

**TABLED AT HEARING**  
Date 9/12/2009

**BEFORE THE CANTERBURY REGIONAL COUNCIL**

In the Matter of **Resource Management Act 1991**

And

In the Matter of **of resource consent applications by various parties to take and use and discharge water in the Upper Waitaki Catchment**

---

**LEGAL SUBMISSIONS ON BEHALF MACKENZIE GUARDIANS SOCIETY  
INCORPORATED.**

---

---

**Counsel Acting:**  
Pherne Tancock  
Barrister  
PO Box 10-242  
WELLINGTON  
Tel: 04 3806037  
Fax: 04 3806037  
Email: phernnetancock@xtra.co.nz

## **LEGAL SUBMISSIONS OF COUNSEL ON BEHALF OF MACKENZIE GUARDIANS SOCIETY:**

### **1 The submitters**

1.1 The Mackenzie Guardians (“the Guardians”) was formed following the public notification the applications by Environment Canterbury.

1.2 The Guardians is made up of the following individual submitters who decided to present their submission as a group:

- Stephen Carswell;
- Sam Mahon and Alison Erikson;
- Lesley Shand;
- Jane Zusters;
- Joan Kollmann;
- Ruth Williams;
- Anne-Marie Rose; and
- Anne Braun-Elwert

1.3 The Guardians have considerable support from people in the wider Canterbury region and throughout New Zealand. Prominent New Zealanders have provided statements in support of the Mackenzie Guardians. These include famous New Zealand artist Grahame Sydney, Actor Sam Neill and Poet Brian Turner to name a few. The New Zealand Tourism Industry Federation, the country’s voice for tourism also supports this submission.

### **2 The Applications**

2.1 This hearing relates to applications by various applicants (“the applicants”) in regard to 110 resource consent applications in the upper Waitaki catchment (Upstream of the Waitaki Dam); 60 water permit applications (pursuant to section 14 of the RMA),<sup>30</sup> land use permit applications (pursuant to section 13 of the RMA) and 20 discharge permit applications (pursuant to section 15 of the RMA) from and to Lakes Tekapo, Pukaki and Ohau and tributaries, upper

catchment tributaries of the Tekapo, Pukaki and Ohau rivers, the Ahuriri catchment, and Lakes Benmore, Aviemore and Waitaki and their tributaries. These applications were lodged with Environment Canterbury at varying times, the earliest being 1998 and the latest in 2008.

- 2.2 The applications of particular concern to the Guardians are those relating to the area known as the Mackenzie Basin, that is, those upstream of Benmore. This comes within the boundaries of the Canterbury Regional Council and within the Mackenzie, Waitaki District. Some are also within the Waimate District.

### **3. Summary of argument**

- 3.1 The Guardians opposition to the applications is centred on the following key issues;
- a. The inappropriateness of the proposed permits and subsequent land use as they are within an area which is an outstanding natural landscape,
  - b. The inappropriateness of the proposal because they do not provide for the preservation of the natural character of lakes rivers and their margins and protection of these areas from inappropriate subdivision, use and development;
  - c. The applications fail to protect areas of significant indigenous vegetation and significant habitats of indigenous flora and fauna;
  - d. The adverse ecological effects of the proposed extraction permits, land use and discharge applications will result in irreparable damage to significant indigenous vegetation and threatened ecosystems;
  - e. The applications amount to inappropriate use and development of the Upper Waitaki Basin.

#### **4. The Consent Process**

- 4.1 The Guardians have struggled with the volume of material in relation to these applications. The manner in which these consents are to be heard has severely prejudiced the ability for the Society and its experts to constructively participate in this hearing due to the inability to respond to every application in detail.

#### **5. Position of Society**

- 5.1 The evidence offered by the Society applies to all the applications unless specifically stated.
- 5.2 The Guardians oppose all of the applications and asks that with few exceptions the application be declined in their entirety. This is the only action that can sufficiently protect the naturalness of the Mackenzie Basin for future generations.

#### **6. District Council land use consents:**

- 6.1 It is considered that Environment Canterbury's ("ECAN's") decision to permit these applications to be processed separately from the land use consents creates an artificial distinction between the present applications and the associated land use consents anticipated by the District Plans.
- 6.2 It is understood that that further land use consents will be required for activities associated with the construction and development of irrigation infrastructure. These activities will undoubtedly have significant impact on the environment. Recognition of the need for further consents for the clearance of indigenous vegetation has however not been recognised in the reporting. The need for further consents will result in unnecessary duplicity.

6.3 Due to ECAN's decision to hear these applications in isolation these consent's are being decided separately from the inevitable environment effects that they will create. For this reason it is considered that the applications are incomplete and there is insufficient information to accurately assess the actual impacts which will arise from these applications both separately and cumulatively.

## **7 Adverse Effects on Environment**

7.1 In determining whether to grant or decline the consents, the Commissioners are directed to consider any actual or potential effect arising from the proposal. The definition of "effect" at section 3 of the Act includes positive and adverse effects; and encompasses both "cumulative effects which arise over time in combination with other effects", "future effects," and "any potential effect of high probability."

7.2 The Environment Court has found that the "cumulative effects" include effects which are predictable and inevitable if a certain consent pattern is established. See *Pine Tree Park Ltd v North Shore CC W/142/95 (PT)*. In *EDS v Auckland RC [2002] NZRMA 492* the Court found that the inquiry as to "other effects" under s 3 (d) required consideration of "both effects on the environment and effects in the future of allowing the proposal."

7.3 On this basis, it is submitted that proper consideration of effects of the current application should include assessment of the applications individually and cumulatively by including assessment of the likely inevitable future effects arising from future land use consents required to implement the current consents.

## **8. Grounds of opposition**

8.1 The Guardians principal objection is in relation to the grant of water permits which will result in the derogation of the Mackenzie Basin ONL as a result of more intensive agricultural use. The area's rivers lakes

and streams are of high natural character and the applications will affect areas of significant ecological and heritage value. These are matters of national importance pursuant to sections 6(b) (c) (d) and (f) of the RMA and thereby ought to be afforded protection.

8.2 The Society will not be calling evidence in relation to s 6(d) and adopts the evidence of Fish and Game in that regard. Ms Zusters will be showing a short film which addresses this matter in support of the Society's submission.

8.3 The Guardians opposition is based on the adverse impacts the application would have on these values. This includes the adverse landscape and visual effects on the basin as a result of conversion of too much land for intensive agricultural use and the irreparable ecological effects on significant indigenous flora and fauna which will arise from the more intensive farming of this land.

8.4 The Guardians are also concerned about the significant adverse effect that the proposal will have on tourism in the area and cultural, heritage and amenity values. The importance of the naturalness of the landscapes is recognised in the substantial use as advertising settings by companies such as Speight's and Mackenzie Bread, as well as by many international car manufacturers as related by Location Scout Graham Thompson.

## **9. Planning**

9.1 The Mackenzie Guardians have not engaged their own planning expert and seek to adopt the planning evidence of Fish and Game and Forest and Bird in this respect. The relevant plans and policies are identified in that evidence and it is not necessary to repeat them here.

9.2 The Society's experts Ms Lucas, Ms Steven and Dr Walker have also discussed relevant plans and policies in relation to their areas of expertise.

**10. The Mackenzie Basin – Canterbury’s largest Outstanding Natural Landscape**

**(a) Planning Context- District Plan**

10.1 The operative District Plans are discussed in the s42A General Landscape Report which notes that the majority of the applications fall within Rural Scenic Zones, Significant Landscape Areas or are classified as being within outstanding landscape Zones. Due to the current intensive landscape review being undertaken in these areas it is considered that these provisions while useful carry little weight.

10.2 The applicant and Council assessments address the landscape only at a very local level, rather than at the regional scale. As recognised elsewhere in Canterbury, the regional scale can be very different from the local. For example for the Banks Peninsula, the Regional Plan (as supported by the Courts) recognises the whole of the Banks Peninsula as an ONL at the regional scale, whereas at the local only small ONL areas have been identified within that area.

**(b) Canterbury Regional Policy Statement (“CRPS”)**

11.1 Policy 3 of subchapter 20.4(1)(e)(i) of the CRPS directs that in identifying regionally significant landscapes factors to be considered include whether it was identified as being regionally outstanding in the Canterbury Regional Landscape Study (“CRLS”). The CRLS (1993) identified the Mackenzie Basin as, “*the most extensive outstanding natural landscape in the region.*” The following factors were identified as key factors that support its outstanding status, including:

- *the area contains numerous geological and biological sites of importance;*
- *there are key features such as Aoraki, Tasman, Sefton;*

- *the lakes of Ohau, Pukaki, Tekapo and Benmore are all different but add to the vastness of the landscape.*
- *the formation of the land is expressed in many ways*
- *the history of the area is of significance to many*
- *the openness and naturalness of the area*
- *the character of the tussock grassland*
- *the very visible details of the landforms*
- *the coherence of the landcover and underlying landform*
- *the Basin's importance to tangata whenua.*

11.2 Chapter 8, objective 2 policy 3 requires that landscapes that meet the sub criteria of chapter 20.4 (1), (which the Mackenzie Basin clearly does due to it's inclusion in the CRLS) should be protected from, *'the adverse effects of use, development. Protection of natural and physical resources and their enhancement should be promoted.'*

11.3 It is therefore considered that the Mackenzie Basin is identified as an ONFL for the purposes of the RPS. The hierarchy of the CRPS in relation to the Regional and District plans is considered relevant to the competing viewpoints advanced as to the status of the Basin as an ONL and Plan Change 13.

11.4 The relevant policies are outlined at pages 4 and 7 of Ms Steven's evidence and Appendix B of Ms Lucas's evidence. The current applications are contrary to these in particular Objective 2 which requires:

*'Protection or enhancement of the natural features and landscapes that contribute to Canterbury's distinctive character and sense of identity, including their associated ecological, cultural, recreational and amenity values.'*

## 12. Section 6(b) of the RMA

- 12.1 The RMA has specifically provided for recognition and protection of nationally important features and landscapes in section 6(b), which states that:

*“In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*

...

- (b) *the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development”.*

### (a) **Landscape significance**

- 12.2 In *Pigeon Bay Aquaculture v Canterbury Regional Council* [1999] NZRMA 209 at 231-232 (paragraph 56) the Court identified a number of aspects as relevant to assessment of landscape significance.

- 12.3 In *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 (“the first *Wakatipu* decision”) the Court stated (paragraph 74) that a precise definition of “landscape” cannot be given. It went on to note three ways of perceiving landscape as follows:

- f. ...as a large subset of the ‘environment’ (paragraph 77);
- g. ...as a link between individual (natural and physical) resources and the environment as a whole. It is a link in two ways: first in that it considers a group of natural and physical resources together, perhaps in an arbitrary cultural lumping as a “landscape” rather than in any ecologically significant way; and secondly it emphasizes that our attitudes to those resources are affected by social, aesthetic and cultural conditions.” (paragraph 78);
- h. under the *Pigeon Bay* assessment criteria.

12.4 The Court accepted the *Pigeon Bay* criteria were generally appropriate but made several changes. The criteria (as amended) include, but are not limited to (referred to in the remainder of this submission as “the amended *Pigeon Bay* criteria”):

- a. The natural science factors – geological, topographical, ecological, and dynamic components of the landscape;
- b. Its aesthetic values, including memorability and naturalness;
- c. Its expressiveness (legibility) – how obviously the landscape demonstrates the formative processes leading to it;
- d. Transient values – occasional presence of wildlife or its values at certain times of the day or year
- e. Whether the values are shared and recognised
- f. Its value to tangata whenua
- g. Its historical associations

12.5 As the Court observed in *Wakatipu* roughly (a) and (d) correspond to what is seen or perceived; and (b) (c) and (e) to (g) to how people perceive the landscape.

### **13. Expert Evidence of Ms Lucas**

13.1 Ms Lucas has assessed the wider Mackenzie Basin landscape in accordance with the modified *Pigeon Bay* criteria.

13.2 Her evidence will be that the Mackenzie Basin is Canterbury’s largest single outstanding natural landscape.

13.3 Ms Lucas is of the view that the proposed irrigation would have significant adverse effects on the vast open expanse of the Basin. In her evidence she will discuss:

- The significant landscape and visual effects which would arise from the conversion of tussock land for more intensive agricultural use;
- The effect the change in use of this land due to irrigation will have on the public's perception and affinity with this area.
- The derogation of the entire Basins high natural qualities, amenity values and scenic views which will result if the applications are granted.

13.4 In contrast landscape assessments for the various applications conclude that their various individual sites are not outstanding and that the irrigation and change in land use of this land is therefore not inappropriate. This view is heavily reliant on emphasising the derogation of naturalness 'on the ground' of the proposal site and its environs. Any modification of individual sites themselves is not apparent or even visible from the many views of these properties. Overall there is continuity in the high degree of naturalness over the whole Mackenzie Basin area.

13.5 Ms Lucas recognises the important relationship and structural inter-play of the waterways with the vast open expanse of tussock high-country across the Basin. This perceptual relationship is experienced by viewers both from within, outside and above the Basin.

13.6 Separation of the various application sites by listing the modifications or suggested areas of derogation, or artificially drawing these lines based on the District Plan fails to acknowledge the role of each site within the context of the wider landscape and its contribution to the whole.

13.7 The important contribution of a particular landscape element to part of a wider outstanding landscape was noted in *Wakatipu (above)*. The Court noted at paragraph 59:

*"When considering the issue of outstanding natural landscapes we must bear in mind that some hillsides, faces and foregrounds*

*are not in themselves outstanding natural features or landscapes, but looked at as a whole together with other features that are, they become part of a whole that is greater than the sum of its parts. To individual landowners who look at their house, pasture, shelterbelts and sheds and cannot believe that their land is outstanding natural landscape we point out that the land is part of an outstanding natural landscape and questions of the wide context and of scale need to be considered. The answer to the question where the outstanding natural landscapes and features end is not a technical one. It is a robust practical decision based on the importance of foregrounds in (views of) landscapes. We do not consider this over-emphasises the pictorial aspects of landscape, merely uses them as a determinative tool."*

- 13.8 The Court accepted that an area that is not outstanding in itself can contribute and be part of a wider outstanding landscape. In this case it is the vast emptiness, naturalness and openness of the wider basin landscape which makes it so highly valued by so many. It is highly distinct.

**(b) "Outstanding"**

- 13.9 It is clear a certain level of significance is required of a landscape before it can be said to be "outstanding" for the purposes of section 6(b).
- 13.10 In *Arrigato Investments* the Environment Court considered at paragraph 75:

*"Outstanding" is defined in the Concise Oxford Dictionary as "conspicuous, eminent, esp. because of excellence". The word is an adjective of some considerable strength..."*

- 13.11 It is the Guardians submission that the Mackenzie Basin is Canterbury's largest single outstanding landscape which is recognised on a District, Regional, National and International scale as "*outstanding*."

**14 "Natural"**

- 14.1 It is accepted that to qualify under section 6(b) a landscape must not only be outstanding; it must also be "natural".

14.2 In the first *Wakatipu* decision the Court noted at paragraph [89] that the criteria of naturalness under the RMA include:

- (a) The physical landform and relief;
- (b) The landscape being uncluttered by structures and/or “obvious” human influence;
- (c) The presence of water (lakes, rivers, seas);
- (d) The vegetation (especially native vegetation) and other ecological patterns;

14.3 The first of these criteria of naturalness was extended by the Court in *Long-Bay-Okura Great Park Society v North Shore City Council* A078/2008, paragraph 135 to:

- (a) *Relatively unmodified and legible physical landform and relief;*

14.4 The various landscape assessments for the applicants generally consider that the modified nature of the site and immediate environs prevent the whole Basin from being an ONL this is incorrect.

14.5 The Court in *Unison Networks Ltd v Hastings SC* Environment Court W011/09, 23 February 2009 Bollard J and in *Long bay – Okura Great Park Society Incorporated v North Shore City Council* [decision A78/2008 Judge Jackson (presiding) have both considered the meaning of “naturalness” and confirmed the interpretation of the Planning Tribunal in *Harrison v Tasman District Council* [1994] NZRMA 193 at paragraph [135]:

*‘The word “natural” does not necessarily equate to the word “pristine” except in so far as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word “natural” is a word indicating a product of nature and can include such things as pasture, exotic tree species*

*(pine) wildlife [...] and many other things of that ilk as opposed to manmade structures, roads, machinery.'*

- 14.6 The cumulative effect of the current Applications would irreparably destroy a landscape which is one of New Zealand's few preserved and significantly natural examples of lowland high-country tussock land.

**15. Is the proposed development inappropriate?**

- 15.1 Section 6(b) does not protect outstanding landscapes from all subdivision, use and development but only from that which is inappropriate. In *Richard Henry Estate Limited v Southland DC* EnvC C22/2003 at paragraph [60] the Court held that development becomes inappropriate:

*"when it diminishes in any significant way the outstanding natural landscape or the reasonable person's perception of it."*

- 15.2 In *Gannet Beach Adventures Ltd v Hastings DC* [2005] NZRMA 311 (*The Cape Kidnappers Decision*) the Court at paragraph [61] noted that:

*"the question isn't whether the development might be visible at all, but rather whether its visible presence, including all mitigation measures, would lower, to a lesser desirable level, the qualities that make this feature outstanding. If the answer to that question is positive, then the effects are both adverse and more than minor."*

- 15.3 The Guardian's submit that the cumulative effect of the current applications will be to significantly diminish the "outstanding" or "natural" character of the Mackenzie Basin and the reasonable person's perception of it. The changes to the Basin as a result of irrigation will be permanent and irreparable.

**16. Ms Steven's evidence**

- 16.1 Ms Steven will give evidence as to the general adverse effects of irrigation on the landscape, including:

- The ploughing cultivation and sowing of land in exotic pasture crop species;
- Removal of existing vegetation including irreversible loss of indigenous species and destruction of habitats;
- disturbance of previously undisturbed soil types and Smoothing out of landforms and surface terrain (legibility);
- Fundamental loss of character and distinctiveness of the landscape changing from highly natural wilderness to a working landscape; and
- Scarring of the land through more intensive stocking, fences, canals, drains etc.

16.2 She will also discuss the specific landscape effects that arise on the Mary Burn, Simons Hill, Simons Pass and Killermont Application Sites. In her opinion generally the application will:

- Coincide with areas of significant landscape value including ecological, geomorphic and historical values which could not be sustained under the proposed development;
- There would be a shift in the actual and perceived naturalness of the landscape to a substantially lower degree of naturalness, outside of areas already cultivated and developed;
- Irretrievable loss of opportunity to restore degraded elements of the Basin to more natural landscapes that would make an enhanced contribution to the natural character of the Basin.

16.3 The change in landscape character and natural character of the Basin would be immediately apparent. This will be discussed in more detail by Ms Lucas.

## 17 Threshold of development in highly natural areas

17.1 It is considered that a low threshold of use or development is required in an outstanding natural landscape before adverse visual effects are caused. (*Kaikaiawaro* at paragraph 120 as outlined above).

17.2 In the “*Cape Kidnappers*” decision the Court recognised the iconic status of the Cape at paragraph [55]:

*“No doubt it is one of the most recognisable places in the country and is generally regarded as an iconic treasure. [...] International and local tourists pay tribute to its sense of remoteness and natural beauty”.*

17.3 These comments could equally apply to the Mackenzie Basin. The sites of the applications form part of a landscape which is undoubtedly a truly ‘iconic’ New Zealand landscape on a regional, national and international scale. It forms an important part of a wider landscape which features in many films, books and pictures of New Zealand landscapes, it influences artists (evidence of painters Graham Sydney, Jane Zusters, Poet Brian Turner and in the evidence of Ms Lucas) and is a landscape greatly appreciated and visited by people within New Zealand and internationally as noted in the statements of the Chief Executive and Advocacy Manager of the NZ Tourism Industry Foundation which discuss the importance of the Basin to New Zealand tourism and statement of Location Scout Graham Thompson which illustrates how sought after the Basin landscape/ setting is internationally.

17.4 The Environment Court has previously indicated that iconic natural landscapes have a lower ability (than other ONLF) to absorb development, before it is considered inappropriate. At paragraph 71 of the *Cape Kidnappers* decision the Court stated:

*“No amount of mitigation will prevent a development of this kind and scale having more than minor adverse effects on the environment of such as place. The Cape, and particularly the area broadly covered by the ONF overlay, is a unique, iconic landscape with intense amenity values. It takes very little that is man-made to jar there.”*

**18. Section 6(c)**

18.1 Section 6(c) requires the Commissioners to recognise and provide for:

*‘the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;’*

18.2 Dr Walker has evaluated the indigenous flora and fauna of the Mackenzie Basin in relation to the relevant policies and commonly used criteria to assess ‘significance’ outlined in *Minister of Conservation v Western Bay of Plenty DC EnvC A07/01*:

- (a) Representativeness (extent of range of genetic and ecological diversity);
- (b) Diversity and pattern (in relation to ecosystems, species and landforms);
- (c) Rarity factors/ special features;
- (d) Naturalness/ intactness; size and shape (affecting the long term viability of the species, communities and ecosystems, and amount of biodiversity);
- (e) Inherent ecological viability/ long term sustainability;
- (e) Relationship between natural areas and other areas of mere modified character; and
- (f) Vulnerability of the site; management input required to maintain or enhance an area’s significance.

18.3 Dr Walker has also assessed the applications in relation to both s6(c) section 7 (d) which directs decisionmakers to have regard to the

*'intrinsic values of ecosystems,'* and has concluded that the indigenous vegetation of the Mackenzie Basin is over and above the criteria of significance which triggers protection. Dr Walker is of the opinion that:

- Mackenzie Basin is biographically distinct and important;
- it contains New Zealand's most extensive and intact sequence of low lying, naturally rare and terrestrial ecosystems;
- These areas support less developed indigenous communities which are still predominantly natural in character including several of New Zealand's most endangered species;
- Many of the remaining low-lying less developed grassland areas contain species which are distinctive and mainly or wholly confined to the Mackenzie Basin and almost entirely comprised of naturally rare ecosystems;
- These ecosystems are irreplaceable and extremely vulnerable to ongoing loss; and
- Protection of these ecosystems and significant vegetation is an issue on an international basis.

18.4 Dr Walker considers that *the applications will result in permanent net loss of significant vegetation and habitats for indigenous fauna that cannot be mitigated or reconstructed.'*

18.5 It should be noted that when considering s 6 (c) protection is the imperative element of this provision and not whether it is inappropriate. (See *Royal Forest and Bird Protection Society of NZ v Manawatu – Wanganui RC* [1996] NZRMA PT. The Environment Court has noted in *Minister of Conservation v Hutt CC EnvC W013/03* that a local authority is under a statutory obligation to take appropriate steps to ensure the

protection of the specified values, areas of significant indigenous flora and fauna and significant habitats of flora and fauna.

**19. Section 6(f)**

19.1 Section 6(f) is also considered relevant to these applications. Ms Lucas and Ms Steven discuss the historic heritage of the Mackenzie Basin, the historical significance of this area to Maori and Pakeha and the likely impact of the applications. You will also hear a submission from Mr McCarthy in this regard.

19.2 The cultural impact assessment by Ms Gail Tipa addresses the significance of these natural lands to Ngati Tahu. The Guardians are very concerned at the anticipated adverse effects on the historic heritage of the lands and waters of the Basin that would result from the applications.

**20. Section 104 of the RMA**

20.1 The various applications have differing RMA status under the relevant plans. ECAN has not taken a bundling approach to the applications. Therefore some are to be assessed as discretionary activities and others as non-complying.

**(a) Discretionary activities**

20.2 Section 104 of the RMA sets out the issues required to be considered by the consent authority in relation to discretionary activities, it states the following:

*' (1) when considering an application for a resource consent and any submissions received, the consent authority must, subject to part 2, have regard to:*

*(a) any actual and potential effects on the environment of allowing the activity; and*

- (b) *any relevant provisions of-*
  - (i) *a National Policy Statement*
  - (ii) *a New Zealand Coastal Policy Statement*
  - (iii) *a Regional Policy Statement or proposed Regional Policy Statement;*
  - (iv) *a Plan or Proposed plan; and*
- (c) *any other matters the consent authority considers relevant and reasonably necessary to determine the application.'*

20.3 Section 104B of the RMA states:

*'After considering an application for a resource consent for a discretionary activity [...] a consent authority –*

- (a) *May grant or refuse the application; and*
- (b) *if it grants the application, may impose conditions under s8.'*

20.4 Unless the applications to be processed as being discretionary activities passes either threshold test in s 104 it cannot be considered under s. 104 and Part 2 of the Act. It is considered that the applications are unable to pass either of the threshold tests.

**(b) First limb – adverse effects more than minor**

20.5 The adverse effects which the Guardians say will arise from these applications are more than minor and cannot be mitigated to an acceptable level. These detrimental adverse effects have been outlined briefly and will be dealt with in detail by its experts.

- It is clear from the evidence of Ms Lucas that the actual and potential adverse effects on the Mackenzie Basin landscape an ONL will be more than minor;
- Ms Steven has outlined the general effects that irrigation has on the landscape and assessed these in relation to the Mary Burn, Simons Hill, Simons Pass and Killermont Application Sites concluding that implementation of the consents sought will result in significant adverse effects;
- The Evidence of Dr Susan Walker describes the unique plant ecological attributes of the Upper Waitaki Basin and explains how the irrigation of this area would result in irreparably harm to threatened indigenous vegetation and ecosystems;
- The statements of the Tourism Industry Federation, Alpine Recreation, and Tussock and Beech Ecotours describe how the application is likely to adversely affect tourism and amenity in the area
- the statements of artists Graham Sydney, Poet Brian Turner, Location Scout Graham Thompson and Actor Sam Neill all discuss the important role of the Mackenzie Basin in the Country's cultural fabric and how the applications will impact on this;

**(c) *Second limb –policies and objectives of Plan***

- 20.6 The second limb of Section 104 requires the Commissioners to determine whether the proposal is contrary to the policies and objectives of any regional policy statement, plan or proposed plan.
- 20.7 The Guardians has adopted the planning evidence of Fish and Game, and Forest and Bird in this respect. It experts have also identified specific policies which relate to their area of expertise and have

concluded that the applications are contrary to, or are inconsistent with the relevant policies, statements and plans.

**(d) Other Matters**

20.8 The Guardians experts identify various non-statutory guidelines and documents are relevant to these applications as well as the statutory framework of the Crown Pastoral Lands Act with regards to the applications or Pastoral Lease lands.

**(e) Non-Complying Activities**

20.9 It is noted that some applications are to be assessed as non-complying activities under s 104(D). Applications assessed on this basis may only be granted if you are satisfied that the adverse effects of the activity on the environment will be no more than minor; and the application is for an activity which will not be contrary to the objectives and policies of any relevant operative or proposed plan in respect of that activity.

20.10 For the reasons already outlined the Guardians consider that the adverse effects of the applications will be more than minor and that the applications are contrary to the relevant plans and therefore should be declined.

**21 Section 5 of the RMA**

21.1 It remains for the Commissioners to exercise their judgment and find a balance of all the competing and conflicting factors in respect of the Applications and section 5 of the Act and other Part II considerations.

21.2 The proper application of section 5 involves an overall judgement of whether or not the proposed wind farm promotes the sustainable management of natural and physical resources (*Genesis Power Limited v Franklin District Council* [2005] NZRMA 541, paragraph [51], *Aqua Marine Limited v Southland Regional Council* 3 NZREDI (C126/1997), 141 endorsed in *Independent News v Manukau City Council* (EC Dec A103/2003) and *Ngati Rangī Trust v Manawatu-Wanganui Regional*

*Council* (EC Dec A67/2004).

- 21.3 That judgment requires a comparison of all the conflicting considerations and the scale or degree of them, and their relative significance to the final outcome (*North Shore City Council v Auckland Regional Council* [1997] NZRMA 59,93; *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70,72).
- 21.4 Ultimately it is a matter of weighing the relative scale and significance of the beneficial and adverse effects in achieving sustainable management (*Motorimu Wind Farm Limited* (above) para 361).
- 21.5 The applicants have also raised s 7 matters in support of their applications. Where there are competing s6 and 7 matters as is the case here then it is the responsibility of decision makers to weigh the significance of the competing interests in all the circumstances of the case (*Kaitiaki Tarawera Inc v Rotorua DC* EnvC A7/98).
- 21.6 How this balance is to be achieved was outlined by the Court in *Meridian energy ltd v wellington* CC 2007/ W073:

[449] *We mentioned earlier the statutory hierarchy between sections 6, 7 and 8, and we agree that the scheme of the Act in assigning national importance particular regard and take into account to those sections respectively gives them an internal ranking. But that cannot mean that, where there are conflicting values as between, say, a s 6 factor and a s 7 factor, the s 6 factor must prevail because in terms of s 6(a) and s 6(b) the issues raised have to be placed in the context of whether or not the project is appropriate or not. Also all Part 2 factors are subservient to the s 5 purpose of sustainable management and go to inform the overall discretionary exercise required by s 5.*

21.7 The Guardians say sections 6(a)(b)(c) and s 7(b)(c)(d)(f) and (g) are key matters in this case. Primarily it is submitted that the applications will constitute an inappropriate use and development of the Mackenzie Basin, an outstanding natural landscape which contains areas of significant indigenous vegetations and lakes, rivers and their margins of high natural character which are worthy of protection as a matter of national importance.

21.8 The various applicants also identify ss 7(b)(g)and (j)as being relevant to their applications arguing that the positive benefits of their applications are efficient use of resources as they will enhance productivity of their land and provide for their economic wellbeing. It is also suggested that irrigation of this area with readily available water will guard against the dangers posed by climate change.

21.9 It is noted that some of the applications intend to use the land for dairying. The Guardians consider that this is an inefficient use of both the land and water resource.

21.10 The Mackenzie Basin is dominated by thin gravel soils, at a high elevation with a short growing season. It is likely that supplementary feed will need to be brought in and the area is also located several hours from milk processing plants. This renders it unsuitable for use for intensive dairying. In light of the recent Environment Court decision in *Hayes* it is considered that because the applications raise matters of National Importance a Cost/ Risk Benefit analysis should be undertaken to assist with determining whether or not the application is actually an efficient use of resources.

21.11 The Court in *Genesis Power Limited v Franklin District Council* (the Awhitu decision) noted that what constitutes protection and what constitutes inappropriate development is a judgment to be carried out by evaluating its findings of fact guided by section 5. The Court went on to note at paragraph [220] that an analysis of what is “appropriate” development must also take into account section 7 matters, being matters to which the Court should pay “particular regard.”

## **22. Competing s6 and s7 matters**

22.1 It is submitted that when weighed against the nationally important issue of protection of outstanding natural landscapes, significant indigenous vegetation and the natural character of waterways, rivers and streams the individual benefits of the applications are not superior and cannot be at the complete expense of other such matters. The evidence of the Society is that the applications will result in irreparable and irreversible harm and in this particular case the balance tips in favour of the protection of what is without doubt an outstanding natural landscape, from what would most certainly be inappropriate development on that landscape. Issues of efficiency and economic gains (for a few individuals) expected from increased productivity of the irrigated land simply do not justify granting this proposal.

## **23. Conclusion**

23.1 In conclusion, it is submitted for the Guardians that:

- a. The applications constitute an inappropriate use and development of an outstanding natural landscape;
- b. The applications would create irreparable adverse effects which are more than minor;
- c. The applications are not consistent with the policies and objectives of the district and regional plans;
- d. The applications do not promote the sustainable management of natural and physical resources.

23.2 In those circumstances the only avenue open to the Commissioners is to decline all of the Applications in their entirety.

23.3 Should the Commissioners be inclined to grant consent to any of the applications, it is requested that the decision be by way of an interim decision and the Society be provided an opportunity to contribute to the development of conditions.

## **24 Evidence**

24.1 The following witnesses will be called on behalf of the Guardians:

- a. Ms Jane Zusters (an artist who will be showing a short film);
- b. Dr Susan Walker (plant ecologist);
- c. Ms Di Lucas (landscape architect);
- d. Ms Anne Steven (landscape architect);
- e. Mr John Smithies (Ohau Conservation Trust Chair);
- f. Mr Albert and Mrs Jenn McCarthy.

24.2 The following statements will also be presented on behalf of the Guardians:

- a. Mr Geoff Ensor - Tourism Industry Assn NZ
- b. Mr Grahame Sydney – Artist
- c. Mr Sam Neill – Actor
- d. Mr Graham Thompson – Location Scout
- e. Ms Anne Braun-Elwert – resident, Tekapo
- f. Alpine Recreation –Ms Anne Braun-Elwert
- g. Mr Stephen Carswell
- h. Mr Brian Turner – writer, poet
- i. Mr Warren Jowett – Tussock and Beech Ecotours

**Signed:** \_\_\_\_\_ **Dated:** \_\_\_\_\_ of December 2009.

**P D TANCOCK**  
**Counsel for the Mackenzie Guardians Society Inc.**

