. [39]

  (ii) Tara Hills water race - does not flow continuously and because of this has only minor aquatic values. [40]

  (iii) Ahuriri River: abstraction complies with the minimum flow requirements of the WCO which means that there are no more than minor effects on the river ecology. [41]

- On Glen Eyrie and Ohau Downs:

  (i) The local streams (Serpentine Creek, Wairepo Creek and Six Mile Creek) all appear ecologically degraded relative to typical streams classified as in "natural state". [42]

  (ii) Riparian margins will enhance the physical character of streams and maintain and potentially enhance the health of local stream aquatic communities. [43]

- On Killermont Station:

  (i) Manuka Creek flows intermittently, the current channel is unfenced from stock and the riparian vegetation is modified. [44]

  (ii) Similarly the upper reaches of Frosty Gully are generally flowing however downstream of the dam the stream flows underground. [45]

  (iii) The establishment of a 5m buffer around the areas where water flows will be sufficient to protect and possibly improve existing aquatic ecosystem values. [46]

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39 Evidence of Greg Ryder, paragraph [20.2].
40 Ibid.
41 Evidence of Greg Ryder, paragraph [20.1].
42 Evidence of Greg Ryder, paragraph [4.14].
43 Evidence of Greg Ryder, paragraph [8.3].
44 Evidence of Ruth Goldsmith, paragraph [5.5].
45 Ibid.
46 Evidence of Ruth Goldsmith, paragraph [4.22].

- On all three properties:

  (i) There is low potential for groundwater inflow to streams within the property boundaries.[47]

5.19 Overall various management techniques will result, for example for Glen Eyrie: [48]

> (a) Riparian fencing will prevent stock encroachment of waterways;
>
> (b) Dual function riparian zones will be planted up to attenuate and remove nutrients entering the waterways.
>
> (c) Runoff from all tracks will be prevented from entering watercourse;
>
> (d) No effluent will be irrigated over watercourses and a 20 m layback will be observed; and
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> (e) The restriction of stock access to waterways will require stock water facilities to be provided. However, due to the very restricted grazing system proposed, soils are not expected to be seriously damaged around troughs. Where damage does occur, this will be assessed during the annual soil compaction assessment, and remedial action taken if necessary.

Tangata Whenua

5.20 I address the effects on tangata whenua below. The applicants have been guided by the matters identified through consultation, the CIA and the statutory recognition of the tangata whenua values. The independent expert advice is that the best practice, intensively managed approach adopted by the applicants addresses the concerns expressed by tangata whenua.

Landscape

5.21 As set out in the MWRL submissions, the cumulative landscape effects of the applications need only be assessed in terms of any potential landscape effects on the water bodies themselves unless land use consent is required from the relevant district council. [49]

5.22 The landscape objectives and policies in the NRRP relate only to the natural character of water bodies.[50] There is nothing in the regional

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47 Ibid.
48 Evidence of Melissa Robson at paragraph [69]
49 Section 14 of the Resource Management Act 1991.
50 Environment Canterbury Natural Resources Regional Plan, Objective WQN1, Objective BLR1, Objective WTL1.

planning framework that merits addressing land use effects or describing them as adverse. In fact, the Regional Policy Statement clearly sets out that the effects of land use on landscape should be managed by the District Plan.

5.23 No landuse consent is required for the present applications as all areas of ONL on the properties is being avoided. In terms of land use effects, farming activities are permitted in the Waitaki districts. Irrigation is also permitted (except in Outstanding Landscape Areas in the Waitaki District which require consent for a non-complying activity). The effects associated with the "greening" of the landscape are specifically addressed in the District Plan and the permitted activity status forms part of the permitted baseline.

5.24 Nevertheless, Mr Brown has undertaken a thorough analysis of the potential landscape effects of the applications. While not strictly necessary for the reasons outlined above he has included an analysis to the cumulative effects of the applications in terms of the "greening" of the landscape. Mr Brown concludes:

- Any landscape effects associated with the Ahuriri intake would be confined to the construction phase and would have a relatively short duration. [51]

- Similarly, the abstractions from Lake Ohau are small compared to the total size of the lake and the minor changes to the Lake level will not be discernable. [52]

- None of the irrigation applications (subject to the mitigation measures) would have a significant impact on the ONL's identified in the Waitaki Plan. [53]

- Potential effects from public views will be avoided: [54]

> While three of the blocks all lie within the foreground of views from major public thoroughfares there are a range of factors that would ultimately limit the degree of physical intrusion into such views and changes to an acceptable level. These factors include:

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[51] Evidence of Stephen Brown, paragraph [94].
[52] Evidence of Stephen Brown, paragraph [110].
[53] Apart from the Quailburn Conservation Area which he does not believe qualifies as a truly ONL area. See Evidence of Stephen Brown, paragraph [141].
[54] Evidence of Stephen Brown, paragraph [142].

(i) Careful siting of the irrigation areas and cubicle barns.

(ii) Modifications to the original irrigation proposals ie K-line irrigation on Pebbley block.

(iii) Regard for the integrity of the QEII covenanted areas and Lake Ohau margins.

(iv) Appropriate mitigation measures.

Cumulative effects

5.25 All three applicants adopt the thresholds in the WQS. As detailed by Dr Robson, the most stringent mitigation requirements are:

- The Ahuriri Arm of Lake Benmore for WHL Killermont and all of the Killermont Station applications.
- The Ohau River groundwater sub catchment which drains into the Wairepo Arm of Lake Ruataniwha for Five Rivers.
- The Ahuriri Arm of Benmore (for P) and the Wairepo Arm (for N) for Glen Eyrie.

5.26 The expert evidence will demonstrate that you can be satisfied that all applicants draining to the Ahuriri catchment can meet the thresholds in the WQS by some margin:

- For the Ahuriri Arm there is approximately 49,000 kg N and 1400 kg P **less** than the threshold based on the OVERSEER modelling done for the FEMPs.

5.27 For both Glen Eyrie and Ohau Downs there will be a minor increase in nutrients with an estimated cumulative nutrient concentration of 0.033mg N/litre and 0.003mg P/litre at the Ohau C Tunnel (being the point of primary concern for Meridian).[55] This effect of this is minor in ecological terms.[56]

5.28 As explained in the MWRL case, the WQS figures are conservative:

- The worse case nutrient loadings were assessed.

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55 Evidence of John Bright, paragraph [9.7].
56 Evidence of Greg Ryder, paragraph [22.15].

- The P is likely to reduce over time as existing irrigation farms convert from border dyke irrigation to spay irrigation when their applications are renewed.

5.29 On-farm nutrient management and mitigation approaches have been developed to achieve these thresholds and these will be essential to ensure that cumulative effects on waterbodies of the Upper Waitaki Basin are protected. The applicants have adopted the multilayered approach recommended by the experts:

- direct control of inputs based on a conservative application of OVERSEER;
- measurement of on farm nutrient loading;
- sub catchment monitoring; and
- clear and precautionary triggers for intervention.

5.30 In the context of the MWRL submissions, the Committee expressed concern about the potential for temporary exceedance of specified thresholds and the management of those effects. The evidence is and will be that the thresholds set are precautionary and therefore avoid effects of significance.

5.31 It is also relevant that, as the Court in *Living Earth* found, temporary effects of a more than minor nature may be tolerable if the overall effect is minor. [57]

6. EVALUATION: PLANNING FRAMEWORK

Objectives and Policies

6.1 The evidence you will hear is that the proposal is consistent with the objectives and policies of the WRP and NRRP. A comprehensive assessment of the objectives and policies is set out in Mr Kyle's evidence. I do not propose to repeat that assessment here.

6.2 In addition, the key themes of the relevant statutory planning instruments are addressed in the MWRL submissions. That analysis is also adopted. In short, the WRP strives to ensure that the water quality of the lakes and

[57] *Living Earth,* paragraph [513].

waterways of the Upper Waitaki basin are "sustained" in all its various elements (ecological, cultural, aesthetic and recreational) while enabling efficient use of water for productive purposes.[58]

6.3 For the purposes of the present applications, the WRP specifies those matters of particular relevance to these applications, and in particular relating to non complying activities:

- the matters considered when setting the environment flow and level regimes set out in Policy 4;[59]
- the effect of granting consent on entitlements to other activities over the timeframe of the consent;[60]

6.4 Plainly Policies 1 and 6 (connectedness), Policies 3, 4, 12 , 23 and 40 (flow, level and allocation regimes), Policy 11 (Ngai Tahu values, national and local effects), Policy 13 (water quality), Policy 14 (catchment needs) Policies 15, 16 and Policy 20 (efficiency and integrated use), Policy 29, 30, 32 (High Natural – Character Water Bodies) and Policies 35 and 42 (Lakes Ohau, Ruataniwha, Benmore, Aviemore and Waitaki), are relevant to these applications.

6.5 Dealing with each in turn:

- the connectedness of all parts of the catchment has been recognised by the applicants committing themselves to a whole of catchment approach to management of nutrients;
- the matters that have driven the setting of the flow, level and allocation regimes, including those matters in Policy 4 have been specifically addressed by the experts assessments with the conclusion the key values will be maintained or improved and significant adverse effects avoided – notably the effects of the takes out of Lake Ohau will be neglible on the values identified;
- other entitlements will not be affected - only Southdown and Five Rivers propose to take from Lake Ohau at this time, and

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58 WRP, Objective 1.
59 WRP, Explanatory Note for Policies 3 - 5.
60 WRP, Explanatory Note Policy 12.

the WCO for the Ahuriri drives allocation and fixes what can be taken in any event;

- Tangata whenua values have been specifically considered with sites of significance avoided and with the mitigation directed to protecting those values;
- the proposed applications if granted will make a positive contribution to national and local social and economic conditions through highly productive use of land;
- significant effort has been devoted to maintaining and improving water quality, with specific regard to the objectives of the NRRP – and while some aspects of the proposed farms may not meet the technical thresholds expressed in those objectives (eg some groundwater thresholds) that non compliance is small in environmental terms and the underlying values will be maintained or improved;
- consistent with the policies of both the WRP and NRRP, technical efficiency will be achieved; and
- the effects of abstraction on High Natural Character Water Bodies including Lakes Ohau will be small, and effects on Lakes Ruataniwha, Benmore, Aviemore and Waitaki will not be more than minor with careful direct and adaptive management.

6.6 Overall, the applications are plainly not "repugnant" to the objectives and policies of the relevant planning instruments. Rather, there is a high level of consistency with them.

6.7 In relation to the NRRP, I maintain that the objectives are incorporated via Policy 13. The issue for you to determine is the extent to which the exercise of the consents could result in the water quality objectives not being achieved. The fact that the consent activity might not achieve all of the technical standards does not mean that the consented activity is inconsistent with the objectives, let alone repugnant to them.

7. PART II:

Sustainable management

7.1 The purpose of the RMA is to promote the sustainable management of natural and physical resources. The question as to how to apply section 5 of the RMA has been settled by several decisions. They require an overall judgment in the following terms:[61]

- The language of section 5 is deliberately open and is intended to allow the application of policy in a general and broad way; [62]
- Section 5 requires an overall judgement, allowing a comparison of conflicting considerations and the relative scale and degree of them, and their relative significance in the final outcome;[63]
- Both the positive and negative effects of a development are to be considered together in order to make the ultimate judgement.[64]

7.2 Turning now to each of the components to sustainable development:

- Section 5(2) - Positive social and economic enablement will result from the additional irrigation and cultivation both in terms of direct benefits to the farms themselves and the wider economic benefits for the district and region as a whole.[65]
- Section 5(2)(a) - Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations. Allocation of water is crucial to enabling a significant natural resource (land) to be used to meet the needs of future generations. The allocation of water is itself sustainable – with the abstraction from Lake Ohau being neglible in real terms, and the abstraction from the Ahuriri being governed by the WCO.
- Subsection 5(2)(b) requires the safeguarding of the life-supporting capacity of air, water, soil and ecosystems. (Also,

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61 Particularly *New Zealand Rail*; *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59; *Aquamarine Ltd v Southland Regional Council* C126/97; and *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541 ("***Genesis***").

62 *New Zealand Rail,* paragraph [72].

63 *Genesis,* paragraph [51].

64 Ibid.

65 Evidence of Bob Engelbrecht, paragraph [4.44].

under section 6(c), decisions on resource consent applications are to recognise and provide for the protection of significant habitats of indigenous fauna.) Caselaw has established that carefully controlled proposals that are carried out in compliance with conditions and with management plans will safeguard the life-supporting capacity of water, soil and eco-systems.[66]

- Subsection 5(2)(c) - Avoid, remedy or mitigate any adverse effects on the environment. This is a central issue which is addressed primarily by way of the WQS and the FEMPs which will ensure that the thresholds in the WQS are complied with and water quality is maintained. Dr Robson and Mr Kyle give a comprehensive account of the approach taken to mitigating adverse effects through the FEMPs, monitoring and adaptive management regimes proposed. Mr Kyle notes that:[67]

> As outlined in the evidence of Dr Robson the mitigation proposed and which must be adopted by the individual landowners in this instance will result in achievement of these thresholds. Ongoing monitoring and adaptive management will also ensure that if any adverse effects are detected they will be addressed.

- After considering the evidence provided by the various experts, Mr Kyle concludes that the FEMPs, monitoring and conditions of consent ensure that any adverse effect to be appropriately avoided, remedied or mitigated.[68]

7.3 Stepping back, and considering the big picture, these applications and the other applications, represent a significant opportunity to enable a regionally if not nationally significant use of land in tandem with highly valued energy generation. It is easy to raise the spectre of water quality degradation given the historically poor land management practices driven by marginally economic dry land farming. But the real difference here is that, with irrigation, the applicants are offering to set the benchmark for farm management so that the special values of the Basin are sustained.

Section 6 matters

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66 See *Royal Forest and Bird,* page [243], *Winstone Aggregates Limited v Auckland Regional Council,* RMA 780/03 (Consent Order), *Alexandra Flood Action Society*, *Ngawha Geothermal Resource Company Limited v Northland Regional Council* A117/06 (Interim) and A146/06 (Final), *Contact Energy Limited v Waikato Regional Council* A4/00, *Biomarine Limited v Auckland Regional Council* A14/2007, *Geotherm Group Ltd v Waikato Regional Council* A151/06.

67 Evidence of John Kyle, paragraph [7.62].

68 Evidence of John Kyle, paragraph [7.63].

7.4 The Committee is required to recognise and provide for stated matters of national importance in section 6.

7.5 These matters are not trumps, and ultimately must serve the purpose of sustainable management.[69]

7.6 The sections 6 matters of potential relevance in this case comprise:

- Section 6(a) - The preservation of the natural character of lakes and their margins, and the protection of them from inappropriate use and development. Mr McIndoe explains that there will be negligible effects on the lakes and rivers from the abstraction; significant adverse effects on water quality will be avoided; and farming is not inappropriate per se, in a context where it is permitted or contemplated by the relevant planning instruments.

- Section 6(b) - The protection of outstanding natural features and landscapes from inappropriate development. Irrigation and associated farming is avoided on areas classified as outstanding natural landscape. It is otherwise permitted as a landuse activity and therefore appropriate in terms of land use effects. In any event, as Mr Brown observes, the effects on landscape are appropriate.

- Section 6(c) - The protection of areas of significant indigenous vegetation and significant habitat. Drs Ryder, Bartlett and Goldsmith conclude that there will be no more than minor effects on vegetation and habitats. Rather, those habitats will be improved.

- Section 6(e) - Mäori relationship with ancestral lands. This is addressed below.

Section 7 matters

7.7 Section 7 addresses a range of matters. [70]

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[69] *New Zealand Rail*.

[70] (a) Kaitiakitanga:
(aa) The ethic of stewardship:
(b) The efficient use and development of natural and physical resources:
(ba) The efficiency of the end use of energy:
(c) The maintenance and enhancement of amenity values:
(d) Intrinsic values of ecosystems:
(e) Recognition and protection of the heritage values of sites, buildings, places or areas:
(f) Maintenance and enhancement of the quality of the environment:
(g) Any finite characteristics of natural and physical resources:

7.8 In contrast with section 6, the section 7 values do not have national importance. Also, the section 7 values are to be given "particular regard" by councils assessing RMA consent applications, rather than being actually provided for.

7.9 The duty to have particular regard to these matters has been described as "a duty to be on inquiry".[71]

7.10 Section 7 matters, along with section 6 matters, inform and assist the purpose of the Act. The Committee may accord such weight as it thinks fit to the competing considerations under section 7, bearing in mind the purpose of the Act.[72]

7.11 Subsections 7(a), (b), (c), (d), (f), (g) and (h) sections are most relevant in this case. Section 7(a), relating to kaitiakitangi is addressed in a separate section below (Mäori Issues). In summary:

- Efficient use and development of natural and physical resources (section 7(b)) - The evidence of Mr Peacocke, Mr Zeestraten, Mr and Mrs Thomas and Mr Engelbrecht illustrates how the irrigation will provide significant economic benefits to the farms. Mr McIndoe will address you on the efficient use of water. Mr Kyle will show that the efficient use of the farmland coupled with appropriate mitigation measures provides the most sustainable outcome for the environment as a whole.

- Section 7(c) - amenity values - Mr Brown's evidence is that there will not be any significant adverse effects on the natural landscape. [73]

- Sections 7(d), (f) and (h) – ecological and intrinsic values - Sections 7(d), (f) and (h) require the Committee to have particular regard to the "intrinsic values of ecosystems", "maintenance and enhancement of the quality of the environment", and "the protection of the habitat of trout and salmon". In terms of these matters, the evidence will show that

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(h) The protection of the habitat of trout and salmon.
(i) The effects of climate change:
(j) The benefits to be derived from the use and development of renewable energy.

71 *Gill v Rotorua District Council* (1993) 2 NZRMA 604 (PT), paragraph [616].
72 *Genesis,* paragraph [53].
73 Evidence of Mr Brown, paragraphs [144] and [145].

the manner in which mitigation measures are undertaken, together with the imposition of suitable controls, will ensure that not only is the overall water quality in the Basin maintained but that the local instream habitat will be improved.

- Section 7(g) – finite resources – the WRP has provided for this issue, and as set out above the applicants have tailored their proposals to comply with the relevant objectives and policies. In reality the abstractions are small and beneficial use of a finite resource (land) is significant.

Tangata Whenua : Section 6(e), 7(a) and 8.

7.12 Sections 6(e), 7(a) and 8 of the RMA generally recognise a variety of Mäori interests.

7.13 It is trite law that section 8 does not give tangata whenua a right of veto, but is subject to the overall purpose of sustainable management.[74] Nevertheless they are matters that must be considered at every stage of the evaluation process. [75]

7.14 Cognisant of this:

- The applicants have endeavoured to engage with tangata whenua at iwi, hapu and individual levels. [76]

- The applicants, through MWRL commissioned a cultural impact assessment.

- This assessment has been reviewed by an independent expert on tangata whenua matters to assess whether the applicants have addressed those matters of concern identified. [77]

- The matters of concern have been addressed:

  (i) the mauri or health of the waterways has been recognised and provided for;

  (ii) sites of significance have not been identified as affected by the proposals;

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74 *Watercare Services v Minhinnick* [1998] NZRMA 113.
75 *McGuire v Hastings District Council* [2000] 1 NZLR 679.
76 Evidence of Richard Peacocke, paragraphs [34] - [39].
77 Evidence of Buddy Mikaere, paragraph [1.24].

(iii) the overall ecological concerns have been addressed; and

(iv) in terms of alternative forms of farming, the farm management plans represent the most intensive form of management commensurate with the scale of the proposals.

- The independent assessment of Mr Mikaere is that the applicants have appropriately addressed the matters raised by tangata whenua and in the statutory documents that seek to embrace Ngai Tahu values to the best of their ability. [78]

8. ISSUES RAISED IN THE S42A REPORT

8.1 Many of the concerns set out in the s42A reports stem from:

- a lack of information;
- a misunderstanding of the information provided; or
- concerns relating to the WQS.

8.2 In terms of the further information sought from the officers in the s42A reports:

- The FEMPs will be presented in full in Dr Robson's evidence;
- A full landscape impact assessment has been carried out by Mr Brown and is outlined in his evidence;
- Mr Mikaere's evidence sets out the cultural impact assessment and consultation which has been carried out;
- Mr McIndoe addresses the officer's concerns regarding compliance with allocation limits and irrigation efficiency;
- Mr McIndoe and Dr Ryder address the design and efficacy of the fish screens proposed; and

[78] Evidence of Buddy Mikaere, paragraph [9.2].

- Dr Bartlett's evidence contains a full assessment of the effects of the proposals on terrestrial ecosystems and outlines the mitigation planting proposed.

8.3 Various conditions of consent have been recommended to address concerns outlined in the s42A report and these have been accepted by the applicants, in particular: [79]

- The construction of the intake structures in the Ahuriri River should not coincide with times when people are likely to be using the river for recreation.
- The discharge of water into the Ahuriri River shall meet the conditions in the WCO.
- Works within the Ahuriri River shall be undertaken so as to avoid the bird nesting and fish spawning seasons.

9. ANCILLARY ISSUES

Five Rivers

Scope of Application

9.1 The Reporting Officer is of the opinion that the use of Ohau Downs for dairying is beyond the scope of the application as notified, based on the increase in effects of water quality:[80]

> I note that the application as lodged and notified specifically excluded milking dairy cows from the property. However, the applicant appears to be seeking to use this land for dairying. I consider this is beyond the scope of the application as notified based on the increase in effects on water quality.

9.2 Five River's application states that consent is ought for the spray irrigation of 1500has of crops and pasture for stock. It also refers to the use of land for "dairy support", but does exclude dairy farming.

9.3 With the benefit of hindsight, the application would have left open the available options. But Five Rivers has been driven to seek approval for an intensively managed dairy operation in response to the need to meet the thresholds of the WQS, while achieving a viable and sustainable

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79 Refer to all of the Officer's Reports for the applications.
80 Refer to paragraph [21] of the Ohau Downs Officer's report.

operation over the long term. In short, a dairy operation of the nature now proposed (with cubicle stables) better achieves both sustainable environmental outcomes and a viable farm.

9.4 I submit that, in this context, the applications can be granted in accordance with leading authority: [81]

- the effects of the proposed land use activity are substantially less than the potential effects of the notified activity – considerably less nutrients, less animal domestication of the environment, similar irrigation infrastructure;
- it is highly unlikely that any additional submitters would have involved themselves in this application had dairying farming been specifically identified – note the same submitters submitted on the Glen Eyrie application; and
- there is no prejudice to any submitter, all of whom have ample opportunity to respond to the proposal as it is now.

9.5 An alternative, less desirable proposal has been assessed in evidence, namely intensive beef farming. This has higher nutrient loading, but still within the WQS thresholds. But with respect, to adhere to the approach of the Officer is in effect to prefer an inferior approach for little substantive justification. It would be a victory of form over substance.

9.6 As stated in evidence, the proposed system will have minimal effects on water quality.[82]

Killermont Station

Alternative proposal

9.7 Issues have been raised about the effects of irrigating Pebbly Block from a landscape perspective. I have addressed you above on these effects. They are no more than minor.

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[81] *Coull v Christchurch City Council* C77/06, paragraph [11] sets out the following test:
(1) Does it increase the scale or intensity of the activity?
(2) 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?
(3) Would parties who have not made submissions have done so if they were aware of the change?

[82] Evidence of Melissa Robson, paragraph [141].

9.8 While not the preferred option for Killermont Station, an alternative block of land has been assessed by the experts in relation to the Pebbley Block on Killermont Station. This block is located on the "Home Block" on Killermont Station.

9.9 I submit that if the Committee felt unable to grant the consent for irrigation of the Pebbly Block on landscape grounds, then it would be appropriate to grant consent in respect of the Home Block:

- Can it really be said that any member of the public would be concerned if in response to concerns raised about landscape, a different block of land was identified with less effects for irrigation purposes.
- The block forms part of an existing operating farm where existing consented water could have been applied to it.

9.10 Having said all of this, the Pebbly Block effects are minor with the proposed K line irrigation and cut and carry operation.

Southdown/WHL

Gallery Intakes

9.11 As with Five Rivers and Killermont Station, Southdown has modified its application in accordance with expert advice to minimise effects on the environment.

9.12 On that basis Southdown would prefer to employ gallery intakes. This departs from the notified application. But as it is in effect a mitigation proposal, I submit it remains within jurisdiction:

- the effects are less (though temporary construction effects may be slightly larger in scale for a short period); and
- persons that might be interested in this aspect are submitters and can address any environmental issues arising.

9.13 Accordingly, as with the changes sought by Five Rivers and the option put up by Killermont, substance should prevail over form and the proposed change to the intakes considered for consent.

Ahuriri River Water Conservation Order

9.14 Both the WHL Killermont and Killermont Station applications seek to abstract water from the Ahuriri River. Mr McIndoe addresses this in detail in his evidence.

9.15 The National Water Conservation Order (Ahuriri River) 1990 ("**WCO**") establishes minimum flows which must be retained in the river to protect its fishery, wildlife and recreation values.

9.16 The reporting Officer observes that the proposed takes could represent an over allocation, based on an assumption that the takes cumulatively exceed the maximum quantum allowed under the WCO.

9.17 Counsel submits that this interpretation of the WCO is incorrect:

- The WCO requires **minimum flows** to be retained in the Ahuriri River. It does not refer to **maximum abstractions**.
- Therefore, the key issue is whether the proposed takes will result in the flows in the river falling below the proscribed minimum flows in the WCO.
- Calculating the flow in the river at any point can be undertaken by a number of methods.[83]
- WHL Killermont and Killermont Station will not take water in contravention of these limits and the proposed monitoring will ensure this outcome.
- This approach to the WCO is also consistent with the findings of the Planning Tribunal.

> [I]ts purpose is to provide for the quantities and rates of flow to be retained in the river under various circumstances and at various times of the year (page 37).

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

- Dr Ryder has confirmed that this interpretation gives effect to the objective to protect the instream environment[84] and is preferable to a simplistic maximum abstraction approach as that does not in fact guarantee that the minimum flows are being maintained.

10. SUMMARY

10.1 The applicants have committed themselves to best practice and the burden of ensuring that the values of the waterways are sustained.

10.2 The counter factual, no irrigation, can provide no assurance of sustainability. It could leave vast areas of land in an unproductive weed infested state, or in a marginally productive condition with the ongoing effects of poorly managed (by comparison to the proposed farm management) dry land farming subject to continual wind blow and soil degradation as a consequence.

10.3 Overall, grant of consent presents as a watershed opportunity to enable the conversion of land resource to its best use, while sustaining the qualities of the Basin's waterways for future generations.

Christian Whata / Stephanie Bond

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

[84] Evidence of Greg Ryder, paragraph [6.16].