

**Special Tribunal Report to the  
Minister for the Environment on  
MAJAC Trust Application to amend  
the Buller Water Conservation Order**

Prepared by the Special Tribunal

February 2006



# Special Tribunal Appointed by Minister for the Environment to consider application for variation of Water Conservation (Buller River) Order 2001

by Michael Anthony Talley and Others as Trustees of the Majac Trust

## Introduction

- 1 This is an application by the Trustees of the Majac Trust (Michael Anthony Talley, Graeme Peter Malone, James Rory Ryder and Guy Alexander Mannering) to vary the Water Conservation (Buller River) Order 2001.
- 2 The ability to seek such a variation is provided for in section 216 of the Resource Management Act 1991 (**RMA**). Section 216 provides for an initial two year period following the making of an order during which the ability to revoke or vary is very restricted but thereafter the processing of an application for variation follows the same course as a new application. That means the Minister has the power to seek further information or even to reject the application at that point but, assuming it survives that vetting process, the Minister then appoints a special tribunal to determine the application. This application proceeded down this route.
- 3 The application was publicly notified under section 204 RMA and that drew over 130 submissions both supporting and opposing.
- 4 Given the fact that this is the first application to vary a water conservation order (**WCO**), the number of submitters expressing a desire to be heard, and the complexities presented as to both procedural and jurisdictional issues, it was decided to convene a procedural directions hearing on 21 October 2004 in Nelson to settle such matters as:
  - 4.1 venue;
  - 4.2 sequence of parties' cases;
  - 4.3 protocols for pre-circulation of expert evidence;
  - 4.4 site visit registration;
  - 4.5 determination of preliminary legal issues.
- 5 As a result on 25 November 2004 a significant preliminary legal issue was determined in a separate hearing in Nelson relating to the ambit of the hearing. That determination excluded some matters raised by opposing submitters that sought amendment of the WCO in respect of different water bodies beyond the

stretch of the Gowan River the subject of the application for variation. But that determination also held that submissions seeking to enlarge the WCO in respect of the same water body would be within the ambit of the hearing. The applicant took that issue to the High Court by way of judicial review and the High Court in a decision dated 18 July 2005 declared that that latter enlargement would be beyond the permitted ambit of the hearing of the application for variation.

- 6 Accordingly the application proceeded on that basis and following a site inspection on 7 November 2005, the substantive hearing proceeded at Nelson on 8–11 November 2005.

## **The application**

- 7 It is important to appreciate that the application was specifically directed to just part of the WCO and to just one water body.
- 8 In essence the application constitutes some proposed amendments to clause 8 of the WCO. (See the Appendices to this decision.) The application set out suggested amendments to clause 8.
- 9 Perhaps not surprisingly, there were refinements to those suggested amendments promoted by the applicant – both at the beginning of the hearing and at the conclusion of the hearing in the applicant's reply submissions that further refined the suggested wording. Some objection was taken although the Special Tribunal did not view those refinements as outside the ambit of the application given the way that it was framed and the nature of the inquiry that necessarily follows.
- 10 As to the precise wording sought in final form at the conclusion of the hearing the applicant advanced two alternative sets of amendments which are annexed as Appendix 1 and Appendix 2 to this decision. The amendments in Appendix 1 were the applicant's preferred outcome of the two.
- 11 The applicant sought these amendments to the WCO so as to enable an application for a resource consent to be made to permit a run-of-river hydro-electric development on the Gowan River. The scheme would divert certain flows that would be returned to the river below the scheme. The diversion would run along the east bank for some four kilometres before dropping through a pen-stock and turbine generators and then returning to the Gowan via a tailrace.
- 12 The intake would be located 2.2 kilometres downstream of the road bridge at Lake Rotoroa and the outlet would be located near New Creek, 3.5 kilometres upstream from the confluence of the Gowan and Buller Rivers.
- 13 Except for legal road beside the Gowan River, the applicant is currently the owner of the land adjacent to the Gowan on which the scheme would be built.

- 14 The detail of the scheme attracted a good deal of attention in a way that the applicant correctly observed would have been more appropriate to a resource consent hearing. That said, it was unavoidable that, in addition to the diversion of water, two features would necessarily receive a greater level of scrutiny at this hearing because they related to the rafting amenity that is the one outstanding feature protected by the existing WCO for this water body (the Gowan). Those two features of the proposed scheme were the intake structure and the telemetry system:
- 15 It is therefore necessary in terms of explaining the application to outline what was suggested in respect of those two matters in more detail.
- 16 The intake structure would effectively be a chamber alongside a river pool with an opening extending along the chamber allowing water entry. This opening could be 14 metres long and one to two metres deep depending on final design.
- 17 The proposed telemetry system would involve a telephone call from a telephone (most probably located in the vicinity of the road bridge at Lake Rotoroa) which would be linked to a hook up that would be monitored around the clock by a security firm. It was proposed that within half an hour the necessary direction would be implemented to shut off the diversion and to return the river to its natural flow for a period considered to be adequate for a rafting trip. Provision of natural flows for rafting could be constrained by hydro-scheme operations to 2–3 times per week.

### **Appearances and witnesses at hearing**

- 18 The following made submissions or gave evidence during the hearing on 8–11 November 2005:

18.1 For the applicant:

18.1.1 Mr Crosby (counsel for the applicant);

18.1.2 Mr Swan (engineer);

18.1.3 Mr Leyland (consulting engineer specialising in hydropower engineering);

18.1.4 Mr Copeland (economist);

18.1.5 Mr Barrow (Gowan project manager);

18.1.6 Mr Simpson (neighbouring farmer);

18.1.7 Dr Mitchell (environmental consultant);

18.1.8 Mr Dougherty (commercial rafter and guide);

18.1.9 Mr Riley (hydro engineer).

- 18.2 For opposing submitter Ms Bieleski:
  - 18.2.1 Ms Bieleski (local resident).
- 18.3 For opposing submitters Fish and Game Councils (both New Zealand and Nelson-Marlborough):
  - 18.3.1 Mr Christensen (counsel for Fish and Game);
  - 18.3.2 Mr Deans (manager, Nelson-Marlborough Fish and Game Council).
- 18.4 For opposing submitter New Zealand (Recreational) Canoeing Association:
  - 18.4.1 Ms Baker (counsel for the New Zealand Recreational Canoeing Association).
- 18.5 For opposing submitter Rapid River Rafting:
  - 18.5.1 Mr Pierce (commercial rafter and guide).
- 18.6 For opposing submitter Ultimate Descents:
  - 18.6.1 Mr Marshall (commercial rafter and guide).
- 18.7 For opposing submitter Director-General of Conservation:
  - 18.7.1 Mr Hulbert (counsel for Director-General of Conservation);
  - 18.7.2 Mr Rutlege (Department of Conservation Freshwater Technical Support Officer for Nelson-Marlborough conservancy).
- 18.8 For opposing submitter Royal Forest & Bird Protection Society of New Zealand Inc:
  - 18.8.1 Ms Crossan (counsel for Royal Forest & Bird Protection Society of New Zealand Inc);
  - 18.8.2 Mr Hopkinson (commercial kayaker and guide);
  - 18.8.3 Mr Jago (commercial rafter and guide);
  - 18.8.4 Mr Allardice (commercial rafter and guide).
- 18.9 For opposing submitter Royal Forest & Bird Protection Society Inc (Nelson/Tasman branch):
  - 18.9.1 Ms Campbell (branch representative).

- 18.10 For opposing submitter Ms Win:
  - 18.10.1 Ms Win (local resident);
  - 18.10.2 Mr Nottage (civil engineer).
- 18.11 For opposing submitter Ms Martin:
  - 18.11.1 Ms Martin (rafting guide and trainer).
- 18.12 For submitter neither supporting nor opposing the Tasman District Council:
  - 18.12.1 Mr Beckett (counsel for Tasman District Council);
  - 18.12.2 Mr Fenemor (former manager, Environmental Information, Tasman District Council).
- 18.13 For opposing submitter Lake Rotoroa Lodge Limited:
  - 18.13.1 Mr Hyde (manager of Lake Rotoroa Lodge).
- 18.14 For opposing submitter Mr Blackmore:
  - 18.14.1 Mr Blackmore (recreational angler).
- 18.15 For supporting submitter Mr Gornall:
  - 18.15.1 Mr Gornall (local bach owner and angler).
- 18.16 For opposing submitter Nelson Trout Fishing Club:
  - 18.16.1 Mr Willis (secretary of Nelson Trout Fishing Club).
- 18.17 For opposing submitter Mr Davey:
  - 18.17.1 Mr Davey (Fish & Game officer but in personal capacity).
- 18.18 For opposing submitter Mr Honeybone:
  - 18.18.1 Mr Honeybone (local resident).
- 18.19 For the applicant in reply:
  - 18.19.1 Mr Crosby (counsel for applicant).

19 There were in addition some affidavits and other statements of persons who were unable to attend the hearing that were sent directly to the Tribunal or were presented through others or appended to their evidence or submissions. Whilst the Special Tribunal readily sympathises with the various difficulties and reasons that prevented the makers of those affidavits or statements from appearing personally, there are well recognised problems with placing any particular weight

on evidence presented in this way for reasons that require little elaboration. Whilst the Special Tribunal has read that material it cannot be accorded much weight vis-à-vis the evidence and submissions presented in person as listed above and does not warrant any further particular identification.

## The law

- 20 The starting point to a reasoned analysis of what is required to assess a WCO variation must be the hierarchy of statutory factors – and in particular sections 207 and 199 of the RMA. On the plain wording of the legislation, that hierarchy would appear to be as follows:
- Firstly:
- 1.1 the purpose of a WCO (refer section 207 'a special tribunal shall have particular regard to ...');
  - 1.2 the other matters set out in section 199 (section 199(2)).
- Secondly:
- 2.1 the application and all submissions (section 207(a));
  - 2.2 the needs of primary and secondary industry and of the community (section 207(b));
  - 2.3 the relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, district plan and any proposed plan (section 207(c)).
- Thirdly:
- 3.1 Part II matters (section 199(1)).
- 21 There is a possible conflict in that hierarchy in the sense that it is not clear whether section 207 intends that factors 1.1 and 1.2 are sequential in importance or equal in importance but nothing turns on that in this application and it was not therefore a matter of argument.
- 22 The statutory hierarchy thus identified, the real issue quickly focuses on the relative weighting of evidential factors vis-à-vis that hierarchy and, typical of this type of process, that then leads to reference to authorities which may give guidance to the decision-makers – particularly in this instance, decision-makers unfortunate enough to be the first to have to address a variation of a WCO.
- 23 Several authorities were referred to, some of which suggested a compelling case would be required for variation. One observation that can be made is that these authorities mostly related to the previous statutory regime, although that observation should rapidly be qualified by making the point that there are some obvious similarities between that previous statutory regime dealing with WCO's and the present one. Insofar as such dicta provide some guidance as to the broad approach (or weighting exercise) required, the following are noted:

- The 'Rakaia case' (Ashburton Acclimatisation Society v Federated Farmers of NZ Inc [1988] 1 NZLR 78:

... unless clearly sufficient reason is shown to the contrary the ultimate criterion must be the public interest. The presumption is in favour of conservation. A strong really compelling case is needed to displace it.

Per Cooke P (as he then was) at p88.

- The 'Mohaka WCO' (Re An Inquiry into the Draft National Water Conservation (Mohaka River) Order W20/92:

The test was expressed in various ways by the Court of Appeal Judges in the Rakaia river case. ... We recognise with respect, that it is inappropriate to treat passages extracted from the judgments as if they were part of the legislation. Yet they colour the formal answer given by the Court referring to what is clearly shown to be essential in the public interest.

(Mohaka p94).

- And earlier on the specific topic of modification:

Despite the existence of provision for modification or revocation of a conservation order, and the removal of the qualification for applying, we do not consider that the Tribunal should treat a conservation order as a temporary or provisional instrument. Rather we should approach our deliberations from the base that if a conservation order is made, it may be expected to endure until the circumstances in which it is made are materially changed.

(Mohaka p45).

- The 'Rangitata decision' (Rangitata South Irrigation Limited v New Zealand & Central South Island Fish & Game Council C109/2004):

... it focuses on the protection of the conservation purpose by excluding consideration of matters which are opposite to that purpose.

(Para 58 addressing the function of section 199(1)).

24 Before leaving the topic of authorities, there is one further 'authority' that is directly relevant, albeit not in the sense of the abovementioned cases dealing with general approach. That authority is the Planning Tribunal decision establishing the WCO now the subject of this variation. (*Re an inquiry into the draft National Water Conservation (Buller River) Order C32/96.*) That decision and its significance is a matter to which we shall need to return.

25 Reverting to the general approach, if the approach suggested by the above authorities is accepted, the statutory hierarchy should be applied but from a perspective that a compelling case is required. Ms Crossan helpfully suggested that that would translate to the following tests for evaluation of a variation of a WCO:

- that the characteristics protected by the WCO are no longer outstanding;
- that the amendment sought will still protect the outstanding characteristics of the waters in their natural state.

26 Mr Crosby demurred from embracing this, observing that it did not really allow for the relative hierarchical weighting of evidential factors and that in any event the present variation qualified under the second of her tests.

27 Without necessarily discarding that test (ie the second test in paragraph 25 above), it would be fair to say that it does not directly lead to an answer on this variation. It may, nonetheless, provide general further assistance.

## **Discussion and reasoning**

28 The particular dynamic of this application did not lend itself so easily to be decided on general evaluations. The case for variation was urged very much on the basis that the present WCO protected only the rafting amenity on the Gowan and no other outstanding feature. It was argued, therefore, that if the rafting amenity could remain largely intact or unaffected, the present WCO presented no particular obstacle to variation. The ancillary argument that followed on was that many of the broader matters advanced by submitters were appropriate issues for resource consent hearings, rather than the present hearing. The focus on the rafting amenity, however, did mean that the telemetry controls and the intake structure, and the impact and significance of them, assumed a greater degree of importance (and possibly premature examination of detail) than might otherwise have been considered appropriate.

29 But the far more fundamental point for the Special Tribunal is whether this approach is the correct one. In other words, is it correct in the terms of this application to focus solely on the protection of one outstanding feature, the rafting amenity? There were two possible weaknesses to this approach. In one sense they could be said to dovetail, but it is preferable to examine them separately.

30 The first is the wording of clause 8(3)(a) of the existing WCO. That reads as follows:

Despite anything in subclause (1)–

- (a) any change in flow permitted in that part of the Buller River specified in item 2 of Schedule 2 must not be greater than 10% of the naturally occurring instantaneous flow.

(emphasis added)

31 Turning to clause 8(1) that places a prohibition on the granting of resource consents or inclusion of rules if the effects would not generally maintain the channel cross section or braided river characteristics or would alter the naturally occurring instantaneous flow by more than 5%. On one interpretation the result is a double layer of restrictions only one of which is addressed by the wording sought in the application and there certainly was some evidence of likely changes in the channel cross-section or braided river characteristics.

32 Mr Crosby, we think correctly, submits that this point, at least in isolation, is answered on the face of the existing WCO. It is true that the Gowan is specifically addressed in the existing WCO in clause 8(3)(c) in terms that for particular flows are more liberal than would otherwise apply in clause 8(1)(b). In any event he has suggested a refined wording that he submits would answer the point by adding introductory qualifying words at the commencement of clauses 8(1)(a) and 8(3)(a).

33 The second point in our view raises a much greater difficulty to the exclusive focus on rafting. Section 199(2) provides as follows:

A water conservation order may provide for any of the following:

- (a) ....
- (b) The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding,–
  - (i) ....
  - (ii) As a fishery.

(emphasis added)

34 The significance of the words 'contributed to' seems to us to inevitably lead to a conclusion that an exclusive focus on the rafting amenity would be incorrect if the Gowan contributes in any significant way to outstanding features that are protected under the existing WCO immediately upstream or downstream.

35 That in turn takes the inquiry inexorably back to the existing WCO terms and to the evidence that might be relevant to such 'contribution'.

36 The existing WCO protects the eel fishery upstream in Lake Rotoroa. The trout fishery upstream in Lake Rotoroa is also protected, as is the trout fishery in the Buller River both upstream and downstream of the Gowan confluence. (Refer clause 5 and schedule 1 item 6; clause 6 and schedule 2 items 1 and 2.)

- 37 That being the case, the next question becomes whether or not there was any evidence that the variation might affect those protected outstanding features and whether that evidence was of sufficient force to ultimately weigh against the application.
- 38 With all due respect to others that may have mentioned these factors, in our view this part of the inquiry comes down to a consideration of two witnesses plus the findings of the Planning Tribunal in establishing the original WCO.
- 39 Mr Rutledge gave the only expert evidence on the eel fishery. His evidence was both considered and balanced. He acknowledged that it would still be possible for eels to move up and down the Gowan at the lower flows that would result from the variation. However, he left us in no doubt that they would be more vulnerable than would have been the case absent the variation. Perhaps the evidence was not as unequivocal as it might have been and perhaps the topic should have been the subject of a more intensive evidential inquiry, but we were left with real doubt about the viability of the Gowan's contribution to the protection of this outstanding feature as per the existing WCO at least vis-à-vis Lake Rotoroa.
- 40 The issue of the trout fishery in the Buller mainstem was addressed by Mr Deans. Again, perhaps the topic should have been the subject of a more intensive examination, but given what is now known about the geographical range, habits and habitat of brown trout within the Buller system and other waterways, enough was said to leave a real doubt in our minds that the variation would not lead to greater vulnerability of the trout fishery in the Buller mainstem protected under the existing WCO.
- 41 We were urged to consider the Planning Tribunal decision in terms of the findings that were the basis of the existing WCO. The applicant quite correctly could draw some support from the manner in which the rafting amenity is addressed in that decision in respect of this specific water body (the Gowan) at page 66 (bottom paragraph):
- The evidence to which we have just referred demonstrated that this water body itself contains some important features for rafting. However, applying the rigorous test, when viewed solely on its own as a rafting amenity, it would probably not qualify as containing an outstanding amenity of that kind. However, when viewed as a constituent part of a rafting trip that includes water body 1B and the multi-day amenity that includes the succeeding downstream water bodies 1C, 1D and 1E, we are completely satisfied that it should be considered for inclusion in a water conversation order because of its significant contribution to this overall amenity, and in particular the one day trip involving water body 1B.
- 42 But those of course are the findings of the Planning Tribunal on rafting as the basis of the existing WCO. However on the topics of the eel fishery and the trout fishery, the Planning Tribunal decision only reinforces the case for protection of the outstanding features covered in evidence by Mr Rutledge and Mr Deans. Reference is made to the following passages of that decision:

- 43 Page 28 addresses Lake Rotoroa in the section of the decision headed 'The Non Contested Waters' and states:

Preservation in its natural state is sought based on a claimed outstanding trout fishery, eel fishery, and wild and scenic characteristics.

Again the findings of the Minister's Tribunal and the evidence we received concerning Lake Rotoiti apply equally so far as it is relevant to the claimed outstanding characteristics and features of this lake. Consequently, there is no need to repeat what we have already said about Lake Rotoiti and for the same reasons as stated in respect of that water body we arrive at the same conclusion.

- 44 Lake Roto-iti is addressed in the same section at page 25 where the following observation is made:

Dr Hayes, who was called to give evidence on native fish by the Minister of Conservation, said that Lake Rotoiti and Lake Rotoroa contain the only significant populations of long-finned eels within reserve areas in New Zealand that have unimpeded access to the sea. He also said that these lakes provide an important source of breeding eels to help maintain the national eel stocks.

- 45 At page 51 in the section of the decision headed 'The Contested Waters' the decision addresses the body of water upstream from the Gowan river confluence in terms that appear to refer to the contribution of the Gowan:

Turning to the trout fishery, Dr Hayes said that in general, large lake outlets with no artificial water control or impediment to fish passage have become scarce in New Zealand owing to hydro electric development, and in this respect the Upper Buller River and the Gowan River are significant because they are still in their natural state and possess exceptionally high trout populations...

On the basis of the evidence just summarised, and applying the rigorous test earlier referred to, we are able to conclude that this particular water body contains an outstanding trout fishery.

- 46 At page 53 the decision addresses the water body downstream from the Gowan River confluence in the following terms:

Based on this evidence, we have concluded that so far as a trout fishery is concerned there is little to distinguish between water bodies 1A and 1B.

- 47 And in that regard it should be noted that 1A was the water body upstream from the Gowan confluence and 1B downstream.

- 48 At pages 105–109 these findings are scheduled in the Planning Tribunal's recommendations where the trout fishery is recommended for protection as an outstanding characteristic in the Buller River from Lake Roto-iti to the Gowan confluence and downstream from the confluence and the trout fishery and the eel fishery are recommended to be preserved in their natural state as outstanding characteristics in Lake Rotoroa.

49 We are therefore inevitably drawn to the conclusion that the case for a variation is not made out.

50 For completion, had the application survived the difficulty presented by the words 'contributed to' in section 199, we would have had little difficulty with the case that was advanced under s 207(b) RMA for renewable energy generation in the nature of the scheme that is being proposed. That part of the applicant's case was largely unanswered at least as far as any relevant expertise and economic analysis was concerned.

### **Recommendation**

51 For the above reasons the Special Tribunal recommends that the application be declined.

**Date:** 2006

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RJB Fowler

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Dr M Johnston

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L Teirney