

**BEFORE THE MINISTER FOR THE ENVIRONMENT  
SPECIAL TRIBUNAL**

**IN THE MATTER**

of an Application by New Zealand  
and Southland Fish & Game  
Councils for Oreti River Water  
Conservation Order

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**RIGHT OF REPLY SUBMISSIONS OF COUNSEL FOR  
NEW ZEALAND AND SOUTHLAND FISH & GAME COUNCILS  
DATED this 18<sup>th</sup> day of June 2007**

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## Introduction

1. These submissions will address matters raised during the hearing requiring a response. In particular they will cover:
  - a. Miscellaneous legal questions:
  - b. Specific evidence supporting assertion that the Oreti is "outstanding" in the context of Part 9 of the RMA, and in reference to proposed clause 3.
  - c. Legal and evidential issues supporting the assertion that the Oreti should have the status and protection that only a WCO can provide.
  - d. Explanation and analysis of the terms of the WCO sought.

## Legal Issues

### Overseas reputation

2. The Tribunal has asked for clarification of the relevance or importance of the overseas reputation of the Oreti to evaluate its qualification for protection by a WCO.
3. We could find no case law that addressed the relevance of overseas or international reputation when assessing whether a resource is outstanding on a national basis.
4. It is submitted that overseas/international reputation and level of use by overseas anglers is one of the many factors that is evidence of the fact the Oreti is outstanding. It is one way we can measure it against other New Zealand rivers. If it compares favourably in an international context to other New Zealand rivers that have already been found to be nationally outstanding, then in that particular context, it is submitted that it meets the benchmark.
5. If you find on the evidence that the international reputation or use of the Oreti is comparatively high compared to other New Zealand rivers, this supports the contention that, on that level, it is outstanding on a national basis.
6. The Oreti's popularity is a measure of its overall value. Overseas anglers in general are no different in their ability to assess the worth of a river fishery -

this ability simply depends on a person's breadth of experience. However, those who have fished on many rivers will have more ability and expertise to rank rivers. Often those anglers motivated to travel internationally in pursuit of their recreation have had the opportunity to fish on many rivers, compared to those who fish a more confined geographical reach.

7. However, this submission should not be taken as downgrading the importance of the popularity of the Oreti to local anglers. The fact the Oreti is also used by a disproportionately high number of the population of local anglers, compared to other rivers' local use rates in New Zealand is yet another, equally important and relevant factor to be considered .

#### Water and Soil Conservation Act 1967

8. The Special Tribunal queried what weight should be given to case law under the Water and Soil Conservation Act 1967 in the context of the RMA.
9. 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 <b>recognise and sustain—</b>	(a)	All forms of water-based recreation, fisheries, and wildlife habitats;
(a)	<b>Outstanding amenity or intrinsic values</b>	(b)	The wild, scenic, or other natural characteristics of the river, stream, or lake;

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”

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.**

[20D Making of national water conservation order

[[ (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 policy statement, regional policy statement, regional plan, [district plan, and any proposed plan].**

(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 industry, and of the community; and **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.

...

10. Even a cursory look at the differences between these provisions shows substantive material changes in the law have taken place.
11. Therefore, I concur with His Honour Judge Jackson 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. ...*

12. 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 recommended for protection, as stated by Judge Jackson in the *Rangitata* (*Rangitata South Irrigation Ltd v NZ and Central South Island Fish and Game Council EnvC C109/04*) case:

*[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.*

13. 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. An example of this careful approach is the discussion by the High Court in *Talley v Fowler* 18/7/05, *Fogarty J, HC Wellington CIV-2005-485-117*, in paragraphs 27 – 30, where Justice Fowler discussed the implications of the fact that the W&SCA does not have any section that is equivalent to

section 205 of the RMA, in the context of the allowable scope for submissions and therefore the proceedings. Despite this, through the process of statutory interpretation, he concluded that "*parliament intends that a WCO made under the RMA can protect matters in addition to those which were the goal of the original application*" (last sentence, para 30) and in doing so, effectively imports the line of cases under the W&SCA regime which make the same finding in terms of scope and jurisdiction.

14. In respect of the case law on the meaning of "outstanding" both the court in the *Rangitata* case, and the Planning Tribunal decision under the RMA on the Kawarau River (*Re an Application by the Minister of Conservation C33/95*) adopt the case law developed under the W and SCA 1967. Judge Skelton in the Kawarau case said (at page 4, Brookers version):

*"Consequently for the purposes of this Act, the test as to what is outstanding remains the same as it did under previous legislation."*

15. So we can rely on those cases on this aspect of the legal test with confidence.

#### **The needs of primary and secondary industry and the community**

16. Submitters in opposition have stated that the proposed Order will adversely affect adjoining landowners. However in terms of specific concerns, such as provision of water to stock, fire fighting the proposed Order allows for this. In other respects, opposition is expressed in terms of the ability to respond to issues such as changing market demands and climate change.
17. Firstly, when considering the needs of primary and secondary industry it must always be borne in mind that a WCO cannot ever affect or derogate from existing resource consents. So no existing use of the water or its surrounds that is consented will be put at risk by the proposed Order:

217            *Effect of water conservation order*

*(1) No water conservation order shall affect or restrict any resource consent granted or any lawful use established in respect of the water body before the order is made.*

18. Also the terms of the proposed Order ensure that gravel extraction is not affected, (unless it results in a degradation of water quality), river works

including bridge repairs are not affected and temporary works are not affected.

19. So, where in the picture do the needs of primary and secondary industry fit, and how much weight do they get? Judge Jackson addressed this very question helpfully in the paragraphs set out below. 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.

20. If you do make findings that there are outstanding characteristics deserving recognition and protection in an Order, then the presumption in favour of conservation and extra emphasis on section 199 and the non contrary provisions of Part 2 heavily weigh the recommendation towards protection of the characteristics in an order. However this does not necessarily preclude use of the water for primary and secondary industry (unless of course you find that the water bodies are deserving of preservation in their natural state).
21. If it is possible to both protect the outstanding characteristics, and allow for some use, then that use can be provided for. The statement in the *Ashburton Acclimatisation* case is of assistance, given the similarity of words of the two statutes on this point (being the requirement to take into account the "needs of primary and secondary industry and the community"). However, given that the W & SCA 1981 did not include the explicit hierarchy expressed in section 207, in accordance with Judge Jackson's statements above on the relationship between the two Acts, it is arguably not binding. It is of assistance however. The provision in the W & SCA 1981 was:

*S 20 B (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 industry, and of the community; and*
- (d) The provisions of any relevant regional planning scheme and district scheme.*

22. Compared with the similar provision in the RMA, section 207 (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—*

...

- (b) The needs of primary and secondary industry, and of the community; and*

At page 23 the Court of Appeal stated:

*Accordingly I would answer both question 1 and question 3 in the affirmative expressing the answer to both questions as follows:*

*Yes, but, as recognised by the Tribunal, other uses may be provided for to the extent that they are clearly compatible with the required preservation or protection of the natural amenity or outstanding features, or are clearly shown to be essential in the public interest."*

23. Given that Judge Jackson's interpretation of the effect of the addition of Part 2 to the equation in the RMA ups the ante in terms of the weight to be given to conservation, it is submitted that the above statement by the Court of Appeal is the absolute bottom line. Arguably, the implication of Part 9 of the RMA putting even more weight on the conservation purposes raises the bar even higher than it was under the previous legislation – if a water body is found to be outstanding it is submitted that a decision maker has even less discretion than under the previous legislation – that water body must be protected. Once this finding has been made the interests of primary and secondary industry can only be given effect too if there is no risk to protection of the outstanding water body.
24. On the assumption, for the purpose of this submission, you make a finding that there are outstanding features requiring recognition and protection, I submit that there is no compelling case from those representing primary and secondary industry that could outweigh the initial presumption in favour of conservation. Indeed it seems that further use by primary industry of the Oreti will be compatible with the Order proposed by Fish and Game. There is no evidence before you of specific projects or developments that will be hindered by implementation of the Order, and in the absence of such specific information, there is no basis for declining an Order for reasons of future, undefined, uncertain possible needs of primary industry. Such a finding would be clearly contrary to Part 9 of the Act.
25. In *Re Draft Water Conservation (Mohaka River) Order W20/92 (PT)*, the statements of the Planning Tribunal are of assistance, when considering the application of section 207 (b), and the needs of primary and secondary industry. The Planning Tribunal in that case was considering the application of the similar section under the W&SCA. Section 20 B (6) (c) required that the Minister take into account "*the needs of primary and secondary industry and of the community*".
26. The Tribunal cited the Court of Appeal in *Ashburton Acclimatisation Society v Federated Farmers* [1988] 1 NZLR78;12 NZTPA 289 CA, on this point, 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 Tribunal's approach to the questions of competing needs and economic evidence was in conformity with the Water and Soil Conservation Act 1967."*

27. In summary therefore, for the "wish list" of primary and secondary industry to be considered under this section, it must first be established as a quantifiable, realistic need, not a vague unformed intention that in the future there might be some alternative use of the Oreti that could be made. The potential needs for primary industry to adapt to changing market or climatic conditions are not valid or relevant in accordance with this ruling.
28. And then later in the conclusions chapter, the Tribunal considered whether the need for the additional electricity overrode the 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".*

29. Finally, it is also relevant that the needs of part of the community will be met and enhanced by protecting the Oreti for its outstanding fishery. A significant proportion of the community greatly value the Oreti for recreation, but also for economic reasons, which has only briefly been touched on in this hearing. I refer too below the extremely high proportion of international and non-local anglers that travel to Southland specifically to fish the Oreti. Many of these members of the "community" are represented in the submissions in support to this application, to which you are required to have regard also in accordance with section 207. The economic benefit of those visitors is significant and should also be added to the equation when considering the section 207 matters. And to get an idea of the potential economic worth of the fishery to the Southland region, you can turn to the Jellyman and Graynoth 1984 publication that cited studies. In 1982 the Taupo fishery was found to be worth in order of \$16.7 million, and nationally the sports fishery was valued, over 20 years ago, as being worth in order of \$150 million. Given the Oreti's very high ranking in use and importance, it is logical to assume the Oreti receives a significant proportion of the "fishing dollar". It is submitted that the needs of the community that rely on the fishing dollar, and its multiplier effects, will be better met if the Oreti is protected, and the primary industry aspect of the community will also not be disadvantaged. There are no losers if the Oreti is protected by a WCO.

### **Outstanding features and characteristics – evidential and legal basis**

#### Trout abundance/trophy trout (clauses 3 (b) and (c) of proposed Order)

30. In respect of the "fishery" there has been a material change in the relevant statutory provisions from the previous legislation. Under the W&SCA, the Tribunal only had the jurisdiction to find an outstanding "fishery", being the combination of both habitat and angling. Under the previous legislation this had an impact on, for example, findings in respect of the Gowan River when the Special Tribunal considered the Buller WCO. In that case the Tribunal

concluded "*that the Gowan River does not have the necessary combination of abundance of fish and angling amenity to justify a finding that it contains an outstanding recreational fishery*" (page 41 *Brookers Re Draft Water Conservation (Buller River) Order C28/93 (PT)*).

31. If you find for example that the angling amenity does not reach the threshold (although I submit you should not), this is not the end of the road for the outstanding trout and trout habitat. Under the RMA, the new statutory provisions allow for the protection of a "fishery", in accordance with the old meaning, but also alternatively and separately, protection of outstanding "habitat for aquatic organisms" (section 199 2 (b) (i)) or as an outstanding "recreational" resource (eg angling (section 199 (2) (b) (v))).

32. In the W&SCA section 20 B 6 specified that:

- (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;*

33. Compared to the wording in section 199

- (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:*

34. Under the RMA it is therefore valid to simply protect the Oreti for that outstanding brown trout habitat that no one disputes, in accordance with section 199 (2) (b) (i). Clearly the Oreti is outstanding on this basis, based purely on the exceptional trophy trout size and abundance. If you find that the habitat for trout is outstanding, then the presumption in favour of conservation/protection applies. The outstanding trout and trout habitat is evidenced by:

- a. The river upstream from Rocky Point contains a high density of large brown trout that have a national and international reputation for their large size. (See Maurice Rodway evidence in chief para 18, 39, table 1). The predominance of large trout is a key and obviously outstanding feature of the trout stock of the Oreti. In the studies

referred to by Don Jellyman, the Oreti River has the largest mean size of trout of any rivers for which there is reasonable data (Don Jellyman para 15, 17). According to expert angler Dean Bell the abundance and concentration of large trout in the upper Oreti is rare in NZ and unheard of elsewhere in the world (para 6 – 9, 12 – 13.)

- b. The drift dives undertaken by Fish and Game establish that the Oreti holds more brown trout per unit area than the Waikaia, Motueka, Buller and Te Wharau (Buller catchment) Rivers, all of which are already protected for being nationally outstanding brown trout fisheries. These facts establish that in terms of that particular benchmark, the Oreti meets the standard. The biomass ( $\text{g}/\text{m}^2$ ) ranking places the upper Oreti at the top of the headwater fisheries investigated by Don Jellyman, and places it in the top 17 of the 158 reaches of rivers (not just headwater rivers) surveyed in the "100 rivers" survey undertaken by Ian Jowett. A biomass of  $3.5 \text{ g}/\text{m}^2$  as calculated by Dr Jellyman places the Oreti in the top 10% of non spring or lake-fed rivers nationally. (Maurice Rodway evidence in chief para 38, table 1, Don Jellyman para 12, 13)
- c. The abundance and size of the trout is likely to be supported by the features of the habitat referred to by John Hayes, being the temperature regime, excellent water quality, good food supply and high proportion of adult trout habitat at MALF (John Hayes para 8, 10, 13 – 15, 27). In particular, the results from the bioenergetics model indicate the importance of the comparatively warm winter water temperature regime in the upper Oreti River and also the relatively cool water temperatures experienced in the summer. Dr Hayes believes the combination of these features of the habitat, i.e., the buffered temperature regimes is a unique characteristic that is important for maintaining the Oreti's outstanding trout fishery. (para 31, with explanation in preceding paras).
- d. The exceptional water clarity of the Oreti is also likely to be another feature of the Oreti trout habitat that is important to the successful growth of trophy sized fish according to Dr Hayes, as it maximises the foraging distances and therefore maximises the efficiency and growth potential for the trout. (paras 34 – 46).

- e. The high dissolved oxygen concentrations in the river (measured at the Three Kings recorder) are likely to contribute to its outstanding fishery (John Hayes pp 52 – 53).
- f. As summarised by Dr Hayes, suitable temperatures for trout growth, clear water, good water quality and a plentiful food supply, along with unimpeded access by trout to feeding grounds in the lower part of the catchment support the outstanding trout fishery in the upper Oreti River (para 62). In other words, the Oreti provides an outstanding habitat for aquatic organisms, in particular brown trout, and the end result of that is the internationally renowned trophy brown trout fishery.

Angling (clauses 3 (a), (c), (d) and (e) of proposed Order)

- 35. The Oreti is classified as a headwater trout fishery, which is broadly defined by leading fisheries scientist Don Jellyman as "a river affording the opportunity to catch large wild trout in clear water, usually in the upper reaches of catchments and usually in conditions of high scenic beauty and remoteness". (Don Jellyman para 8)
- 36. Surveys illustrate that the Oreti is one of New Zealand's most used trout fisheries. The 1994/6 and 2001/2 National Angling Surveys aimed to estimate annual angling usage (Martin Unwin para 14). Excluding fisheries wholly or partly dependent on sea-run Chinook salmon, usage of the Oreti River was equalled or exceeded only by the Maitai and Tongariro rivers, both of which have national and international status. The Oreti River is therefore NZ's 3<sup>rd</sup> most heavily fished trout river, which clearly establishes that it is outstanding on a national basis. (Martin Unwin para 25). In terms of the more confined results for the upper Oreti in the 2001/2 survey, compared to other backcountry fisheries, it ranks 10<sup>th</sup> in terms of total usage (Martin Unwin para 31).
- 37. A particularly unusual feature of its use is the extremely high proportion of overseas anglers, compared to other fisheries. Of the anglers Stu Sutherland surveyed in the comprehensive angler field survey in 2000 and 2001 59% of the anglers found on the river were from overseas. In summary, in terms of the various statistics available as to its use, the Oreti clearly ranks as nationally important. (Maurice Rodway evidence in Chief para 19, Martin Unwin para 28 , Stu Sutherland para 7).

38. The high water quality, outstanding water clarity and ability to clear very quickly after floods are critical features of the Oreti that make it an excellent fishery, and make it stand out on a national basis. (Maurice Rodway para 40). Dean Bell specifically describes the water clarity as being one of the main contributors to the outstanding angling experience (para 14) as does Ron Todd (para 17) .
39. The fact that anglers can fish for large individual trout is also one of the unique features of the fishery (Maurice Rodway para 44).
40. The Oreti ranked in the Jellyman report (1994) as an important trophy headwater fishery, and the upper Oreti as potentially a nationally important wilderness fishery (Maurice Rodway 1<sup>st</sup> supplementary evidence para 4).
41. Compared to other similar back country type fisheries, the Oreti has better access (Maurice Rodway 1<sup>st</sup> supplementary evidence para 5 (c)). Many trophy trout rivers have difficult access – for example the upper Karamea and Mokihinui Rivers are almost exclusively fished by anglers who gain access by helicopter, but the Oreti can be accessed by road. (Don Jellyman para 20).
42. The comprehensive river bank angler survey conducted by Stu Sutherland of Fish and Game in 2000/2001 showed that while anglers were obviously lured by its reputation for producing large trophy trout, anglers valued most highly the peace and solitude and spotting trout and fishing undisturbed water than actually catching a fish. (Stu Sutherland para 13). This corresponds with the evidence of anglers such as Ron Todd, Rob Bowler and Bradley Kastner in terms of the importance of the natural and wild surroundings to the value of the angling experience. In other words, the wider angling amenity of the Oreti is extremely highly valued by its users.
43. It was summarised eloquently by Don Jellyman when he stated: *"Overall then, both very large size and high numbers of fish, combined with extensive reaches of clear and fishable water, and a backdrop of high natural character, all combine to make the upper river a truly outstanding angling amenity."* (para 23)
44. The challenge of actually landing a trout is also one of the important aspects that adds to the importance and reputation of the angling amenity (Dean Bell para 18, Brad Kastner oral evidence).

45. Courts in the past have placed significant weight on the evidence of both lay and expert anglers, when making findings regarding the status of a fishery. In the *Rangitata* decision a great deal of attention and weight was placed on expert anglers, such as Mr Hall and Mr Watson, discussed at paragraphs 85 – 89 and 197 – 198 when finding that the angling was outstanding, and determining the means to protect it. In the Mataura case also, at page 40, the Planning Tribunal gave serious weight to the "anecdotal" angling evidence. (*Re Draft National Water Conservation (Mataura River) Order C32/90*)
46. It is therefore submitted that if you found Ron Todd, Brad Kastner, Dean Bell, Rob Bowler and the other angling submitters to be credible witnesses, then it is consistent with the previous decisions on the issue of angling amenity to place a lot of reliance on such evidence.
47. These features, and the resulting reputation of the Oreti means that reports of its characteristics are spread far and wide. The existence of this "reputation" itself is yet another piece of evidence that supports the assertion that the Oreti stands out on a national basis. Expert trout scientists and anglers refer repeatedly to this reputation, and confirm it. (eg John Hayes para 8, )

Tributaries need protection for their own values, and contribution to the fishery of the Oreti:

48. Firstly when considering the tributaries bear in mind that Fish and Game is now suggesting that only the fish passage provision apply to them in order to protect both their outstanding characteristics, as well as their important contribution to the Oreti mainstem.

*Windley*

49. The Windley has a good stretch (2 – 3 km) of high quality fishing for large trout. The trout from the Windley are of equal size to the trophy trout in the Oreti main stem (Maurice Rodway 1<sup>st</sup> supplementary evidence para 17, Rod Todd in questioning).

*Weydon*

50. The Weydon has access in the lower 3km through farmland and upstream it is through protected land. Above that is berm fenced, and then flows through

in DoC land again. The Weydon has good fishing according to anglers (refer Dean Bell et al) and it is important for trout spawning and native fish.

*Ashton*

51. The Ashton is an important tributary for the flow it contributes to the mainstem. It also clears quickly after rain providing for good angling when the Oreti is in flood, and holds large trout early in the season. These features make it a highly valued aspect of the Oreti fishery and provide a necessary contribution to the Oreti fishery (Maurice Rodway 1<sup>st</sup> supplementary evidence para 17, Brad Kastner paras 11, 16 (a) and (b))

Native Fishery (clauses 3 (b), (d) and (f) of proposed Order)

52. Electro fishing results showed the importance of numerous tributaries as native fish habitat, particularly the Weydon Burn (Maurice Rodway 1<sup>st</sup> supplementary evidence paras 18 – 20). The Weydon is important for galaxiids and bullies. In terms of long finned eels – Michael Skerrett gave evidence about the large female eels living in the smaller tribs – this is the kind of habitat they use. Don Jellyman's evidence on native fish (paras 30 – 35) shows that the mainstem of the Oreti is an important habitat for galaxiids in particular.
53. The Oreti is both regionally and nationally significant for the long inland penetration to remote intermountain rivers and lakes it provides to eels. Southern flathead galaxiids and Gollum galaxiids are endemic to Southland and found in the Oreti. The Department of Conservation rates these habitat features in respect of eels and the two fish species as being nationally significant in its letter to the Special Tribunal dated 28 March 2007.

Habitat for black billed gulls and black fronted terns (clause 3 (b))

54. The evidence of Rachel McClellan and Forest and Bird supports the request to have a WCO recognising that the Oreti supports nationally important populations of these rare, and declining species, as does the correspondence from the Department of Conservation dated 28 March 2007. I refer you back to my opening submissions, and the finding of the Environment Court that a population of 5% of the world population of an endangered species qualifies as outstanding on a national basis. In the case of the Oreti the black billed gull population far exceed this figure.

*Didymo*

55. It is submitted that the habitat and angling is still outstanding despite the presence of didymo. As evidenced by the difference in opinions of anglers, it does change the fishing experience, but does not necessarily reduce it from the status of outstanding. (Dean Bell para 20). It is also an ephemeral feature – high flow removes the didymo from time to time. Didymo is not expected to remain at high densities for prolonged periods in the Oreti River, due to the flushing effects of floods, scouring by finer material and the mobile bed and more easily eroded margins (Bill Jarvie paras 18, 25). The survey result of Dr Hayes survey indicated that moderate levels of didymo (as experienced in the Oreti) may have a favourable effect on trout growth by supporting increased invertebrate biomass (para 80). Also, much research is being done into how didymo may be eradicated or controlled.
56. It is proposed that clauses 9 and 10 of the draft Order **attached** will allow for resource consents to be issued for water or discharge permits needed to implement didymo treatment. Such treatment will be for protection of the fishery (clause 9 (2) (a)) and also could qualify under clause 10 (a) (i) potentially.

### Protection

57. The question of whether and how to protect a water body against threats or otherwise has come up during this hearing, and requires further consideration. Again, the comments of Judge Jackson in the *Rangitata case* are of assistance at the outset:

*Conclusions as to the method and purpose of the inquiry*

*[53] Substantively a water conservation order is a plug in any unnatural outlets of water quantity and quality. It establishes the water levels which must not be lowered if the purpose of an order is to be achieved.*

*[54] The purpose of a water conservation order under Part 9 of the RMA is to provide a waterline (of quantity and quality) below which the river should not be drawn ..."*

58. One question that needs to be asked in respect of these statements is as to what the effect is of his Honour's subsequent description of the issues to be considered at para 55 (2):

*[55] The basic issues when considering an application for a water conservation order are:*

*(1) whether outstanding characteristics exist in the river;*

(2) if so, whether those characteristics are threatened by potential changes to flow, water quality, temperature etc;

(3) whether an order is necessary to sustain the outstanding characteristics having regard to:

(4) the matters in section 207 (2) – which are in our view designed to ensure that an overly idealistic approach to the river's waterline is not taken.

59. It is submitted that 55 (2) is His Honour's description of how we identify those "plugs", or the "waterline" of quantity and quantity in paras 53 and 54 above, but for some reason instead of phrasing it in terms of what is needed as a bottom line to protect, he has referred to it from the perspective of what threats to the bottom line must be avoided. 55 (2) could equally have read "what potential changes to flow, water quality, temperature etc are to be prevented in order to protect those characteristics." It is submitted His Honour was not stating that there must be real threats looming before an Order can be made, he was simply stating that the second point to consider is what the bottom line is, in order to protect.
60. And if protection is opted for instead of preservation, then the evidence must be assessed as to what, as a bottom line, is needed to protect the outstanding characteristics. As noted in opening, the ruling of the Court in the *Rangitata* case was that to "protect" in the context of a WCO means to maintain the outstanding characteristics in their "*current quality and quantity*" (para 30 of decision).

Relevance of protection afforded by other measures, instruments, land status etc

61. The Parliamentary intent when initiating the WCO regime first in the W&SCA, and then repeating it in the RMA, is that once it is found there are outstanding characteristics, there is a presumption they will be protected by a WCO. It is not relevant that there may be no direct threat, or that there are other statutory documents or instruments, such as the status of conservation land, or the regional plan, that act as de facto protection mechanisms – a WCO is the preferred mechanism established by the Act to both recognise and sustain water bodies that support outstanding characteristics. The section of the Planning Tribunal's decision on the *Buller* WCO application states this (set out below), as does the ruling of the High Court in *NZ Paper Mills Ltd v Otago Acclimatisation Soc [1995] NZRMA 155* set out subsequently.

62. The Planning Tribunal in the *Buller* case stated, in response to submissions that other Acts and land status protected the water body: (at page 9, Brooker version):

*In the case of the Minister of Conservation in particular, Mr Robinson reminded us that under the Conservation Act 1987, public land owned by the Crown can be administered as part of the conservation estate thus helping to ensure, particularly where waters are included within that estate, that they are protected. Mr Robinson also referred to the Crown Minerals Act 1991 and the Resource Management Act 1991 as a further package of measures designed to provide for a more sophisticated means of protecting environment values than that afforded by the suggested "blunt instrument" approach of a conservation order.*

*We did not understand Mr Robinson to go as far as to say that, as a matter of law, a conservation order cannot be made and therefore should not be recommended. Rather, we understood him to be submitting that because of the passage of these other statutes, which he submitted were statutes in pari material in the sense discussed by Chilwell J in Huakina Development Trust v Waikato Valley Authority [1978] 2 NZLR 188, there is no longer a need for a conservation order particularly where there are resources that the nation might need to exploit.*

*This is the first time a submission of this kind has been made to the Tribunal in a case involving a conservation order and it came as no surprise to us to learn that it was not supported by any other party to this inquiry, including those opposed to the making of an order. In particular it received no support from either your counsel Mr Galen or Mr Hulbert counsel for the Minister of Conservation.*

*Quite apart from this however there is another very good reason for rejecting the submission. Notwithstanding the passage of the legislation referred to by Mr Robinson post the 1981 Amendment Act, when it came to the Resource Management Act 1991, Parliament included comprehensive provisions concerning conservation orders. These are contained in Part IX of the Act where, so it appears to us, provision has been made for the kind of code provided for the 1981 Amendment Act – see the Rakaia River case. Some of the details in the later code are different and, in some respects, the matters to which regard are to be had are wider, but section 199(1) opens with these words:*

(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.*

*We think this means that even the purpose of the Act in section 5 loses primacy if there is a conflict between that purpose and the purpose of a conservation order as stated in section 199(1). The expression of such a clear intention by Parliament is wholly*

*inconsistent with the proposition advanced by Mr Robinson and we reject it accordingly. We hold that the approach sanctioned by the Court of Appeal in the Rakaia river case remains the correct approach to take in a case such as this."*

63. In *NZ Paper Mills Ltd v Otago Acclimatisation Soc* [1995] NZRMA 155, which was an appeal in respect of the Mataura Water Conservation Order, the High Court rejected an argument that a water conservation order should not be made if there was no immediate need for preservation or protection and no evidence of such need in the reasonably foreseeable future. The High Court was asked, amongst other points on appeal:

*5 Did the Planning Tribunal err in law in recommending a NWCO when there was no or little evidence to suggest that the angling and fishery amenity was threatened by the existing out of stream users or needed protection? (page 8, unreported version)*

64. At page 16 Justice Holland stated:

*...Some time was spent in argument as to whether a WCO should be recommended if there was no immediate need for preservation or protection and no evidence of such a need in the reasonably foreseeable future. That is answered first by the recognition that existing water rights cannot be affected, but secondly by the need to declare that a river, lake or stream or its outstanding characteristics or features was worthy of preservation or protection in accordance with s 20 D (2) and 20 B (6). Those issues were issues of fact for the Tribunal and again I have not been persuaded that any error of law has been made by the Tribunal in its consideration. The answer to Questions 4, 5, 6 and 11 is also "No".*

#### Proposed Regional Freshwater Plan for Southland ("Proposed Plan")

65. The Tribunal has requested further submissions on how section 207 (c) should be applied.
66. It is submitted there are two potential ways you could apply section 207 (c), although there is very little case law on this issue to assist. Having regard to statutory plans can firstly illustrate whether or not the proposed Order is generally consistent with the approach in the documents, and secondly whether or not the statutory regime leaves a gap that the WCO will fill – i.e. do the statutory plans otherwise adequately protect the water body .
67. In respect of the first point, I note that the when the Planning Tribunal in the *Mohaka case (Re Draft Water Conservation (Mohaka River) Order W20/92 (PT)* assessed the statutory plans at pages 89 to 90 it was explicitly to get a feel for the "community" views towards hydro electricity, and the scenic and

natural values supported by retaining the waters unmodified. Therefore, if you apply that approach to the Oreti, the impression of the "community" view towards the values of the Oreti is that it is reasonably highly valued for its natural values in the Proposed Plan. At a higher level (objectives, policies and regional focus) the Proposed Plan takes a similar approach as the WCO and reflects the same values (Carmen Taylor, para 116).

68. In respect of the second point, if it is found that the relevant plans do provide a high level of protection (which in this case it is submitted they do not) that does not mean that a WCO should not be granted. As noted by the Planning Tribunal in response to Mr Robinson's submissions in the *Buller* case above, the existence of other statutory instruments, or indeed statutes, effecting some sort of de facto protection does not remove the obligation to create a WCO in accordance with parliament's clear statutory intent.
69. However, the Proposed Plan fails to provide that bottom line of protection referred to by Judge Jackson in the *Rangitata* case, by either setting bottom lines that are too low, or not setting bottom lines at all, but instead leaving the final decision to be a matter of discretion. The deficiencies of the current form of the proposed Plan, being decision made on submissions, are highlighted in the Appeal lodged by Fish and Game **attached**.
70. On the issues of application of minimum flow and flow regime, maintenance of water quality and damming, the water plan is seriously deficient when it comes to protecting the outstanding characteristics of the Oreti.

*Minimum flow*

71. There is no guarantee that the minimum flow calculated in accordance with the Proposed Plan will be applied to all resource consents, as the wording of Policy 21 (c) was amended by the decision on submissions, to now read "*...the Council will apply where appropriate a condition specifying a minimum flow/level in accordance with Appendix I*". A strict interpretation of this wording gives the Council the discretion to not impose a minimum flow. Also, there is no rule prohibiting the issue of consent for abstraction that would breach the minimum flow.
72. Fish and Game have therefore sought in its appeal:
- a. Removal of the words "where appropriate" from Policy 21 (c), and amendment of the policy to ensure that the minimum flow as calculated with Appendix I will always be imposed. The only

exception to this should be when a minimum flow higher than that as calculated with Appendix I is imposed; and/or

- b. Insertion of a new rule that makes water takes that breach the minimum flow as calculated by Appendix I prohibited activities.

### *Water Quality*

73. Policy 1 sets out the different surface water body classes, which are then used to manage discharges in the Proposed Plan. Appendix D, appears to classify the Oreti from Mossburn to Lincoln Hill as "hill" despite the fact it has water quality which is significantly higher than this. Upstream of this the Oreti and its tributaries are a mixture of Hill, Mountain and Natural State. The water quality of the Oreti mainstem upstream of Mossburn is in fact reasonably pristine, and should more appropriately be put in either the "Natural State" category, or "Mountain" classification, and managed as such. The Oreti tributaries upstream from and including the Windley River are also reasonably pristine. The majority of the Oreti's water flow derives from land managed by the Department of Conservation or land classified as "Mountain". The water quality of the Oreti above Mossburn is largely unmodified and unaffected by human activities (as referred to in Objective 1). It is appropriate that the Oreti be managed so as to ensure no deterioration in water quality. Otherwise, if the Oreti upstream of Mossburn is managed as "hill" this could allow for a reduction in water quality
74. Discharges that comply with the standards set in Appendix X will be discretionary, in accordance with Rule 1. The standards prescribed in Appendix X fall significantly below the existing high water quality of the Oreti upstream of Mossburn.
75. Discharges that breach the standards set in Appendix X will be non-complying. This is inappropriate for a river such as the Oreti. The combination of the water body class, the qualification in Policy 3, and comparatively low water quality standards mean that the Plan does not sufficiently protect the Oreti from a reduction in water quality.
76. Accordingly Fish and Game have sought the following substantive relief in the Plan in order to protect the Oreti:
  - a. Reclassification of the Oreti from Mossburn upstream to "natural state" so that it is managed in accordance with Objectives 1 and 2,

requiring no reduction in the quality of water beyond the zone of reasonable mixing; and/or

- b. Amendment of the policy framework so that there is a clear policy directive that the water quality of the Oreti upstream of Mossburn is not to be degraded from existing quality; and/or
- c. Amendment of rule 2 so that discharges that breach water quality standards for the Oreti upstream of Mossburn are prohibited; and/or
- d. Amendment of the policies, rules and Appendix X so that waters classified as "mountain" and "hill" are to have their water quality retained in its existing state, or improved, if their existing state is better than the water quality standards set out in Appendix X; and/or
- e. Amendment of the standards set for water bodies classified as "Hill" in appendix X so that they more closely relate to the existing high water quality of the Oreti upstream of Mossburn.

### *Damming*

- 77. Rule 15 (c) classifies damming the Oreti downstream of the forks at NZMS 260 E42 345450 as non-complying.
- 78. However the policy context in relation to damming is not sufficiently strong to deter applications for non-complying damming activities, and does not set a sufficiently high threshold in terms of the test in section 104D for the Oreti.
- 79. Consequently the rule and policy framework on damming in respect of the Oreti is insufficient to protect the Oreti's important natural values.
- 80. Fish and Game are therefore seeking the following relief:
  - a. Amend rule 15 (c) so that dams on the mainstem of the Oreti River upstream of Mossburn are prohibited; and/or
  - b. Either strengthen policies 19 and 20, or add new policies, that require the adverse effects of dams be avoided on the Oreti.
- 81. In conclusion, particularly in the areas of guaranteeing imposition of a minimum flow, preventing in absolute terms reduction in water quality, and preventing in absolute terms damming, the proposed plan falls far short of achieving protection of the Oreti, and as such a WCO is necessary. And further, even if the proposed plan did come close to setting appropriate

standards it is submitted that there is no justification in either the RMA, or case law, for using such a fact as a reason for not recommending making of a WCO. The legislation has created these specific statutory instruments to protect outstanding water bodies. WCOs sit above regional plans in terms of the hierarchy, just as Regional and National Policy Statements and Environmental Standards do – yet there is never any argument that an RPS or NPS or NES need not address a particular issue just because a regional plan addresses it adequately – all the statutory instruments are considered necessary and appropriate and part of a package for the integrated sustainable management of the environment. Likewise legislation has created specialised instruments for particular features of the environment – heritage orders and national parks being the main examples that spring to mind.

### **Terms of proposed WCO**

82. The version of the proposed Order, with which Environment Southland could live, is **attached**. It has minor amendments tracked that have been discussed and agreed with Environment Southland.

#### **Minimum flow**

83. As noted above, Fish and Game is concerned that the Proposed Plan does not guarantee that a minimum flow will be imposed and therefore have appealed. While hopeful this appeal will be successful, there remains a risk. No agreement was reached with Environment Southland on this point. However, if you find that the Oreti needs the protection of a guaranteed minimum flow, it is open to you to provide in the Order for this. Note that Fish and Game do approve of the method for calculating minimum flow in the Plan and would be happy for a flow calculated as such to be imposed.

#### Damming

84. The Tribunal would like us to consider wording which means that damming the full flow is prohibited. The attached order contains the provision agreed with ES.
85. The alternative definition of dam is that as used in the "newest" water conservation order, being the Rangitata Order is, by way of example. A similar clause to this was presented in opening submissions:

*Cl 8 No resource consent may be granted or rule included in a regional plan authorising the damming of waters specified in Schedules 1 and 2. For the purposes of this clause, damming does not include any intake or deflection structure that does not-*

- (a) prevent the passage of any salmon; or*
- (b) reduce the use of the waters for rafting or canoeing; or*
- (c) reduce the aquatic bird habitat; or*
- (d) intrude visually to the extent that it reduces wild and scenic values.*

86. Such an approach, being a definition by way of defining effects to be excluded, is an alternative for you to consider. This is the approach that was first suggested in opening, and would manage exactly the effects that endanger outstanding characteristics, but would not prohibit features that would otherwise avoid such effects. For example the rock weirs at Branxholme and under the bridge at the Riverton Wallacetown highway would not be captured, and in any event are not on the stretch of river proposed for the damming prohibition. For the Oreti therefore such a clause could read:

*No resource consent may be granted or rule included in a regional plan authorising the damming of waters specified in Schedule 1 item 1. For the purposes of this clause, damming does not include any intake or deflection structure that does not-*

- (a) prevent the passage of any trout, or native fish; or*
- (b) reduce the aquatic bird habitat; or*
- (c) reduce fish spawning habitat; or*
- (d) inundate the natural river bed ; or*
- (e) intrude visually to the extent that it reduces wild and scenic values.*

#### Fish passage

87. Fish passage throughout the mainstem and to the tributaries is required to maintain the habitat that the trout population depend on. The juvenile trout are spawned in the upstream reaches of the Oreti, and its various tributaries, and then migrate downstream as they grow. Electro fishing shows that numerous tributaries provide habitat for juvenile trout (that would have been spawned in the upper Oreti, and likely to return there when adults) including Starvation Creek, the Weydon Burn, Mossburn Creek, Hidden and Gorge Burns. (Maurice Rodway 1<sup>st</sup> supplementary evidence para 18 – 22, Don Jellyman 14, 26). John Hayes' bioenergetics model shows that the large fish

caught in the upper Oreti are unlikely to have achieved their large size without migrating downstream to take advantage of the temperature regimes in the lower catchment (John Hayes para 25 – 26). They then grow in the lower and middle reaches of the Oreti river and finally move upstream as adults. The otolith microchemistry work of Ricky Olley establishes that brown trout in the Oreti perform migrations over large distances (paras 7.1 – 7.3). Therefore passage between the upper and lower river reaches is essential to maintain the population in its current quality and quantity.

#### Water Quality

88. In the section of these submissions on the outstanding trout habitat and angling, numerous references are made to the evidence that details the importance of the existing high water quality to maximising the growth of trophy trout, and enhancing the angling experience. While trout may no doubt be able to survive in water of lesser quality, the advice of Dr Hayes is that it is likely the high water quality enhances their ability to grow to trophy trout size. Accordingly Fish and Game maintain that in order protect this aspect of the fishery, the current water quality must be maintained.

#### Discharges to land that may affect water quality

89. It has been queried whether or not such a rule would effectively regulate discharges to land that may reach water also.

90. Section 217 (2) states:

*(2) Where a water conservation order is operative, the relevant consent authority—*

*(a) Shall not grant a water permit[, coastal permit,] or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:*

*(b) Shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless [the grant of any such permit or] the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation:*

*(c) Shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained.*

91. A discharge permit is defined in section 87 (e) as "A consent to do something (other than in a coastal marine area) that otherwise would contravene section 15 (in this Act called a discharge permit)."

92. Section 15 states:

*15 Discharge of contaminants into environment*

*(1) No person may discharge any—*

*(a) Contaminant or water into water; or*

*(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*

*(c) Contaminant from any industrial or trade premises into air; or*

*(d) Contaminant from any industrial or trade premises onto or into land— unless the discharge is expressly allowed by a rule [in a regional plan and in any relevant proposed regional plan], a resource consent, or regulations.*

93. Accordingly, if the Order is made in line with Fish and Game's proposal, no discharge to land that would result in a contaminant entering water would be allowed if it resulted in a breach of the terms of the Order.

*Future proofing*

94. The Tribunal said that they have to look at a time frame 10 or 20 years out and to "crystal ball gaze" so that the exemptions cover what may need to occur in the case of another example of Didymo or climate change. It is submitted however that if there is such a material change, the effects of which are unable to be predicted with any certainty, then that would be the situation that would justify revocation or variation of the Order in accordance with section 216. That is exactly the type of situation contemplated by the Act, and accordingly a specific section has provided for it so that the Minister does not have to include crystal ball gazing provisions in each Order. Likewise, Regional Plans do not contain such crystal ball gazing provisions, but instead can be subject to plan changes. Accordingly, if only minor or technical

changes to the Order are required so as to make it work better to achieve its purpose, that can be undertaken on an effectively non-notified basis between the proponent of the change, Fish and Game and the Minister, in accordance with section 216 (1) (c) (ii), (2) and (3).

*(1) Until the expiration of 2 years after the date a water conservation order is made under section 214 (or under the corresponding provision of any former enactment),—*

*(a) No application shall be made to the Minister to revoke any such order; and*

*(b) The Minister shall reject any application made under subsection (2) to amend any such order unless, after having regard to the purposes of the order and the restrictions and prohibitions imposed by the order, the Minister is satisfied that the amendment to which the application relates—*

*(i) Will have no more than a minor effect; or*

*(ii) Is of a technical nature and would enable the order to better achieve any purpose for which it was made; and*

*(c) No recommendation shall be made to the Governor-General—*

*(i) To revoke any such order; or*

*(ii) To amend any such order unless the Minister is satisfied that the amendment is of a minor nature or of a technical nature which would enable the order to better achieve any purpose for which it was made.*

*(2) Except as provided in subsection (1), any person may at any time apply to the Minister for the revocation or amendment of any water conservation order, and every such application shall state the reasons for the application.*

*(3) Upon receipt of an application made under subsection (2), if—*

*(a) The Minister is of the opinion that the application should not be rejected but that, by reason of the minor effect of the amendment, it is unnecessary to hold an inquiry; and*

*(b) The original applicant for the order (if that person can be located) and the regional council agree to the amendment—*

*the Minister may recommend that the order be amended, and the Governor-General may, by Order in Council made on the recommendation of the Minister, amend the order accordingly.*

95. Alternatively, if a more substantive amendment or revocation is promoted in order to take into account a material change in circumstances, then it is necessary, just like it would be for a regional plan, for such a change to be notified and subject to the public submission process in accordance with section 216 (4):

*(4) Except as provided in subsection (3), an application made under subsection (2) for the revocation or amendment of a water conservation order shall be dealt with in the same manner as an application for such an order, and sections 201 to 215 shall apply accordingly.*

96. For more minor activities that are necessary for infrastructure or maintenance reasons, but are technically a breach of the Order, the operation of clauses 9 and 10 are intended to enable such activities that do not otherwise undermine the protection of the water body to take place, subject to the usual resource consent process.

### Conclusion

97. It is now for you to evaluate the evidence and determine whether the Oreti trout habitat, and/or angling amenity, reach a similar threshold as those other water bodies already protected by other Orders. In particular when you are doing this I submit you need to put a great deal of weight on the fact there was no conflicting evidence from either fisheries scientists or anglers of the Oreti's fisheries values. While some submitters made statements in disagreement, there was no expert evidence that attacked the evidence presented by Fish and Game. If you find that either one or both of these features are outstanding, then the presumption is in favour of conserving and protecting these features. Also, it is submitted the Oreti supports nationally significant populations of endangered birds, native fish and is of significance in accordance with Tikanga Maori, further qualifying the river of recognition and protection by a WCO.
98. No case has been made that there is an "essential" need that outweighs the conservation presumption, particularly when considered in light of the evolution of the legal tests in the RMA. Protecting these features can be achieved while still allowing for a reasonable out of stream use of the water with the flow regime proposed by Fish and Game.
99. It is submitted that the application by Fish and Game meets the legal tests in the RMA, and the granting of the application will give effect to the Act's clear intention that WCOs provide a high level of recognition and protection for outstanding water bodies.
100. As submitted in opening, the Order sought by Fish and Game (in its now amended form) will result in a "win/win" outcome. The outstanding features and characteristics will be protected, in accordance with the evidence and strong support from both the local and international angling community. At the same time, the Oreti will remain available for reasonable use by the agricultural industry through the resource consent process, in accordance with the water plan.

101. As stated by Bradley Kastner "... if you want to have the opportunity to catch a fish of a lifetime, the Oreti is the place to fish" (para 13). Parliament clearly intended that such outstanding water bodies be protected by WCOs, not other means. You do not have the discretion to find that the Oreti would be better protected by some other method – if you find it is outstanding, then the method dictated by the RMA to protect it is a WCO. The Oreti ranks in the very top rankings and opinions of local and international anglers for use, habitat, trophy trout and reputation – it is clearly outstanding on a national basis in my submission and as such should be protected by a water conservation order.

Dated this 18<sup>th</sup> day of June 2007

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Maree Baker  
Counsel for Fish and Game

## **Appendix A**

### **DRAFT WATER CONSERVATION (ORETI RIVER) ORDER 2007**

#### **1. Title**

This order is the Water Conservation (Oreti River) Order 2007.

This order comes into force on the        of        after the date of its notification in the Gazette.

#### **2. Interpretation**

In this order unless the context otherwise requires.

"Act" means the Resource Management Act.

"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 those waters identified in the Schedules to this order. The main stem shall be the river with that name on NZMS260 series topographical maps between specified lower and upper river limits as defined by map references in schedules to this order.

"Tributaries" means all the tributaries of rivers or sections of the rivers identified in schedules to this order.

#### **3. Outstanding Characteristics**

The waters specified in Schedule 1 and 2 include or contribute to, to the extent identified in Schedule 2, the following outstanding characteristics, features and values:

- (a) amenity and intrinsic values
- (b) habitat for terrestrial and aquatic organisms
- (c) fishery values
- (d) wild, scenic and other natural characteristics
- (e) recreational characteristics
- (f) significance in accordance with Tikanga Maori.

#### **4. Waters to be Protected**

Because of the outstanding characteristics, features and values identified in clause 3, the waters specified in Schedule 1 are to be protected in accordance with the relevant conditions in clauses 6 - 8 as specified in Schedule 1.

#### **5. Waters to be protected as Contributing to Outstanding Features**

Because of their contribution to outstanding characteristics and features identified in clause 3 the waters specified in Schedule 2 are to be protected in accordance with the relevant conditions in clause 7 as specified in Schedule 2.

**6. Restriction of Damming of Waters**

No water permit may be granted or rule included in a Regional Plan authorising the damming of waters specified in Schedule 1 item 1.

**7. Requirement to maintain fish passage**

No water permit may be granted or rule included in the Regional Plan relating to the waters identified in Schedule 1 and item 1 of Schedule 2 authorising an activity that will adversely affect passage of fish.

**8. Restriction on the alteration of water quality.**

No discharge permit may be granted or rule included in a Regional Plan authorising a discharge into any of the waters identified in item 1 of Schedule 1 that will result in a reduction of water quality beyond the zone of reasonable mixing.

**9. Scope of Order.**

- (1) This order does not limit section 14(3)(b) and (e) of the Act relating to the use of water for domestic needs, for the needs of animals, and for, or in connection with, fire fighting purposes.
- (2) 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 (as defined in section 166 of the Act); or
  - (c) the construction and maintenance of soil conservation and river protection works undertaken pursuant to the Soil Conservation and Rivers Control Act 1941; or
  - (d) the protection of human or animal health.

**10. Exemptions**

Nothing in this order prevents the grant of a discharge or water permit that would otherwise contravene conditions set out in clauses 6, 7 and 8 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 an activity that is of a temporary nature; or
  - (iii) the permit is for an activity that is associated with necessary construction and maintenance work; and
- (b) the exercise of any such resource consent would not compromise the preservation and protection of the outstanding characteristics and features identified for the waters specified in the schedules.

**Schedule 1 – Protected waters with outstanding characteristics**

Item	Waters	Outstanding Characteristics or Features	Conditions to Apply
1	Oreti River main stem at Rocky Point at NZMS 260 E44 373946 upstream to the forks at E42 345450.	Brown Trout Fishery Angling Amenity including natural state, wild and scenic Habitat for trout Value in accordance with Tikanga Maori Wildlife habitat Trout spawning Native fish habitat	Prohibit damming (cl 6) Maintenance of fish passage (cl 7) Maintenance of water quality (cl 8)
2	Weydon Burn, Windley River and all other tributaries upstream of the Oreti River at E43 305210 near Lincoln Hill.	Habitat for trout Brown Trout Fishery Angling Amenity including natural state, wild and scenic Trout spawning Native fish habitat	Maintenance of fish passage (cl 7)

Schedule 2 – waters to be protected for their contribution to the above mentioned outstanding features:

Item	Waters	Outstanding Characteristics or Features contributed to:	Conditions to Apply
1	Oreti River downstream of Rocky Point at E44 373946 to the Wallacetown Bridge at E46 455208	Brown Trout Fishery Habitat for trout Wildlife habitat	Maintain fish passage (cl 7)
2	Groundwater hydraulically connected to the surface water of the Oreti River from Rocky Point at E44 373946 upstream to the forks at E42 345450.	Brown Trout Fishery Habitat for trout Angling amenity	

**Appendix B**

**BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH**

<b>IN THE MATTER</b>	of the Resource Management Act 1991
<b>BETWEEN</b>	<b>SOUTHLAND FISH AND GAME COUNCIL</b>
	<b>Appellant</b>
<b>AND</b>	<b>ENVIRONMENT SOUTHLAND</b>
	<b>Respondent</b>

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**NOTICE OF APPEAL**

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**ANDERSON LLOYD CAUDWELL**  
SOLICITORS  
DUNEDIN

Solicitor: M A Baker

Appellant's Solicitors  
Tenth Floor, Otago House  
Cnr Princes Street/Moray Place  
Private Bag 1959,  
DUNEDIN  
Tel 0-3-477-3973  
Fax 0-3-477-3184

To: The Registrar  
Environment Court  
Christchurch

1. The Southland Fish and Game Council ("Fish and Game") appeal against part of a decision of Environment Southland on the following plan:  
Variation No 3 (Water Quantity) and No 4 (Water Quality) for Proposed Regional Freshwater Plan for Southland.
2. Fish and Game made a submission on the Variations.
3. Fish and Game received a notice of the decision on 31 March 2007.
4. The decision was made by Environment Southland.
5. The parts of the decision Fish and Game is appealing are the parts relating to:
  - a. Setting minimum flows on every resource consent to abstract
  - b. The Oreti River, in particular:
    - i. Minimum flow
    - ii. Surface water body class of the Oreti and related water quality provisions
    - iii. Activity status of damming; and
  - c. Definition of Spring Creeks and the non-inclusion of them in the planning maps.
6. The reasons for the appeal, and relief sought in respect of each issue, are as follows:
7. By way of background, and in general terms, the Oreti River currently supports a nationally outstanding trophy brown trout fishery. It is largely unmodified, and has close to pristine water quality, especially in the reaches upstream of Mossburn. Fish and Game seek that the Oreti upstream of Mossburn be protected in its current state in order to protect the instream values it supports, including the brown trout fishery.
8. Fish and Game have applied for a Water Conservation Order on the Oreti. If the Order is granted on the terms sought by Fish and Game, there will be no need for the majority of this Appeal, particularly in respect of water quality and damming provisions relating to the Oreti. If the Order is gazetted on terms satisfactory to Fish and Game, there will be no need to pursue this Appeal as

it relates to the Oreti. However, in case the Water Conservation Order is not granted, Fish and Game must pursue similar relief through the Plan process.

**A –Setting minimum flows in all rivers (both generally and in respect of the Oreti)**

9. There is no guarantee that the minimum flow calculated will be applied to all resource consents, as the wording of Policy 21 (c) was amended by the decision on submissions, to now read "*...the Council will apply where appropriate a condition specifying a minimum flow/level in accordance with Appendix I*". A strict interpretation of this wording gives the Council the discretion to not impose a minimum flow. Also, there is no rule prohibiting the issue of consent for abstraction that would breach the minimum flow.
10. Relief sought:
  - a. Remove the words "where appropriate" from Policy 21 (c), and amend policy to ensure that the minimum flow as calculated with Appendix I will always be imposed. The only exception to this should be when a minimum flow higher than that as calculated with Appendix I is imposed; and/or
  - b. Insert a new rule that makes water takes that breach the minimum flow as calculated by Appendix I prohibited activities; and/or
  - c. Such other amendments that the Court considers appropriate to address the concerns raised including costs.

**B – Oreti River surface water body class and associated water quality issues**

11. Policy 1 sets out the different surface water body classes, which are then used to manage discharges. Appendix D, appears to classify the Oreti from Mossburn to Lincoln Hill as "hill" despite the fact it has water quality which is significantly higher than this. Upstream of this the Oreti and its tributaries are a mixture of Hill, Mountain and Natural State. The water quality of the Oreti mainstem upstream of Mossburn is in fact reasonably pristine, and should more appropriately be put in either the "Natural State" category, or "Mountain" classification, and managed as such. The Oreti tributaries upstream from and including the Windley River are also reasonably pristine. The majority of the Oreti's water flow derives from land managed by the Department of Conservation or land classified as "Mountain". The water quality of the Oreti above Mossburn is largely unmodified and unaffected by human activities (as referred to in Objective 1). It is appropriate that the Oreti be managed so as

to ensure no deterioration in water quality. Otherwise, if the Oreti upstream of Mossburn is managed as "hill" this could allow for a reduction in water quality

12. Discharges that comply with the standards set in Appendix X will be discretionary, in accordance with Rule 1. The standards prescribed in Appendix X fall significantly below the existing high water quality of the Oreti upstream of Mossburn.
13. Discharges that breach the standards set in Appendix X will be non-complying. This is inappropriate for a river such as the Oreti. The combination of the water body class, the qualification in Policy 3, and comparatively low water quality standards mean that the Plan does not sufficiently protect the Oreti from a reduction in water quality.
14. Relief sought:
  - a. Reclassify the Oreti from Mossburn upstream to "natural state" so that it is managed in accordance with Objectives 1 and 2, requiring no reduction in the quality of water beyond the zone of reasonable mixing; and/or
  - b. Amend the policy framework so that there is a clear policy directive that the water quality of the Oreti upstream of Mossburn is not to be degraded from existing quality; and/or
  - c. Amend rule 2 so that discharges that breach water quality standards for the Oreti upstream of Mossburn are prohibited; and/or
  - d. Amend the policies, rules and Appendix X so that waters classified as "mountain" and "hill" are to have their water quality retained in its existing state, or improved, if their existing state is better than the water quality standards set out in Appendix X; and/or
  - e. Amend the standards set for water bodies classified as "Hill" in appendix X so that they more closely relate to the existing high water quality of the Oreti upstream of Mossburn; and/or
  - f. Such other amendments that the Court considers appropriate to address the concerns raised including costs.

### **C – Activity status of damming on the Oreti River upstream of Mossburn**

15. Rule 15 (c) classifies damming the Oreti downstream of the forks at NZMS 260 E42 345450 as non-complying.

16. However the policy context in relation to damming is not sufficiently strong to deter applications for non-complying damming activities, and does not set a sufficiently high threshold in terms of the test in section 104D for the Oreti.
17. Consequently the rule and policy framework on damming in respect of the Oreti is insufficient to protect the Oreti's important natural values.
18. Relief sought:
  - a. Amend rule 15 (c) so that dams on the mainstem of the Oreti River upstream of Mossburn are prohibited; and/or
  - b. Either strengthen policies 19 and 20, or add new policies, that require the adverse effects on dams be avoided on the Oreti; and/or
  - c. Such other amendments that the Court considers appropriate to address the concerns raised including costs.

**D. Spring Creek identification.**

19. The planning maps (Appendix D) which identify the Water Type and Quality Standards do not include a number of spring creeks in the region.
20. Many spring fed creeks are classified as "Hill" which has a different and, in some cases, lower standards than spring creek standards.
21. Relief sought:
  - a. Correct the maps of Appendix D so that all spring creeks are correctly classified, or
  - b. Such other amendments that the Court considers appropriate to address the concerns raised including costs.
22. I attach the following documents to this notice:
  - a. A copy of my submission:
  - b. A copy of the relevant decision;
  - c. A list of names and addresses of persons to be served with a copy of this notice

---

Southland Fish and Game Council  
By its solicitors and duly authorised agents  
ANDERSON LLOYD  
per: Maree Baker

15 May 2007

Address for service of appellant:

c/- Anderson Lloyd  
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Contact Persons: Maree Baker

**Advice to recipients of copy of notice**

*How to become party to proceedings*

You may be a party to the appeal if you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 30 working days after this notice was lodged with the Environment Court.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

*How to obtain copies of documents relating to appeal or inquiry*

The copy of this notice served on you does not attach a copy of the relevant application, a copy of the Council officer's report on the application or the relevant decision. These documents may be obtained, on request, from the appellant.

*Advice*

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Christchurch:

83 Armagh Street (corner Durham Street)  
P O Box 2069  
Christchurch  
Telephone: (03) 962 4170  
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Southland District Council  
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C/- Tonkin & Taylor Ltd  
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Shell NZ, Caltex NZ, BP Oil NZ & Mobil  
Oil NZ Ltd  
C/- Burton Consultants Ltd  
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Takapuna  
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Transpower New Zealand Ltd  
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