

**Report by a Special Tribunal
Appointed by the Minister for the
Environment to Consider an
Application for a Water Conservation Order
for the Oreti River**

November 2007

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Summary of the Special Tribunal's Findings

1. In May 2005 the New Zealand Fish and Game Council and Southland Fish and Game Council (the applicants) applied to the Minister for the Environment for a water conservation order for the Oreti River under Section 216(2) of the Resource Management Act 1991 (the Act).
2. The Oreti River rises in mountainous country to the south of Lake Wakatipu, and flows some 200 kilometres to enter an estuary just to the west of Invercargill. The middle and lower reaches of the river are lined with stopbanks. Here the river is used for many purposes, including dilution of discharges, gravel extraction, irrigation from both surface water and hydraulically linked groundwater, and domestic water supply to Invercargill.
3. The headwaters of the river upstream of Rocky Point (near Mossburn) are very little used, with no authorised discharges. The river flows through a broad U-shaped valley formed by a glacier. Headwater reaches have exceptionally clear water, and low flows are buffered by water entering the river from many small spring seepages.
4. The application sought protection of flows and water quality in the main stem of the river and its tributaries from Rocky Point upstream. The application also sought a prohibition of damming of the full flow of the river downstream of Mossburn, and a full prohibition of damming the main stem upstream of Mossburn.
5. A Special Tribunal comprising Dr Brent Cowie (chair), Dr Paul Blaschke and Dr Gail Tipa was appointed by the Minister to hear the application.
6. The application was publicly notified in accordance with Section 204 of the Act on 30 September 2006. Seventy-seven submissions were received, of which 63 supported the application, 13 opposed it and one was neutral.
7. The Special Tribunal inspected the catchment by helicopter and by car in January 2007.
8. The Tribunal heard the application in Invercargill over six days, being 26 and 29-31 January 2007, and 19-20 April 2007. The second stage of the hearing was delayed, with the approval of the applicant and submitters appearing, until decisions on the Southland Proposed Regional Freshwater Plan ("Water Plan") as amended by variations were available. This enabled the remainder of the application process and the Tribunal's findings to be made in the context of the best possible information and most up-to-date policy context.
9. The applicant's right of reply was heard on 18 June 2007.
10. The legal framework for considering applications for water conservation orders is in Part 9 of the Resource Management Act. The purpose of a water conservation order, set out in Section 199, is to "recognise or sustain outstanding amenity or intrinsic characteristics" of waters.

11. The Tribunal relied in large part on the Environment Court decision on an application for an order on the Rangitata River in Canterbury for its decision-making framework.
12. To qualify for protection by a water conservation order, a water body must have or contribute to outstanding characteristics. The Environment Court has determined that “to qualify as outstanding, a characteristic would need to be quite out of the ordinary on a national basis”.
13. After careful consideration the Tribunal has determined that at least parts of the Oreti River provide for or contribute to four outstanding characteristics:
 - (a) The river supports an outstanding brown trout fishery, particularly in its upper reaches above Rocky Point. The fishery is outstanding because of the size of brown trout in the upper river: the largest of any South Island headwater fishery; and because the number of large trout present is also comparatively very high.
 - (b) The headwaters of the river upstream of Rocky Point provide outstanding angling amenity. Characteristics that contribute to this amenity include the presence of many large brown trout, peace and solitude and the very clear water which allows anglers to “spot” and fish to particular trout. Although the Oreti is the third most heavily fished trout river in the country, there was insufficient evidence that the entire river supports outstanding angling amenity.
 - (c) At least some parts of the river provide outstanding habitat for endemic black-billed gulls (*Larus bulleri*) which is regarded as a threatened species in serious decline in New Zealand. About 70–80% of the national population of 80,000 to 100,000 black-billed gulls breed in Southland, where the Oreti River, along with Aparima River to the west, carry the greatest numbers of breeding birds. Most gull colonies are found in the middle reaches of the Oreti.
 - (d) The river, at least in the reach upstream of Rocky Point, is of outstanding significance in accordance with tikanga Māori. The presence of taonga species (both fish and wildlife), the relatively unmodified upper catchment, evidence of past occupation in the form of archaeological sites and remains, the continuity of flow in the waterway from its source to coast, and high water quality are factors that help determine that the mauri of the Oreti River is robust and vibrant.
14. The Tribunal considered that the presence of the invasive diatom *Didymosphenia geminata* (“didymo”) may at times detract from the outstanding angling amenity of the upper river. This would, however, only be for short periods as the cobble bed of the river is very mobile during freshes or floods. As a result of this, didymo appears unable to establish itself in the Oreti River to the extent that it has in more embedded rivers such as the Mararoa and lower Waitaki. Indeed the comparative value of the Oreti may increase, given the likely more adverse effects of didymo on angling amenity in some other valued South Island river fisheries.

15. The applicants presented evidence about other values which they considered to be outstanding, including wild and scenic values and native fisheries. While these values are significant and may contribute to the values which the Tribunal considered were outstanding, the evidence did not establish that in the Oreti River they were outstanding in a national context.
16. The Tribunal next considered matters listed in Part 2 – the Purpose and Principles of the Act. The Environment Court has determined that those sections and sub-sections of Part 2 that are contrary to the Purpose of Water Conservation Orders are not to be considered. The application was consistent with many elements of Part 2, particularly those listed in Section 6, Matters of National Importance.
17. Section 207 of the Act lists three matters that decision makers must have regard to, while at the same time having particular regard to the purpose of a water conservation order. This distinction is important because it raises the purpose above the matters listed in Section 207.
18. The first of these Section 207 matters are the application and all submissions. The Tribunal read all individual submissions. They heard legal submissions and 16 witnesses for the applicant, five parties who supported the application, one party who was neutral and six parties who opposed the application at the hearing. This process covered all aspects of the application and submissions, and the Tribunal took these fully into account in decision making.
19. After discussions with the regional council (Environment Southland), the applicants amended the application at the resumption of the hearing in April. The amended application was on more general and less restrictive terms than were sought in the original application or at the January hearing. The Tribunal was told that the applicant was now satisfied that decisions released on variations to the Water Plan in March 2007 covered matters such as flows and taking of groundwater hydraulically linked to the Oreti River, and that these no longer need be included in the order sought.
20. Environment Southland still submitted in opposition to the making of an order, but did not call technical evidence, and further submitted that if an order were to be made it should be along the lines of the amended application. The order drafted by the Tribunal is indeed along these lines.
21. The next Section 207 matter is the “needs of primary and secondary industry and the community”. The Tribunal agreed with counsel for the applicant that these should be “needs, and not merely hopes or aspirations for the future.” The needs considered included community water supplies, gravel extraction, river protection and erosion control, the maintenance of infrastructure such as bridges, and potential use of the water resource for irrigation and/or power development.
22. The order drafted by the Tribunal has very little or no effect on these needs apart from potential hydro-electric development of the river. Given, however, the wide U-shaped valley through which the Oreti River flows the potential opportunity for power development is low. Certainly no such possible development was foreshadowed by any party.

23. The Tribunal concluded that there are no needs of primary or secondary industry that weigh against making a water conservation order for the Oreti River.
24. The third Section 207 matter is the relevant planning instruments, and particularly the Water Plan prepared by Environment Southland. This Plan already offers a substantial level of protection to water quality and flows in the Oreti River.
25. Several submitters expressed strong frustration that having been through a very extensive consultation process around the Water Plan, a water conservation order could override the Plan in what they saw as an arbitrary way and with little consultation. Many submitters contrasted the strong and robust consultation process engaged in by the regional council in preparing the Water Plan and its variations, with the very limited consultation undertaken by applicants about the water conservation order application. Concerns were also raised about the relative inflexibility of water conservation orders.
26. The Tribunal had considerable sympathy for these views. Certainly the Water Plan is a robust document with a high level of community buy-in. But the law requires the Tribunal to have particular regard to the purpose of water conservation orders, and only regard to the provisions of the Plan. This means that as, in the Tribunal's view, the Oreti River has or contributes to outstanding characteristics, and the Plan does not offer sufficiently strong protection for those outstanding characteristics, a water conservation order has to be made.
27. As the final step in the process the Tribunal had to determine what waters be covered by the draft order, what provisions the draft order should include to protect outstanding characteristics or features, and what exemptions should be allowed for.
28. The first determination was that the Oreti River and its tributaries upstream of Rocky Point near Mossburn deserved the greatest level of protection. This area, which includes the Windley River and Weydon Burn, is where the outstanding brown trout habitat and angling amenity is. The measures deemed necessary to protect the outstanding features comprise a prohibition on damming, a requirement to maintain fish passage, and a requirement that no discharge affect water quality after reasonable mixing.
29. In the remainder of the river, the only restriction imposed by the order is a requirement to maintain fish passage. This is because of evidence presented that the population of very large brown trout in the headwaters of the Oreti relies on migration from downstream reaches of the river.
30. The order as drafted will help protect the outstanding contribution the Oreti River makes to tikanga Māori. It will do little, however, to protect the outstanding habitat of black-billed gulls provided by the river. This is because the order can do little to protect those gulls against threats such as predation, flooding or disturbance. The order does, however, complement the Water

Plan which will help protect those gull colonies by providing for flows in the river.

31. Importantly the draft order has a number of exemptions that allow particular activities to occur as of right on any part of the river. These include maintenance of roads, bridges and other network utilities, works undertaken for river control and soil conservation purposes, protection or enhancement of fisheries and wildlife habitats, and the protection of human or animal health.
32. The Tribunal considers that the order as drafted will make little difference to the competent day-to-day management of the water resources of the Oreti River exercised by Environment Southland. The order drafted will, however, alongside the flow-related provisions of the Water Plan, help protect the outstanding characteristics of the river. And that is what the purpose of water conservation orders is.

1 Introduction

1. This report outlines the recommendations of a Special Tribunal appointed by the Minister for the Environment (“the Minister”) under section 202 of the Resource Management Act 1991 (“the RMA”, “the Act”) to hear an application for a Water Conservation Order for the Oreti River in Southland. The application was made by the Southland and New Zealand Fish and Game Councils (“Fish and Game”, “the applicant”).
2. The Special Tribunal comprised Dr Brent Cowie (chair), Dr Paul Blaschke and Dr Gail Tipa. Between us we have expertise in resource management, freshwater ecology, conservation biology, social science, planning and tikanga Māori. One of us used to be a trout fisherman, albeit one who only ever had moderate success and who gave up long ago. Another of us is a passive member of Forest and Bird, and the third is a member of Ngāi Tahu. We did not see this as causing any conflict of interest in any case.
3. We were very ably assisted by Mr Steve Merito in the Christchurch Office of the Ministry for the Environment (“the Ministry”), and Ms Christina Wells from the Ministry in Wellington. We record our thanks to them. We were also able to access legal advice from Philip Milne from Simpson Grierson, whom we thank for his help. In particular, the legal advice he provided us in May 2007 provided strong guidance for our recommendations, and he undertook a legal audit of our draft report and the associated draft order.
4. The Special Tribunal inspected the upper Oreti catchment from Mossburn upstream by helicopter on 25 January 2007. We also inspected the lower part of the catchment by car on the same day, and Dr Blaschke returned to the upper catchment by car a few days later. We consider that these inspections, along with the knowledge that was imparted to us by witnesses during the hearing, gave us a very good overview of the Oreti catchment, and particularly its headwaters.
5. We heard the application in Invercargill over six days, being 26 and 29-31 January 2007, and 19-20 April 2007. We heard legal submissions and 16 witnesses for the applicant, five parties who supported the application, one neutral party and six parties who opposed the application. We then adjourned the hearing at about 1430h on 20 April to allow for the applicant’s right of reply.
6. We heard the application and submissions in two stages, because we wanted the submitters who opposed the application to have ample time to consider the applicant’s evidence before preparing their own evidence. In the first stage in January we heard all evidence from the applicant (except for one witness who was unavailable), and we also heard from submitters in favour of the application. In the second stage in April we heard from the remaining witness for the applicant, and all other submitters, as well as some supplementary evidence requested by us from the applicant.

7. Unlike an application for a resource consent (which must be accompanied by an Assessment of Environmental Effects on a scale appropriate to the effects of the consents sought), an application for a Water Conservation Order is only a “triggering mechanism”: it does not have to be comprehensive. The application made by Fish and Game provided a resource description along with an outline of the protection sought by an Order. We thought about requiring either further information under s92, or requiring pre-circulation of the applicant’s evidence under s41C of the RMA. Instead, we decided on the two-stage process to give the submitters who opposed the application, time to consider and appraise the applicant’s evidence in full.
8. There was one somewhat unusual feature of this hearing process. We had originally scheduled the second stage of the hearing for 21-23 March. At the January hearing, however, we received a request from Southland Regional Council (“Environment Southland”) to delay the second stage of the hearing until after such time as decisions on submissions and further submissions to the three relevant sections of their Proposed Regional Freshwater Plan (“the Water Plan”), as amended by variations, were available, which we were told would be late March. These three variations dealt with groundwater, water quality and water quantity respectively, and referring to those decisions would help Environment Southland prepare its case for our hearing their submissions on the application. It would also help us make our findings in the context of the best possible information and most up-to-date policy context.
9. We asked that this request from Environment Southland be put in writing, and this was duly received on 30 January. Counsel for the applicant, Ms Baker, did not object to delaying the second part of the hearing to allow the decisions on the variations to the proposed Water Plan to be released. Environment Southland was confident those decisions would be released prior to Easter, and so we tentatively agreed to defer the second stage of the hearing to 18–20 April.
10. Before finalising this we wanted to be certain, however, that no party opposing the application would be disadvantaged by this change, so we asked Mr Merito to contact them individually. There were no objections to this change of timetable, so the second stage of the hearing took place in April.
11. The decisions on the variations to the three chapters of the Water Plan were duly released on 31 March. There then followed on Friday 13 April a meeting between the applicant and the regional council. That meeting resulted in the applicant putting forward an amended application to us at the commencement of the hearing on Thursday 19 April. Environment Southland, while continuing to oppose the granting of the application, told us that if we were to find that the application should be granted, it should be on the terms that they had agreed with Fish and Game at the 13 April meeting.
12. We detail the changes made to the application later in this decision. It will suffice to say here that due to decisions on submissions on the three variations to the Water Plan, the applicant in April sought an order on considerably more general and less restrictive terms than was the case in January. In broad terms this was because Fish and Game were apparently satisfied that the provisions of the amended plan provided sufficient protection for some matters, notably related to flows and the associated

taking of groundwater hydraulically linked to the Oreti River, and that accordingly these provisions were no longer needed in a water conservation order.

13. We had some concerns about this process for two reasons. First, submitters who appeared in support of the application in January had not had the opportunity to comment on the applicant's amended application. Second, parties opposing the application, who were due to be heard on 19 or 20 April were not privy to this "agreement". Accordingly, we asked Mr Merito to contact these parties, which he did by e-mail on 17 April.
14. Several submitters who opposed the application expressed some frustration at the short notice given of this "agreement". While we well understand that, we note that the "agreement" was for an application on much less restrictive grounds than was originally sought by Fish and Game. Submitters who opposed the application therefore had to address less substantive issues than had been the case before.
15. We heard the applicant's final right of reply at Mosgiel on Monday 18 June 2007. This was after the time that appeals to the decisions on relevant variations to the Water Plan had closed. We circulated that right of reply to all submitters who had attended the hearing, but no further comment was received.
16. The right of reply was attended by Ms Baker and Mr Rodway on behalf of the applicant, and Ms Millar on behalf of Environment Southland. Mr Slowley, Counsel for Environment Southland, was not able to attend as he was indisposed.
17. We did have one concern about the right of reply in that Ms Baker invited us, albeit somewhat indirectly, to impose a minimum flow regime for the river. Our concern was because in the amended order presented to us at the April hearing, Counsel for Fish and Game presented an amended application that did not include any provision for a minimum flow. Submitters presented evidence to us on this basis. We comment in more detail on this matter later in this report, but suffice to say here that we have not imposed any minimum flow regime on the river.

2 Background to the Application

2.1 The Application

18. In May 2005 the New Zealand Fish and Game Council and Southland Fish and Game Council applied to the Minister for a water conservation order for the Oreti River under Section 216(2) of the Act.
19. The application was supported by further information that described the catchment and its values, and outlined the detail of the order sought. In essence Fish and Game sought protection of flows and water quality in the main stem of the river and its tributaries from Rocky Point, which is near Mossburn, upstream. We have called this the upper Oreti catchment. The protection sought would also restrict the taking of hydraulically connected shallow groundwater in the upper catchment. The applicant also sought a prohibition of damming of the full flow of the river downstream of Mossburn (which we have called the lower Oreti catchment), and a full prohibition of damming the mainstem upstream of Mossburn. No water quality or quantity provisions were sought in the lower catchment.
20. In August 2005 the Minister sought additional information to better define what was meant in the application by “hydraulically connected groundwater”. Solicitors for the applicant forwarded a definition from a policy in Proposed Variation 2 (Groundwater) to the Proposed Freshwater Plan. We need not detail that here as we return to this matter later .
21. We were appointed by the Minister by letter dated 6 September 2006.

2.2 Notification

22. The application was notified pursuant to s204 of the Act on 30 September 2006. This included notification in each of the major metropolitan dailies and the local media. Copies of the application could be viewed at offices of the Ministry, at the offices of local authorities in Invercargill, Gore or Queenstown, and at libraries at Te Anau, Lumsden and Winton.
23. The Ministry received 77 submissions by the time they closed on 15 November 2006. Of those submissions, 63 supported the application, 13 opposed it and one was neutral. There was one late submission which we accepted. A full list of submitters is provided in Annex A. One submitter (the Royal Forest and Bird Protection Society of New Zealand, Southland Branch) originally did not ask to be heard but later requested to be so. We granted this request.

2.3 Description of the Catchment and its Management

2.3.1 The Setting

24. The Oreti River rises between the Thompson and Eyre mountains to the south of Lake Wakatipu. It is bounded to the north by the Von River, a tributary of Lake Wakatipu, to the east by the Mataura River catchment, and to the west by the Mararoa River catchment. In its headwaters the Oreti runs approximately southwest, before turning south near the junction of the Windley River and then running southeast or south across the undulating Southland Plains to enter the coast west of Invercargill. The gradient of the river is steepest upstream of Lumsden.
25. The Oreti River, which is approximately 200 km long, has the third-largest mean annual flow of rivers in Southland. In the upper catchment the river is predominantly single thread, but it becomes a little braided downstream of about Rocky Point, with flow generally in two or three channels. The river becomes single thread downstream of about Winton to the coast.
26. The headwaters of the Oreti River lie in highly dissected mountains up to about 2000 metres high. From here the upper river flows across a wide, U-shaped outwash plain valley formed by one of the tongues of the Wakatipu Glacier. The upper valley is characterised by tussock grasslands on the river flats, through which many small, spring-fed seepages run. The channel is dominated by quite long pools or runs up to about two metres deep separated by short riffles. The bed of the river is characterised by gravels and cobbles which would move freely during floods. Importantly, the river is not at all embedded.¹ There are a few locations, such as at Lincoln Hill, where the river flows between rock buttresses, but the valley is generally very open and, we were assured, often windswept.
27. The largest tributary, the Windley River, rises in the Eyre Mountains and enters from the east or true left. The other main tributaries in the headwaters are the Ashton River, another high-country sourced river that enters from the east, and meandering Weydon Burn, which enters from the west near State Highway 94.
28. The headwaters of the river are generally in the tenure of the Department of Conservation (DOC), with the Eyre Mountains having been gazetted in 2005 as the Eyre Mountain Ecological Reserve. The river then enters public land in the tenure of Mount Nicholas Station, and the riverbed is used for extensive summer grazing of cattle in particular. Further downstream the upper catchment is largely in the tenure of Landcorp on the true right, and other

¹ This is important in so far as the unstable bed limits the opportunity for extensive growths of *Didymo*. We discuss this matter at some length later.

private landowners (including two submitters: Andrew Morris and Peter Lawson) on the true left downstream of the Windley River. In this reach much of the river is fenced off from stock, but stock access is certainly possible higher up on Mount Nicholas. Land use is generally extensive, with some production forestry stands also present.

29. As the river crosses the Southland Plains, land use changes to more intensive sheep, dairying and cropping.
30. Access to the upper catchment is via a well formed gravel road that leads from State Highway 94 along the west bank of the river to the upper reaches of the catchment on Mount Nicholas station. There are a number of points where anglers can park and walk fairly easily to the river. There are no high bluffs that impede access to or along the river, and during normal flows the river can readily be waded.

2.3.2 Catchment Hydrology

31. Hydrological information for the catchment was summarised by Ms Jan Riddell, appearing as a witness for the applicant. She had obtained the relevant records from the regional council.
32. There are three main hydrological recording stations on the river. These are at Three Kings in the upper catchment about 30 kilometres upstream of Mossburn, Lumsden (close to the middle of the catchment) and Wallacetown, near the mouth of the river. Their catchment areas are 271, 1,125 and 2,141 square kilometres respectively. The latter two sites have been operational for about 30 years and that at Three Kings for over 20 years.
33. Mean annual flows in cubic metres per second (m^3/s) are 8.65, 29 and 41.3 m^3/s at Three Kings, Lumsden and Wallacetown respectively. Seven-day mean annual low flows (MALF) at the three sites are 2.5, 5.7 and 8.3 m^3/s respectively.
34. The Three Kings site shows a somewhat unusual hydrological feature in that the MALF is almost 30% of the mean flow. This reflects the extent to which low flows are buffered by shallow groundwater inflows in the upper catchment. According to Mr Rekker, a witness for the applicant, groundwater makes up about 60% of the base flow at Three Kings. As a result, flow variations, particularly at low flows, are less marked in the upper catchment than at sites further downriver.
35. Mean annual rainfall at Three Kings is 1,196 mm per year. Rainfall is reasonably consistent and reliable on both a monthly and annual basis, with annual rainfalls varying from about 800 mm to 1,500 mm. Spring is typically a little wetter than other periods, and winter a little drier. Rainfall is generally quite reliable. In the 20 years of record at least 0.5 mm of rain has fallen on average on 166 days per year. In most years of record there are between six and nine periods of more than eight days with rain of less than 1 mm. Periods of 20 or more days with less than 1 mm of rain have occurred once in May,

June, September and December and twice in March and July in the 20 years of record.

36. Mean monthly flows at Three Kings vary from 6.25 m³/s in February to 12.87 m³/s in October. The lowest flow mean daily flow recorded of 1.39 m³/s occurred in March 1990, and the highest flow recorded was estimated to be 171 m³/s. The upper river is subject to reasonably frequent and reliable freshes and floods. The longest periods of sustained low flows occurred in February and March of 1990 (34 days), and 1999 (31 days).
37. Under sustained low-flow conditions water is apparently lost from the Oreti River downstream of Lumsden. Such losses are inferred to be to shallow groundwater.

2.3.3 Water Quality and the Invertebrate Fauna

38. In the upper catchment water quality is high, and water clarity can be exceptionally high. A study compiled by NIWA scientists of 190 observations in 96 rivers at base flow showed the upper Oreti to have water clarity in the top 20% of those rivers. Other parameters are also indicative of high water quality. For instance, recorded levels of dissolved oxygen are always high, whereas levels of nutrients and ammonia are always low. There has been no recorded decline in water quality in the upper river.
39. In Māori conceptualisations, water quality is vital to sustaining a healthy and vibrant mauri – the life principle.
40. In the headwater reaches of the river the invertebrate community is dominated by species such as mayflies, stoneflies and caddisflies, which are indicative of high water quality. These insects form a major part of trout diets. The invertebrate community remains indicative of high water quality as far downstream as Lumsden, but in the lower reaches of the river is indicative of possible mild pollution.
41. Environment Southland has collected water temperature data in the upper river continuously at Three Kings since 1998. The highest spot temperature recorded was 25 degrees centigrade, but the highest daily average temperature was only 17.5 degrees. The average water temperature seldom dropped below 4 degrees for more than several days in winter.
42. The invasive alga *Didymosphenia geminata* (“didymo”) is present in the river. This is the first application for a water conservation order heard at a time that didymo was present in a river. We discuss this in detail later in this report.

2.3.4 The Regional Planning Context

43. Management of the water resources of the Oreti catchment are the responsibility of the Southland Regional Council, which has branded itself as “Environment Southland”. The regional council is responsible for managing all of the surface water and groundwater resources in the region, along with discharges to water and to land where they may enter water. At our request Ms Millar, the council’s Senior Resource Planner primarily responsible for water resource planning, gave us a very good outline of the council’s management regime in the catchment, which we summarise here.
44. The principal document that sets the framework for the management of the water resources of the Oreti River is the Proposed Regional Fresh Water Plan (“the Water Plan”). Other plans of some relevance, in so far as they place controls on discharges to land and water in the catchment, are the Regional Solid Waste Management Plan and the Regional Effluent Land Application Plan.
45. The Water Plan was originally notified in October 2000. Since that time, however, both the demand for water and the understanding of the water resources of the region have increased substantially. As a result of this the council has notified five variations to the plan between 2003 and 2006. It has now heard submissions, and made decisions on all these variations. The decisions relating respectively to groundwater, water quantity and water quality were released on 31 March 2007, and the remaining variations were released on 14 July 2007.
46. Appeals on the March decisions closed on 16 May 2007. One of the appeals was from Fish and Game and related specifically to the Oreti catchment. We discuss this later in this report. We also discuss later the provisions of the plan as they relate to the water conservation order application.
47. The water planning process, and the associated extensive consultation that had been undertaken by Environment Southland, was widely commended by many participants to the hearing, be they primarily interested in conservation or in development. We consider that this is a credit to the council and its staff.

2.3.5 Use of the Catchment

48. Ms Riddell said that according to regional council databases, consents exist for 94 land use consents, 266 discharge permits, 109 groundwater takes and 16 surface water takes in the catchment upstream of Wallacetown. Although permits have been granted to dam some small tributary streams, no current permit authorises damming of the main stem of the river at any point.
49. Only eight of those permits apply to the river upstream of Mossburn. Three are land use consents held by Environment Southland for river control purposes. Another consent held by the regional council is for aerial spraying

of herbicides to control plant pests. The other consents are either for river control or bridge construction/maintenance purposes, and one consent authorises the taking of up to 100,000 cubic metres of gravel from the river.

50. There are no consented point source discharges to the upper catchment, nor are there any consents to dam or take water (including hydraulically connected groundwater) upstream of Rocky Point. The only present consent in the upper catchment upstream of the confluence of the Weydon Burn is held by Environment Southland who, in exercising their powers under the Soil Conservation and Rivers Control Act 1941, undertake occasional river control works to prevent the river from eroding towards farmland on the east downstream of the Ashton River confluence.
51. As indicated by the consents database, the river downstream of Mossburn has many more uses. It supplies water treated to a standard suitable for domestic supplies in Invercargill, and through (at least partly) hydraulically connected groundwater, to communities such as Mossburn and Lumsden. Gravel is taken from the middle reaches of the river, and there is some use of surface water and hydraulically connected groundwater for seasonal irrigation. Water quality declines downstream, primarily due to the effects of non-point source runoff from intensively farmed land.

2.3.6 Management of the Brown Trout Fishery

52. The brown trout fishery of the Oreti River is managed, in what we consider to be a very competent fashion, by Southland Fish and Game, whose region closely coincides with that of Environment Southland. Native fisheries are the responsibility of the Department of Conservation. The trout fishing season on the upper Oreti is from October to April inclusive.
53. Because of concerns about angling pressure in the upper river, Fish and Game introduced a mandatory “catch-and-release” policy in a reach of approximately 15 km downstream of the Mt Nicholas Bridge in the early 1990’s. This reach is also a “walk only” zone. The success of this policy may be reflected in average numbers of large trout per kilometre in the upper river increasing from 6-8 about 15 years ago to close to 30 per kilometre today.
54. Anyone with a fishing licence can presently fish this reach of the river. Two other nearby headwater fisheries, the Greenstone and the Caples in Fiordland National Park, have ballot systems operating, but there is no proposal at present to introduce a similar system on the upper Oreti.

3 Summary of Evidence

55. In this section we briefly summarise the evidence presented to us at the two stages of the hearing. This summary is not intended to be exhaustive as we often refer back to this evidence in our evaluation of the application.

3.1 The Case for the Applicant

56. The applicant provided legal submissions and called 16 witnesses, all of whom bar Mr Stenning we heard in January 2007.
57. **Ms Maree Baker** is a resource management lawyer with Anderson Lloyd Lawyers. She presented legal submissions on behalf of the applicant, and outlined what matters would be covered by witnesses for the applicant. She also presented a draft order for our consideration.² We need not detail her legal submissions here as we cover these matters comprehensively elsewhere in this report.
58. The applicant's case was comprehensive. We heard from scientists and technical specialists who provided evidence about the fishery, its comparative values, its management, and what characteristics of the Oreti River make it an outstanding fishery. Evidence was led on hydrology, native fisheries and wildlife values. We also heard from a number of expert anglers (both professional and amateur) who described, often very enthusiastically, why they felt the Oreti was special. In this summary we deal first with the scientific and technical evidence, and then the evidence of the expert anglers.
59. **Mr Maurice Rodway** is the Southland Manager of Fish and Game New Zealand and had been instrumental in preparing the application. He has a Masters degree and has been an angler for 40 years.
60. Mr Rodway detailed why he considered the upper river is an outstanding brown trout fishery and habitat for trout, and associated outstanding angling amenity. We need not detail that here – suffice to say this assertion was based primarily on both the size and abundance of trout and the challenge of fishing for them. He also provided comparative information on other trout fisheries in Southland.
61. The consultation process undertaken by the applicant was outlined. Mr Rodway had held meetings with the Lumsden Community Board, who he considered were relatively relaxed about the proposed water conservation order, and local farmers, who were generally opposed to the application. The Department of Conservation had supported the application and, by way of a

² Noting that the application was much amended by the applicant at the second stage of the hearing.

letter appended to the application, stated that they would continue to be involved in the process through the submission process. Unfortunately the Department chose not to follow up this undertaking.

62. **Dr John Hayes** is a very experienced fisheries biologist employed by the Cawthron Institute in Nelson. He considers himself an “avid trout and salmon angler”.
63. Dr Hayes listed four factors that he considered contributed to the renowned trout fishery and large-size trout found in the upper Oreti. These were: a favourable year-round water temperature regime (relatively cool summers and warm winters); good water quality with very high clarity; an inferred good food supply (inferred because of the size to which trout grow); and a high proportion of the adult trout habitat being present at the mean annual low flow. He noted that available trout habitat does, however, decline quite steeply at flows below the mean annual low flow.
64. The brown trout found in the upper Oreti are, on average, exceptionally large by New Zealand standards. Dr Hayes considered that, based on considerations of water temperatures and trout energetics, fish would be unlikely to reach this size if they stayed permanently in the upper river. Accordingly he inferred that most fish would spend at least some time feeding in the lower river to attain these sizes. He considered that continuous passage along the river is very important to maintain the headwater fishery.
65. Once trout grow to a large size, however, it is advantageous for them to live in cool waters. This is because their efficiency at assimilating food increases with cooler water temperatures. Dr Hayes considered that the many shallow groundwater inflows to the upper Oreti buffer temperature variations, and so are very important to maintaining cool temperatures in the river.
66. Trout are visual feeders, and the exceptionally high water clarity in the upper river at base flow conditions will assist feeding. Other water quality parameters, such as high dissolved oxygen levels, also contribute to highly valued trout habitat.
67. **Dr Don Jellyman**, another very experienced fisheries biologist, works for the National Institute of Water and Atmosphere (NIWA). He gave evidence about the trout fishery of the river, the significance of trout movements and the relative significance of native fish. We discuss native fish when evaluating what characteristics of the river are outstanding.
68. Dr Jellyman described a comprehensive study of the brown trout fishery in the headwaters of the Oreti River carried out in 1989–1992. This work was commissioned by the New Zealand Fish and Game Council. Some comparative information was collected from 10 recognised South Island headwater fisheries, but the emphasis of the study was on the upper Oreti. Reasons for this emphasis included the river’s reputation as a trophy brown trout fishery, good access, and that the size of the river and its high clarity made it suitable for activities such as drift diving. Fish were caught by hand where possible and tagged.

69. The number of large fish ranged between 6 and 8 per kilometre. In terms of biomass, the Oreti then ranked behind very productive rivers such as the Karamea or Mohikinui, but was comparable to rivers in the Inangahua catchment. Dr Jellyman noted that since that time large trout numbers in the upper Oreti have increased to about 30 per kilometre (which he attributed to the “catch-and-release policy” now in place). In terms of trout biomass this would place the Oreti at the top of the headwater rivers studied in 1989–92, and 17th out of 158 rivers studied nationally at much the same time. Of the rivers with higher trout biomass than now present in the river, eight were lake or spring-fed, which fosters high trout biomass because of stable flows. The trout biomasses now recorded in the upper Oreti would be in the top 10% of non-spring or lake-fed rivers nationally (assuming biomasses in other rivers surveyed have not changed greatly in the last 15 years or so).
70. The size of the trout present in the upper Oreti was quite exceptional. Over two thirds of fish seen were large, a proportion exceeded for the headwater fisheries studied only by the Mohikinui. In the comparative study of the 10 headwater catchments, the mean size of fish in the upper Oreti was, at 2.74 kg, over 10% greater than the next two rivers (Karamea, 2.36 kg; Wairau, 2.31 kg). The upper Oreti also had the largest mean size of trout in the 154 headwater rivers for which reasonable size data are available. The headwater fishery is dominated by male fish, which make up over 75% of the fish recorded.
71. Trout in the middle and lower reaches of the river are on average considerably smaller than in the headwaters. Tagging studies showed that large fish caught in the headwaters were more likely to remain there, while smaller fish in the middle and lower reaches of the river are more mobile. There was some evidence that the headwater fishery was maintained by recruitment from lower down the river, but this was not conclusive. Dr Jellyman did note, however, that in other rivers female trout have been shown to migrate downstream after spawning to recover condition by feeding on species characteristic of estuaries and lower river reaches. This would help explain the predominance of males in the headwater fishery, which is a common feature of headwater fisheries.
72. **Ms Jan Riddell** has an honours degree in hydrology and many years’ experience in professional and political roles in the Southland region. She provided detailed information on the hydrology of the Oreti catchment, and the uses to which the river is put. We have already summarised what she said in our description of the catchment.
73. **Mr Jens Rekker** is a consultant hydrogeologist. His evidence covered the contribution of riparian groundwater to the maintenance of flows in the Oreti River, and, associated with this, the need to protect those riparian aquifers from abstractions that could deplete surface flows.
74. Modelling studies indicated that on average at base flows, riparian groundwater contributes about 60% of the flow recorded in the upper Oreti at Three Kings. Mr Rekker provided calculations that indicated that during a sustained dry period in summer 2001, groundwater contributions may have made up 95% of the river’s flow.

75. Abstraction of shallow groundwater that is hydraulically strongly connected to the river will deplete surface flows. Mr Rekker considered that any water conservation order should make provision to protect shallow groundwater.³
76. **Ms Carmen Taylor** is a qualified planner with a good deal of experience associated with water management in the Southland region. She discussed how the provisions of the water conservation order originally sought by the applicant tie in with relevant statutory policies and plans in the region. We need not detail her evidence here as we address these matters later in this report.
77. **Mr Martin Unwin** is a fisheries scientist with 30 years' experience who is employed by NIWA. His evidence focused on angler surveys of the relative value of the Oreti River.⁴
78. The first such survey was the National Angling Survey of 1979–81. This was comprehensive, involving 4,692 replies providing 20,800 assessments of 817 river fisheries. The responses focused on qualitative attributes such as ease of access and size of fish.
79. The assessment for the Oreti was based on the whole length of the river, and it was identified as a possible candidate for national importance status. Other nearby headwater fisheries, such as the Greenstone, Caples, Mararoa and Eglinton were also identified as possibly being of national importance.
80. Further national angling surveys were carried out on behalf of Fish and Game New Zealand in 1994/96 and 2001/02. These were based on information collected from a percentage of licence holders, but this method generally fails to capture anglers who are not New Zealand residents. The first of these surveys treated the Oreti as one river, but the second survey divided it into reaches above and below Lumsden.
81. Trout and salmon angling shows regional trends. Based on fishing licence sales it is three times more popular in the South Island than the North Island. Participation rates are highest in the lower South Island, and in Southland one in six adult males held a season fishing licence in 2001/02. This is nearly four times the national average. Almost as many licenses were sold in Invercargill and Gore combined than in the greater Auckland area.
82. Mr Unwin then described the relative importance of the Oreti River fishery in a regional and national context. We discuss this elsewhere.

³ Such provision was sought in the original application and expanded upon in Ms Baker's opening submissions. At the April hearing, however, the applicant provided an amended application that relied upon the provisions of the Proposed Regional Fresh Water Plan to protect hydraulically connected groundwater.

⁴ We should point out here that fishing licenses are necessary to fish for acclimatised trout and salmon in fresh waters in NZ, but are not necessary for fishing coastal waters. Apart from the Taupo Conservancy, which is administered by the Department of Conservation, all other parts of the country are administered by local Fish and Game councils.

83. **Ms Rachel McLellan** is a graduate student at the University of Otago with several years' previous experience in conservation management, who is investigating black-billed gull populations on the Oreti River for her doctoral studies. Ms McLellan described the distribution, breeding ecology, threats and conservation status of black-billed gulls.
84. The black-billed gull is an endemic New Zealand species and is regarded as the most threatened gull species in the world. In New Zealand it has the classification of being "in serious decline". Breeding colonies have been observed on the Oreti River over the last 30 years between about 15 km inland from the sea and Coal Hill near the confluence of the Windley River. Ms McLellan stated that the Oreti may support as much as a quarter of the world population of black-billed gulls and some of the largest breeding colonies in the country. These colonies can establish almost anywhere along the length of the river. She considered that the Oreti provided outstanding breeding habitat for this species. We return to this matter later in our discussion of whether the Oreti has or contributes to outstanding features or characteristics.
85. In answer to questions, Ms McLellan gave anecdotal information about other bird species inhabiting the Oreti River, including pied stilt, Canada geese, black-fronted terns and oystercatchers, and noted the vulnerability of several of these species such as black-billed gulls, to threats such as predation.
86. **Mr William Jarvie** has worked in fish and game management for nearly 30 years, the last 17 of them for Southland Fish and Game. His evidence discussed the comparative "success" of didymo in colonising the Oreti and Mararoa Rivers. We discuss this evidence elsewhere.
87. **Mr Ricky Olley and Dr Tobias Bickel** are freshwater ecologists who have qualified from the University of Otago. They co-authored a report titled "Using otolith micro-chemistry to track migration of trout in the Oreti River".⁵
88. The two main conclusions they drew from this study were:
- Adult fish from the upper river had not spent time in the river estuary. However, the origins of all fish sampled from the estuary could be traced back upriver, many to headwater reaches. Once fish entered the estuary, they appeared to stay there.
 - Long-distance migration along the river system is common among brown trout from the Oreti. Some headwater fish had for instance spent part of their life in the Makarewa River, which is a tributary of the lower Oreti.⁶

⁵ Otoliths are found in the inner ears of fish. They show growth rings, somewhat comparable to those found in trees, from which information about fish growth and migration patterns can be determined.

⁶ This appears to be a common life history strategy among brown trout in NZ rivers, as similar migration patterns have been recorded from the Taieri, Clutha and Motueka rivers.

89. Mr Olley and Dr Bickel concluded from this study that any barrier that prevents migration throughout the catchment could have a negative impact on the brown trout population of the river.
90. As explained earlier we also heard from a number of expert anglers who gave evidence on behalf of the applicant.
91. **Mr Ron Todd** is an angling guide based in Te Anau. He was a member of Southland Fish and Game and its antecedent organisation for 14 years. He has fished the Oreti River since he was 13.
92. The things that keep attracting Mr Todd back to the upper Oreti include the peace and solitude, the beauty of the place, the great fish, the friends that you make and the clarity of the water. He also said that the river clears very quickly after a flood, so from a guide's point of view the Oreti is "one handy river to have". Of his overseas clients at least half want to fish the Oreti, and about 5% come to the country specifically to fish the river. The easy access to the river, combined with being able to wade it, make it very special for older fishermen.
93. On his "best day" on the river Mr Todd landed eight trout of between 3.5 and 8 lbs.⁷ He said that on the right day this would be the best brown trout river he has fished for sighting and catching big fish. He has caught three "trophy" brown trout of over 10 lbs in the river.
94. **Mr Stuart Sutherland** is based in Lumsden and has worked for Southland Fish and Game and its predecessor since 1973. He has been involved in all Fish and Game's work on the river for the last 33 years. Based on his experience Mr Sutherland considers the upper Oreti is an "outstanding internationally important brown trout fishery".
95. In the fishing season of 2000/01 Mr Sutherland conducted an angler field survey upstream of Rocky Point. He was on the river for 42 days and interviewed 191 anglers. Of these, 59% were from overseas, 26% from Southland and 15% came from other parts of New Zealand. Of the overseas anglers 27% were from North America and 16% from Australia. Some overseas anglers have bought houses in local villages. Anglers accompanied by fishing guides made up about 10% of the use of the upper river.
96. Asked what drew them to the upper Oreti, survey respondents rated the following characteristics most highly: peace and solitude, undisturbed water (i.e. they are not fishing behind another angler), the ability to spot and fish individual trout, the environment and scenery and the challenge to their skill. Catching large fish and catching several fish rated low. Most anglers said they were satisfied or very satisfied with the experience; only three expressed dissatisfaction.

⁷ Most anglers talk about fish in terms of pounds (lbs) rather than kilograms, so we have largely done the same. A trout of over 10 lbs is regarded as a "trophy fish" by some; others say a trophy fish is over 8 lbs.

97. Asked what has changed since 2000/01 Mr Sutherland considered that the fishery in the lower river may have declined, but that it has improved in the upper river due to greater numbers of large fish being present. Numbers of overseas anglers had dropped off following the 9/11 terrorist attack in 2001, but were now increasing again. In his view anglers were “getting used to didymo” and were now returning to their old haunts.
98. **Mr Dean Bell** has been a fishing guide since 1994. On average he guides anglers on the upper Oreti 18 days per season. He considered he had more “fishing knowledge” of the upper river, where he knows every pool, riffle and run, than anyone else. One of the reasons overseas anglers are attracted to New Zealand is that there are no aerial predators, so fish can feed openly during the day.
99. Mr Bell has fished widely around New Zealand and indeed the world. No other New Zealand trout fishery with trophy fish present has such easy access as the Oreti – other rivers either must be accessed via long tramps or by helicopter. The only places he knew of internationally where easily accessible trout of such large size are found are in three modified environments, two in North America and one in Mexico.
100. One of the characteristics of the upper Oreti is the relative lack of fish under 2 kg. He said that his guided anglers spent 16% of their time on the upper Oreti, but it provided 76% of the trout over 8 lbs they caught. Catch rates are lower than on other rivers, but according to Mr Bell the challenge is greater on the Oreti, where fishing must be “perfect” if fish are to be caught. He felt that the Oreti River is the best single test of an angler’s ability anywhere in the lower South Island, and that its presence is paramount to his successful guiding business. Fish and Game were commended for its “catch-and-release” and “foot only” policies, which he said had enhanced the experience for anglers able to hike to the river.
101. Mr Bell considered the optimum flow for angling was between 9 and 12 m³/s. At flows below 6 m³/s fish became very wary and difficult to catch, while above 15 m³/s the river is usually discoloured and not fishable. He did note, however, that the river clears very rapidly after a moderate flood following say 20mm of rain, which is not the case in, for example, the Mataura. He attributed this to the lack of any intensive land use in the upper Oreti catchment.
102. Mr Bell takes clients to Weydon Burn early in the season, and to the lower Windley River. He noted the former is now affected by didymo, which he did not consider would become a significant issue in the upper Oreti because of the mobile bed and the frequency of freshes and floods. Asked what he thought were the main risks to the upper river, he cited angling pressure, drought and didymo.
103. **Mr Rob Bowler** is an American fisherman who owns a house in Balfour in Southland. He has written two books on trout fishing, and has fished widely in New Zealand and overseas. He has kept a detailed diary; since 1992 he has visited the Oreti River 147 times, and caught and released 472 trout with an average weight of 6.16 lbs.

104. Mr Bowler ranked the Oreti as the best trout river in the country, followed closely by the Ahuriri and the upper Wairau. He also considered it outranked all the brown trout rivers in North America. Particular challenges in the Oreti include “wily and smart” trophy trout, sight fishing and the difficulties of selecting the right fly for fishing. He said that didymo did detract from the angling experience, but it had not affected the condition of trout.
105. **Mr Brad Kastner** is another American who works as a fishing guide and has fished the Oreti River for four years. He has also fished in Alaska, Russia, Argentina and Mongolia. He said that there is no river in North America that has brown trout fishing offering an experience remotely close to the Oreti, and in New Zealand the only comparable river is the Ahuriri. There are comparable rivers with rainbow trout in Alaska but access is only by floatplane. Rivers in the Rio Grande in South America hold larger brown trout, but access is very difficult and fishing is not by sight.
106. In two days in November 2006 he and a friend landed and released 55 trout, all but 10 over 7 lbs. He has also caught trout in the lower reaches of the Windley River.
107. **Mr Paul Stenning** lives in Invercargill. He has been a Southland Fish and Game councillor since 1998, and has fished widely in Southland since he was a boy.
108. Mr Stenning fishes along the entire length of the Oreti River, but prefers fishing the headwaters. Among the reasons for this are the presence of large fish and the challenge of fishing for them, the clear water and the ability to spot fish, and the “truly beautiful” natural environment. The upper Oreti meets all his criteria as the “perfect river”. As an honorary ranger he has met many anglers from overseas on the upper river, and without exception they rate the river as one of the best in the world to fish for brown trout.
109. In April we heard from **Ms Phillipa Jones**, another lawyer from Anderson Lloyd Lawyers as Ms Baker was not available. Ms Jones told us that the applicant and Environment Southland had met on 13 April following the release of decisions on the Variations 2–4 of the Proposed Regional Freshwater Plan late in March. As a result of that meeting Fish and Game had agreed to amend the specific protection sought in the application, as some of the concerns of Fish and Game had been met by the decisions on the variations to the regional plan. She provided an amended draft order for our consideration, which we discuss at some length later.
110. **Mr Rodway** provided supplementary evidence. He commented particularly on comparisons in national angling survey information presented by Dr Jellyman and Mr Unwin, and discussed the values of tributaries for which protection is sought by the water conservation order. We need not detail that evidence here as we discuss these matters later.

3.2 Submitters in Support of the Application

111. We heard from five submitters who supported the application, and one neutral submitter, at the January hearing.
112. Royal Forest and Bird Protection Society were represented by **Ms Sue Maturin**, an experienced field officer of the Society, supported by evidence from **Mr Lloyd Esler**, an experienced Southland naturalist and teacher. Ms Maturin presented wide-ranging arguments in favour of a water conservation order to protect what she saw as the outstanding amenity and intrinsic values of the Oreti River. She and Mr Esler provided evidence about the value of the river as habitat for significant populations of a number of native species, including bird species that are considered to be nationally and internationally threatened with extinction, such as black-billed gulls, black-fronted and Caspian terns, and banded dotterels. She considered that Environment Southland's current and proposed statutory plans would not protect the existing river flow and form, or water quantity and quality to the extent necessary to maintain the outstanding characteristics of the Oreti. Mr Esler backed up these assertions with a summary of natural values of the river to sections of the community other than fishers, for example the many school children and naturalists he leads on trips to the river.
113. **Mr Michael Skerrett** is the Manager of Te Ao Marama which represents the resource management interests of the four Ngāi Tahu papatipu rūnanga o Murihiku – Te Rūnaka o Awarua, Hokonui Rūnanga Inc Society, Te Rūnaka o Oraka-Aparima and Te Rūnaka o Waihopai. Mr Skerrett explained a number of the cultural values associated with the Oreti River, including its value as a major inland trail, as habitat for many native fish, bird and plant species that are regarded as taonga species, as a pounamu trade route, and as a source of mahinga kai and other cultural materials. This use of the catchment is evidenced by archaeological evidence that remains. The significance of such sites was also outlined by Mr Skerrett. He concluded that a water conservation order would protect Ngāi Tahu's cultural, spiritual, historical and traditional association with the catchment.
114. **Mr Niall Watson** is the manager of the Otago Fish and Game Council. He has worked in fish and game management for over 25 years.
115. Mr Watson said that the Oreti River is "part of the spectrum of angling opportunity" available to many Otago anglers within a reasonable travel distance. This recreational angling opportunity spectrum falls into five categories: urban, rural, natural, back country and remote. Features of back country or remote fisheries include largely unmodified landscapes, relatively low rates of encounters with other anglers, good catch rates and/or size of fish, locations distant from population centres and limited access.
116. He considered the Oreti River to be an outstanding back-country fishery, and noted that it is managed alongside two Otago back-country fisheries, namely the Caples and Greenstone, details of which are described elsewhere in our report.

117. **Mr Les Ladbroke** is a local angler, who also spoke on behalf of submitters Dave Harris and Adam Cowie. He said the Oreti River is a very important fishery for both local and overseas anglers. He supported the application as he considered that while the Water Plan went a long way, he didn't feel it "had enough teeth" to protect flows and did not prevent damming.
118. **Mr John Purey-Cust** is a retired forester who lives in Gore and has been a fisherman for over 60 years. He thought it was regrettable that a water conservation order had to be applied for, as he thought the river's value should have been recognised in local authority plans. Like others, Mr Purey-Cust highlighted the river's importance for tourism, and said that the application "spoke for the Oreti River and all of Southland."
119. Mr Purey-Cust said opposition to the order came from only two quarters – local authorities defending their territory, and sectional interests who want to use the river for gravel supply or irrigation. He urged that we grant the application.
120. In April we also heard a submission in support of the application from Mr **Ted Loose, Mrs Mariana Loose and Mr Ted Tapper**, who appeared on behalf of a number of submitters. Both Mr Loose and Mr Tapper were Environment Southland councillors, but were appearing as individuals supporting the application.
121. Mr Tapper, who "retired 11 years ago to go fishing", said that the upper Oreti is a world-class brown trout fishery, which draws anglers from all over the world. He emphasised the importance of maintaining fish passage from the lower estuarine reaches of the river to the headwaters. He has fished in many parts of the world, and regards the Oreti River extremely highly. In his experience fishing in other countries, such as Iceland, didymo will not establish in rivers which carry significant floods and which have mobile beds.
122. Mr Loose has lived in northern Southland for 45 years, He considered that a conservation order was necessary as he did not think the RMA, or the provisions of the Water Plan, would protect the river. The council's goal of beating non-point source pollution by 2015 cannot be achieved, according to Mr Loose, unless the upper catchments are protected.
123. Mrs Loose is a JP and a member of Ngāi Tahu. She explained how Māori view creation and the linkages between their spiritual values and how Māori view natural systems, such as the Oreti River.

3.3 Neutral Submitters

124. At the January hearing, Mr **Craig Evans** spoke on behalf of the **Oreti Irrigation Water Users Group**. Mr Evans is a senior hydrologist with MWH New Zealand Ltd based in Dunedin, and has 16 years' relevant experience. He has been involved in work in Southland since 2001.
125. The water users group comprises the eight major irrigators downstream of Mossburn. These users have a total groundwater allocation of over 8.8 million cubic metres of water per year if water were taken for 180 days per year. In answer to a question, however, Mr Evans said most users would only take water for about 10–20 days per annum.
126. Most of these consents are for a term of 10 years, and expire from 2012 on. One is for a take that is of groundwater with a direct hydraulic linkage to the Oreti River, but the other seven takes are from the confined Lumsden and North Range aquifers with no known hydraulic link to the river, apart from sharing the same recharge area. Water management guidelines prepared by Environment Southland indicate that no further water will be allocated from the North Range Aquifer at present, while members of the group hold most of the allocation from the Lumsden aquifer. The users wish to ensure that their consents will be able to be “renewed” once they do expire, and do not want any water conservation order to affect that.
127. The water users group did not oppose a prohibition of damming on the river, but were concerned about a possible provision to protect fish passage. This is in part because of difficulties caused in the management of the Mataura River by the provisions of the water conservation order made there in 1997. They sought clear and unambiguous wording in any order made.
128. **Mr Shane Roberts**, a resource management planner employed by Opus International Consultants, gave evidence to the April hearing on behalf of **Transit New Zealand**. In Southland, Opus is Transit's network management consultant.
129. The State Highway network in Southland closely follows parts of the Oreti River. There are crossings of the river at Wallacetown, Winton, Lumsden and Mossburn; additionally SH 94 crosses Weydon Burn and its tributaries at several points north of Mossburn. Regular maintenance and occasional repair works are necessary at these bridges. This includes removing debris and accumulated gravel following floods, installation and maintenance of protective rip rap and gabion baskets, and repairs to the base of piers.
130. Transit sought that any water conservation order made, provides for protection and maintenance of state highway assets. Mr Roberts noted that the amended draft order circulated to us in April differed from the original application and now makes provision for the activities that Transit could foreseeably undertake. We have included those provisions in the draft order.

3.4 Submitters Opposing the Application

131. In April we heard from five groups who opposed the application. All bar Environment Southland had prepared at least part of their substantive evidence prior to the hearing at a time when they were unaware of the “agreement” reached on 13 April between the regional council and the applicant.
132. Environment Southland was represented by their solicitor, **Mr Barry Slowley**, and a Senior Resource Planner **Ms Rachael Millar**.
133. Mr Slowley said that, as a result of the understanding reached with Fish and Game on 13 April, Environment Southland would not be leading technical evidence opposing the way the application had been drafted. The regional council never intended to lead evidence contesting that the Oreti River had outstanding characteristics; rather their view was that this was for the applicant to establish.
134. The council was particularly concerned that a water conservation order is, in the words of the Environment Court in the Rangitata case, “*a crude and very expensive tool in an otherwise relatively sophisticated toolbox*”. He noted particularly that a water conservation order is not responsive to changes in technology or a greater understanding of water resources.
135. The council’s concerns about water conservation orders stem particularly from the wording of the Mataura order, which was made in 1997. Since that time dairying has expanded greatly north of Gore, with demands for large water takes, particularly from hydraulically linked groundwater. The order on the Mataura has meant the river is now managed differently from others in Southland through the Water Plan. A recent Environment Court case was described that Mr Slowley claimed showed the difficulties of interpreting the Mataura order given the more recent development of water resources in that catchment. Mr Slowley contrasted the process for making a water conservation order with the extensive expert and public input into the Water Plan, and questioned the utility of another level of regulation.
136. In answer to a question, Mr Slowley agreed that Environment Southland’s position could be summarised in three points.
- It is up to the applicant to show that the Oreti River qualifies for protection by a water conservation order.
 - Even if it does qualify, the Tribunal needs to carefully consider s207 matters, and particularly the provisions of the Plan.
 - If an order is to be made, then it should be along the lines of the amended application.
137. Ms Millar has been responsible for coordinating all staff work on the council’s Water Plan and its variations. She holds a degree in resource studies and has lived most of her life in Southland.

138. Ms Millar did not duplicate material covered by Ms Taylor, who was the planning witness for the applicant, but did disagree with her on two matters. First, she noted that both the Regional Solid Waste Management Plan and the Regional Effluent Land Application Plan were relevant to the application in so far as any discharge permit applications cannot be contrary to a water conservation order. Second, she noted that s207 of the Act does give weighting to a proposed plan, such as the Regional Fresh Water Plan.
139. We discuss the provisions of the Plan in our evaluation of s207 matters, so we need not detail the balance of Ms Millar's evidence here.
140. Two witnesses gave evidence opposing the application on behalf of the Southland province of **Federated Farmers**. They were **Ms Fiona Young**, an environmental scientist employed by Sinclair Knight Merz who used to work as a senior policy analyst for Federated Farmers, and **Mr David Rose**, the president of the Southland province. In Southland the federation has about 1,400 members and represents the majority of landholders in the region.
141. Ms Young said that water conservation orders by their nature do not provide for the community to make decisions. Federated Farmers opposed the original application and they also opposed the amended application put forward on 19 April. She reminded us of the provisions of s207 of the Act in relation to "the needs of primary and secondary industry and of the community". Ongoing access to the river for stock water is important.
142. A perceived lack of consultation by the applicant was criticised. Ms Young compared this with the extensive consultation carried out by Environment Southland over the Regional Water Plan. She said that as a result of this, "landowners in general support the practical effects-based approach that the Water Plan has taken to achieving water quality and quantity outcomes in the Oreti catchment". She pointed out that some of the provisions of the water conservation sought would duplicate, or nearly duplicate, those in the Water Plan.
143. Mr Rose runs a sheep farm of about 200 ha on the banks of the Oreti River. He has lived in the area all his life, chaired the Oreti River Liaison Committee for over eight years and has coordinated submissions on the Water Plan since the process started in 1999. He expressed frustration that after all the work carried out on the Water Plan, the outcomes reached may be overruled by the water conservation order.
144. Mr Rose had contacted farmers along 27 km of river frontage, all but two of them upstream of Rocky Point. He said there are generally good relationships between anglers and farmers, with many of the latter giving permission for access over their land.
145. Some farmers commented that the berm land was full of gorse and broom, and that the river contains didymo. Fertiliser inputs occur well back from

waterways, and farmers support the requirement for a three-metre buffer for intensive winter grazing being promoted by Environment Southland.⁸

146. Mr Rose also read a statement of behalf of the Butson family (who were not submitters) who farm Mt Nicholas Station. The station, which is Crown leasehold, covers 100,000 acres. This includes 30,000 acres of the headwaters of the Oreti River, with 22 km of boundary with both branches of the head of the river. These lands provide grazing for a large number of stock, being grazed at times by merino sheep and beef cattle, and used for calving.
147. There is no fencing so stock have access to the river, but numbers are kept low to minimise impacts on the river. Care is taken not to spread fertiliser close to water. Anglers have open access to the property.
148. The Butsons concluded by saying that they considered they have achieved a sustainable balance between environmental values and their farming practices. They cited the quality of the fishery and the spectacular scenic values as testament to this.
149. **Mr Grant Hubber** gave evidence on behalf of the **Oreti River Liaison Group**. This is a consultative/advisory group that works alongside the regional council and represents landowners along the length of the river. The liaison group influences the budget for river control works, and is actively involved in commenting on proposed works programmes and resource consent applications.
150. The liaison group totally opposes the application for a water conservation order, and asked that we recommend it be declined. Mr Hubber contrasted the extensive consultation undertaken by the regional council during the preparation of its Water Plan with that undertaken about the proposed conservation order, which he asserted has landowners, particularly in the upper reaches, feeling “left out of the process”. He said the proposed order would be another cost imposed on the community for no benefit whatsoever, and noted that the protection sought was little over and above that provided by the Water Plan.
151. **Mr Peter Lawson** owns a farm of some 1,250 ha on the left bank of the Oreti River starting about 3 km upstream of Rocky Point. He runs sheep and beef, and does not irrigate his land. He said the argument put forward by Fish and Game that the river is in its natural state is strongly flawed because of the presence of noxious plants, pests and now didymo.
152. Farming is carried out in conjunction with high conservation values. Among other things Mr Lawson has fenced off the river boundary, controls pests and has tight controls on fertiliser application. Ms Rachel McLellan has studied a black-billed gull colony on his property, and pest control is carried out to protect gull colonies.

⁸ This is through Proposed Variation 5 to the Regional Freshwater Plan, but decisions on submissions to this provision have yet to be notified.

153. Anglers are allowed access across his property. Like some other submitters Mr Lawson criticised the lack of consultation by Fish and Game about the water conservation order application, and contrasted this to the Water Plan, which is said was a “living document administered by a democratically elected body”. He asked us to reject the application.
154. **Mr Andrew Morris** owns a farm on the true left bank of the upper Oreti downstream of the confluence of the Windley River, and immediately upstream of Mr Lawson’s property. The farm covers 980 ha, and runs sheep, deer and beef cattle. Mr Morris said that the property has been developed to its potential, and most work now is maintenance.
155. Mr Morris said that it was hard to see “outstanding values” associated with the river when it is covered in gorse, which he considered Fish and Game should control. He did not see the need for a water conservation order. Anglers are allowed access over his property. He owns land beside the lower reaches of the Windley River, which he said lies in “a beautiful valley”, but noted that didymo is already present and that, as the river is relatively stable, it is likely to become more infested.
156. We asked if any resource consents are needed from the regional council to manage his property. He said that a consent had been sought to maintain the Oreti River in its channel to prevent erosion on his and his neighbours’ properties, but he said this had been opposed by Fish and Game and to his knowledge no consent had been granted.⁹
157. **Mr Brydon Hughes** gave evidence on behalf of **Landcorp Farming Limited**. Mr Hughes is presently a senior hydrogeologist at Sinclair Knight Merz. Prior to that he was employed by Environment Southland for six years as an environmental scientist where he specialised on groundwater in the region.
158. Landcorp owns about 7,000 ha on the true right (west) bank of the Oreti catchment. This is about 11% of the catchment upstream of Mossburn, with frontages of 9.8 km along Weydon Burn and 22.5 km of the Oreti River (although much of the land immediately beside the river is a marginal strip managed by DOC). The company has a commitment to sustainable resource management through a “balanced scorecard”.
159. Mr Hughes considered that the variations to the Water Plan are a more appropriate mechanism to achieve outcomes for the community as a whole. He compared the provisions sought in the amended order with those in the plan, and concluded that they were little different. He said water conservation orders are a restrictive instrument that are not capable of responding to changing conditions in a timely way, as they are difficult to change. This contrasts with regional plans, which are subject to regular review and so are

⁹ This is not actually the case. Mr Slowley provided to us a resource consent granted to the Catchment Management Division of Environment Southland in May 2006 for a term of six years allowing works associated with a realignment channel to take place.

more flexible. For these reasons, Landcorp requested that the application be declined in its entirety.

3.5 Other Submitters

160. Many parties who made submissions to the original application did not appear at the hearing.
161. The large majority of those submitters supported the making of an order. In essence, these submitters asserted that the Oreti River, particularly the upper river, is an outstanding brown trout fishery. A significant number were from overseas, and either owned property in Southland or regularly visited the region to fish for trout. Apart from angling amenity, the main reasons these submitters gave for supporting the application included scenic values, and to preserve the peace and serenity of the area and protect it from development.
162. We think the submission points that they made were all well covered by the witnesses for the applicant, or submitters in support of the application.
163. Ms Baker told us in January that as the submissions provide overwhelming support for the protection of the Oreti River, this “represents an expression of community needs as perceived by those who comprise the community”. We do not entirely concur with this interpretation. While these submissions no doubt represent the views of significant sections of the Southland community, they do not represent the views of the entire community. A substantial proportion of those submissions were from overseas, and we have no doubt that Fish and Game strongly encouraged their members to make submissions on the application. We also note that the two local authorities who do represent the entire community through the electoral system – Environment Southland and the Southland District Council – both opposed the application.
164. Of the 13 submitters who originally opposed the application seven did not appear at the hearing. One of these was Southland District Council, who had told us in January that they would appear at the second stage of the hearing but did not do so. The district council’s main concerns about the application included that:
 - it did not provide sufficient evidence that that the Oreti River had or contributed to outstanding characteristics in accordance with s199 of the Act;
 - there was insufficient evidence of any threats to the river such that a conservation order was necessary;
 - alternative options to a water conservation order were not assessed in the application; and
 - there had been insufficient consultation with the local community.

165. Other submitters who did not appear at the hearing were opposed to the application for reasons such as:

- The water conservation order was unnecessary as the provisions of the Water Plan and its proposed variations sufficiently protected the values sought to be protected by the order.
- The consultation undertaken by the applicant was flawed and insufficient, particularly compared with the robust consultation process undertaken over a long time by Environment Southland regarding the Water Plan.
- The order sought was inflexible and did not allow for potential development options in the future.

4 Part 9 of the RMA

4.1 The Relevant Case Law

166. Part 9 of the RMA sets out the procedure for the processing of applications for water conservation orders, and what matters we have to consider in making our report on the present application.
167. We need not detail the process issues here. Essentially upon receiving an application to make or vary a Water Conservation Order, the Minister must appoint a Special Tribunal under s203 of the RMA to undertake an inquiry and conduct a hearing. That Special Tribunal then prepares a report, as we have done here, which makes a recommendation on the application (s208). This recommendation can be appealed to the Environment Court, who can recommend to the Minister that our recommendation be rejected, or accepted with or without modifications (s213). The Minister can make a water conservation order through an Order in Council (s214), or alternatively decline to make one (s215). Any order made is binding on the consent authority (s217) but does not affect or restrict any resource consent granted, or lawful established use in respect of the water body before the order was made.
168. In making our decision we had the benefit of an Environment Court decision by Judge Jackson regarding an appeal to the Special Tribunal's recommendations on an application for a water conservation order for the Rangitata River.¹⁰ This decision provides a comprehensive overview of the relevant sections of Part 9 of the Act, which we found very helpful.
169. In saying this we note, however, that:
- (a) In its middle and lower reaches the Rangitata is a much modified river compared with the Oreti, with large takes for irrigation combined with power generation; and so the considerations and competing interests there, were much more complex than they are for the Oreti River.
 - (b) The Court's decision focused primarily on the conditions on which an order should be granted, as there was no serious dispute that the river had outstanding amenity and intrinsic values.
170. The Environment Court largely dismissed comparisons between the provisions made for "water conservation order and notices" under the repealed Water and Soil Conservation Act ("WSCA") 1967 and the provisions of Part 9 of the Resource Management Act. The Court commented at paragraph 32 that:

¹⁰ Rangitata South Irrigation Ltd v NZ and South Island Fish and Game Council. C109/04.

“substantially and procedurally the differences between [them] are so great that we consider that it is not useful, and indeed probably misleading, to consider the former except as some guide to the interpretation of identical words or phrases in the latter”.

The Court noted that the main substantive difference is that the purpose of an order is now influenced by consideration of the Purpose and Principles (Part 2) of the RMA, and there was no equivalent of this in the Water and Soil Conservation Act. Of the many procedural differences, the most important is that a Special Tribunal is appointed to conduct a hearing and make a report.

171. The Judge in the Rangitata case later at paragraph 58 qualified the above quote when he made the following comment:

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.

172. The same approach has been reinforced in other case law. If protection through a water conservation order is sought for a water body, and that water body is found to have outstanding values, then there is a presumption in favour of protection. For instance, in the same case cited above Justice Bisson said that *“the sustaining of the amenity afforded by the waters in their natural state must have priority”*; and 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”*.

173. In the Rangitata case the Special Tribunal in paragraph 61 set out its decision-making framework as follows:

“The tribunal first evaluated which, if any of the characteristics, values or purposes able to be protected or preserved by a water conservation order were outstanding (Part III). We also considered whether or not the waters are in their natural state (Part II). During this part of our deliberations we did not consider whether or how to recognise and provide for protection for any features that we found to be outstanding.

Having concluded that there were outstanding features, the tribunal assessed the needs of primary and secondary industry and reviewed relevant plans and policies (Part IV and Part V).

Next the conditions required to protect the outstanding features were determined and then allowance given for industry and community needs

that could be met while protecting the outstanding features (Part VII). At this point, the tribunal decided that a Water Conservation Order was necessary to protect or preserve the outstanding features and a draft was prepared. (Part VIII and Appendix 1)."

174. The Environment Court held that the Special Tribunal "*generally applied the correct approach required by Part 9 of the Act*". The Court, however, used a somewhat different approach, and in paragraph 55 of their decision set out the issues that it considered should be addressed in evaluating an application for a water conservation order:
- a. *whether outstanding characteristics exist in the river;*
 - b. *if so, whether those characteristics are threatened by potential changes to flow, water quality, temperature, etc;*
 - c. *whether an order is necessary to sustain the outstanding characteristics, having regard to;*
 - d. *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.*
175. We had some concerns about the applicability of step (b) of these considerations. This is because there are currently no readily identifiable threats to the outstanding values of the Oreti River that can be controlled by the provisions of a water conservation order. We return to this matter later in this decision.
176. Section 199 of the RMA sets out the purpose of a water conservation order, which is to "recognise and sustain outstanding amenity or intrinsic characteristics" of waters. This can involve either preservation of outstanding waters that are in their natural state, or the protection of outstanding waters that are not in their natural state but which are still considered outstanding.
177. At paragraph 30 of the Environment Court's decision in the Rangitata case, the court said in relation to s199:
- "Collating the various appropriate definitions we conclude that the meaning of s199 which is most relevant here is that the purpose of a water conservation order is to restrict the regional council's powers to the extent necessary for the natural but not pristine characteristics of the river (including tributaries, wetlands within its catchment and hydraulically connected groundwater) which are out of the ordinary on a national basis to be maintained in their current quality and quantity."*
178. As Ms Baker pointed out to us, the High Court in *New Zealand Paper Mills Ltd v Otago Acclimatisation Society*¹¹ (decided under the WSCA) considered

¹¹ [1995] NZRMA 155

whether a threat needed to be identified before a water conservation order could be recommended:

“Some time was spent in argument as to whether a Water Conservation Order 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 protection or preservation in accordance with s20D(2) and 20B(6) of the [WSCA]. Those issues were issues of fact for the [Planning] Tribunal and again I have not been persuaded that any error of law has been made by the Tribunal in its consideration.”

179. The High Court’s decision was that a threat is not required for a water conservation order to be granted. The critical consideration is whether the outstanding characteristics or features are worthy of protection or preservation.
180. While the precise language used in the WSCA and the RMA differs, the scheme for water conservation orders is similar. In the RMA a water conservation order also has no effect on existing use rights.¹²
181. While on a first reading step (b) of the framework used by the Environment Court suggests that potential threats to any outstanding characteristics of the river need to be identified as being likely before making an order, we think a more appropriate consideration is whether a change could potentially threaten those characteristics.
182. Accordingly we think the relevance of considering threats relates more to the conditions to be contained in a water conservation order, rather than whether there should be an order at all. This is consistent with the purpose of water conservation orders prescribed in s199 of the Act. We think that this approach reconciles the High Court’s reasoning in the *NZ Paper Mills* case and the Environment Court’s statement of considerations in the *Rangitata* case.
183. We were also required to consider Part 2 RMA matters. Uniquely in the context of the Act, the purpose of water conservation orders is stated in s199(1) that *“notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order”*
184. In the *Rangitata* case, the Court held that the qualifying words in s199(1):

*“make it clear that not all of Part II is to be ignored, **but only those aspects of Part II that are contrary to the purpose stated in section 199**”* (emphasis added). The Court expanded on this by stating that *“[Section 199] focuses on the protection aspect of the conservation purpose by excluding consideration of matters which are opposite to that*

¹² s217 RMA and s20D(7) WSCA

purpose”, and “in addition to the matters we must have regard to in section 212, we must also consider those provisions of Part II which are not excluded on the facts before us as being contrary to section 199(2) of the Act”.

185. This is the test we have applied in our consideration of Part 2 matters. In saying this we observe that much of Part 2 is actually in accord with the conservation purpose of s199 of the RMA.
186. Section 207 of the Act states that in terms of matters we must consider we must have **particular regard to the purpose of a water conservation order** and the (other) matters set out under s199, but that we also must 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.*
187. We have added the emphasis. We agree with Ms Baker that the Act clearly elevates the purpose of a water conservation order, as outlined in s199, above the matters in s207. This was reinforced by the Environment Court in paragraphs 40–44 of the Rangitata decision.
188. Ms Baker also submitted that under (b) what we must weigh are “needs, and not merely hopes or aspirations for the future, or principled opposition to a statutory instrument that will not in reality affect the reasonable needs of primary or secondary industry or of the community.” We accept that submission also.

4.2 Decision-Making Framework

189. Our review of the relevant case law led us to the following decision-making framework.
190. The first two questions we asked were:
- (a) Whether all or part of the Oreti River provides either outstanding amenity or intrinsic values from waters in their natural state, and if so, what those values are.
 - (b) Where the waters of the Oreti River are not in their natural state, whether there are any amenity or intrinsic values that require protection because they are outstanding.

As with the Rangitata Special Tribunal, in this part of our deliberations we did not consider how to protect any features that we found to be outstanding.

191. In making our assessment as to what amenity or intrinsic values of the river were outstanding, we were also guided by the Environment Court's decision in the Rangitata case, where they cited previous case law under the WSCA:

*“the test as to what is outstanding is a reasonably rigorous one and that to qualify as outstanding a characteristic would need to be **quite out of the ordinary on a national basis**”* (emphasis added by the Court).

192. The Court also accepted Mr Milne's submission that:

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

193. It is relevant insofar as comparisons go that the Mataura River, the catchment immediately to the east of the Oreti River, is protected by a National Water Conservation Order made under the provisions of the WSCA 1967. The Mataura was found to have “outstanding fisheries and angling amenity features”.

194. We next considered the relevant matters under Part 2 of the RMA.

195. We then addressed the relevant provisions under s207. None of these matters outweighed the emphasis placed in Part 9 of the Act on sustaining the outstanding characteristics of the river.

196. Having decided there are outstanding values associated with the Oreti River, we weighed whether they were threatened by potential changes to parameters such as flow and water quality. From this, we determined the conditions in the draft order.

5 Does the Oreti River have Outstanding Values?

197. In this section of our report we systematically evaluate the intrinsic and amenity values of the Oreti River to determine which of these are “outstanding”.
198. It is pertinent to note here that although we consider that relatively few intrinsic or amenity values of the river are outstanding, many of the other values that we appraise here would be protected by the provisions of the water conservation order that we have recommended. For example we consider the native fishery values of the catchment to be significant but not outstanding, but the order we recommend will help protect those native fishery values by retaining flows and providing for passage through the river system.

5.1 Wild and Scenic Values

199. We endeavoured to assess whether the upper Oreti has outstanding wild and scenic values. In saying this we acknowledge that none of us are expert in judging such values, and we heard no real expert evidence that did so. Accordingly our conclusions are primarily subjective.
200. The upper Oreti is certainly a visually impressive valley. Formed by a glacier, it is conspicuously U-shaped, surrounded by mountains that are clad by beech forest at lower altitudes giving way at higher altitudes to sub-alpine vegetation and bare tops. The river itself is visually quite striking, particularly with regard to its classic pool-riffle-run reaches and for its remarkably clear waters. We can well imagine that to a trout angler or other visitor the river and its valley may for very good reason appear to be scenically outstanding. Indeed, many of the anglers who spoke to us said as much.
201. We do not consider that the upper Oreti catchment can be described as “wild”. There are several reasons for this. Much of the upper valley is easily accessible by road. Many of the flats beside the river are farmed, albeit extensively, and the riverbed is in places accessed by grazing stock and encroached upon by introduced weed species such as gorse and broom. The river itself is an unconfined single-thread channel, with no rapids or waterfalls between narrow rock buttresses that make river channels appear “wild”¹³ (the upper Mohaka, Rangitikei and Motu rivers being very good examples).
202. In a comparative context we also consider that the scenic values are nothing particularly out of the ordinary. There are many similar headwater river

¹³ There is one short area at Three Kings where the river flows briefly between rock buttresses.

systems to the east of the main divide of the South Island that in our view have greater wild and scenic values than those of the upper Oreti. Many of these river valleys are already protected in perpetuity by being part of National Parks (good examples being the headwaters of the Waimakariri Catchment in Arthur's Pass National Park, the Travers, D'Urville and Sabine Rivers in Nelson Lakes National Park, and the Greenstone and Caples Rivers in Fiordland National Park).

203. Accordingly we do not find the upper Oreti catchment to have outstanding wild and scenic values as, to quote the Environment Court, it is not in our view "quite out of the ordinary on a national basis".
204. The lower river certainly has no notable scenic values. It is a typical semi-braided river running across the relatively flat Southland Plains. It is like many other similar rivers in the south and east of the South Island.

5.2 Native Fisheries

205. Dr Jellyman provided the substantive evidence on native fisheries values. He said that 14 native fish species, of which 10 are migratory, have been recorded from the river. Two of the migratory species – long-finned eel and giant kokopu – are considered to be in decline nationally. Apart from long-finned eels most migratory species are confined to the lower 50–60 kilometres of the river. Passage to the sea is necessary to maintain populations of migratory fish.
206. The Oreti River provides very important habitat for long-finned eel and several galaxid species, two of which are endemic to Southland. Dr Jellyman described the Oreti's characteristics that offer long inland range penetration and unimpeded upstream access (the best in Southland), both very important for the long-finned eel in particular, and probably also for the migratory galaxid species.
207. Upstream reaches are dominated by relatively high densities of non-migratory southern flathead galaxias. Dr Jellyman said their food supply could potentially be threatened by didymo.
208. Because the information about freshwater fish is incomplete, and because long-finned eel and some of the galaxid species are so widely distributed, it is difficult to be definitive about the national significance of the Oreti River's habitat values for freshwater species. However, there are no known features of the native fish populations of the river that we consider make it "outstanding" in a national context. While both long-finned eels and giant kokopu are "in decline", both species are widespread throughout much of the country. The Oreti is important as a habitat for these species and others, but this does not make it outstanding.
209. Mr Skerrett explained the significance of native fish species to Ngāi Tahu who regard them as a taonga. This cultural significance has also been recognised by the Crown in Schedule 97 of the Ngāi Tahu Claims Settlement Act 1998 which lists taonga species. Our conclusion is that, at the very least,

the quality of the Oreti River as habitat for long-finned eel strongly contributes to the river's outstanding values in accordance with tikanga Māori, which we discuss later.

5.3 The Brown Trout Fishery

210. The nub of the applicant's case was that the brown trout fishery, and the associated recreational opportunities that it provides, are outstanding and so merit protection by a water conservation order. We agree on both counts for the reasons now discussed.

5.3.1 The Comparative Value of the Brown Trout Fishery

211. We have already summarised compelling evidence that both the size and numbers of brown trout in the upper Oreti make it exceptional on a national basis. In particular, the average size of brown trout, at just over 6 lbs, is over 10% greater than in ten other highly valued South Island headwater fisheries studied by NIWA in 1989–92.¹⁴ The numbers of large trout now being recorded, at some 30 per kilometre, make the upper river one of the most productive trout fisheries nationally that are not fed by a lake or springs.
212. Evidence was also provided that trout densities and biomass in the upper river have increased nearly four-fold in the last 15 years or so. This was attributed in large part to the “catch-and-release policy” imposed by Southland Fish and Game in the early 1990s. While we have no quantitative evidence to support this assertion, it seems probable that the policy has been an important factor in the recorded increase.
213. Some of the submitters who opposed the application questioned the value of the brown trout fishery of the upper Oreti, saying for instance that while the fishery was good it was not exceptional for Southland. No evidence was led to lend any significant substance to this view.
214. Referring back to the case law, the Environment Court concluded “*that to qualify as outstanding a characteristic would need to be quite out of the ordinary on a national basis.*” We think that this is clearly the case for the upper Oreti. Both the average size of the brown trout present, and their numbers and biomass, place the river quite out of the ordinary nationally. Accordingly, we find that the upper Oreti does support outstanding habitat for brown trout, and as such qualifies for protection by a water conservation order.

¹⁴ While this study only compared South Island rivers, we suspect the comparative results would be no different if North Island headwater brown trout fisheries were included. This is because generally North Island rivers do not sustain populations of large brown trout as their waters are on average too warm. Rather, headwater fisheries are dominated by rainbow trout, sometimes supplemented by smaller numbers of brown trout.

215. Both the original and amended applications also sought protection of named tributaries of the upper Oreti. These included the Weydon Burn, the Windley River and all other tributaries upstream of a point near Lincoln Hill.
216. We consider that all these tributaries contribute to the outstanding brown trout fishery. In particular we note that shallow groundwater and small stream flows are very important for maintaining flows and water quality in the river, and that the lower reaches of the Windley River hold some large trout.
217. We carefully considered whether the above reasoning also applied to the Weydon Burn, for which the evidence was initially less clear. This catchment enters from the west further downstream of the other significant headwater tributaries, and much of it is farmed. The stream does hold some brown trout, but is relatively stable and already affected by didymo.
218. In his second brief of evidence, Mr Rodway presented information from nine electric fishing surveys carried out in Weydon Burn and a tributary, Starvation Creek, between 1980 and 1997. These showed often high numbers of juvenile brown trout, resident galaxids, bullies and long-finned eels in both streams. Mr Rodway also said there are some resident brown trout in deep pools in the lower reaches, and that the stream is an important trout spawning and juvenile rearing habitat.
219. We have decided that Weydon Burn contributes sufficiently to the outstanding brown trout fishery of the Oreti River to merit protection by a water conservation order. This is primarily because of its value as trout spawning habitat and as a nursery for juvenile trout.

5.3.2 The Value of the Fishery to Anglers

220. In broad terms we heard two streams of evidence from witnesses for the applicant about the value of the brown trout fishery of the upper Oreti to anglers. Mr Unwin put the values of the Oreti River in a national context using national survey data that ranked the Oreti fishery in comparison with others around the country. Individual anglers spoke, often passionately, about what makes the upper Oreti special for them. We heard relatively little evidence, however, about the angling amenity of the river downstream of Rocky Point.
221. As we have already outlined in summarising Mr Unwin's evidence, angling participation rates are highest in the lower South Island, and in Southland in particular. The two national angling surveys carried out for Fish and Game in 1994–96 showed that of the 152,900–157,400 angling days in the Southland region, about a third were spent on the “world class” Mataura River, 16-20% of days were spent on lake fisheries, and 13–18% of days were spent on the Oreti River. This represents 20,600–27,200 angler days per year.
222. Nationally the Oreti River is well established as New Zealand's third most heavily fished trout river, and is headed as a trout fishery only by the internationally renowned Mataura and Tongariro Rivers. It was also the seventh most heavily fished river nationally, with others ranking more highly

being the major Chinook salmon rivers of Canterbury – the Waimakariri, Waitaki and Rakaia Rivers – and the Clutha River.

223. The estimated use of the upper Oreti in 2001/02 was 2,700 plus or minus 800 anglers per year. This estimate, based on a survey of fishing licence holders in New Zealand, very likely underestimates the contribution made by overseas anglers who were not included in the survey and who are about 12 times more likely to fish the upper Oreti than their New Zealand counterparts. This was supported by the evidence of Mr Sutherland, who during an extensive survey of the river in 2000/01 spoke to 191 individuals, of whom 59% were visiting from overseas.
224. The upper Oreti ranks 10th for usage of the 218 back country and headwater fisheries nationally. Its use is very similar the Ahuriri, which is already protected by a National Water Conservation Order (for its wildlife habitat as well as fisheries values). The ranking is likely to be higher if overseas anglers are taken into account, as they are known to favour high-quality back-country fisheries, such as provided by the Greenstone, Caples, Ahuriri and Oreti.
225. We have summarised the evidence of those anglers and fishing guides who spoke about why they rate the upper Oreti so highly. The characteristics that they spoke so enthusiastically of include:
- The peace and solitude of the area, along with the scenic qualities of the environment and the relatively low numbers of anglers present.
 - The presence of substantial numbers of large brown trout, including trophy fish.
 - The extremely clear water, associated with being able to spot, stalk and fish to individual fish.
 - Relatively easy access to and along the upper river.
226. The Southland and Otago Fish and Game regions are blessed with some very highly rated trout fisheries, of which the Oreti River is one. Other highly rated rivers include:
- The Mataura River immediately to the east. It is protected by a National Water Conservation Order made in 1997. The river holds only brown trout, which are much smaller on average than in the Oreti, but provides high-quality angling along much of its length. It is the most heavily fished brown trout river in the country.
 - The Mararoa River immediately to the west of the Oreti has been badly affected in its upper reaches by didymo. According to Mr Rodway it remains a good trout fishery, mainly for rainbow trout, below about Key Bridge.
 - The Greenstone and Caples rivers, which form a tributary entering the south west of Lake Wakatipu. Both hold predominantly rainbow trout, access is by foot and the rivers are true wilderness fisheries, being much

more remote than the Oreti. A ballot system is in place. Some witnesses said the fishery has declined in recent years.

- The Eglinton River which runs alongside State Highway 94 north of Te Anau. Access is quite easy, and the river contains mainly brown trout with some rainbow trout. The river is usually clear, and to use Mr Bell's words, has "scenic grandeur".
- The Waiau River, which is the outlet of Lake Manapouri. The river is highly rated but access is limited and the river cannot be waded.

227. On a national basis we heard evidence from witnesses such as Mr Bowler and Mr Kastner that the river most comparable with the Oreti is the Ahuriri.

228. We also heard that the Oreti River ranks highly on an international basis. Several anglers with wide experience of fishing rivers in some of the more remote and challenging parts of the world said there was no brown trout river that matched their experience of the upper Oreti.

229. In her closing submissions Ms Baker also submitted that there are economic reasons for the Oreti River to be protected, saying it is logical to assume it receives a significant proportion of the "fishing dollar" spent nationally. While this may be a reasonable assumption, no expert evidence was provided on this matter and so we make no finding about it.

230. In conclusion, we find the weight of evidence strongly supports the applicant's assertion that the upper Oreti provides outstanding angling amenity as a brown trout fishery. The river has a national and international reputation as a challenge to skilled anglers, providing very large fish that can be spotted and fished to.

231. The evidence also indicates to us that the entire Oreti River brown trout fishery is outstanding in a national context. While it is the value of the headwater fishery that was strongly emphasised by the applicant and their supporters, the whole river undoubtedly supports a highly valued trout fishery, as indicated by its status as the third most popular trout fishery nationally. However, evidence about angling amenity focused on the upper river above Rocky Point, and we have insufficient evidence to determine if the entire river provides outstanding angling amenity.

5.3.3 The Extent to Which the Fishery is Affected by *Didymo*

232. The impact of the recently introduced diatom *Didymosphenia geminata* (didymo) on the outstanding angling amenity of the upper Oreti was discussed by several witnesses, most notably Mr Jarvie, and we asked questions of a number of others. This is because we wanted to ascertain the extent to which the outstanding brown trout habitat and the outstanding angling amenity could be adversely affected or degraded by didymo.
233. First recorded in New Zealand in 2004 in the Mararoa River, the catchment immediately to the east of the Oreti River, didymo has now been recorded in over 50 South Island rivers. Further incursions are being recorded regularly. Didymo has been present in the Oreti since October 2005.
234. We asked a number of witnesses for the applicant and submitters how didymo affected the angling experience in the upper Oreti. A typical answer was given by Mr Todd, who said that it affected the angling experience, but not the catch rate. Overseas anglers, particularly those from the USA where didymo has become a major problem, were particularly sensitive to its presence.
235. In early stages of colonisation, the microscopic diatom cannot be detected with the naked eye. Didymo aggregations grow rapidly, however, and at their worst, form dense brown mats up to 20 cm thick in the beds of the rivers; these are aesthetically disgusting, and reduce habitat for the benthic invertebrates on which trout (and many native fish) predominantly feed. At such levels of infestation didymo could affect trout growth rates and carrying capacity, affect the angling experience and success by fouling gear and reducing aesthetic values, and potentially affect water quality parameters such as pH and dissolved oxygen levels.
236. Unlike many other algae, notably filamentous green algae, didymo does not need significant levels of plant nutrients present in the water to form dense growths. This is part of the reason it has been so “successful” in colonising pristine headwater rivers, which generally have very good water quality, with low levels of nutrients present. The Oreti is one such river. According to Mr Sutherland the Oreti does occasionally have filamentous green algae growths during spring, but these are quickly removed by floods or freshes.
237. Like other algae, didymo is sloughed off its substrate during high flows. In broad terms, the more stable the substrate and the more stable the flow, the greater the potential for didymo to form the large mats that are so degrading of natural habitat values. This is because stable substrates do not become mobile during freshes and moderate floods, and is why didymo has caused the greatest concern in rivers with stable, strongly embedded substrates. Notable examples include the Mararoa, Clutha, lower Waitaki and upper Buller Rivers. All these river catchments are at least part-fed by lakes and so flows tend to be relatively stable and the substrate becomes very embedded. In two cases – the lower Waitaki and the Clutha – flows are also regulated by

hydro-electric power schemes and so floods occur much less frequently than they would if these rivers were unmodified.

238. Fortuitously the upper Oreti does not have a stable bed. Rather it is the opposite – the bed comprises largely cobbles that would move easily during freshes and floods. Mr Jarvie told us that didymo did form extensive cover in a number of reaches of the upper Oreti during extended periods of stable low flows in 2005 and 2006. However, in January 2007 the riverbed was largely devoid of didymo (at least at levels discernable to the naked eye) due to a series of minor to medium flood events that occurred between August and November 2006. For instance at Centre Hill in the upper catchment, visual assessments of didymo showed that it decreased from covering 60–70% of the bed in winter 2006 to covering less than 1% in January 2007. Similarly, the thickness of the mats decreased from 6–8.5 mm to less than 1 mm.
239. In the much more stable Mararoa River (where flows are buffered by the influence of the Mavora lakes), 100% cover was measured at the monitoring site in winter 2006, and 86% coverage in January 2007, at which time the thickness of the infestation was estimated to be 18.5 mm.
240. After invasion it appears that the diatom will always remain in its microscopic presence, so there is always potential for further rapid growth. However, Mr Jarvie said that even following floods in the Mararoa River strips of didymo have remained intact against bank margins, which allows rapid recolonisation. In contrast, in the Oreti River remaining didymo only occurs as very small remnants, and so recolonisation is much slower.
241. We did hear that Weydon Burn, which in its lower reaches has a meandering channel and a relatively stable bed, has recorded significant biomasses of didymo.
242. Dr Hayes told us about provisional studies carried out in April 2006 by the Cawthron Institute, for Biosecurity New Zealand, on the impacts of didymo at two sites in the Oreti River and one in the Mararoa River. Didymo was rare to absent in the upper Oreti, present at moderate biomass in the lower Oreti and present at moderate to high biomass at the Mararoa site.
243. The studies focused on invertebrate drift, which is an indicator of the density of invertebrates in a reach of river. Invertebrates such as mayflies and stoneflies are a primary source of trout food, and so their density in the drift is an indicator of food availability. Other important trout food sources include young fish, terrestrial invertebrates blown on to the surface of the water and, on occasions, mice.
244. The results – albeit from only one limited study – did not support the hypothesis that didymo alters drift sufficiently to have negative impacts on trout growth. Indeed moderate infestations did increase invertebrate densities in drift, although insects were on average smaller. However, Dr Hayes did consider that trout would find it difficult to feed directly on invertebrates in reaches of river heavily infested by didymo.
245. NIWA have been undertaking work on possible chemical controls to reduce levels of didymo infestation. Some of these have shown good potential for

control in trial situations. However, given that the colonising forms of the diatom are microscopic, and given the already very wide (and increasing) range of infestation, we think it very unlikely that didymo can be eradicated from New Zealand, at least using current methods and technology. In our view it is now, regrettably, a feature of rivers such as the Oreti River for the foreseeable future.

246. We have reached the following conclusions about the potential effects of didymo on the outstanding brown trout fishery of the upper Oreti:
- In the foreseeable future didymo will always be present in the Oreti catchment.
 - Infestations are likely to be on average relatively light and generally of short duration in the upper river due to the unstable and mobile nature of the cobble-dominated river bed, which is readily mobile during freshes and floods. The greatest infestations will occur during periods of stable low flows.
 - More stable tributaries, such as Weydon Burn, are likely to become more heavily infested at times, with potential adverse effects upon fishery values.
 - In the upper river infestations appear unlikely to have significant or lasting adverse effects on trout habitat, growth or abundance. Infestations may, however, have temporary, potentially adverse effects on recreational angling values following periods of stable flows.
247. In summary, we strongly believe that the outstanding brown trout habitat and associated outstanding angling amenity of the upper Oreti will not be affected by didymo to the extent where they could no longer be considered as outstanding. Its presence in the river is no reason not to make a water conservation order for the Oreti.
248. We also suggest that the regrettably rapid spread of didymo throughout the South Island, and we think inevitably the North Island also, means that rivers such as the Oreti will become relatively more important in future. This is because many rivers with more stable flow regimes and embedded substrates will become more strongly affected by the diatom species. By way of example we note that didymo has recently been recorded in the Hurunui River in Canterbury. This is another highly valued headwater trout fishery, but as it is primarily lake fed and has a relatively stable bed, it seems likely that those values will be substantially eroded by the presence of didymo. In other words, we think the widespread incursions of didymo in our rivers will in future make the Oreti relatively more outstanding in a national context, than it would be without the diatom being so “successful” in many otherwise pristine or high-value environments.

5.3.4 Conclusions re the Brown Trout Fishery

249. We have drawn three main conclusions about the brown trout fishery of the Oreti River and its headwater tributaries:
- The river, along its length but particularly in its upper reaches, provides outstanding habitat for brown trout. We draw this conclusion because of both the very large average size, and the high densities of brown trout in the upper river. The essential elements of protecting this outstanding habitat include maintaining existing high water quality, maintaining flow characteristics including shallow groundwater inputs, maintaining the cobble-based bed of the river and maintaining fish passage throughout the river (as it is evident that migration through the river system helps sustain the headwater fishery).
 - The upper river provides outstanding angling amenity. This amenity is provided primarily by the presence of large numbers of large brown trout, with the very high water clarity allowing individual fish to be “spotted” and fished to. The amenity values present also include the relative isolation and scenic values of the upper catchment, and the limited amount of modification of the landscape that has taken place there.
 - The outstanding brown trout habitat of the river is unlikely to be significantly affected by the presence of didymo in the river. Angling amenity may be somewhat affected, albeit for only generally short periods. The comparative value of the river may increase given the adverse affects of didymo on many other highly valued trout fishing rivers in the South Island.

5.4 Wildlife Values

250. The applicant presented relatively little evidence on the native wildlife values of the Oreti River. We heard evidence from Ms McLellan regarding black-billed gulls and from Dr Jellyman regarding native fish (which we have already discussed). This evidence was supplemented to some extent with evidence from Ms Maturin and Mr Esler for Forest and Bird.
251. We were disappointed that the Department of Conservation, who in a letter included as part of the application had indicated their support for a water conservation order, did not submit on the application. We did, however, write to the department on 9 March 2007 seeking more information on the wildlife values of the Oreti River. A helpful response was received on 28 March, and was made available to all interested parties at the hearing.
252. There are some significant populations of native species, some of which are endangered, living and breeding on and in the Oreti River. The variability of these populations in both space and time makes it difficult to judge whether

the presence of these populations gives the Oreti River outstanding characteristics as habitat for terrestrial or aquatic organisms, which is the relevant criterion under s199(2).

253. The species for which most evidence was led was the endemic black-billed gull (*Larus bulleri*) which is listed as a threatened species in serious decline in the New Zealand threat classification system. The evidence presented to us is that currently there are about 80,000–100,000 breeding black-billed gulls nationally, and that the numbers of these gulls have dropped significantly over the last 20–30 years. It is estimated that 70–80% of these birds breed in Southland, with the greatest numbers being recorded from the Aparima and Oreti Rivers. Numbers of birds and colonies on each river vary substantially from year to year. On the Oreti River, colonies are found along much of its length apart from the lowest reaches and the upper headwaters.
254. Clearly, the Oreti River (along with the Aparima River) provides critical habitat for the threatened endemic black-billed gull. Regardless of all the variability of numbers over time, the river bed contains some of the largest breeding colonies nationally and a very sizeable proportion of the breeding population nationally, quite possibly more than 30% in some years. Significantly, some of the Oreti breeding sites are not only large but relatively secure from threats, a most important characteristic for a declining national population.
255. We accept the submission of Ms Baker that case law supports the assertion that at least some parts of the Oreti River provide outstanding wildlife habitat. In particular the 5% “threshold” of the national population of an endangered species suggested by the Environment Court in its findings on the Rangitata water conservation order, is far exceeded in the case of the black-billed gull population in the Oreti.
256. Ms McLellan told us that over the last 30 years, colonies of black-billed gulls have been recorded on the river between about 15 km of the mouth to close to the confluence of the Windley River. The colonies known to Ms McLellan from the last ten years’ observations were mostly located between Centre Bush (about 40 kilometers inland) and Mossburn, with one “outlier” at Coal Hill (about 130 kilometers inland). However, neither the applicant nor supporting submitters established exactly how important the river upstream from Mossburn was for black-billed gull habitat.
257. The significance of the Oreti River for other native birds is more difficult to establish. The black-fronted tern is a nationally endangered species for which the Oreti appears to offer significant habitat, judged by Mr Esler’s estimate of “several hundred birds” seen nesting by him, and some survey information from the 1990s cited by Ms Maturin. However, there is not enough specific information to support Ms Maturin’s assertion that “it is possible that the Oreti still provides habitat for a significant proportion of the Southland population of black-fronted tern, and possibly the New Zealand population”, to the extent of our agreeing that the Oreti is nationally outstanding habitat for black-fronted tern.
258. It is very likely that the Oreti River provides good habitat for populations of several other native birds, some of them endangered, but again there is not

enough information to show that the Oreti provides nationally outstanding habitat for these species.

259. We have concluded that the Oreti River provides outstanding habitat for black-billed gulls, at least in the section downstream of Rocky Point. The outstanding habitat may extend further upstream than Rocky Point, but there was insufficient evidence to determine this.
260. We note also that, as discussed in the section of native fisheries above, many of the species identified in the evidence of Forest and Bird are identified in Schedule 97 of the Ngāi Tahu Claims Settlement Act as taonga species – in other words the species are culturally significant and valued by Ngāi Tahu.

5.5 Values in Accordance with Tikanga Māori

261. We heard evidence from Mr Skerrett and Mrs Loose on the value of the river to tangata whenua. This put into context how the natural characteristics and outstanding values of the river, as discussed above, complement Māori perspectives.
262. Mr Skerrett explained that Ngāi Tahu has a long association and involvement with the Oreti catchment and it remains culturally significant. The Crown recognised this significance in the Ngāi Tahu Claims Settlement Act 1998. Schedule 50 of the Act is the Statutory Acknowledgement for the Oreti River.
263. In describing the significance of the Oreti River to Ngāi Tahu, Mr Skerrett explained the importance of the entire catchment and the waters of the Oreti from its source to the coast before emphasising the importance of the upper parts of the catchment.
264. Continuity from the mountains to the sea (ki uta ki tai) is essential for ensuring the well-being of a waterway. This is particularly important because, as Mrs Loose explained, Ngāi Tahu conceptualisations recognise that water is the provider and sustainer of life, and the condition of waterways reflects the health of Papatūānuku (Earth Mother) and consequently the health of the ecosystems.
265. We note that in terms of significance it is difficult and not really possible to undertake a comparative analysis examining the relative significance of the Oreti with other rivers. While it is generally agreed that the Waitaki, as the ancestral river of Ngāi Tahu, is paramount to them, concepts of national and regional significance are difficult to apply to cultural settings where significance is accorded by the respective whānau, hapū and rūnanga. With respect to this application for a water conservation order, it is important to note that Mr Skerrett presented on behalf of all four papatipu rūnanga in Murihiku and was supported in his submissions by Te Rūnanga o Ngāi Tahu, the iwi authority for Ngāi Tahu as recognised in the Te Rūnanga o Ngāi Tahu Act 1996. Mrs Loose, as a member of Ngāi Tahu Whanui, presented similar evidence.

266. Mr Skerrett emphasised that protection of the mauri of a resource is the fundamental management principle for Ngāi Tahu. The presence of taonga species (both fish and wildlife), the relatively unmodified upper catchment, evidence of past occupation in the form of archaeological sites and remains, the continuity of flow in the waterway from its source to coast, and high water quality are factors that enable us to conclude that the mauri of the Oreti River, especially in the upper catchment, is robust and vibrant. We note that, at least in part, all of these factors are able to be protected by the provisions of a water conservation order. While each of these factors when considered individually may fail to pass the test of being outstanding, collectively they represent grounds for our deciding that the main stem of the Oreti is outstanding for values in accordance with tikanga Māori.

6 Part 2 of the Act

267. We next evaluated the provisions of Part 2 of the Act, which are its Purpose and Principles. As already noted s199(1) uses the words “*notwithstanding any to the contrary in Part 2, the purpose of a water conservation order ...*” and that in the *Rangitata* case, the Court held that these qualifying words “*make it clear that not all of Part II is to be ignored, but only those aspects of Part II that are contrary to the purpose stated in section 199*”.
268. Section 5 of the Act outlines its purpose, which is to promote the sustainable management of natural and physical resources. Sustainable management is then defined as managing the use, development or protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their economic, social and cultural wellbeing, and their health and safety, while:
- (a) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
 - (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
 - (c) Avoiding, remedying or mitigating any adverse effects of activities on the environment.
269. A water conservation order is obviously focused more on protection than use and development. The order we have recommended, however, will not strongly constrain use and development, apart from preventing damming the river for power generation.
270. The order we recommend will clearly safeguard the life-supporting capacity of the Oreti River, and help avoid or mitigate adverse effects.
271. Section 6 lists seven matters of national importance that must be provided for, all of which are broadly aimed towards the protection of conservation, cultural or historic values. Certainly none of these provisions are contrary to the purpose of a water conservation order as outlined in s199(1).
272. The order we recommend will help protect significant habitat of indigenous native fish, including the long-finned eel and giant kokopu which are considered nationally to be “in decline”. To accommodate bicultural understandings in the meaning and interpretation of Part 2, and s6 in particular, it necessary to recognise that Ngāi Tahu cultural beliefs make no such separation between the natural world and the place of humans within it. Key factors for assessing “natural character” revolve around the health and robustness of mauri, while determining a landscape or habitat as outstanding and significant depends upon the value and importance of those landscapes and habitats to manawhenua. As previously explained we believe that Ngāi Tahu have presented an argument to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral

lands, waters, sites, wāhi tapu and other taonga by way of a water conservation order.

273. Section 7 lists 11 matters to which particular regard must be had to.
274. Ngāi Tahu in their submission and evidence presented an argument that suggests that the three subclauses 7(a), 7(c) and 7(d) are directly relevant to the protection of their cultural values and use interests in the Oreti River. Further, in presenting their evidence to the Tribunal, and supporting a water conservation order, Ngāi Tahu were exercising their responsibilities (their kaitiakitanga) to respect and protect the Oreti catchment as a resource for enjoyment by future generations.
275. The draft order we recommend will help enhance amenity values and maintain the quality of the environment. It will certainly protect the habitat of trout in the Oreti River, and provide for the intrinsic values of the ecosystems that it supports. We consider the finite characteristics of the water resource of the river are appropriately managed through the provisions of the Water Plan.
276. The draft order will prevent the development of the river for renewable energy generated from hydro power, but we believe that is not a practical option. No submitter put forward any possible proposals for power generation on the Oreti River. We think power generation from the river is highly unlikely for several reasons, including the shape of the Oreti valley and the relatively low flows carried by the river, as well as economic factors such as the abundance of other hydro power (and potential wind power) in Southland and the distance from major markets.
277. The draft order will not affect possible further wind generation projects in Southland, such as that recently commissioned by Meridian Energy at White Hills near Mossburn.
278. We heard no evidence nor received any submissions that the making of a water conservation order on the Oreti River would be contrary to the Principles of the Treaty of Waitangi. We believe that we have exercised our duty to “take into account” the Principles of the Treaty by weighing the material presented by Ngāi Tahu alongside the material presented by others, and according it due consideration within the constraints set by the sections of the Act specific to water conservation orders.

7 Section 207 of the Act

279. We have previously reviewed the context of Section 207. It states that in terms of matters we must consider we must have particular regard to the purpose of a water conservation order and the (other) matters set out under s199, and that we also must 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.*

7.1 The Application and Submissions

280. We have already discussed the application, both in its original form and as amended. We have summarised the evidence presented to us by submitters at the two hearings, and in Section 3.4 above we have discussed the other submissions.

7.2 The Needs of Primary and Secondary Industry and the Community

281. We considered a number of needs in this part of our evaluation. These included community water supplies, gravel extraction, river protection and erosion control, existing and future use of the Oreti River water resource for irrigation and possible power development. We have discussed the latter above when reviewing the provisions of Part 2 of the Act.

282. As we have already said in this regard, we agreed with Ms Baker that what we must weigh are “needs, and not merely hopes or aspirations for the future, or principled opposition to a statutory instrument that will not in reality affect the reasonable needs of primary or secondary industry or of the community.”

283. In its lower reaches, the Oreti River provides water for community supply in Invercargill; communities such as Lumsden and Winton rely on groundwater, which has some hydraulic linkage to the river, for their domestic supplies. None of these community water supplies will be affected in any way by the order we have drafted.

284. Significant amounts of gravel are taken from the river, consistent with river management purposes. We heard favourable comment about a recent

agreement between the operations arm of Environment Southland and gravel extractors. The operations of those extractors will not be affected by the draft order as the conditions that they work under now mean the effects of taking gravel upon water resources are minimised.

285. Downstream of about Lumsden stopbanks on both sides of the river protect communities and highly productive farmland from flooding. More minor works are undertaken upstream to prevent the river eroding, and to protect community assets such as bridges. The future maintenance or enhancement of any of these works upstream of Rocky Point has the potential to be affected by the order we have drafted, so we have made specific provision for such works as necessary upstream of Rocky Point.
286. In relation to primary industry, we heard from several landowners alongside the river, from Federated Farmers, and from a group of water users who have resource consents to take groundwater. Only one of that latter users group takes groundwater that is hydraulically linked to the river, and that take is downstream of Mossburn. Concerns were raised by this group about any provision to provide for fish passage through the river. We think, however, that this is an essential part of the order and will be protected in any case by the Mean Annual Low Flow (MALF) “default” flow regime in the Water Plan. We certainly do not think this provision will affect the possibility of the one user who takes hydraulically connected groundwater from the river, of having their consent “renewed”.
287. No party convincingly foreshadowed to us any significant development opportunities for the water resources of the Oreti River. Demand for irrigation water is not high in Southland, and nor does it appear likely to increase significantly in the Oreti catchment in at least the foreseeable future. Put simply, no such “need” was demonstrated to us by any party.
288. Regardless, the minimum flow provisions provided for in the Matura Water Conservation Order have caused administrative difficulties for the regional council which have had to be resolved in the Environment Court. The wording of that order has also caused associated practical difficulties for landowners seeking consents for irrigation to support development in the middle and upper reaches of that catchment. As already noted, however, we have not recommended that any minimum flow regime be set for the river, and so these practical difficulties will not occur, at least in the context of the water conservation order, on the Oreti River. Rather, the applicant is satisfied by relying on the minimum flow provisions in the Water Plan, which we discuss in more detail in the next section.
289. Similarly no significant concerns were raised about protecting existing water quality. There are no point-source discharges in the catchment above Rocky Point at this time, nor were any foreshadowed to us. Regardless, the order we have recommended allows point source discharges to the river provided they do not have adverse effects after reasonable mixing.
290. The main concerns we heard revolved around providing for existing opportunities, and allowing activities such as soil conservation, occasional river control works and the maintenance of bridges to be able to continue.

These are all provided for in the draft order, as are the needs of stock and domestic supplies.

291. We have concluded that there are no needs of primary or secondary industry or the community that weigh against the making of a water conservation order on the Oreti River.

7.3 Statutory Planning Matters

292. There are no National Policy Statements that cover the management of the Oreti River, and the provisions of the New Zealand Coastal Policy Statement are not applicable.
293. Ms Taylor, one of the witnesses for the applicant, outlined what she considered to be the relevant provisions of the Regional Policy Statement for Southland, which became operative in December 1997. None of the objectives or policies she listed weighs against the making of a water conservation order on the Oreti River. Rather it could be argued that some support, at least in general terms, the protection of the waters of the Oreti. An example is Policy 4.8, which is *“to support water conservation orders where these will assist in achieving the objectives and policies of this regional policy statement.”*
294. The provisions of the Proposed Regional Fresh Water Plan, as amended by decisions on submissions, are open to several appeals including one from Fish and Game. We discuss this below.
295. The parts of the Water Plan particularly relevant to this discussion are those in Variation 2 (groundwater), Variation 3 (water quantity) and Variation 4 (water quality).
296. Takes of groundwater with a direct or high hydraulic connection with surface water resources are managed as part of a river’s flow. While the original application made by Fish and Game sought to restrict takes of hydraulically connected groundwater, the amended application presented to us in April did not do so. We understand that this is because the applicant was satisfied that those provisions in the amended plan adequately protected surface water resources from takes of hydraulically connected groundwater.
297. The flow provisions provided in Variation 3 of the Water Plan set a default minimum flow of MALF. If takes in a catchment total more than 10% of MALF, the flow provisions require more detailed habitat analysis to support further applications to take water. As we think those provisions appropriately protect the flow regime of the Oreti River, we have decided that there is no need for a minimum flow in the order (noting that there are also strong process reasons not to make a minimum flow in the draft order).
298. We also discuss the water quality provisions in the Plan below. Suffice to say here that we are satisfied that in the upper Oreti, to protect outstanding

characteristics, no discharge should be allowed that reduces water quality beyond the zone of reasonable mixing.

299. The Water Plan makes any damming of the main stem of the Oreti River a non-complying activity. However, the “policy hurdles” one would have to pass in order to be granted an application to dam the river are so high as to be, for all practical purposes, impassable. The draft order effectively prohibits such damming as we think this is necessary to protect the outstanding brown trout habitat and outstanding angling amenity provided by the river.
300. In summary, there is nothing in the Proposed Regional Fresh Water Plan that weighs against the making of a water conservation order on the Oreti River.
301. A strong concern expressed to us by submitters was that given the provisions of the Water Plan, and the protection that plan offers the Oreti River, making an order was unnecessary. We had considerable sympathy with this view.
302. Environment Southland and many other submitters contrasted the strong and robust consultation process engaged in by the regional council in preparing the Water Plan and its variations with the very limited consultation undertaken by Fish and Game about the water conservation order application.
303. A number of submitters who opposed the application, such as Federated Farmers and the Oreti River Liaison Group, expressed frustration or dismay that having worked so long on the Water Plan, they now find agreements reached during that process potentially subsumed by a possible water conservation order. This was particularly so in the present circumstances where the Water Plan process, and associated community engagement undertaken by Environment Southland was praised and there was strong support voiced for the outcomes reached.
304. We certainly understand that frustration. However, the application made by Fish and Game for a water conservation order is entirely consistent with all the legal requirements set out in Part 9 of the Act. The applicant is not required to undertake extensive consultation.¹⁵
305. Strong concerns were also expressed about the inflexibility of water conservation order procedures versus regional plans. This was highlighted by Judge Jackson of the Environment Court in the Rangitata case where he called water conservation orders “*a crude and very expensive tool in an otherwise relatively sophisticated toolbox*”. Again we have sympathy for the concerns expressed by submitters about the inflexibility of water conservation orders.

¹⁵ We think that this is a failing in Part 9 that should be remedied. Applicants for water conservation orders should, in our view, have to undertake more extensive consultation and assess alternatives. Arguably an inquiry such as ours fills that gap, but it does so in a more adversarial “winners and losers” context. In this regard also, the regional planning and water conservation order processes are out of step.

306. We have thought carefully about these matters, and have come to two main conclusions:
- Although the Water Plan does offer a significant level of protection for the water resources of the Oreti River, we must have particular regard to the purpose of water conservation orders and only regard to the provisions of the regional plan. In other words, a water conservation order is a superior legal instrument, and no matter how much a regional plan protects a water resource, if there is a case for an order to be made it takes precedence.
 - As water conservation orders are quite inflexible and difficult to change compared with a regional plan (which itself is very time-consuming to change) the order should be drafted in terms that allows some flexibility beyond what is essential to protect the outstanding values of the Oreti River. We consider the order we have recommended, which is very much along the lines “agreed” by Fish and Game and Environment Southland, retains that flexibility where appropriate.
307. Accordingly the draft order only goes further than the regional plan in three ways. First, the draft order prohibits damming of the upper river. Second, it allows no exemptions to the provision that any discharge should not affect water quality after reasonable mixing. Third, the draft order requires fish passage be provided for throughout the river.
308. We do not think that these provisions will make any effective difference to the current day-to-day management of the river, and probably little difference to its long-term management. But they will, when considered alongside the flow related provisions of the plan, sustain the outstanding characteristics of the river. And that is what the purpose of water conservation orders is.

8 Protection of Outstanding Features and Characteristics

309. Having decided that the Oreti River provides outstanding habitat for brown trout along with outstanding angling amenity, outstanding habitat for black-billed gulls, and values in accordance with tikanga Māori; and having considered the matters in Part 2 and s207, we next had to decide how those values can appropriately be protected through the provisions of a water conservation order.
310. The original application sought protection of the brown trout fishery through four main measures. These were a prohibition on damming, restrictions on any alteration of river flow, a requirement to maintain fish passage, and restrictions on the alteration of water quality. We are now not being asked to make any determinations in relation to some of these matters, but we do consider that the original application was drafted in a cumbersome, and we think rather impractical, way.
311. At the April hearing Ms Jones presented us with an amended application that had previously been discussed with Environment Southland. The amended application contained three main elements – a restriction on damming, a requirement to maintain fish passage and restrictions on the alteration of water quality. The latter provision was drafted in much more simple terms than the original application, and no restrictions were sought on flows or on the water that can be allocated from the river.
312. It is this amended application that the submitters who opposed the application commented on. One – Ms Young on behalf of Federated Farmers – went as far as to strike out previously prepared evidence relating to flows.
313. The main reason an amended application was provided to us in April was because in late March Environment Southland had released their decisions on submissions to the Proposed Regional Fresh Water Plan. Ms Jones told us that this had meant that the application could be simplified, as the applicant could rely on the provisions of the Plan to cover some of the matters included in the original application. Mr Slowley said that although Environment Southland still opposed the application, the agreement reached with Fish and Game meant that they would not lead technical evidence against the application.
314. Following the second stage of the hearing, but prior to the right of reply, Fish and Game lodged an appeal against some of the provisions of the plan as they relate to the Oreti catchment. Part of that appeal read:

“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.”

315. All but one of the appeal points raised by Fish and Game are addressed by the Order that we have drafted. That outstanding appeal point is *“insert a new rule that makes water takes that breach the minimum flow as calculated by Appendix I a prohibited activity.”*

8.1 Protection of Minimum Flow

316. At the right of reply, Ms Baker inferred to us that we should consider making a minimum flow on the Oreti River consistent with Appendix I in the Water Plan which sets out methods for determining minimum flows and levels. This appendix sets a “default” minimum flow of MALF which applies if the total quantity of water allocated is less than 10% of MALF (which is currently the case in the Oreti). However, in the Water Plan, this provision can be changed if detailed studies, such as through habitat analysis, show that another minimum flow will protect specified in-stream values. In a river the size of the Oreti, those specified values include trout spawning and rearing, and the habitat of large adult trout. On the other hand, if this provision were applied in the order, there would not be the same flexibility.
317. We heard no substantive evidence on what flows are necessary to protect trout habitat in the upper Oreti. Environment Southland, however, commissioned expert studies in setting a default minimum flow of MALF in rivers such as the Oreti.
318. More importantly, submitters who opposed the application did not comment specifically on flow regimes at the April hearing. This is because the amended application made no mention of minimum flows. Those submitters were speaking to the amended application, not to the original application.
319. We think for both evidential and process reasons there are no grounds for including minimum flow provisions in the draft order. In our view it was regrettable that the applicant, having amended the application to take out any provisions relating to flows, inferred at the right of reply that we should subsequently include them in the draft order.
320. The position taken at the applicant’s right of reply also somewhat contradicts what Ms Baker said in her opening submissions. It was claimed that the order sought to provide a “win/win” outcome with the values of the river protected while “at the same time a major portion of the Oreti’s natural flow will continue to be available for agriculture through the resource consent process in accordance with the water plan”.

8.2 A Prohibition on Damming and Maintenance of Fish Passage

321. There was reasonably compelling evidence provided to us that brown trout in the Oreti migrate long distances, and so unimpeded passage along the river is critical for maintaining the fishery.
322. There were two streams to this evidence. Dr Hayes analysed trout energetics, and concluded that headwater trout could not grow to the size that they do in the relatively cool waters there. Accordingly he considered that most large trout in the upper river must spend some time feeding on fish and other food sources in the lower river or its estuary. Similarly Mr Olley and Dr Bickel found from their otolith studies that trout present in the headwaters of the river had migrated long distances.
323. We accept the evidence of these experts, which was not contested by any other party. Accordingly we have decided that passage for brown trout along the length of the river system is a vital component of maintaining the outstanding brown trout fishery in the headwaters.
324. We also note the value Ngāi Tahu accord continuity from the mountains to the sea, consistent with their conceptualisation of Ki uta ki tai, which they contend is vital to ensuring the wellbeing of the Oreti River.
325. In the amended application, the applicant sought two means of protecting fish passage. The first is a clause seeking fish passage be maintained along the length of the Oreti River, and in Weydon Burn, the Windley River and other headwater tributaries.
326. The second provision sought, is a prohibition on any damming of the main stem of the Oreti River or specified tributaries upstream of Rocky Point. Such damming is presently a non-complying activity under the Water Plan. As we have already discussed, in practical terms any proposal for a permanent dam is highly unlikely – the river valley is too wide and the flows in the river are too low to make such a proposal economically viable, at least in the foreseeable future.
327. Both these provisions were part of the “agreement” reached between Environment Southland and Fish and Game in April, and were included in the amended application commented on submitters at the April hearing.
328. In order to protect the outstanding characteristics we have identified, we consider that the water conservation order should prohibit damming of the upper Oreti and specified tributaries, and should ensure fish passage be maintained along the river and its headwater tributaries. This is what we have recommended. In combination these two provisions will ensure that brown trout (and migratory native species) continue to have unimpeded access along the length of the river, and in itself this will make a major contribution to the maintenance of the outstanding brown trout fishery of the Oreti River.

329. We note here that structures such as stopbanks are, in legal terms, dams. The requirements preventing damming and maintaining fish passage will not prevent consents being sought or granted for such structures, nor will it prevent consents being granted for temporary structures such as coffer dams in the bed of the river to divert flows while construction or maintenance activities are being carried out. This is made clear in the exemptions to the ambit of the draft order that we outline below.
330. The prohibition on damming and the requirement to maintain fish passage will also have some limited benefit for the outstanding black-billed gull habitat provided by the Oreti River. However, the management of the water resource of the river, whether it be through the auspices of the water conservation order and/or via the Water Plan, cannot alone provide for the protection of that habitat.
331. Ms McClellan listed in her evidence the main threats to black-billed colonies on the river. The three most important were weed encroachment (such as broom and lupins) on to river bed gravels reducing habitat availability, predation by introduced mammals and floods wiping out breeding colonies. Other threats included disturbance (such as by gravel extractors, four-wheel drive vehicles or motorbikes, people and dogs), river modification works and water abstraction for irrigation reducing potential food availability. We consider the same threats would have potential to affect other breeding river bed birds found on the Oreti river bed, such as black-fronted terns.
332. Of these threats the amended order sought by the applicant will only help prevent weed encroachment on to the riverbed by ensuring no damming occurs and so floods pass unimpeded down the river. The provisions of the Water Plan will protect flows, and so help provide for the “moat effect” which can limit predation and help protect in-stream food availability. However, any continuing success of breeding black-billed colonies on rivers such as the Oreti will require much more than this, and these are matters we have no control over.

8.3 Maintenance of Water Quality

333. The original application sought the inclusion of some very prescriptive water quality standards in the upper river. These were subsequently taken out of the amended application put to us, after discussions between Fish and Game and Environment Southland on 13 April.
334. The amended provision sought by the applicant was that in the main stem of the Oreti River upstream of Rocky Point no discharge permit be granted, nor rule made in a regional plan that will result in a reduction of water quality beyond the zone of reasonable mixing.
335. This differs subtly from the present provision in the Water Plan, which does not allow a discharge permit to be granted that will result in a reduction of water quality beyond the zone of reasonable mixing unless it is consistent with the purpose of the Act to do so. We note here that the ambit of the

exception is not very clear, and that it would have to be applied on a case-by-case basis.

336. There are presently no consented discharges to water in the upper catchment. Given the extensive nature of the farming undertaken, it seems rather improbable that discharge permits will be sought in the foreseeable future.
337. The very high water quality of the upper Oreti, and particularly its very high clarity, contribute strongly to the outstanding angling amenity. Individual fish can be spotted and fished to, and this is a major part of the challenge of fishing the river for skilled anglers.
338. The high water quality is also highly valued by Ngāi Tahu and is seen as a vital contributor to protecting the mauri of the Oreti River.
339. We think protecting the existing water quality in the upper catchment from the effects of point source discharges is an important component of protecting the outstanding brown trout habitat and angling amenity of the upper Oreti. It will also help protect the values of the river for Ngāi Tahu. Accordingly, we have included the provision sought by the applicant in the draft order.
340. We did think about limiting the scope of the protection of water quality in the upper catchment by using numerical standards for parameters such as water clarity and colour that are most important to the maintenance of outstanding features. This would, however, have added complexity to the draft order for what we think would be very little tangible benefit to any possible resource user.
341. We think it important to note here that this provision will not protect existing water quality in the upper river from the effects of any non-point source discharges. Clearly, however, existing land use in the upper catchment is compatible with existing high water quality. It seems that for the foreseeable future land use in the upper catchment will remain extensive.
342. We can not, however, predict a long time forward. Factors such as farm economics, change of ownership and climate change could conceivably change the nature of land use in the upper catchment. If this occurs, such land use may be less compatible with the maintenance of high water quality in the river. A water conservation order cannot make provisions to control land use, however, so any such controls would be the responsibility of local authorities and will have to go through robust consultative procedures.

8.4 Scope of the Order and Exemptions

343. A water conservation order in a catchment like the Oreti must provide for certain activities and make exemptions for possible future activities. These activities include:
- the taking of water for domestic or stock use and for fire-fighting;
 - research into fisheries or wildlife;
 - the use of measures to control organisms such as *didymo*;
 - the maintenance of roads, bridges and other infrastructure;
 - soil conservation and river protection works (such as the construction and maintenance of stopbanks where necessary);
 - protection of human or animal health.
344. All these matters are provided for in the order we have recommended. We have also recommended exemptions be provided for other unforeseen activities associated with matters such as temporary works or construction or maintenance. The exemptions are consistent with the provisions of s107(2) of the Act.
345. Such provisions are “standard practice” in water conservation orders made over reaches of river not in their natural state. Transit NZ was satisfied that the wording of these provisions in the order would allow them to undertake necessary construction and maintenance works.
346. We consider such provisions are essential if the water conservation order is to be managed effectively and pragmatically.

Dated this 28th day of November 2007



Dr Brent Cowie
CHAIR OF THE SPECIAL TRIBUNAL

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 (1991).

“Damming” means the impounding of all or part of the natural flow of any water that may involve an associated temporary or permanent structure.

“River” means the main stem of 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) habitat for brown trout;
- (b) angling amenity;
- (c) habitat for back-billed gulls; and
- (d) significance in accordance with tikanga Māori.

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 Clauses 6–8 to the extent specified in those clauses and in Schedule 2.

6 Restriction of Damming of Waters

Subject to Clauses 9 and 10, 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

Subject to Clauses 9 and 10 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 the passage of fish.

8 Restriction on the Alteration of Water Quality

Subject to Clauses 9 and 10 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 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.	Habitat for brown trout Angling amenity Value in accordance with tikanga Māori	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 brown trout	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	Habitat for brown trout Habitat for black-billed gull	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.	Habitat for brown trout Angling amenity Value in accordance with tikanga Māori	

Annex A: List of submitters

No.	Name/Organisation	Place
O1	Wyndham Angling Club	Invercargill
O2	Steve Gerard	Methven
O3	Bruce Lambie	Dunedin
O4	Southland Recreational Whitebaiters Ass. Inc	Invercargill
O5	Warren Davis	Mossburn
O6	Southland District Council	Invercargill
O7	Waimate Rod & Gun Club	Waimate
O8	David Haynes	Auckland
O9	Tinaka Enterprises	Timaru
O10	The Professional Fishing Guides Assn Inc, Queenstown Branch	Queenstown
O11	Richard Mayes	Wanaka
O12	John Purey-Cust	Gore
O13	Lindsay Withington	Invercargill
O14	Christopher Rundle	Methven
O15	Andrew Altman	Dunedin
O16	Peter Dixon	Australia
O17	Thomas Hayes	Australia
O18	Gore & District Angling Society	Gore
O19	Adam Cowie	Invercargill
O20	R Blackbeard	Nelson
O21	F Blackbeard	Richmond
O22	Richard Weaver	Australia
O23	Dean Riphagen	South Africa
O24	Peter Ophuis	Christchurch
O25	John Kent	Christchurch
O26	Dr Sheralyn Hume	Te Anau
O27	Silvio Caldelari	Te Anau
O28	Transit New Zealand	Dunedin
O29	Marc Cohen	Southland
O30	Phil Neylon	Invercargill
O31	Fraser McGarvie	Gore
O32	Daniel Agar	Auckland
O33	Te Ao Marama Inc.	Invercargill
O34	Eugene Decker	United States of America
O35	PJ Jacobs	South Africa
O36	Arthur Henderson	Invercargill
O37	Peter Stowe	Rotorua

O38	The Wildfowlers Assn of NZ inc	Taupo
O39	Tor Skarpodde	Karamea
O40	Environment Southland	Invercargill
O41	Norman Kidd	Invercargill
O42	Teviot Angling Club Inc	Central Otago
O43	David Harris	Invercargill
O44	Andrew Morris	Mossburn
O45	Nancy Tapper	Invercargill
O46	Peter Williams	Nelson
O47	Herbert Taylor	Gore
O48	James Plunkett	Invercargill
O49	Christopher Hutchison	Southland
O50	Rex & Megan Carter	Te Anau
O51	George Taylor	Mossburn
O52	Royal Forest & Bird Protection Society, Southland Branch	Invercargill
O53	Granville Holmes	Christchurch
O54	Oreti Irrigation Water Users Group	Dunedin
O55	Glenys Dickson	Gore
O56	Mereana Loose	Te Anau
O57	William Stewart	Te Anau
O58	Trevor Halford	Te Anau
O59	Michael Molineux	Manapouri
O60	Arthur Gray	Te Anau
O61	Oreti River Liaison Committee	Invercargill
O62	Robert Cravens	Dunedin
O63	Federated Farmers NZ	Hamilton
O64	New Zealand Federation of Freshwater Anglers	Auckland
O65	Russell Graham	Invercargill
O66	Josh Polan	Southland
O67	Upper Clutha Angling Club	Wanaka
O68	Kevin Christie	Mossburn
O69	Fraser Anderson	Lumsden
O70	Wakatipu Anglers Club	Queenstown
O71	Peter Lawson	Lumsden
O72	Otago Fish & Game Council New Zealand	Dunedin
O73	Landcorp Farming Limited	Christchurch
O74	The Aggregate and Quarry Association of New Zealand Inc	Auckland
O75	Stephen Cullen	Lumsden
O76	Les Ladbrook	Invercargill
O77	Michael Colombo	Dunedin
