

UNDER

the Resource Management Act 1991
(the RMA)

IN THE MATTER OF

an application for a Water
Conservation Order on the Hurunui
River and Lake Sumner (Hoka Kura) by
the New Zealand and North Canterbury
Fish and Game Councils and the new
Zealand Recreational Canoeing
Association

AND

IN THE MATTER OF

a submission by Te Rūnanga o Ngāi
Tahu, Te Rūnanga o Kaikōura, Te Ngāi
Tūāhuriri Rūnanga

SUBMISSION OF PAUL HORGAN

Introduction

1. My name is Paul David Horgan. I have qualifications in both law and resource management and have had several years experience in environmental law, policy analysis and planning related matters. I have been employed by Te Rūnanga o Ngāi Tahu as an Environmental Advisor since June 2006.
2. Ngāi Tahu supports the kaupapa and intent of the Fish and Game /NZ Recreational Canoeing application and considers that a water conservation order (WCO) is the preferred planning tool with which to protect and preserve the waters of the Hurunui River and Hoka Kura (Lake Sumner). Ngāi Tahu considers that the WCO will set a much needed baseline to prevent inappropriate development (including taking, using, damming and diverting) of the Hurunui water resource. Ngāi Tahu is particularly concerned to ensure that the restrictions and prohibitions imposed as a part of the WCO prevent damming and instream water storage in the Upper Hurunui Waters (as defined in the WCO application).
3. Ngāi Tahu seeks that the water conservation order specifically provide for the protection of those characteristics, which the Hurunui River and Hoka Kura (Lake

Sumner) either has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Māori (in accordance with section 199(2)(c) of the RMA). The purpose of my role today is to set out the relevant legal considerations that must be taken into account in assessing whether the Hurunui River and Hoka Kura possesses such outstanding characteristics. I will also identify the features of the proposed WCO that establishes it as the preferred management tool by Ngāi Tahu for the Hurunui River.

Section 199(2)(c)

4. Section 199(2)(c) of the Act provides separately and differently for characteristics of importance to tangata whenua as opposed to other characteristics. Unlike the preceding subsections, the term “*outstanding*” is followed and qualified by the words “...*significance in accordance with tikanga Maori*”. This phrase does not occur elsewhere in the Act.
5. It is clear from the wording of this provision that the assessment of whether waters are outstanding to the requisite degree is to be carried out in accordance with tikanga Maori. This means that, in contrast to the preceding subsections of section 199(2), which require that a comparative assessment with other rivers be undertaken in order to determine whether the water body or the characteristics of that water body are outstanding, it is not appropriate (or necessary) to compare the Hurunui River with other rivers when applying section 199(2)(c). Rather, in accordance with tikanga Māori, the relative significance of the river (and its characteristics) must be determined by the tangata whenua who exercise manawhenua over it.
6. This approach was endorsed by the Environment Court in *Rangitata South Irrigation Limited v NZ and Central South Island Fish and Game Council* (C109/2004) where the Court said:

Finally there is a policy for achieving the purpose of a water conservation order by protecting the characteristics of a river (or lake) which are of outstanding significance in accordance with tikanga Māori. That provision leads to another difficult issue in that it was the evidence of Ngāti Huirapa hapu – the tangata whenua in whose rohe the Rangitata River runs – that it is not tika [correct] to

make comparisons across iwi in relation to resources. Thus the national comparison required in other parts of section 199 does not appear appropriate under section 199(2)(c). [paragraph 29]

7. The court also made similar observations about the reference to "...spiritual or cultural purposes" in s199(2)(b):

We have some difficulty in understanding how we are to begin to make the comparative assessment required by outstandingness in relation to cultural, let alone spiritual matters. [paragraph 28]

8. A similar stance was also taken by the Special Tribunal in the *Application for a Water Conservation Order on the Oreti River* (November 2007):

We note that in terms of significance it is difficult and not really possible to undertake a comparative analysis examining the relative significance of the Oreti River with other rivers. While it is generally agreed that the Waitaki, as the ancestral river of Ngāi Tahu, is paramount to them, concepts of national and regional significance are difficult to apply to cultural settings where significance is accorded by the respective whānau, hapū and rūnanga. [paragraph 265]

9. The effect of these statements is that, whether a river is of outstanding significance to tangata whenua will be determined by reference to the features and characteristics of the river that encompass their relationship with the Hurunui River. In accordance with tikanga, only tangata whenua are qualified to comment on these matters as it is their relationship with the river that provides such an insight.

Tikanga Māori

10. Section 2 of the Act defines Tikanga Māori to mean:

Māori customary values and practices

11. The evidence for Ngāi Tahu will explain that tikanga requires a holistic approach to be taken to the world. This means that rivers are seen as an extension of self. Each river is an individual and has its own mana.
12. An essential feature of tikanga Māori is the concept of whanaugatanga. Although the literal interpretation of whanaugatanga is relationship, the concept embraces

an important spiritual and metaphysical dimension that is not normally associated with the western concept of relationship. While the Ngāi Tahu witnesses will speak to you in detail about their whanaungatanga with the Hurunui River and Hoka Kura, it is relevant at this stage to refer to the Environment Court's articulation of the meaning of the concept. In *Ngāti Hokopu v Whakatane DC* (C168/02), the Environment Court referred to the following passage:

Of all the values of tikanga Maori, whanaungatanga is the most pervasive. It denotes the fact that in the traditional Maori thinking relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities). The glue that holds the Maori world together is whakapapa identifying the nature of relationships between all things.

(Maori Custom and Values in New Zealand Law NZ Law Commission, paragraph 130 citing an unpublished paper written for the Commission by Joseph Williams (“He Aha Te Tikanga Maori”))

13. In *Ngāti Rangī Trust v Manawatu-Wanganui Regional Council* (A067/04), the Court observed:

This genealogical relationship is one of the foundations upon which the Maori culture is based. It is known as “whanaungatanga”. Whanaungatanga in its broadest context could be defined as the interrelationship of Maori with their ancestors, their whanau, hapu and iwi as well as the natural resources within their [tribal] boundaries eg mountains, rivers, streams, forests, etc. [paragraph 104]

14. Beyond whanaungatanga, tikanga Māori also brings into play a range of other cultural concepts. In *Land Air Water Association & Ors v Waikato RC* (A110/01), the Environment Court, discussing the relevance of tikanga Māori to section 8 (Treaty of Waitangi), stated:

...in a general way section 8 requires the Court to take account of tikanga Maori whereas sections 6(e) and 7(a) refer to specific philosophical concepts that form part of tikanga Maori. Examples are “waahi tapu”, “other taonga” in section 6(e) and “kaitiakitanga” in section 7(a). Further the need to have regard to “tikanga Maori” by virtue of section 8 means that the Court may be required to have regard to a wide range of concepts such as “tangata whenua”, “manawhenua”, “whanaungatanga”, “mana”, “tapu”. “utu” and “mauri” to mention just a few. [paragraph 391]

15. In this context, it is my submission that, a broad and all-encompassing view must be taken when considering the concept of tikanga Māori. It will be important for the values and practices that tikanga Māori comprises to be recognised and provided for in much the same way as they are required to be when applying section 6(e).

Part 2 of the Act

16. In interpreting and applying section 199, it is relevant and appropriate to have regard to the matters contained in part 2 of the Act. This was recognised by the Environment Court in *Rangitata South Irrigation Limited v NZ and Central South Island Fish and Game Council* (C109/2004):

[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.

[23] Mr Mime submitted that section 199(l) 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.

17. The tangata whenua provisions of Part 2 of the Act (sections 6(e), 7(a) and 8) are entirely in keeping with the conservation focus of Part 9 and therefore must be referred to when applying section 199. More specifically, a water conservation order on the Hurunui River will facilitate the recognition of the relationship that Ngāi Tahu Whānui (and their culture and traditions) have with their ancestral lands, water, sites, waahi tapu and other taonga associated with the Hurunui catchment. In relation to section 7(a), the provision in the proposed WCO for the protection of the characteristics which the Hurunui River has or contributes to and which are considered to be of outstanding significance in accordance with tikanga Māori will serve as a means by which Ngāi Tahu Whānui can exercise kaitiakitanga over the Hurunui and Hoka Kura. Finally, in respect of section 8, the making of a water conservation order over the Hurunui River and Hoka Kura gives effect to the Treaty principle of active protection of tangata whenua values and interests, including taonga.

The Ngāi Tahu Evidence

18. The Ngāi Tahu witnesses will address tikanga Māori from an holistic perspective, covering all aspects and characteristics of their relationship with the Hurunui and Hoka Kura – including tangible and physical, metaphysical and intangible. In keeping with the interconnected nature of each of the witness's statements, the Ngāi Tahu evidence has been compiled into a single document, which as far as possible follows a chronological timeframe from the beginning of creation through to the present day.

19. A series of relevant considerations to bear in mind when assessing cultural evidence was identified by the Environment Court in the *Ngāti Hokopu* decision (referred to above). There the Court held (at paragraph 53) that it could decide issues raising beliefs about values and traditions by listening to, reading and examining (amongst other things):

- Whether the values correlate with the physical features of the world (places, people);
- Peoples explanations of the values and their traditions;
- Whether there is external evidence (e.g. Maori Land Court minutes) or corroborating information (e.g. Waiata or Whakatauki) about the values;
- The internal consistencies of peoples explanations (whether there are contradictions);
- The coherence of those values with others;
- How widely the beliefs are expressed and held.

20. In line with these considerations, the Ngāi Tahu evidence draws upon a range of external sources (including a series of texts documenting Ngāi Tahu history, Waitangi Tribunal reports, museum artefacts and policy statements and planning documents) in order to reinforce the views expressed. The Ngāi Tahu evidence is also intended to be mutually reinforcing and to provide a complete picture of the nature and strength of the relationship that exists with the Hurunui River.

Why a WCO?

21. The proposed WCO is the mechanism preferred by Ngāi Tahu for the future management of the Hurunui River and Hoka Kura. Unlike a regional plan, which is the alternative to the WCO, a water conservation order is able to specifically provide for the protection of those characteristics that are of outstanding

significance in accordance with tikanga Māori. Although a regional plan may be prepared in response to "...any significant concerns by tangata whenua for their cultural heritage in relation to natural and physical resources..." (section 65(3)(e)), the wording of section 199(2)(c) goes further and enables tangata whenua themselves to identify, in accordance with their own tikanga, those characteristics that require protection. It is this reference to "...in accordance with tikanga Māori..." that sets water conservation orders apart from other planning tools.

22. In addition, water conservation orders are a proactive means of preserving and protecting the natural state of a river/lake in a more timely manner than other planning mechanisms. By and large, regional plans, especially in the Canterbury region, have struggled to keep abreast of the demands that are increasingly being placed upon our natural resources, especially water. In this context, the proposed WCO provides a timely opportunity to put in place a robust planning regime before resource consents for potentially very large scale developments of the Hurunui water resource are lodged.

23. The focus of a water conservation order upon preservation and protection means that, more so than standard planning approaches, there are parallels to be drawn with the traditional Māori concept of rahui. The following description of rahui is drawn from Te Whakatau Kaupapa – the Ngāi Tahu Resource Management Strategy for the Canterbury Region:

Within Māori society there were a number of control mechanisms used to either forbid or limit the access to, and the use of, particular areas and resources. These controls limiting the actions of individuals by use of rahui (restrictions) and tapu were approved by tohunga (experts) working in concert with rangatira, and were reinforced by the fear of both spiritual and physical retribution. Controls were important tools in the pro-active management of all resources.

A rahui is a form of restriction on the access to, and use of, a certain area or resource at, or for, a particular time. They also proclaim that a resource is being actively managed. Rahui were mainly, but not always, used to control food resources and generally took two forms.

The first of these was the rahui symbolised in the form of the Pou Rahui. In this case a post or similar marker was fixed into the ground, stream, lake or coastline. An infringement of the rahui resulted in the trespasser becoming subject to tribal discipline.

Another form of rahui was used for purposes of conservation. If a shellfish bed was being depleted, a pourahui was placed to restrict the use and to ensure sustainability. All economic resources were conserved this way. [page 3-14]

24. Although it is acknowledged that rahui were generally only imposed for a specified period, whereas water conservation orders are a long-term form of control, there is a clear resemblance between the two mechanisms in that they are both concerned with proactively conserving and ensuring the sustainability of a natural resource, especially where there are competing or excessive demands being placed upon it.
25. It is also the case that the higher level of protection afforded by a water conservation order (subject of course to the precise nature of the restrictions and prohibitions imposed) is in keeping with the outstanding cultural significance of the Hurunui River. The mana of the Hurunui calls for a strong and enduring planning tool. A water conservation order is the best current example of such a tool and is befitting of the statutory acknowledgement status of both the Hurunui River and Hoka Kura. While it is accepted that the statutory acknowledgement status cannot compel the Special Tribunal to give any greater or lesser weight to the significance of the Hurunui/Hoka Kura, in my submission, it does provide corroborating evidence as to the association of Ngāi Tahu to the Hurunui catchment and of its special significance.
26. The catchment based scope of the proposed WCO will also give meaningful effect to the Ngāi Tahu philosophy of the Ki Uta Ki Tai, which literally translated means from the mountains to the sea. The concept of Ki Uta Ki Tai starts from the premise that all parts of the environment are interconnected and that an impact on one part will affect all other parts. In this sense, the focus of the proposed WCO on both the upper and lower Hurunui Rivers (including all the lakes, tributaries and contributing waters including hydraulically connected groundwaters) is in harmony with Ki Uta Ki Tai.