

**IN THE MATTER OF**

The Resource Management Act 1991

**AND**

**IN THE MATTER OF**

Consent review of Water Permit CRC952441 under section 128(1)(b).

**BETWEEN**

**MR C.D. AND MRS L.A. GALLOWAY**  
**Consent Holder**

**AND**

**CANTERBURY REGIONAL COUNCIL**  
**Consent Authority**

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**REPORT AND DECISION OF HEARING COMMISSIONERS**

**Sharon McGarry and Hoani Lansbury**

**15 July 2021**

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Heard on the 9 April 2021  
in the Gallery, Hotel Ashburton, Racecourse Road, Ashburton.

## **Representations and Appearances**

### **Applicant:**

**Mr B. Williams**, Counsel (Chapman Tripp)

**Mr C. and Mrs L. Galloway**, Consent Holders

**Mr L. Webb**, neighbour

**Mr M. Bubb**, Water Resources Engineer (Aqualinc Limited)

**Mr R. Polson**, Farm Advisor (Lauriston Farm Improvement Club)

### **Submitters**

**Mr C. Allen**

**New Zealand Fish and Game Council - Ms A. Christensen**

**Save the River Mid Canterbury Incorporated - Mr M. Hall**

**Te Rūnanga o Ngāi Tahu and Te Rūnanga o Arowhenua**

- **Ms. T. Davidson**, Senior Environmental Policy Advisor for Aoraki Environmental Consultancy
- **Mr V.K. Russell**, on behalf of Kāti Huirapa

**Queen Elizabeth the Second National Trust - Mr M. Lucas** (via the internet)

### **Section 42A Reporting Officers:**

**Ms G. Ensor**, Environmental Consultant (Enviser Limited)

- **Dr A. Meredith**, Principal Surface Water Scientist (Canterbury Regional Council)
- **Ms J. Topélen**, Senior Scientist – Hydrology (Canterbury Regional Council)
- **Mr D. Ashby**, Rural Consultant

**For the above reasons, it is the decision of the Canterbury Regional Council, pursuant to sections 131 and 132, and subject to Part 2 of the Resource Management Act 1991, to GRANT consent review CRC200269, which is a review of water permit CRC952441, to impose the conditions proposed by the CRC and not the alternative conditions proposed by the consent holder. The conditions subject to this decision are set out in Appendix 1 of this decision. The new conditions are shown with underline.**

## BACKGROUND AND PROCEDURAL MATTERS

1. This is the report and decision of independent Hearing Commissioners Ms Sharon McGarry (Chair) and Mr Hoani Lansbury. We were delegated powers and functions<sup>1</sup> by the Canterbury Regional Council (**CRC** or ‘the Council’) to hear and decide a consent review of Water Permit CRC952441 held by Mr C.D. and Mrs L.A. Galloway (‘the Consent Holders’) pursuant to section 128(1)(b) of the Resource Management Act 1991 (**RMA** or ‘the Act’).
2. Notice of the consent review was served on the Consent Holders on 18 July 2019. The Consent Holders were invited to proposed alternative new conditions.<sup>2</sup> The timeframe for a response was doubled by the CRC from 20 working days to 40 working days.
3. The Consent Holders subsequently requested and were granted two further extensions to the timeframe for a response until 12 October 2020.
4. On 25 September 2020, the Consent Holders provided an alternative new minimum flow condition, proposing restrictions on the taking of water subject to minimum flow conditions in the Ashburton River mainstem only.
5. The Consent Holders’ alternative new minimum flow condition proposed was publicly notified on 7 November 2020. Eight submissions were received within the submission period; with six submissions opposed, one in support and one neutral to the alternative minimum flows. Seven submissions indicated that they wished to be heard.
6. Prior to the hearing, a report was produced pursuant to section 42A of the Act by CRC’s Reporting Officer Ms Gillian Ensor. This ‘s42A Report’ included technical review of the application and written reports by Ms Jeanine Topélen, Senior Scientist for CRC (Appendix 2), Dr Adrian Meredith, Principal Surface Water Scientist for CRC (Appendix 3), and Mr Dave Ashby, a Farm Consultant (Appendix 4). It also included a set of new recommended conditions (Appendix 5) and a memorandum from Wynn Williams in relation to legal interpretation of section 131 of the Act (Appendix 6).
7. The s42A Report provided an analysis of the matters requiring consideration and recommended the resource consent review should be granted subject to the minimum flow conditions proposed to implement the Canterbury Land and Water Regional Plan (**LWRP**). The s42A Report, the Consent Holders’ expert evidence and submitters’ expert evidence was pre-circulated prior to the hearing<sup>3</sup>. This evidence was pre-read by us and was ‘taken as read’ at the hearing.
8. The hearing commenced at 9.30 am on Friday 9 April 2021 and was adjourned at 6.10 pm the same day to enable the provision of further information and for the Consent Holders to provide a written right of reply.

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<sup>1</sup> Under section 34A of the Resource Management Act 1991

<sup>2</sup> In accordance with section 129(1)(d).

<sup>3</sup> In accordance with section 103B of the Act

9. We did not undertake a site visit given the nature of the review conditions and on the advice of the hearing parties.
10. At the adjournment of the hearing, we directed the provision of further information by the Consent Holders and Council Officers. This further information was promptly provided the following week.
11. We directed the Consent Holder to provide a written right of reply by 18 June 2021. Mr Williams subsequently requested an extension to provide a written right of reply on 25 June 2021, to enable further discussions with Council Officers. He also noted the Consent Holders had been adversely impacted by recent flooding events. We agreed to this request.
12. Mr Williams provided a written right of reply on behalf of the Consent Holders on 21 June 2021. We closed the hearing on 24 June 2021.

### **WATER PERMIT CRC952441**

13. Water Permit CRC952441 to take and use water for the irrigation of 150 hectares (**ha**) was granted in 1995 and expires on 9 November 2030. The taking of water for irrigation under the existing consent is restricted by a variable monthly minimum flow in the Ashburton mainstem at the State Highway 1 (**SH1**) bridge. The s42A Report summarised the consented activity as follows:

- a. The taking of water from the North Branch at or about map reference K36:954-204 or from springs at or about map reference K36:956-198, via an open channel, at a rate not exceeding 240 litres per second (**L/s**), with a volume not exceeding 111,750 cubic metres in any 21 consecutive days;
- b. Water can be used for irrigation of up to 150 hectares (**ha**), using a border-dyke irrigation system;
- c. The taking of water must cease when the flow in the Ashburton River, at the State Highway 1 Bridge recorder site, falls below the following flow rates:

<b>Month</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr-Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>Flow (m<sup>3</sup>/s)</b>	4.5	3.5	3.5	5.0	6.5	8.0	8.0	6.5	5.0

- d. The taking of water must be reduced to 50% of the allocation when the flow in the Ashburton River, at the State Highway 1 Bridge recorder site, falls below the following flow rates:

<b>Month</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr-Jul</b>	<b>Aug</b>	<b>Sept</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>
<b>Flow (m<sup>3</sup>/s)</b>	5.0	4.0	4.0	5.5	7.0	8.5	8.5	7.0	5.5

- e. The hours and rate of take are to be measured and recorded in a daily log and a copy of the records provided to the CRC annually.

14. Figure 1 of the s42A Report is shown below:

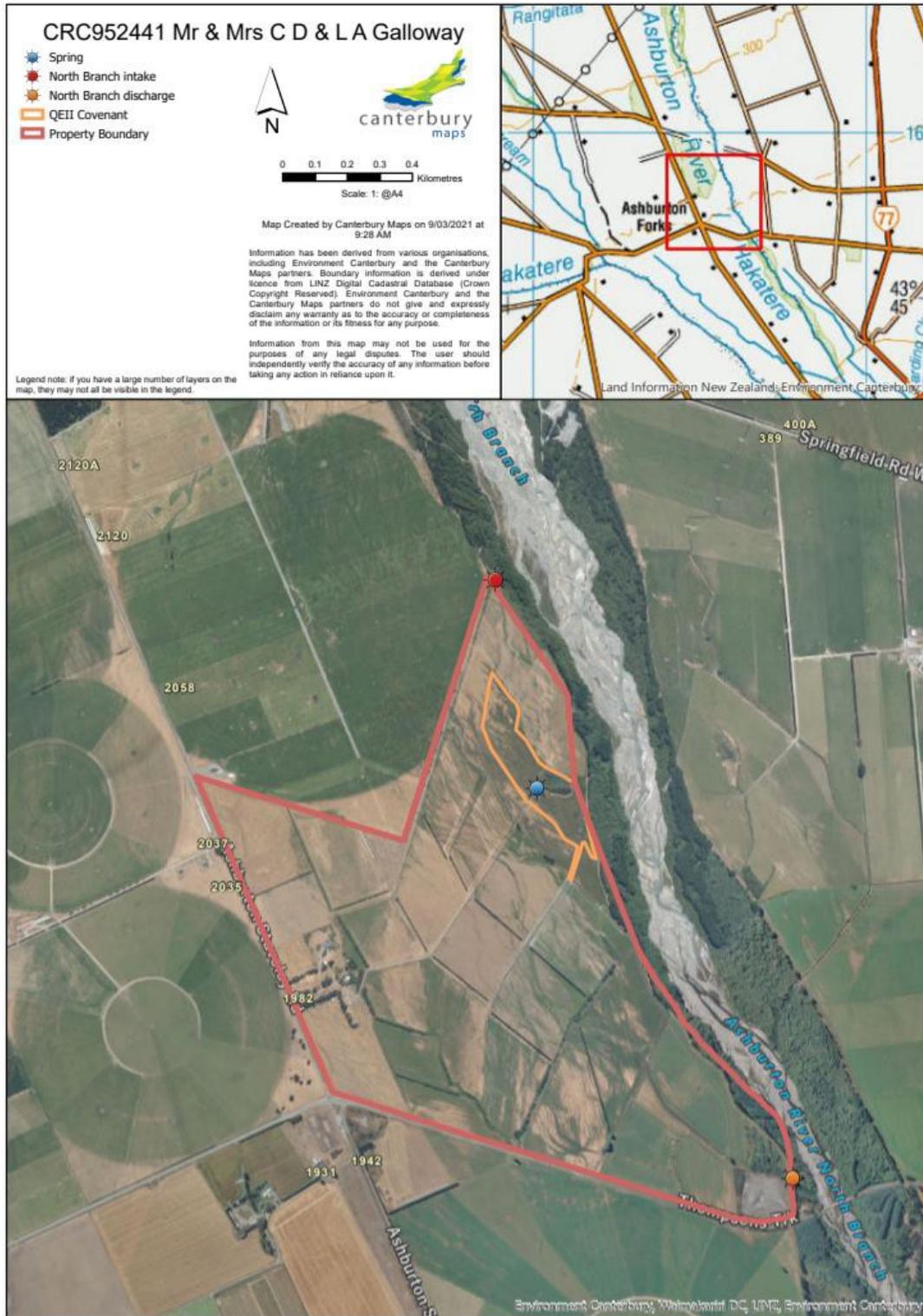


Figure 1: Location of Consent Holders' property, North Branch intake and spring locations, point of discharge to North Branch Ashburton River, and QEII covenant boundary.

## HAKATERE/ASHBURTON RIVER CATCHMENT RESOURCE CONSENT REVIEW 2019

15. The CRC is currently undertaking reviews of 90 resource consents in the Hakatere/Ashburton River catchment to implement the LWRP minimum flow regime set out in Table 13(b) to be met from 1 July 2023 and the water metering and telemetry provisions.
16. Policy 13.4.9 of the LWRP provides for the consent review process prior to 1 July 2023 as the best method to ensure equity in the catchment in achieving the outcomes of the Ashburton Water Zone Committee's Zone Implementation Programme 2011 (ZIP)<sup>4</sup> and the objectives in the LWRP. It is acknowledged that the benefits to the environment envisaged by the LWRP will only be realised when all resource consents for all surface water takes and hydraulically connected groundwater takes are subject to the LWRP minimum flows.
17. The CRC has been working on the consent review process with the Ashburton Water Zone Committee to ensure the review meets the outcomes of the LWRP and to engage with consent holders and the community throughout the review process. Consent holders affected by the consent review were served formal written notice and received an information booklet<sup>5</sup> summarising CRC's assessment of the impact of the minimum flow changes for each of the eight surface water abstraction zones in the Hakatere/Ashburton River catchment.
18. In the North Branch, 25 resource consent holders were sent notice of the review; eight consents are for direct surface water takes and 17 are for groundwater takes connected to surface water.
19. The CRC proposes to insert a new condition restricting the taking of water under minimum flow conditions in the North Branch sub-catchment and the Ashburton River mainstem; and a new condition requiring water metering and telemetry to ensure actual water usage is accurately measured and recorded. No alternative condition is proposed by the Consent Holders to the water metering and telemetry condition proposed by CRC.
20. The new condition to implement the LWRP minimum flows proposed by the CRC is as follows:

*Notwithstanding any other flow restriction contained within the conditions of this consent, from July 1 2023:*

  - a. *Whenever the flow in the North Branch of the Ashburton River, is at or below 1,000 litres per second, there shall be no taking of water in terms of this permit during the next succeeding day.*
  - b. *Whenever the flow in the mainstem of the Ashburton River is:*
    - i. *at or below 7,275 litres per second, the taking of water shall be subject to a reduction of take during the next succeeding day as set in Table 1*

<sup>4</sup> Under the Canterbury Water Management Strategy.

<sup>5</sup> 'Hakatere/Ashburton River catchment resource consent review 2019: Information for consent holders: Impacts of the consent reviews on water availability.'

below.

- ii. at or below 6,000 litres per second, there shall be no taking of water in terms of this permit during the next succeeding day.
- c. For the purposes of this condition:
  - i. the flow in the North Branch of the Ashburton River shall be the mean flow as estimated by the Canterbury Regional Council at the South Branch confluence at approximately map reference Topo50 BY21:976-401, for the 24 hour period ending at noon on any one day.
  - ii. the flow in the mainstem of the Ashburton River shall be the mean flow as estimated by the Canterbury Regional Council in the Ashburton River at the State Highway 1 Bridge recorder site located at map reference Topo50 BY21:999-351, for the 24 hour period ending at noon on any one day.

<b>Table 1</b>	
Flow in River (litres per second)	Reduction in take
At or below 7,275	25 %
At or below 6,850	50 %
At or below 6,425	75 %

**Advice Note:** The environmental flow regime specified in this condition takes effect from the 1<sup>st</sup> of July 2023. Until such time, the consent holder is subject to any existing restrictions on their consent that relates to minimum flow restrictions. As of this date, those conditions shall cease to apply and instead the abstraction will be managed on this flow regime. The allocation limits in this consent are not altered by this condition.

**Advice Note 2:** The minimum flow restrictions in clause (a) and (b) of this condition both apply. The consent holder must not take water when either of the minimum flow restrictions are triggered.

## ALTERNATIVE NEW MINIMUM FLOW CONDITION PROPOSED BY CONSENT HOLDERS

- 21. The information submitted to the CRC to support the alternative minimum flow proposed by the Consent Holders was included in an email on 25 September 2020. The s42A Report summarised the key matters from that email as follows:
  - a. The CRC proposed new minimum flow would result in an increase in the number of days on partial and full restriction. The consent holders believe the number of days that water would be able to be taken would reduce from approximately 20 days (1 day per week for the irrigation season) to 6 days (4 days between October and December and 2 days between January and early April).
  - b. The proposed new minimum flow site, on the North Branch Ashburton River above the confluence, “will deem the existing consent totally worthless”.
  - c. The proposed restrictions would equate to approximately \$56,000 loss in economic return per year, based on 100 hectares (ha) irrigated with a loss of \$560/ha/year.
  - d. The “property will lose most of its existing right to irrigate out of the North

*Branch of the Ashburton River following the introduction of the new minimum flow”.*

- e. The property will *“lose at least 70% of its annual irrigation ability with the new minimum flows and more importantly, the autumn irrigation availability will be almost nil in most years.”*
  - f. The Consent Holders consider that by being subject to the Ashburton River mainstem minimum flow only, and not the North Branch minimum flow as well, this will *“still deliver some irrigation water in the all important autumn time”.*
22. The s42A Report noted that the Consent Holders did not provide an assessment of the effects of the proposed alternative new minimum flow or an assessment of the alternative minimum flow against the relevant LWRP provisions. It acknowledged that there is no requirement under the Act for the Consent Holders to provide such assessments or any mechanism for a consent authority to request them.
23. The Reporting Officer drafted the following wording for the alternative minimum flow condition proposed by the Consent Holders:

*Notwithstanding any other flow restriction contained within the conditions of this consent, from July 1 2023:*

- a. *whenever the flow in the mainstem of the Ashburton River is at or below 7,275 litres per second, the taking of water shall be subject to a reduction of take during the next succeeding day as set in Table 1 below.*
- b. *whenever the flow in the mainstem of the Ashburton River is at or below 6,000 litres per second, there shall be no taking of water in terms of this permit during the next succeeding day.*
- c. *For the purposes of this condition the flow in the mainstem of the Ashburton River shall be the mean flow as estimated by the Canterbury Regional Council in the Ashburton River at the State Highway 1 Bridge recorder site located at map reference Topo50 BY21:999-351, for the 24 hour period ending at noon on any one day.*

<b>Table 1</b>	
<i>Flow in River (litres per second)</i>	<i>Reduction in take</i>
<i>At or below 7,275</i>	<i>25 %</i>
<i>At or below 6,850</i>	<i>50 %</i>
<i>At or below 6,425</i>	<i>75 %</i>

**Advice Note:** *The environmental flow regime specified in this condition takes effect from the 1<sup>st</sup> of July 2023. Until such time, the consent holder is subject to any existing restrictions on their consent that relates to minimum flow restrictions. As of this date, those conditions shall cease to apply and instead the abstraction will be managed on this flow regime. The allocation limits in this consent are not altered by this condition.*

## DESCRIPTION OF THE AFFECTED ENVIRONMENT

24. A description of the affected environment was set out in the s42A Report. This should be read in conjunction with this decision. The s42A Report referred to the decision makers' report on the LWRP and the ZIP.
25. We adopt<sup>6</sup> the summary of the main points in the s42A Report for the purpose of our assessment. We note the consent site is within the Ashburton Water Zone under the LWRP. Section 13 of the LWRP includes an overview of the natural and physical resources and the communities within the catchment.
26. Surface water and groundwater quality in the catchment is degraded. Surface water and groundwater is deemed to be overallocated under the limits of the LWRP and water flows and groundwater levels show a declining trend. The consent review does not address the overallocation of water resources in the catchment. The lower reaches of the Hakatere/Ashburton River and its mouth/hāpua are adversely affected by water quality and quantity stressors.
27. The CRC information booklet summarised the North Branch Ashburton River surface water allocation zone water availability information (pages 9-10) and Table 4 showed the estimated number of days and duration on restriction for consent holders that take water from the North Branch with the current SH1 minimum flows and the proposed LWRP minimum flows.
28. The CRC information booklet stated that the river reach from Shearers Road (below the confluence of O'Shea Creek) to Digby's Road frequently dries, sometimes completely, and that Mt Harding Creek joins the North Branch partly down this dry reach. It noted that over half of the water taken from the North Branch is for stockwater. It stated that a large amount of shallow groundwater is abstracted under consents without minimum flow restrictions.
29. The Hakatere/Ashburton River supports high indigenous ecological values, a sports fishery and recreational values. It has a high abundance of rare and threatened river nesting birds, threatened fish species, diverse native fish species and important mahinga kai species, such as tuna/eels and kanakana/lamprey.
30. The Hakatere/Ashburton River is a Statutory Acknowledgement Area under the Ngāi Tahu Claims Settlement Act 1998. Three Rūnanga consider the Ashburton Water Zone part of their takiwā – Arowhenua, Taumutu and Ngāi Tūāhuriri.
31. The catchment is in the Department of Conservation (**DOC**) conservancy area of Ruapakupa and the Hakatere/Ashburton River is a DOC site of special wildlife significance, land of national significance and a recommended area of protection.
32. The Consent Holders' property is located adjacent to the North Branch in its upper reaches. The springs, which the Consent Holders are authorised to take water from are located in

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<sup>6</sup> In accordance with section 113(3).

the wetland area that is part of a QEII covenant on the property. The QEII covenant which is known as the 'Galloway Wetland' has particularly high indigenous biodiversity values containing 33 indigenous species, including pukio-toetoe swamp and is the only known site of an indigenous orchid (*Spiranthese australis*, current threat status: 'At Risk-Declining').

## SUBMISSIONS

33. The submissions were summarised in the s42A Report and should be read in conjunction with this decision.
34. All six submissions opposed to the alternative minimum flow condition seek imposition of the LWRP minimum flows, as proposed through the CRC review process.
35. One submission supported the proposed alternative minimum flow because of the science used to set the minimum flows and derogation of the existing consent.
36. The neutral submission from the Ashburton District Council highlighted that any used (but consented) stockwater allocation cannot be taken into account as mitigation for the impacts of the consent.

## THE HEARING

### Consent Holders' Case

37. **Mr Ben Williams**, Counsel for Mr and Mrs Galloway, provided written legal submissions addressing background to the consent, the power of a review, the test under section 131 of the RMA, section 104 requirements, actual and potential effects on the environment, measures proposed by the Consent Holders, relevant provisions of the higher order documents, the viability assessment, previous use of the consent, and issues with the North Branch minimum flow. He concluded that imposition of the LWRP minimum flow requirements would prevent the activity for which consent was granted, which is *ultra vires*. He submitted the alternative proposed would 'go a good way' towards implementing the LWRP flows, while enabling the consented activity to continue until expiry in 2030. He considered the only appropriate outcome of the process was not to amend the consent or to adopt the alternative minimum flow, with discussions on what the North Branch minimum flow might look like.
38. **Mr Craig Galloway**, presented a written statement in support of their alternative minimum flow. He described their land use of the property and work undertaken to fence off waterways and plant native vegetation. He noted that they had leased the property out since 2005, due to his health problems. He highlighted their involvement in the Ashburton River water users' group and voluntary adjustments in their water take to keep water levels above minimum flow. He considered the LWRP minimum flow for the North Branch is 'unachievable' given the frequent dry reaches in it and that irrigation of the property will become 'non-viable'. He noted that changing to pivot irrigation would require the removal of shelter belts and ecological habitat. He considered that the LWRP minimum flows would

cause the farm to become uneconomic causing it to become a dryland property, with the loss of two thirds of its income.

39. Following the adjournment of the hearing, Mr and Mrs Galloway provided a description of the irrigation system and two aerial photographs showing the existing layout of the control gates, irrigation race, QEII covenant area boundaries, spring, pond, intake point and the culvert through the stopbank back to the river.
40. **Mrs Lyn Galloway**, presented a written statement and photographs at the hearing in support of their alternative minimum flow condition. She outlined their environmental protection vision and efforts since purchasing the property 32 years ago, including fencing, and establishing riparian plantings, shelter belts and the six hectare QEII covenant over the pond and wetland area. She described the highly diverse wetland complex and rare wetland species protected. She noted that the impression the property was poorly maintained related to their deliberate strategy to enable natural biodiversity to grow.
41. **Mr Lydon Webb**, a resident of Greenstreet since 1954, attended the hearing in support of the Galloways and provided written notes of an interview taken by Ms Amanda Brown. The notes outlined his recollections of reaches of the North Branch going dry between the end of December and January. He recalled that people often swam at Digby's bridge in the weekends when the RDR used to spill water, but that this would stop on weekdays and that the river would be dry again. He noted that there was always water above Thompson's Track and that historically it would go dry below this area. He noted that O'Shea Creek and Mt Harding Creek contribute flows to the North Branch, but often only run a short distance before drying out. Appended to his statement was an aerial photograph labelled 'Greenstreet Plan'.
42. **Mr Matt Bubb**, a Senior Water Resource Engineer at Aqualinc Research Ltd, provided a written statement of evidence addressing background to the review, viability issues, consequences of imposing the LWRP minimum flows, observations of setting the limits on the Ashburton River, and the s42A Report. He considered the alternative minimum flow proposed sat between the historic/existing situation and the LWRP minimum flows, with the Consent Holders accepting some reduced reliability. He noted the two main reasons to not accept the LWRP minimum flows was because irrigation of the property would no longer be viable and there would be no benefit to river health given the North Branch is frequently dry below their property. He considered it was reasonable for the activity to continue until 9 November 2030, unless there are significant adverse effects from the activity. He focussed on the potential 'unintended consequences' of imposing the LWRP minimum flows, including causing the sale of the property, land use intensification, encouragement of dairy farming, removal of shelter belts and trees, loss of the benefits of border dyke irrigation, less water downstream and the discharge of higher concentrations of nutrients. He considered there was no evidence the LWRP minimum flows would provide significant gains for the North Branch and it would still go dry. Appended to his statement was a copy of Mr Richard de Joux's evidence to the LWRP hearing on behalf of the Greenstreet Irrigation Society Limited.
43. Mr Bubb also tabled a supplementary statement at the hearing relating to the direction of sub-surface flows, loss of flows to groundwater and possible mitigation. He noted the

abstraction of 240 L/s for three days in 21 days would not have a one-to-one effect upon surface flows or sub-surface flows in the lower catchment. He noted that to mitigate the risk that the Galloway's abstraction could cause the river to go dry a minimum flow could be set at the Thompson Track bridge and a flow recorder installed to inform future decision making.

44. **Mr Ross Polson**, a Farm Advisor with the Lauriston Farm Improvement Club, provided a written statement assessing the consent value at the start and end of the review process (using a market analysis approaches a test of value) and whether the proposed alternative minimum flow adds value to the consent. His evidence stated that he had 'taken no consideration of what may happen beyond LWRP 2023'. He confirmed 103 ha of the 150 ha property is operated with border dyke irrigation in long term pasture and that the soils are suited to livestock farming rather than arable farming. He estimated the dry matter used for the border dyke irrigation system under sheep (by the Galloways) and dairy grazing (under lease arrangements). He noted the Overseer model for the period 2010 to 2019 estimated 5,700 kg of dry matter per ha, which he considered appeared too low. He noted the Galloways had recognised the risk from the pending increase in minimum flows and had spent very little on repairs and maintenance on the property, including the water intake area. He highlighted that the uncertainty leading up to the review had been a difficult time for the Galloways and that their motivation to spend money is very low. He concluded the market would recognise the increased reliability of irrigation with the alternative minimum flow through recognition of the earning capacity, but not so much the land value. He considered the LWRP minimum flows removed all financial value of the current resource consent.

#### Submitters

45. **Mr Chris Allen**, a farmer at Ashburton Forks, appeared at the hearing in support of the alternative minimum flows proposed by the Consent Holders. He noted his support for the 6,000 L/s minimum flow on the mainstem at SH1; and his involvement with the development of the LWRP and as a community member of the Ashburton Zone Committee (after the LWRP was decided). He considered the science behind the North Branch minimum flow was 'dubious at best' and would be 'extremely onerous for any consent holder to meet and stay viable'. He noted that even in times of no irrigation there is often no flow below Thompson's Track bridge and that 1,000 L/s at Digby's bridge was 'too ambitious'. He highlighted that under the LWRP all abstractors would only be subject to the higher 10,000 L/s in the mainstem at SH1 minimum flow in 2033. He noted he was unaware of any ground truthing of the modelling undertaken for the North Branch and whether 1,000 L/s was sustainable. He considered the LWRP minimum flow for the North Branch would derogate the consent to being useless and that this was not consistent with the RMA. He requested that the Hearing Panel find a timely solution for the Galloways to find a reasonable compromise with minimal impact and not derogate their consent.
46. **Save the River Mid Canterbury Incorporated** was represented at the hearing by Mr Matthew Hall, who presented a written statement in opposition to the proposed alternative minimum flow. He outlined his background in the community development of the Canterbury Water Management Strategy (**CWMS**) and the LWRP, and the Ashburton Zone Committee in consultation with the public developed Zone Implementation

Programme (**ZIP**) behind section 13 of the LWRP. He noted that section 13 of the LWRP describes the planning aspirations for the Hakatere/Ashburton River, including the flow regime set out in Table 13(b). He expressed concern that the 6,000 L/s minimum flow needed in the mainstem at SH1 to keep the river mouth/hāpua open would not be achieved because of the state of the North Branch and the fact it relied on 1,000 L/s from the North Branch. He considered if the alternative minimum flow was successful it would cut across the years of work that had gone into the development and implementation of the LWRP. He noted the proposed 10,000 L/s minimum flow in the mainstem at SH1 by 2033 was aspirational and that not enough effort was currently going into achieving this outcome. He highlighted water is currently overallocated in the catchment, which had negatively impacted instream values and the hāpua. He considered degradation due to water quality and quantity effects in the catchment needed to be urgently addressed to reverse declining trends. He noted the proposed alternative minimum flow would not improve the environmental health of the North Branch. He highlighted the importance of minimum flows and flow variability for migratory species such as salmon and trout, and maintaining habitat for juvenile rearing and invertebrate life.

47. **Central South Island Fish and Game Council** ('Fish and Game') was represented at the hearing by Ms Angela Christensen, who is employed as a Resource Officer. Ms Christensen's written statement of evidence outlined the statutory functions of Fish and Game, the significant values of the Hakatere/Ashburton River and hāpua, water flow management, water quality, planning and the relief sought. She highlighted the importance of the North Branch flows to surrounding wetlands and spring-fed systems and ecosystems reliant on them. She also noted the importance of North Branch flows in helping to maintain hāpua health and keeping the mouth open to the sea to support its life sustaining capacity. She considered that gross overallocation of water contributed to the extent (length) and duration of reaches going dry in the critical summer period for fish migration. She highlighted the current health warnings in place at three locations on the river and the community's expectations that the existing unacceptable water quality will improve. She concluded that the proposed alternative minimum flow would not honour the LWRP flow regime set for the North Branch, which would have flow on and cumulative effects on ecosystem health in the downstream catchment. She considered this would not give effect to the concept of Te Mana o te Wai and would put the Consent Holders' economic considerations ahead of the health of the waterbody and ecosystems. She highlighted the degraded instream health from surrounding land use intensification; and the deterioration in both water quality and water quantity that had caused significant negative impacts on habitat, fish passage, the proliferation of periphyton, and sediment deposition and cover. She concluded the values of the river have significantly deteriorated overtime due to inadequate protection from current land use and over abstraction, and an inappropriate river flow regime. She requested that the alternative minimum flow not be granted due to likely adverse cumulative effects on the health of the water body and freshwater ecosystems downstream.
48. **Ms Treena Davidson**, a Senior Environmental Policy Advisor for Aoraki Environmental Consultancy, provided a written statement of evidence on behalf of Te Rūnanga o Ngāi Tahu (TRONT or 'Ngāi Tahu') and Te Rūnanga o Arowhenua ('Arowhenua'), collectively referred to as 'Ngā Rūnanga'. Her evidence addressed the key points of the submissions in opposition to the alternative minimum flow and provided a planning assessment. She noted

her support for the s42A Report conclusions and imposition of the LWRP minimum flows. She outlined adverse effects on the recognition of rangatiratanga and kaitiakitanga if the review process does not contribute towards achieving the aspirations of Ngā Rūnanga for restoring the health of the river. She highlighted the requirement to put the health and wellbeing of the river first under the National Policy Statement for Freshwater Management 2020 (NPSFM) and the concept of Te Mana o te Wai; and the requirement to take immediate steps to address the current degraded state of the river. She considered the alternative minimum flow did not put the needs of the river first and would not improve the health of the North Branch. She concluded the alternative minimum flow is inconsistent with the key objectives of the RPS and contrary to the key region wide and sub-region objectives and policies of the LWRP. She considered the LWRP minimum flows are more aligned with the common intent of the relevant iwi management plans by providing for rangatiratanga and kaitiakitanga through interim measures and stepwise longer term limit setting. She requested that the review be granted with the imposition of the LWRP minimum flows.

49. **Mr (Vivian) Karl Russell**, provided cultural evidence on behalf of Kāti Huirapa with the unconditional support of Arowhenua and Ngāi Tahu, in his role of tangata tiaki. His evidence addressed Arowhenua's submission, Te tiriti o Waitangi/Treaty of Waitangi, their Iwi Management Plan, and the importance of land and water to Arowhenua. He highlighted the ongoing decline of the river catchment and the significant adverse impact on mahinga kai and ecological values. He noted the Rūnanga have sought improvements in water quality and quantity in the river for many years through the Ashburton Zone Committee and LWRP plan changes and consent processes. He highlighted that the purpose of the LWRP minimum flows is to reduce the adverse effects of overallocation and the dramatic decline of the mana and mauri of the river through lack of water flows. He noted that in this case the water was being used in a wasteful and inefficient manner (using border dyke irrigation) with little control over the management of the water. He explained that the ongoing degradation of the river ecosystem had an immediate negative effect on the physical and emotional state of Arowhenua whānau; and had resulted in the loss of more and more mahinga kai species, at a faster rate.
50. **Queen Elizabeth the Second National Trust (QEII Trust)** was represented at the hearing by Mr Malcom Lucas, via the internet. He outlined the Trust's partnership with private landowners to protect and enhance open space for the benefit and enjoyment of present and future generations of New Zealanders. He noted the Trust's agreement with the conclusions of the s42A Report and support of Ngā Rūnanga and Fish and Game's submissions. He noted that the existing covenant did not allow for water abstraction from the wetland or spring areas. He expressed no confidence in the proposed alternative minimum flow and considered it was inconsistent with the NPSFM and the LWRP. He considered the outcomes of the NPSFM and LWRP will only be achieved if the LWRP minimum flows are imposed and adhered to by all consent holders in the catchment. He requested that the health and wellbeing of the freshwater ecosystem be put first by granting the review with the minimum flows set by the LWRP.

## Section 42A Report

51. **Ms Gillian Ensor**, an Environmental Consultant with Enviser Limited prepared the s42A Report and attended the hearing with the CRC expert reviewers. The s42A Report concluded the proposed alternative minimum flow is inconsistent with the relevant provisions of the NPSFM, the RPS and LWRP; would result in adverse effects on the ecological environment, other water users in the North Branch and cultural values; and would not achieve the purpose of the RMA, as defined in section 5. The Report recommended that the consent review be granted with the imposition of the LWRP minimum flows.
52. **Ms Jeanine Topélen**, Senior Scientist – Hydrology for CRC, provided a report addressing the existing environment and the effects of the proposed alternative minimum flow on hydrology and water availability for the Consent Holders and other water users. Ms Topélen's Figure 2 showed flow profiles for the North Branch, with loss of surface flow from reaches between Old Weir to Shearers Road, and Ollivers Road to Digby's bridge. She noted that the Consent Holders' abstraction point is two kilometres upstream of Thompson's Track and the reach between Shearers Road and Digby's Road which frequently dries from January onwards after periods of low flow. She highlighted consented surface water abstraction volumes are high (2,000 L/s) relative to the flow generated in the headwaters, which results in declining surface flows in the lower reaches. She noted that high interaction between surface water and groundwater, and declining trends in groundwater levels in the lower catchment. Her Table 2 showed the estimated impact of the current consent minimum flows and the LWRP minimum flows on water takes from the North Branch. She noted that water abstraction of up to 240 L/s in periods of low flow (typically from January to March) would result in a significant reduction in surface flow (up to approximately 30%) and could result in the flows in the lower reaches receding more quickly and extending the length and duration of the dry reach. Table 3 of her evidence included the estimated number of days no water can be taken under the proposed alternative minimum flow, which showed water would be available for abstraction on more days than under the LWRP minimum flows. She noted this increase in availability for the Consent Holders would have adverse impacts on the availability of other water users and instream values.
53. **Dr Adrian Meredith**, a Principal Surface Water Scientist for CRC, provided a report addressing the surface water environment and ecology of the Hakatere/Ashburton River, the Galloway wetland, and the change in effects on the surface water environment of the LWRP minimum flows and the proposed alternative minimum flow. He highlighted the high indigenous and biodiversity values of the Hakatere/Ashburton River. He noted that the LWRP flow regime in the mainstem at SH1 from 2023 had been set to maintain and improve these ecological values by keeping the river mouth/hāpua open and optimising trout, indigenous fish and riverine bird habitats. He noted the different flow management required for the North Branch (as a hill-fed river system) and the additional flow controls required to support trout and indigenous fish habitat, and mahinga kai values. He stated that the mainstem flow controls are insufficient alone to protect the North Branch values given that rapid recessions both following floods and seasonally. He also noted the importance of North Branch flows in contributing to springs and wetlands along its margins and the ecological importance and values of these unique habitats. He advised the LWRP

minimum flow for the North Branch (and other tributaries such as Pudding Hill Stream, Taylors Stream, O’Shea Creek, Mt Harding Creek and Lagmhor Creek) exist solely to protect the independent values of the tributary. He highlighted the magnitude of the rate of take of 240 L/s in relation to the 760 L/s calculated MALF(7d)<sup>7</sup> just below Thompson’s Track; and the potential for significant adverse effects on ecological, cultural and recreational values from causing the downstream reach to lose surface water more quickly and extending the length of the dry reaches and period it is dry for. He highlighted the critical importance of maintaining fish passage and habitat during the late spring and summer for indigenous fish species. He considered the alternative minimum flow would have no benefit for the health of the North Branch.

54. **Mr Dave Ashby**, a Farm Consultant, provided a review addressing the use of water authorised and how the water is used; the impact of the LWRP minimum flows; and the impact of the proposed alternative minimum flow on the consented use of water. He noted it was important to consider the *potential* productivity of the property under irrigation. He estimated the cost of the loss in economic return from the LWRP minimum flows is up to \$420 per ha due to the unavailability of irrigation water after Christmas. He estimated the cost in the reduced amount of dry matter grown and the total cost of supplements required to make up the reduced level of production based on the CRC’s water availability information. His Table 1 estimated the cost of replacing the loss of dry matter production based the average increase in number of days on full restriction under the alternative minimum flow is \$3,154 and under the LWRP minimum flows is \$20,469, which is a difference of \$17,315. His Table 2 estimated the cost of replacing the loss of dry matter production based on the increase in number of days on full restriction in the two driest seasons (2014/15 and 2015/16) under the alternative minimum flow is \$15,813 and under the LWRP minimum flows is \$57,865, which is a difference of \$42,052. He concluded that in the two driest seasons it may not be possible to continue even with the current low input farming operation and significantly impacts on future potential use.
55. Following the adjournment of the hearing, the Reporting Officer provided a written response to our questions from the hearing (dated 16 April 2021), including further hydrological information from Ms Topélen (Attachment 1), ecology information from Dr Meredith (Attachment 2), legal advice from Wynn Williams (Attachment 3) and background to the LWRP (Attachment 4). The Reporting Officer confirmed the recommendation contained in the s42A Report to grant the consent review with imposition of the LWRP minimum flows.

### **Applicant’s Right of Reply**

56. Mr Williams provided a written right of reply on behalf of the Consent Holders and final wording for the proposed alternative minimum flow conditions. His reply addressed the background information to the LWRP minimum flows, the outcomes envisaged by the Ashburton Zone Committee, the integrity of the LWRP, the alternative minimum flow condition wording and other relevant effects to be considered. Mr Williams submitted that the LWRP minimum flows would have the effect of cancelling the consent. He referred to the background to the LWRP minimum flows, which he considered indicates that a

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<sup>7</sup> Mean annual low flow (7 day period)

‘package’ of measures was required to implement these and that several of the critical components of this package had since ‘fallen away’. He highlighted that the LWRP section 13 outcomes were intended to be achieved over time, so as to have minimal impact on existing activities, and through the active involvement of the RDR, some surface water abstractors switching to groundwater, water sharing arrangements and new water storage projects to maintain and improve reliability of supply for water users. He submitted this is not what has eventuated. He submitted that the only course of action was to either leave the consent unchanged or to impose the proposed alternative minimum flow conditions.

## ASSESSMENT

57. In assessing the review, we have considered the s42A Report and technical reviews, the pre-circulated evidence, and the evidence provided during and after the hearing adjournment. We have summarised this evidence above.
58. Our assessment is of the alternative minimum flow condition proposed by the Consent Holders under section 104 of the Act and the effect of that change on the environment. We observe that the Consent Holders provided very little evidence on the effects on the environment of the alternative minimum flow, except for the loss of economic income and evidence that certain reaches of the North Branch frequently dry out.
59. We accept that the new conditions proposed by CRC implement the provisions of the operative LWRP and that these minimum flows and water metering provisions have been assessed throughout the plan development and implementation process to give effect to the higher order planning documents and Part 2 of the Act. We are satisfied that the LWRP provisions have been determined to be the best methods to achieve the objective and policies and Part 2 of the Act. The appropriateness of the LWRP minimum flow for the North Branch is not a matter for this review process, although we requested further information to understand the background to the LWRP minimum flow for the North Branch. We acknowledge this will be a critical matter in the plan review process to give effect to the NPSFM 2020, which is required to be notified by 2024.

## Statutory Considerations

60. Sections 129 and 130 of the Act set out the notice of review, public notification, submission and hearing process.
61. Section 130 sets out matters relating to public and limited notification and states that sections 96 to 102 and 95 to 95G shall, with all necessary modifications, apply in respect of a review of any resource consent.
62. Section 130(1) establishes that the notification provisions apply as if the notice of review were an application for a resource consent, and the consent holder were the applicant.
63. Section 130(3) states that sections 95 to 95G of the RMA (notification requirements) apply, with all necessary modifications, as if:
  - (a) *the review of consent conditions were an application for a resource consent for a discretionary activity; and*

- (b) *the references to a resource consent and to the activity were references only to the review of the consent conditions and to the effects of the change of conditions respectively.*
64. Section 131 states when reviewing the conditions of a resource consent, the consent authority -
- (a) *shall have regard to the matters in section 104 and to whether the activity allowed by consent will continue to be viable after the change; and [...]*
  - (b) *may have regard to the manner in which the consent has been used.*
65. Section 132(2) states that sections 106 to 116 and sections 120 and 121 apply, with all the modifications to a review under section 128 as if the review is an application for a resource consent and the consent holder were an applicant for a resource consent.
66. In terms of section 104(1), and subject to Part 2 of the Act, which contains the Act's purpose and principles, the consent authority must have regard to-
- (a) *Any actual and potential effects on the environment of allowing the activity;*
  - (ab) *Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;*
  - (b) *Any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or a proposed regional policy statement, a plan or proposed plan; and*
  - (c) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*
67. We consider each of these sections of the RMA below.

#### **Section 104(1)(a) Actual and potential effects on the environment**

68. In making our assessment, we are required to consider the actual and potential effects of the new minimum flow condition proposed by CRC and the alternative minimum flow condition proposed by the Consent Holders, on the existing environment. The existing environment is that which exists at the time this determination is made and includes lawful existing activities, permitted activities and activities authorised by existing resource consents.
69. Mr Williams highlighted that the 'environment' embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under the relevant plan and the implementation of resource consents that have been granted or are likely to be implemented. He submitted that the assessment therefore required a two-step process of the present time and the potential future environment as it might be modified by the implementation of resource consents.
70. We agree that the existing water permit (expiring 9 November 2030), the farming consent (expiring 31 March 2027) and the existing irrigation infrastructure form part of the existing environment. We agree that potential future effects of these activities for the remaining term of consent is part of the environment for the purposes of our assessment. However, we have to also assume the limits and standards of the LWRP will be implemented and that

after 1 July 2023 all surface water and hydraulically connected groundwater takes will be required to meet the limits set out in Table 13(b).

71. The following actual and potential effects on the environment were assessed in the s42A Report:
  - (a) Potential adverse effects on hydrology;
  - (b) Potential adverse effects on ecosystem health, biodiversity and water quality; and
  - (c) Potential adverse effects on other water users/consent holders.
72. We have considered all of these actual and potential effects in relation to the application.
73. Mr Williams submitted that the alternative minimum flow would lead to:
  - (a) A reduction in reliability of supply and a benefit to the river;
  - (b) Less negative impacts on downstream spring flows from ceasing border dyke irrigation on the property;
  - (c) Significant value to the farm property as a livestock property;
  - (d) Positive effects from border dyke irrigation on recharge and water dilution of nitrates;
  - (e) Added value to the irrigation consent due to increase earning capacity and land value; and
  - (f) The continuation of positive ecological outcomes, including native plantings.
74. We accept that the alternative minimum flow would have positive economic and social effects on the Consent Holders by being less restrictive than the LWRP minimum flow for the North Branch.
75. We acknowledge the commitment of the Consent Holders to restore the natural environment surrounding their property and their considerable efforts to protect the significant ecological values present.
76. The existing border dyke irrigation system relies on a direct take of relatively large volumes of surface water (240 L/s) by diverting part of the river flow to the intake and water race, and flooding the downgradient land with water. The flow rate allowed is 240 L/s, which equates to 20,700 cubic metres for 24 hours of delivery. The volume taken must not exceed 111,750 cubic metres in any 21 consecutive day period.
77. There is no evidence that the ability to undertake border dyke irrigation on the property has any positive effects on downstream spring flows or the dilution of nitrate-nitrogen concentration in groundwater. Border dyke irrigation is considered to be an inefficient use of water and contributes to nutrient discharges to surface water and groundwater.
78. The alternative minimum flow will have some positive impacts on the mainstem of the Ashburton River, but may not have any positive effects on the North Branch. We accept that the Ashburton River mainstem minimum flow of 6,000 L/s is considered to be the minimum flow necessary to keep the mouth/hāpua open, optimise trout habitat, and benefit native fish and bird habitat.
79. Mr Williams submitted that the key frustration for the Consent Holders is that certain reaches of the river will dry naturally regardless of the take and that there will be times

when water is available at the intake site that would otherwise disappear into the ground in the lower reaches of the North Branch. He considered the LWRP minimum flow assumed either constant or increasing flows along the North Branch when in fact the situation is the reverse.

80. We consider the time for challenging the LWRP minimum flows was during the plan development process. We do not accept that the North Branch flows were set to achieve water flow over the reach which often dries out. We are satisfied that the flows were set to achieve the Ashburton Zone Committee's objectives and consequently the objectives of the LWRP and higher order statutory documents.
81. We find that current overallocation of water for abstraction is lowering surface water flows and groundwater levels in the Hakatere/Ashburton catchment. We accept the evidence of Ms Topélen that surface water abstraction from the North Branch is contributing to the increased frequency, duration and extent of dry reaches, than would otherwise occur naturally.
82. We find that declining water flows and water quality is resulting in significant adverse effects on the life supporting capacity and ecological values of the North Branch and the lower Hakatere/Ashburton River and hāpua. Direct surface water abstraction during periods of low flow is contributing to significant negative impacts on the habitat of trout and salmon, indigenous fish and riverine birds.
83. We find that the alternative minimum flow would not have any positive effects on the North Branch and would therefore not address the existing environmental degradation associated with over allocation and poor water quality. We note that while the minimum flow for the North Branch will require abstraction to cease, this will not guarantee water flows in all reaches. However, it will minimise the frequency, duration and length of dry reaches which is critical to maintaining habitat refuges and enabling fish migration. We accept the evidence of Dr Meredith that the LWRP minimum flow for the North Branch recognises the protection of important and unique habitats both instream and associated with springs and wetland complexes.
84. We agree with Dr Meredith that the flow controls for the mainstem and tributaries are both necessary and complimentary in protecting the life supporting capacity of the river system and hāpua. We acknowledge that both the connectivity and timing of sufficient flows that are critical to support (diadromous) fish migration both to and from the sea, and seasonally up and down the waterways. We accept that the LWRP minimum flows are necessary to provide fish passage in the tributaries and mainstem, and to maintain a connection through the hāpua to the sea. The alternative minimum flow does not protect minimum flows for fish passage in the North Branch in critical times of seasonal migration.
85. In terms of effects on cultural values and relationships, we find that the following quote from Mr Russell speaks for itself -  
*'The Hakatere was a well know river for drowning the people of Kati Huirapa. Tere = fast. They only talked of one river the Hakatere. In the whakapapa from the creation heaven, today has heard of the term of 'mana o te wai'. The key in this is the mana.*

*In the Hakatere region, we have been over-run by intensive farming. Our whakapapa is gone, we have lost it. We cannot get to it due to it now being a farm. The rivers never dried up. In 1844-1845 Shortland, was with Tarawhata chief at Arowhenua who travelled the route regularly. They had to go 22 miles inland to get around the wetland to get to Christchurch.*

*The whakapapa of the freshwater going to sea. The link to the sea is lost, kelp needs a flush of freshwater. There are species that move from salt to fresh and fresh to salt. Waterway needs to be open and viable to enable his to happen.'*

86. We accept that land use intensification and water abstraction has adversely impacted the river and its surrounding wetlands and that reaches of the river are going dry more frequently and for longer periods. We find that the alternative minimum flow does not address the cumulative effect of the surface water take on the significant cultural value and relationship tangata whenua have with the Hakatere/Ashburton River (from the mountains to the sea) or protection of the mana and mauri of the wai/water.
87. We accept the evidence of Ms Davidson that restoration and protection of the mana and mauri of the river requires management of the entire waterway and not just a focus on the mouth/hāpua being open. We find that the alternative minimum flow will not address significant adverse effects on cultural values and relationships.

**Section 104(1)(ab) Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment offset or compensate for any adverse effects on the environment that will or may result from allowing the activity**

88. No relevant measures were identified by any party for our consideration under s104(1)(ab).

**Section 104(1)(b) Relevant objectives and policies**

89. An analysis of the relevant provisions of the Resource Management (National Standards for Freshwater) Regulations 2020 (**NESF**), National Policy Statement for Freshwater Management 2020 (**NPSFM**), the National Standards for Sources of Human Drinking Water (**NZSDW**), the Canterbury Regional Policy Statement (**RPS**), and the Canterbury Land and Water Regional Plan (**LWRP**) was provided in the application, the s42A Report and in the evidence of Ms Christensen and Ms Davidson.
90. We accept that the LWRP provisions give effect to the NPSFM-2017, but are yet to be reviewed to give effect to the NPSFM-2020. We acknowledge that is up to the Consent Authority to *give effect* to the NPSFM-2020, by way of a notified plan change by the end of 2024. We are obliged to *have regard* to the objectives and policies of the NPSFM-2020. In doing so, we have focused our assessment on the direction of the NPSFM-2020 and the concept of Te Mana o te Wai.
91. We have had regard to the requirement to manage the resource in a way that prioritises the health and well-being of waterbodies and freshwater ecosystems as a first priority, the

health needs of people (drinking water) as a second priority, and the ability of people and communities to provide for their social, economic and cultural well-being as a third order.

92. We have had regard to the need to prevent any further degradation of freshwater, to make intermediate improvements to existing environmental degradation within the next five years, and to reverse past damage to bring waterways and ecosystems into a healthy state within a generation.
93. We find that the alternative minimum flow is inconsistent with the overall direction of the NPSFM by giving priority to the social and economic wellbeing of the Consent Holders before the health and life supporting capacity of the river. It does not prevent further cumulative effects on water flows or address the existing environmental degradation in the North Branch.
94. The LWRP does not give any of its single objectives (region wide) or policies (sub-regional) more importance than another. We consider the NPSFM-2020 supports priority to be given to the objectives and policies which seek to safeguard the life supporting capacity of ecosystems and ecosystem health. We do not accept that these provisions can be balance against objectives and policies that enable resource use for social and economic wellbeing.
95. The LWRP provisions have been developed and implemented through extensive public processes, with local representation, community involvement and collaborative participation. Through this process tangata whenua have been able to exercise their rangatiratanga, particularly with regard to their statutory acknowledgement areas. We consider the LWRP reflects the communities' values and aspirations. We accept the LWRP provisions set out a clear path to managing and staging improvements in both water quality and quantity, where it is degraded and overallocated. We are satisfied that resource users have had many years to anticipate implementation of these planning provisions, and to change and adapt their land use practices to meet the agreed flow regimes and water quality targets set in the LWRP.
96. We find that achievement of the key objectives of the LWRP for water quality and quantity, and the protection of the life sustaining capacity of freshwater is heavily reliant on setting and imposing appropriate minimum flows. Policies specifically direct that surface water bodies are managed to not alter natural hāpua opening, not render rivers unsuitable for recreation, maintain fish passage, not induce rivers to run dry, and maintain variable flow.
97. Section 13 of the LWRP, which is specific to the Ashburton sub-region, list the priority outcomes for the catchment as identified by the Ashburton Zone Committee as:
  - (a) Improved and protected natural character and mauri of the river;
  - (b) Ecosystem health and biodiversity are protected and improved;
  - (c) Protected and improved water quality; and
  - (d) Efficiently used, secure and reliable supply of water.
98. These outcomes are envisaged to be achieved for the river when the minimum flow regime in Table 13(b) is achieved by all consent holders.

99. Overall, we find that with the LWRP minimum flows are consistent with the direction of the key objectives and policies of the NPSFM, RPS and LWRP. We find that there is significant uncertainty whether the alternative minimum flow condition would be consistent with the direction of these planning documents given the cumulative adverse effect of the take on water flows in the catchment downstream.

#### **Section 104(1)(c) Other matters**

100. We note the relevance of the CWMS, Te Rūnanga o Te Ngāi Tahu Freshwater Policy Statement (**FPS**), Te Whakatau Kaupapa Resource Management Strategy, Mahaanui Iwi Management Plan 2013 and the Iwi Management Plan of Kāti Huirapa for the area Rakaia to Waitaki 1992.
101. The CWMS provides a strategic collaborative framework to help manage the multiple demands on water resources and sets a vision and fundamental principles. It sets clear priorities for the use of water. It directs us to prioritise the health and life sustaining capacity of water before the use of water for irrigation. We find the LWRP minimum flow is more consistent with this strategic vision.
102. We agree with Ms Davidson that the common intent of the iwi management plans is clear in seeking that –
- (a) Ngāi Tahu rights and interests are provided for;
  - (b) Ngā Rūnanga is engaged in processes related to land and water management;
  - (c) Ki uta ki tai is thinking whole of catchment and intergenerational;
  - (d) Water is taonga, it must be protected for its own values, then how it meets instream and other values; and
  - (e) Water quantity must be improved to the level at which it can provide for its mauri.
103. We agree with Ms Davidson that the alternative minimum flow will not provide for these matters. In particular, we find that the alternative minimum flow ignores tangata whenua's rights and interests and will not protect water quality and quantity in the North Branch or address significant cumulative adverse effects in the mana and mauri of the water.
104. We agree with Ms Davidson that the LWRP minimum flows are more aligned with the common intent of the iwi management plans. We also acknowledge that engagement and collaboration with tangata whenua in the ZIP and LWRP planning process and subsequent implementation of the LWRP limits recognises their rangatiratanga and kaitiakitanga roles.
105. Mr Hall and Mr Russell raised concern that the alternative minimum flows would set a precedent for other consent holders on the North Branch.
106. Mr Williams submitted that a decision on this review would not create a precedent for future applications.
107. We agree with Mr Williams that the imposition of alternative minimum flows would not of itself create a precedent given each case must be considered on its merits. However, we have considered the integrity of the LWRP and need for consistent administration of its

provisions. We accept that to step away from the LWRP provisions, which have been developed over many years with the input of the community, tangata whenua and interested parties, would undermine confidence in the planning process. While this is not determinative in our overall decision, we consider the LWRP minimum flows provide the community with certainty of administration, confidence in the planning process and equity amongst resource users.

108. We do not consider the ‘unintended consequences’ outlined in evidence by Mr Bubb are anything more than speculation. We do not consider these to be relevant matters.

### **Viability of the consent after the change**

109. The memorandum from Wynn-Williams (dated 10 March 2021)<sup>8</sup> stated that whether the consent will continue to be viable is not determinative and could potentially undermine the purpose and intent of the review provisions of section 128(1)(b). It considered that the assessment of the viability of the consent must be approached through the lens of a section 128(1)(b) review which is quite different to other reviews contemplated by section 128. It noted that the LWRP minimum flow requirements must be imposed in order to meet the Council’s obligations under the NPSFM. It stated that while there is a requirement to have regard to the continued viability of the consent after the conditions are changed, there is no limit on the extent to which the conditions can be changed, except for a judgement as to what is appropriate.
110. We agree that a section 128(1)(b) review should be considered within the context of the outcomes sought by the implementation of the plan and the recognition that cumulative effects can only be addressed through catchment wide limits.
111. Mr Williams submitted that it is clear the consent review cannot render the consent ineffective, and the Consent Holders must retain the ability to continue with the intensive irrigated pastoral production post review. He was of the view that this consideration was additional to consideration of the consent viability. He noted that caselaw did not support a different approach to viability for reviews under section 128(1)(b) compared to other reviews. He considered the importance of the planning provisions was irrelevant to any viability assessment. While he agreed it made sense to consider existing consent use in some circumstances for the viability assessment, he considered this should not be determinative. He submitted the key issue is that the viability must be informed by the key elements of the activity, which is not based solely on the number of days per year that the consent is able to be exercised, but instead the ability to irrigate 150 hectares of farmland (i.e. as an economically viable operation). He concluded the s42A Report had based the viability assessment almost solely on the existing use of the consent, without considering whether the activity as a whole would remain viable.
112. Mr Bubb considered that significant weight should be given to whether the consent remains viable, rather than adverse effects or the manner in which the consent has been used in the past. We disagree that the viability of the consent should be given more weight than section 104 matters, which we consider are determinative matters.

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<sup>8</sup> Appendix 6 of the s42A Report 12 March 2021

113. Mr Polson noted that the market would consider the existing consent as a border dyke system with low water efficiency and on a rostered supply basis; and as needing an irrigation upgrade and significant water storage to provide increased irrigation reliability with the 240 L/s flow rate authorised. He noted that other storage ponds had been successful installed on nearby farms.
114. Mr Polson stated –
- ‘Under the proposed minimum flows, it may still receive the odd border dyke flow but the market would manage this property as a dryland unit and stocking rates would be much lower than its current potential.’ (pg. 7)*
115. Mr Polson concluded the Galloway’s consent would have nil value after the LWRP 2023 minimum flows are implemented. He noted the market would deem the water take as too unreliable for any form of irrigation investment and the farm would be considered as a dry livestock property in the market. He estimated the difference between the current minimum flows (\$1,050 per ha) and the LWRP minimum flows (\$500 per ha) at \$550 per ha or \$56,600 per annum for the 103 ha. He highlighted this showed there is value in the current consent. He estimated the difference between the alternative minimum flows (\$750 per ha) and the LWRP minimum flows (\$500 per ha) is \$250 per ha or \$23,000 per annum.
116. Mr Polson considered the LWRP minimum flows would have a ‘devastating’ effect on irrigation reliability and would be too unreliable for any irrigation investment. He stated the consent would be considered by the market to have no value. He concluded that the alternative minimum flows added some financial value to the existing resource consent, whereas the LWRP minimum flows removed all financial value from the current resource consent.
117. Mr Ashby noted that the Consent Holder’s information suggested the number of days water will be available for irrigation will change from approximately 20 days in an average year to six days under the LWRP minimum flows. He highlighted that Mr Galloway estimates this will be four days between late October to December, two days from January to early April and almost nil in autumn, which is more important than in the late spring/summer.
118. Ms Topélen’s Table 2 showed significant increases in the number of days on full and partial restrictions and significant increases in the duration of days where no water can be taken under the LWRP minimum flows. It shows that in most years the longest duration of no water available to be taken is in March and April.
119. We note that Mr Polson and Mr Ashby went about their assessment of the economic loss in different ways, but ultimately came to similar figures on a per ha basis. We acknowledge these assessments were on a small data set (eight years), but accept they are indicative.
120. We consider it is overstating it to assert that imposition of the LWRP minimum flows will effectively terminate or cancel the consent as submitted by Mr Williams. Water will

continue to be able to be taken, albeit on significantly less number of days, with a reduced reliability of supply. However, this will not prevent the activity for which consent was granted or the ability of the Consent Holders to adapt their irrigation system. We are satisfied that these matters were taken into account during the LWRP planning process and that the provisions include policies and pathways for consent holders adversely affected to mitigate the impact by changing irrigation methods and enabling the swapping surface water takes to groundwater takes, subject to hydraulic connection assessments<sup>9</sup>.

121. While we acknowledge that there is agreement that the availability of water will be significantly affected, we find the existing consent to take and use water for irrigation will still be able to be exercised with the LWRP minimum flows, albeit with much reduced availability and reliability of supply without upgrade.

#### **Manner in which the consent has been used**

122. We have considered the manner in which the existing consent has been used, including:
- (a) Scale and frequency of water usage;
  - (b) Actual area irrigated;
  - (c) Location of the abstraction;
  - (d) Physical constraints of the existing system and infrastructure;
  - (e) The effects of the use; and
  - (f) Compliance history.
123. We note Mr Williams considered that compliance with the existing consent was a separate consideration and was not part of the manner in which the consent has been used. We disagree, we consider this is part of the consideration. We accept that the current system requires upgrading to comply with the requirement to maintain an effective fish screen. We also accept that the current system is inefficient and allows little control over rates and volume taken.
124. We agree with Mr Williams that consideration of the manner the consent has been used provides for a 'real world' analysis of how the consent has been exercised in the past rather than assuming full utilisation of the consent.
125. We note that only approximately 103 ha of the consented 150 ha irrigation can physically be irrigated. We accept that it is not physically possible to irrigate more than this due to the irrigation set up and the covenanted wetland areas. We accept that irrigation from the spring or wetland area is not permitted under the existing covenant.
126. We are mindful that the Consent Holders have not made any efforts to upgrade the border dyke irrigation system or to look at options such as water storage or converting to a groundwater take, in light of the anticipated LWRP minimum flows. This indicates that the current use of their property is not heavily reliant on irrigation and that irrigation has occurred intermittently over the consent term.

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<sup>9</sup> Policy 13.4.5 of the LWRP.

127. We consider whether the Consent Holders have the financial means or desire to upgrade the irrigation system to enable the land to be used to its full productive potential is a matter for them.
128. The manner in which the consent has been used has been one of a number of matters that we have considered in our assessment, but has not been determinative. We consider it is appropriate to consider the effects of the significant reduction in the reliability of supply under the LWRP minimum flows and the alternative minimum flow in the context of the current and past use with the existing physical and infrastructure constraints.

## **Part 2 of the Act**

129. The s42A Report noted that consideration of Part 2 of the Act is not prevented, but that it cannot be used to justify an application that is otherwise not supported by objectives and policies. It noted that the objectives and policies of the LWRP hold significant weight and will be largely determinative.
130. We agree that the provisions of the LWRP should be given significant weight. However, we consider that these should be read with regard of the clear priorities of the NPSFM-2020. We accept that the NPSFM-2020 gives effect to Part 2 of the Act.
131. We do not consider that reference to Part 2 would add anything to the evaluative assessment we have undertaken under sections 104.

## **Overall Conclusion**

132. We conclude that the proposed alternative minimum flow will result in ongoing adverse cumulative effects on hydrology and ecology, as set out in the evidence of Ms Topélen and Dr Meredith. We agree that imposition of a minimum flow in the mainstem of 6,000 L/s at the SH1 bridge, on its own, is insufficient to maintain the ecological values of the North Branch.
133. We conclude that existing significant adverse effects on cultural values and relationships, as set out in the evidence of Ms Davidson and Mr Russell, would not be reduced and the mana and mauri of the river would not be improved by imposition of the alternative minimum flow.
134. We find that the alternative minimum flow puts the use of water for irrigation purposes before the health and wellbeing of the freshwater ecosystems and is therefore contrary to the direction of the NPSFM and the concept of Te Mana o Te Wai. We find that the alternative minimum flow is overall contrary to the key objectives and policies of the RPS and LWRP; and the common intent of the relevant iwi management plans.
135. We find there would be adverse effects on other water users who are or will be subject to the LWRP Table 13(b) minimum flows.

136. On this basis, we conclude that imposition of the LWRP minimum flows is consistent with the purpose and principles of sustainable management, as defined in section 5 of the Act.

**Decision**

137. **For the above reasons, it is the decision of the Canterbury Regional Council, pursuant to sections 131 and 132, and subject to Part 2 of the Resource Management Act 1991, to GRANT consent review CRC200269, which is a review of water permit CRC952441, to impose the conditions proposed by the CRC and not the alternative conditions proposed by the consent holder. The conditions subject to this decision are set out in Appendix 1 of this decision. The new conditions are shown with underline.**

Dated at Christchurch this 15<sup>th</sup> day of July 2021



**Sharon McGarry**  
**Hearing Commissioner (Chair)**



**Hoani Lansbury**  
**Hearing Commissioner**



**Appendix 1**  
**Conditions for CRC200269**

- 1 The rate at which water is taken shall not exceed 240 litres per second, with a volume not exceeding 111750 cubic metres in any 21 consecutive day period.
- 2 A fish screen shall be operated and maintained on the intake to ensure that fish are prevented from passing into the intake.
- 3 a. Whenever the mean flow (expressed in cubic metres per second) in the Ashburton River, as estimated by the Canterbury Regional Council, at the State Highway One Bridge recorder site (map reference K37:087-989), for the 24 hour period ending at noon on any one day falls below the following flows there shall be no taking of water in terms of this permit during the next succeeding day.

Month	JAN	FEB	MAR	APR-JUL	AUG	SEP	OCT	NOV	DEC
Flow	4.5	3.5	3.5	5.0	6.5	8.0	8.0	6.5	5.0

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- b. The taking of water in terms of this permit shall be reduced to 50% of the allocation whenever the mean flow in the Ashburton River, as estimated by the Canterbury Regional Council, at the State Highway One Bridge recorder site (map reference K37:087-989), for the 24 hour period ending at noon on any one day falls below the following flows.

Month	JAN	FEB	MAR	APR-JUL	AUG	SEP	OCT	NOV	DEC
Flow	5.0	4.0	4.0	5.5	7.0	8.5	8.5	7.0	5.5

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4. The hours and rate at which water is taken shall be measured to within an accuracy of 10 percent and recorded daily in a log kept for that purpose, and a copy of the records submitted to the Canterbury Regional Council before 31 January each year for the previous period August-December inclusive and before 31 May each year for the previous period January-April inclusive.
5. The Canterbury Regional Council may annually, on the last working day of June, serve notice of its intention to review the conditions of this consent for the purposes of:
  - a. dealing with any adverse effect on the environment which may arise from the exercise of the consent which was not foreseen at the time of granting the consent and is therefore appropriate to deal with later; or
  - b. requiring the adoption of the best practicable option to remove or reduce any adverse effect on the environment; or
  - c. requiring compliance with any relevant rule of an operative regional plan including a rule on a financial contribution payable by consent holders toward the cost of restoration of any natural or physical resources of the Ashburton

River adversely affected by the exercise of consents.

6. Charges, set in accordance with section 36 of the Resource Management Act 1991, shall be paid to the Regional Council for the carrying out of its functions in relation to the administration, monitoring and supervision of resource consents and for the carrying out of its functions under section 35 of the Act.
7. Notwithstanding any other flow restriction contained within the conditions of this consent, from 1 July 2023:
  - a. Whenever the flow in the North Branch of the Ashburton River, is at or below 1,000 litres per second, there shall be no taking of water in terms of this permit during the next succeeding day.
  - b. Whenever the flow in the mainstem of the Ashburton River is:
    - i. at or below 7,275 litres per second, the taking of water shall be subject to a reduction of take during the next succeeding day as set in Table 1 below.
    - ii. at or below 6,000 litres per second, there shall be no taking of water in terms of this permit during the next succeeding day.
  - c. For the purposes of this condition:
    - i. the flow in the North Branch of the Ashburton River shall be the mean flow as estimated by the Canterbury Regional Council at the South Branch confluence at approximately map reference Topo50 BY21:976-401, for the 24 hour period ending at noon on any one day.
    - ii. the flow in the mainstem of the Ashburton River shall be the mean flow as estimated by the Canterbury Regional Council in the Ashburton River at the State Highway 1 Bridge recorder site located at map reference Topo50 BY21:999-351, for the 24hour period ending at noon on any one day.

<u>Table 1</u>	
<u>Flow in River (litres per second)</u>	<u>Reduction in take</u>
<u>At or below 7,275</u>	<u>25 %</u>
<u>At or below 6,850</u>	<u>50 %</u>
<u>At or below 6,425</u>	<u>75%</u>

**Advice Note 1:** *The environmental flow regime specified in this condition takes effect from the 1 of July 2023. Until such time, the consent holder is subject to any existing restrictions on their consent that relates to minimum flow restrictions. As of this date, those conditions shall cease to apply and instead the abstraction will be managed on this flow regime. The allocation limits in this consent are not altered by this condition.*

**Advice Note 2:** *The minimum flow restrictions in clause (a) and (b) of this condition both apply. The consent holder must not take water when either of the minimum flow restrictions are triggered.*

8 Notwithstanding any other conditions on this consent, in addition to adhering to the Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020, or any subsequent revision, the consent holder shall, no later than 1 July 2023:

- a. Install, operate and maintain a flow and water level measurement device which will measure the rate at the abstraction point to demonstrate compliance with all consented rates and volumes; and
- b. install a data logger(s) to record the measurement with a time stamp a pulse from the flow measuring device; and
- c. All flow and water level measurement and recording equipment, systems and procedures shall be installed, operated and maintained at all times in accordance with the National Environmental Monitoring Standards (or any updated versions):
  - i. in order to meet the accuracy set in the Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020; and
  - ii. the time stamp from the flow measuring device shall be at least once every 15 minutes; and
- d. connect the measuring and recording device to a telemetry system which continually collects and stores the data; and
- e. make the data available, as described in the "Environment Canterbury Data Management Guidelines", at all times to the Canterbury Regional Council; and
- f. provide an end of year report containing modified use data for the preceding season with detailing reasons for the modifications, including but not limited to any changes to rating curves:

- i. The report detailed in clause (f) of this condition shall be provided to the Canterbury Regional Council, attention: RMA Compliance and Enforcement Manager; no later than 31 July each year, and when requested in writing by the Canterbury Regional Council; and
- g. The water measuring device described in clauses (a) and (b) shall be available for inspection at all times by the Canterbury Regional Council, including access to the data recorded in accordance with clause (c); and
- h. Archive and store the data and provide to the Canterbury Regional Council upon request.

***Advice Note 1: The National Environmental Monitoring Standards can be located at: <http://www.nems.org.nz/>***

***Advice Note 2: The Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020 can be located on the New Zealand Legislation website: <http://www.legislation.govt.nz>***

***Advice Note 3: Guidance on practices which are considered acceptable by the Canterbury Regional Council can be found in Environment Canterbury's report "Data Management Guidelines – Water Use" R17/23 6100, or any revision of that report, which is available on the Environment Canterbury website and stored at Environment Canterbury as (C19C/39863).***

***Advice Note 4: This condition is to ensure the consent holder has a telemetered water metering system in place for when the minimum flow regime takes effect on 1 July 2023. Should the consent already comply with this condition then no further work will be required. Where a consent does not currently require telemetry and none is installed, the consent holder has until 1 July 2023 to upgrade their system.***

- 9. Notwithstanding any other conditions on this consent, by no later than 1 July 2023 and in addition to adhering to the Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020, or any subsequent revision, for verification of the measuring and recording device(s):
  - a. the consent holder shall provide an Open Channel and Partially Filled Pipe Installation and Commissioning Form to the Canterbury Regional Council, Attention: RMA Compliance and Enforcement Manager, signed by a suitably qualified hydrologist.
  - b. The form in clause (a) of this condition shall be provided within one month of

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the installation of the measuring or recording device(s), or any subsequent  
replacement measuring or recording device(s), and

- c. A review of the site shall be carried out every five years by a qualified  
hydrologist with their findings provided in the form in clause (a) of this condition,  
and at any time when requested by the Canterbury Regional Council.

***Advice Note 1: The installation and commissioning form is available on the Environment  
Canterbury website [www.ecan.govt.nz](http://www.ecan.govt.nz)***