

Shannon Farm –water deed for irrigation

Shannon Farm Owners Association Incorporated

[Owner]

DRAFT

**anderson
lloyd.**

Date:

Parties

- (1) Shannon Farm Owners Association Incorporated (**Association**)
- (2) [] (**Owner**)

Background

- A. The Developer has, at its cost, constructed certain Water Infrastructure Assets for supply of irrigation water.
- B. The Association owns and operates the Water Infrastructure Assets to supply irrigation water for residential activities and for the Orchard.
- C. The Owner is, or will be, the registered proprietor of a Levied Property and a Member of the Association.
- D. The Association will supply irrigation water to Members and to the Orchard.

Agreement

1. Definitions and interpretation

1.1 In this deed, unless the context otherwise requires:

Bylaws mean the bylaws of the Association, as amended from time to time in accordance with the Constitution.

Capital Expenditure means any capital expenditure which the Association reasonably needs to incur to meet its obligations to supply irrigation water under this deed, including (without limitation) the repair or replacement of any Water Infrastructure Assets.

Constitution means the constitution of the Association as amended from time to time, including all schedules to the Constitution, but excluding appendices.

Council means the Central Otago District Council or its successor entity.

Council Water Supply Bylaws means the Council Water Supply Bylaw 2008, and any amended or replacement bylaws promulgated by the Council or other territorial or government authority from time to time (including any integrated three waters bylaw).

Default Interest Rate means a rate of 12% per annum.

Developer means New Zealand Cherry Corp (Leyser) LP or any successor nominated in writing by the Developer.

Easements means easements and/or covenants and/or similar registered documents which permit water to be taken from any source of water and/or any storage facility within the Water Infrastructure Assets, and from there to all Levied Properties.

Excess Charge means a sum equal to the Excess Charge per Cubic Metre multiplied by the Excess Volume calculated annually.

Excess Charge per Cubic Metre means a charge per cubic metre (or part thereof) for the Excess Volume, as determined or revised by the Association from time to time, acting reasonably.

Excess Volume means the number of cubic metres of irrigation water used by the Property above its Quota.

Fixed Charge means the fixed charge to each Levied Property irrespective of the number of cubic metres of irrigation water used by a Property, as set from time to time by the Association, acting reasonably.

Grossed Up means grossed up for the Tax payable on that part of the Irrigation Expenses which represents the Tax as a deemed Irrigation Expense.

GST means goods and services tax charged in accordance with the Goods and Services Tax Act 1985.

Irrigation Expenses means the Association's expenses in that Operating Year for Tax purposes, excluding GST, calculated reasonably by the Association, including Management Expenses and expenses to store and supply irrigation water, plus:

- (a) any Tax payable by the Association in respect of that Operating Year will be deemed to be an expense when any such Tax is paid, calculated in the manner set out in clause 10; plus
- (b) regardless of whether they are an expense or a capital item for Tax purposes, Capital Expenditure and the Sinking Fund are deemed to be an expense for the purposes of calculating Irrigation Expenses.

Levied Property has the meaning given to it in the Constitution.

Licences means any licences to occupy or similar documents which permit water to be taken from any source of water and/or any storage facility within the Water Infrastructure Assets, and from there to all Levied Properties.

Management Expenses means expenses charged by a Manager to the Association for the management of the Association's obligations under this Deed, at market rates for such services, as agreed from time to time under an administration services agreement between the Association and such Manager.

Manager means any party engaged by the Association to manage the supply of irrigation water to Members and the Orchard and levying of Members for the supply of irrigation water.

Material Right means any Easement, Water Consent or Licence reasonably required to permit the supply of water to Members.

Member has the meaning given to it in the Constitution.

Operating Year means each calendar year beginning 1 April and ending 31 March, or part year as required.

Orchard means the cherry orchard operating from the land within Records of Title 182714 to 182717.

Orchard Priority Period means the period from 30 April to 30 November in each year.

Property means the property owned by the Owner within Shannon Farm.

Quota means an allocation of irrigation water in cubic metres per Levied Property per annum as set out in clause 5, as determined and revised by the Association from time to time, acting reasonably.

Residential Connection Requirements has the meaning set out in clause 3.1.

Shannon Farm has the meaning given to that term in the Constitution.

Sinking Fund means a charge by the Association under a policy reasonably adopted by the Association from time to time to fund short and long term Capital Expenditure in respect of the Water Infrastructure Assets in a manner that smooths the cost of such Capital Expenditure to Members.

Tax means all forms of taxes, except GST, assessed or charged together with all costs, charges, interest, penalties, fines, expenses and other additional statutory charges, incidental or related to the imposition.

Water Charge means the sums charged by the Association to the Owner under this deed (and where the context requires means all Water Charges levied under all other water supply deeds by the Association).

Water Consents means any resource consents, water permits or other rights or consents, whether under the Resource Management Act 1991 or otherwise, which permit the Association to take and use water for the purposes contemplated by this deed.

Water Infrastructure Assets means:

- (a) the Easements;
- (b) the Licences;
- (c) the Water Consents; and
- (d) all physical improvements, including buildings, plant and meters, in, on or under the land in respect of the supply of water under this deed, water pipes, storage tanks, reservoirs, bores and pumps,

in respect of the supply of irrigation water owned or held by the Association.

1.2 In this deed, unless the context requires otherwise:

- (a) any reference to:
 - (i) a person includes any other entity or association recognised by law and the reverse, and that person's successors and any permitted assigns;
 - (ii) the singular includes the plural and the reverse;
 - (iii) a clause is a clause in this deed;
 - (iv) a statute includes:
 - (A) all regulations under that statute;
 - (B) all amendments to that statute; and

- (C) any statute substituting for it which incorporates any of its provisions; and
- (v) currency is in New Zealand dollar.
- (b) any covenant on the part of two or more persons will bind them jointly and severally;
- (c) headings are for reference purposes only; and
- (d) all periods of time or notice exclude the day on which they are given.

2. Term and basic structure

- 2.1 The term of this deed will commence on the date of this deed and will continue indefinitely unless terminated by the Association under this clause or under clause 8.
- 2.2 Notwithstanding anything else in this deed the Association may in its sole discretion at any time transfer, sell or otherwise dispose of all or part of the Water Infrastructure Assets to Council, provided that the Association must give its Members 30 days' prior written notice of its intention to transfer the Water Infrastructure Assets.
- 2.3 On the transfer of all the Water Infrastructure Assets to Council in accordance with this clause, the Association may terminate this deed by giving 30 days' prior written notice to the Owner, or alternatively (at the Association's election) may assign the Association's rights under this deed to the Council.
- 2.4 The Owner acknowledges that if this deed is terminated under this clause, the Council may require the Owner to enter into a new contract with the Council in respect of the supply of irrigation water to the Owner.
- 2.5 In supplying water under this deed, the Association will comply with any applicable Council engineering standards.
- 2.6 The Association will ensure that its Constitution and Bylaws are at all times consistent with this deed and will procure its Committee to amend the Bylaws to include any provisions and regulations in respect of the supply of irrigation water under this deed as required.
- 2.7 The Bylaws require all Members to comply with the Council Water Supply Bylaws, to the extent they are consistent with the term of this deed and the Bylaws, as if all references to Customers are references to Members and all reference to the Council are references to the Association. The Owner agrees that the Association may enforce the obligations of the Owner (as a Customer) to the Association (as Council) under the Council Water Supply Bylaws.

3. Water supply

- 3.1 Subject to clauses 8 and 5.2, the Association will supply irrigation water as set out in this deed to the Property from the date on which the Property meets the following requirements (**Residential Connection Requirements**):
 - (a) there is an irrigation water line reticulated to a point in close proximity to the boundary of the Property capable of delivering an on-demand supply of irrigation water in accordance with any Council code of practice standard engineering conditions for the Property;
 - (b) there is an operational water meter for irrigation water installed on or in close proximity to the boundary of the Property as required under the Bylaws; and
 - (c) the Owner has submitted an application for irrigation water in accordance with the Bylaws.

- 3.2 For clarity, the Association is under no obligation to supply irrigation water to the Property until the Residential Connection Requirements are met.

4. Water charges

4.1 The Owner will pay for the supply of such water in the manner set out in this deed.

4.2 The Association may at any time set or vary different:

- (a) Quota; and/or
- (b) Fixed Charges; and/or
- (c) Volumetric Charges;
- (d) Excess Charges per cubic metre; and/or
- (e) Sinking Charges,

Including for different types or "bands" of Levied Properties, depending on usage and other factors as determined by the Association from time to time, acting reasonably and give notice of the same to Members under clause 6.1.

4.3 The Association will initially charge the Owner for the supply of water to the Property as follows:

- (a) the Fixed Charge;
- (b) if irrigation water in excess of the Quota is used by the Property, the applicable Excess Charge; and

4.4 The Excess Charge will be payable annually in arrears prior to the 20th day of the first calendar month of each Operating Year. The Fixed Charge will be paid annually in advance within 14 days of invoice from the Association. Sinking charges will be paid within 14 days of invoice from the Association or within such longer timeframe as required by the Association.

4.5 The Association will keep written records of the total volume of irrigation water delivered to the all Levied Properties and all Water Charges levied.

5. Allocation of irrigation water

5.1 Subject to:

- (a) the Property meeting the Residential Connection Requirements; and
- (b) any revision of the Quota by the Association from time to time under this deed,

the Association will make irrigation water available to the Property, on the following basis, subject to any revision of the Quota under clause 6.1. The initial Quota will be 500 cubic metres of irrigation water per annum:

5.2 The Orchard currently has a primary supply of water from an alternate source, but requires the ability to take water from the Association irrigation water supply as a contingency measure, and will have its own supply agreement with the Association. The Owner acknowledges that the Association will also supply irrigation water to the Orchard without charge and that during the Orchard Priority Period the supply of irrigation water to the Orchard will take priority over supply to Residential Levied Properties, including for frost fighting purposes.

- 5.3 The Owner further acknowledges that the Developer will require the Association to provide irrigation water to it, without charge, including for the purpose of irrigating planting within Shannon Farm to comply with its maintenance obligations under its resource consents.

6. Setting Charges

- 6.1 For each Operating Year, the Association will, acting reasonably, determine:

- (a) the Quota; and
- (b) the Excess Charge per Cubic Metre,

which may vary for different types or bands of Levied Property (where applicable) and give notice of the same to Members in writing prior to the commencement of the Operating Year.

- 6.2 The Owner acknowledges that the Association may change the method of charging for irrigation water supply, including by changing the Quota and/or introducing a Volumetric Charge.

7. Reconciliation

- 7.1 At the end of each Operating Year, and within a reasonable time after the Association has completed its annual accounts for Tax purposes, the Association will reconcile:

- (a) the total Water Charges in that Operating Year (collectively, **Charges**); against
- (b) its actual Irrigation Expenses for that Operating Year (collectively, **Costs**).

- 7.2 If, during that Operating Year, the Charges are more than the Costs, the difference will be applied to reduce the Irrigation Expenses in the following Operating Year.

- 7.3 If, during that Operating Year, the Costs are more than the Charges, the difference will be deemed to be an Irrigation Expense in the following Operating Year.

- 7.4 Notwithstanding the above, the Association may incorporate a levy for a Sinking Fund in the Water Charges and any portion of the Charges comprising levies for the Sinking Fund will be held by the Association and not form part of the above reconciliation.

8. Availability of irrigation water

- 8.1 Subject to all applicable laws, and notwithstanding anything else in this deed:

- (a) the Association will take all reasonable steps to ensure it can supply irrigation water to the Property as anticipated by this deed; however
- (b) the supply of irrigation water is at all times subject to:
 - (i) the Association holding all necessary Easements, Consents and Licences; and
 - (ii) there being sufficient irrigation water available from the source of supply to allow the Association to supply irrigation water under this deed; and
 - (iii) the Owner complying with its obligation under this deed; and
 - (iv) there being sufficient water supply available to the Orchard during the Orchard Priority Period for frost fighting purposes.
- (c) If at any time:

- (i) any Material Right is terminated or deemed to be at an end for any reason; or
- (ii) the Association determines, acting reasonably, that any of the conditions in clause 8.1(b) are not met,

then the Association may by written notice to the Owner do all or any of the following:

- (iii) reduce the Quota on a pro rata basis for all Residential Levied Properties; and/or
- (iv) cut off the supply of irrigation water to any Residential Levied Property that exceeds its Quota (prohibiting the supply of any Excess Volume); and/or
- (v) suspend the supply of irrigation water under this deed,

until such time as the Association determines that the conditions in clause 8.1(b) are met.

- (d) If the Association reasonably determines that the conditions in clause 8.1(b) (except (b)(iv)) cannot be satisfied for a period of three months or longer, the Association may on written notice to the Owner terminate this deed.

9. Prolonged excessive use of irrigation water

- 9.1 The parties acknowledge that there is a restricted supply of water under the Water Consents, which is reflected in the Quota.
- 9.2 If based on average irrigation water usage at the Property, the Owner is exceeding its Quota then the Association may, at its sole discretion, restrict the supply of irrigation water to the Property to the Quota, using any method determined by the Association and for such period of time as the Association reasonably determines.

10. Tax

- 10.1 If the Association is required to pay Tax on any amounts charged or received under this deed, the Tax will be a deemed expense for the purposes of calculating the Irrigation Expenses.
- 10.2 Those deemed Irrigation Expenses will equal the Tax, Grossed Up to ensure that after paying the relevant Tax, the Association receives, net of Tax, an amount that the Association would have received if the Association had paid no Tax in that Operating Year.

11. Warranties and undertakings

- 11.1 The Association warrants to the Owner that it will:
 - (a) at all times:
 - (i) comply with any irrigation water standards applicable under New Zealand law to the Property; and
 - (ii) complete regular monitoring and maintenance of primary plant and tanks and water distribution systems in accordance with the recommendations of the designer of the tanks and the water distribution systems which form part of the Water Infrastructure Assets; and
 - (iii) ensure that it complies with the lawful requirements of the Council with regard to the supply of water pursuant to the Water Infrastructure Assets, whether under resource consents in respect of Shannon Farm or otherwise. Without limiting this, the Association will comply with any requirements imposed by any relevant

resource consent in respect of the supply of water within Shannon Farm on the holder of that consent; and

- (b) not sell any Water Infrastructure Assets at any time, including when the Association is in receivership or liquidation, other than to Council or to an entity which enters a deed with the Owner on terms consistent with this deed.

11.2 Subject to clause 11.3, the Owner will not, and will not permit:

- (a) any other person or entity other than the Association to, create or build another irrigation water supply scheme to supply water to Members. Without limiting this obligation, except as set out in this deed, the Owner will not use or give permission to any other person or entity other than the Association to use the Easements or the Licences or any encumbrances or easements or licences or other interests in land which are in favour of the Association for the carrying of water;
- (b) the supply of irrigation water to the Property other than via the Water Infrastructure Assets.

11.3 Clause 11.2 will not apply if:

- (a) the Association is placed into liquidation or a receiver is appointed in respect of the Association;
- (b) any Material Right is terminated, surrendered or at an end for any reason; or
- (c) the Council imposes any requirement concerning irrigation water supply to Members which is inconsistent with the Association supplying irrigation water on the terms of this deed.

12. Default

12.1 If the Owner fails to make any payment due under this deed:

- (a) the Owner will pay interest on the full amount owing to the Association at the Default Interest Rate, calculated on a daily basis, from the date payment was due until payment is made in full, including payment of interest under this clause; and
- (b) the Association may suspend supply of irrigation water to the Property until such time as payment of all amounts owing by the Owner have been received.

This clause is without prejudice to any other rights or remedies of the Association.

13. Dispute Resolution

13.1 If a party has any dispute with the other party in connection with this deed:

- (a) That party will promptly give full written particulars of the dispute to the other.
- (b) The parties will promptly meet together and in good faith try and resolve the dispute.

13.2 If the dispute is not resolved within 7 days of written particulars being given (or any longer period agreed to by the parties) the dispute will be referred to mediation.

13.3 A party must use the mediation procedure to resolve a dispute before commencing arbitration or legal proceedings.

13.4 The mediation procedure will be as follows:

- (a) The parties will appoint a mediator and if they fail to agree the mediator will be appointed by the President of the New Zealand Law Society or the President's nominee.
- (b) The parties will co-operate with the mediator in an effort to resolve the dispute.
- (c) If the dispute is settled, the parties must sign a copy of the terms of the settlement.
- (d) If the dispute is not resolved within 14 days after the mediator has been appointed, or within any extended time that the parties agree to in writing, the mediation must cease.
- (e) Each party will pay half of the mediator's fee and costs including travel, room hire, refreshments.

13.5 The terms of settlement are binding on the parties and override the terms of the deed if there is any conflict.

13.6 The terms of settlement may be tendered in evidence in any mediation or legal proceedings.

13.7 The parties agree that written statements given to the mediator or to one another, and any discussions between the parties or between the parties and the mediator during the mediation period are not admissible in any arbitration or legal proceedings.

13.8 Either party may commence arbitration proceedings when mediation ceases under clause 13.4(d).

13.9 If the dispute is referred to arbitration:

- (a) The arbitration will be conducted by one arbitrator appointed by the parties.
- (b) If the parties cannot agree on an arbitrator within 14 days the appointment will be made by the President of the New Zealand Law Society or the President's nominee.
- (c) The arbitration will be conducted in accordance with the rules in schedules 1 and 2 of the Arbitration Act 1996.

13.10 Neither party will unreasonably delay the dispute resolution procedures in this clause.

13.11 This clause does not apply to:

- (a) any dispute arising in connection with any attempted renegotiation of this deed; or
- (b) an application by either party for urgent interlocutory relief.

13.12 Pending resolution of any dispute the parties will perform this deed in all respects including performance of the matter which is the subject of dispute.

14. General

14.1 Each party will with due diligence sign all necessary deeds and documents and do everything that is reasonably required to carry out the terms of this deed.

14.2 Any failure by a party to enforce any clause in this deed, or any forbearance, delay or indulgence granted by that party to any other party will not be construed as a waiver of the first party's rights under this deed.

14.3 If any part of this deed is held by any court or administrative body of competent jurisdiction to be illegal, void or unenforceable, such determination will not impair the enforceability of the remaining parts of this deed and they will remain in full force and effect.

14.4 This deed constitutes the entire agreement between the parties on the subject matter of this deed and supersedes and extinguishes all earlier negotiations, understandings and agreements between the parties, whether oral or written, relating to the subject matter of this deed.

Execution

Signed by **[Owner]**:

Signed by **Shannon Farm Owners Association Incorporated:**

Authorised witness

Authorised witness

Common Seal