

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of an application pursuant to section 201 for a  
Water Conservation Order on the Hurunui River

**Supplementary legal submissions for Fish and Game and NZRCA  
6<sup>th</sup> April 2009**

**Introduction**

1. These supplementary legal submissions address questions raised by the Special Tribunal during the opening of the joint applicants' case, specifically:
  - a. Relevance of references to s 199(2) (b) matters;
  - b. Guidance is assessing "wild, scenic and natural" characteristics;
  - c. Discussion of terms of proposed order, in comparison with existing Orders

**Relevance of references to section 199 (2) (b) matters**

2. The Tribunal has asked for clarification of which provisions of section 199 the Applicants are relying on, as in some instances, section 199 (2) (b) sub clauses have been referred to, while the application states that section 199 (1) (a) and (2) (a) are relied on.
3. The Applicants contend that the Upper Hurunui Waters have outstanding amenity and intrinsic values that are afforded by the fact the waters are in their natural state, so to that extent rely on section 199 (1) (a). The Applicants further contend that it is appropriate to preserve these waters in their natural state, in accordance with section 199 (2) (a). The reasons justifying preservation are two fold. Firstly, the existence of a natural state, unmodified river catchment, is an increasingly rare thing, particularly on the east coast of New Zealand, and therefore preservation of a remaining, outstanding example is important. Secondly, preservation in its current state is what is deemed necessary to protect the various amenity and intrinsic values – the wild, scenic and natural characteristics rely on the Upper Hurunui Waters remaining unmodified, the trout habitat is sustained by the existing natural state, the range of angling flows preferred (from low to mid range) are protected by the natural state, the range and variability of kayaking flows (from low to high range) that contribute to the Hurunui's popularity and attractiveness are protected by the natural state.
4. Were the Upper Hurunui Waters not in their natural state, or if it were found by the Tribunal that the outstanding characteristics should be protected with a lower form of protection than preservation of the natural state to take into account other matters, then section 199 (2) (b) would come into play.
5. Inadvertent references to section 199 (2) (b) have been made as section 199 (2) (b) is effectively the list of the various "amenity and intrinsic values" that section 199 (1) (a) is referring to. As stated by Judge Jackson's division of the Environment Court in the *Rangitata* decision:

[28] Secondly section 199 also authorises orders in respect of five characteristics if any one or more is considered to be outstanding:

(1) as a habitat for plants or animals;

(2) as a fishery

(3) for wild scenic or other natural characteristics

(4) for scientific and ecological values; or

(5) for recreational, historical, spiritual or cultural purposes

In fact that list seems to cover most of the possible non-industrial uses humans could make of a river and its water.

6. The "characteristics" listed in section 199 (2) (b) (i) – (v) either fall into the category of amenity value, intrinsic value, or sometimes both. It is submitted the term "characteristic" used in section 199 is as an umbrella term, encapsulating both amenity values and intrinsic values. References to section 199 (2) (b) sub clauses have simply been to illustrate which specific characteristic was being addressed, rather than actually relying on section 199 (2) (b).

### Wild, Scenic and Natural Characteristics

7. Section 20 B (6) (b) of the Water and Soil Conservation Act referred to "wild, scenic and natural" characteristics, so to that extent, judgements under the previous legislation are of some assistance when trying to define exactly what it is that is to be considered.

8. In *Re an inquiry into the Draft National Water Conservation (Mohaka) Order (W20/92)* the Planning Tribunal under the heading "Amenity" stated (Page 50):

*Amenity is an abstract concept, as are such characteristics of a river as whether it is wild, or scenic. However all the qualities of a river listed in section 20 D (2) of the act are derived from its physical characteristics and features. It may be wild if it is untamed or turbulent. It may be scenic if its surface is pleasing to the beholder's eye. It may have scientific interest because of its current, turbidity, chemical composition, or biota. Although in Huakina v Waikato Valley Authority it was held that cultural and spiritual values in relation to a body of water were relevant, that was in the context of a provision that lacked express criteria and where it was appropriate to seek extrinsic guidance. There is no mention of cultural or spiritual matters in the Act.*

We adopt, with respect, the conclusion reached by Mr Justice Jeffries (which we understand was not challenged on appeal), and hold that the word "amenity" in section 2 of the Amendment Act is to be taken to refer to an amenity derived from one or more physical characteristics or features of the body of water.

9. The Planning Tribunal assessing the Mohaka were faced with conflicting evidence from experts, and preferred the evidence of a Mr Hansen. His method was discussed at page 55. Mr Hansen adopted what he described as a cognitive approach to visual assessment. He considered it the most suitable approach as it recognises the role of human judgment in assessing scenic beauty in that it addresses the human landscape interaction issue. He described the cognitive approach as attempting "to understand how people perceive the landscape and thus discover the factors, elements or relationships which will affect their assessment of the visual environment" (page 55):

*That method calls for measuring 3 basic values: scenic, wild and natural; which are assessed according to a set of defined criteria and scored against a scale ranging from very low to very high. Scenic values are assessed by reference to coherence, complexity, special definition or legibility, and mystery. "Sense of place" is also included in assessing scenic values. It is a measure of that distinctiveness which makes a place clearly recognisable".*

Mr Hansen has adopted a meaning of the word wild as an area that:

- Is extensive and remote with land and waterscape shaped by natural processes.
- Shows little evidence of change indicated by human activities; no impoundments or diversions, or alternations to water quality.
- Has no vehicular access to the interior.
- Accommodates human activity at a level which does not compromise the sense of remoteness and solitude.

10. Mr Hansen also referred to the following explanation (page 56):

*The distinguishing feature... is that the area is very highly valued for those experiences of remoteness and solitude, respite from environments subdued, tamed or otherwise influenced by human activities, and enjoyment of a landscape shaped by natural processes.*

11. While the Tribunal preferred Mr Hansen over the other witness, it noted a reservation at page 57:

*Mr Hansen's method did not appear to give sufficient weight to diversity in the landscape. He acknowledged that if he had used a different approach it may have produced a different result. Turbidity and discoloration in the river at the time he made his visit may have affected the overall rating. His criteria appeared to count against narrow steep sided gorge sections because of restricted foreground views.*

12. Therefore, as a starting point, in my submission the Planning Tribunal's findings in respect of what should be considered when assessing wild, scenic and natural characteristics can be summarised as:

- a. The characteristics must be derived from the physical characteristics or features of the body of water
- b. Scenic values assessed by reference to coherence, complexity, special definition or legibility, and mystery.
- c. "Sense of place".
- d. Land and waterscape shaped by natural processes.
- e. Experiences of remoteness and solitude
- f. Little evidence of human induced change
- g. Diversity in landscape

13. The next decision to discuss "wild, scenic and natural" characteristics, still under the WSCA, was in respect of the Buller WCO, *Re an inquiry into the Draft National Water Conservation (Buller River) Order 1989 C32/96*. Relevant extracts from that decision are quoted below (Page 20):

*In this case, the Minister of Conservation in particular has claimed outstanding wild and scenic characteristics for several of the water bodies in the schedule. The correct approach to be adopted in determining whether a water body contained such outstanding features became an issue at our inquiry. This has its difficulties. It is well established, and indeed accepted by the experts in such matters, that it is the waters themselves, or the contribution they make to such values that need to be considered.*

14. In this case, the Planning Tribunal preferred the approach of Mr Rackham over Ms Lucas. The approach taken by Mr Rackham was summarised on page 21:

*Mr Rackham interpreted wild and scenic to embrace the whole sequence of natural waterway characteristics from the wild to the picturesque. He placed emphasis on the presence of physical characteristics and features of the water bodies rather than on the perception of these. He researched literature to establish the upper 10% of all water bodies which might reasonably be classed as outstanding. If the Tribunal thought this was too restrictive he considered*

*whether the rivers and creeks of particular interest in this case might be included in the top 25% of all New Zealand water bodies.*

*His approach involved 5 interconnected components: a review of the literature; a description of characteristics and features of the particular water bodies being assessed; a comment on relevant affidavits prepared by Maruia in support of this aspect of the case; the witness' own subjective judgement, and a review of other Water Conservation Orders. Although there had been no national study specifically aimed at assessing outstanding wild and scenic qualities, there had been several comparative river assessments and Mr Rackham listed these and referred to them in some detail.*

15. Therefore the additional features adopted by the Tribunal in the *Buller* that we can add to the list derived from the *Mohaka* decision can be summarised as:
  - a. Assessment of the waters themselves, or the contribution they make to such values (of the surrounding landscape) that need to be considered.
  - b. Description of physical characteristics and features of the water bodies
  - c. Literature review findings
  - d. Review of other WCOs
  
16. The next decision to consider "wild, scenic and natural" is the Environment Court's decision in respect of the Kawarau WCO, *Re an inquiry into the Draft National Water Conservation (Kawarau) Order C33/96*, which related primarily to the Shotover River.
  
17. In that case one expert Mr Blackley said that it is not possible to separate the waters of a river from the wider landscape, the two being inextricably linked. The Tribunal thought that was particularly true in this case because:

*Page 7 " The river is the central component of the land through which it flows and many of the land forms have their genesis in river processes, as for example the terraces, the river flats and the deeply entrenched gorges".*
  
18. The Tribunal evaluated the evidence and concluded the best way to view the claimed outstanding wild and scenic characteristics is to assess the whole river as one.

*Page 21 "It is of some importance to notice too that most, if not all, the earlier assessments were of the whole river as an entity and, in the end, we think this is the most realistic way to view this particular claimed outstanding characteristic. While there are obvious differences, particularly in scenery and in parts in the wildness of the waters in the upper and lower river, the combination of these with the waters being a dominant feature throughout, whether running clear or not, make this, as Mr Borrell agreed, a very special river. The presence of schist formations also distinguishes it from other rivers referred to by him".*
  
19. Therefore the additional features added by the Court in the *Kawarau* decision that we can add to the list derived from the *Mohaka* and *Buller* decisions can be summarised as:
  - a. The component the river plays in relation to the land
  - b. The most realistic way to view wild, scenic and natural characteristics is the view the whole river as an entity
  
20. The Special Tribunal Report on the Rangitata WCO application made findings in respect of the upper Rangitata and headwaters on wild, scenic and natural

characteristics that were not appealed, and were generally accepted by the Environment Court (see paragraphs 27 and 61 of Environment Court decision).

21. When introducing the discussion on this topic, the Special Tribunal noted at paragraph 161:

*We note the wildness is not wilderness, nor necessarily indigenesness, nor pristine. However, we expect that outstanding wild characteristics will occur in largely indigenous situations.*

22. In terms of the approach:

*164 Lucas and Rackham were in agreement that it is the waters themselves or the contribution that they make to wild and scenic values that need to be considered. Both witnesses had participated in the "Canterbury Regional Landscape study" 1993 (see next section). We note that although this study is relevant, an aspect or feature that is regionally outstanding may not necessarily be nationally outstanding and vice versa i.e.. something that is locally common may also be striking or special on a national basis.*

23. And

*206 We note that experts disagreed about the headwaters, upper Rangitata River and gorge sections, but the Canterbury Regional Landscape study found that the upper Rangitata River is regionally outstanding and the gorge regionally significant. We consider that these types of landscape are more commonplace in Canterbury than nationally, and can be nationally outstanding even if only significant regionally.*

24. In the end, the Tribunal found that the headwaters, upper Rangitata and Rangitata Gorge had outstanding wild, scenic and natural characteristics, effectively preferring Ms Lucas' assessment.

25. As noted by the Environment Court at paragraph 27 of the Rangitata decision, no submitter challenged the findings in respect of the Upper Rangitata, so the Environment Court accepted the Special Tribunal's recommendations, and they were followed through into the gazetted Order.

26. Therefore, if we synthesis the approaches these various decisions approved of, when assessing wild, scenic and natural values, we get the following:

- a. It must be an assessment of the waters themselves, and the contribution they make to surrounding wild, scenic and natural values that needs to be considered. In doing this, the focus is on the physical characteristics and features of the water bodies both on their own, and how they contribute to the values of the surrounding landscape. Relevant to this assessment are the following considerations:
- i. Scenic values should be assessed by reference to coherence, complexity, special definition or legibility, and mystery;
  - ii. "Sense of place";
  - iii. How the land and waterscape are shaped by natural processes;
  - iv. The component the river plays in relation to the land;
  - v. Viewing the river as an entity;
  - vi. Experiences of remoteness and solitude;
  - vii. Little evidence of human induced change;
  - viii. Diversity in landscape;
  - ix. Literature review findings;
  - x. Review of other WCOs; and
  - xi. Something that is locally common may also be striking or special on a national basis.

## Discussion of key differences and similarities between draft Order tabled and WCOs for Oreti, Rangitata and Buller.

27. I have undertaken a comparison of the terms and structure of the draft order tabled, with the Buller, Rangitata and Oreti WCOs. Also it should be noted that while the recommending report in respect of the Buller WCO was decided under WSCA, it was drafted and gazetted finally in 2001, in full knowledge that it was to be implemented pursuant to the RMA and this was, I am advised, taken into consideration in its final drafting by the Parliamentary Counsel Office.
28. The Order being sought by the Applicants seeks "natural state" protection, so in a sense is comparatively simple, when compared with the other Orders.
29. Therefore the main points of comparison relate to how damming, fish passage, and fish screening is treated.

### *Damming*

30. The draft order tabled uses the same approach to defining and referring to damming, as the most recent order granted, the Oreti WCO, with a definition at the start in the definition section: "*damming means the impounding of all or part of the natural flow of any water that may involve an associated temporary or permanent structure*", and a corresponding clause stating that damming is prohibited.
31. This contrasts with the Buller and Rangitata Orders. Clause 7 in the Buller WCO specifies what damming is not, and does not otherwise contain a definition of damming. It states:
  - (1) *For the purpose of this clause, damming does not include any intake or deflection structure that does not-*
    - (a) *harm any salmonid fish spawning or prevent the passage of any fish; or*
    - (b) *prevent the use of the waters for rafting or canoeing; or*
    - (c) *reduce the wildlife habitat; or*
    - (d) *intrude visually to the extent that it reduces wild and scenic values*
  - (2) *No resource consent may be granted or rule included in a regional plan permitting the damming of the waters specified in schedule 2 whenever any of the characteristics in subclause (1) are listed as outstanding in schedule 2 and that schedule refers to this clause.*
32. The Rangitata Order also contains the definition within the relevant clause itself, rather than in the definition section, and takes similar form to clause 7 in the Buller:

#### *Clause 8*

- (1) *No resource consent may be granted or rule included in a regional plan authorising the damming of the waters specified in Schedules 1 and 2. For the purposes of this clause, damming does not include any intake or deflection structure that does not-*
    - (a) *prevent the passage of any salmon; or*
    - (b) *reduce the use of the waters for rafting or canoeing; or*
    - (c) *reduce the aquatic bird habitat; or*
    - (d) *intrude visually to the extent that it reduces wild and scenic values.*
33. Therefore, if it is found that a more focused, narrow definition of damming is required to both give effect to protection of outstanding characteristics, while also allowing for some use of the waters, the definitions in the Rangitata and Buller Orders may be a useful reference.

### *Fish passage*

34. In conjunction with the damming restriction clauses, the Buller, Rangitata and Oreti WCOs all contained clauses referring to "fish passage" specifically. The Buller Order has clause 10:

*Requirement to maintain fish passage*

*No resource consent may be granted or rule included in a regional plan for the waters specified in Schedule 2 unless that resource consent or rule maintains -*

*(a) adequate natural or artificial passage for trout through those waters where Schedule 2 identifies trout as an outstanding characteristic; and*

*(b) adequate natural or artificial passage through those waters for those native fish that require such passage where Schedule 2 identifies native fish as an outstanding characteristic.*

35. The Rangitata Order has clause 10:

*Requirement to maintain fish passage*

*(1) No resource consent may be granted or rule included in a regional plan relating to the waters identified in Schedule 2, authorising an activity that will adversely affect the passage of Salmon, where Schedule 2 identifies salmon passage or salmon spawning as an outstanding characteristic or contributing to an outstanding characteristic.*

36. The Oreti Order clause 8 follows the same form as that tabled in the draft order:

*Requirement to maintain fish passage – subject to clauses 10 and 11, no water permit may be granted or rule included in a regional plan relating to the waters specified in Schedule 1 and item 1 of Schedule 2 authorising an activity that will adversely affect the passage of fish.*

37. In the *Buller* decision the discussion on fish passage is a little hard to evaluate when read out of context, but to the extent it is helpful it is quoted (page 95):

*On fish passage and diversity and abundance, we have to say we agree with those that seek to have diversity and abundance taken out the conditions. In our view, requiring maintenance of relative abundance in particular is too vague and, in any event, is unnecessary. We agree with Mr Hulbert there is little point in protecting fish passage if fish habitat is not protected, but the other conditions of this order are designed, in part at least, to do just that. The flow condition contributes to the protection of that habitat, particularly in the smaller rivers and streams as does the river form condition and the water quality parameters. We see no need to go any further, and we know of no other water conservation order that contains such a requirement. For these reasons, we will delete the reference to abundance and species diversity in condition (e) and delete condition (f) altogether.*

38. In the case of the *Rangitata*, the Environment Court did not discuss the fish passage clause at all but impliedly adopted the recommendations of the Special Tribunal. The Special Tribunal, in part 7 of the October 2002 recommendation report on the restrictions and prohibitions discussed fish passage in the context of both the damming clause, and the flow regime (a very sophisticated flow regime), and never directly discussed how it envisaged the fish passage clause itself was intended to function, in the context of the damming and flow provision clauses. It is therefore unclear whether the fish passage clause was intended to relate to water flow and water level, and/or structures in the river bed.

39. The Special Tribunal in respect of the Oreti discussed "prohibition on damming and maintenance of fish passage" together in section 8.2, page 54, after finding "*there was reasonably compelling evidence provided to us that brown trout in the Oreti migrate long distances, and so unimpeded passage along the river is critical for maintain the fishery*" (para 321). The Tribunal concluded (para 328):

*In order to protect the outstanding characteristics we have identified, we consider that the water conservation order should prohibit damming of the upper Oreti and specified tributaries, and should ensure fish passage be maintained along the river and its headwater tributaries. This is what we have recommended. In combination these two provisions will ensure that brown trout*

*(and migratory nature species) continue to have unimpeded access along the length of the river, and itself this will make a major contribution to the maintenance of the outstanding brown trout fishery of the Oreti River.*

40. The Oreti contains no minimum flow or flow regime clause, as it was considered the Regional Plan should determine that, therefore the discussion in respect of fish passage was intended to be in respect of structures or modifications to the river bed that could impede passage.
41. So in all these orders, where it was found that maintaining fish passage was necessary to protect the fishery, a corresponding fish passage clause was included.
42. It was for this same purpose that the fish passage clause is proposed in the case of the Lower Hurunui. It is not the intention for this to act directly as a default minimum flow and flow regime provision, as it is considered that will be adequately dealt with under the Regional Plan. Although it is noted that if there is a clause in the WCO requiring that fish passage be maintained, the flow regime that will eventually be set in the regional plan and any resource consents issued will need to ensure they are not inconsistent with this requirement.
43. The application referred to the fact the Lower Hurunui needed to be protected for the fish passage it provided. Eg at paragraph 41, page 21, it stated:
- While the Lower Hurunui is not considered to be in its natural state, it contributes to the outstanding brown trout habitat and fishery in the Upper Hurunui Waters by providing rearing habitat and fish passage. The Lower Hurunui River also contributes to the outstanding recreational value of the Upper Hurunui Waters by provided a safe "get out" point for kayaking and canoeing. The applicants consider that this contribution should be protected.*
44. Then at paragraph 45, page 22:
- While the Lower Hurunui is not in its natural state, protection is also sought for the contribution it provides to the outstanding brown trout habitat in the Upper Hurunui Waters. The Applicants seek protection of this contribution by providing for fish passage.*
45. Paragraphs 54 on page 23 and 122 on page 39 include a similar statement, regarding the intention to protect "fish passage".
46. The Application then states at paragraph 128, page 41 that it is considered the contribution of the Lower Hurunui (to habitat and fish passage) should be protected by the damming prohibition, and the fish screen standards.
47. In conclusion, the fish passage clause was included for two reasons. Firstly, to make it clear that it is necessary that fish passage be maintained (as stated several times throughout the Application), and secondly, because the Orders on which the tabled draft is based, included a similar combination of clauses, in order to protect that same objective, being fish passage.

#### *Fish screening*

48. A suggestion has been made that the clause should follow a similar drafting pattern to the clauses relating to damming and fish passage, to make it clear that it does not apply retrospectively, but that it applies to consents issued in the future.
49. It is agreed that this clause could be redrafted to clarify that it only applies in the future, and in a manner that is consistent with the structure of the previous clauses:

*Requirement for fish screens—~~No water permit may be granted or rule included in a regional plan in respect of~~ ~~All intakes associated with the taking or diversion of the waters specified in Schedule 2, or taking or diversion of the waters specified in Schedule 1 as exempted by clauses 10 and 11, shall be~~ unless all associated intakes are screened and ~~be~~ designed and maintained to comply with the minimum standards for fish screens and intakes contained in Schedule 3.*

50. The Oreti WCO does not contain a clause referring to fish screening explicitly.
51. The Rangitata Order contains clause 10 (2) in respect of fish screening (coming under the heading "Requirement to maintain fish passage":
- (2) No resource consent in relation to an intake site may be granted, or rule included in a regional plan, for the waters specified in Schedule 2 authorising an activity that resource consent provides for fish exclusion or a fish bypass system to prevent fish from being lost from the specified waters.*
52. No mention is made in the Buller WCO of fish screening.

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Dated this 6<sup>th</sup> day of April 2009.