Before Otago Regional Council

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| In the matter of | the Resource Management Act 1991 |
| And | |
| In the matter of | Application RM19.151 for resource consent to take water for irrigation of 160 ha of land originally lodged on 13 May 2019 |

# Legal Submissions for John Baker and Bridget Steed

Dated 14 June 2021

## INTRODUCTION

1. These submissions are on behalf of Mr John Baker and Ms Bridget Steed (**Submitters**). The Submitters hold a share in Deemed Permit 97402 which authorises the take of water from the Royal Burn some 4 km downstream of the take proposed in the application by BSTGT Ltd and Trustees of the AP McQuilkin Family Trust (**Applicant**). The Submitters oppose the Applicant's proposal to take over a million litres of water a year from New Chums and the Royal Burn North Branch (**Application**).

2. Mr Baker and Ms Steed made a carefully considered and detailed submission as to why the Application should be declined, and they rely on that submission in full. It is not my intention to repeat the content of that submission, but rather to reiterate and reinforce key aspects of it, and to consider whether the modifications since made to the Application, and conditions which are now on the table, mean that the Submitters' concerns have been addressed. In short, the answer to that last question is, no.

3. The Submitters' position, in summary, is:

   (a) As a matter of jurisdiction, the Commissioner must decline the Application because it ought to have been publicly notified, but was not: s 104(3)(d) Resource Management Act 1991 (**RMA**).

   (b) Even if the Commissioner is satisfied that there is jurisdiction, the Application should be declined, because:

(i) There is inadequate information on which to determine the Application (s 104(6) RMA).

(ii) The proposed take is contrary to important statutory documents, including the National Policy Statement on Freshwater Management 2020 (NPSFM 2020), and the objectives and policies of the Otago Regional Plan and Plan Change 7; and the actual and potential effects of the take are unacceptable (s 104(1) RMA), and it will not give effect to the sustainable management purpose of the Act (Part 2 RMA).

(c) Should the Commissioner consider, contrary to the Submitters' primary position, that there are grounds to grant consent, a conservative approach to the imposition of conditions is required. In that regard, and subject to further comment below, the Submitters prefer the conditions put forward on behalf of the Council, Kāi Tahu ki Otago, and Mr Blakely and Ms Wallace.

## NO JURISIDICTION TO GRANT CONSENT

4. Section 104(3)(d) provides that (emphasis added):

> (3) A consent authority must not, - …
>
> (d) grant a resource consent if the application should have been notified and was not.

5. The Submitters say that the Application ought to have been publicly – not just limited – notified, on the basis that it will have adverse effects on the environment that are more than minor. The fact that it was not means that there is no jurisdiction to grant the consent sought.

6. There are a number of legal issues to unpack in applying this section which I deal with in turn.

*Is limited notification enough?*

7. In this case, the Application was limited notified. The question is whether this is sufficient to satisfy s 104(3)(d)'s requirement that the application was 'notified'.

8. In *Maungahruru-Tangitū Trust Inc v Hawke's Bay Regional Council* the Environment Court rejected an argument that it was not fatal that an application which should have been notified was limited notified. The Court noted it did not accept that proposition, and said:

> Section 2AA identifies two types of notification, "public" or "limited". The relevant provisions of the Act establish a process requiring a consent authority to determine if one of those two types of notification is required (subject to its general discretion to notify in any event) and then undertake that type of notification. It cannot be that the requirement to publicly notify can be satisfied by limited notification, they are two different things.

9. With respect and acknowledging that there is one case that briefly suggests the opposite,[1] what the Court said in the above case must be correct. The purpose of notification is to enable persons with a statutory expectation of public participation to have their say on a proposal with the potential for adverse effects on the environment. The statutory purpose of public notification is not met by limited notifying only directly affected persons. The alternative interpretation would mean the Council, or an applicant could avoid the potential jurisdictional hurdle of s 104(3)(d) by limited notification to a single party. That cannot be the intention of s 104(3)(d).

10. Therefore, if the Commissioner must himself consider the test for notification, set out at s 95A – 95E. For present purposes, the key issue is that an application must be publicly notified if "*the consent authority decides, in accordance with section 95D, that the activity will have or is likely to have adverse effects on the environment that are more than minor*" (s95A(8)(b)). As discussed below and in evidence, the Submitters say that the Application will result in adverse effects on in-stream ecological health; down-stream water users;[2] groundwater; and wetland areas.

11. If, having done that assessment, the Commissioner considers the Application would result in an effect on the environment which is more than minor the Application must be declined.

*What must be assessed?*

12. A relevant question – particularly relevant here where the Application has been amended multiple times since lodgment - is what version of the Application is relevant for the Commissioner's s 104(3)(d) consideration.

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1 In *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, the Court observed at [240] - *"Without going into such a review, we also note that the definition of notification in s 2AA RMA means public notification or limited notification of the application or matter. We think that the meaning of notified in s 104(3)(d) is to be interpreted consistently with that definition."* There was no further analysis and the earlier *Maungaharuru* decision which considered the issue in depth was not cited. It is therefore neither binding nor persuasive.

2 Noting that effects on downstream users that are located 'adjacent' to the subject site are excluded under s 95D. However, users further away are not excluded and trigger public notification if effects are more than minor.

13. The Court in *Goodwin v Wellington City Council* held the relevant version is that at the time of considering the application, not the version that existed at the time the original notification decision was made.[3]

14. Importantly, however, it is the 'Application' that must be considered – that means it is the proposal and conditions put forward by the Applicant which the Commissioner must be satisfied meets the statutory tests for not requiring public notification. This is the approach required when assessing notification as stated by the Court of Appeal in *Auckland Regional Council v Rodney District Council*.[4] It held that, in making decisions on notification, a consent authority can only take into account prospective conditions of consent as mitigating the effects of the activity if they are "*inherent in the application*" – later described as "*both certain and an integral part of the application"*[5] – but otherwise may not be considered.

15. In this case, ORC and submitters have identified conditions which they say are necessary to mitigate adverse effects of the proposed water take to ensure they are no more than minor. For instance, they propose residual flow conditions to ensure adverse effects on instream values and downstream users are mitigated. However, the Applicant opposes those conditions. As such, they cannot be said to be an 'integral part of the application' for the purposes of assessing whether the application ought to have been notified. In my submission, the decision the Commissioner must make under s 104(3)(d) is whether, with only the conditions put forward as part of the Application, the proposal would have more than minor effects. Whether those effects might be brought to a minor level by the imposition of different conditions is not relevant under s 104(3)(d).

16. Another important point is that when deciding whether the application ought to have been notified, there is no ability to consider positive effects, only adverse ones.[6]

*Test for notification*

17. The Commissioner will not be materially assisted by either of the Council's notification assessments in this matter:

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3 *Goodwin v Wellington City Council* [2021] NZEnvC 9 at [104].

4 *Auckland Regional Council v Rodney District Council,* [2009] NZCA 99, [2009] NZRMA 453, (26/3/2009) at [53]

5 Ibid, at [60].

6 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580 – "*… a balancing of good and bad effects is entitrely appropriate when a consent authority comes to make its substantive decision, [but] it is not to be undertaken when non-notification is being considered*…". Confirmed in *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647 at [33].

(a) First, as noted above, the Application has changed considerably since the time notification was assessed, and more information is available (though still not enough, as is discussed later).

(b) Secondly, this is not a judicial review of the Council's decision – unlike the High Court on review, which looks at the legal process only, the Commissioner can and must undertake an independent assessment of whether the effects of the application are more than minor.

(c) Finally, the notification decision proceeded on a flawed basis so is not of material assistance to the Commissioner. In particular, the assessment did not differentiate between effects on persons who own or occupy land adjacent to the subject site – which are excluded under s 95D(a)(ii) – and persons further away. For instance, effects on the Submitters – who are located some 4 km downstream from the subject site and are not 'adjacent' – were assessed as suffering from effects that were *"at least minor"*.[7] The author did not go on to consider whether the effects were more than minor because, as is clear from the remainder of the report, she thought downstream users could only be relevant for limited notification purposes. That is not correct. Beyond the adjacent landowners excluded under s 95D, effects on 'people and communities' are relevant effects on the 'environment',[8] which, if more than minor, require public notification. Had the decision correctly identified, as it should have, that the potential effects on the Submitters were more than minor, public notification was required.

*Approach required*

18. The matter of whether the Application – in the form now proposed by the Applicant – should have been publicly notified should be determined as a preliminary matter as it goes to jurisdiction to take the Application any further. If the Commissioner concludes that, with only the Applicant's conditions, there is a potential effect on any of these aspects of the environment that is more than minor, then s 104(3)(d) applies, and the Application must be declined.

19. If the Commissioner does not have sufficient information to make the decision, then the Application should also be declined – this is addressed in the next section.

7 Notification Assessment, 13 November 2020, p21.
8 RMA, s 2; *Lysaght v Te Rūnanga o Ngāti Awa* [2021] NZHC 68 at [4] and [58].

## INADEQUATE INFORMATION TO DETERMINE APPLICATION

20. Section 104(6) provides that "*A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application*".

21. That is consistent with the legal principle that there is a persuasive burden on an applicant to convince the decision-maker that granting the consent will meet the sustainable management purpose of the RMA. In *Ngati Rangi Trust v Genesis Power Ltd*, the Court of Appeal held:[9]

> … I see no difficulty with the statement in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at [121] that *"[i]n a basic way there is always a persuasive burden*" on an applicant for a resource consent. As the Environment Court said in *Shirley*, that approach reflects the requirement that a person who wants the court to take action must prove his or her case. In addition, as the court observed at [122] there are also statutory reasons for speaking of a legal burden on an applicant:
>
> > "Since the ultimate issue in each case is always whether granting the consent will meet the single purpose of sustainable management, even if the Court hears no evidence from anyone other than the applicant it would still be entitled to decline consent."

22. Therefore, the Applicant's counsel's assertion that *"she/he who alleges must prove"*[10] does not properly capture the approach required under the RMA. The Applicant needs to provide the decision-maker with a proper evidential basis to conclude that the purpose of the Act will be met, which includes safe-guarding the life-supporting capacity of water, and avoiding, remedying or mitigating adverse effects on the environment. The Applicant is not entitled to any presumption, nor to the 'benefit of the doubt' that such important matters will be achieved, if there is inadequate information on which to undertake the assessment.

23. It has been a matter of some concern to Mr Whyte, the expert hydrogeologist engaged by the Submitters, that the information provided in support of the Application does not address some fundamental questions about the state of the environment that would allow effects on it to be addressed. He shows that there is inadequate information on a range of matters, including:

    (a) Current flows in the streams at relevant periods and at different points.

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9 *Ngati Rangi Trust v Genesis Power Ltd*, [2009] NZCA 222, [2009] NZRMA 312, (2/6/2009) at [23].
10 Opening Submissions of Counsel for the Applicants, para 114.

(b) The current state of the groundwater and its relationship with surface water in the catchments, including lag time between losses from surface water to groundwater and re-emergence.

24. Mr Whyte's evidence sets out in detail what information should have been provided in order to allow a proper assessment, and I do not repeat that here.

25. A useful example however is Mr Hickey's assertion that the Royal Burn North Branch has a naturally drying reach,[11] and the Applicant relies on that statement to say "*intermittency is not caused by the Application or existing abstraction*". This 'evidence' is relied on to oppose proposed conditions which seek to protect in-stream ecology.[12]

26. However, Mr Veendrick points out that Mr Hickey relies for his assertion on gauging that was undertaken when the Applicant was taking one third of the flow. Mr Veedrick's view is that there is "*significant uncertainty regarding the reach in question and whether it is naturally drying. I do not consider that the applicant has provided sufficient evidence to conclude that the reach naturally goes dry*".[13] Mr Whyte makes similar comments about the lack of clarity as to which sections are drying, and whether that can be attributed to the Applicant's take. In those circumstances, how can the parties, or the Commissioner, properly be satisfied that effects are minor, or what conditions are appropriate, much less whether the directive requirements of the NPSFM 2020 are being achieved by the grant of consent.

27. I simply point out that if the Commissioner agrees and is unsure whether the Application will result in adverse effects on the environment because there is insufficient information, then there is a clear ability to decline consent.[14]

## SECTION 104 MATTERS

28. The Submitters have not called planning evidence as their position relies primarily on evidence of adverse effects and inadequate information, supported by the evidence of Mr Whyte and Mr Baker, as well as that for other submitters such as Bloomsbury Stud, Kāi Tahu Ki Otago, the Clarkes and Mr Blakely and Ms Wallace.

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11 Evidence of Matthew Hickey, para 24.
12 Opening Submissions of Counsel for the Applicants, para 13.
13 Evidence of Bas Veendrick, at para 42.
14 An example of s 104(6) being relied on to decline consent is the Environment Court's decision in *RJ Davidson Family Trust v Marlborough District Council*, upheld by the High Court on this issue in *R J Davidson Family Trust v Marlborough District Council*, [2017] NZHC 52, [2017] NZRMA 227, (31/1/2017), at [95] – [103]. This aspect of the High Court decision was not the subject of the appeal to the Court of Appeal.

29. A brief commentary on the additional matters addressed under s 104(1) is as follows.

*Any actual and potential effects on the environment of allowing the activity*

30. An important starting point is the environment against which the effects of the Application are to be assessed. The correct approach is reflected in the evidence of Ms King[15] and Mr Vial,[16] namely that the effects of the existing take are to be ignored, and the environment is assumed to be in the state it would be but for the Applicant's current water takes.

31. The difficulty with a lot of the information provided by the Applicant is that it is unclear whether the Applicant was operating their system at the time of various measurements, or how recently it had stopped. It is therefore quite difficult to know what the unaffected state of the environment is, and this affects the assessment of effects on natural water flows, and the nearby wetland. A fair assumption is that if over a million cubic metres of water was left in the catchments each year, there would be more water available for in-stream ecology, downstream users and groundwater replenishment of wetland areas.

32. Just because takes have been allowed previously, under pre-RMA legislation that had no regard to environmental outcomes, does not mean the effects of such takes are now acceptable, particularly in light of the emphasis in the NPSFM 2020 on giving effect to Te Mana o Te Wai. In my submission, it is quite valid and appropriate for the environmental outcome to be one that is significantly improved from what has in the past or is currently being experienced in these catchments.

33. The principal adverse effects claimed relate to:

    (a) The availability of water for downstream users – while the Applicant asserts its take has essentially no effect on downstream users, this is disputed by downstream users who have direct experience of having their water sources dried up as a direct result of the Applicant's take. The evidence of these witnesses is compelling and there is no reason to suggest it is unreliable. Appropriate weight must be afforded to this direct evidence.

    (b) In-stream ecological health – Mr Whyte and others give evidence of trout being present in the Royal Burn, as well as the presence of aquatic birds suggesting the

15 Section 42A report, p27.
16 Evidence of Tim Vial, p6.

presence of smaller aquatic fauna. The Applicant largely dismisses the need for conditions directed at protecting in-stream ecology on the basis there are stretches that are intermittently dry. As noted earlier, it is far from clear that but for the Applicant's take, that would be the case. The Submitters do not consider the Applicant's proposed conditions adequately provide for in-stream health and consider substantial residual flow conditions of the type proposed by Kāi Tahu Ki Otago would be required to mitigate the potential for adverse effects.

(c) Groundwater – the irrigation of 20 hectares of land for use as a golf course, accompanied by the intensive application of fertilizer, fungicides and pesticides, raises significant concerns about the potential for contamination of groundwater. In this regard, I respectfully agree with the legal opinion provided by Wynn Williams confirming the ability to consider consequential water quality effects in the context of this application. Given the Applicant's counsel disputes the approach from a legal perspective, I deal with this further below. Mr Whyte has significant concerns about the potential for contamination of groundwater, and this has not been adequately addressed by the Applicant, nor the conditions proposed by the Council.

(d) Effects on wetlands – While the 'swamp' said to be affected by the Application is not defined as a Regionally Significant Wetland, and therefore directly relevant under matter of discretion 12.1.4.8(xiii), the Commissioner should be slow to disregard effects on it, given the strong emphasis in the NPSFM 2020 on protecting wetlands. Mr Whyte's evidence expresses a view that the 'swamp' likely meets the definition of a natural inland wetland under the NPSFM 2020, and the evidence of Mr Clarke would support that. If the proposed take has the potential to dry up or otherwise compromise the wetland – as Mr Whyte thinks it does – this should be considered under whether there is a need for a residual flow, and possibly whether there are any potential effects on any groundwater body, given it is clear the wetland is fed by groundwater. I note that Ms Lennox's comment that any effects of the proposal on the 'swamp' will be less than occurring previously is irrelevant,[17] given the existing environment against which the Application is to be assessed ignores the current take.

34. Returning to the relevance of effects on groundwater, it is somewhat surprising, not to say concerning, that the Applicant is suggesting the Commissioner should disregard

[17] Evidence in reply of Hilary Lennox, para 37.

potential effects arising from the intensive use of contaminants on the golf course in circumstances where there is a risk of infiltration to groundwater.

35. Effects of permitted activities that will be enabled by the grant of consent are frequently assessed as part of the considerations when assessing an application. For instance, when assessing a subdivision consent, the decision maker will always consider the effects of development that will be a permitted activity on the newly created lots. The decision maker will need to consider whether new houses will create adverse reverse sensitivity effects as a result of being located close to operational farms.[18] In that example, the applicant cannot avoid that assessment by saying the houses are controlled under a different section of the RMA (s 9, rather than s 11), or by different rules in the District Plan which would provide for the houses as a permitted activity. The houses would not be there but for the subdivision, and their effects must be carefully assessed.

36. Interestingly, in *Gibbston Vines*, the Court considered whether the discharge of domestic garden sprays to air by new residents might adversely affect neighbouring vineyards. The Court noted a condition was proposed preventing such sprays and concluded there was no material risk as a result. Those sprays would have been a discharge under s 15 and a permitted activity under the Regional Plan, but the Court still took them into account and acknowledged a condition of subdivision to mitigate them.

37. In the same way, the water take is said to be partly required for use for irrigation of the golf course. The effects of that irrigation are squarely within the Commissioner's discretion. To say that the take and use of water is controlled by s 14 and the discharge of contaminants by s 15 is a fatuous argument. As *Gibbston Vines* demonstrates, a compartmentalized approach is not one that has found favour with the Environment Court and would be inconsistent with achieving the sustainable management purpose of the Act.

38. I discuss the NPSFM 2020 below but note here that Policy 3 puts in place a clear requirement that freshwater is managed in an integrated way that considers the effects of the use and development of land, including the effects on receiving environment. This reiterates the requirement to undertake a holistic assessment of what is actually proposed.

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18 See, for instance, *Gibbston Vines Ltd v Queenstown Lakes District Council* [2019] NZEnvC 115 from [95]. (**Gibbston Vines**)

39. The fact that the application of chemicals to the golf course might be a permitted activity does not mean it is irrelevant to consideration of the application for water take. But for the irrigation proposed, the chemicals either would not be discharged at all (because the golf course could not be sustained) or would not be transported to groundwater. The effects of concern are a direct consequence of the proposal to take and use water and must be fully addressed.

40. Overall, the Submitters say that the effects on the environment of the Application are not appropriately mitigated by the conditions proposed by the Applicant. Those proposed by other parties go some way to addressing them, although the lack of information means the Submitters have residual concerns that there will be adverse effects not fully addressed by the conditions currently proposed. I comment on conditions below.

*NPSFM 2020, Regional Planning documents and Part 2*

41. I have dealt with these together, because, as the most recent expression of how Part 2 of the RMA is to be implemented in relation to freshwater management, the assessment of all three of these aspects of s 104(1) should, in my submission, be undertaken through the 'lens' of the NPSFM 2020.

42. The NPSFM 2020 represents a significant shift in the management of freshwater in New Zealand and it is directly relevant to this application. The sole Objective 2.1 is of key importance, providing:

> The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
>
> (a) first, the health and well-being of water bodies and freshwater ecosystems
>
> (b) second, the health needs of people (such as drinking water)
>
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

43. The request for water by the Applicant is in category (c) of this hierarchy, with the water essentially being required for economic reasons only (and possibly social, for the golf course). Categories (a) and (b) must be given priority, and no one person can properly claim a monopoly on category (c). Furthermore, Policy 15 makes clear that social and economic wellbeing is to be enabled only in a way that is consistent with the NPSFM 2020.

44. In addition to Policy 15, other relevant policies are 1, 2, 3, 6, 7, and 11.

45. The Submitters acknowledge and support the evidence of Mr Vial in relation to how the Application measures up against the requirement to manage freshwater in a way that gives effect to Te Mana o Te Wai, and his observation that the abstraction of a significant proportion of flow in these waterbodies does not uphold that principle nor provide for their health and wellbeing.[19]

46. Policy 6 requires that there is "*no further loss of natural inland wetlands, their values are protected, and their restoration is promoted*". Mr Whyte's view is that the so called 'swamp' likely meets the definition of a 'natural inland wetland'. Other witnesses state it is not, but do not explain what features they rely on to exclude it from what is generally a very broad definition. The directive wording of the Policy emphasizes the national significance of even very small wetlands. The Submitters support the evidence of Ms Miller that the conditions proposed by the Applicant risk stagnancy in the 'wetted area', and that greater residual flows are appropriate to ensure the wetland is not adversely affected.[20]

47. None of the Regional planning documents were prepared under the NPSFM 2020 and therefore they need to be viewed with some caution, particularly in terms of the priority to be afforded to the health and well-being of the waterbodies over economic and social well-being. This is not to say they are irrelevant, but rather, there should be care taken to ensure the regional objectives and policies do not cut across the priorities and outcomes sought by the NPSFM 2020.

48. Provided the NPSFM 2020 is correctly applied, separate resort to Part 2 of the RMA is unnecessary in this case, other than to emphasise the importance of safe-guarding the life-supporting capacity of water and avoiding, remedying or mitigating adverse effects on the environment. The NPSFM 2020 gives substance to the principles of Part 2 as they apply to freshwater in the same way as the New Zealand Coastal Policy Statement does for coastal management. In *RJ Davidson v Marlborough District Council*, the Court of Appeal held:[21]

> If a plan has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative

19 Evidence of Tim Vial, para 56.
20 Evidence of Bryony Miller, para 38.
21 [2018] 3 NZLR 283 at [75].

exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.

49. In this case, the NPSFM has been prepared under RMA, and reflects the outcomes sought by Part 2. The NPSFM represents the most up-to-date reflection of what the Act requires when considering applications to take and use freshwater. The evidence before you is that the Application is inconsistent with key aspects of that National Policy. The conditions put forward by the Council, and the suggested amendments to those by Mr Vial, go some way to addressing the inconsistency.

## CONDITIONS

50. At the risk of repetition, the Submitters consider consent should be declined, and conditions are therefore irrelevant. However, and without derogating from that position, the following brief comments on conditions are made. Where a condition is not mentioned, they have no particular comment.

(a) Expiry – The Submitters support the request by Kāi Tahu Ki Otago and others for a 6-year duration. This will ensure the consent is reconsidered in light of NPSFM compliant regional planning documents, rather than leaving it to a discretionary review process.

(b) Condition 3 – The Submitters support the evidence of Mr Blakely and Mary Wallace, and Mr Clarke, in requesting that the allocation volumes be reduced to a more sustainable level, if indeed there is a level that could be described as 'sustainable'.

(c) Condition 4 – the Submitters support the requirement for a residual flow but would prefer that it was higher than the level proposed by Council.

(d) Condition 5 – the Submitters support the version of Condition 5 set out in para 83 of Mr Vial's evidence, requiring a residual flow of at least 9.6 litres per second at the lower Royal Burn North Branch take.

(e) Condition 6 – the Council's version is accepted.

(f) Condition 9 – the Council's version is accepted.

(g) Condition 17 – monitoring of groundwater is supported but this condition should be amended to reflect the recommendations in para 215 of Mr Whyte's evidence.

51. I note that the Applicant opposes some conditions on the basis of cost.[22] There are a number of cases where parties have argued that the high cost of complying with conditions of consent makes those conditions unreasonable. The Courts, however, have consistently held that conditions are not unreasonable just because they will be expensive to comply with. In *Kiwi Property Management Ltd v Hamilton City Council*, the Environment Court held:[23]

> It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not "negated", or rendered "impracticable" or "frustrated", merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper's submission that such may be the price which an applicant has to pay for implementing a resource consent in certain circumstances.

52. Whether the cost of carrying out an activity and mitigating its effects is economically viable is one for the consent holder and should not bear on the Commissioner's decision as to the appropriate conditions of consent.

## CONCLUSION

53. The Submitters have significant and genuine concerns about how the grant of consent to the Application will impact them directly, and in terms of the health and wellbeing of the waterbodies in general. These concerns arise from personal experience of the river having been run dry as a result of the Applicant's actions, and the Applicant's lack of apparent acknowledgement of the implications of that for downstream users.[24]

54. In support of their position they call evidence from Mr Baker and Mr Whyte. They also rely on the evidence of Mr Berri Schroder, and in the event that there is any doubt about the status of Bloomsbury Stud, they call Mr Schroder as their witness.

55. The Submitters ask that the Commissioner carefully consider the matters raised, and that in the circumstances of this particular Application, consent be declined.

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Asher Davidson
Counsel for John Baker and Bridget Steed
14 June 2021

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22 Opening Submissions of Counsel for Applicants, para 50; Applicant's response to Commissioner queries – 4 June 2021, p2.
23 *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 at [65].
24 Evidence of John Baker.