

29 November 2000

COPY

*Parties*

WAIMAKARIRI DISTRICT COUNCIL  
(WDC)

WAIMAKARIRI IRRIGATION LIMITED  
(WIL)

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AGREEMENT IN RELATION TO  
MANAGEMENT OF WATER RACE  
SYSTEM

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COPY

 **Chapman Tripp**  
*Barristers & Solicitors* NEW ZEALAND

# AGREEMENT IN RELATION TO MANAGEMENT OF WATER RACE SYSTEM

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*Date:*

## **PARTIES**

- (1) WAIMAKARIRI DISTRICT COUNCIL, at Rangiora (*WDC*)
- (2) WAIMAKARIRI IRRIGATION LIMITED, at Rangiora (*WIL*)

## **BACKGROUND**

- A WDC is the owner of the Water Race System described in the Waimakariri District Council Stock Water Race Bylaw 1999 (*"the Water Race System"*)
- B WDC has granted WIL a licence right to use the Water Race System for the purposes of an irrigation scheme to be constructed and operated by WIL, servicing initially up to 14,000 hectares of land in the area north of the Waimakariri River, extending north east towards the Ashley River in North Canterbury (*"the Irrigation Scheme"*).
- C WDC has agreed to appoint WIL as its manager to manage the entire Water Race System on the terms and conditions set out in this Agreement.
- D WDC allows WIL to use the Water Race System, and operate the irrigation scheme and the stock water in accordance a mutually agreed "Water Race System Operation & Maintenance Manual for Waimakariri Irrigation Limited & Waimakariri District Council"

**THE PARTIES AGREE** as follows:

## **DEFINITIONS AND CONSTRUCTION**

### **1 Defined Terms**

In this Agreement, unless the context requires otherwise:

*"Additional Works"* has the meaning given in Clause 5.4;

*"Annual Report"* has the meaning given in clause 6.2;

*"Base Payment"* means the payment due under Clause 5 of \$120,000.00 plus GST per annum as reviewed from time to time under this Agreement;

*"Business Day"* means a day on which registered banks are open for business in Christchurch;

*"Bylaw"* means the Waimakariri District Council Stock Water Race Bylaw 1999, as amended or replaced from time to time;

*"Capital Works"* means works of a capital nature, renewal, and improvement of an asset or item to a standard or condition greater than it was at the Commencement Date;

*"Commencement Date"* means 15 December 1999;

*"Consumer price index"* means the Consumer price index (average for all groups) published by the New Zealand Department of Statistics or if that Index is no longer provided, such other consumer price index as the parties may agree, or failing Agreement as may be nominated by the President for the time being of the New Zealand Institute of Chartered Accountants;

*"Force Majeure"*: means any:

- (1) act of God, fire, earthquake, storm, flood, or landslide;
- (2) strike, lockout, work stoppage or other labour hindrance;
- (3) explosion, public mains electrical supply failure, or nuclear accident;
- (4) sabotage, riot, civil disturbance, insurrection, epidemic, national emergency (whether in fact or law) or act of war (whether declared or not);
- (5) requirement or restriction of, or failure to act by, any government semi-governmental or judicial entity;
- (6) unavoidable accident, or inability to obtain or delay in obtaining adequate labour, contractors, equipment, materials, transport or supplies;

- (7) any other similar cause beyond the reasonable control of the party claiming the benefit of the Force Majeure clause in this Deed and which that party is unable to overcome by the exercise of reasonable diligence and at a reasonable cost;  
  
but does not include
- (8) any event which the party affected could have prevented or overcome by exercising a standard of reasonable care;  
or
- (9) a lack of funds for any reason.

*"Licence"* means the Deed of Licence to use the Water Race System between WDC and WIL dated 28 May 1999;

*"O & M Manual"* means the Water Race System Operation & Maintenance Manual for Waimakariri Irrigation Limited & Waimakariri District Council;

*"Resource Consents"* means the resource consents held by WIL for the purposes of operation of the Irrigation Scheme.

*"Water Race System"* means the Water Race System described in the Bylaw and shown on the attached plans and includes any additions or variations made from time to time.

## 2 Term of Agreement

- 2.1 This Agreement will commence on the Commencement Date and will continue for an initial term of 3 years, with the right to renew for further terms of 3 years each during the term of the Licence, including any renewals thereof.
- 2.2 The term of this Agreement will automatically renew on each three year anniversary until the expiry or termination of the Licence, unless WIL has given WDC written notice that it does not wish to renew, at least 6 months before the relevant 3 year anniversary date.
- 2.3 Provided WIL has not given notice that it does not wish to renew the term three calendar months before each three year anniversary of this Agreement, the parties will enter negotiations with the intention of reaching agreement as to payments to be made by WDC to WIL under this Agreement for the following three year term. If the parties cannot

reach agreement in relation to payments due for the following three year term by the relevant three year anniversary, the payment basis contained in this Agreement will continue to apply.

### **3 Description of Works**

- 3.1 WDC hereby appoints WIL to manage the Water Race System on its behalf, on the terms and conditions set out in this Agreement.
- 3.2 In carrying out its management functions under this Agreement, WIL is required to carry out the inspections and the maintenance works described in the O & M Manual.

### **4 Level of Service**

- 4.1 All works and activities carried out by WIL under this Agreement will be carried out in a proper and professional manner, conforming to normal industry standards.
- 4.2 All works and activities undertaken by WIL under this Agreement shall, where appropriate, comply with the following:
  - 4.2.1 the O & M Manual; and
  - 4.2.5 the resource consents issued for the Water Race System.
- 4.3 WIL shall produce and maintain a comprehensive Health and Safety Management Plan in accordance with the Health and Safety in Employment Act and shall use its best endeavours to ensure that the plan is complied with by all of its employees and contractors.

### **5 Payment**

- 5.1 In consideration for WIL carrying out its obligations under this Agreement, WDC will pay WIL a Base Payment of \$120,000.00 plus GST per annum, made up in accordance with Schedule 1.
- 5.2 The Base Payment will be increased on 30 June in each year of the term of this Agreement by the percentage increase (if any) in the consumer price index for the most recent quarterly consumer price index published before that date.
- 5.3 The Base Payment shall be invoiced by WIL to WDC in 12 equal monthly instalments by the 5<sup>th</sup> Business Day of each month and shall be accompanied by the relevant monthly report under clause 6.1. Provided WDC has received the relevant invoice and report by the 5<sup>th</sup> Business Day

of the month, WDC shall pay such invoiced amounts to WIL on the 20<sup>th</sup> day of that month.

5.4 The Base Payment does not include the following works or activities carried out by WIL:

5.4.1 Replacement of structures;

5.4.2 Capital Works;

5.4.3 Emergency works (including emergency repair works) as defined by the O & M Manual;

5.4.4 Cleaning and river diversion works at intake in excess of the works required by the O & M Manual or in excess of the value allocated in Schedule 1;

5.4.5 Any other works and activities carried out by WIL that are not required by the O & M Manual or are in excess of the value allocated in Schedule 1;

Such works shall be referred to as "Additional Works";

5.5 All Additional Works (other than emergency works) will be undertaken by WIL only in accordance with prior agreed programmes and payment arrangements with WDC. All costs associated with Additional Works will be met entirely by WDC where the Additional Works affect stock water races only. Where the Additional Works affect those parts of the Water Race System used by the Irrigation Scheme, WDC shall pay the greater of 32% or, that percentage calculated in accordance with the formula in Schedule 2, of the costs associated with the Additional Works and WIL shall pay the balance.

5.6 WIL will invoice WDC for the costs payable by WDC under Clause 5.5, and in doing so, will not recover margins in excess of 10% of the cost to it of the Additional Works, but will not recover any margin on its own employee costs that are payable under clause 5.5. WIL will issue invoices for the Additional Works by the 5<sup>th</sup> Business Day of the month and such invoices are to be paid by WDC by the 20<sup>th</sup> of that month.

5.7 Emergency works shall be undertaken by WIL as required. WIL will endeavour to notify WDC before carrying out such Works, but if unable to

do so, shall notify WDC of the emergency work undertaken and the reason for it within 48 hours or as soon as practicable thereafter.

- 5.8 WDC will pay interest at the Bank of New Zealand overdraft rate from time to time (calculated on a daily basis) on any payments that are not made to WIL by the due date for payment.

## **6 Reporting**

- 6.1 WIL shall submit to WDC monthly reports within 5 Business Days of the end of each month. These reports will contain the information required by the O & M Manual.

- 6.2 WIL shall provide an Annual Report to WDC by the end of July for the previous 12 months ending on 30<sup>th</sup> June which shall contain the information required by the O & M Manual.

- 6.3 WIL shall also provide such other reports that are required by the O & M Manual.

## **7 Relationship between WDC and WIL**

- 7.1 WDC appoints WIL as WDC's agent for the purposes of managing and operating the Water Race System. WIL will be responsible for and operate all day to day client liaison on behalf of WDC .

- 7.2 WDC will designate up to four of WIL's named staff or agents as officers of WDC for the purposes of enforcing the Bylaw. These shall be named within a schedule of the O & M Manual.

- 7.3 WDC will exercise its enforcement and other powers under the Bylaw or given to it by law, when reasonably requested to do so by WIL.

- 7.4 The parties intend that their relationship during the term of this Agreement be as co-operative and open as possible, in recognition of the common goal of the parties of ensuring quality services to the users of the Water Race System. Open discussion between the parties is proposed, thereby helping to ensure problems can be overcome with a minimum delay to the benefit of the parties and the ratepayers.

## **8 Force Majeure**

Neither party will be liable to the other party for any failure or delay in performance of its obligations under this Agreement nor will such party be deemed to be in breach of this Agreement if such failure or delay has

been caused by Force Majeure. The procedures for claiming under this clause shall be in accordance with Section 14 NZS 3910:1998.

## **9 Dispute Resolution Procedures**

- 9.1 Any dispute arising between WDC and WIL in relation to this Agreement shall be resolved in accordance with the Dispute Resolution procedures described in section 13 of NZS 3910:1998.
- 9.2 WIL shall notify WDC of any unresolved disputes between WIL and stockwater users. If the dispute relates to or is covered by the Bylaw or the Rating Powers Act 1988 (or any replacement or amending legislation), the dispute will be determined by WDC. Otherwise, WIL may resolve disputes with stockwater users as it determines.

## **10 Limitation of Liability**

Notwithstanding any other provision in this Agreement, the liability of WIL under this Agreement shall not at any time extend to:

- 10.1 Force Majeure events
- 10.2 any actions or events of any third party, not within WIL's control;  
and
- 10.3 any consequential or indirect loss.

## **11 Termination**

- 11.1 Either party may terminate this Agreement before the end of its term:

- 11.1.1 on 10 days notice where the other party has committed or allowed a substantial breach of this Agreement (which, in the case of WIL, results in or is likely to result in cessation of supply of water to WDC's stockwater users) and has not remedied the breach within a reasonable period of having received a written notice requesting the breach to be remedied; and
- 11.1.2 immediately on written notice if the other party enters into composition with its creditors, has a receiver, liquidator or statutory manager appointed, or is otherwise unable to pay its debts as they become due (as defined by the Companies Act 1993).

- 11.2 Clause 8 of the Licence is deleted and replace with the following:



## **"8 TERMINATION**

*WDC may terminate the licence granted by this Deed by notice in writing to WIL if WIL breaches any significant covenant or condition in this Deed that results in or is likely to result in cessation of supply of water to WDC's stockwater users and that breach has not been remedied within a reasonable time of WDC giving WIL written notice of such default."*

11.3 This Agreement will automatically terminate if the Licence is terminated or expires.

11.4 On the later of the termination of this Agreement and the termination of the Licence (for any reason other than default of WIL or expiry of the Resource Consents), WDC will purchase all of the assets and contracts owned or constructed by WIL (as at the date of termination) that the Water Race System and the Irrigation Scheme relate to the assets owned or constructed by WIL at the date of this Agreement are listed in Schedule 3. The value of these assets shall be determined by an independent valuer agreed to by both parties. Any disputes in relation to the valuer and the value shall be resolved in accordance with clause 9 of this Agreement.

11.5 On the later of the termination of this Agreement or the termination of the Licence (as a consequence of default by WIL or expiry of the Resource Consents) WDC will not be obliged to purchase any assets or improvements belonging to WIL. WIL may, however, remove any of its assets that form part of the Irrigation Scheme within a reasonable period of termination.

## **12 Sub-Contractors**

WDC acknowledges that WIL will from time to time appoint sub-contractors and agents to carry out its functions and responsibilities under this Agreement. They shall be required to comply with the requirements under this Agreement and the O & M Manual.

## **13 Assignment**

Neither party may assign its interests under this Agreement without the prior written consent of the other (which consent shall not be unreasonably withheld).

## **14 Survival of Provisions**

The provisions of clauses 9, 10, 11 and 17 shall continue in effect after termination or expiry of this Agreement.

**15 Counterparts**

This Agreement may be executed in any number of counterparts. Once the parties have executed the counterparts, and each party has received a copy of each signed counterpart which that party did not execute, each counterpart shall be deemed to be as valid and binding on the party executing it as if it had been executed by both parties.

**16 Entire Agreement**

This Agreement is the entire agreement between the parties and; it replaces all earlier negotiations, representations, warranties, understandings and agreements, whether oral or written, between the parties relating to the management and operation by WIL of the Water Race System.

**17 Breach of Agreement**

Subject to clause 11.1, all breaches of Agreement shall be resolved in accordance the dispute provisions of section 13 of NZS 3910:1998.

**18 Operation**

WIL shall operate the Water Race System in accordance with the O & M Manual, which has been or will be jointly prepared by WDC and WIL and can only be subsequently amended by mutual agreement of WDC and WIL.

**19 Information**

WIL shall make all information held by it available to WDC to enable WDC to prepare asset plans or maintain records. If WDC requests any further information from WIL that is not already held by WIL, WDC shall pay WIL all reasonable costs incurred in the provision of this information.

**20 Governing Law**

This Agreement shall be governed by and construed in accordance with New Zealand law.

**21 No Partnership**

Nothing in this Agreement shall evidence or be deemed to constitute a partnership between the parties.

**22 Notices**

22.1 Any notice or other communication given under this Agreement to a party shall be in writing addressed to that party at the address or facsimile number from time to time notified by that party in writing to the other party. Until any other address or facsimile number of a party is notified, they

shall be as set out below its attestation clause at the end of this Agreement.

22.2 Delivery may be effected by hand, by post with postage prepaid, or by facsimile.

22.3 A notice or other communication delivered by hand shall be deemed to have been received at the time of delivery. However, if the delivery is not made on a Business Day or is made after 5.00 p.m. on a Business Day, then the notice or other communication will be deemed to have been delivered on the next Business Day;

22.4 A notice or other communication delivered by pre-paid post shall be deemed to have been received on the Business Day after posting; and

22.5 A notice or other communication sent by facsimile shall be deemed to have been received on the day of transmission. However, if the date of transmission is not a Business Day or the transmission is sent after 5.00 p.m. on a Business Day then the notice or other communication will be deemed to have been given on the next Business Day after the date of transmission.

## EXECUTION

The common seal of the  
**WAIMAKARIRI DISTRICT  
COUNCIL** was affixed hereto in the  
presence of:

\_\_\_\_\_  
*Mayor*

\_\_\_\_\_  
*District Manager*

Address for Service:

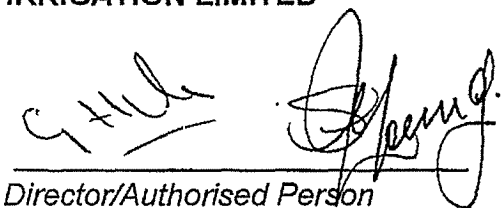
215 High Street

Rangiora

Fax:

Attention:

On behalf of **WAIMAKARIRI  
IRRIGATION LIMITED**

  
\_\_\_\_\_  
Director/Authorised Person

*In the presence of:*

\_\_\_\_\_  
*Name:*

*Occupation:*

*Address:*

Address for Service:

267 High Street

Rangiora

Fax:

Attention:

# **SCHEDULE 1**

## **Base Payment**

### **DIFFERENCES IN COST ESTIMATES**

- 1. Raceman Contract** **\$67,667.00**

Includes vehicle, salary, telephone, general.

- 2. Monitoring** **\$0.00**

WDC view this should be undertaken by Raceman.  
Not onerous cost for water stock scheme.

- 3. Riverworks** **\$4,500.00**

Stock water allowed \$3,000.00. Total cost allowed by  
Company \$15,000. Allocated 30% contingent amount.

- 4. Repairs and Maintenance** **\$18,364.00**

Total amount allowed \$22,864. Combined races new,  
therefore minimum. Our total provided \$38,000.00.

Common Races	255km )	\$38,000 < 36,566 x 30% = \$10,970	
Council Races	10km )	1434	<b>\$12,404.00</b>

- 5. Professional Services**

Total scheme allowed \$18,370. Our estimate \$8,000.

There will be higher level of reporting.

30% of \$8,000 = \$2,400. Allow **\$2,400.00**

- 6. \*Current Administration**

Not relevant to Council. Marginal cost minimal.

Cost still incurred by Council. Disallow.

**\$0.00**

- 7. Directors Fees** **\$8,000.00**

2 Directors appointed by the Council. OK.

8. <b>Standing Charges Insurance</b>	<b>\$7,634.00</b>
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Total allowed \$25,446. Allow at 30% = \$7,634

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**\$120,969.00**

Agreed payment for purposes of Agreement	<b>\$120,000.00</b>
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## SCHEDULE 2

### Formula

#### FORMULA FOR COST APPORTIONMENT WIL & WDC

Costs to be apportioned based on the actual water used as recorded at the intake.

Initially this is based on the "Probable Actual Use" indicated below but can be checked at the end of each year by either party if necessary.

Probable Actual Use				
Irrigation	months	Percent		
7cumeecs	2	15%	226800M3	
8months	2	55%	831600M3	
	1	80%	604800M3	
	3	100%	2268000M3	
			3931200m3	68%
Stock water				
1.5cumeecs	4	80%	518400m3	
12months	8	100%	1296000m3	
			1814400m3	32%
			5745600m3	

### SCHEDULE 3

#### Assets Owned or Constructed by WIL

Type	Component	Quantity	Length m	Replacement Value	Depreciated Value
<b>Main Races</b>	Crossings	71	-	1,014,770	1,014,770
	Races	13	34,756	1,161,899	1,161,899
	Fencing		-	249,675	249,675
	Intake	1	-	96,971	96,971
	Eyre Siphon	1	175	137,136	137,136
	Gates	3	-	6,002	6,002
	<i>Sub Total</i>			<b>2,666,454</b>	<b>2,666,454</b>
<b>Distributary Races</b>	Turnout gates	44	-	170,495	170,495
	Stockwater Turnouts	72	-	19,027	19,027
	Races	52	208,360	1,114,804	1,114,804
	Drop Structures	3	-	12,873	12,873
	Crossings	503	-	1,339,908	1,339,908
	<i>Sub Total</i>			<b>2,657,106</b>	<b>2,657,106</b>
<b>TOTAL</b>				<b>\$5,323,560</b>	<b>\$5,323,560</b>