

15 November 2005

Minister for the Environment
Parliament Buildings
WELLINGTON

For: Hon David Benson-Pope

Dear Minister

BULLER RIVER WCO VARIATION APPLICATION: FISH & GAME COUNCIL

1. We refer to your letter of 7 November 2005. You have requested some additional information concerning our client's application to vary the Buller River Water Conservation Order, particularly as that Order affects the Gowan River.
2. Your first query seeks clarification of the values the Fish & Game Council wishes to see protected. We advise that all the values you list are considered outstanding and therefore our client seeks protection under the WCO for the Gowan River as a trout fishery, as a habitat for brown trout and for the Gowan River's contribution to the fisheries upstream (Lake Rotoroa and its tributaries) and downstream (other parts of the Buller River system). This is in accordance with the tracked changes suggested in Appendix 1 to the application. The term "trout fishery" is intended to apply both to the trout habitat, and the fishing amenity. However for the sake of clarity on this issue, and in order to avoid future confusion, we now suggest that that the added outstanding characteristics and features in Appendix 1 of the Application read "trout habitat, trout fishery, contribution to trout fishery".
3. You have also sought clarification as to which aspects of the evidence referred to in the application support the amendments being sought. As we understand it, you wish to be satisfied that this application amounts to more than an attempt to relitigate the findings of the Planning Tribunal a decade ago. In response to that we say:
 - (i) All of the evidence referred to in the application is relevant to the amendments being sought.
 - (ii) The evidence is not set out in its entirety in the application. The evidence in full will be presented to your Special Tribunal in due course.
 - (iii) Some of the evidence to which the Special Tribunal will be referred is material that was earlier presented to the Planning Tribunal. However, that material is now more than a decade old and in some cases is even older than that.

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- (iv) With increased knowledge of the nature and functioning of trout fisheries in the intervening period some of this earlier information has been reassessed giving rise to a new understanding of the significance of the Gowan River trout fishery.
4. Information about the usage of the Gowan River as a recreational fishery in the last decade is new information.
 5. Information about trout density or biomass in the Gowan River collected within the last decade is new information. (See references in the Application to Fish and Game drift dive data 1995, 1996 and 2005.)
 6. Information about the functioning of brown trout fisheries such as the Gowan River fishery and the role they play in the overall health and quality of the wider fishery is new. In particular, scientists now have a much greater understanding of the extent to which brown trout move within a river system. That information has been gathered in the last decade from tagging and radio-tracking fish studies within the Buller River system, as well as in other important brown trout fisheries such as the Tongariro River and the Wairau River in Marlborough. The result is that scientists now believe the Gowan River, with its exceptional food production and trout numbers, plays a crucial role in the overall health and functioning of the Buller River system. (See references in the Application to Young (2002), Stickland et al (1998), Wilson and Boubee (1995) and Parker (unpublished)).
 7. In summary therefore, while some information heard by the Planning Tribunal forms part of the current evidence as to the Gowan River's fishery values, there is significant new information which now needs to be considered.
 8. We also note that Fish and Game's application is at least as comprehensive as that lodged by Majac Trust, and notified by the Minister in 2004.
 9. In your letter of 7 November you also note the requests by our client for its application to be dealt with urgently and by the same Special Tribunal as is currently considering the MAJAC Trust application. While we accept that the correct first step is for you as Minister to be satisfied the application is deserving of an inquiry, we are concerned at the time that it has taken to reach that point. In saying this we are of course cognisant of the administrative hiatus caused by the recent election and the change of Minister. Having said that, we would like to set out the background to our client's application to ensure that you have it in context:
 - a. While the Planning Tribunal did not conclude that the Gowan River should be protected as a recreational fishery in 1995/96, the Tribunal did hold that on trout numbers, the Gowan would be considered outstanding. Importantly, the Tribunal also held that the flow regime which the parties to the original inquiry had negotiated to protect a range of outstanding values (including the trout fishery) was appropriate for inclusion in the Order.
 - b. Fish & Game was therefore content with the outcome of that process in the sense that the fishery was in fact protected even though it was not itself recognised in the body of the Order.
 - c. The MAJAC application seeks to alter the flow regime currently contained in the Order in order to provide for a hydro-electricity proposal. If there is any question about the validity of re-litigating issues in light of new evidence or

circumstances, it must also be taken into account that the Planning Tribunal rejected submissions from Tasman Energy in the original hearing, and therefore chose not to provide for such a use of the Gowan. If it is now appropriate to reconsider this issue in light of new circumstances, Fish and Game submit that it is equally appropriate to reconsider the status of the fishery, in light of new evidence and use patterns.

- d. In its submission on the MAJAC application, Fish & Game sought protection for the trout fishery, both by recognising that value in the Order and providing an alternative flow regime which better protected the fishery values.
 - e. Whilst your Tribunal, accepted this submission, the High Court ruled that on a strict reading of s205 of the RMA a submission which opposed an application could not go on and seek that additional matters be included in the Order.
 - f. Immediately upon receipt of that decision of the High Court, the Fish & Game Councils made their variation application.
10. We reiterate our view that given the two applications relate to the same river it is appropriate for the same Special Tribunal to report to you on both applications. We further suggest that it is appropriate for both applications to be fully resolved before any changes to the Order are gazetted, given that such changes will set the stage for any subsequent resource consent applications.
11. If there remains any outstanding issues preventing the appointment of a Special Tribunal to inquire into and report on the Fish & Game application we should be grateful for the opportunity to meet with you and your staff to discuss them.
12. As an aside, we note that you have not been represented by Counsel at recent Water Conservation Order hearings. In past Water Conservation Order hearings the Tribunal and Courts have been assisted greatly by submissions from previous Ministers' Counsel and in our view consideration of matters such as the scope of the Special Tribunal to consider submissions on fisheries values within the context of the MAJAC application would be enhanced were you represented.

Yours faithfully

ANDERSON LLOYD CAUDWELL

Per:



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