

**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

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**OPENING SUBMISSIONS OF COUNSEL FOR NEW ZEALAND AND  
NORTH CANTERBURY FISH AND GAME COUNCILS AND THE NEW  
ZEALAND RECREATIONAL CANOEING ASSOCIATION  
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## Introduction

1. New Zealand Fish & Game Council and North Canterbury Fish & Game Council ("Fish & Game") and the New Zealand Recreational Canoeing Association ("NZRCA") ("the joint applicants") jointly applied to the Minister for the Environment for a Water Conservation Order over the Hurunui River Catchment.
2. Fish and Game, established under the Conservation Act 1987, has as part of its statutory functions and duties, the responsibility to represent the interests of anglers and hunters, and to advocate for the management, maintenance and enhancement of sports fish and game resources.
3. The NZRCA is the national representative organisation of canoe and kayak clubs and individual canoeists and kayakers. It is a nationally representative body, affiliated to the New Zealand Canoe Federation, and has the mandate from the Federation to represent it on RMA matters. The NZRCA takes an active role in RMA proceedings affecting its members interests, and is recognised nationally as making an important and responsible contribution to the implementation of RMA law and policy.
4. This Special Tribunal has been appointed by the Minister for the Environment pursuant to section 202(1)(a) to hear and report on the application.
5. In these opening submissions I deal with the following matters:
  - a. A background to the application
  - b. An overview of the Water Conservation Order regime and its relationship to resource management generally and a discussion of the relevant statutory provisions, including

- i. The purpose of WCOs (section 199)
- ii. Relevant matters including statutory plans, and the needs primary and secondary industry and the community (section 207)
- iii. Part II
- c. Why protection is needed
- d. Specific issues relevant to the terms of the Order sought:
  - i. Reaches of the river
  - ii. Wild, scenic and natural values
  - iii. Fishery (habitat and angling values)
  - iv. Whitewater (kayaking and rafting) amenity
  - v. Didymo
  - vi. Terms of the Order sought

### **Background to the Application**

- 6. In terms of rivers, the Upper Hurunui seems to have it all:
  - a. Unimpeded and unmodified from source to sea;
  - b. Stunning scenery and natural surroundings;
  - c. Pristine, highly natural state;
  - d. Highly valued by tangata whenua;
  - e. Clean water;
  - f. Variable and wide ranging flows;
  - g. Abundant and large trout;
  - h. A healthy salmon run;
  - i. Several top quality white water runs;
  - j. Easily accessible excellent fishing;
  - k. Remote excellent fishing;

- I. Great picnicing, tramping and camping.
7. And all of this is within 90 minutes drive of a major population centre, making it incredibly popular, and therefore important, to a very large number of people. You will be hearing extensive evidence on these various features, so I will not go into too much detail now.
  8. Given these qualities, and the looming threats occasioned by changing landuse patterns, the joint applicants chose to apply for a WCO to recognise and protect these precious waters.
  9. The focus of the original application was on the Upper Hurunui Waters, from the source, to the confluence with the Mandamus river confluence, as it is in these Upper Waters that all the characteristics of concern to Fish and Game and the NZRCA are located. The Lower Hurunui Waters were included in the application for the contribution they make to the features supported by the Upper Hurunui Waters, and the levels of protection proposed reflect this. Submitters have subsequently sought to expand the scope of the Order, as they are entitled too, to include additional protections on the Lower Hurunui Waters for additional outstanding features.

### **Overview of the Water Conservation Order Regime**

10. Before getting into the detail of the critical legal tests you are going to need to apply, some preliminary comments are appropriate to place water conservation orders within the broader framework of resource management law.
11. National water conservation orders and local water conservation notices were created by an amendment to the Water and Soil Conservation Act in 1981.

12. The regime was created as a direct response to what was seen at the time to be a statutory imbalance in the decision-making framework for rivers and lakes. Put simply, there was no legislative mechanism to protect rivers and lakes with important natural values in the same way as existed (and still exists) for land.
13. The Water and Soil Conservation Amendment Act 1981 had as its object (section 2):

*"... to recognise and sustain the amenity afforded by waters in their natural state."*
14. At the same time the Long Title to the principal Act was amended to read:

*"An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, [community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes]."*
15. Following the passing of this legislation there have been a number of applications granted for water conservation orders to protect, for example:
  - a. Mataura River
  - b. Buller River
  - c. Mohaka River
  - d. Motu River
  - e. Motueka River
  - f. Kawarau River
  - g. Rangitikei River
  - h. Rangitata River
  - i. Oreti River.
16. Interestingly, most of the applications have been made by Fish & Game. Whilst they have attracted broad support from other groups

and individuals, it seems to be Fish & Game's lot in life to initiate action to protect these rivers, consistent with its statutory advocacy function (s26C and 26Q Conservation Act 1987). This is the first joint application between Fish and Game and the NZRCA. Although the NZRCA has been a strong supporter of other applications that concern rivers with white water amenity including the Motu, Mohaka, Buller, Kawarau and Rangitata Orders.

17. When the Resource Management Act was enacted in 1991, the separate water conservation order regime was carried through. The main differences from the old provisions in the Water and Soil Conservation Act ("WSCA") are:
  - a. The characteristics that are able to be protected (section 199) are broader than the corresponding section in the WSCA (section 20D(2)) and in particular include express reference to historical, spiritual and cultural purposes, as well as to outstanding significance in accordance with tikanga Maori.
  - b. The local notice provisions have not been continued. Existing local notices have become deemed regional plans (section 368). There is some uncertainty as to whether water conservation orders can be obtained for rivers of regional (as opposed to national) significance, although the national significance of the Hurunui River is such that this issue does not arise for consideration in the context of the fishery and fishing amenity and kayaking.
  - c. The WCO provisions under the RMA are qualified as being "not subject to Part II", setting them apart from the main body of the Act.
  
18. A more detailed comparison of the two regimes is contained in the **attached** appendix 1 to these submissions. Even a cursory look at the differences between these provisions shows substantive material changes in the law have taken place. I will address the implications of these substantive differences a little later in my submissions.

19. In essence, what the WCO regime requires is that where there are outstanding features or characteristics (of the types described in section 199) present in a water body, then in the absence of something truly exceptional, there is a presumption that those outstanding features or characteristics should be preserved or protected, and that an Order is an appropriate mechanism to achieve this.
20. Against this background, decisions purely subject to Part II (i.e., not under Part IX) are to occur subject to any water conservation order. That is why the Act expressly provides that regional and district planning instruments and resource management decisions, cannot be inconsistent with any water conservation order (section 217).
21. This also explains why water conservation orders are phrased in terms of restrictions and prohibitions on the regional council's ability to provide for matters in its plans and in resource consents issued by it.
22. In summary, Water Conservation Orders sit high in the hierarchy of statutory instruments under the RMA. They come into force by way of gazettal of Orders in Council, and have the status of a Regulation.
23. In 2004 Judge Jackson's division of the Environment Court issued a substantive decision in respect of the application for a WCO on the Rangitata River. This is the most substantive decision from the Court to have been issued pursuant to the RMA, (as opposed to the Water and Soil Conservation Act), and therefore assists in the interpretation and application of the water conservation order provisions of the RMA. *Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council* Dec No C 109/2004.

24. The Court considered the differences between the WSCA and the RMA, as referred to previously, and His Honour Judge Jackson said at paragraph 32 of the *Rangitata* decision.

*[32] We have considered, only to dismiss, comparisons with the "Water Conservation Orders and Notices" provisions in section 20A to 20I of the repealed Water and Soil Conservation Act 1967 ("WSCA"). Substantively and procedurally the differences between the WSCA and part 9 of the RMA are so great that we consider it is not useful, and indeed is probably misleading, to consider the former except as to some guide to the interpretation of identical words or phrases in the latter. The main substantive difference is that the purpose of a water conservation order is now affected by Part 2 of the RMA to some extent, and there was no equivalent (only a long title) in the WSCA. ..*

25. His Honour separately qualified his statement above, at paragraph 58, when adopting and importing the presumption in favour of protection/conservation once a characteristic is found to be outstanding. Therefore one matter that clearly has been imported by the judiciary in part, is the presumption that outstanding characteristics should be protected, as stated by at paragraph 58:

*[58] However, once it is found that a part of the river has outstanding characteristics then the purpose of a Water Conservation Order and the non-repugnant sections in Part II of the Act entail that there is a presumption that those characteristics should be recommended for specified protection. To that extent we are adopting (respectfully) the approach of the Court of Appeal in the Rakaia Water Conservation Order case: Ashburton Acclimatisation Society v Federated Farmers of New Zealand Incorporated [fn53 [1988] 1 NZLR 78 at 88]. That case was about the WSCA 1967 which did not contain any provision as powerful as Part II of the RMA.*

26. Therefore, in any instance when we turn to apply case law developed under the previous regime, we must first assess if we are using it to assist in the interpretation of words and phrases that are identical between the two statutes, or for some bigger picture/higher level of interpretation. If it is the former, chances are it is appropriate, if it is the latter, it must be approached with care.

27. The Minister's Special Tribunal appointed to hear the application for a WCO over the Oreti River in 2007 relied in large part on the Environment Court's decision in respect of the Rangitata. (para 11,

page vi, and para 168, page 27, Special Tribunal Report November 2007), as did the Special Tribunal appointed to hear the application for an amendment to the Buller WCO in respect of the Gowan (para 40, page 10, Interim Decision on Application to vary the Buller Water Conservation Order), and the Environment Court's decision in respect of Majac Trust's application to amend the Buller WCO *Re Talley as Trustees for Majac Trust EnvC C006/06*. These decisions, in conjunction with the decision in respect of the *Rangitata*, is where most guidance to interpretation of the statute is found.

28. While the Special Tribunal decisions do not have the same weight or precedent effect as a Court judgment, they are of assistance when trying to interpret and apply the law and I will be referring to them throughout these submissions.
  
29. The Planning Tribunal decision granting the Water Conservation Order in respect of the Kawarau River was also made under the RMA, rather than the predecessor legislation, by Judge Skelton's division. *Re an Inquiry into the Draft National Water Conservation (Kawarau) Order C33/1996*. However that case was significantly less contentious than the Rangitata case, and therefore contained less discussion and clarification of the application of the legislation.
  
30. Finally, by way of general introduction, it is significant to note that the water conservation order regime sits a little outside of the purpose and principles of the Act as contained in Part 2. Section 199 applies "notwithstanding anything to the contrary in Part II", which has been held by the Courts and Special Tribunals as meaning that only the provisions of Part II that accord with the purpose of the Order have weight. Part II provisions that are contrary to protection and preservation of outstanding values do not need to be weighed and balanced in the standard way. The practical application of this will be addressed later in these submissions.

## Relevant Statutory Provisions

### Part IX - Section 199

31. The purpose of WCO's is established by section 199.

199 *Purpose of Water Conservation Orders*

- (1) *Notwithstanding anything to the contrary in Part 2, the purpose of a Water Conservation Order is to recognise and sustain—*
  - (a) *Outstanding amenity or intrinsic values which are afforded by waters in their natural state:*
    - (b) *Where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.*
- (2) *A water conservation Order may provide for any of the following:*
  - (a) *The preservation as far as possible in its natural state of any water body that is considered to be outstanding:*
    - (b) *The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding,—*
      - (i) *As a habitat for terrestrial or aquatic organisms:*
      - (ii) *As a fishery:*
      - (iii) *For its wild, scenic, or other natural characteristics:*
      - (iv) *For scientific and ecological values:*
      - (v) *For recreational, historical, spiritual, or cultural purposes:*
  - (c) *The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.*

32. Effectively there are two forms of protection. The highest form is preservation of the waters in their natural state, for the purpose of sustaining outstanding amenity and intrinsic values (s 199 (1) (a) and (2) (a)). The second form of protection is for water bodies that are no longer in their natural state, and this requires protection of the various features identified.

33. The Upper Hurunui Waters are clearly at the pristine end of the natural state spectrum. The joint applicants have therefore applied for a natural state level of preservation, as they believe this is necessary to

properly sustain and protect the natural and outstanding characteristics.

34. In the *Rangitata* WCO decision the Environment Court considered the application of some of the key words of section 199. In terms of "sustain" the Court stated:

*[16] 'Sustain' is defined in The Concise Oxford Dictionary as (relevantly):*

*1 Support, bear the weight of; esp. for a long period. 2 Give strength to; encourage, support . . . 4 Endure, stand; bear up against . . . 9 continue to represent (a part, character, etc) adequately.*

*All those senses, and particularly the last, have some application to 'sustain' as used in section 199 of the RMA.*

35. And in terms of the application of the requirement to "protect", which becomes relevant if the water body is not to be preserved in its natural state, the Court stated:

*[30] Collating the various appropriate definitions we conclude that the meaning of section 199 which is most relevant here is that the purpose of a Water Conservation Order is to restrict the Regional Council's powers to the extent necessary for the natural but not pristine characteristics of the river (including tributaries, wetlands within its catchment, and hydraulically connected groundwater) which are out of the ordinary on a national basis to be maintained in their current quality and quantity.*

36. Therefore, it is submitted that in order to give effect to the purpose of WCOs in the Act, the terms of the Hurunui WCO if granted must ensure that any recognised outstanding characteristics are sustained by preserving them in their natural state.

### Outstanding

37. The test for outstanding in the context of section 199 was clarified and confirmed by Judge Jackson in the *Rangitata* ruling:

*[17] In the first case on Part 9 of the RMA — Re an Inquiry into the Draft National Water Conservation (Kawarau) Order [C33/1996 at p 5] the Planning Tribunal referred to the reports in Re Draft National Water Conservation (Mataura River) Order (C32/90) and Re Draft Water Conservation (Mohaka River) Order (W20/92), and stated that the Tribunal held that:*

*the test as to what is outstanding is a reasonably rigorous one and that to qualify as outstanding a characteristic would need to be quite out of the ordinary on a national basis . . .*

*[emphasis added]*

We accept Mr Milne's submission that:

*the amenities should stand out on a national comparative basis. If one takes a national comparative approach the fact that the wider region is well endowed with similar high quality features, may well suggest that particular waters do not stand out when considered in a national context.*

## Part II

38. The practical implication of the reference to Part II in section 199 is set out by Judge Jackson in the *Rangitata* case:

*The context of section 199*

[21] *It is important that section 199 does not begin 'notwithstanding anything in Part II . . .' but 'notwithstanding anything to the contrary in Part II' [our emphasis]. The qualifying words make it clear that not all of Part II is not to be ignored but only those aspects of Part II which are contrary to the purpose stated in section 199. As explained in *New Zealand Rail Limited v Marlborough District Council* [fn9 [1994] NZRMA 70 at 80 (HC)] 'contrary' has the sense of 'repugnant or antagonistic to'.*

[22] *The phrase 'notwithstanding anything to the contrary in this or any other Act' was considered by the Court of Appeal in *Rix v Controller and Auditor-General* [fn10 [1948] NZLR 1021]. The Court stated that the phrase meant that the provisions of other Acts which were contrary to the section under consideration must be disregarded. It referred to an Australian case in *Bland Brothers and Inglewood Borough Council* [fn11 (No 2) [1920] VLR 522] in which the Court stated:*

*As to the introductory words, the section should first be construed without them, and then, if there is anything in the other provisions of the Act inconsistent with the interpretation so arrived at, these other provisions must yield. This was in effect decided, as we understand, by all the Justices of England in *Sir Thomas Cecil's case* [fn12 [1597] 7 Co Rep 18b, 19, 20], where it was said that the Act otherwise was to be no impediment to the interpretation of a section containing the words 'notwithstanding etc.'*

[23] *Mr Milne submitted that section 199(1) downgrades the conservation focus of the Act. We hold that it has the opposite effect — it focuses on the protection aspect of the conservation purpose by excluding consideration of matters which are opposite to that purpose.*

[24] *Whether the application of any part of sections 5 to 8 of the RMA is contrary to section 199(1) is a matter of judgement on the facts in each case. However it is more likely for example that the matters of natural importance in section 6(a) to (c) should be recognised and recommendations made as to how to provide for them in (nearly) the normal way. That is because the preservation of the natural character of the margins of the Rangitata River, the protection of any outstanding natural feature and of any significant habitat of indigenous fauna are not repugnant to the section 199 purpose but entirely consistent with it. The exception — a point reiterated*

frequently by some counsel — is that it is not a part of the purpose of a water conservation order to enhance characteristics so they become outstanding or even to improve them if already outstanding.

[25] We conclude that in addition to the matters we must have regard to under section 212, we must also consider those provisions of Part II which are not excluded on the facts before us as being contrary to section 199(1) of the Act.

39. The Court made further statements in paragraph 58:

[58] However, once it is found that a part of the river has outstanding characteristics then the purpose of a Water Conservation Order and the non-repugnant sections in Part II of the Act entail that there is a presumption that those characteristics should be recommended for specified protection. To that extent we are adopting (respectfully) the approach of the Court of Appeal in the Rakaia Water Conservation Order case: Ashburton Acclimatisation Society v Federated Farmers of New Zealand Incorporated [fn53 [1988] 1 NZLR 78 at 88]. That case was about the WSCA 1967 which did not contain any provision as powerful as Part II of the RMA.

40. When the Tribunal assessing the Oreti application turned its mind to the relevance Part II it stated:

16. The Tribunal next considered matters listed in Part 2 – the Purpose and Principles of the Act. The Environment Court has determined that those sections and sub-sections of Part 2 that are contrary to the purpose of Water Conservation Orders are not to be considered. The application was consistent with many elements of Part 2, particularly those listed in Section 6, matters of National Importance.

41. The Environment Court when considering the Majac Trust application to amend the Buller WCO in respect of the Gowan, made the following statement in respect of the purpose of WCOs and Part II (*Re. Talley, Supra*):

[42] We adopt the general discussion as to the meaning of section 199 outlined in the **Rangitata** decision at paragraphs [13] to [30]. In particular, we conclude that the effect of section 199 (1) is to focus on the protection aspect of the conservation purpose by excluding consideration of matters which are inconsistent with that purpose...

42. In a sense, Part IX of the Act sets a bottom line. The Order must achieve protection of the outstanding values. Then, over and above this, Part II is relevant, and other matters can arguably be addressed or allowed for in the Order, as long as that bottom line is not breached, and the purpose of the Order is achieved.

Section 207

43. The purpose of WCOs in section 199 is not the only relevant statutory consideration. Section 207 must also be applied in the process of the Inquiry:

207 *Matters to be considered*

*In considering an application for a water conservation order, a special tribunal shall have particular regard to the purpose of a water conservation order and the [other] matters set out in section 199 and shall also have regard to—*

- (a) *The application and all submissions; and*
- (b) *The needs of primary and secondary industry, and of the community; and*
- (c) *The relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, [district plan, and any proposed plan].*

44. In respect of section 212 (which contains the same directive as section 207) the Court stated in the *Rangitata* (supra) case:

*[43] Thus in section 212 the Environment Court is to consider the identified matters. The difference between having regard to the matters in paragraphs (a)-(e) and having 'particular regard to' the purpose of a Water Conservation Order is to give extra emphasis to that purpose as defined in section 199 of the Act.*

45. With this in mind, I turn to each of the provisions in section 207:

The Application and submissions – section 207 (a)

46. This is a general requirement that effectively sets the scope of this Inquiry.

47. This Tribunal has a wide scope as to what findings it ends up making, and if it recommends a draft order, that Order is not restricted by the scope of the original application. The High Court summarised this power in *Talley et al v Fowler et al* CIV 2005-486-000117 in relation to proceedings on the Gowan River, which is part of the Buller Water Conservation Order:

*[27] Under the W & SCA it was possible for the conservation orders ultimately made to extend beyond the scope of the original application. This was*

*confirmed by the Ashburton Acclimatisation decision. Although in the context of that statute the Court was only talking about changes in detail:*

*"A public inquiry by the Tribunal under the special code is a step towards legislation, for by s 20 D (5) an order takes effect as a regulation. Obviously the evidence at the inquiry and the Tribunal's own observations of the river system may bring to light desirable changes in detail. The public and all interested parties should be regarded as having notice of such possibilities. The Tribunal must have flexibility, within the broad limits of reasonableness and natural justice, and there is no ground for saying that they have gone too far in the present case."*

*[28] There is no equivalent to s 205 in the previous legislation. It is plain that s 205 is consistent at the very least with the finding of the Court of Appeal in the Ashburton Acclimatisation Society.*

*[30]...So Parliament intends that a WCO made under the RMA can protect matters in addition to those which were the goal of the original application.*

48. Section 205 (3) allows for submitters to seek additional preferences in the Order, and section 207 (a) requires that regard be had to submissions. Thus there can be no dispute that the scope of the inquiry is broader than the scope of the originating application.

Needs of primary and secondary industry – section 207 (b)

49. This subsection is very relevant to your deliberations, as the majority of opposition to the application comes from the primary sector.
50. In accordance with Judge Jackson's reasoning in the *Rangitata* decision referred to previously, despite the similarities, due to the numerous differences between the WSCA and the RMA the case law established under the WSCA while still of assistance is not directly applicable to applications under the RMA. This is due to changes in the legislation and the increased emphasis placed on protection and preservation. However I will first look at findings on the regard to be had to primary and secondary industry under the previous legislation as it is still of some relevance, and conclude with an assessment of the law on this point under the RMA.

51. In *Re Draft Water Conservation (Mohaka River) Order W20/92 (PT)*, the statements of the Planning Tribunal are of assistance. The Planning Tribunal in that case was considering the application of the similar section under the Water and Soil Conservation Act 1967. Section 20 B (6) (c) required that the Minister take into account "*the needs of primary and secondary industry and of the community*".
52. The Tribunal cited the Court of Appeal in *Ashburton Acclimatisation Society v Federated Farmers* [1988] 1 NZLR 78;12 NZTPA 289 CA, when considering at the outset, what even qualifies as "needs", at page 23:

*Concerning the reference in section 20 B (6) (c) to the "needs" of primary and secondary industry and of the community, the Tribunal had said in its report:*

*"In our opinion, the term "needs", in the context here being considered, should be confined to quantifiable physical needs for the water resource. Matters of farm economics, for example, which involved changing patterns of corporate and individual policy decision making, cannot be weighed adequately. Even to attempt to do that fairly would require placing economic values on the competing features".*

*The Court of Appeal held that the Tribunals approach to the questions of competing needs and economic evidence was in conformity with the Water and Soil Conservation Act 1967."*

53. It is submitted that the Hurunui Water Group's proposal does not fall under the heading of "quantifiable physical need". It is not being designed primarily to meet the existing needs of existing land uses, which is a quantifiable physical need. It is instead a potential plan for the future, that arises from landowners' policy decisions to manage their land differently, and to change the pattern of land use, for the greater profit for one group of landowners and sector of the community. This is not so much an actual "need", as a "want".
54. Later in the conclusions chapter, the *Mohaka* Planning Tribunal considered whether the quantifiable need for the additional electricity overrode the conservation objective of sustaining the waters' amenity in their natural state (page 94):

*We have considered therefore whether the need for the additional electricity, the potential for which would be forgone by protecting the gorges, or avoiding the additional unit cost of what would be produced, qualifies to override the*

*ordinarily dominant conservation objective of sustaining the waters' amenity in their natural state.*

*The test was expressed in various ways by the Court of Appeal Judges in the Rakaia River case. The learned President, Sir Robin Cooke, (at page 88) referred to needs that "demonstrably outweigh the goal of conservation"; and to protection*

*"... unless clear and 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."*

*Later the president said that "truly and sufficiently weighty reasons can displace it in particular cases".*

*Mr Justice Bisson (at page 94) said that "the sustaining of the amenity afforded by the waters in their natural state must have priority", and at page 95 he referred to according primacy to that object which "should not be defeated by striving to achieve a balance for other users"; and that the amenity "should not be compromised by making provision for other uses unless they are essential and there is a sufficient resource to serve them to some extent as well". The learned Judge observed that "conservation is not to be pursued to the entire exclusion of other worthy uses under section 20 B where they can be accommodated to some extent without endangering the essential feature of the protection Order".*

...

*It is our judgment that there is not clear and clearly sufficient reason, nor a strong, really compelling case, nor truly and sufficiently weighty reasons, for the additional electricity from the higher dams and for avoiding the extra cost of electricity from the lower dams, to displace the presumption which Parliament enacted in favour of conservation. Hydro-electricity generation can be accommodated to some extent without endangering the gorges. There is sufficient resource to serve that use of the river's waters as well. However, to allow for the higher dams at Raupunga and Te Hoe would be to compromise the natural waters' amenity in a way that would fail to honour the legislature's stated objective.*

*There is a cost. It is considerable indeed. It is the price of achieving Parliament's objective of protection the amenity.*

55. That decision related to the old legislation. In my submission it remains a fair statement of the law, but the RMA takes it a step further.
56. Judge Jackson in the *Rangitata (supra)* decision addressed this question in the context of the RMA. The starting point are the introductory words of section 207 "*In considering an application for a water conservation order, a special tribunal shall have particular regard to the purpose of a water conservation order and the [other] matters set out in section 199 and shall also have regard to—...(b) the needs of primary and secondary industry...*":

*[40] Because the words "shall have particular regard to" are also used in section 7 of the RMA it was initially tempting to look at the cases on that*

section. Various rather conflicting decisions of the planning Tribunal and the Environment were cited to us: *Gill v Rotorua District Council*; *Marlborough District Council v Southern Oceans Seafood Ltd*; and *Ngati Hokopu ki Hokowhiti v Whakatane District Council*. However as the last case point out, to "have particular regard to" in section 7 of the RMA is part of a hierarchy of weightings to be given to various factors and identified in sections 6 to 8 of the Act.

[41] Normally to have regard to a submission requires that it be given "genuine attention and thought" but it might be rejected wholly or partly: *NZ Fishing Industry Association Inc v Ministry of Agriculture and Fisheries*. However, the interpretation of such words always depends on the context in which they are used: *Bleakley v Environment Risk Management Authority*.

[42] In this case the context is very important. As Mr Davidson QC for RDRML and TrustPower and Mr Wallace for the CRC pointed out to us in their final submissions, there is a good reason that the words used when specifying matters to be considered by the Environment court are that the Court is to "have (particular) regard to". The reason is that the Court, like the Special Tribunal before it, is only conducting an inquiry and making a recommendation to the Minister for the Environment. Neither the Special Tribunal, nor the Environment Court has any power to make a decision. It would have been inappropriate for Parliament to state that the Special Tribunal or the Environment Court should "recognise and provide for" the purpose of a water conservation order. Any power to provide for certain matters is vested in the Minister for the Environment.

[43] Thus in section 212 the Environment Court is to consider the identified matters. The difference between having regard to the matters in paragraphs (a) – (e) and having 'particular regard to "the purpose of a water conservation order" is to give extra emphasis to that purpose as defined in section 199 of the Act.

[44] It is therefore unhelpful to compare the wording in section 212 – have (particular) regard to – with the various formulae in Part 2 of the act. Those formulae still apply except to the extent they are contrary to section 199. Subject to that qualification we are, in effect, to have particular regard to (in the section 212 sense) the matters which are to be recognised in section 6 of the Act, and indeed to the purpose of the Act in section 5.

57. If you do make findings that there are outstanding characteristics, then the presumption in favour of conservation and extra emphasis in section 199 on the non contrary provisions of Part II should heavily weigh your recommendation towards protection/preservation of the characteristics, in the face of competing needs or wants from primary and secondary industry.
58. The statements quoted by the *Mohaka* Planning Tribunal from the *Ashburton Acclimatisation* case are still relevant, given the similarity of words of the two statutes on this point (being the respective requirements to "take into account" or "have regard to" the "needs of primary and secondary industry and the community").

59. However, given that the WSCA did not include the explicit hierarchy expressed in section 207, and, in accordance with Judge Jackson's statements above on the relationship between the two Acts, the weighting in favour of protection and preservation is potentially even greater under the RMA than it was previously. The implication of Part IX of the RMA putting even more weight on the conservation purposes raises the bar higher.
60. In summary therefore, for the needs of primary and secondary industry to be considered under this section, it must first be established as a quantifiable, realistic, current need. Secondly, if this need is established, it should only be allowed for if it can be accommodated after protection is afforded to the outstanding values. If it can't be accommodated while still ensuring the level of protection required by section 199, it must be verging on an essential, overwhelming matter of public, arguably national interest, to displace the priority in favour of section 199.
61. It is submitted that the purpose of section 199 will only be met by preserving the outstanding Upper Hurunui Waters in their current state. The "needs" that will be described by opponents to the Order, while worthy, do not reach the statutory threshold required to displace the purpose of section 199.

Needs of the community – section 207 (b)

62. When you come to consider the needs of the community I submit you are best guided by paying close attention to the submissions before you. They represent an expression of community needs as perceived by those that comprise the community. Those submissions provide overwhelming support for the protection of the Hurunui River's outstanding features and characteristics from both the Canterbury Region, and nationwide.

63. When considering an issue of national significance, such as is being claimed for the Hurunui, it is submitted that the "community" needs that should be had regard to are not just the needs of the local community, but also the needs of the national community with an interest in that outstanding resource. This is evidenced by the fact there are submissions from individuals from throughout New Zealand in support of the application. Therefore the needs of the national angling, kayaking, rafting communities, and those other communities that support Forest and Bird's and the Director General of Conservation's interests, are relevant to consideration of this issue.
64. The needs of primary and secondary industry are not given more weight or importance than other needs of the community in section 207.
65. Evidence that you will hear in respect of the angling, kayaking, rafting, and general recreational use of, and appreciation of the Hurunui are all relevant to your consideration as to what the needs of the community are. These matters are also relevant in the context of section 5, and other Part II provisions which are consistent with section 199's purpose.
66. The Special Tribunal considering Fish and Game's application to amend the Buller WCO in respect of the Gowan had this to say about the needs of the community (page 9):

*35. Section 207 (b) also requires a special tribunal to have regard to the needs of the community. We interpret the community as having a broad meaning in this context. Such an interpretation is consistent with the use of the word in section 5 RMA. It is also consistent with the requirement to have regard to the needs of the community being much broader than the reference in the long title to the WSCA to the needs of community water supplies, all forms of water – base recreation...*

*36. We are proceeding on the basis that section 207 (b) means that we are to have regard to a wide range of needs of industry and the community. This includes the need for industry to have water to generate electricity and the need for the community to have electricity. The needs of the community may also extend to non-economic matters, although a number of the conservation related needs of the community are already matters which we are required to have particular regard to because they are matters set out in section 199 RMA.*

67. The Environment Court considering the Majac Trust's application to amend the Buller WCO in respect of the Gowan stated:

*[189] this Court must also consider the needs of the community, which consists not only of power consumers but those who live, work, raft, recreate and enjoy the river. Thus the rafting, fishing and amenity effects are relevant as aspect of needs of the community. The community can be regarded to include the local Gowan community, many of whom depend to some extent on tourism, particularly fishing, as a source of income. It seems likely there will be an impact on them. The community might also include the regional community which might extend as far as Nelson. For this community and their needs, the effects would be mixed. The benefit may be improved electricity supply security; the impacts may be effects on recreation.*

68. Other needs of the community include matters such as domestic water takes, erosion control, road maintenance, weed control and river control works. These types of needs can be provided for in an Order with an appropriately crafted exclusion clause which will be addressed later in this submission.

#### Relevant statutory plans – section 207 (c)

69. There are two matters that could be considered under this sub section. Firstly, whether or not the proposed Order is generally consistent with the approach of relevant statutory plans, and secondly, whether the proposed Order provides a higher level of protection than the statutory plans – ie does it fill a gap in the statutory instruments regulating the use of the river.

70. When the Special Tribunal considered the application in respect of the Oreti River addressed this section, it stated (page viii):

*25. Several submitters expressed strong frustration that having been through a very extensive consultation process around the Water Plan, a water conservation order could override the Plan in what they saw as an arbitrary way and with little consultation. Many submitters contrasted the strong and robust consultation process engaged in by the regional council in preparing the Water Plan and its variations, with the very limited consultation undertaken by applicants about the water conservation order application. Concerns were also raised about the relative inflexibility of water conservation orders.*

*26 The Tribunal has considerable sympathy for these views. Certainly the Water Plan is a robust document with a high level of community buy-in. But the law requires the Tribunal to have particular regard to the purpose of water conservation orders, and only regard to the provisions of the plan. This means that as, in the Tribunal's view, the Oreti River has or contributes to outstanding*

characteristics, the Plan does not offer sufficiently strong protection for those outstanding characteristics, a water conservation order has to be made.

71. As we will hear, proposed NRRP, in its current proposed form, offers a fair amount of protection to the natural values of the Hurunui, but not enough, in my submission, to protect the Hurunui's outstanding values. Significantly, it does not prohibit damming on the South Branch or of Lake Sumner, and it contemplates water takes and diversions from the Upper Hurunui. Furthermore, some submissions on the proposed Plan, of whom some are also submitters opposing this WCO application, are seeking that the NRRP provisions be weakened further. So there is no certainty that at the end of what has already been a very long planning process, the NRRP will give an appropriate level of protection to the outstanding features of the Hurunui River.
72. Many submitters have expressed opposition to the WCO application, because of the apparent duplication it poses in relation to the NRRP.
73. I submit there is no duplication. What should hopefully be clear from these legal submissions is that Part IX of the RMA on WCOs establishes WCOs as a legal instrument that is subject to quite a different legal test and threshold to all other statutory RMA instruments. Part IX also establishes that WCOs have a distinct and different statutory purpose to all other RMA statutory instruments. WCOs are not subject to the typical balancing and weighing of conflicting interests required to achieve sustainable management under Part II of the RMA. The RMA has set aside WCOs as a special instrument, to protect or preserve waterbodies, if it is established they have outstanding characteristics. The NRRP must achieve sustainable management. The WCO, must protect or preserve water bodies in their natural state, or the outstanding characteristics and features of water bodies. This distinction is indisputably confirmed by all the caselaw.

Part II

74. Part II is relevant to the extent its provisions are consistent with section 199 matters. Therefore, looking at the values the Hurunui supports, there are Part II matters that are relevant, and should be applied in the same manner the Environment Court in the *Rangitata* decision did in paragraph 24:

*[24] Whether the application of any part of sections 5 to 8 of the RMA is contrary to section 199(1) is a matter of judgement on the facts in each case. However it is more likely for example that the matters of natural importance in section 6(a) to (c) should be recognised and recommendations made as to how to provide for them in (nearly) the normal way. That is because the preservation of the natural character of the margins of the Rangitata River, the protection of any outstanding natural feature and of any significant habitat of indigenous fauna are not repugnant to the section 199 purpose but entirely consistent with it. The exception — a point reiterated frequently by some counsel — is that it is not a part of the purpose of a water conservation order to enhance characteristics so they become outstanding or even to improve them if already outstanding.*

75. The relevant Part II matters for you to bear in mind are:
- a. The section 5 (2) provision relating to enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety—
    - i. The application of this provision that is consistent with section 199 relates to the use of the Hurunui by people for recreating, relaxing, learning, training and earning a living (guiding, instruction, tours etc)
  - b. The recognition and protection of the section 6 matters of national importance in respect of:
    - Section 6 (a) preserving the natural character of the river and its margins, and the protection of them from inappropriate subdivision, use, and development:
    - Section 6 (c) protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna:

Section 6 (d) maintaining and enhancing public access to and along the river.

- c. And particular regard must also be had to the relevant section 7 matters:

Section 7 (c) The maintenance and enhancement of amenity values:

Section 7 (d) Intrinsic values of ecosystems:

Section 7 (f) Maintenance and enhancement of the quality of the environment:

Section 7 (g) Any finite characteristics of natural and physical resources:

Section 7 (h) The protection of the habitat of trout and salmon.

- i. Note, even though the salmon fishery is not being promoted as outstanding, it is a well renowned salmon fishery, and its protection is a relevant Part II matter that is consistent with section 199.

### **Why protection is needed**

76. There are increasing demands being placed on New Zealand's remaining free flowing rivers for abstractive use as land use practises change, and demands for renewable energy increase.

77. However, technically there is no need to prove an immediate or impending threat to the outstanding features, to justify a WCO. In *NZ Paper Mills Ltd v Otago Acclimatisation Soc* [1995] NZRMA 155 the appellant asked in questions 5 and 6 to the High Court:



upper Hurunui from predominantly irrigation interests at present. The current plans on the table involve damming the South Branch, and Lake Sumner, and augmenting flows down the Hurunui to a much higher and more stable flow than is currently experienced. The actions of damming, manipulating lake levels and river flows, are likely to seriously damage the existing wild and scenic values, trout habitat, angling amenity and white water amenity.

81. So even though case law has determined that a proven threat is not a prerequisite for the granting of a WCO, in this case we do have such a threat, which makes the need for the WCO even stronger, for the statutory purpose of Part IX and Parliament's intent to be given effect.

**Specific issues for consideration – outstanding features and characteristics**

Wild, Scenic and Natural Characteristics

82. Where a water body is outstanding, section 199 (2) (a) states that it can be preserved as far as possible in its natural state.
83. Judge Jackson's comments in the Rangitata case are helpful when considering the natural state of the Hurunui:

*[20] 'Natural state' means towards the pristine end of the artificial/polluted to pristine continuum.*

84. The evidence of both expert and lay witnesses as to the wild, scenic and natural characteristics of the Upper Hurunui, as well as your own visits, should leave you in no doubt that the Upper Hurunui is outstanding in this regard.

Brown Trout Fishery (habitat and angling)

85. Judge Jackson made some helpful comments on the meaning of "fishery" in the Rangitata case:

*[82] The Special Tribunal pointed out that 'fishery' is not defined in the RMA but includes both [fn67 Special Tribunal Report p 33]:*

*[the] place where fish live (hatch, rear, migrate, spawned) and the occupation (commercial or recreational) of catching them.*

*It cited dictionary definitions which supported those two meanings. We follow the Special Tribunal in considering the 'fishery' in the two aspects:*

*salmon and their habitat; and*

*salmon angling.*

86. The Upper Hurunui sustains a highly valued back country fishery which attracts more effort from NZ resident anglers than any other fishery of a similar type in NZ.
87. The Hurunui, unlike many other once popular fisheries, has not been downgraded, and is still relatively pristine and productive.
88. Why is this fishery so popular and valued? It relates in part to the stunning surroundings and character of the angling lies, but also to the fact there a large number of high quality, large sized brown trout, which are only present in the numbers and quality because of the habitat. The Hurunui in the reach below Lake Sumner has a high density of trout, comparable to other rivers with WCOs on them such as the Buller, Mohaka, Motueka and Mataura. In respect of the brown trout habitat, the key features are:
- a. Excellent spawning and rearing habitat in all the Hurunui Lakes except Marion, Mary and Raupo Lagoon.
  - b. Excellent spawning habitat in the North and South Branches, and other tributaries.
  - c. Very high national ranking for trout density and abundance,
  - d. High water quality
  - e. Highly productive reaches for food.
  - f. Unimpeded passage throughout the catchment to feed.

- g. One of only 6 unmodified deep lake outlets in the country

White water kayaking, rafting and "bugging"

89. White water kayaking is the main sport for which the Hurunui is known, however, submissions and evidence will also show that it is an important rafting river, and supports the burgeoning sport of "river bugging", all of which use the variety of white water features.
90. Therefore, instead of just referring to "kayaking", I will from now on refer to "white water", which unless otherwise specified, is meant to encapsulate rafting, kayaking and river bugging.
91. There are several different whitewater sections in the Upper Hurunui, that have distinct and different characteristics. They are "Top Gorge", "Jollie Brook", "Maori Gully" and "Hawarden Gap". These sections are valued for different reasons, and provide optimal amenity at a different range of flows. The different sections provide different levels of difficulty from grade 2 to grade 4 (in high flows). This variability and range is a critical factor that contributes the Hurunui's popularity and amenity values – variable flows and a selection of reaches means it has a wide appeal, to a wide range of users, many of whom seek to use it intensively, going back time and time again for a different experience. Some kayakers have paddled the Hurunui literally hundreds of times because of this.
92. The Upper Hurunui is not just used for pure "recreation" by clubs and individuals. It is also valued destination for education groups such as schools and polytechnics, for kayak instruction. It is also renowned as providing excellent training ground for rafting. We are not talking about a minority sport here. It is used by many high schools, families, youth programmes, polytechs training future tourism professionals, groups on work outings...the list is extensive, and its popularity, and the intensity of use it experiences, is unprecedented in New Zealand.

93. The 1991 NZRCA river use survey showed that the Hurunui River was the 7<sup>th</sup> most paddled river in New Zealand after rivers such as the Buller, Waikato, Manawatu and Tongariro. The Hurunui receives a very high level of usage comparable to other rivers with WCOs for kayaking. The easier sections of the Hurunui, Top Gorge and Jollie Brook, were rated in 1991 as the 6<sup>th</sup> most commonly kayaked grade river section in New Zealand. Maori Gully was the 6<sup>th</sup> most commonly kayaked grade three section. They are the most popular sections in Canterbury.
94. One of the key features that contributes to the Hurunui's popularity is the range of flows the river offers, as the type of amenity at low, medium and high flows, on the different reaches, provides a whole range of different experiences valued by river users. Without this variety, the amenity offered would be significantly reduced.

#### Reaches of the river

95. You will see that care has been taken to present evidence that describes the habitat and amenity values of different sections and parts of the Hurunui catchment. This has, in part, been as a precaution in case the Tribunal takes an overly clinical approach to assessing the values the waters support. It is submitted however that such a clinical approach is contrary to the purpose of WCOs. To divide a river up reach by reach, and make findings that one section has outstanding habitat or fishery, but another does not, is not, in my submission, the best way to approach such an inquiry. There is a line where it is logically, or ecologically, unsound to subdivide a river in this way. As the Special Tribunal considering Fish and Game's application in respect of the Gowan stated (page 19):

*75. Although the 3 different sections of the river have different characteristics and values, it would be most unsound ecologically to subdivide the river into different sections in the WCO and consequently we consider that the whole of the relatively short Gowan River is an outstanding fishery. This approach is consistent with the recognition in item 1 of Schedule 2 in the WCO of the Buller River from its confluence with the Gowan River to Lake Rotoiti as a trout fishery. Dr Hayes told us that the upper Buller has a steep rock section (steeper than the*

*Gowan) not suitable for either angling or trout habitat. No doubt other rivers recognised in the WCO as outstanding fisheries do not provided consistent fishing opportunities throughout their entire length, but they are included as a discrete ecological unit.*

96. From the white water recreation perspective – one of the features is the various small runs, which if being looked at clinically, could be each assessed on their own. In the case of the Hurunui, often white water recreationalists will do more than one reach on each visit to the catchment. It is the existence of multiple reaches, that is one of the features that makes the Hurunui so attractive.

### Didymo

97. Didymo is present in the Hurunui, just as it is now in other rivers that are protected by WCOs such as the Buller, Rangitata and Oreti. The extent of the didymo's presence is addressed by Roger Yount At the time the Special Tribunal considered the application for a WCO over the Oreti River, didymo was already present. The Tribunal made these comments:

*14. The Tribunal considered that the presence of the invasive diatom Didymosphenia geminata ("didymo") may at times detract from the outstanding angling amenity of the upper river. This would, however, only be for short periods as the cobble bed of the river is very mobile during freshes or floods. As a result of this, didymo appears unable to establish itself in the Oreti River to the extent that it has in more embedded rivers such as the Mararoa and lower Waitaki. Indeed the comparative value of the Oreti may increase, given the likely more adverse effects of didymo on angling amenity in some other valued South Island river fisheries.*

98. The Special Tribunal considering Fish and Game's application in respect of the Gowan under the Buller WCO stated:

*70. The invasive river diatom didymo is now present in the river. However, too date there has been no quantitative study of its impact on either trout habitat or the quality of the trout fishery in the Gowan. Under questioning, Dr Hayes did not consider didymo to have had a significant impact on the quality of angling in the Gowan. Mr Murray said that, to date, didymo has not had a significant impact on angling in the Gowan. Mr Gornall had ceased to fish the Gowan after didymo had been detected, however this was due to his desire to avoid the risk of transferring didymo to other waters rather than a decline in the quality of the angling. No submitters presented any evidence to indicate that didymo has had any significant detrimental impact on the river. Didymo has now been detected in over 50 South Island rivers, and has only formed significant blooms in a small proposition of these rivers. Based on available evidence, it is currently impossible to predict the long-term extent of didymo growth and impact in the Gowan River.*

99. It is also submitted that didymo is, for the present time at least, a characteristic of a vast number of rivers that the Hurunui is to be compared with, when considering whether or not it stands out on a national basis. So in that sense, it's a level playing field so to speak. We are still comparing apples with apples. It is submitted the Hurunui does stand out for its angling, fishery habitat, kayaking and wild and scenic values, despite the presence of didymo, when compared with other outstanding rivers. It is anticipated that most rivers in the South Island will have didymo present, but that fact does not mean that those rivers will cease to support valuable amenity values.

### **Details of Order sought**

100. It is the joint applicants' submission that preservation in its current, natural state, is needed to properly protect the outstanding characteristics, and wild, scenic and natural values. Such protection falls under section 199 (2) (a): *The preservation as far as possible in its natural state of any water body that is considered to be outstanding.* The Special Tribunal considering Fish and Game's application in respect of the Gowan River, in the Buller WCO, noted that:

*Such orders are often referred to as preservation orders (page 7, Interim Decision on Application to vary the Buller Water Conservation Order, 11 July 2007.)*

101. Other water bodies that are currently protected in their natural state by WCOs include:
- a. Clyde and Havelock Rivers (Rangitata WCO)
  - b. Wangapeka River, Upper Motueka River, Rainy River (Motueka WCO)
  - c. Travers River, Lake Rotoiti, Sabine River, Lake Constance, D'Urville River, Lake Rotoroa, Owen River, Upper Matiri River, Upper Matakītaki River, Nardoo Creek, Upper Glenroy River, Maruia River, Lake Daniells, Deepdale River, Te Wharau Creek, Blackwater River, Ohikanui River (Buller WCO)

- d. Dart River, Routeburn, Rees River, Greenstone River, Caples River, (Kawarau WCO).
  - e. Upper Manganuioteao, Makatote River, Mangaturturu River (Manganuioteao WCO)
  - f. Upper Rakaia and Lake Heron (Rakaia WCO)
102. By seeking preservation in natural state, the joint applicants are effectively seeking there be no damming, no effects on fish passage, no taking or diversions and no degradation of water quality, in the Upper Hurunui.
103. Preservation in natural state is required specifically, to protect the following features essential to sustaining the outstanding characteristics of the Upper Hurunui:
- a. Current natural state of water and its margins
  - b. Wild and scenic landscape/riverscape
  - c. High water quality
  - d. Wide range of flows and current flow range, (needed to support whitewater recreation, trout habitat angling,)
104. Fish and Game is firmly of the view, based on expert evidence, that unimpeded fish passage along the entire length of river is critical for maintaining the fishery. This question was also addressed by the Oreti Special Tribunal:
- 322. There were two streams to this evidence. Dr Hayes analysed trout energetics and concluded that headwater trout could not grow to the size that they do in the relatively cool waters there. Accordingly he considered that most large trout in the upper river must spend some time feeding on fish and other food sources in the lower river or its estuary. Similarly Mr Olley and Dr Bickel found from their otolith studies that trout present in the headwaters of the river had migrated long distances.*
- 323. We accept the evidence of these experts, which was not contested by any other party. Accordingly we have decided that passage for brown trout along the length of the river system is a vital component of maintaining the outstanding brown trout fishery in the headwaters.*
- 324. We also note the value Ngai Tahu accord continuity from the mountains to the sea, consistent with their conceptualisation of Ki uta ki tai, which they contend is vital to ensuring the wellbeing of the Oreti River.*

105. The only guaranteed way of achieving unimpeded fish passage equivalent to that currently provided, is to prohibit damming along the entire reach of the river that the trout rely upon.
  
106. It is also necessary to ensure that any trout traversing the Lower Hurunui are not hurt or killed by inadequate fish screens for water takes. For this reason, fish screen specifications are also required.
  
107. When focusing on the finer details of the Order, it is noted that reaches that are considered outstanding in themselves, such as the South Branch, North Branch and the Lakes, also provide a necessary contribution to the other outstanding reaches. For example, the South Branch, in addition to be an outstanding fishery and having outstanding habitat, contributes to the fishery of the remainder of the river, and is a vital influence on the flow regime in the mainstem valued by white water recreationalists. The same is said for the North Branch, and the Hurunui Lakes.
  
108. Finally certain activities that may technically breach the Order, but that are essential for various reasons, should be excluded from the terms of the Order by way of an exclusion clause. Such activities that are generally allowed for in other orders include:
  - a. Research, protection and enhancement of wildlife and fisheries habitat;
  - b. Removal, maintenance or protection of roads and bridges, and network utility operations;
  - c. Protection of human or animal health
  - d. Activities associated with exceptional circumstances;
  - e. Discharge of herbicides associated with control of introduced weeds.

109. **Attached** as appendix 2 is an example of what the Order could look like, based only on the original application (and not the additional preferences sought). It is appended primarily to give a concrete example, or illustration, of the potential form and content of an Order for the Tribunal and parties to consider, rather than talking about it in the abstract. It follows the now reasonably standardised form of gazetted WCOs.

### Conclusion

110. In conclusion, the framework for inquiry that has been adopted by decision makers preceding you, when considering applications for WCOs, can be summarised as follows:
- a. Whether all, or part of the Hurunui River provides either outstanding amenity or intrinsic values from waters in their natural state, and if so what those values are.
  - b. Where the waters of the Hurunui River are not in their natural state, whether there are any amenity or intrinsic values that require protection because they are outstanding.
  - c. Where the waters of the Hurunui catchment are not in themselves outstanding, do they provide a necessary contribution to the outstanding amenity or intrinsic values in other parts of the Hurunui?
  - d. What are the relevant matters under Part II?
  - e. Do any of the relevant provisions under section 207 outweigh the emphasis placed in Part IX of the Act on sustaining and protecting the outstanding characteristics of the river?
  - f. If you decide there are outstanding values associated with the Hurunui River, will those values be threatened by potential changes to parameters such as flow, the presence of dams and water quality? From this, you can determine the conditions for any draft Order.

WitnessesFish and Game

111. Bryce Johnson
112. Tony Hawker
113. Di Lucas
114. Don Jellyman
115. Dave Stewart
116. Roger Young
117. Davor Bejakovich
118. Chappie Chapman
119. Martin Unwin
120. Rob Greenaway
121. Brian Ross
122. Malcolm Bell
123. Adrian Bell
124. Adam Colley
125. Les Hill
126. Peter Robinson
127. Sally Marx
128. Murray Rodgers

NZRCA

129. Tony Ward-Holmes
130. Douglas Rankin
131. Hugh Canard
132. Ian Gill-Fox
133. Steve Gurney (on behalf of Steve Moffat, individual submitter)
134. Nixie Body (individual submitter)

135. Graeme Boddy (individual submitter Bugsports Inc)
136. Eddie Murphy (Submitter)
137. Alistair Moore (Submitter, CPIT)
138. Graeme Wilson (White Water Canoe Club).

## Appendix 1

Set out below are the substantive, rather than procedural, sections of the two pieces of legislation for comparison, with the new provisions in the RMA highlighted.

### Resource Management Act 1991

### Water and Soil Conservation Act 1967

#### Part 2

An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, [community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic, and other natural characteristics of rivers, streams, and lakes]

#### Sections 5, 6 and 7

199 Purpose of water conservation orders

S 20 B (6) In considering the application the [[Minister]] shall take into account—

(1) Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to **recognise and sustain**—

(a) All forms of water-based recreation, fisheries, and wildlife habitats;

(b) The wild, scenic, or other natural characteristics of the river, stream, or lake;

(a) **Outstanding amenity or intrinsic values** which are afforded by waters in their natural state:

(b) Where waters are no longer in their natural state, the **amenity or intrinsic** values of those waters which in themselves warrant protection because they are considered outstanding.

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

(a) The preservation as far as possible in its natural state of any water body that is considered to

be outstanding:

(b) The protection of characteristics which any water body has or contributes to, and which are considered to be outstanding,—

(i) As a **habitat for terrestrial or aquatic organisms:**

(ii) As a fishery:

(iii) For its wild, scenic, or other natural characteristics:

(iv) For **scientific and ecological** values:

(v) For recreational, **historical, spiritual, or cultural purposes:**

(c) The protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with **tikanga Maori**.

200 Meaning of "water conservation order" [20D Making of national water conservation order

In this Act, the term water conservation order means an order made under section 214 for any of the purposes set out in section 199 and that imposes restrictions or prohibitions on the exercise of regional councils' powers under paragraphs (e) and (f) of section 30(1) (as they relate to water) including, in particular, restrictions or prohibitions relating to—

(a) The quantity, quality, rate of flow, or level of the water body; and

(b) The maximum and minimum levels or flow or range of levels or flows, or the **rate of change of levels or flows** to be sought or permitted for the water body; and

(c) **The maximum allocation for abstraction or maximum contaminant loading consistent with the purposes of the order; and**

(d) **The ranges of temperature and pressure in a water body.**

[[ (1) The Governor-General in Council, on the advice of the Minister given after taking into account any recommendation of the Planning Tribunal, may make a national water conservation order.]]

(2) Every national water conservation order shall specify the river, stream, or lake, or part thereof, to be preserved as far as possible in its natural state, or the outstanding wild, scenic, or other natural characteristics, or the outstanding recreational, fisheries, wildlife habitats, scientific, or other feature of the river, stream, or lake, or part thereof, to be protected.

(3) Any order made under this section may provide for—

(a) The retention in its natural state of the quantity, rate of flow, or level of natural water in a river, stream, or lake, or part thereof, because of its wild, scenic, or other natural characteristics or

because of the value of the water for recreational, fisheries, wildlife habitats, scientific, or other purposes:

(b) The quantity, rate of flow, or level of natural water to be retained in a river, stream, or lake, or part thereof, for scenic, recreational, fisheries, wildlife habitats, or other purposes:

(c) The parts of a river or stream in which a right to dam under section 21 ... of this Act shall not be granted, or which shall not be affected by any dam authorised under any such right granted in any other part of the river or stream:

(d) The maximum and minimum levels to be sought or permitted for the natural water in a lake, and the minimum flow and maximum range of flow to be sought or permitted for the natural water in a river or stream.

(4) Any order made under this section may impose conditions, restrictions, and prohibitions on the power of Regional Water Boards ... to grant any water right in accordance with sections 21, ... and 24 of this Act in respect of any natural water affected by the order, and on the power of any Board to make a general authorisation, in accordance with section 22 of this Act, in respect of any such natural water.

(5) Every order made under this section shall be deemed to be a regulation for the purposes of the Regulations Act 1936.

207 Matters to be considered

S 20 B

In considering an application for a water conservation order, a special tribunal shall have **particular regard to the purpose of a water conservation order and the [other] matters set out in section 199 and shall also have regard to—**

- (a) The application and all submissions; and
- (b) The needs of primary and secondary industry, and of the community; and
- (c) **The relevant provisions of every national policy statement, New Zealand coastal**

(6) In considering the application the **[[Minister]] shall take into account—**

- (a) All forms of water-based recreation, fisheries, and wildlife habitats;
- (b) The wild, scenic, or other natural characteristics of the river, stream, or lake;
- (c) The needs of primary and secondary

**policy statement,** regional policy statement, industry, and of the community; and regional plan, [district plan, and any proposed plan].

**NB the phrase community was included in an identical manner as it is in the RMA**

(d) The provisions of any relevant regional planning scheme and district scheme.

...

## Appendix 2

### Draft Order Example

## Order

- 1) Title—This order is the Water Conservation (Hurunui River) Order 2009.
- 2) Commencement—This order comes into force 28 days after the date of its notification in the *New Zealand Gazette*.
- 3) Interpretation—In this order, unless the context otherwise requires:
  - “Act” means the Resource Management Act 1991
  - “damming” means the impounding of all or part of the natural flow of any water that may involve an associated temporary or permanent structure
  - “River” means the main stem of the waters identified in the Schedules to this order. The main stem shall be the river with that name on NZMS260 series topographical maps
  - “tributaries” means all the tributaries of rivers or sections of rivers identified in Schedules to this order.
- 4) Outstanding characteristics—The waters specified in Schedules 1 and 2 include or contribute to, to the extent identified in Schedule 2, the following outstanding characteristics, features, and values:
  - a) Habitat for brown trout
  - b) Brown trout fishery
  - c) Natural character, wild and scenic
  - d) Angling (brown trout)
  - e) White water recreation including kayaking, rafting and river bugging
  - f) Cultural value in accordance with tikanga Maori
- 5) Waters to be retained in natural state - Because of the outstanding characteristics, features, and values identified in clause 4, the quality, quantity, level and rate of flow of the waters specified in Schedule 1 are to be retained in their natural state, subject to clauses 10 and 11..
- 6) Waters to be protected as contributing to outstanding characteristics—Because of their contribution to outstanding

characteristics and features identified in clause 4, the waters specified in Schedule 2 are to be protected in accordance with the relevant conditions in clauses 7, 8 and 9.

- 7) Restriction on damming of waters—Subject to clauses 10 and 11, no water permit may be granted or rule included in a regional plan authorising the damming of waters specified in item 1 of Schedule 2.
- 8) 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 2 authorising an activity that will adversely affect the passage of fish.
- 9) Requirement for fish screens—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 screened and be designed and maintained to comply with the minimum standards for fish screens and intakes contained in Schedule 3.
- 10) Scope of order—
  - (1) This order does not limit sections 14(3)(b) and (e) of the Act relating to the use of water for an individual's reasonable domestic needs, or for the reasonable needs of an individual's animals for drinking water, or taken or used for fire-fighting purposes, provided that all intakes (other than those for emergency fire-fighting) be screened and be designed and maintained to comply with the minimum standards specified in Schedule 3, to prevent the entrapment or impingement of fish.
  - (2) Subject to sub-clause (3), this Order does not restrict or prevent the grant of resource consents for the purpose of:
    - (a) research into, and protection or enhancement of, fisheries and wildlife habitats; or
    - (b) the construction, removal, maintenance or protection of any road, ford or bridge, or the maintenance or protection of any network utility operation (as defined in section 166 of the Act); or
    - (c) the protection of human or animal health.

(3) No resource consent may be granted or rule included in a regional plan that would allow activities specified in sub-clause (2) if exercise of any such resource consent or rule would compromise the protection of the outstanding characteristics and features identified for the waters specified in the Schedules.

- 11) Exemptions—Nothing in this Order prevents the grant of a discharge or water permit that would otherwise contravene conditions set out in clauses 7, 8 and 9 if:
- (a) a consent authority is satisfied that:
    - (i) there are exceptional circumstances justifying the grant of a permit; or
    - (ii) the permit is for a discharge that is of a temporary nature; or
    - (iii) the permit is for an activity that is associated with necessary construction and maintenance work for works and structures not otherwise prohibited by this Order; or
    - (iv) the permit is for discharge of herbicides for control of introduced plants; and
  - (b) the exercise of any such permit would not compromise the protection of the outstanding characteristics and features identified for the waters specified in the Schedules.

#### Schedule 1

##### *Waters to be Retained in Natural State*

Item	Waters	Outstanding Characteristics or Features	Conditions to Apply
1 Hurunui Lakes	Lakes Sumner, Taylor, Sheppard, Mason, Marion, Mary, Loch Katrine and Raupo Lagoon (including hydraulically connected groundwaters)	Natural character, wild and scenic; habitat for brown trout (excluding Lake Marion, Raupo Lagoon and Lake Mary); brown trout fishery, cultural value in accordance with tikanga Maori	Preservation in natural state (clause 5)

		<p>Contribution to brown trout fishery</p> <p>Contribution to white water recreation</p>	
2 Mainstem	Mainstem from Lake Sumner outlet to immediately above its confluence with the Mandamus River (at or about NZMS 260 M33 736238) (including hydraulically connected groundwaters)	Natural character, wild and scenic; habitat for brown trout; brown trout fishery; angling (brown trout); White water recreation including kayaking, rafting and bugging (downstream from the confluence with Sisters Stream only); cultural value in accordance with tikanga Maori	Preservation in natural state (clause 5)
3 Tributaries	North Branch from its source in the Main Divide of the Southern Alps down to its entrance to Lake Sumner including all contributing waters (including hydraulically connected groundwaters)	Natural character, wild and scenic; habitat for brown trout; brown trout fishery; headwater angling (brown trout); cultural value in accordance with tikanga Maori  Contribution to brown trout fishery	Preservation in natural state (clause 5)

		Contribution to white water recreation	
4 Tributaries	South Branch Hurunui from its source in the Main Divide of the Southern Alps down to its confluence with the mainstem including the North Esk River and all contributing waters (including hydraulically connected groundwaters)	Natural character, wild and scenic; habitat for brown trout; brown trout fishery; headwater angling (brown trout); cultural values in accordance with tikanga Maori  Contribution to brown trout fishery  Contribution to white water recreation	Preservation in natural state (clause 5)
5 Tributaries	All other tributaries in the catchment from their source down to immediately above the confluence of the mainstem with the Mandamus River (at Lake Marion, Raupo or about NZMS 260 M33 736238) and all contributing waters (including hydraulically connected groundwaters)	Natural character, wild and scenic; habitat for brown trout (excluding any creeks and streams which contribute flow to, or discharge from Lake Marion, Raupo Lagoon or Lake Mary); cultural value in accordance with tikanga Maori  Contribution to brown trout fishery	Preservation in natural state (clause 5)

		Contribution to white water recreation	
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## Schedule 2

*Waters to be protected for their contribution to outstanding characteristics*

Item	Waters	Outstanding Characteristics or Contribution to Outstanding Features	Conditions to Apply
1	The mainstem of the lower Hurunui River from immediately above its confluence with the Mandamus River (at or about NZMS 260 M33 736238) down to the sea	Brown trout habitat (in the form of fish passage); brown trout fishery; white water recreation (from immediately above the confluence of the mainstem with the Mandamus River (at or about NZMS 260 M33 736238) down to "Waitaha Station" (at or about NZMS 260 M33 764211))	Prohibit damming (Clause 7); Maintenance of fish passage (Clause 8); Requirement for fish screens (Clause 9)

## Schedule 3

### *Clauses 9*

*Minimum requirements for fish screens and intakes*

Feature	Minimum Standard
Screen location	At the point of water diversion

	from the channel (or as close as practicable)
Screen size (aperture)	Aperture size not exceeding: <ul style="list-style-type: none"> <li>• 2 mm in diameter for profile bar screens</li> <li>• 3 mm in diameter for woven mesh screens</li> <li>• 3.2 mm in diameter for perforated plate screens (round opening)</li> </ul>
Approach velocity	No greater than 0.12 metres per second
Sweep velocity (parallel to the face of the screen)	Equal to or greater than the approach velocity at all times
Return of fish to an active flowing channel of the water from which they were diverted	Bypass channel where necessary
Screen maintenance and operation	To ensure that the screen remains effective at all times