

15 November 2019



Dear Sir/Madam

Proposed Plan Change 5A (Lindis Integrated Water Management) to the Regional Plan Water for Otago

Purpose of this letter

- 1 The purpose of this letter is to encourage you to provide your views to the Otago Regional Council (ORC) on the appropriateness of splitting the total primary allocation limit for water takes in the Lindis catchment in Schedule 2A of the operative Regional Plan: Water for Otago (Water Plan) into four separate primary allocation limits for different parts of the catchment.
- 2 These proposed changes are intended to ensure that the environmental outcomes and flow patterns that are likely to occur upon the introduction of a minimum flow of 550 l/s at the Ardgour Road flow monitoring site and implementation of a new way of taking water (the “galleries scheme” described in paragraph 13 below) proposed by the Lindis Catchment Group (LCG) are not eroded by future transfers of water permits under S136(2)(b) of the Resource Management Act 1991.
- 3 The Environment Court has directed that the ORC must consult on this matter with the farmers in general and the LCG in particular, as well as the Otago Fish and Game Council and the Tarras community.
- 4 Please provide your response to ORC by 6 December 2019 (contact details are included below in paragraph 30).

Background

- 5 Plan Change 5A to the Water Plan was notified in August 2015. It addressed flows in the Lindis catchment.
- 6 Among other things, it proposed a summer minimum flow of 750 l/s at the Ardgour Road flow monitoring site and a primary allocation limit of 1,000 l/s. Primary allocation is the maximum amount of water that can be taken by all users holding primary consents at one time and no further primary allocation will be granted in the catchment.
- 7 After hearing submissions on the proposed plan change, the Council increased the primary allocation limit to 1,200 l/s subject to a summer minimum flow of 900 l/s at the Ardgour Road flow monitoring site.
- 8 The LCG appealed that decision to the Environment Court. In its appeal, the LCG sought a primary allocation limit of 1,900 l/s subject to a summer minimum flow of 450 l/s at the Ardgour Road flow monitoring site.
- 9 A number of other parties joined the plan change appeal.

For our future

- 10 Court-assisted mediation was held in December 2016 and July 2017.
- 11 Between the two rounds of mediation further technical investigations and studies were carried out.
- 12 At mediation in mid-2017, the ORC and the LCG agreed that the plan change appeal should be resolved on the basis that the primary allocation limit be 1,650 l/s (later reduced to 1,639 l/s and then rounded to 1640 l/s) with a summer minimum flow of 550 l/s at the Ardour Road flow monitoring site.
- 13 This agreement is based on the takes from 4 major existing races being discontinued and placed with a system of 13 “gallery takes” to be located further downstream (the “galleries scheme”). A gallery takes groundwater from immediately beside a surface water body, remaining effectively surface water.
- 14 The 4 races are:
- The Tarras Race;
 - The Ardour Race;
 - The Point Race (sometimes called the Rutherford Race); and
 - The Begg-Stacpoole Race.
- 15 The LCG applied for resource consents for the galleries scheme and for a number of other resource consents to replace expiring deemed permits, often known as mining privileges, and other rights to take water.
- 16 Those resource consent applications were also referred to the Environment Court for a decision.
- 17 The plan change appeal and the application for resource consents were heard together by the Environment Court.
- 18 The hearing took place in Wanaka and Cromwell in the weeks of 5 and 12 November 2018 and the week of 28 January 2019.
- 19 The Environment Court decision on Proposed Plan Change 5A was released on 7 October 2019.
- 20 In it the Court concluded that the minimum flow at the Ardour Road flow monitoring site should be fixed at 550 l/s and that the primary allocation limit for the Lindis catchment should be fixed at 1,640 l/s.
- 21 A second Environment Court decision on the applications to replace permits with new consents was issued on 8 November 2019. In this decision the Environment Court provisionally granted water permits to the members of the LCG to take water from the Lindis River.

Subject matter of the consultation

- 22 In its decision on the plan change the Environment Court recognised that takes from tributaries operate under a lower reliability of supply (average of 56% reliability) than takes from the main stem (calculated at 84% reliability). Transfers of a take from a tributary to the Lindis main stem or transfers of takes to locations further upstream of the Ardgour Road flow recorder or downstream of the Ardgour Road flow monitoring site can therefore have an impact on environmental values in the main stem. Potential impacts may include:
- Increase in overall water abstraction during low flow conditions (Transfers from tributaries to main stem)
 - Reduced reliability to water users along the main stem (Transfers from tributaries to main stem);
 - Reduced flows in upstream reaches (Transfer of takes to upstream locations);
 - Reduced flows downstream of the Ardgour Road flow monitoring site leading to increased stream depletion effects/surface flow loss to groundwater and less flow at the Lindis/Clutha confluence than predicted (transfer of takes to locations downstream of the Ardgour Road flow monitoring site)
- 23 The Environment Court considered several options for mitigating the risks associated with such transfers, including:
- setting further restrictions in the Water Plan;
 - adding conditions to individual water permits; or
 - setting conditions in a low flow management plan.
- 24 The issue that the Environment Court has directed ORC to consult on is the need for adding restrictions on transferability of water takes in the Lindis catchment and the appropriateness of breaking up the primary allocation limit¹ expressed in Schedule 2A of the Water Plan, which is currently set by Decision [2019] NZEnvC 166 at 1,640 l/s, to become:
- 132 l/s from the Lindis catchment from its headwaters to the Lindis Peak flow recorder;
 - 265 l/s from tributaries of the main stem between the Lindis Peak flow recorder and the confluence of the Clutha River/Mata-Au;
 - 1,104 l/s from the main stem of the Lindis River and the Lindis Alluvial ribbon Aquifer between the Lindis Peak flow recorder and the Ardgour Road flow monitoring site; and
 - 138 l/s from groundwater takes (connected groundwater takes allocated as surface water) in the Lindis catchment downstream of the Ardgour Road flow monitoring site.

¹ For surface water, which includes connected groundwater in terms of Water Plan Policy 6.4.1A.

- 25 A discussion of the issues involved with the transfer of primary allocation consents within the management of takes at low flows is found in Appendix 1 - Paragraphs 401 – 419 of the Environment Court’s decision on the application for resource consents (Decision [2019] NZEnvC 179).
- 26 The effect of these proposed provisions will be to:
- Limit the granting of resource consents, for primary allocation takes of water exercised in each area, to the volume set for that part of the catchment;
 - More reliably ensure continuous flows in the main stem;
 - Help to ensure that actual flows in the river correspond to modelled flows for 1,640 l/s of primary allocation and 550 l/s minimum flow under the provisionally consented abstraction regime;
 - Avoid the risk of further increases in losses of surface water to aquifers;
 - Sustain a higher degree of reliability of water supply to those dependent on lawful taking of water from the Lindis main stem; and/or
 - Enable ORC to decline consent applications for transfers that could adversely affect existing lawful taking.

Court Directions

- 27 The Environment Court has directed that ORC must consult with “farmers along the Lindis River in general, Lindis Catchment Group, Otago Fish and Game Council, and the local Tarras community.”
- 28 The Court’s directions are set out in an order which is attached as Appendix 2. This letter is written in accordance with Paragraph 2 of the Court’s directions in Minute (Re PC5A) – 1 November 2019.

How to provide your views

- 29 You may provide your views and seek information by contacting Richard Pettinger by telephone on DDI 027 625 7604, or by email Richard.pettinger@orc.govt.nz.
- 30 Further information is available on the Council website or by following this link <https://www.orc.govt.nz/plans-policies-reports/regional-plans-and-policies/water/changes-made-operative-and-archives/proposed-plan-change-5a-lindis-integrated-water-management>
- 31 Any response is due by 5.00pm on Friday 13th December 2019. It can be as hard copy, or preferably via an e-mail to Richard Pettinger.

Next steps

- 32 Once the Council has received feedback, it will determine by 30 January 2020 whether it will recommend the splitting of the primary allocation limit into four as described above or will recommend an alternative approach for managing the potential risks associated with transfers. You will be advised in writing.

Yours faithfully

Gwyneth Elsum

General Manager Strategy, Policy and Science

APPENDIX 1 : Paragraphs 401 – 419 of the Environment Court’s decision on the application for resource consents (Decision [2019] NZEnvC 179)



available at the present time to set a monthly volume on any other basis.

[400] Strictly Ms Lojkine's evidence was not rebuttal and so on normal evidential principles it was not admissible. However it raised a question of normal practice so in our discretion⁴¹⁵ we will accept it. We raise a question for the ORC to discuss with the other parties as to whether standard practice would be a condition requiring a monthly split of the maximum volumes to be taken? Failing agreement, we seek a further brief report from Dr Cowie as to the appropriateness of monthly maxima being specified and the approach to calculating these.

8.2 Portability: moving water permits (primary allocation) within the catchment

[401] The LCG proposal treats all taking of water from anywhere in the catchment as the same in terms of effects, with the legal effect that the volume of water for a tributary take could in theory be transferred to a take from the main stem. Given the differences in reliability between water from the tributaries (lesser) and water from the mainstem, and the effects on mainstem flows if a water take is moved upstream, this is clearly problematic.

[402] In opening Fish and Game proposed that the total primary allocation be divided to cover four different reaches of the river and its tributaries:

- 132 l/s above Lindis Peak FR;
- 265 l/s from the tributaries;
- 1104 l/s from the remainder of the mainstem (i.e. between Lindis Peak FR and Ardgour FR and the Lindis Ribbon Aquifer; and
- 138 l/s from groundwater takes below the Ardgour FR.

[403] Dr Cowie considered in his section 87F report that "there is no need for any changes to the water plan specifically with the potential transfer of permits to take water within the Lindis catchment"⁴¹⁶. But after reading all the evidence he revised his position in his supplementary evidence and wrote⁴¹⁷:

⁴¹⁵ Section 276 RMA.

⁴¹⁶ B Cowie section 87 Report 367 [Environment Court document 0.4].

⁴¹⁷ B Cowie supplementary evidence 8 [Environment Court document 46B].



I am in favour of the second component, which is to limit the total volume of primary allocation take in three different reaches of the river and its tributaries on a section by section basis. These are respectively primary allocations of: 132 l/s above Lindis Peak; 265 l/s from the tributaries; 138 l/s from groundwater takes below the Ardgour Road flow monitoring site; and 1104 l/s from the remainder of the mainstem.

I consider this to be an elegant solution to possible concerns⁴¹⁸ about transfer of permits which were discussed in Paragraphs 363-367 of my S 87F report. It would prevent for instance transfer of a tributary take to a more reliable main stem take. In conjunction with the proposed prohibition on future use of the four irrigation raceways, it further incentivises the galleries scenario by setting the total maximum instantaneous takes sought in different sections of the river.

Later, in cross-examination⁴¹⁹, Dr Cowie expressed some concern as to the way in which this would work (further to a proposal from Ms Lojkine to make such a division of the primary allocation of the Lindis catchment as part of Schedule 2A "Schedule of specific minimum flows for primary allocation takes in accordance with Policy 6.4.3, and primary allocation limits in accordance with Policy 6.4.2a and 6.4.1A". However, he said he "leaned towards" the idea but was not wedded to it.

[404] We consider the issue is a useful one. We have now issued directions in the PC5A proceeding for the ORC to consult on this issue with a view to adding restrictions on portability to the ORP:W in relation to the Lindis River's primary allocation. We also support an addition to the objectives of the relevant flow management plan and discuss that below.

[405] As an alternative, Ms Lojkine provided⁴²⁰ an example of the type of condition that could allocate certain flows to different parts of the catchment to attain some variability in the flow pattern at low flows, seeking to be consistent with Mr Henderson's hydrographs. Her proposal would have seen this condition subject to any refinements of an abstraction management plan that she was proposing⁴²¹. In our view this is uncertain and unenforceable as a condition. We prefer the idea of incorporating the restricted portability of allocations either directly as specific restrictions in the individual water permits or through the mechanism of the conditions on the Low Flow Management Plan.



⁴¹⁸ Discussed in paras 363–367 of the section 87F Report.

⁴¹⁹ Transcript (2019) p 304 lines 1-2.

⁴²⁰ F A Lojkine rebuttal Attachment 3 [Environment Court document 45A].

⁴²¹ F A Lojkine rebuttal Attachment 1 [Environment Court document 45A].

8.3 Water sharing/rationing between permit holders

[406] The LCG put a great deal of emphasis on the Low Flow Management Plan (“LFMP”) as contemplated by the ORP:W Policy 6.4.12B and C and developed further by Dr Cowie. As a preliminary point we note that the proposed condition provides for each consent holder to have its own LFMP. In our view they need to be standardised so that the ORC is not faced with a multiplicity of different plans, layouts and contents. This leads us into the broader topic of how to manage these multi-party processes / collective requirements to comply. We anticipate that the consent holders will cooperate in producing a Low Flow Management Plan template suitable for meeting the requirements of the conditions that are common to all parties.

[407] There is one further specific issue about water sharing we need to resolve, as well as some general issues about the purpose of the LFMP. The specific issue is that on occasion there will be insufficient flow to satisfy the face value of each of the permits. The case for Fish and Game is that water scarcity will result in competition for water that will result in “flat-lining” of the river when inflows at MALF or below. In closing submissions Mr Page said “LCG is alive to the issue. LCG’s members are well aware that it is in the Group’s individual and collective interests to co-operate to share available water rather than compete for a “commons” resource on a first in, first served basis”.

[408] It will be recalled that the ORC has power⁴²² to impose conditions on the taking of water in accordance with an ORC approved rationing scheme. While that power is contained in a policy, because most of the takes we are concerned with are fully discretionary activities, there is clear power to impose such conditions.

[409] The consent conditions require each consent to be exercised in compliance with a water-sharing agreement. Ms Lojkine commented⁴²³ that:

A minimum flow condition should function as a definite threshold below which the consent cannot be exercised. Dr Cowie’s Condition 4 on RM17.301.14 (the Cooke consent) is a good example: it clearly sets a flow at the Ardgour Flow Recorder that the Lindis River must be above before the consent can be exercised. By contrast, Condition 3 of RM17.301.14 states that the exercise of the consent must not result in the flow falling below 550 l/s.

⁴²² Policies 6.4.12, 6.4.12A, 6.4.12B and 6.4.12C ORP:W.

⁴²³ F A Lojkine rebuttal evidence 17 [Environment Court document 45A].



Under this condition it could be possible for the consent holder to claim that it was not the result of the exercise of their consent that had caused the river to drop below 550 l/s. Ms Lojkine proposed alternative wording in her Attachment 1 to ensure that compliance with both summer and winter minimum flows is clear and certain. Her condition makes it clear that at the specified minimum flows (550 l/s October to May and 1600 l/s June to September) abstraction is to cease. Further, her condition 1 (which is subject to condition 4) specifies that the of rate of abstraction shall be the lesser of:

- the rate allowed at a particular property;
- the rate which in combination with all other actual real-time primary allocation takes from the Lindis River catchment above the Ardgour FR ensures that the total volume taken does not exceed 1639 l/s.

[410] We consider the conditions should be modified to adopt her wording or to similar effect but seek submissions on the workability of the conditions (in case there are problems we do not see at present).

Objectives of the LFMP

[411] Dr Cowie developed a LFMP⁴²⁴ (attached to these Reasons as "A") with the following objectives:

- i. to minimise the frequency and duration of flows less than 600 litres per second at the Ardgour FR during the months of October to May inclusive;
- ii. to limit the length of the Lindis River affected by low flows; and
- iii. to manage the taking of supplementary allocation water.

[412] Ms Dicey sought to add a new first objective:

- i. to facilitate the sharing of water between permit holders with primary allocation water during low flow periods and to provide flexibility as to how this sharing occurs.



⁴²⁴ B Cowie supplementary evidence Appendix 4 [Environment Court document 46B].

[413] Mr Hickey⁴²⁵ expected that working as group would provide the opportunity of for a catchment-based approach that (among other things) provides flexibility between users for better water management (day-to-day allocation) during times of water shortage. We prefer Mr Hickey's approach and consider the following should be added as a fourth objective:

- iv. to provide the opportunity for a catchment-based approach that promotes flexibility between users for better water management particularly during times of water shortage.

[414] Fish and Game is concerned that the flow regime that will result from implementing the LCG scheme may not resemble the outcome expected based on the modelling. As we described above on the portability of water permits (primary allocation) within the catchment, proposals were made as to a possible regime to divide the catchment into four reaches with specified primary allocations. We think that adopting that approach will go some way to alleviating those concerns and that this should be spelled out in the LFMP. In addition, our view is that oversight of this is required, and we suggest that an objective be added to those above to give effect to that such as the following:

- v. to confirm that the LCG scheme once implemented does result in the hydrological and ecological outcomes predicted.

[415] Dr Cowie also proposed the LFMP should identify the following means of achieving the objectives:

To achieve these objectives the LFMP shall include, but not be limited to, specifying:

- i. How the instantaneous rate of take from the main stem of the Lindis River will be progressively reduced when flows recede below 1,600 litres per second at the Lindis Peak flow monitoring site.
- ii. How takes will be rationed from the main stem of the Lindis River in advance of flows lower than 1,000 litres per second occurring at the Ardgour Road flow monitoring site.
- iii. How takes from the main stem of the Lindis River will be managed to ensure that the minimum flow of 550 litres per second at the Ardgour Road flow monitoring site is met at all times.
- iv. How condition 1 [the pulse flow condition] will be implemented.

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M Hickey evidence-in-chief 54 [Environment Court document 10].



- v How the supplementary allocation will be managed to ensure minimum flow requirements are met at all times.

[416] As we noted above our view is that dividing the river into three reaches and the tributaries gives greater certainty that the outcome of implementing the scheme will be as predicted and we have directed that the ORC consults about adding those restrictions to PC5A. In addition to any addition (or not) to PC5A we consider the following should be inserted into Dr Cowie's list of objectives:

- vi. How the allocations to three reaches of the river and the tributaries are to be defined and managed, taking the following as a starting point:
 - (d) 132 l/s above Lindis Peak FR;
 - (e) 265 l/s from the tributaries;
 - (f) 1,104 l/s from the remainder of the mainstem (i.e. between Lindis Peak FR and Ardgour FR and the Lindis Ribbon Aquifer; and
 - (g) 138 l/s from groundwater takes below the Ardgour FR.

[417] Further to the objectives added above, we will direct that the following two matters be added to the list:

- vii. How the hydrological outcome of the scheme will be monitored against the hydrological predictions.
- viii. How, once the scheme has been implemented, any changes, if needed, would be made to ensure the hydrological outcome predicted by the modelling can be achieved.

[418] Ms Lojkine suggested an alternative to the Low LFMP, styled an "Abstraction Management Plan". That contained objectives, criteria and flow management principles to achieve the criteria, along with a low flow monitoring plan. Our view is that Ms Lojkine's concept over-complicates the matter. With our amendments to the LFMP (above, and on which we will invite comments) we consider that the scheme can likely be implemented in a satisfactory manner. We do not consider any general adaptive management plan conditions are necessary.

[419] One further requirement for the LFMP is the removal of condition 10, which would allow for a 'default certification' if the ORC does not respond within 30 days. That is



unacceptable as the certification process provides important verification of the effectiveness and continued workability of the plan. Accordingly it should be deleted. If any person considers the ORC is unreasonably slow to certify there are remedies under the Act.

8.4 Should the command areas be allowed to extend?

[420] While each property for which a consent is sought has identified a command area, and its annual maximum volume has been calculated in reliance on that, the proposed conditions⁴²⁶ of consent simply give the general legal description of the land and add "... and other land as addressed in writing to the Consent Authority".

[421] Fish and Game seeks that the area to be irrigated should be restricted to the area applied for. A larger issue is whether the command area should be limited by conditions in each water permit to take and use water for irrigation. Fish and Game sought this and eventually Dr Cowie agreed with it. Ms Lojkine wrote⁴²⁷ that "Including this condition will mean that if that area of land can be irrigated more efficiently, any surplus water can be returned to the river and reduce adverse effects". This was supported by Dr Cowie in his supplementary report⁴²⁸ on the grounds that "the LCG applications are predicated on a total irrigation area of about 2,500 ha, and an efficient annual irrigation annual volume of 810 mm". Dr Cowie observed that if water can be used more efficiently, then an increase to the command area can be sought as a variation⁴²⁹.

[422] Fish and Game's point is that this is not a case where a 'new' resource is being allocated from a starting position of natural flows and a careful appraisal of all aspects of the ecosystem's integrity, form, functioning and resilience. Rather the exercise is one of pulling back from a situation of arguably inefficient overallocation to a compromise point that appropriately weighs all the competing factors; it sends the wrong message to allow the command areas (singularly or in collaboration) to be increased without careful further scrutiny. One of the questions that might/should arise for example is whether the command area should stay the same but the maximum annual volume be reduced.

[423] There is considerable force to this suggestion (supported by Dr Cowie).



⁴²⁶ Attachment to the section 87F Report [Environment Court document 46X].

⁴²⁷ F A Lojkine rebuttal evidence 15 [Environment Court document 44B].

⁴²⁸ B Cowie supplementary evidence 24 [Environment Court document 46B].

⁴²⁹ Under section 127 RMA.

APPENDIX 2: Environment Court Minute



**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

IN THE MATTER of the Resource Management Act 1991
AND of Plan Change 5A to the Regional Plan
Water for Otago
AND of an appeal under clause 14 of the First
Schedule of the Act
BETWEEN LINDIS CATCHMENT GROUP
INCORPORATED
(ENV-2016-CHC-61)
Appellant
AND OTAGO REGIONAL COUNCIL
Respondent

MINUTE (RE PC5A) – 1 November 2019

[1] In its Further Decision of 1 November 2019 the Environment Court reserved the issue of portability of water permits to take water from the Lindis River.

[2] We now direct the Otago Regional Council under section 293 of the Resource Management Act 1991 to consult with the farmers along the Lindis River in general and the Lindis Catchment Group in particular as well as the Fish and Game Council and the local Tarras community as to whether the primary allocations in Schedule 2A ORP:W should be allocated further to three reaches of the river and the tributaries to be defined and managed as follows:

- (a) 132 l/s above Lindis Peak FR;
- (b) 265 l/s from the tributaries;
- (c) 1104 l/s from the remainder of the mainstem (ie between Lindis Peak FR and Ardour FR and the Lindis Ribbon Aquifer; and



(d) 138 l/s from groundwater takes below the Ardgour FR.



J R Jackson
Environment Judge

Issued: **01 NOV 2019**

