

# Decision relating to an application for a mooring at Lake Dunstan

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<b>Subject</b>	Lake Dunstan Houseboat Mooring Application – Ian Horsham
<b>From</b>	Craig Harris, Commissioner of Crown Lands
<b>Date</b>	19/12/2023
<b>Objective reference</b>	<a href="#">A5375430</a>

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## Details

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### Purpose

To set out my decision, relating to the declining of an application for a licence to occupy for mooring a houseboat at Lake Dunstan.

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### Background and context

Lake Dunstan in Central Otago is a hydro lake where the water levels are artificially controlled for the purpose of hydro electricity generation. It was formed by the inundation of land behind the Clyde Dam. LINZ administers the bed of Lake Dunstan, as it is Crown land under the Land Act 1948 (the Act).

In May 2021, LINZ received a request from the Central Otago District Council (CODC) to provide an affected party approval for a resource consent for a vessel to occupy part of the bed Lake Dunstan. It was followed in June 2021 with an application from Mr Ian Horsham for landowner consent for one mooring on Lake Dunstan, Otago. This was later increased to four moorings.

The moorings were to moor a houseboat for private recreational use including overnight stays. These moorings are four 1m<sup>3</sup> concrete blocks fixed to the lakebed, with a metal chain connecting to floating buoys. The site identified is a small cove on the western side of Lake Dunstan. A plan of the location and site is attached as Appendix I.

On 25 June 2021, LINZ returned the signed Affected Party Approval for the resource consent process for four moorings and asked the Council to update it on the resource consent process. Resource consent was granted in July 2021. LINZ was made aware of this in November 2021.

It appears that the moorings were installed in October 2021 without any licence from the Crown as owner of the lakebed. In January 2022 LINZ advised Mr Horsham that it had not, as landowner approved any installation of the moorings. LINZ directed that work must cease until a decision on whether to grant a licence to occupy was made. This was followed up in March following media stories on Mr Horsham's intention to launch and moor his houseboat.

The tenure considered was a licence to occupy under s68 of the Act. This is the tenure granted for other moorings in other lakes. This provides for a maximum term of 5 years, not the 15-years sought by Mr Horsham.

On 4 April 2022, the application to grant a licence to occupy was declined. The rationale for this was set out in the memo from Crown Property. This decision was notified to Mr Horsham by LINZ's service provider on 20 April 2022, including:

*"This application for moorings at Lake Dunstan is declined based on being for private, exclusive use. LINZ's approach currently is that any moorings have been granted on a commercial basis or for public recreation."*

Through his solicitor, Graeme Todd, Mr Horsham requested a rehearing on 11 May 2022, within 21 days after being notified of the decision in accordance with section 17 of the Land Act 1948. I granted the rehearing on 23 May 2022.

I provided the decision papers to Graeme Todd on 9 June 2022. With the agreement of Mr Todd, the rehearing was put on hold while he sought further information from LINZ under the Official Information Act 1982 relating to this application and other applications for use of the bed of Lake Dunstan. The last of this material was provided in April 2023.

Mr Todd provided his submission to me on 23 May 2023.

During my consideration of the submission I discovered that the statutory power under section 75 of the Land Act (see below) had not been delegated beyond the Commissioner. This means that the original decision was made without delegated authority. In order to correct this error, I intend to remake the decision in reliance on section 46 of the Legislation Act 2021. When advising the applicant's solicitor of this position, I asked further questions regarding the application and answers were received in October 2023.

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## Statutory Framework

The relevant statutory provisions to consider are sections 52, 53, 54, 68 and 75 of the Land Act 1948 (the Act).

- Section 52 of the Act provides that the Commissioner may alienate Crown land (that has been made available for alienation) on any tenure either after calling for applications or without competition in accordance with the provisions of the Act.
- Section 53 of the Act sets out how the Commissioner may call for public applications for Crown land.
- Section 54 of the Act enables the Commissioner to allot land (including by licence) without competition in specific cases, as prescribed in that section.
- Section 68 provides that the Commissioner may grant a licence to occupy Crown land for grazing or other purposes, on such terms and conditions (including rent) as the Commissioner considers appropriate. Such licences are for no longer than 5 years and do not provide a right of exclusive occupation.

- Section 75 provides that the Commissioner shall at all times have power, in the public interest and in its discretion, to refuse any application whatsoever.

Section 17 of the Act allows any person aggrieved by a decision of the Commissioner, within 21 days after being notified of the decision, to apply for a rehearing.

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### **Mr Todd's submission**

Mr Todd's submission identified the following concerns with the original decision:

- The LINZ officers who made the recommendations took irrelevant factors into account and matters beyond LINZ's jurisdiction, including:
  - LINZ could not have been aware of the public interest in granting a license, as there was no public notification and there was no correspondence from the public on the application. It was also noted that the parties LINZ consulted either gave their approval or did not respond,
  - The occupation was not for exclusive use of the lakebed of Lake Dunstan as only a very small portion of the lakebed would have been occupied by the moorings,
  - LINZ has no role in the use of the stratum airspace in relation to Lake Dunstan as it has no authority in respect of the same that resting with the Council. It was also noted that LINZ had previously given their affected party approval to the application for resource consent to the Council, and
  - Matter such as environmental impacts and health and safety were matters for the resource consent, not LINZ to consider.
- There is no published LINZ policy that limits the use of lakebeds to a commercial basis or public recreation, and the Land Act does not differentiate between private exclusive use and use for commercial or public recreation purposes. Even if such a policy existed, LINZ gave its affected party approval to the application for resource consent, and Mr Horsham would never have progressed his application had he been aware of the policy, and
- There is no statutory or policy basis to prevent LINZ making decisions about private recreational use of Crown land, as distinct from public recreational use.

Where appropriate, I will consider these matters that have been raised when making a decision on this application.

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### **Analysis**

I consider that there are several key questions to be addressed for this application:

- Is the land (being the location applied for) Crown land,
- If so, is the land available for alienation,
- If so, what is the appropriate tenure under the Land Act,
- If so, is this an appropriate use for the land,
- Are there any grounds for preferential allotment rather than a public offering of that tenure for that use, and

- Are there any other matters that are relevant to this decision?

### Status of land

The land subject to the application is Crown land, held under the Land Act 1948. It is part of the bed of Lake Dunstan, being part of Sec 1-11 SO 23940.

### Availability of the Land

There are currently no moorings for private vessels on the Crown land bed of Lake Dunstan.<sup>1</sup> Moorings have been provided for in other lakes, such as Lake Wakatipu – I note that for that lake, many of these moorings are historical and were in place before LINZ became responsible for administering the lakebed.

No decision has been made on providing moorings for private recreational boating on Lake Dunstan, and no assessment of what areas on the lakeshore would be suitable for mooring has occurred. This application is the first that has been received for Lake Dunstan. However, common practice over the last 20-30 years is for LINZ to respond to applications by the public for use on a case-by-case basis as they are received.

During consideration of the original application, other interests in the lakebed were identified:

- Contact Energy (as grantee of the operating easement over the bed) consented to the licence being granted, and it was proposed that they be a party to the licence,
- The Department of Conservation (DOC) has advised that no marginal strips apply, and proposed conditions to protect birdlife and ensure compliance with notices and guidelines to prevent the spread of didymo,
- The lakebed is subject to a deed of recognition to Ngai Tahu. The iwi did not provide any comments on the application, and
- The dry land beside the inlet is subject to a licence to occupy to the New Zealand Motor Camping Association (NZMCA). This group has advised that it has no issues with the applicant driving his vehicle over the area covered by their licence.

There are no other current plans for use of the land. The local community have proposals for the foreshore, but I am not aware of any specific use identified for this inlet. However, over time, new uses for the area may be identified, and the Crown may decide that another use is more appropriate.

### Tenure

The Act provides only limited tenures over Crown land, generally by lease or licence. A lease is not appropriate given the nature of the activity, occurring on lakebed (and such a tenure gives exclusive rights over that area of Crown land).

A licence to occupy, in terms of section 68 of the Act provides for a short tenancy for grazing or other purposes. The licence also allows the CCL to terminate the licence at will and without compensation, on notice, including in situations where the land is sold or

<sup>1</sup> There are jetties at Pisa Moorings but these are located on private land, not the Crown lakebed.

leased. The licence holder may be required to remove any improvements erected on the land at the expiry or termination of the licence.

This tenure is the one used for moorings on other lakes and rivers and is appropriate in this case.

#### Use of the land

Other uses of the bed at Lake Dunstan are moorings for the Central Otago District Council to enable recreational use, and a commercial recreation permit for a waterpark.

Moorings for private recreation exist on other lakebeds administered by LINZ. This includes nearby lakes Wakatipu and Wanaka. Many of these were originally granted before LINZ took over administration of the lakebeds, however, the Commissioner has granted licences for vessel mooring. Therefore mooring for private recreation vessels can occur on Crown land and this has occurred elsewhere in the Crown land estate.

I do note that these provide for yachts to be moored. I have not found an example of any licence granted for mooring a houseboat on Crown land (lakebed/riverbed). Since this rehearing began, I have been made aware of houseboats existing on other lakes. None of these appear to currently be moored on Crown land.

I do have several concerns with the location of the moorings.

Firstly, this is one of the few inlets over the man-made lake, and it is located next to the area licensed to the NZMCA, which means it is an area with moderate to high levels of public use. Colliers' advice considered that while the moorings will facilitate private recreational use, however, it may deter public recreational use in this small, sheltered cove. Colliers considered that this would be the result of an activity on the water and therefore was not for LINZ to assess.

I consider the Crown's ownership of Lake Dunstan includes the bed, the sub strata estate, and all the air space above the bed. This includes the water column, and the air above that. All of this area is Crown land under the Land Act. Any tenure granted would also include that stratum. Also, I consider that any impacts on public use is relevant to my decision, as this is public land, and the public utility derived from the land is a matter that I believe should be considered.

I consider that where that activity may have an impact on the Crown's ownership interest, then it is appropriate for the Commissioner to consider whether to impose any terms and conditions with any tenure granted, or even to decline to alienate the land.

Secondly, due to the lake being created following the construction of the Clyde Dam (and the raising of water levels), this is one of only a few sheltered inlets along this shoreline. The almost permanent presence of the houseboat moored there will affect any boat traffic in and out of the inlet. While Mr Todd's submission confirmed that the houseboat would have a motor and be mobile, I note that for much of the time, it will be moored in this location, either while Mr Horsham occupies the house, and while it is vacant.

Thirdly, I note the ORC harbourmaster advised the applicant that it did not have any concerns about navigability.<sup>2</sup> There is room for boats to navigate either side of the houseboat – there appears to be a gap of around 20m to the shoreline. However, in the location applied for, I consider that there is potential that the houseboat may deter others from accessing or using this inlet for boating.<sup>3</sup> There may also be an impact on recreational swimmers, if any, that use the inlet.

Finally, at other lakes, moorings are often provided to people who own land adjacent to or near to the mooring. In this case, the nearest residence is around 800 metres from the inlet. Mr Horsham will be absent from the location, and the vessel will likely be unattended for significant periods of time. While that is a risk for the applicant to manage, I do wish to note the potential for damage to the unattended vessel.

I note a local community group also undertook a survey in to a shared vision for the management of the lake.<sup>4</sup> The findings were presented in late 2022. While the report did not directly touch on this land, the survey identified strong community interest in developing a community-led masterplan for the lake, including boating. A marina was one of the aspirations in terms of facilities and infrastructure that was identified. While I understand that LINZ has yet to engage with the community group in detail on this report, I am mindful of the aspirations expressed in the survey.

In light of all of the above, I consider that granting applications for licences to occupy of the lakebed on a first-come, first-served basis for a private houseboat mooring is not appropriate in this particular location. As the adjoining land is used for recreational camping, and the potential for public recreational use of the inlet, I do not consider that it is in the public interest to grant this application.

I do not agree with Mr Todd's submission that public consultation is required for me to reach this conclusion under section 75 of the Land Act. I consider that, based on the factors above, it is reasonable to assess the public interest in this case.

I consider that in the long-term LINZ should work with the local council, iwi and others to identify whether there is a more appropriate location for the mooring of vessels in the lake, including houseboats. If so, then individual moorings can be allocated either by calling for applications or if appropriate without competition.

#### Allotment without competition

As I have decided to decline the application, making a determination on allotment without competition is not required.

However, I have concerns about the validity of the case advanced by Colliers for this application. Colliers considered that s54(1)(d) applied because the moorings applied for

<sup>2</sup> ORC also advised that its bylaws relating to moorings did not apply to inland waters, but that this would be considered in the next review of the bylaws.

<sup>3</sup> The original location identified was within the Lowburn Inlet, but this was changed to the current site. Given the volume of traffic from the inlet, I agree that this would not have been an appropriate location.

<sup>4</sup> <https://www.lakedunstan.org/community-vision-report.html>

only cover a small area. Other moorings have been granted in the past without competition on this ground. My interpretation of s 54(1)(d) is that it applies to small parcels of Crown land that are not suitable for sale or can only be used in conjunction with other land held by the applicant. Neither appear to apply in this case as the mooring footprint is part of a significantly-sized property (the entire lakebed and riparian lands), and the applicant has no other land in the vicinity.

As a result, I have also requested that LINZ undertakes further analysis and development of a policy to guide future decisions on applications for moorings on Crown land to provide greater certainty and to manage any potential unintended consequences relating to the granting of applications on an ad hoc basis.

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### Conclusion

I have concluded that granting of this application for this location is not in the public interest for the reasons stated above, and the application is refused under section 75 of the Land Act.

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### Consultation undertaken and/or implications

I consulted with Legal Services on the preparation of this decision.

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### Decision(s)

I have decided to:

1. **Decline** a licence to occupy as set out above in terms of section 75 of the Land Act, and
2. **Request** that LINZ consider identifying locations for moorings on Lake Dunstan and draft policy principles for allotment without competition (in particularly for moorings for both yachts and houseboats on Crown land lakebed and margins).

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Craig Harris  
Commissioner of Crown Lands