

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2022] NZEnvC 227

IN THE MATTER OF

submissions under s 209 of the
Resource Management Act 1991

BETWEEN

NGĀ KAITIAKI O TE AWA O
NGARURORO

(ENV-2019-AKL-000270)

HAWKE'S BAY REGIONAL
COUNCIL

(ENV-2019-AKL-000272)

EAST TAUPŌ LANDS TRUST

(ENV-2019-AKL-000273)

OWHAOKO B & D LANDS TRUST

(ENV-2019-AKL-000274)

WHITEWATER NEW ZEALAND
INCORPORATED

(ENV-2019-AKL-000277)

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED

(ENV-2019-AKL-000278)

OWHAOKO C TRUST

(ENV-2019-AKL-000309)

Submitters

Court: Judge MJL Dickey
Judge L Harvey
Commissioner K A Edmonds



NGARURORO-CLIVE WATER CONSERVATION ORDER

Hearing: 9-12 February 2021
14-18 June 2021

Last case event: Final reply submissions received 27 August 2021

Appearances: P Anderson and W Jennings for Forest and Bird
S Eveleigh for Whitewater New Zealand Inc
M Downing and S Newell for the Director-General of Conservation
J Mauger, O Steedman and W Karena for Ngā Kaitiaki o Te Awa o Ngaruroro
R Gardner for Federated Farmers of New Zealand
H Atkins and N Buxeda for Horticulture New Zealand
P Maw and I Edwards for Hawke's Bay Regional Council
A Davidson for Napier City Council and Hastings District Council
L Blomfield for Big Hill Station Limited, Heinz Wattie's Limited and T&G Global Limited
M Ross for East Taupō Lands Trust
Peter MacGregor for Owhaoko C Trust
R Steedman for Owhaoko B & D Lands Trust

Date of Report: 4 November 2022

Date of Issue: 4 November 2022

INTERIM REPORT OF THE ENVIRONMENT COURT

- A: The Applicants to prepare a revised draft order (on both a track change and untracked versions) with replacement map as directed at [44] by 21 November 2022;
- B: Parties then have 10 working days to provide any comments on the revised draft order that concern the drafting and not the substance.

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REASONS

A The proceedings, the law and our approach

Special Tribunal Report

[1] On 21 December 2015, joint applicants lodged an application with the Minister for the Environment for a water conservation order over the Ngaruroro and Clive Rivers. At that time the joint applicants were New Zealand Fish and Game Council, Hawkes Bay Fish and Game Council, Operation Pātiki Ngāti Hori Ki Kohupātiki, Royal Forest and Bird Protection Society of New Zealand Inc (**Forest and Bird**), Jet Boating New Zealand; and Whitewater NZ Inc (**Whitewater NZ**). The application was notified on 24 July 2017 and the Minister for the Environment appointed a Special Tribunal to hear and report on the application.

Special Tribunal Order over the upper Ngaruroro

[2] On 30 August 2019, the Special Tribunal produced a Report and recommended a water conservation order for the Upper Ngaruroro River and its tributaries (**the Special Tribunal order or ST order**) recognising some but not all the attributes the applicants had submitted were outstanding. The Special Tribunal did not recommend a water conservation order for the lower Ngaruroro River or the Clive River.

[3] Forest and Bird, along with eight other parties subsequently submitted on the Special Tribunal decision under s 209 RMA, with numerous parties joining the proceedings. On 24 January 2020, the Environment Court held a pre-hearing conference. On 15-16 October 2020, the parties attended mediation but this did not resolve all the issues.

Amended orders sought for upper Ngaruroro and orders sought for lower Ngaruroro

[4] By the time of the hearing the Hawke's Bay Regional Council (**Regional Council**) had adopted what it called a neutral stance regarding a different order over

the upper Ngaruroro River and its tributaries. That order does not satisfy all the concerns of the applicants, who seek the addition of recognition of outstanding avifauna habitat and outstanding indigenous fish habitat values and stronger protections in the Special Tribunal order.

[5] For convenience we refer to Forest and Bird and Whitewater NZ as the **Applicants**,¹ noting that the other original applicants took no part in the proceedings before the Environment Court. For the lower Ngaruroro, the Applicants also sought many of the same or similar protections as for the upper Ngaruroro waters with some additional protections. Forest and Bird continue to seek an order over the mainstem of the Ngaruroro River from Whanawhana cableway downstream to the Chesterhope Bridge to recognise and protect what it considers to be outstanding values for avifauna and outstanding values for indigenous fish habitat.

[6] An important difference from what was applied for is that Forest and Bird no longer seeks an order that includes:

- (a) the tributaries of the lower Ngaruroro as waters to be protected for their outstanding characteristics (although it does still seek their inclusion as waters to be protected for their contribution to outstanding characteristics); and
- (b) hydraulically connected groundwater for the lower river.

The Department of Conservation (**DOC**) supports Forest and Bird's position on the lower Ngaruroro River for birdlife.

[7] Besides the Regional Council there are many parties (individuals and groups) opposing such an order over the lower river, although their positions and reasons differ. The primary sector parties had particular concerns, as did that part of the Regional Council dealing with flood control and management.

¹ Given the different interests, representation and evidence we also refer to each of the two applicants separately.

[8] As the hearing progressed there were amendments proposed to the various orders in front of us. In their closings the Applicants and the Regional Council put their ‘best version of preferred order’ forward, with the Applicants accepting some of the drafting in the Regional Council’s best version.

[9] From the available evidence and submissions, it became evident that no order over any part of the Ngaruroro is acceptable to tangata whenua who were engaged in the process. That included several Māori landowner and hapū representatives, along with various groups and individuals. At the outset, however, we record our concerns that, despite the Applicants’ intentions and the extensive engagement that they undertook with specific groups and individuals, not all the tangata whenua marae and hapū appear to have been involved in the process from the start. That was certainly the point made to us by, for example, the Mōkai Pātea and Taihape connected marae and hapū that have important historic and current interests in the upper Ngaruroro. We examine their concerns in full later in this decision. There also appeared to be a misunderstanding by the Applicants as to the representative status, or otherwise, in the context of the consultation they undertook, of the Māori land trusts created under Te Ture Whenua Māori Act 1993. That issue and related matters are also discussed.

The Law

The purpose of a water conservation order

[10] Section 199 of the RMA provides:

- (1) Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to recognise and sustain:
 - (a) outstanding amenity or intrinsic values which are afforded by waters in their natural state;
 - (b) where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.
- (2) A water conservation order may provide for any of the following:
 - (a) the preservation as far as possible in its natural state of any water body that is considered to be outstanding;

- (b) the protection of characteristics which any water body has or contributes to, and which are considered to be outstanding, -
 - (i) as a habitat for terrestrial or aquatic organisms:
 - (ii) as a fishery:
 - (iii) for its wild, scenic, or other natural characteristics:
 - (iv) for scientific and ecological values:
 - (v) for recreational, historical, spiritual, or cultural purposes:
- (c) the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.

The methods of water conservation orders

[11] The RMA provides three methods for achieving the purpose of a water conservation order.² The first is that an order may provide for the preservation of a water body which is both in its natural state and outstanding.³ Secondly, s 199 authorises orders in respect of five characteristics if any one or more are considered to be outstanding:⁴ as a habitat for plants or animals; as a fishery; for wild, scenic or other natural characteristic; for scientific and ecological values; or for recreational, historical, spiritual or cultural purposes. Finally, an order may be made protecting the characteristics of a river or lake which are of outstanding significance in accordance with tikanga Māori.⁵

Effect of water conservation order

[12] Section 217 addresses the effect of a water conservation order. No order shall affect or restrict any resource consent granted or any lawful use established in respect of the waterbody before the order is made.⁶ There are restrictions on the grant of water, coastal or discharge permits once a water conservation order is operative.⁷

² RMA, s 199(2).

³ RMA, s 199(2)(a).

⁴ RMA, s 199(2)(b).

⁵ RMA, s 199(2)(c).

⁶ RMA, s 217(1).

⁷ RMA, s 217(2).

[13] The RMA provides that regional and district planning instruments cannot be inconsistent with any water conservation order.⁸

Our inquiry

[14] In conducting our inquiry under s 212, the Court is to have particular regard to the purpose of a water conservation order and the other matters set out in s 199 and to also have regard to:

- (a) the needs of primary and secondary industry, and of the community; and
- (b) the relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, district plan, and any proposed plan; and
- (c) the report of the special tribunal and any draft water conservation order; and
- (d) the application and all submissions lodged with the Environment Court; and
- (e) such other matters as the Environment Court thinks fit.

[15] The factors in s 212(a) to (e) must be had “regard to”, that is they must have been given attention and thought and catered for to the extent they do not frustrate the protection aspect of the conservation purpose of s 199.⁹ The Court has concluded that the difference between having “regard to” matters and having “particular regard” to the purposes of an order is to give extra emphasis to the purpose as defined in s 199.¹⁰

[16] In addition to the matters we must have regard to under s 212, we must also consider those provisions of Part 2 which are not excluded on the facts as being contrary to s 199(1) of the RMA.

⁸ RMA, ss 67(4), 75(4).

⁹ *Re Whitewater New Zealand Inc* [2013] NZEnvC 131 at [157] (Minority Decision).

¹⁰ *Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council* C109/04, 5 August 2004 at [43].

[17] This is not a de novo hearing and the Court's jurisdiction is limited to matters raised in submissions made to the Court as opposed to all original submissions to the Special Tribunal on the water conservation order application.

Our approach

[18] The steps for the Court to take are:

- (a) identify the recommendations of the ST Report that were challenged;
- (b) to report on whether the challenged values are outstanding;
- (c) to report on whether the ST has correctly identified threats to the ongoing qualities of the river;
- (d) to have regard to the matters raised in s 212;
- (e) and where not contrary to s 199(1) to apply Part 2 of the RMA;
- (f) to recommend changes to or deletions of the ST's report;
- (g) to identify the terms of a proposed water conservation order (if appropriate).

[19] Elements of the Applicants and the Regional Council proposed orders differed from the Special Tribunal order. We recognise there were common and agreed elements but focus on the points of difference. We decide whether an order is appropriate or a possibility and then set out a draft.

[20] In considering the provisions of any order we deal with the issues around the values (including the threats) before turning to consider the protections for the values. Then we turn to the other matters set out in s 199.

[21] We next address the question of whether there should be any order. That includes consideration of the reasons argued by various Māori landowner representatives, groups and individuals that there be no water conservation order. In

addition, we also consider whether and how any water conservation order could provide for Māori values in line with s 199(2)(b)(v) “historical, spiritual or cultural purposes” and (c) “outstanding significance in accordance with tikanga Maori”.

[22] We also consider the report of the Special Tribunal and any draft water conservation order, the application and all submissions lodged with the Environment Court and such other matters as we see fit.

[23] We start with considering a jurisdictional issue raised with us.

[24] Next we consider the extent of waters in natural state. We then consider whether habitat for avifauna (which in the upper Ngaruroro and other avifauna in the lower Ngaruroro) and habitat for indigenous fish (and for the lower river the contribution to outstanding habitat for indigenous fish values in the upper Ngaruroro waters) are outstanding. If neither is the case for the lower Ngaruroro River, then we need proceed no further as the values do not reach the threshold for a water conservation order and so an order is not warranted. For the upper Ngaruroro waters, these questions inform whether additional values should be recognised and the protections in any order.

Legal issue

Jurisdiction of the Court on inquiry

[25] A matter of jurisdiction was raised by Forest and Bird regarding the Special Tribunal’s conclusion that the lower Ngaruroro river supports nationally outstanding avifauna— banded dotterel and black fronted dotterel habitat. The Tribunal determined that as the threat test for the habitat was not met there should be no order for the protection of avifauna on the lower river.

[26] Forest and Bird argued that, as the Tribunal’s findings were not raised in any submission, they were not within the scope of the Court’s inquiry, drawing a distinction between the findings of outstandingness and its desire there be an order over the lower River to recognise that.

[27] The scope of our inquiry begins with the Tribunal’s Report. The Court must have regard to the application and submissions lodged with the Court, among other matters. Quite simply, we find that the whole of the Report may be considered in the context of the relief submitters seek. We find that it was appropriate for those opposing an order on the lower River to call evidence challenging the Applicants’ evidence on the outstandingness of the habitat for avifauna.

B Waters in natural state and related provisions

The different schedules for the upper waters

[28] The Special Tribunal order and the different versions sought by the Applicants and Regional Council have a different numbering and approach to the schedules for waters to be retained in natural state and related provisions. This makes comparisons difficult. We attempt to simplify matters by referring to what the respective schedule covers rather than its numbering.

What areas should be identified as natural state?

Special Tribunal order

[29] The Special Tribunal order had as Waters to be retained in Natural State:

The mainstem of the Ngaruroro River and of its tributaries from its source in the Kaimanawa Ranges down to Whanawhana cableway (at or about NZTopo50 BK37:918-158), “upper Ngaruroro waters”.

[30] That order also contained:

Because they are in their natural state, and because of the outstanding characteristics, features and values identified in clause 4 and in Schedule 1, the Upper Ngaruroro waters specified in Schedule 1 are to be retained as far as possible in their natural state including the quality, quantity, level and rate of flow of the waters through the protection provided in clause 7.

[31] Clause 7 restricted damming of the upper Ngaruroro waters.

What amendments are sought?

[32] It seems to have been accepted as a general proposition that not all of the area identified by the Special Tribunal as natural state should have that status. Instead any order should have a more confined natural state area higher up the catchment with the remainder identified as waters to be protected as having, or contributing to, outstanding values.

[33] The differences in the positions of the Applicants and the Regional Council on the area that is natural state relate to three areas: two small areas in the Taruarau catchment, and a larger area of the east side of the Ngaruroro catchment.

[34] In the Taruarau catchment at that river's confluence with Woolwash Creek, the Applicants' boundary excludes two small catchments on the east or true left bank. The Regional Council's boundary includes these catchments. The land use map in Dr Andrew Hicks' evidence¹¹ shows these catchments have indigenous/native vegetation cover.

[35] The second area in the Taruarau catchment is on the true right or western bank of the river, upstream of the Woolwash Creek confluence. The Applicants' boundary includes this right bank area while the Regional Council's boundary excludes it by running up the river for about 10 km before re-joining the Applicants' boundary at the Ngawaiawhitu stream confluence. The land use map in Dr Hicks' evidence shows the right bank area included in the Applicants' boundary has indigenous/native vegetation with small areas of grazed grassland.

[36] In the Ngaruroro catchment the Applicants' preferred eastern boundary includes a number of tributary catchments that drain from the east or true left bank to join the river between the Kuripapango Cableway and the confluence of the Ngaruroro and Taruarau Rivers. The Regional Council's boundary excludes these catchments by following the mainstem of the Ngaruroro River. The land use map in Dr Hicks' evidence shows these left bank catchments include some indigenous/native

¹¹ Hicks Evidence-in-chief (EIC) at Appendix 3.

vegetation along with significant areas of plantation forest and grazed grasslands.

What evidence was there?

[37] We received evidence from water quantity and water quality experts, who prepared Joint Witness Statements (**JWS**).¹² Witnesses taking part were:

Hydrology:

- Dr Thomas Wilding (for Regional Council);
- Dr Anthony Davoren (for Heinz Wattie’s and T&G Global Ltd);
- Tim Baker (for Horticulture NZ);
- Peter MacGregor (for Owhaoko C Trust);
- Opae Steedman (for Ngā Kaitiaki o te Awa o Ngaruroro);
- Jenny Mauger (for Ngā Kaitiaki o te Awa o Ngaruroro); and
- Tere Lambert (for Owhaoko A East & A1B Blocks Land Trust).

Water quality:

- Dr Andrew Hicks (for Regional Council);
- Dr Claire Conwell (for Horticulture NZ);
- Dr Vaughan Keesing (for Horticulture NZ);
- Mark Ross (for Owhaoko B & D and East Taupo);
- Arapiu Seymour (Abe) (for Owhaoko C Trust, and Owhaoko A East & A1B Trust);
- Edward Waaka (for Owhaoko C Trust);
- Fred Nicoll (for Owhaoko A East & A1B Blocks Land Trust); and
- Tere Lambert (for Owhaoko A East & A1B Blocks Land Trust).

¹² Hydrology JWS dated 3-4 March 2020; Water Quality JWS dated 5-6 March 2020.

[38] The Hydrology JWS recorded:

17. Flow modification is more pronounced downstream of the Whanawhana cableway. Upstream of Whanawhana, flow modification is mostly limited to the effects of land use change. Upstream of Kuripapango, the cultural experts consider land use is almost entirely natural (mostly native forest).

18. The scientists agree that areas not in native vegetation are unlikely to be in a natural state, because changes in land use affect the rates of evapotranspiration, the soil properties, and management practices that alter the way water moves through the landscape.

19. The scientists agree that the Taruarau River and Omahaki Stream are examples of catchments in the upper Ngaruroro with a higher proportion of non-natural land use (agriculture and forestry respectively).

[39] The Water Quality JWS recorded:

5. The experts agreed that water quality in a natural state refers to water that has not been degraded by human influences, i.e. minimal human disturbance, evidenced by no agriculture/horticulture/forestry in the catchment. Water in a natural state (i.e. wai Māori) is taonga tuku iho. Minor plant pest incursions, or the presence of feral deer/pigs/goats, would not constitute a substantial deviation from 'natural state'.

6. The experts agreed discussion around the concept of wai Māori was useful when considering the concept of 'natural state'. The concept of wai Māori predated use of the term 'Māori', because 'Māori' never considered themselves as Māori until European colonisation. Rather, they have always been 'tangata whenua'.

7. The experts agreed that the term 'wai Māori' is the way that tangata whenua would refer to waters in the upper Ngaruroro, i.e. it is normal, not degraded and not unusual.

8. The experts agreed that there were three main areas where water quality should be considered as 'natural state':

- (a) the mainstem of the Ngaruroro and its tributaries upstream of the Kuripapango cableway;
- (b) tributaries on the true right of the mainstem Ngaruroro between the Kuripapango cableway and just upstream of the Taruarau confluence (although a very minor forestry influence was noted here);
- (c) the Taruarau River and its tributaries upstream of Ngamatea Station.

9. The experts agreed that water quality in the mainstem Ngaruroro and its tributaries on the true left below the Kuripapango cableway was not in a natural state due to forestry influences. Likewise, the water quality in the Taruarau and its tributaries downstream of and including Ngamatea Station were not in a

natural state due to influences from forestry as well as sheep and beef farming.

10. It was agreed that tributaries in a natural state on sections of the river described in point 8 (above) would be best illustrated graphically, and [Dr Hicks] would arrange for a suitable map to be produced and circulated to all experts for confirmation after the conclusion of the expert witness conferencing. After that it will be provided to all parties.

[40] By the time of the hearing, it was not clear whether there had been agreement on the boundaries of the natural state area between the water quality experts. Unfortunately, there appeared to be some confusion as to whether the final step had been carried through properly. Initially we indicated to parties that we might need further evidence on this point. After hearing the evidence of Dr Hicks (the last water quality witness to give evidence), whose evidence contained a map,¹³ we concluded that we did not require further evidence.

Positions of the Applicants and Regional Council

[41] In summary, the remaining differences between the natural state area identified in the two different versions of the orders provided in closing are that the Regional Council order:

- (a) does not contain an area on the true right of the Taruarau River above the confluence with Woolwash Creek; and
- (b) does contain an area on the true left of the Taruarau River downstream of the confluence with Woolwash Creek; and
- (c) does not contain an area with Ngaruroro tributaries on the true left, and the Ngaruroro mainstem, immediately above the Taruarau confluence.

The Regional Council version appears to align with the map produced by Dr Hicks.¹⁴

¹³ EIC 2 June 2020 at Appendix 3 – Natural State of Waterways in the upper Ngaruroro River.

¹⁴ EIC 2 June 2020 at Appendix 3 – Natural State of waterways in the upper Ngaruroro River.

[42] In its closing Whitewater NZ's position was:¹⁵

- (a) ... the water quality experts have not applied the correct legal test in relation to the threshold for natural state. In *Rangitata*, the Court found that “natural state” means **towards the pristine end** of the artificial/polluted to pristine continuum”.
- (b) In relation to the area on the true right of the Taruarau River above the confluence with Woolwash Creek - Dr Conwell and Dr Keesing could not assist with any explanation of why this area had been excluded from the natural state area. Dr Hicks explained that the placement of the line was “a judgement call based on land cover, that it was debatable as to whether the stream excluded should be included, and that given the bulk of Woolwash Creek seemed to be modified it was excluded. The area depicted on the Applicant's map includes areas identified as indigenous cover, and excludes the Woolwash Creek catchment.
- (c) In relation to Ngaruroro tributaries on the true left, and the Ngaruroro mainstem, immediately above the Taruarau confluence - Dr Keesing, Dr Conwell and Dr Hicks confirmed that this area was considered pristine. Again, Dr Conwell and Dr Keesing could not assist with demarcation of natural state areas. Dr Hicks explained that “looking at things like nitrogen and phosphorous sediment, and pine forest and native bush more or less behave the same way with regards to those things” but that pine needles are not a good food source for a lot of the aquatic invertebrates that would usually be present in native bush, and this will effect macro-invertebrate communities. In my submission, this applies an overly stringent interpretation of “natural state”, considering that there are no takes or point source discharges in this part of the catchment, and particularly in respect of the mainstem which flows through indigenous vegetation cover with only a contribution of flow from waters flowing through exotic forest.

(footnotes omitted)

Evaluation

[43] The Applicants did not brief a hydrologist or water quality or other witnesses to give evidence on these matters. The water quality witnesses called by other parties made the assessment of where water quality should be considered as “natural state”. While that tended to be deferred to as the proxy for identifying “natural state” during proceedings, there was also evidence of a complementary nature on hydrology.

[44] In the absence of any other or better evidence we accept that of Dr Hicks in relation to the map he produced depicting the natural state area in relation to the

¹⁵ Reply submissions on behalf of Whitewater NZ 30 July 2021 at [16].

contested areas and conclude that the order should reflect that.¹⁶ The descriptions of the waters in the Schedules to the order will also need to be reviewed and amended (as we direct).

[45] The area that is not natural state in the Regional Council's preferred order (and indeed that of the Applicants) is still in a schedule identifying areas to be protected for outstanding characteristics. That means under the Applicants' preferred order that area is still subject to the restrictions, prohibitions and other requirements in clauses 8 (damming), 9 (alteration of river flow and form), 10 (fish screens), and 11 (water quality) that also apply to waters to be retained in natural state. We were not alerted to potential concerns the Applicants' witnesses may have held about the boundary of natural state area in terms of the operation of the order.

[46] We also note that the Special Tribunal order and the Applicants' version of clause 5 Waters to be retained in natural state refers to "including the quality, quantity, level and rate of flow of the waters". The Regional Council's version of the order deletes that phrase. The Applicants refer to this phrase as consistent with the drafting of other water conservation orders which provide for protection of natural state (for example the Water Conservation (Buller River) Order 2001, cl 5 (waters to be retained in natural state). In the absence of any compelling reason for the deletion of this phrase, we accept there is good reason to leave the approach in clause 5 as it is in the Special Tribunal order. It explicitly recognises that quality, quantity, level and rate of flow all inform natural state.

C Upper waters to be protected for their outstanding characteristics

[47] Notwithstanding the Regional Council's position on reducing the area that should be 'natural state' from that in the ST order, the Regional Council's version of the order in its schedule of upper waters to be protected for their outstanding characteristics (and the accompanying map) included:

- (a) that area on the true right of the Taruarau River above the confluence with

¹⁶ Transcript at 515-519.

Woolwash Creek; and

- (b) that area with Ngaruroro tributaries on the true left, and the Ngaruroro mainstem, immediately above the Taruarau confluence.

[48] We note that the outstanding characteristics, features or values in the Regional Council's order reflect amenity and intrinsic values (absent the "afforded by natural state"), habitat for rainbow trout fishery, angling amenity and recreation, whitewater rafting and kayaking amenity and recreation and wild and scenic characteristics in the ST order. There was no evidence challenging the Special Tribunal's categorisation of these as outstanding.

[49] We conclude that those areas that are not to be shown as 'natural state' that were in the ST order are to be treated as Upper Ngaruroro waters to be protected for their outstanding characteristics. We return to the issue of what those protections should involve later in our Report.

D Is avifauna an outstanding value for the Ngaruroro?

Special Tribunal findings

[50] The Special Tribunal found:

132. The Tribunal acknowledges the conservation significance of the whoio populations of the upper Ngaruroro River. However, the population size is not currently sufficient to trigger the 5% criterion and the intervention required to achieve this level (predator control) is not within the mandate of a WCO. The Tribunal therefore does not consider the avifauna habitat of the upper Ngaruroro River to be nationally outstanding.

133. The majority of Tribunal members accept the evidence provided by Dr Mc[C]lellan and Dr Hughey on the population estimates of the banded dotterel and black fronted dotterel in the lower Ngaruroro and considers there is sufficient evidence to conclude that the lower Ngaruroro supports nationally outstanding avifauna habitat.

What amendments are sought?

[51] The Applicants and DOC made a case for avifauna to be added to the outstanding values of the natural state area as well as the remainder of the upper

waters and the lower Ngaruroro River, with the Regional Council calling evidence opposing this.

The test for ‘outstanding’

[52] How to determine outstandingness is a critical issue for both the upper and lower rivers.

[53] The Special Tribunal relied on the test set out in *Rangitata*.¹⁷ The Court in *Rangitata* accepted that the characteristics should stand out on a national comparative basis. The Court accepted the submission that 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. The characteristics must be “quite out of the ordinary on a national basis”.¹⁸

What evidence was there?

[54] The witnesses that took part in preparing the JWS Avifauna 9-10 March 2020 were:

- Dr John Craig and Dr Adam Forbes (for Regional Council);
- Dr Vaughan Keesing (for Horticulture NZ);
- Dr Kenneth Hughey (for DOC);
- Dr Des Smith (for Forest and Bird);
- Toro Waaka (for Owhaoko C Trust);
- Jenny Mauger (for Ngā Kaitiaki o te Awa o Ngaruroro); and
- Tere Lambert (for Owhaoko A East and A1B Blocks Land Trust).

[55] We start with considering avifauna in the upper Ngaruroro waters and then

¹⁷ *Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council* C109/04, 5 August 2004 at [17].

¹⁸ At [17].

turn to the lower Ngaruroro River. Before that we address a question on the threshold of ‘outstanding’.

Is 5% of the national population of a defined bird species an appropriate measure of “outstanding”?

[56] Most experts agreed that 5% of the national population is not an appropriate value to use in determining whether a species is outstanding. The number is arbitrary and does not reflect current thinking about determining a level of ‘outstandingness’ for at risk or threatened species.

[57] Dr Hughey and Dr Keesing agreed in part. They considered that for the purpose of the process the criterion should be 5% in the absence of a better method to help decide about the river and whether it is outstanding as a wildlife habitat. Both said there is some science behind the figure, and it is a trigger to recognise that management is necessary to support the species. Also, they recognised that while the figure is arbitrary there is case law on the matter.

[58] Nonetheless the experts agreed that threatened species that have populations less than 5% are important. Dr Smith considered that measurements are never so precise they can be determinative to that degree. Dr Craig considered that it is an arbitrary figure that has nothing to do with science and is a very crude measure.

[59] All agreed that a better alternative would be a multi-criterion based approach incorporating a range of elements of te ao Māori-based mātauranga and ecological science. For example, an improved version of the River Values Assessment System used in Hawkes Bay.

[60] We deal with this issue further when considering the evidence.

Avifauna in the Upper Ngaruroro

[61] Prior to finding that the whoio population was not sufficient to trigger the 5% criterion, the Special Tribunal said:

122. A population threshold of 5% or more of the total New Zealand

population of an At Risk or Threatened bird species has previously been used as a criterion to define nationally outstanding avifauna habitat in the *Rangitata* case. The Tribunal accepts this criterion as an appropriate test.

123. For the applicant, Dr McClellan provided an overview of bird habitats of Ngaruroro catchment. She considered that the catchment would be divided into four main sections on the basis of avian habitat:

123.1 the upper reaches of the river above the Whanawhana cableway (including its tributaries), which support the Nationally Vulnerable whio or blue duck...

...

128. With regards to the whio population in the upper river, agreement was reached on the number of birds (50) and the genetic and biological distinctness of the North and South Island populations. Both experts also agreed that incorporating stoat control as a factor when applying the RIVAS+ assessment method would have likely increased the population beyond the 5% threshold. This latter approach was also confirmed by Dr Hughey upon questioning by the Tribunal. The upper Ngaruroro River whio population could therefore only be considered nationally outstanding (using the 5% criterion) if predator control was undertaken.

(footnotes omitted)

What is the threat status of whio?

[62] Whio are classified as Nationally Vulnerable under the New Zealand Threat Classification System. We had evidence that the North and South Island populations are independent and genetically diverging and conservation efforts to protect South Island whio will not benefit North Island whio.

What is the population size of whio or its potential size in the upper Ngaruroro?

[63] To inform the discussion at witness conferencing Dr Hughey provided a paper summarising older and more recent information on the Ngaruroro River blue duck population written by Bill Fleury (March 2020). The expert opinion of John Cheyne cited by Dr Rachel McClellan in her evidence to the Special Tribunal indicated a population of some 50 birds from the mainstem and tributaries including and upstream of Koau Stream (which is downstream of the Taruarau – Ngaruroro confluence). Mr Fleury, Dr McClellan and Mr Cheyne did not give evidence before us.

[64] All witnesses agreed that the best approach would be to undertake a

catchment-wide whio survey to settle the matter. We accept that there is uncertainty on the precise number of birds as there has not been a full survey of the upper catchment.

[65] The experts agreed that the population of whio in the upper Ngaruroro would benefit from predator control. Mr Fleury's summary indicated that with some further predator control (based on the results of such predator control in other catchments) the Ngaruroro River above the Napier – Taihape Road bridge could support 60-100 pairs of whio, and some 50-80 pairs downstream of that road.

[66] Dr Smith considered a density of one breeding pair every km could probably be achieved. His evidence was that the river is a huge catchment with large areas of suitable habitat, not just in the mainstem but also tributaries in the upper catchment.

What are the habitat requirements of whio?

[67] Dr Craig's evidence was that whio have been driven to occupy the habitat they use now; they were once widespread in streams and rivers from high altitude to sea level. Dr Smith gave evidence that the primary habitat requirements of whio are inland streams, most commonly in alpine or montane areas and that whio require forested habitat and pool sequences and nest on the edge of rivers in forested habitat. He considered it is probably good to have adjacent valleys that allow movement between similar habitat, including for fledglings.

[68] Drs Smith and Hughey gave evidence that habitat quality is likely also a reason that the species is present in the numbers it is in the upper Ngaruroro.

[69] The JWS records that the estimated 50 birds described above are not 5% of the national population (they make up 3.9% of the North Island population of whio). In terms of that percentage, Dr Smith did some statistical analysis of the Ngaruroro whio counts and gave evidence that the upper confidence limit for whio is 5.2% of the North Island population. He said that you cannot reject the possibility that whio make up 5% of the North Island population but it is very difficult to be accurate with

population estimates.

[70] There was agreement that the whio population would benefit from predator control, with expert opinion that it could increase by 50-80 birds, bringing it close to or above 5% of the North Island population.

What is the relevance of the upper Ngaruroro not being identified as a security or recovery site in the whio/blue duck recovery plan?

[71] In cross-examination the Regional Council tabled a Whio/blue duck (*Hymenolaimus malacorhynchos*) recovery plan 2009-2019 prepared by DOC. It questioned why the upper Ngaruroro has no security or recovery sites. Dr Smith said the selection of these will be based on factors such as availability of information, and referred to the lack of a catchment wide survey and data on the Ngaruroro as making it very difficult to include the upper Ngaruroro as a recovery site.¹⁹

[72] The Regional Council also produced a DOC press release dated 15 July 2020. That referred to 748 pairs of whio in eight security sites across NZ (from Te Urewera in the North Island to Fiordland in the South), up from 298 pairs found across these sites in 2011 (an increase of 151%) when DOC and Genesis started working together to restore important populations of whio on awa across NZ.

[73] The goal of that recovery plan is to ensure the retention of viable wild whio throughout their natural range, by protecting whio at eight first priority ‘security sites’ as well as a number of second-priority ‘recovery sites’ distributed equally between the North and South Islands. There was nothing in the recovery plan to indicate the selection of these sites was based on the “outstandingness” of whio habitat. Two of the North Island security sites were already receiving intensive management: Te Urewera Mainland Island and Tongariro Forest Kiwi Sanctuary.²⁰

[74] We do not find the recovery plan and press release are relevant to the consideration of outstandingness.

¹⁹ Transcript at 141.

²⁰ Recovery Plan 2009-2019 at 14.

What other factors might be relevant?

[75] DOC submitted that there are other factors that should inform consideration of whether the Upper Ngaruroro has outstanding habitat for whio:²¹

- (a) other water conservation orders currently in force have recognised the outstanding wildlife habitat for whio based on different criteria (not the 5% threshold);
- (b) there would be significant loss to the greater North Island whio population if the Ngaruroro catchment were to be lost because it was not properly protected or managed;
- (c) there is uncertainty on the precise number of birds as there has not been a full survey of the Upper Ngaruroro catchment;
- (d) the Upper Ngaruroro can support a high density of whio;
- (e) that landscape scale predator control would increase the numbers.

[76] Further, when looking at habitat in isolation, this observation by Dr Smith is enlightening:²²

The fact that predators such as stoats are ubiquitous in their distribution mean that areas where whio are more abundant, such as the Ngaruroro River, must be better habitat, because at these sites whio have high reproductive success relative to their mortality from predation compared with other areas.

[77] DOC also submitted that other water conservation orders have used other criteria (or factors):

- (a) A threshold of “approximately one pair [of whio] per kilometre of river”.²³
- (b) In *Re Draft National Water Conservation (Motueka Order)*²⁴ the Court accepted the evidence that the rivers had potential to support “one pair per

²¹ Opening submissions at [72].

²² Dr Smith Rebuttal at [23].

²³ *Re Nelson Acclimatisation Society* C32/96, 31 May 1996 at 33.

²⁴ *Re Draft National Water Conservation (Motueka River) Order 1991* W 7/2003, 22 January 2003.

kilometre”,²⁵ the rivers represent excellent habitat and who densities may well increase in future once effects of predation are fully understood and populations managed accordingly.²⁶ Also the “habitat provided by these rivers is nationally outstanding and has the potential to support high densities of blue duck”.²⁷

Evaluation

[78] We accept the submissions and evidence in support of nationally outstanding values of the upper waters as who habitat.

[79] We also observe that to discount the suitability of the habitat based on a need for further predator control as a consideration could place At Risk and Threatened species in an even more precarious position than they are now. That must be the position for much of the habitat of New Zealand avifauna.

[80] We now consider the threats to who that will inform the requirements for protection in any order.

What are the threats to who?

[81] The JWS states that there can be issues with the conferring of special status such as a water conservation order as it can bring more people into the area. On the upper river, part of the land is publicly owned and part is owned by the Māori land trusts. The Trusts say they are having to clean up after hunters, fishers and trampers, control weeds brought in on boots and manage fires should they occur. There are also health and safety issues for the trusts. An increase in the numbers of people is not likely to be beneficial to bird populations by their very presence. The level of these threats if a water conservation order was applied to the upper river is not known.

[82] Dr Smith gave evidence that the protection of water quality and the

²⁵ At [112].

²⁶ At [113].

²⁷ At [114].

maintenance of a natural flow regime are fundamentally important requirements to continue to provide outstanding habitat.

[83] Dr Craig considered that damming and its effects on whoio habitat is not the issue, it is predator control. Drs Smith and Hughey did not agree. Both considered that habitat quality is likely also a reason that the species is present in the numbers it is in the upper Ngaruroro. They believed a large poorly planned dam in the wrong place might impact some blue duck habitat.

[84] We consider further the threats to whoio on the upper river when considering the restrictions in the order proposed by the Applicants.

Avifauna in the mainstem of the lower Ngaruroro River

Special Tribunal finding

[85] In concluding that the lower Ngaruroro supports naturally outstanding avifauna – banded dotterel and black fronted dotterel - the Special Tribunal stated:

129. For the lower river, a similar discussion ensued amongst experts. Dr Mc[C]lellan contended that the banded dotterel exceeded the 5% threshold. Dr Craig, on the other hand, disputed the population estimates used to derive this number. ... Dr Hughey pointed out that “Data Poor” actually means “Confidence in the listing is low due to there being only poor data available for assessment”. Dr Hughey went on to discuss the range of data that the Expert Panel uses to inform decision making and to also highlight the national and international level of expertise on the panel. The Tribunal accepts the evidence presented by Drs Mc[C]lellan and Hughey with regard to the population estimate for this species...

130. For the black fronted dotterel, Dr Mc[C]lellan, Dr Craig and Dr Hughey agreed that the population represented greater than 5% of the national population.

131. Upon questioning by the Tribunal as to the status of the Ngaruroro in comparison to other braided river systems in terms of avifauna habitat, Dr Hughey commented that it rated “very highly” compared with South Island braided rivers and that, while the area of available habitat may be smaller, the quality of the habitat was “exceptional”. ...

(footnotes omitted)

What evidence was there?

[86] The JWS recorded that Drs Hughey, Keesing and Smith all agreed that the population of black fronted dotterel (At Risk – Naturally Uncommon) represents more than 5% of the national population. We note that Dr Craig did not provide any evidence to refute that.

[87] Drs Hughey, Keesing and Smith all agreed that the population of banded dotterel (Nationally Threatened) represents more than 5% of the national population.

[88] Dr Craig contended that the New Zealand Threat Classification for banded dotterel (Nationally Threatened) is wrong. He maintained that position despite evidence that species' threat classifications are listed in peer-reviewed publications and are determined by a panel of independent experts, following their review of the relevant data including information received in response to requests for submissions. We note there is a review of threat classifications underway. We are not able to make a different finding based on the evidence of Dr Craig on threat classification.

[89] Dr Hughey considered the Ngaruroro to be outstanding for birdlife for several reasons. The proportion of two 'threatened' or 'at risk' bird species (banded dotterel and black-fronted dotterel) populations present on the Ngaruroro River exceeds the 5% proportion of the national population threshold. The population sizes of these two species relative to many other sites on which they occur is very large. The diversity of 'threatened or at-risk' and other native bird species is very high. Also, importantly, the quality of habitat is extremely high.

[90] In addition, Dr Hughey gave evidence that braided rivers are an important habitat for birds in New Zealand, are globally rare, and "almost a handful" are in the North Island.²⁸

[91] Dr Hughey said that when he considered these conclusions in association with the levels of importance against a range of national and international evaluation

²⁸ Transcript at 270.

systems, and he looked across the braided rivers of New Zealand, then the Ngaruroro is one of a few that does ‘stand out’.

[92] Dr Keesing did not agree to the statement in Dr Hughey’s evidence that: “nesting on habitats other than braided rivers appears to be declining and seems to be declining at rates which mean remaining habitats like those on the Ngaruroro will become relatively even more important over time”. Dr Keesing was not convinced that is necessarily so, questioning whether there is enough data to say that is the case.

[93] Dr Craig’s evidence did not focus on the quality of the habitat or make any comparisons with habitat of other braided rivers. Instead, he pointed to threats to banded dotterel that he considered to be beyond a water conservation order’s mandate, a matter we return to under the heading of threats.

[94] In cross-examination Dr Smith referred to the Ngaruroro River as the only currently known breeding population in the North Island of the South Island pied oystercatcher (principally a South Island species and At Risk-Declining) as extremely significant, as the current northern range limit for the breeding of that bird. He said that ideally you would protect birds at the edge of breeding ranges, because range contractions typically result in substantial loss of genetic diversity and increase the vulnerability of populations to catastrophic decline.

Evaluation

[95] We find that the mainstem of the lower river has outstanding values for avifauna. That is not only based on the population of banded dotterel (nationally threatened) and of the (At Risk) black-fronted dotterel representing more than 5% of the national population, but also considers the following factors:

- population sizes of the above two species;
- diversity of threatened or at risk and other native bird species;
- quality of habitat, including braided river habitat.

What are the threats to avifauna in the lower Ngaruroro?

[96] The Special Tribunal report said:

134. The next step is for the Tribunal to consider the threats to the avifauna habitat of the lower Ngaruroro River. Of the threats identified by experts (predation, four wheel driving, jet boating, changes to the flow regime, gravel extraction and river racking [sic]), the Tribunal considered that all threats could be managed through existing mechanisms. For example, the Ecological Management and Enhancement Plan provides fine-scale, river-specific guidance regarding the ecological management of river control and drainage works (and enhancement of ecological values) on the Ngaruroro River (such as gravel extraction) and is embedded in the planning framework through the resource consent process. Of those threats for which a WCO could mandate (such as minimum flows), other mechanisms, such as Plan Change 5, already provide for this.

135. As such, the threat test for avifauna habitat is not met.

136. Accordingly the Tribunal finds that there should be no order made for a WCO for the protection of avifauna habitat in the Ngaruroro River.

(footnote omitted)

[97] Rather than traverse the legal argument as to what the Special Tribunal was doing (or thought it was addressing) when it applied what it called “the threat test for avifauna”, we consider what the threats are and how they might inform the protections sought by the Applicants. We return to this matter in addressing those protections.

[98] The Avifauna JWS lists many threats in no particular order. Dr Keesing gave evidence that there is no single threat to avifauna but that it is a multitude of things that are often interrelated.

[99] We note the evidence of Dr Hughey that a transitory threat (such as a boom in predator numbers, or an outbreak of disease, or a 4-wheel drive rally during the breeding season) may result in a lot of dead birds; but it will not necessarily alter the intrinsic qualities of the habitat that make it optimal for the species. We also accept the evidence of Dr Hughey that a change in the intrinsic habitat attributes, such as reduced flows that result in fewer, less varied and productive channels resulting in diminished food availability, is a relevant habitat change. Dr Keesing also confirmed that flow reductions, damming and takes present a risk to riverbeds.

[100] We also note that the experts agreed in the JWS that in relation to raking for weed control and to break up compacted gravel surfaces the more sophisticated methods used for this since the early 2000's may have been influential in the improvement seen in the numbers of banded dotterels and black-fronted dotterels in the lower parts of the lower Ngaruroro.

[101] We consider the threats to avifauna on the lower river when addressing the restrictions in the order proposed by the Applicants.

E Should habitat and contribution to habitat for indigenous fish be recognised as an outstanding value?

Special Tribunal findings

[102] The Special Tribunal report concluded:

154. The Tribunal accepts that the determination of outstanding status should not rest solely on any one type of evidence. In making its determination, the Tribunal has considered all strands of evidence presented by the applicant and submitters. On the balance of this assessment the Tribunal accepts the evidence of opposing submitters as to the status of the native fish habitat of the Ngaruroro River. The Tribunal accepts that while some aspects of native fish habitat are likely to be *nationally significant*, they are not *nationally outstanding*.

What amendments are sought?

[103] In opening, the Applicants submitted that the Ngaruroro catchment provides outstanding habitat for native fish based on:

- species diversity, biotic integrity and the proportion of threatened species present;
- water quality and food availability;
- the near-natural condition of the upper catchment;
- the presence of braided and estuarine habitat in the lower catchment; and
- uninterrupted fish passage between source and sea.

[104] For the upper Ngaruroro, the Applicants' closing order had 'contribution to outstanding habitat for indigenous fish' for its natural state area and surface water for the remaining area and 'habitat for indigenous fish' for hydraulically connected groundwater.

[105] For the mainstem of the lower Ngaruroro the Applicants' closing order had as outstanding values 'habitat for indigenous fish' and 'contribution to outstanding habitat for indigenous fish in the Upper Ngaruroro Waters'. For the waters to be retained in their natural state and the mainstem of the Ngaruroro River and its tributaries from immediately above the confluence with the Taruarau River down to the Whanawhana cableway, there is also 'habitat for indigenous fish' as a contribution to outstanding values.

What evidence was there?

[106] Witnesses participating in indigenous fish expert conferencing on 11-12 March 2020 and producing a JWS – Fish were:

- Dr Thomas Wilding and Dr Andy Hicks (for Regional Council);
- Dr Vaughan Keesing (for Horticulture NZ);
- Jenny Mauger (for Ngā Kaitiaki o te Awa o Ngaruroro);
- Tere Lambert (for Owhaoko A East & A1B Blocks Land Trust);
- Marei Apatu (for Owhaoko C Lands Trust); and
- Kate McArthur (for Forest and Bird).

The focus in that expert conferencing was on the lower river.

[107] When cross-examined, Dr Keesing made it clear that he was briefed to look at the lower river (below Whanawhana) and to determine whether that lower river was outstanding or not based on the attributes.

What should guide our evaluation of outstanding values for indigenous fish habitat?

[108] In the Ecology – Fish JWS, the experts agreed the ecological attributes of relevance to whether there are outstanding values for indigenous fish habitat would be: indigenous species richness, threat classification status of species, abundance, representativeness of habitat or species assemblage, diversity of habitat types and quality of habitat. In terms of the weighting of those attributes that is up to each expert’s opinion.

[109] The JWS noted the guidance around outstandingness provided in the Special Tribunal’s report as “outstanding on a national comparative basis” or “quite out of the ordinary on a national basis”. All witnesses agreed that a more robust ecological assessment of ‘outstanding’ would require a national scale assessment of rivers around New Zealand, using comparable methods and focusing on species richness and abundance at a number of different scales (e.g. species richness at a reach or catchment scale).

[110] The JWS records that opinions differed between Ms McArthur, who considers it does provide outstanding habitat, and Drs Wilding, Keesing and Hicks who consider it does not. This reflects the difference in approaches taken for making the assessment in the context of the data available, including the population of rivers (and reach scale richness or diversity) used for comparisons.

[111] Ms McArthur, in her extensive cross-examination, said that her thinking had evolved somewhat in terms of this case. She said she had presented the question to the New Zealand Freshwater Science Society conference because there is still not an agreed set of ecological criteria for determining what is outstanding. She considered that Dr Keesing, Dr Hicks and herself are looking at a different threshold within a different context. In Ms McArthur’s view it is disappointing that there has been such a “hard bar” to cross for indigenous fish in water conservation order history. She referred to watching the number of species of New Zealand indigenous fish growing in their Threatened and At Risk status.

What was agreed on the values of the lower river?

[112] For the lower river the Ecology – Fish JWS records agreement that:

- species richness at the reach level in the lower Ngaruroro River is nationally high, with many species often observed during a single reach survey;²⁹
- there is one species that is classified as ‘Threatened’ (lamprey) and 7 species classified as ‘At Risk’. The lack of robust population data makes it impossible to assess the importance of the Ngaruroro River for conserving these species in a national context;
- the freshwater fish fauna is representative of species that would be expected to occur in a braided river in good condition, including flow sensitive species such as bluegill bullies and torrentfish. The Ngaruroro supports all migratory *Gobiomorphus* species (bullies);
- all species, both migratory and non-migratory, in the lower river are also found in many other river systems;
- the lower river catchment, as a whole, contains a high variety of riverine macrohabitats, from the braided reaches beginning in the vicinity of the Whanawhana cableway to the estuarine habitats in the terminal reaches;
- habitat for fish in the lower Ngaruroro is in overall good condition;
- species of fish present in the lower river are 14 freshwater and 4 marine wanderers (black flounder, mullet and triple fin). The lower river fish faunal community is relatively intact meaning it has all the expected species except the New Zealand grayling.

[113] We now consider the evidence informing the areas of disagreement and the different opinions on whether the values are outstanding in more detail.

²⁹ See JWS – Fish at [40].

[114] We note that the focus in the joint witness conferencing was on the lower river, with little reference to the upper river:³⁰

Experts agreed that due to the strong influence diadromy has on the freshwater fish fauna of NZ, species diversity and the abundance of migratory individuals typically decreases with increasing distance from the sea. This general pattern holds true for the Ngaruroro where, for example, only 6 indigenous freshwater species have been observed in stream reaches above Whanawhana, of the total 18 (or 17 according to [Drs Wilding and Hicks]) indigenous freshwater fish species found in the broader Ngaruroro River catchment.

What data, thresholds and weighting for outstanding were applied?

Indigenous fish species richness

[115] Ms McArthur did not think it appropriate to compare fish species richness nationally, due to major biogeographic differences and disturbance history (e.g. volcanism, glaciation, river capture) across the country. Her approach was to compare the Ngaruroro River with rivers with a similar disturbance history that has resulted in a predominately migratory fish fauna.

[116] Ms McArthur also considered reach-scale richness provides an ecologically relevant way to assess species richness nationally, while accounting, to the degree possible, for major biogeographical differences. In her view reach-scale richness is more affected by local characteristics such as land use, water quality and habitat quality and less influenced by biogeography, latitude and to some degree distance from the sea, all of which have a major influence on catchment scale diversity. In her opinion if the comparison of rivers does not consider biogeographic factors, rivers outside the southern South Island will not meet the species richness and threat classification of species criteria.

[117] In addition, Ms McArthur considered that every one of 17 rivers (out of 6,000), including the Ngaruroro (Fernhill), she identified as having exceptional reach-scale diversity of indigenous fish with nine or more taxa recorded in the New Zealand Freshwater Fish Database (NZFFD) as outstanding with respect to indigenous fish.³¹

³⁰ At [12].

³¹ Transcript at 44. See EIC Appendix 3 Rivers with Exceptional Reach-Scale Diversity of Indigenous Fish Table 1: Rivers with exceptional reach-scale diversity of indigenous fish (nine or more taxa) recorded in the NZFFD 2000–2020.

[118] Further, Ms McArthur considered that her reach scale assessment has the benefit of removing the confounding factors of influences of north versus south or distance from the sea. She said she looked at all the 59 rivers and classified and described them and the Ngaruroro was the only large braided river with nine or more species.

[119] Dr Keesing was critical of Ms McArthur's approach to assessing reach-scale species richness, with its breaking down the species data of the rivers from the NZFFD into small units to examine "exceptional reach-scale diversity" using fish presence/abundance. He considered her approach to be "very complex" and "convoluted".

[120] Dr Keesing referred to the JWS agreement that the lower Ngaruroro River was unusual in that it was possible to find many species in a small area (a sample reach 100-300m) in any one sample. He said of Ms McArthur's approach:³²

this reductionism obscures the point that in the plains (lower) river the species richness and abundance and number of threatened species in total is not "notable".

[121] Dr Keesing said that Ms McArthur's table of rivers with high reach-scale diversity of indigenous fish (eight or more taxa) recorded in the NZFFD 2000-2020³³ (Appendix 1) shows that there are six better reach-diversity rivers than the Ngaruroro River, but most were very similar at eight or nine taxa. He noted that most of this data came from only one survey, with the more surveys done the more likelihood of finding additional taxa.

[122] Dr Keesing also considered the Ngaruroro River to be regionally important and a significant habitat with a range of quality of habitat that allows the current fauna to persist, but he did not see evidence that supports a finding of outstanding. He said:³⁴

³² EIC at [104].

³³ EIC Appendix 1: Rivers with high reach-scale diversity of indigenous fish.

³⁴ EIC at [95].

At a regional level the River is an important fish habitat with values, but at a national level, while in the top 30%, it is not, comparatively speaking, one of the better or more important (top 10%) of rivers in terms of fish abundance and species richness or the number of At-Risk and threatened species.

[123] Dr Keesing did not agree with Ms McArthur's evidence that North Island rivers should not be expected to be as rich as South Island ones because of biogeography and disturbance history and differential colonisation abilities. As an example, he referred to the Ruamahanga catchment (and North Island river), with 19 taxa only less than the Buller, the "best" river in New Zealand at 20 taxa.

[124] Dr Keesing said:³⁵

In my analysis of 305 larger rivers in New Zealand, where the Ngaruroro River ranked 31st, higher ranking North Island rivers are present (and in the top 10% nationally). These include: Ruamahanga, Manawatu, Waikato, Waikanae, Kaituna, Hutt River, and the Patea Rivers. The Whanganui, the neighbouring Tukituki, and the Rangatiki Rivers all have the same species richness as the Ngaruroro River. In a North Island only comparison the Ngaruroro River is the same or similar as several of the larger rivers but would not make the top 10%.

Threat classification status of species

[125] In terms of the number of threatened fish species Dr Keesing noted Ms McArthur agreed that the Ngaruroro River does not stand out at a national scale.

Abundance

[126] Ms McArthur gave evidence that the NZFFD contains inconsistent records of fish abundance which do not enable robust comparisons to be made at the national level. She referred to advances in national monitoring protocols relevant to measuring fish abundance and population health and more recent inclusion of these in some monitoring programmes. Despite this, an understanding of abundance at the national level and ability to compare abundance between rivers at this scale remains poor.

³⁵ EIC at [102].

Representativeness of habitat or species assemblage

[127] Ms McArthur considered representativeness should not be applied as a criterion for outstandingness in isolation given it relates to what is typical about the condition of a river and what is exceptional, but the two components are useful to include in an assessment of outstandingness. In her opinion a species assemblage containing all four migratory bullies at the reach scale is a rare enough occurrence in the data to be a useful future criterion for assessing outstanding indigenous fish habitats in New Zealand. She concluded that the Ngaruroro River is an important and representative habitat for dwarf galaxias, migratory bullies and torrentfish and in her opinion this contributes to its outstanding habitat value.

[128] Dr Keesing considered that the fish fauna of the lower Ngaruroro River is typical and representative and that does not make it an outstanding habitat. He disagreed with Ms McArthur that the presence of dwarf galaxiid meets the “quite out of the ordinary” criteria but considered it just “normal” out of the ordinary (referring to Dr Hicks agreeing with that in the JWS). He accepted this is a fine distinction, but said it is an important one. He referred to the NZFFD with records in 26 rivers and 11 of those with greater numbers, several other rivers with larger populations, and that there are likely to be several recent surveys not represented in the database.

[129] Dr Keesing also disagreed with Ms McArthur that the lower river is outstanding because it is representative habitat for migratory bully fauna (redfin, bluegill, giant and common bully). He said that his experience and the NZFFD records in most rivers do not bear that out. While he agreed that the lower Ngaruroro River bully fauna is important he said the abundances of the migratory indigenous fish in the Ngaruroro River (and the number of species) is not in the top 10% of New Zealand’s rivers, ranking for all bully abundance records as 44th most abundant river for bully (of 305 rivers).

[130] When cross-examined, Dr Keesing said³⁶ that he did his analysis of the lower Ngaruroro and its comparison with other lower river examples across New Zealand,

³⁶ Transcript at 414- 418.

not of the Ngaruroro River and its catchment in total. Neither did he take data for the entire river and its catchment for the other comparative rivers. If he were to do an evaluation of the entire river and included upland bully that would put it second in his analysis but doing the same for the other rivers might also add species to their number.

[131] Ms McArthur considered the lower reaches of the Ngaruroro to be a torrentfish stronghold habitat, referring to its high abundance and common presence, within the context of nationally declining populations (Dunn et al. 2018) and suggested decline in other large rivers of the central North Island (Dr R. Allibone pers. comm). Dr Keesing said that Ms McArthur presents no comparative evidence that supports this species as an outstanding attribute to the lower river. He said it is an important fish, but still relatively common, being found in 187 of 305 rivers in the NZFFD and in abundances greater than in the Ngaruroro River (e.g. Whanganui, Grey, Motu, Rakaia, Ruamahanga, Tukituki and Waianakarua Rivers).

Uniqueness of the lower Ngaruroro River

[132] The JWS addressed this as a factor. The witnesses agreed that all species, both migratory and non-migratory, in the Ngaruroro River are also found in many other river systems and the catchment does not support a “unique” fish unlike the Nevis River galaxias which is recognised in a water conservation order (Kawarau River).

[133] In the JWS the experts agreed the distribution of dwarf galaxias in the lower Ngaruroro mainstem is ‘out of the ordinary’ with Ms McArthur considering this makes the fish fauna unique. Dr Keesing and Dr Hicks noted that dwarf galaxias have been observed at various other coastal and mainstem sites (e.g. Hutt, Wairau, Kaituna) and do not consider this feature to be “quite out of the ordinary”. In subsequent evidence Dr Keesing agreed with Ms McArthur that the abundance of dwarf galaxiid in the lower Ngaruroro contributes to the character of the lower river and to its significance but not that it makes the river outstanding in terms of being “quite out of the ordinary”. This was because there are a number of other rivers with

populations of dwarf galaxiid larger than the Ngaruroro River.

Diversity of habitat types

[134] The JWS agreed that the catchment, as a whole, contains a high variety of riverine macrohabitats, from the braided reaches beginning in the vicinity of the Whanawhana cableway to the estuarine habitats in the terminal reaches. Also, that braided river habitat (e.g. lower Ngaruroro/Tukituki) contains a diverse range of mesohabitats and provides well for riffle-dwelling species. Consequently, braided rivers provide habitat for a greater range of species compared with deep, single-thread river habitats (e.g. Wairoa River, Mohaka River).

[135] Dr Keesing did not agree with Ms McArthur's opinion that the Ngaruroro River is the most diverse fish fauna braided river. In his opinion it is no more special in its braided nature than any other braided river. He expressed a concern that Ms McArthur's analysis whittled down the variables until only the Ngaruroro River is showing rather than comparing the attribute of fish assemblages irrespective of the finer details (semi-braided versus braided and related to survey effort etc) of the river type.

Quality of habitat

[136] The JWS records agreement that the habitat for fish in the lower Ngaruroro is in overall good condition and the absence of barriers to fish passage means migratory species are easily able to colonise the good quality habitat. Ms McArthur considers the quality of habitat is outstanding.

History of treatment of trout and indigenous fish in water conservation orders

[137] Ms McArthur gave evidence that indigenous fish habitat was applied for as an outstanding value in eight previous water conservation orders and, of these, only the Buller and Kawarau (via an amendment) orders recognised indigenous fish habitat as an outstanding value. That was for the presence of a genetically isolated species

(Kawarau, for the Nevis River) or containing an unusual assemblage of species (Buller).

What is the relationship between the lower and upper waters?

[138] The Applicants seek recognition that the lower Ngaruroro mainstem provides the outstanding value of ‘contribution to outstanding habitat for indigenous fish in the Upper Ngaruroro Waters’. The Court was interested in Ms McArthur’s opinion on the reasons for that. Dr Keesing later gave evidence that he had not addressed fish passage in that regard.

[139] Ms McArthur gave evidence that any analysis that splits the upper catchment indigenous fish habitat from the lower catchment habitat is not ecologically valid. It is more ecologically appropriate to take a whole of catchment approach to any analysis or evaluation.

[140] Looking at the catchment as a whole, Ms McArthur considered that from her perspective indigenous fish habitat of the catchment as a whole is outstanding. To her, ecologically it is all one river in terms of fish moving around it, and the habitat is outstanding. She referred to the contribution of the water quality from the well forested upper catchment and the natural state area to the values of the lower river. Also the importance of maintaining connectivity, mentioning that some fish migrate and travel between the sea and the upper catchment. She said that those things may be adequately covered in the protection conditions as opposed to the values but that was outside her field of expertise.

Closing submissions

[141] In closing, Forest and Bird submitted that Dr Keesing’s approach to determining outstandingness for indigenous fish was to use species richness, threatened species presence or indigenous fish abundance along with a 10% threshold. Dr Keesing came up with 10% as a “reasonable guesstimate” for determining

outstandingness for indigenous fish.³⁷ Dr Keesing concluded that the lower Ngaruroro River was in the top 10.2% threshold for species richness, within the margin of error for his calculation.³⁸

[142] Further, in closing Forest and Bird submitted that throughout Dr Keesing's evidence he makes it clear that for his analysis on species richness, he only used data for the lower river. However, when it came to giving weight to species richness in the lower Ngaruroro River from any single sample effort, he dismissed the Ngaruroro's nationally high ranking because the river as a whole was not particularly high.³⁹ Further, in the JWS⁴⁰ it was agreed by the experts that this attribute is not typical of New Zealand rivers. Dr Hicks also acknowledged that it was fair to look at reach scale diversity as a metric.⁴¹

[143] In closing, Forest and Bird submitted that Dr Hicks' threshold metric of only one or two other places like it is too high and inconsistent with the way in which the outstanding test has been applied elsewhere, especially for trout.⁴²

[144] The Regional Council's line of cross-examination was that Ms McArthur's analysis, with its process of extracting data and applying filters excluding other rivers, had resulted in the Ngaruroro River being outstanding because it is the Ngaruroro River. The Regional Council questioned whether a water conservation order discriminates between the types of rivers given the national context within which the ecological assessment for a water conservation order is occurring.

Evaluation

[145] We had no evidence specifically on indigenous fish habitat in the upper Ngaruroro and its tributaries. We also note the focus in the evidence, the expert conferencing and the cross-examination was on the lower river.

³⁷ Transcript at 411.

³⁸ Transcript at 418.

³⁹ Transcript at 418.

⁴⁰ JWS: Indigenous Fish at [40].

⁴¹ Transcript at 511.

⁴² Transcript at 511.

[146] We acknowledge that in expert conferencing the experts recorded that they were “quite uncomfortable with the lack of explicit guidance around what ‘quite out of the ordinary on a national comparative basis’ means with respect to indigenous fish habitat”.⁴³ Also, it was agreed “that a more robust ecological assessment of ‘outstanding’ would require a national scale assessment of rivers around New Zealand, using comparable methods and focusing on species richness and abundance at a number of different scales (e.g. species richness at a reach or catchment scale)”.⁴⁴

[147] This is unfortunate but cannot stand in the way of our making a decision on the basis of the evidence before us.

[148] Ms McArthur was extensively cross-examined on the robustness of the data and methodology she used in her assessment, particularly in respect of her reliance on reach-scale richness as a factor.

[149] The past treatment of indigenous fish and trout in water conservation order applications is not a reason in and of itself to justify identifying outstanding indigenous fish habitat values. In any case we had no comparative evidence on other water conservation orders and their relevance to the Ngaruroro.

[150] We accept the evidence of Dr Keesing that the lower Ngaruroro River does not meet the outstanding threshold. We do not find the points made by Forest and Bird about Dr Keesing’s analysis detract from that finding.

[151] Accordingly, we find the case was not made out for including indigenous fish habitat (or fish passage) as an outstanding value in either the upper or lower Ngaruroro order.

[152] We acknowledge the point made by Ms McArthur that the restrictions in the order sought by the Applicants would also benefit indigenous fish. She made much of what protections might achieve regardless of whether indigenous fish values are

⁴³ At [31].

⁴⁴ At [61].

recognised in an order as outstanding or not. Such protections of course only apply to those waters that are in an order.

[153] Dr Keesing, too, gave evidence that from his experience a water conservation order might influence threats from extended periods of unnatural drying and major changes to flow regime to indigenous fish fauna. He referred to provisions restricting/managing flows for the storage and abstraction of water, with the damming restriction, restrictions to alteration of flow water abstraction, the need for fish screens and requirements to protect water quality.

F Should amenity and intrinsic values afforded by natural state be specifically recognised as outstanding values in the Upper Ngaruroro?

Special Tribunal Order

[154] The Special Tribunal Order had in Schedule 1 “Amenity and intrinsic values afforded by natural state”.

Amendments sought

[155] During the hearing we asked whether there was a need to include “amenity and intrinsic values afforded by natural state” in the waters to be retained in natural state schedule, given this simply repeated the general purpose of a water conservation order in s 199(1) with the more specific outstanding values listed below. The Applicants say the clause should have a reference to “amenity and intrinsic values”:⁴⁵

This is consistent with the outstanding values which were recognised in the Special Tribunal version Schedule 1. It also goes to the clause 5 recognition of waters in their natural state, consistent with the purpose of s 199(1)(a) to recognise and sustain outstanding amenity and intrinsic values afforded by waters in their natural state;

[156] The Regional Council removed various references of this nature in their closing version. Nothing major hinges on this and we accept the Special Tribunal version.

⁴⁵ Joint Reply Legal Submissions for Forest and Bird and Whitewater NZ 20 August 2021.

G Should natural characteristics be included as outstanding values?

Special Tribunal Order

[157] The Special Tribunal order for the Upper Ngaruroro waters to be retained in natural state has as outstanding characteristics or features:

- wild and scenic characteristic; and
- natural characteristics – water quality.

[158] The Special Tribunal found:

208. The Tribunal is very aware that judgements on this type of value or characteristic have a distinct qualitative element, and there are obvious difficulties in trying to assess these values on some sort of quasi-empirical basis. Nonetheless, ... the Tribunal accepts Ms Pfluger's evidence of the unique or close to unique concentrated landscape diversity to which she refers. This is particularly evident from the air as the river passes within relatively short distances from its open headwaters, through various riverscapes, and then into its wild and forested gorges. On the ground the sense of remoteness and pristine natural features is very marked. The relationship between the river itself and the surrounding landscape looms large and is unavoidable, particularly in the gorges.

209. The applicants also rely on water quality. The Tribunal accepts that indeed the very high water quality is a contributing feature to the wild, scenic and natural character of the water body.

Amendments sought

[159] The Regional Council's case refers to the Water Quality JWS agreement that water quality is not outstanding as a reason for removing the reference to 'natural characteristics – water quality'. The Applicants agree 'water quality' should not be listed but that 'natural characteristic' should be added to wild and scenic characteristic as follows: "Wild, scenic, and natural characteristic". The Applicants submit that water quality is different to an assessment of natural state and natural characteristics.

Evaluation

[160] The material before us and our experience on the ground of the values supports the findings of the Special Tribunal. We note that the Special Tribunal's

Report (but not its order) refers not just to ‘wild’ and ‘scenic’ in its reference to the water body but also to its natural character. That construct brings in other natural characteristics besides water quality. Nevertheless, we find that the Applicants have not made out a case for amending the Special Tribunal’s order to refer to ‘natural characteristics’ in the way proposed.

[161] We delete the references in the Special Tribunal’s order to ‘natural characteristics – water quality’ and amend the references in the order to ‘wild and scenic characteristics’ as proposed in the Regional Council version.

H What should be the protections for the outstanding values?

Special Tribunal findings

[162] The threats to whio did not explicitly inform the Special Tribunal order protections given it concluded avifauna was not an outstanding value.

[163] The Special Tribunal did consider threats to avifauna in the lower river.

Amendments sought and evidence received

[164] Witnesses for the Regional Council gave evidence on river control and drainage works such as gravel extraction, the Ecological Management and Enhancement Plan and beach raking and the resource consent process in the planning framework. We deal with aspects of that evidence when considering the restrictions sought by the Applicants for the lower river and particularly the Natural Character Index.

[165] We covered some of the general evidence on the threats to whio in considering the values. The major area of difference in the two different versions of orders for the upper waters is the threat to whio from removing the restriction on damming of tributaries proposed in the Regional Council version. Some of its witnesses (not including its planning witness) suggested a resource consent process might be the appropriate method for that.

Restriction on damming of waters for the upper waters

[166] A major difference in the protections for the upper waters is the restriction on damming of waters:

Special Tribunal order:

7. No resource consent may be granted, or included in a regional plan authorising the damming of the upper Ngarururo waters.

Applicants' order:

8. No resource consent may be granted, or rule included in a regional plan authorising the damming of the upper ... Ngaruroro waters.

RC order:

7. No resource consent may be granted, or rule included in a regional plan, authorising the damming of the waters of the mainstem of the upper Ngaruroro River

[167] Both the Applicants and the Regional Council agreed that the addition of 'rule' is warranted for clarity.

[168] The Special Tribunal Report stated:

272. The Tribunal notes that PC9 prohibits damming on the upper Ngaruroro mainstem and its tributaries the Taruarau and Omahaki. The Tribunal is of the view that the outstanding values identified cannot be limited to those waters in isolation and that the damming prohibition should be in respect of all upper Ngaruroro waters. The impounding of waters is prohibited unless the adverse effects are deemed to be no more than minor.

273. The Tribunal acknowledges that there may be beneficial effects of off-stream water storage and augmentation schemes and the ability to abstract water at high flows for landowners and that such actions may also improve community resilience to climate change. Therefore, except as specifically excluded by the WCO, the Tribunal considers that such projects should not be prohibited per se but are matters to be considered by HBRC on receipt of an application for a resource consent for such activity.

(footnote omitted)

[169] The Applicants' position is that the damming provision should apply to both the tributaries and mainstem of the Upper Ngaruroro as necessary to preserve the natural state and protect the outstanding characteristics.

[170] The Regional Council's case was that restriction on damming should not

extend beyond the mainstem of the Upper Ngaruroro relying on the protections in Clause 8 'Restriction on alterations of river flow and form' to provide the degree of protection it considered was required. Its version of the order did not have a restriction on damming of the Taruarau mainstem and the Omahaki mainstem and other tributary streams including those directly feeding the mainstem of the Upper Ngaruroro.

[171] Dr Philip Mitchell for the Regional Council was asked about the regional plan provisions for damming water. Acknowledging that the TANK Proposed Plan Change 9 is still in process, he said:⁴⁶

Small dams are permitted and they're permitted in terms of small catchment size and dam height, meaning that plus anything that doesn't meet that requirement defaults ultimately to being a prohibited activity ... and the specific prohibited activity rules relating to the damming of the mainstem of the Ngaruroro, the mainstem of the Taruarau River and the Omahaki River.

[172] We note that Rule TANK 17 in Proposed Plan Change 9 for damming water has the construction of dams or the damming of water on the mainstem of the Ngaruroro River, Taruarau River and Omahaki River as a prohibited activity. We deal with the evidence of Dr Mitchell and other planning witnesses on the provisions in the planning documents under that heading.

[173] The Regional Council case was not clear on its reasons for not extending the damming restrictions into the Taruarau River and Omahaki River in line with the TANK Proposed Plan Change 9. There was also some confusion in the evidence of its witnesses about what the Regional Council version involved. The Regional Council case relied on the restrictions in alterations of river flow and form to protect the values that could be impacted by damming.

[174] The evidence of the Regional Council witnesses had a focus on damming (and not allowing consideration of damming) in the tributaries.

⁴⁶ Transcript at 598 – 599.

[175] Dr Ian Jowett⁴⁷ considered the Regional Council's proposed water conservation order would effectively prohibit damming in the mainstem of the Taruarau and tributaries above the confluence of Taruarau and Waiwhetu Stream because in his view clause 8 (requiring no more than a minor stream depletion effect) is effectively a prohibition on dams that can actually affect the river flows and things like that.⁴⁸ He said that a small farm dam on an ephemeral tributary or similar might pass the test but it would be difficult for a storage dam for instance to pass that test. He said that on a tributary a change in flow actually measurable with the current flow gauging techniques is about a 10% change. He went on to consider that it depended on actual effects, but the test is always very uncertain.

[176] Dr Wilding had not undertaken specific modelling of the potential effect of damming on the many tributaries of the Ngaruroro River, beyond the modelling work completed by Dr Jowett for the braided sections of the mainstem. Instead, he offered an opinion of the risk that damming tributaries poses to values relating to flow and sediment transport:⁴⁹

Dams in small valleys (ephemeral or intermittent water) in rural areas (e.g. stock water ponds) would pose a low risk to the flow regime of the Ngaruroro and its perennial tributaries. Such dams are also unlikely to intercept greywacke gravel and cobbles.

Constructing larger dams in perennial tributaries in rural sub-catchments (e.g. for irrigation supply) poses a greater risk, with the potential to modify the flow regime of the tributary and intercept bedload. The effects of such dams would need to be evaluated through an RMA consenting process in order to examine potential effects on the rainbow trout fishery. Because of land use changes, the flow regime of these tributaries is not in a natural state. If done right, dams could be used to mitigate land-use effects (e.g. reduce land use effects on peak flows, release cooler water from below the thermocline). The risk is less for the mainstem of the Ngaruroro (see "Effects of high flow allocation ..." above), but would still require investigation on a case by case basis.

It would be difficult to avoid, remedy or mitigate the effects of a large dam constructed in a forested sub-catchment of the Ngaruroro, if the WCO is intended to retain the flow regime of these tributaries in a natural state.

[177] Dr Wilding concluded that dams in small valleys in rural areas - for example,

⁴⁷ Dr Jowett provided evidence on hydrology for the Regional Council.

⁴⁸ Transcript at 500-501.

⁴⁹ EIC 2 June 2020 at [33]-[35].

stock water ponds - would pose a low risk to the flow regime of the Ngaruroro and its perennial tributaries. He also proffered an opinion (arguably outside his area of expertise) that a water conservation order should not foreclose the consideration of dams on the tributaries of the Ngaruroro River on a case by case basis.

[178] Under cross-examination he agreed that damming or abstraction would be an alteration to the flow that results in waters no longer being in their natural state.⁵⁰ He considered that would probably not disqualify a very small alteration e.g. one water tank but by the time you reach some threshold size of storage or diversion, you would no longer say it was natural state.

[179] Dr Wilding also gave his opinion on the restriction on alterations of river flow and form as a primary control on damming and abstraction of water outside of the mainstem. He said that a “more than minor stream depletion effect”:⁵¹

...so this is either itself or in combination, so this is both the individual diversion plus the cumulative effects ... Rules or permitted takes authorising the use of water. So ... often ... looking at what is measurable or something less than that was detectable or it has the potential to cause a change in that system.

... it is referring to stream depletion effect on schedule 1 and 1A waters.

...

I'd have to look for some policy advice there. ... just ... a very small unperceivable change, I suppose, regardless of whether it is an outstanding characteristic.

[180] Witnesses for the Applicants seeking the retention of a restriction on damming of all the waters in both the natural state and areas contributing to outstanding values (previously natural state areas) also gave evidence.

[181] Dr Douglas Rankin was the Conservation Officer for Whitewater NZ from 2012 to 2018, and has been actively involved in kayaking and white-water paddling since 1971. He assisted with the gathering, coordination and provision of information for the application on kayaking and rafting values and gave evidence to the Special

⁵⁰ Transcript at 567.

⁵¹ Transcript at 568-569.

Tribunal on the white-water recreation values.

[182] Dr Rankin gave evidence as to his concern about the potential for dams of any scale on the mainstem or tributaries in the upper Ngaruroro waters to affect white-water kayaking and rafting values. His concern is not only with large dams that affect flow variability on the mainstems but also with small dams. He said that their mere presence (even if not visible) in an otherwise essentially pristine catchment has significant bearing on the wild and scenic and natural character of that resource. He said that many white-water boaters would not be happy with that proposition. The mere presence of a dam is an intrusion and depending on its size and scope it could still have significant bearing and impacts on the downstream flows. He accepted the allowance for a small take for limited purposes already in the order sought by the Applicants. With no certainty about what any dam would involve (and he also mentioned the potential for a plethora of dams), Whitewater NZ's preference is: "Look, it's much simpler and clearer and less ambiguous if there's no possibility of dams".⁵²

[183] Dr Smith and Dr Hughey gave evidence in the context of whio (with avifauna an outstanding value the Special Tribunal did not need to consider protection for) that a large poorly planned dam in the wrong place might impact some whio habitat.

[184] We conclude that it is better to put it beyond doubt that damming of the tributaries of the upper waters (whether we were to decide in favour of the Applicants' or Regional Council's versions of the natural state area) is restricted. We see there are high risks with relying on a resource consent process to provide for the protection of not just whio habitat but also the many other values recognised in either version of the order for the upper waters. We are also aware that the resource consent process does not deal well with the cumulative effects of individual applications. Individual applications for damming activities with no more than minor adverse effects on the outstanding values can add up to major adverse effects with the resetting of the environmental baseline after the grant of each consent.

⁵² Transcript at 187.

What should any restriction on damming in the lower river be?

[185] The restriction on damming sought by the Applicants for the lower river is the same as for the upper river, with two important differences. It does not cover hydraulically connected groundwater. Neither does it extend to the tributaries (a later amendment to the order sought). That restriction is to protect outstanding avifauna values.

[186] We accept the evidence that damming is a threat to intrinsic habitat attributes, such as reduced flows that result in fewer, less varied and productive channels resulting in diminished food availability, and that is a relevant habitat change.

[187] We accept that there is a need to restrict damming of the mainstem to protect the outstanding avifauna values of the lower river. We acknowledge there are limited exceptions provided for in the order.

Restrictions on alterations of river flow and form for the upper waters

Special Tribunal Order

[188] The Special Tribunal order for the upper waters states:

8.1 No resource consent may be granted or rule included in any plan that, either itself or in combination with other consents, rules or permitted takes authorising the use of water, that will have more than minor stream depletion effect on Schedule 1 waters.

Amendments sought

[189] The Applicants seek:

9.1 Except where clause 12.2 applies, no resource consent may be granted or rule included in any plan that provides for abstraction of surface water from the waters specified [as natural state or to be protected for their outstanding characteristics].

[190] The Regional Council seeks a revised order:

8.1 Except where Clause 11.1 applies, no resource consent may be granted or rule included in any plan that, either itself or in combination with other

consents or rules authorising the take and use of water, will have more than minor stream depletion effect on Schedules [of natural state and outstanding values].

[191] Clause 12.2 in the Applicants' order and Clause 11.1 in the Regional Council's order refer to permitted activities.

[192] The Special Tribunal order has a clause 8.2 that is amended in the Regional Council version (both versions opposed by the Applicants):

8.2 Resource consents may be granted or rules included in a regional plan authorising water uses other than for damming the waters of the mainstem of the upper Ngaruroro River, provided that their exercise does not compromise protection of the outstanding characteristics, features and values described in clauses 4 and 5 and meets the requirements of clauses 8.1 and 9.

[193] The Applicants prefer a total prohibition on takes and other water uses not provided for under clauses 12 and 13, in order to maintain natural state and protect the outstanding characteristics. The Applicants are particularly concerned that the Regional Council's proposed text provided that their exercise does not compromise 'protection of the outstanding characteristics, features and values' lacks certainty and will result in interpretation issues in future.

[194] The Special Tribunal order has clause 8.3:

8.3 No rule may be included in a regional plan that provides for abstraction of hydraulically connected groundwater to the Schedule 1 waters that will have a more than minor stream depletion effect on Schedule 1 waters.

[195] Both parties propose clauses requiring that abstraction of groundwater has a no more than minor stream depleting effect. The Applicants submit that the Regional Council relies on clause 8.1 and deletes clause 8.3. The Applicants state that as their clause 9.1 relates only to surface water (and is a total prohibition), a separate clause 9.3 (as contained in clause 8.3 of the Special Tribunal order) is required.

What are the implications of the different approaches?

[196] We asked Dr Mitchell how he saw the two clauses (8.1 and 8.2) in the Regional Council's version relating to each other in practice. Are they workable? What degree

of protection will they achieve?

[197] Dr Mitchell considered that the two clauses addressed⁵³ two sides of the coin – 8.1 says what you cannot do and 8.2 what you can and when. Both serve subtly different purposes - 8.1 is what is not contemplated and 8.2 is what is. He said that saying you cannot do something does not necessarily answer the flip side of what you can do, what is contemplated.

[198] Another key difference is that the Regional Council version confines the damming restriction in its clause 8.2 to the mainstem of the upper Ngaruroro River (in line with its position on damming as already discussed). Given our finding on the damming restriction we do not find this approach provides adequate protection to the values of waters outside of the Ngaruroro River mainstem.

[199] In addition, the words ‘detract’ and ‘compromise’ are likely to be variably interpreted and expand the scope of what might be contemplated to an unacceptable degree.

[200] We find the Applicants’ approach to provide greater certainty of protection of the natural state and outstanding characteristics of the upper waters.

What restrictions on alterations of river flow and form are sought for the lower Ngaruroro?

Natural Character Index

[201] The Applicants now seek the addition of clause 9.4(a) below:

9.4 No resource consent may be granted or rule included in a plan that, either itself or in combination with other consents or rules (including permitted activities) in existence at the time of the decision:

- (a) Would result in a decrease from a 2020 reference condition of more than the relevant value in the table below for the respective reach of the lower Ngaruroro waters.

⁵³ Transcript at 591.

Reach	Whanawhana Cableway (NZTM2000: 1891901E, 5615830N) to Matapiro Rd (NZTM2000: 1899143E, 5615058N)	Matapiro Rd (NZTM2000 : 1899143E, 5615058N) to top of HBRC Flood Management Scheme (NZTM2000: 1906679E, 5610950N)	Top of HBRC Flood Management Scheme (NZTM2000: 1906679E, 5610950N) to Fernhill Bridge (NZTM2000: 1923019E, 5611264N)
Average active channel width	7%	2%	1%
Braiding Index ¹	22%	15%	14%
Area of unvegetated bar (ha)	12%	10%	14%

Unless it can be demonstrated that the effect is the result of a naturally occurring process

¹ Brice's braiding index, where the extent of braiding is twice the total length of mid-channel bars in a reach divided by the mid-channel length of that reach.

The proposed Natural Character Index restriction and its evolution

[202] Professor Ian Fuller, an expert in researching river processes, gave evidence on the Natural Character Index (**NCI**) and considerably updated that evidence and his calculations and assessment in his rebuttal evidence prepared after expert conferencing. We note Thomas Kay gave evidence in his capacity as advocate for Forest and Bird, of the potential for a water conservation order, including containing limits to changes in the natural character of the river using the NCI, to inform regional planning documents and to provide a clear direction to protect the river's outstanding values and discontinue what he called the ecologically harmful practice of willow planting in the active river bed.⁵⁴

[203] In his rebuttal evidence, Professor Fuller clarified:

- the NCI is a tool to measure broad-scale changes in some geomorphological parameters of the river;

⁵⁴ Mr Kay's Reply Evidence at [6] records that he is currently in the final stages of study at Massey University for a Master of Science in Ecology and that his thesis focuses on the further development and application of the 'Habitat Quality Index' (aka NCI) as a measure of change in river habitat quality in response to specific events such as flood protection engineering.

- the NCI can be used to identify and quantify change in the natural character of a river over time;
- it is critical a time reference is specified to set limits on degradation in the natural character of the river from its current condition and a 2020 baseline is appropriate for the current conditions (for which there is high quality aerial photo evidence) which supports outstanding values;
- the output is suited to assessing relative change in river geomorphology not the value of the aquatic habitat, although since the condition of the habitat in part depends on the physical template provided by the river geomorphology it may be used to assess change in habitat condition;
- the Ngaruroro is a dynamic system that means an assessment of potential change in natural character would be beneficial;
- braided rivers relate to a complex interplay between flow (flood magnitude, frequency, and duration), bed-calibre sediment (quantity and grain size), stream power (a function of channel-bed gradient and discharge), and bank erosion;
- the extent of braiding in the Ngaruroro has been reduced by ‘flood management activities’ governed and monitored by (what is now) Hawke’s Bay Regional Council, namely riparian planting (reducing bank erosion) and gravel extraction (reducing bedload);
- the purpose of the NCI is monitoring ongoing river condition following the implementation of the water conservation order to detect any change that may occur in future – and to set a limit on degradation.

[204] Professor Fuller agreed with Dr Jowett that the NCI is not a predictive tool and said it is not intended as such, but as a monitoring tool.⁵⁵

⁵⁵ Rebuttal at [43].

[205] Professor Fuller undertook analysis on three parameters for which specific protection of natural character is sought within discrete reaches of the Ngaruroro River because of the assemblage of morphological units making up the river form or character changes along its length. He did this by analysing the degree of channel confinements:

- Whanawhana to Matapiro Rd (limited confinement, wide valley floor occupied mostly by braidplain approx. 8km long);
- Matapiro Rd to the top of the Regional Council flood management scheme (narrowed active channel confined by river terraces, occupied mostly by wandering semi-braided river approx. 10km long);
- below that to Fernhill Bridge (active channel confined by stop banks, occupied mostly by wandering, semi-braided river approx. 21km long).

[206] He identified the active channel width, braiding index, and area of unvegetated bar for these reaches of the Ngaruroro River as the most appropriate variables to assess the form of the river. He calculated these using aerial photos flown in the summers of 2010/11, 2014/15 and 2019/20.

[207] He noted the area of backwaters as appropriate for measuring river form, as well as the respective areas of riffles, pools, and runs where the resolution of aerial imagery allowed. A preliminary review of changes in the area of backwaters over the last decade suggest the focus for limits in the order should be on the other three variables (although ongoing monitoring could still include them).

[208] After analysing these results he concluded that, in the past 5 years, values have fluctuated by up to 7% in channel width, ~ 20% in braiding index (a less precise parameter), and ~12% in the area of unvegetated bar. He derived similar results for comparison between 2010/11 and 2014/15, although the difference in braiding index is much greater, probably reflecting a more complex network of braids following a much higher flow during the 2010/11 collection period. He applied a 'bottom line' approach to each of the variables of natural character.

How does the approach in the closing order differ from what was initially proposed as the Natural Character Index?

[209] To respond to the concerns of parties and some experts (including and particularly planners), Forest and Bird amended clause 9.4(a) to, in summary:

- adopt a ‘reference condition’ approach in the current (2020) state and form as informing the degree of change as a percentage change (not a ratio) to a specified parameter rather than reference a NCI;
- recast the limits on a degree of change considered to be an effect which is ‘no more than minor’ in a format more well established in resource management law in other contexts e.g. resource consents;
- allow for measuring some of these parameters differently or within a different framework (i.e. not using the NCI) at the next reference point (e.g. 2025) with a consistent and robust methodology it says is equally acceptable and is “adaptive”; and
- introduce an exclusion for where an unusually low value might be measured for a parameter in a future assessment as a result of a naturally occurring process.

[210] A considerable part of the hearing was devoted to considering this condition. We deal with the issues raised under a series of questions.

Is the monitoring tool fit for purpose?

[211] As a monitoring tool Professor Fuller believed that the NCI is fit for purpose to assess the changes in coherent reaches over time, to provide a holistic assessment of river general morphology.

[212] We note that the monitoring tool is two dimensional. It does not deal with bed level change, with a degrading bed likely to reduce and an aggrading bed likely to increase channel width and the area of unvegetated bars. Professor Fuller did not know what the status of the bed levels are and their trajectory but knows gravel is

extracted and has had an impact on river form from the 1950s to the present.

Is the basis of the condition robust?

[213] There are differences between a monitoring tool and a restriction on activities contained in a water conservation order as is proposed.

[214] Professor Fuller was asked whether the periods he uses give a sufficient range within which to calculate the natural variability that might occur for the parameters the water conservation order seeks protection for. He thought so, referring to flow of 884m³ per second during the 2010-11 collection phase among the much lower flows during subsequent phases of photo collection. He did not look back at the historic hydrograph of the river to put that in context. He conceded he could look at the flood sequence prior to survey and that might potentially result in a wider range of variation and a change to the index.

[215] He said that if there is a flood-rich phase with a succession of large floods changing the morphology of the river additional assessments could be made on the extent to which the morphology was changing in response. He said it is important to understand responses to flood-rich and flood-poor phases, linked particularly with climate episodes, climate phases and climate changes. He considered if there is a large 10 or 20 year flood, it might be useful or prudent to assess the impact of that flood on the morphology.

[216] Professor Fuller was questioned about the definition of the active channel and beds and the floodplain (whether for 10, 50, 100, 500, 1000 year floodplain). We need not go into that. While Professor Fuller was confident about his morphological definition we did not have that assurance. In any case, our finding does not depend on this issue.

[217] He said there is uncertainty regarding climate change, with predictions for extremes, particularly drier summers punctuated by episodic storm events. He thought there is a low probability of other natural events which may lead to variations

such as catastrophic natural events and natural disasters which may reset channels.

[218] He reiterated that the NCI is not a forecasting tool. Professor Fuller believed that if ‘we’ committed to a five year assessment, the expectation is that natural variability in the flow, and natural changes, and deviation from that natural variability can be used as a flag to say degradation is happening and intervention is required, suggesting a moratorium on gravel extraction or planting may be required.

[219] Professor Fuller suggested that there should be a review so if there is any degradation it would not go on too long and allow for intervention in a timely matter and that could be reviewed subsequently.

[220] Professor Fuller’s suggestion of review does not sit well with how resource consenting and plan provisions and changes work.

The monitoring requirements

[221] There were questions about what monitoring is required and who would undertake that monitoring. Professor Fuller said it is important to take measurements at a consistent flow and a consistent time of year and the end of summer is an ideal time in terms of consistency (with what has already been done).

[222] The Regional Council has monitoring obligations. We accept that a water conservation order cannot require a council to carry out particular monitoring.

Is the NCI workable?

[223] Heinz Wattie’s Ltd, T & G Global Ltd and ENZAFruit NZ submitted that none of the Applicants’ evidence explained how a resource consent applicant would be able to predict whether their proposed activity (either by itself or in combination with other consented or permitted activities) would generate an adverse effect resulting in a change of less than the percentage limits specified in the Applicants’ clause 9.4(a). The cost of attempting to obtain a resource consent for an activity that potentially exercises clause 9.4(a) would be significant and the outcome uncertain.

Most applicants will not have the resources to undertake the modelling necessary to accompany the consent application.

[224] We note that Professor Fuller said:⁵⁶

[While not a predictive tool] we should be able to infer if there is someone with expertise within the applicant or the agency granting the application should understand the dynamics of the river and be able to understand the likely impact of say gravel extraction, planting, narrowing and so forth.

[225] Forest and Bird submitted that the NCI is a simple and effective solution to protect components of the river's geomorphology important for maintaining braided river bird and native fish habitat. We do not find it so. We find there are unanswered questions about the approach. We were not convinced that what the Applicants propose will actually achieve their purpose in a practical way.

[226] We accept that the NCI has potential as a monitoring tool. Using it to set bottom lines, as has been proposed in the Applicants' closing, with limits to parameters even under the revised proposal, is a step too far. That is to use it for a predictive purpose, which Professor Fuller conceded was not its function. Accordingly, we do not accept the Applicants' clause 9.4(a) and make a consequential amendment to clause 12.3 deleting "subject to Clause 9.4(a)".

Maintaining flow variability

[227] The Applicants now seek Clause 9.4(b) to specify:

9.4 No resource consent may be granted or rule included in a plan that, either itself or in combination with other consents or rules (including permitted activities) in existence at the time of the decision: ...

(b) results in a change of more than 10% to FRE3 at Fernhill.

[228] In opening, Forest and Bird's position⁵⁷ was that it had carefully considered the planning documents and accepts that some of the provisions in the regional plans do provide some protection for the outstanding characteristics of the lower river. In

⁵⁶ Transcript at 124.

⁵⁷ Opening submissions at [219]-[222].

particular, it referred to provisions providing for minimum flows (which we deal with under 9.5 and the protection of flow variability with Schedule 32 of TANK Plan Change 9 containing a FRE₃ limit of “no change of more than 10% to FRE₃ in the mainstem”. A concern expressed for replicating these provisions in the order was the uncertainty as to whether they would survive the planning process still to be gone through for the proposed plan.

[229] A location at Fernhill was added in the Applicants’ closing version. That appears to have been added to make it clear that the clause that applies to both the lower Ngaruroro mainstem (Schedule 2) and its tributaries (Schedule 3) only relates to FRE₃ on the mainstem and not the tributaries.

[230] In cross-examination Mr Baker clarified that his remaining concern with clause 9.4(b) only related to the mainstem of the lower river rather than the tributaries.⁵⁸ He had said that it would be more appropriate if the FRE₃ trigger applied only to the mainstem not the entire catchment, considering it possible to have abstractions (or dams that are not restricted in the tributaries of the lower river) that do not affect FRE₃ in the mainstem but may affect FRE₃ on a tributary. He considered the nature of flood flows are that across a catchment these occur at different times and in different places and all contribute to the flow in the mainstem differently. He referred to clearer wording, for example, as provided in the TANK Plan Change 9, and said that would be beneficial here.

[231] We note that the TANK Proposed Plan Change 9 adds a definition of FRE₃ to the plan glossary:

Fre₃ means the frequency of floods that are three times above the median flow for a river as determined by the Regional Council records.

That definition is not in the Applicants’ water conservation order.

[232] The Court has had some difficulty with the revised provision. The Applicants advised us that their order seeks to replicate provisions in the TANK Proposed Plan

⁵⁸ Transcript at 366 – 367.

Change 9. There was no direct evidence given for the Applicants on what the provision involves and the reasons for it, how it relates to what is in the TANK Proposed Plan Change 9, and how it would be applied. Fundamentally too we had no direct evidence on what the need for it is in terms of protecting the outstanding birdlife values. Instead Forest and Bird placed a heavy reliance on the cross-examination of some witnesses to support its case for the provision.

[233] In closing, the Applicants made extensive submissions on this provision.⁵⁹ In terms of the evidence, Forest and Bird submitted that:

88 Experts agreed that FRE3s are in place to ensure sediment movement, maintain channel morphology and flush periphyton. Dr Jowett said that he found through all of his studies that (wetted) channel width and river braids varied with river flow, and floods. These features are important to maintaining the habitat of avifauna and indigenous fish.

...

90 In cross-examination, Dr Wilding accepted that unlimited high flow abstraction could have significant effects on the Ngaruroro River channel form. ...

(footnotes omitted)

[234] In closing, counsel for T& G Global, Heinz Wattie's Ltd and ENZAFruit NZ submitted that adding a location does not address the concerns raised in the evidence of Bruce Mackay (for Heinz Wattie's Ltd who did not appear before us) or Craig Betty (for T&G Global) that the Applicants' version of the order would restrict the potential for water storage and water harvesting during high flows. Given the restriction on water takes in clause 9.4(b) (they cannot alone or in combination with other consents and permitted activities result in a change of more than 10% of FRE₃), their submission was it is difficult to know whether water harvesting will actually be possible in practice.

[235] Those parties further submitted that while the Applicants' preferred version seems to allow for water storage, the prohibitions and restrictions in the draft order appear to make that unworkable. For example, the draft order allows damming in the lower tributaries, but only if the prohibitions and restrictions in clause 9.4 are met.

⁵⁹ Forest and Bird Closing Submissions at [88]-[94].

Even with the changes proposed, the Applicants' version will restrict options such as water storage and water harvesting during high flows, making it very difficult for the pip fruit (and other) industry to provide for its future needs.

[236] Dr Jowett expressed a concern about how this clause would be implemented. In answer to a question from the Court, Dr Jowett stated:⁶⁰

So that we have a river where it doesn't have very frequent floods but when it does those are big floods compared to the low flow. This river is a river of high flow – what I would describe as high flow variability, because you have very low lows and high highs. So, you've got a lot of up and down movement in the river but it has a low frequency of – relatively low frequency of freshes. What I describe in my evidence is that, that the high flow abstraction of eight cumecs which is allowed for in the TANK plan, will cause an average change of 10% in FRE₃. But that's a sort of a long-term average assuming that all that water's been taken out. When you have results in the change of more than 10% to FRE₃ what, what is it talking about? In any one year? Over a 20 year time period? It's very difficult to know how you'd put such a condition into practice. Much like the NCI, it's hard to see how you'd actually put those measures into practice.

[237] On reviewing the evidence, including on TANK Proposed Plan Change 9, we note that we were not provided with any detailed analysis of what the provision proposed by the Applicants could and would achieve. Dr Mitchell's planning evidence and the JWS-Planning⁶¹ provided an overview of the TANK provisions but did not go into detail.

Evaluation

[238] We looked at the TANK Proposed Plan Change provisions to see whether these would shed any light on this issue. Our understanding is that there are extensive objectives, policies and rules including Schedule 32 that have a bearing on this matter. We would have expected to receive primary evidence in support of positions advocating reliance on and a preference for particular provisions, whether in the order or in the plan provisions. We also note that the provisions in the TANK Proposed Plan Change 9 had not been tested (at that time) through the Council hearing and any subsequent appeal processes.

⁶⁰ Transcript at 503.

⁶¹ 17/18 March 2020.

[239] The Applicants attempted to cross-examine Dr Wilding on the High Flow Regime Report⁶² on the basis he was a co-author. The Court asked counsel for the Applicants if he was able to ask Dr Wilding without reference to this document in terms of the principle or opinion he was trying to elicit after Dr Wilding said it was a long time since he saw the document and it was not in front of him.⁶³

[240] The ensuing cross-examination elicited:⁶⁴

Q So the last question previously was the importance of a FRE₃ flow is its relation to flushing periphyton and gravel bed movements, correct, is one of the ecological values that it helps, correct?

A There will be rivers where, yes, it will have a closer relationship to periphyton, and I think in the original study it was related to periphyton. In terms of gravel movements, I wouldn't go that far. Could be the case in some situations.

...

Q Now in terms of limiting impacts on the Ngaruroro's aquatic environment, would you accept that it is appropriate to limit the change in a FRE₃ by no more than 10% when compared to naturalised flows?

A Appropriate – sorry, there's a lot there. In terms of, you know, the process of setting limits on that, it's a – there's a lot that goes into decisions around setting those sort of limits. So, sorry, "appropriate" is just a broad term. In my words, I'd say it is an indicator of disturbance.

[241] We note that the FRE₃ provisions in Schedule 32 of the notified TANK Plan Change referred to by Forest and Bird are only contained under limits for damming in the Ngaruroro tributaries.

[242] We conclude there is inadequate evidence to support the addition of the Applicants' clause 9.4(b) with its proposed FRE₃ provision for the mainstem, and that also applies to tributaries albeit the limit is set for and measured at Fernhill on the mainstem.

[243] We further address the concerns of primary and secondary industry and the evidence of Dr Anthony Davoren (who was not cross-examined) for T&G Global

⁶² Discussion Document and Options: Part 2: High Flow Allocation (HBRC, 22 March 2018).

⁶³ Transcript at 561.

⁶⁴ Transcript at 563.

Ltd and Heinz Wattie's Ltd later in our report.

Minimum flow at Fernhill

[244] The Applicants sought to add new clauses 9.5 and 9.6:

9.5 All consents granted for the taking of water from the lower Ngaruroro waters or their tributaries must include a condition that requires taking to cease when the flow at Fernhill is less than 2,400 l/s.

9.6 This clause does not restrict a regional plan from imposing rules that set higher minimum flows or that reduce the allocable volume for any of the waterbodies referred to in this Order.

[245] In opening Forest and Bird⁶⁵ sought to replicate provisions in existing and 'in process' planning documents that provide for minimum flows on the basis they provide for the protection of the outstanding characteristics of the lower river, and because of the uncertainty of ongoing protection in a plan. It said the existing Regional Resource Management Plan (RRMP) provides 2400 l/s as the minimum flow for the Ngaruroro River (measured at Fernhill Bridge) and this is replicated in Schedule 31 of TANK Proposed Plan Change 9. Gregory Carlyon, who gave planning evidence for Forest and Bird, was asked about the alignment of the 2,400 l/s with the minimum flow in the operative plan and what was notified in the TANK Proposed Plan Change 9 and confirmed that there was no change. We note that the minimum flow maintenance site at Fernhill in TANK Proposed Plan Change 9 Schedule 31 comprises both the mainstem and tributaries of the Ngaruroro River as in the Applicants' clause 9.5 above.

[246] Mr Carlyon was also asked about the danger of clause 9.5 (notwithstanding a recognition in clause 9.6 that a regional plan could impose rules that set higher minimum flows or reduce the allocable volume for any of the waterbodies) becoming a low (and fixed) target. Mr Carlyon did not see that as a problem:⁶⁶

Q. Do you see a danger with a WCO setting the limit at 2,400 that that is then seen [in] perpetuity as the limit required to sustain these outstanding values if they're found to exist?

⁶⁵ Opening submissions at [219]-[220].

⁶⁶ Transcript at 206.

- A. No because the order specifically identifies that the Regional Council through the regional plan process could elevate that volume in order to provide for sustainable outcomes in the river. And I take you there to clause 9.6 which specifically says: “This clause does not restrict a regional plan from imposing rules that set higher minimum flows or that reduce the allocable volume for any of the water bodies referred to in this order.”
- Q. There is a danger though, isn’t there, in that the number that’s in the order is seen to be the number which sustains the values?
- A. Yes, that would be unfortunate, but I think that’s been part of the process for the co-applicants to come to grips with the view that the regional planning function is one for the Regional Council.

[247] We accept the evidence that the minimum flow provision sought to put a stake in the ground or to hold the line is an appropriate protection for outstanding avifauna values in the water conservation order. We also accept that it is appropriate to include the qualifying clause 9.6, given the outstanding status of avifauna in a water conservation order may justify the reconsideration of that minimum flow.

Requirements to protect water quality

[248] The Applicants’ draft order no longer specifically includes water quality as an outstanding characteristic. Both the Regional Council’s and Applicants’ order delete the Special Tribunal approach of a water quality schedule with specific limits but there are two different approaches to what should replace it.

[249] The JWS-Water Quality provided reasons for agreeing that water quality limits defined in Schedule 4 of the Special Tribunal order are not appropriate or useful for testing whether water quality is being ‘retained in a natural state’. These included:⁶⁷

- i) Natural variability means water quality parameters can fluctuate considerably, and setting a value based on the previous 5 or 10 years would not necessarily be reflective of ‘natural state’ in perpetuity.
- ii) Setting limits is more appropriate for when change is needed to meet a desired target state that is mechanistically linked to particular values, e.g. reducing *E. coli* levels enough for a waterway to be considered safe to swim in, or to reduce nutrient levels to a level where periphyton growth will be reduced. In both cases, reaching a specific value for a particular water quality parameter is considered necessary to meet certain objectives. And

⁶⁷ JWS – Water Quality at [14].

therefore aiming for a particular limit is sensible. For the purposes of a WCO, however, a narrative ‘maintain’ or ‘zero trend from unnatural influences’ would be far more appropriate and pragmatic. That is because the objective is to retain waters in a ‘natural state’ i.e. the water should exhibit no ‘unnatural’ change rather than exist at any particular value forever.

- iii) The detection of change from natural state, or the demonstration of ‘no change’, is more appropriately measured by looking at trends in water quality parameters over time, rather than by comparison to the static values presented in Schedule 4.

[250] We concur with the parties that Schedule 4 should not be included in a water conservation order.

What restrictions should be on regional plan rules?

[251] The Applicants proposed an amended clause 11.1:

11.1 No rule may be included in a regional plan authorising the discharge of contaminants onto land or into waters specified in [the Schedules] that will cause, either by itself or in combination with any existing consents, activities or rules, the deterioration of the existing state of water quality.

[252] The Regional Council’s order adds a new qualifier “such that outstanding values that rely on water quality are compromised”. We note that the Applicants did not like the restriction on alterations of river flow and form where a similar approach is used. They submitted it ‘lacks certainty and will result in interpretation issues in future’. We find the Applicants’ version to not only better protect the outstanding values, but to be more certain in its application.

[253] The Applicants then propose to add clause 11.2 (the meaning of deterioration beyond the existing state) and clause 11.3 (methods for assessment of trends):

11.2 For the purposes of clause 11.1, "deterioration of beyond the existing state" means a negative long-term trend in any of the following parameters, as determined using the methods in clause 11.3:

- (a) Water clarity - black disk;
- (b) Nitrogen – NNN, DIN, NH₃-N, TN;
- (c) Phosphorus – DRP, TP;

- (d) Faecal contamination – E. coli;
 - (e) MCI.
- 11.3 The assessment of trends for the purposes of clause 11.2 shall be in accordance with the following methods:
- (a) The assessment shall use the most robust trend analysis approach available at the time it is undertaken;
 - (b) Trend analyses should use all available data, and from the commencement of this Order shall include at least monthly monitoring of the parameters contained in clause 11(b)(i)-(iv) and annual macroinvertebrate sampling;
 - (c) Trend analyses may involve the inclusion of climate and flow indices to help remove any ‘natural’ causes for water quality variation.
 - (d) Non-local unnatural changes should be excluded for compliance purposes. For example, if anthropogenic climate change contributed to a change in water quality parameters (e.g. rising water temperature affecting MCI scores, increased storm frequency generating more landslips and decreased water clarity).

[254] Whitewater NZ submitted that:⁶⁸

In the Water Quality Joint Witness Statement, the experts agreed that inclusion of Schedule 4 limits (as recommended by the Special Tribunal) was not appropriate and that a narrative clause should be assessed by trend-analysis. They also recommended a subset of water quality that would satisfactorily characterise whether water was in natural state, monitored at least monthly.

Dr Conwell's evidence was that the clauses proposed in the Applicant's version were "very similar to the wording that was set out in the joint witness statement", that the correct parameters were identified to gauge the state of water quality, but that it didn't offer the same "flexibility of incorporation of new science knowledge and new information" as the simple narrative clause proposed by HBRC.

Ultimately this is a question of the level of certainty or flexibility provided in relation to assessment of the narrative clause. Relying on the position contained in the Water Quality JWS that the narrative clause "should be accompanied by ... guidance for testing compliance", Whitewater NZ continues to favour the level of certainty provided by inclusion of this clause.

(footnotes omitted)

⁶⁸ Reply submissions at [22]-[24].

Is there any need for additional provisions?

[255] We now address whether there is any need for the additional provisions and how workable they are. We address the basis for the provisions, the robustness and certainty of the nature and application of the methodology. Thirdly, we consider what the additional provisions achieve.

[256] We were told that the additional clauses carried through what was contained in the JWS of the water quality experts.

[257] The experts agreed that a narrative target of ‘waters should be retained in their natural state’ should be accompanied by guidance for testing compliance. That guidance included:

- i. the retention of natural state should be tested using the most robust trend analysis approach at the time (trend analysis approaches are being continually improved and so the water conservation order should not lock in any one particular method);
- ii. trend analyses should use all available data and not be limited to the last 5 or 10 years (to prevent the risk of a subtle but persistent change being overlooked by trend analyses over shorter time scales);
- iii. trend analyses may involve the inclusion of climate and flow indices to help remove any ‘natural’ causes for water quality variation; and
- iv. there would be a ‘breach’ or ‘non-compliance’ if trend analyses suggested that a long-term deteriorating trend was due to local, anthropogenic influences, with non-local unnatural changes excluded for compliance purposes.

[258] The experts also agreed that a subset of water quality parameters would satisfactorily characterise whether water was in a ‘natural state’, monitored at least monthly and complemented with annual macroinvertebrate sampling. In addition, routine water quality monitoring should occur in at least one site that reflects natural

state conditions and act as a proxy for the entire natural state area.

[259] The Applicants' proposed new clauses purport to impose these as requirements, leaving several matters unclear. For example, the scope of the phrase "negative long-term trend" for any of the specified parameters is unclear. With respect to monitoring, it is not clear who would be expected to undertake the monitoring and assessment work and whether that would be required. There was also an issue of ensuring compliance with monitoring requirements.

[260] When questioned Mr Carlyon accepted that a water conservation order cannot impose an obligation on a third party with respect to actions such as monitoring.⁶⁹ He said that the clauses simply set out the methodology recommended by the team of water quality specialists, including those for the Regional Council. That methodology provides a means by which the Regional Council can ascertain whether there are impacts occurring within that area and it logically sits with the Regional Council to undertake that as part of its state of the environment monitoring obligation which it does routinely.

[261] It was suggested to Mr Carlyon that a water conservation order stays in place in perpetuity and it would be better not to enshrine the best methodology available at the present time in an order that is in place in perpetuity. He accepted that an amendment to the order is a relatively significant undertaking, but that plan processes are equally cumbersome in their own way.

What restrictions should there be on granting a resource consent?

[262] The Special Tribunal order contains the following clause:

10.2 No resource consent may be granted that is inconsistent with the regional plan with respect to water quality in the waters specified in Schedules 1 and 2. This clause does not restrict a regional plan from imposing water quality standards that set more conservative limits.

[263] The first part of this clause effectively leaves it up to the regional plan to

⁶⁹ Transcript at 209.

include provisions dealing with water quality (inside the requirements of rules set in clause 11.2). This could result in a gap or lacuna in the treatment of water quality in resource consents. A clause with a narrative standard to be met along the lines of clause 11.1 for resource consents (or Special Tribunal order clause 8.1 for restriction on alterations of river flow and form) might have been preferable but no party appears to have proposed one.

[264] The Court asked questions about the purpose of and need for the Special Tribunal order version, including of Dr Mitchell who thought it did not add much. The version sought by the Applicants is:

11.4 This clause does not restrict a regional plan from imposing more stringent water quality standards for the purpose of improving water quality where it is not in natural state.

[265] The Regional Council closing version deletes the clause altogether.

Evaluation

[266] We conclude that there are several unanswered questions about the nature and application of the methodology in the proposed new clauses 11.2 and 11.3 put forward by the Applicants. An important one is how a water conservation order could require the monitoring and assessment regime specified.

[267] We find there is a lack of clarity in the phrase ‘natural state’ as either applying to the natural state area in the schedule as opposed to water quality not in its natural state. We approve the version of clause 11.4 sought by the Applicants (amending the purpose to read ‘where not in its natural state’ to make it clear that it is where the water quality is not in its natural state) as providing at least an indication of what could be aspired to and achieved through the regional plan (and under the NPS-FM 2020) in the future.

Other provisions

[268] The Applicants saw merit in several of the changes suggested by the Regional

Council in its upper waters order such as to provide a complete carve out for firefighting and to delete unnecessary cross-referencing to other clauses.⁷⁰ (There is also a need to correct some references to particular clause numbers.) We do not need to traverse the agreed amendments in detail but note and concur with the following:

- (i) deletion of “waters” definition;
- (ii) clause 4 (and Schedules 1, 2 and 3): Minor amendments to the clause to refer to values;
- (iii) clause 9.3: Drafting improvements (but with “or” rather than “and” when referring to the Schedules as in 9.1);
- (iv) clause 10 amended to read:

No resource consent may be granted, rule included in a regional plan or activity undertaken (other than those for fire-fighting purposes) in respect of the taking or diversion of the waters specified in Schedules 1A, 1B, 2 and 3, unless all associated intakes are screened and maintained in accordance with the minimum standards for fish screens and intakes contained in Schedule 4;

- (v) clause 13 amended to read:

13.1 Nothing in this Order prevents the grant of a resource consent that would otherwise contravene clauses 5, 6, 7, 8, 9, 10 and 11 provided that a consent authority is satisfied that:

- i. The exercise of any such consent would not compromise the protection of the outstanding characteristics, features and values identified for the waters specified in the Schedules;⁷¹ and

- (vi) Schedule 4 heading in second column to be amended by deleting “Outstanding

⁷⁰ Joint Reply Legal Submissions for Forest and Bird and Whitewater NZ 20 August 2021.

⁷¹ For consistency, we have the same drafting for clause 12.4.

Characteristics or Features” and replacing with “Minimum Standards” (as suggested in the DOC reply and agreed by Regional Council).

I Draft Order

[269] We attach a draft order as **Appendix A** that may be appropriate or a possibility. This does not address the issues yet to be discussed on where and how any water conservation order could provide for Māori values in line with s 199(2).

[270] The focus of the Applicants, Regional Council and other parties was on the protections. Our attention was drawn by several submitters and planning witnesses to the Environment Court’s observation in the *Rangitata* decision⁷²:

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

[271] There was limited attention to addressing the implications of the inclusion of the outstanding values in a water conservation order in terms of future planning document preparation (objectives, policies and rules) and resource consenting. We find that there are potential other benefits to recognising outstanding values (without necessarily requiring specific protection plugs) in a water conservation order. We also accept that over time there may be a need for a water conservation order to be amended as more is known about the outstanding values and their protection. That said we find that there are important checks (both procedural and substantive) in the RMA that militate against a risk that today’s stake in the ground is given more status in future resource consenting and plan writing processes than is justified. We also note the order contains clauses recognising that it is acceptable to impose more stringent controls than contained in the water conservation order, such as in clauses 9.6 and 11.4.

[272] Schedule 3 in the order put forward by the Applicants includes hydraulically connected groundwater waters to be protected for their contribution to outstanding

⁷² *Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council* C109/2004, 5 August 2004 at [51]-[53].

characteristics or features contributed by hydraulically connected groundwater for the upper waters. Both versions of the order included this.

[273] Tributaries to the lower Ngaruroro River from Whanawhana cableway to Chesterhope Bridge Waters are to be protected for outstanding characteristics of habitat for avifauna. The Applicants seek restriction on alteration of river flow and form (cl 9.4(a) and (b)) and we have given reasons for not accepting this approach. Those reasons apply equally to the mainstem and the tributaries.

[274] We come to a different conclusion for clauses 9.5 and 9.6, finding these an appropriate protection for Schedule 2 and Schedule 3 tributaries for the lower Ngaruroro river. Clause 9.5 requiring all consents granted for the taking of water from the lower Ngaruroro waters or their tributaries to include a condition that requires taking to cease when the flow at Fernhill is less than 2,400 l/s reflects the regime in the operative plan and proposed TANK Plan Change 9. Clause 9.6 then makes it clear that there is no restriction on a regional plan imposing rules that set higher minimum flows or that reduce the allocable volume for any of the waterbodies referred to in the order.

[275] We find the individual protections (including those differentiating the upper Ngaruroro waters and the lower Ngaruroro mainstem) would cumulatively contribute to achieving the purpose of protecting the outstanding values in an order.

J Section 212 Matters

[276] We now turn to the matters we need to address under s 212. Those matters also inform the approach in drawing conclusions on some of the protections.

The needs of primary and secondary industry, and of the community

[277] In relation to the upper waters the Special Tribunal Report stated:

264. While much of the upper reaches of the Ngaruroro River and its tributaries are wild, natural and isolated, pastoral farming activities exist within the greater catchment areas. Evidence was provided ... that the upper Ngaruroro consists of a total area of 111, 958 ha. of which 94,003 ha. are

undeveloped or natural state. 12,647 ha. is in pasture or developed land and 5,308 ha. is in forestry. The largest single block is administered by the Department of Conservation and sits within the Kaweka and Kaimanawa Forest Parks. An upper Ngaruroro Landowners map annexed identifies the ownership on a per property basis.

...

270. The Tribunal accepts that in the upper Ngaruroro the reality is that opportunities for land use intensification, primary conversion of land for farming, are restricted given land use tenure, topography, and access difficulties in the upper catchment.

(footnotes omitted)

[278] We too had evidence about property ownership and land use in the upper Ngaruroro, including maps produced by Dr Hicks, that we considered. Peter Matich (for Federated Farmers) also provided a map of land use and property titles within the Ngaruroro and Clive River catchments and hydraulically connected groundwater area⁷³ showing land in land use categories (arable, beef, dairy, deer, urban, forest or bush, sheep & beef, orchards or vineyards). That was compiled from the AgriBase 2015 database, a database that draws on a survey of land users that takes what the land user describes as the 70% activity and assigns that as the predominant use.

Do we have sufficient evidence on primary and secondary industry needs?

[279] Forest and Bird submitted that:⁷⁴

... for the needs of primary and secondary industry to be considered ..., it must first be established as a quantifiable, not hypothetical, current need.

[280] It also referred to the Tribunal's findings considered by the Court of Appeal in *Asburton*.⁷⁵

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

⁷³ Exhibit 15.

⁷⁴ Opening submissions at [191].

⁷⁵ *Asburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78 (CA) at 89.

[281] The Court of Appeal found that the Tribunal's approach was in conformity with the Water and Soil Conservation Amendment Act 1981 (which contained a similar provision to s 212(a)).

[282] Federated Farmers submitted:⁷⁶

The Applicants' ... claim that the potential uses of water ... are not designed primarily to meet the existing needs of existing land uses, rather they are a potential use for the future, which would arise from landowners' policy decision to manage their land differently, "for the greater profit for one group of landowners and sector of the community".

[283] Federated Farmers submitted that the Planning Tribunal decision which led to the appeal in the *Ashburton* case was issued in 1985, more than 35 years ago, and was not dealt with under the RMA which includes 'future effects'. It is notable that, in the *Mohaka application report*,⁷⁷ the Planning Tribunal considering the order for the Mohaka River accepted that there is a future need for hydro-electricity generation on the River, finding that it is appropriate to consider the changing needs of industry and of the community over the longer term, to the extent that they can be foreseen with reasonable reliability.

[284] Federated Farmers noted that Mr Carlyon acknowledged that the additional water needs of farmers and others brought about by climate change is a quantifiable need.⁷⁸ Federated Farmers considered that quantifiable assessments can now be better made for the issue of climate change and changes to primary production that were not the issue in 1985 that they are today.

[285] Mr Carlyon was clear that the applicants have not set about quantifying the needs of primary and secondary industry. His view is that the best party to speak to issues in which they are expert is that party and the Applicants identified two farmer groups and industry body groups on a number of occasions that they needed to receive material from that they could analyse for there to be any constructive discussion. Federated Farmers or farmers speaking to the future aspirations are the

⁷⁶ Federated Farmers opening submissions at [27].

⁷⁷ Report on Mohaka River Draft Water Conservation Order, W20/92, 8 April 1992 at 75.

⁷⁸ Transcript at 218-219.

best parties to lay them out in sufficient detail to allow an assessment against the provisions of the order. He said it was highly problematic for the Applicants to demonstrate what any future needs might look like in the context of feedback received from industry groups as they went through the process.

[286] Federated Farmers submitted that the Applicants should have undertaken research into future needs and at least made some effort towards quantifying future needs for water resource of the primary sector in the catchment, as a whole. It was not the role of Federated Farmers to do that as it simply does not have the necessary resources. All Federated Farmers was able to do at the Special Tribunal hearing was to provide evidence of future needs based on individual perceptions.

[287] Federated Farmers submitted that:⁷⁹

... we do know that farmers will need access to freshwater in the future, probably more than they do now. Climate change adaptation will require farmers to build more drought resilience into farming systems, in particular water storage. Farmers will also need to further diversify into mixed farming systems. ... This exposes a real issue with the WCO, that it is too narrow in focus and does not integrate well with other planning goals and objectives such as climate change adaptation.

[288] Federated Farmers did not provide any expert evidence on these matters, with the brief of Mr Matich confined to the planning documents. We note the heavy reliance many of the parties placed on the regional planning documents, including those still in process, in terms of their view that these met (or perhaps better met) the needs of primary and secondary industry and the community.

[289] We find we have enough evidence to assess the implications for primary and secondary industry and the community.

Winegrowers Group

[290] We deal first with the involvement of the Winegrowers Group.

⁷⁹ Opening submissions at [34].

[291] On 23 December 2020 the Court received a joint memorandum of counsel for the Hawke's Bay Winegrowers Association, Gimblett Gravels Winegrowers Association, and Pernod Ricard Winemakers New Zealand Limited (**the Winegrowers Group**) and the Applicants. Counsel for the Winegrowers Group sought leave to be excused from attending the hearing on the basis that their needs would be represented by Forest and Bird and Whitewater NZ.

[292] The Winegrowers Group considered their interests would be sufficiently advanced and protected by the undertakings given by the Applicants such that they did not consider it necessary or efficient (including for the other parties and the Court) for the Winegrowers Group to have to appear at the hearing. That included the withdrawing of the evidence filed (noting that Mark St Clair, the Winegrowers Group planner, had attended the planners' conferencing) and an acceptance that the Group will need to rely on the Applicants to continue to pursue the agreed drafting and outcomes and report back to the Winegrowers Group on any issues arising. It said if any issue were to arise that might affect the interests of the Winegrowers Group, that the Group's position would need to be communicated through the Applicants or the Group need to seek leave to address the Court on it.

[293] The Court considered it to be appropriate that the Winegrowers Group be represented at the hearing if any issues relating to their interests are raised. Ultimately, however, it was a matter for the parties and their counsel to determine. With reference to the agreement reached between the parties and the Applicants, the Court said it would be interested to hear about those matters but noted that the parties' agreements are not binding on the Court.

[294] The Winegrowers Group did not take an active part in the hearing. We record that its evidence was withdrawn.

Horticulture NZ

[295] Michelle Sands, the Environment Manager at Horticulture NZ (**HortNZ**) appeared as its representative and advocate. HortNZ accepted the Special Tribunal's

findings that outstanding characteristics exist in the upper river and that some of these face threats. It supports the Regional Council's version of the order, specifically referring to the proposed prohibition on damming in the upper Ngaruroro mainstem. HortNZ seeks that the application for the lower river water conservation order be declined.

[296] Ms Sands said that the Heretaunga Plains are exceptional for horticultural production with a high degree of crop diversity with production on a year-round basis and are nationally significant for horticultural food production. Further, she said that horticulture depends on irrigation. A concern is that a water conservation order that constrains water harvesting and storage opportunities will constrain the land use diversification that is needed over the next 20 years as New Zealand transitions to a low emissions economy and adapts to a changing climate.

[297] Ms Sands considered that the benefits from a water conservation order were uncertain and that in turn would create further uncertainty and constrain foreseeable water needs of existing growers. She referred to the possibility of locating small dams in some locations on tributaries in the upper and lower catchment, without any discernible effect on channel form and flow of the mainstem.

[298] Ms Sands also said that the TANK Proposed Plan Change 9 signals that in the future allocation of water on the Heretaunga Plains will need to change to meet environmental outcomes. In addition, the climate is changing, which will result in changes to the Ngaruroro flow regime. She considered the proposed amendments to the Special Tribunal order by the Applicants threaten the ability of the horticultural sector to respond to environmental outcomes that reflect community values. In her view the proposed amendments present a set of regulations that are complex, uncertain and very limited in their ability to manage the threats to the values of concern.

[299] Ms Sands relied on the evidence of Stuart Ford, an economist, that the proposed water conservation order in the lower river reduces the opportunity to store and use water and this will reduce the productive capacity and amount and quality of

food produced from the highly productive land on the Heretaunga Plains. She says climate change is expected to bring warmer weather and changes in rainfall seasonality to Hawkes Bay with the potential for more frequent droughts. She also compared the water quality impacts of horticulture to unirrigated agriculture among others.

[300] Mr Ford considered the needs of primary and secondary industry and of the community as well as the potential economic impacts on the horticultural sector and the wider community with a water conservation order on the lower river. In his opinion the water harvesting conditions in the initially submitted draft are so tight that it is unlikely that viable or economic water harvesting could be undertaken.

[301] The thrust of Mr Ford's evidence was a comparison of a base case minimum flow with various scenarios that had been produced in background work undertaken for the TANK Proposed Plan Change 9. By the time Mr Ford appeared, a different order was sought to that he considered in his written evidence. Given the opportunity to address whether he had any changes to his opinions, he said:⁸⁰

There aren't any changes to my evidence as a result of the changes that have been made to the proposed water conservation orders. Mainly because my evidence is relating to the needs of primary and secondary industry in the community and it is my opinion that the Forest and Bird application doesn't consider that issue at all, whereas in my evidence I put out my support of the Hawke's Bay Regional Council's version because it's been going through an extensive analysis in the TANK process and subsequent to me putting in this evidence the TANK process or PC9 as it is now called, has been further changed as result of the s 42A report and it would be fair to say that it is quite harsh on irrigation takes because there isn't any more water. So, it signals very strongly the requirement for water storage and it has got other things like, for example, it has got a consideration of protection water for horticulture which the Forest and Bird application doesn't have. So, if anything my support for the Hawke's Bay Regional Council option has strengthened as a result of that.

[302] When asked whether the current status quo base case should now be a minimum flow of 2,400 l/s he was uncertain about what the revised minimum flow and change of position on groundwater now sought meant for his foundation material (and accordingly his opinions). That uncertainty extended to his reliance in his written

⁸⁰ Transcript at 395-396.

evidence on the opinions of Mr Baker. Mr Ford said:⁸¹

It is my understanding there is still concerns about the practicality of the volume, to actually be able to take water and harvest it.

[303] In closing, Forest and Bird submitted:⁸²

HortNZ presented economic evidence through Mr Ford. His evidence pointed out different water abstraction scenarios including a 'base case' ... current status quo (e.g. minimum flow 2,400 litres / second). His evidence then set out the economic response associated with each water abstraction scenario. Mr Ford did not quite accept that the draft WCO (exhibit 14) for the lower Ngaruroro was the base case because he thought "...there may be other things which affect the takes of water in it...". Mr Ford did not say what those other things were. Forest & Bird submit that the draft WCO represents seeks to protect the outstanding values of the lower Ngaruroro River by maintaining the existing current management regime. The exception to this is the NCI clause (now amended, see below), which while not a current management technique, aims to ensure the status quo is at least retained.

(footnote omitted)

[304] When questioned, Mr Baker confirmed that his remaining concern was with clause 9.4(b), and if it was made clear that it only applied to the mainstem that concern would resolve.⁸³ He thought it possible that you could have dams or abstractions in a tributary that do not affect FRE₃ in the mainstem.⁸⁴ He said clearer wording such as what is written in the TANK Plan Change would be beneficial here (although did not elaborate on what he meant by that).

[305] In closing, the Applicants submitted that HortNZ's concerns are for the most part removed in the latest version of the order for the lower river. The FRE₃ requirement does not apply to the tributaries. Clause 8 prohibits the damming (i.e. artificial impounding of all or part of the natural flow) of the mainstem of the lower Ngaruroro River. The definition of damming does not prevent the construction of a diversion or a diversion structure in the mainstem so long as the structure does not impede the passage of fish (as is also the case for the order for the upper waters). Dr Wilding accepted that existing high flow abstractions for a water storage scheme

⁸¹ Transcript at 398.

⁸² Closing submissions at [55].

⁸³ Transcript at 367.

⁸⁴ Transcript at 367.

in the mainstem do not impede the passage of fish.⁸⁵ There is no express restriction on damming in the tributaries to the lower river.

Heinz Wattie's Ltd, T&G Global Ltd and ENZA Fruit New Zealand International Ltd

[306] Dr Davoren's supplementary statement of 16 June 2021 did not support the Applicants' latest version of the order for the lower Ngaruroro River. He considered that the clause 3 definition of damming would restrict the diversion of the lower river flow in sufficient quantity (l/s) to out of river storage. Combined with that he considered that clause 9.4(b) with its limitation of 'results in a change of more than 10% to FRE₃, would limit access to any high flow allocation in the lower river in the June to November period.

[307] In his opinion:⁸⁶

Existing and future high flow abstractions will enable utilisation of available water resources to safeguard and/or maximise productive benefit and will reduce pressure on water resources during period of low flow. The high flow abstraction is for storage to provide for irrigation and to provide reliability during periods when water availability is restricted.

...

In order to access the high flow relatively high diversion flows will be required (500-600 L/s or more). The diversion will need to be from the Ngaruroro mainstem because flows in tributaries below Whanawhana are not high enough to capture out of river storage and in some cases is already captured. High flow allocation would need to be diverted from the main stem of the Ngaruroro.

[308] Dr Davoren's view is that high flow allocation is best managed (and is already proposed) through the TANK Plan Change 9 process. He supported no order over the lower river because access to the lower Ngaruroro High Flow Allocation in the June to November period is facilitated, and diversion in sufficient quantity (l/s) to out of river storage is possible.

[309] Mr Betty, the Director Operations for T&G Global gave evidence on its

⁸⁵ Transcript at 563.

⁸⁶ Supplementary statement at [7], [11].

ongoing capital investment in the region and the need for confidence about its long-term water supply. He prepared a supplementary statement of evidence dated 18 June 2020 addressing the then water conservation order version proposed by the Applicants. He noted that the main concern with the earlier order was that it included hydraulically connected groundwaters and noted these references have been removed.

[310] He said:

... the February 2021 proposed order includes conditions which restrict the alteration of river flow and form (clauses 9.4-9.5). These conditions would apply to the mainstem of the Lower [Ngaruroro] River ... and [its] ... tributaries.

This order also includes a prohibition on damming the mainstem of the Lower Ngaruroro River (clause 8) but leaves open the possibility of a dam in the tributaries. However, I think clauses 9.4(a) and (b) will make water harvesting and storage very difficult in practice.

That is a concern for T&G because it has growth aspirations over the next five years, which are to develop 100 hectares per annum of orchards to grow Envy apples. Whether T&G can get the water needed for that development will depend on the final form of the Plan Change 9 (the TANK plan change). If it cannot get new consents to take groundwater under that plan change, then it must get a consent to take surface water (which is only possible if the orchard is close to surface water) or look to water harvesting and storage as a possible source for that water.

T&G does not support the latest version of the order proposed by [the Applicants] because of the concerns about clause 9.4 and its effect on water harvesting and storage.

If there is to be an order over the Upper Ngaruroro River, T&G supports the order proposed by the HBRC.

The main reason for that is that the order would only prevent damming of the mainstem of the Ngaruroro River, whereas the draft WCO proposed by [the Applicants] prohibits damming on the Upper Ngaruroro River and its tributaries.

Mr Betty was not required for questioning.

[311] Mr Mackay, the Agricultural Manager at Heinz Wattie's Ltd, provided helpful background to the company's operations and its contribution to the regional economy. He said that every crop supplied to it is grown on irrigated land, and there needed to be security of water supply to process the crops. He referred to considering

water storage options for securing water supply but said that as yet there is no clear understanding of rules that may make this possible or whether it would even be possible under the Applicants' version of the water conservation order. He believed a report prepared for the Regional Council by Tonkin and Taylor in 2011 identified two highly favourable sites on tributaries in Otamauri and Omahaki (one downstream, the other upstream of the Whanawhana cableway demarcation).

[312] Mr Mackay also prepared a supplementary statement of evidence in response to the new version of the proposed order for the lower Ngaruroro River. He was concerned about clause 9.4 of the draft order and what that might mean for potential water harvesting and storage. He said:⁸⁷

Proposed Plan Change 9 (the TANK plan change) has policy and objectives that allow for high flow harvesting and storage of water that is the significant remedy to perceived over allocation and allowing for future change to demand of the water resource. That is particularly important to Heinz Wattie's because it is a substantial processing industry dependent upon a reliable water supply for both its suppliers and its own operations. Water harvesting and storage is a potential source of additional water for Heinz Wattie's and its growers in the future.

[313] Mr Mackay considered clause 9.4 would not allow resource consents to be granted or a rule included in a plan that results in a change of more than 10% of FRE₃. He believed this would limit significantly the amount of water that might be made available for harvesting from high flows.

[314] Mr Mackay also had a concern about the definition of "damming" (agreed to by the planners in JWS Planning December 2020 and in both versions of the order) and the Applicants' restrictions on damming of the upper Ngaruroro waters (the mainstem and its tributaries above Whanawhana) and the lower river mainstem. He considered any intake or diversion structure would impede the passage of fish or personal watercraft and that is another potential impediment to water harvesting from the mainstem of the lower river.

⁸⁷ Supplementary evidence at [9].

[315] He said Heinz Wattie's supports the Regional Council's version of the order as it would only prevent damming of the mainstem of the upper Ngaruroro River.

Federated Farmers

[316] In its closing, Federated Farmers continued to oppose any order. It would prefer there to be no order over the upper Ngaruroro River, but would support the Regional Council's preferred order if there were to be an order.

[317] Federated Farmers considered that the current planning framework, including the NPS – FM 2020 and those instruments under preparation, in particular the TANK Proposed Plan Change 9 (drawing particular provisions to our attention), provides sufficient protection for the values of the lower Ngaruroro River. Its position is that the existing provisions in these existing planning instruments, together with those under preparation, are appropriate to the circumstances of and provide sufficient protection of that resource, so that no water conservation order is appropriate or necessary.

[318] Further, Federated Farmers submitted that the RRMP and TANK Proposed Plan Change 9 are documents that militate against the grant of any order and should be afforded the most weight. Imposing a water conservation order over the top of a regional planning regime that responds to the complex nature of the river and groundwater would force a blunt instrument on to a planning regime that is otherwise fit for purpose.

[319] Dealing with some more specific concerns, Federated Farmers submitted against the Applicants' clauses on restriction on alterations of river flow and form.

[320] Federated Farmers also submitted that clauses 9.1 (upper waters), 9.4 and 9.5 unduly limit when water can be taken from the river for the purpose of livestock drinking water (beyond what is permitted by s 14(3)(b)), root stock survival, irrigation and dairy shed water. It considered that clauses 9.4 and 9.5 would mean in practice people wishing to take water for rootstock survival would be subject to the limit tied

to a minimum flow at Fernhill.

[321] Mr Matich, a planner (for Federated Farmers), gave evidence on the needs of the farming industry for water. He identified livestock drinking and rootstock water as a need for the farming industry. He accepted the water conservation order allows for the domestic needs of farmers and livestock drinking water.

[322] Mr Matich gave evidence that the takes for root stock survival water managed within the TANK Proposed Plan Change 9 would not be subject to the exceptions in the order. He said there is provision in the TANK plan change, as it stands, for 20 m³ per day from existing permitted takes within that particular set of parameters which would be useable for rootstock survival. In his opinion clause 9.5 would override and remove the 20 m³ per day provision in TANK because the order contains no other exception allowing root stock survival water to be taken or to be excluded from the other exceptions. If this version has restrictions that require taking to stop at that certain flow of 2,400 l/s, there is no exclusion that allows root stock survival water to be taken beyond that point.

[323] Mr Matich acknowledged that water takes of up to 20m³/day for root stock survival is a permitted activity under the operative RRMP which is carried through to TANK Rule 7. Mr Matich thought that clause 9.5 in the order would cut across the permitted activity regime and prevent the taking of water for root stock survival when the minimum flow went below 2,400 l/s.

[324] Forest and Bird submitted that this is not correct on the basis that clause 9.5 only applies to resource consents and permitted activities do not require a resource consent. We note that ignores the possibility of any plan change or review requiring consideration of consistency with the water conservation order. Permitted activities are not fixed in time.

[325] Federated Farmers also identified water for irrigation of crops and dairy shed water as a need for industry. Mr Matich accepted that takes for these types of abstractions are generally managed through resource consents. Forest and Bird

submitted that farmers can still apply for these types of resource consents under the order.

Other submissions

[326] Evidence was filed by William Glazebrook a director of Big Hill Station Ltd (the company that owns Big Hill Station, a hill country pastoral farm of approximately 2,700 hectares) but no party or the Court required his attendance for questioning. Mr Glazebrook has been a farmer in the near vicinity of the Ngaruroro River and its tributaries for 33 years. He has farmed Big Hill Station where the Whanawhana cable crosses the river since 1987. He said that he has a close recreational attachment to the river, hunting duck, pheasant and quail on the banks of the river and fishing it. Also, that he is familiar with the work being done for blue ducks in the Ikawetea stream and supports the eradication of introduced mammalian predators.

[327] Mr Glazebrook said:⁸⁸

We share a boundary with the river for over 11 kilometres. It is part of the essence of the property and is deeply treasured not only for the fishing but all the recreational activities described by applicants as well as the solace, comfort and peacefulness it provides.

We acknowledge his comment:⁸⁹

I have seen the maps attached as Appendix 2 to the evidence of Thomas Wilding. Map 3 which shows land owners in the Upper Ngaruroro Catchment does not show the land owned by Big Hill Station above the Whana Whana Cableway.

[328] Mr Glazebrook considered the order sought to be too broad and believed some of the restrictions sought by the Applicants go further than justified by the evidence on the outstanding values and the threats to them. He supported the Regional Council order for the reasons given in the evidence of Dr Wilding that dams in small valleys in rural areas (e.g. stock water ponds) would pose a low risk to the flow regime of the Ngaruroro and its perennial tributaries. He said that dams of this

⁸⁸ EIC at [12].

⁸⁹ EIC at [14].

type could be hugely beneficial to landowners in the Upper Ngaruroro catchment.

[329] He was also concerned that clause 9.1 of the order sought by Whitewater NZ and Forest and Bird would prevent any abstraction of surface water except as provided by clause 12 of the water conservation order. That can be contrasted with the form of the order recommended by the Special Tribunal which was that:

8.1 No resource consent may be granted or rule included in any plan that, either itself or in combination with other consents, rules or permitted takes authorising the use of water, that will have more than minor stream depletion effect on Schedule 1 waters.

[330] If the water conservation order in respect of the Upper Ngaruroro River is made in the form sought, he considered it would preclude Big Hill Station and other private land owners in the Upper Ngaruroro catchment from seeking consent to take water for water storage purposes at any flows and for any use (whether it be for primary production, recreational and/or tourism activities). He said he had seen no justification for prohibiting surface water abstraction from the upper Ngaruroro River at high flows.

[331] Mr Glazebrook saw 'no logic' in the submitters' request for more stringent controls on damming and diversion (over and above those currently recommended by the Special Tribunal and amended as proposed by the Regional Council) to ensure the flows do not materially or measurably affect the characteristics of the river which they claim are outstanding.

[332] He considered little account seems to have been taken of the positive results of predator control for the likes of the blue duck, but that has been demonstrated as crucial in the recovery of the population in the tributaries of the Taruarau/Ikawetea catchment.

[333] Also, if further consideration is to be given to the habitat for indigenous fish, it must logically include the elimination of introduced trout species from all the river's catchment.

Summary

[334] It is helpful to record each party's final position on the orders:

- (a) Federated Farmers was concerned that there are undue limitations on when water can be taken for livestock drinking water, irrigation, root stock survival among others. It opposed any order, and argued it was the Applicants' responsibility to provide an assessment of 'quantifiable need' – that farmers will need access to freshwater in the future, probably more so than they do now. It argued that the planning framework – current and proposed – provides sufficient protection of the resource;
- (b) HortNZ supports the Regional Council's order – referring to prohibitions on damming in the upper river's mainstem. It opposes any order on the lower river. Its concern was that an order that constrains water harvesting and storage opportunities will constrain land use diversification that is needed over the next 20 years. It referred to the possibility of locating small dams on tributaries in the upper and lower catchment, without discernible effects. It stated that a water conservation order in the lower river reduces the opportunities to store and use water, reducing productive capacity. It was concerned that the proposed order over the lower river would impact the status quo, eg minimum flow of 2,400 l/s but its witnesses could not explain why that is;
- (c) Heinz Wattie's, T & G Global and ENZA Fruit NZ supported the Regional Council's order over the upper river and opposed an order over the lower river. They were concerned that the limit on damming would restrict the diversion of lower water flow in sufficient quantity (l/s) to out of river storage. Combined with a limit that results in a change of more than 10% to FRE₃ would limit access to any high flow allocation in the lower river in June-November. They argued that high flow allocation is best managed by Proposed Plan Change 9;

- (d) Mr Glazebrook was concerned about being precluded from being able to seek resource consent to take water in the upper river for water storage. He sees no justification for prohibiting surface water abstraction from the upper Ngaruroro River at high flows.

[335] There is no doubt that the industries from which we heard require water. They spoke of concerns for the future and how their future needs may be impacted by a water conservation order, particularly one that prohibits damming of the tributaries of the mainstem of the river and restricts access to high flow allocations. They also referenced the effects of climate change, and the potential impacts on their security of water supply. Reliance was also placed on the various planning documents – to ensure the water supply they need.

[336] We acknowledge the concerns of industry, but note that no witness adequately quantified their future needs in a way that assisted us.

[337] Having said that, we are satisfied that the minimum flow l/s at least maintains the status quo, and that the proposed orders make provision for stock drinking water. Concerns were expressed that no exception has been made for water for root stock survival. However, there was no reasoned proposal put forward to support making it an exception, or on what terms – the implications, therefore, are unclear. We do not, therefore, propose any exception.

How might the order impact on the flood control activities of the Regional Council?

[338] Dr Forbes, an ecologist, has assisted the Council for the last 10 years with advice on the ecological management of braided rivers including in preparing an Ecological Management Enhancement Plan (EMEP) addressing the impacts of the Council's flood control activities on the Ngaruroro River. He gave evidence that:

...

13. ... The Ngaruroro EMEP is a non-statutory guidance document that is integrated with and provides a river-specific level of information to the HBRC Environmental Code of Practice for River Control and Waterway Works (Code of Practice; Groves, 2017). Both the Ngaruroro EMEP and the Code of Practice are incorporated through references in the HBRC

Regional Resource Management Plan (RRMP).

...

20. The Ngaruroro EMEP covers the Ngaruroro river reaches that are actively managed by HBRC for flood control purposes (Scheme Area: Waitangi Estuary upstream for approximately 36km to the Mangatahi River confluence) and also extends upstream to the edge of the Ruahine Ranges (Management Area; upstream to the Omahaki Stream confluence).
21. The braided reach of the Ngaruroro River represents a Naturally Uncommon Ecosystem of Threatened-Endangered status (Holdaway *et al.*, 2012). This threat status is due to a severe decline in ecosystem function over more than 80% of New Zealand's braided riverbed ecosystems.

...

28. ...The flood control activities work in combination to protect human lives and properties from the risk of flooding from Hawke's Bay's large braided river systems. Within the braided riverbed, flood control activities include river beach raking, gravel extraction plus management of edge retreat and channel diversions.

29. Beach raking is conducted once-annually. ...

...

41. ... the reach from Mangatahi to Chesterhope is beach raked annually. ...diversions of braided channel are undertaken as required to curtail impending bank erosion. There are also two long-standing, large-scale commercial gravel extraction operations operating upstream of Fernhill and Roys Hill, both are based on the true right berm of the Ngaruroro River. Further, gravel extraction occurs in a number of other localities within this reach also...

43. For the sake of the lower Ngaruroro River's ecology, it is important that other management regimes such as the Draft Water Conservation Order do not undo the positive effects of protection and enhancement that the Ngaruroro EMEP delivers.

[339] His concern is the potential of the order to stifle the benefits of existing provisions of the Ngaruroro EMEP or to limit future improvements or innovations in future revisions. He said that since river management has been underway riverbed bird numbers have increased and he would be concerned if existing or improved management was prevented.

[340] Dr Forbes referred to provisions of the water conservation order sought by the Applicants:

12.3 Subject to clause 12.4 this Order does not restrict or prevent the grant

of resource consents or inclusion of a rule in a regional plan for the purpose of:

(ii) the operation, maintenance, removal, protection or replacement of any existing road, ford or bridge, or network utility operation (as defined in section 166 of the Act); temporary construction dewatering activities; **or the maintenance or operation of the Ngaruroro Flood Protection and Drainage Scheme, subject to Clause 9.4(a)**; or the protection of human or animal health;

(emphasis added)

[Clause 9.4(a) is the restriction on alterations of river flow and form for the Lower Ngaruroro waters.]

12.4 No resource consent may be granted or rule included in a regional plan that would allow activities specified in clause 12.3 if exercise of any such resource consent or rule would compromise the protection of the outstanding characteristics and features identified for the waters specified in the Schedules.

[341] He gave as an example, under the Ngaruroro EMEP, gravel extraction as an important part of riverbed bird management. He was not clear how this activity would be affected at the time of re consenting.

[342] This is very like the arguments the Regional Council has advanced about its planning documents (which is not surprising given the inter-relationship with the planning documents and resource consent processes). The concern of Dr Forbes seems to be about what was advanced on an NCI basis, an approach we earlier concluded has no place in any order.

[343] The Applicants' case involved a concern about the approach taken to managing activities on the river, including the planting of vegetation. Mr Kay gave evidence on examples of willow planting questioning the authority for planting of vegetation and its effects on the river. In his opinion this is a threat to natural character and habitat for native birds and fish. He considered the cumulative impact of this activity could amount to a significant reduction in the width of the river corridor over time, reduce the area of unvegetated bar, and reduce the extent of braiding. We do not need to traverse that evidence as it is unrelated to matters we determine on any order.

[344] More to the point is Mr Kay's evidence (acknowledging that he gave that as

an advocate rather than an expert) that a water conservation order would inform regional planning documents and provide a clear direction to the Council to protect the river's outstanding values. He includes the introduction of limits to changes in the natural character of the river (then the NCI) in that but we have found against the Applicants' proposal for a restriction on that basis.

Planning provisions for consideration under s 212(b)

[345] Analysis of the relevant provisions of policy and plan documents was set out in the respective planning evidence and the two JWS: Planning.⁹⁰ The key planning instruments are the NPS-FM 2014 (**NPS-FM**), the operative RRMP and Proposed Plan Changes 7 and 9 (TANK plan change).

[346] All planning witnesses acknowledged that several of these planning documents are not settled yet.⁹¹ In addition, there is also still the process to be undertaken to give effect to the NPS-FM 2020 with its fundamental shift and concept of Te Mana o te Wai.⁹²

[347] Mr Matich gave evidence that Proposed Plan Changes 7 and 9 address environmental concerns where the operative RRMP is lacking and there is no need for a water conservation order to fill the gaps. He said that the NPS-FM 2020, Resource Management (National Environmental Standards for Freshwater) Regulations 2020 and Resource Management (Stock Exclusion) Regulations 2020 will close any such gaps even further.

[348] Charlotte Drury, a planner for HortNZ who provided evidence and took part

⁹⁰ Greg Carlyon Evidence in Chief, 2 June 2020, pages 22 – 36, Dr Philip Mitchell Statement of Evidence, 18 June 2020 at [25] - [105]; Charlotte Drury, Statement of Evidence, 18 June 2020 at [33]; Peter Matich Statement of Evidence, 18 June 2020 at [6.1] - [6.86]; JWS: Planning 17 & 18 March 2020 at [9] - [56]; JWS: Planning December 2020, at [7] - [37].

⁹¹ We record that since this matter was heard the Regional Council has released its decision on submissions to the TANK Plan Change. The Council invited us to reopen the hearing and consider that decision. We declined that offer. We had the notified version of the Plan Change in front of us which formed the basis of submissions and evidence received. We address the notified version in our reasons and findings. We assessed that those reasons and findings would not be upset by receiving further material on the Decisions Version that was still subject to appeals (that could take some time to resolve). Receiving further material would have required us to consider putting to one side our draft decision and reopen the hearing process. That is undesirable particularly given the length of time since the application was lodged.

⁹² See *Re Otago Regional Council* [2021] NZEnvC 164.

in the planning expert conferencing but could not appear for cross-examination, considered a water conservation order has the disadvantage of a static nature that restricts a community's ability to revisit, change and potentially improve the way it manages its freshwater resources. In her view the existing suite of planning protections enable that to occur and are a more appropriate protection mechanism to deal with challenges such as climate change and substantial regulatory changes.

[349] Dr Mitchell's opinion was that the planning documents provide for the wider concept of sustainable management better than the water conservation order does. He also considered that those planning documents are such that there is no necessity for the water conservation order because those matters are already being provided for.

[350] Mr Carlyon gave evidence that the water conservation order was complementary to the planning documents including the NPS-FM. He saw the planning documents as working together rather than competing.

The Values

[351] Dr Mitchell gave evidence on proposed Plan Change 7, noting that Schedule 25 Part 1 lists and describes the various outstanding values of water bodies in the region for the purpose of giving effect to the NPS-FM, as well as providing a non-inclusive list of sub-values to help describe the outstanding values. These are cultural and spiritual, ecology, landscape, natural character, recreation and geology. The Ngaruroro River is one of 38 waterbodies in Part 2 of the Schedule. He said that new Policy LW3A sets out decision-making criteria to apply when considering certain resource consent applications affecting outstanding water bodies in Schedule 25 once the new catchment-based regional plan changes become operative.

[352] Dr Mitchell's evidence was that the Plan Change 7 provisions identify all the "outstanding values" that the revised draft Order seeks to impose, plus all the others that are no longer being pursued. Overall, in his opinion, Plan Change 7 provides a wide-ranging policy regime for protecting the important resources of the Ngaruroro

River, irrespective of whether a water conservation order was made, especially when integrated with the objectives, policies and, most importantly, rules.

[353] When questioned he said that Plan Change 7 contains regionally outstanding values and did not deal with values at the higher threshold for recognising (and protecting) values in a water conservation order. We find that to leave a considerable gap in the existing planning framework.

The Protections

[354] Dr Mitchell's opinion was that Proposed Plan Change 9 goes further in providing protection of the characteristics, features and values of the Ngaruroro waters than the revised draft water conservation order. He considered it does this in a manner that is more easily adaptable to changes or threats to those waters that might arise in the future.

[355] Mr Carlyon's view was the protections in the Proposed Plan Change 9 (even if operative) were open to change at any time and did not provide the degree of certainty needed. He referred to the lengthy proceedings that had resulted in Proposed Plan Changes 7 and 9, along with his experience elsewhere of considerable time lags in bringing through necessary changes from higher order documents.

Consistency with the planning framework

[356] Forest and Bird submitted that:⁹³

23. The majority in *Re Whitemater* looked at whether the proposed restrictions or prohibitions in a WCO would disrupt or upset the planning provisions in the planning documents.

24. This is the correct approach, and no evidence was given that the WCO would disrupt or upset the Hawke's Bay regional planning provisions. In this regard, some of the protections sought by Forest & Bird match those in the relevant planning documents, including in the proposed TANK plan change (plan change 9). This includes minimum flow, FRE3, and damming prohibitions. Forest & Bird submit that the WCO is consistent with the planning framework and this supports the granting of the WCO as sought.

⁹³ Reply submissions 30 July 2021 at [23] and [24].

Certainty and flexibility

[357] A water conservation order endures until it is amended or cancelled. In Mr Carlyon's view the certainty of a water conservation order that would endure beyond the life of successive policy statements and plans was the purpose of and a reason for having a water conservation order. It would provide more permanent and certain protection than the regional planning framework.

[358] Some witnesses (not just planning witnesses) saw a water conservation order as being less flexible and less able to react to changing environmental conditions and community views. One reason advanced for this was the process involved in modifying (or removing) a water conservation order. Mr Carlyon's response was that the modification of planning documents also involved complex processes.

Community input

[359] The planning witnesses, other than Mr Carlyon, preferred the planning documents and processes driven by the Regional Council as a way of engaging with the community.

[360] We do not find the issue to be a contest about the perceived merits of different instruments and processes. A water conservation order, with its specific purpose, is an available instrument and process under the RMA.

Statutory hierarchy

[361] The regional planning documents are at a lower place in the hierarchy of planning instruments than a water conservation order. The regional policy statement and regional plans must not be inconsistent with a water conservation order.⁹⁴

[362] While Mr Carlyon put considerable store in the higher status of a water

⁹⁴ RMA, s 62(3), s 67(4)(a).

conservation order he did not see the “recognition” of outstanding values in a water conservation order as conferring a benefit without supporting “protections”. That was his view notwithstanding the relationship between the planning instruments and the requirement to have regard to a water conservation order in considering a resource consent application.

National Policy Statement - Freshwater Management 2020

[363] The Regional Council submitted that significant weight can be placed on the NPS-FM 2020 that represents a fundamental shift in the management of freshwater, far beyond what was in existence at the time the water conservation order framework was first introduced.

[364] Further, the Regional Council submitted:⁹⁵

21. As Cooke P stated in *Ashburton Acclimatisation Society v Federated Farmers*, a planning scheme may itself demonstrably outweigh the goal of conservation. Although the NPSFM 2020 does not “outweigh the goal of conservation”, in my submission its existence and the limit setting process which regional councils are required to go through are relevant to whether a WCO is necessary at all in this case.

22. In my submission, given the clear and explicit requirements of the NPS-FM 2020, the regulatory toolbox is now even more sophisticated and best placed to deal with the complex water planning issues facing the region. ...

(footnote omitted)

[365] A problem with this submission on the NPS-FM 2020 is that none of the current planning documents have been prepared to give effect to it. There is still the implementation of the NPS-FM to come. A water conservation order will assist in informing that process.

Adequacy of the existing planning framework

[366] In closing the Regional Council submitted:⁹⁶

The existing planning framework operates to sustain the outstanding values in

⁹⁵ Closing submissions at [21]-[22].

⁹⁶ At [14].

the upper Ngaruroro River. If the planning framework was not adequately sustaining those values, those values would not have been found to exist.

[367] That is an assertion based on assumptions that may be flawed and is not without risk, including of irreversible outcomes, to outstanding values.

Māori Values and Concerns

Introduction

Kai Raumati Kai Makariri i te Hinu o te Whenua
I can flourish during both the Summer and Winter from the fat of our lands.

Te Rangituouru⁹⁷

[368] The original application was for the Ngaruroro River and Clive River, with Ngāti Hori ki Kohupātiki an applicant. The Clive River was no longer pursued in Environment Court proceedings with Chesterhope Bridge the extent of the order sought (so no longer *ki uta ki tai*).

What process did the Court adopt regarding tangata whenua evidence?

[369] We directed that cultural experts or pūkenga along with other specialist experts be involved in all expert conferencing on an equal footing. We thank the cultural experts for that involvement and acknowledge the considerable time commitment by everyone involved in the expert conferencing.

[370] At the hearing, we had a virtual Google earth tour informing us on Māori values throughout the Ngaruroro catchment with Mr Kay and Mr Carlyon driving the technology and providing a commentary. As part of the tour, tangata whenua witnesses were also invited to comment on sites of interest to them and that included Mr MacGregor, Mr Karena, Mr Richard Steedman and Ms Mauger. We also undertook our own day long haerenga to see the river ourselves past Kuripapango and then down to its seaward outlet.

[371] We followed up the informative virtual tour at the resumed hearing (held

⁹⁷ Ngāti Whitikaupeka iwi, Ngāti Haumoetahanga hapū, speaking about Owahaoko. From the Reply Submission of Richard Steedman, 27 August 2021.

some months later as a result of adhering to the Covid-19 restrictions) by inviting Māori land owner representatives as well as several individuals who participated in the process to put the material in writing and on maps. That was received, with reasons for an understandable caveat regarding the keeping of the identification of certain sites out of the public domain. We thank those who participated in assembling material and apprising us of the history and values associated with these sites. All of this, along with the evidence and submissions, contributed to our understanding of the position of tangata whenua – those Māori landowner groups, representatives and individuals who were engaged in the proceedings.

Who gave evidence and submissions from tangata whenua?

[372] As foreshadowed, we heard submissions and evidence from:

- (a) Peter MacGregor for the Owhaoko C Trust;
- (b) Richard Steedman and Mark Ross for the Owhaoko B & D Trust;
- (c) Mark Ross and Hemi James Biddle for the East Taupo Lands Trust;
- (d) Arapiu Seymour for the Owhaoko A Trust;
- (e) Jenny Mauger, Opae Steedman and Wero Karena for themselves and for Ngā Kaitiaki o Te Awa o Ngaruroro;
- (f) Tai Tin;
- (g) Hera Tahua; and
- (h) Joanne Freeman.

We have also taken into consideration the submissions and evidence from others made in writing who did not appear before us.

[373] Turning then to the evidence and submissions of tangata whenua who were engaged in the process, the Owhaoko and the East Taupo Lands Trusts, are significant landowners in the upper catchment, with combined landholdings almost the size of Lake Taupō. The Ngaruroro River borders or flows through the Owhaoko A, D and C blocks, along with Kaimanawa 1F. As to their scale, the area of Māori freehold land managed by each trust is set out below:

- (a) Owhaoko A East & A1B Trust - 6,958 hectares;⁹⁸
- (b) Owhaoko B & D Trust - 13,776 hectares;⁹⁹
- (c) Owhaoko C Trust – 9,058 hectares;¹⁰⁰
- (d) East Taupo Lands Trust 30,270 hectares.¹⁰¹

Summary of submissions

[374] Of this grouping, the East Taupo Lands Trust and Owhaoko A Trust opposed a water conservation order. So too did Owhaoko B & D Trust. Owhaoko C Trust, while acknowledging the proposed order was “a start”, nonetheless continued to maintain their opposition. Equally importantly, we note that some of the representatives and individuals appearing before us associated with the upper waters saw that the question of whether there should be an order over the lower river was outside their mandate or remit. That view was entirely understandable.

[375] Turning then to the issue of broader representation in the consultation context, as foreshadowed, several tangata whenua representatives, including Mr R Steedman, expressed concern that they had not been properly engaged with the process with the result that their views could not have been considered. He referred to the interests of the Mōkai Pātea and related Taihape tribes, most of whom had historic, contemporary and legal interests as affected landowners.

⁹⁸ <https://www.owhaokoalands.co.nz/>

⁹⁹ <https://www.owhaoko.co.nz/about/about-owhaoko-b-and-d-trust/>

¹⁰⁰ <https://www.maorilandonline.govt.nz/gis/title/search.htm>

¹⁰¹ <http://www.easttaupolands.co.nz/about-us-3/>

[376] At the Heretaunga part of the rohe, within the domain of hapū that included Ngāi Te Upokoiri and Omaha Marae, Ms Mauger appeared for what she described as a mandated hapū authority with interim trustees set up at Omaha Marae approximately 2 years ago in response to experiences with the Treaty claims processes. In general terms, she was also supported by Mr Karena and Mr Steedman. As foreshadowed, Ms Tin, Ms Tahua and Ms Freeman also provided submissions in support of the position of tangata whenua and expressing concerns over the process that had been employed by the Applicants.

[377] When asked the view of the trustees of Omaha Marae, Ms Mauger referred to difficulty in getting the information flow back to trustees who only have responsibility for the small area of the reservation. She did not know whether the local Taiwhenua have been engaged in the water conservation process.

[378] The position Ms Mauger advanced was to oppose a water conservation order. When the Court asked Ms Mauger whether she supported or opposed the water conservation order she said:¹⁰²

That's the tricky thing, like we are, my understanding was that all the Māori groups were going to work in concert, harmoniously together. Unfortunately, we've not been privy to conversations, so I'm not sure where the other lots are at. But I guess – but on behalf of the – like, in principle it's wonderful. I would think that that applied to the entire river. And because, as it's been noticed and mooted before, that the lower is the part that needs the help.

Why are Māori values not recognised in any order?

[379] The Court asked whether it is an issue that Māori values are not recognised in any version of the orders in front of us.

[380] The Applicants proposed a clause:

12.1 This Order acknowledges the rights and interests of the Māori landowners, iwi, hapū and the exercise of their mana whenua and kaitiaki rights, duties and obligations in this regard; nothing in this Order prevents the exercise of any of those rights, duties and obligations, including but not limited to:

¹⁰² Transcript at 312.

- (a) The aspirations of Māori landowners, iwi and hapū to obtain a transfer of authority concerning the management of water to an iwi authority pursuant to s 33 of the Resource Management Act 1991; and
- (b) The provisions of any Nga Whenua Rāhui Kawenata.

[381] Mr MacGregor submitted that the Owhaoko C Trust would support that statement “as a first step”.¹⁰³ In contrast, Mr Ross contended that there was no value in a water conversation order for the trusts he represented and confirmed that he could see no added benefit to the landowners from any such order.

[382] We also note clause 12.3 of the Applicants’ order has provision for rules in a regional plan and resource consents for ‘research into, and protection or restoration, rehabilitation or enhancement of, water quality, cultural, spiritual and tikanga Māori values, fisheries and wildlife habitats’ (but subject to not compromising the protection of the outstanding characteristics – clause 12.4.) That approach is carried through from the Special Tribunal order for the upper waters in clauses 11.2(1) and 11.3.

Should outstanding cultural values or values of outstanding significance in accordance with tikanga Māori be recognised in the order?

[383] The Special Tribunal report stated:

80. The Tribunal accepts that the Ngaruroro River above the Whanawhana Cableway is both culturally and economically important to tangata whenua. However, aside from those associations the Tribunal was not presented with any evidence that the Ngaruroro River from the headwaters to the Cableway at Whanawhana was considered outstanding in accordance with tikanga Māori ...

The Lower Ngaruroro

87. ... the Tribunal was not presented with sufficient evidence to consider the lower reaches outstanding in accordance with tikanga Māori

Cultural and spiritual purposes

88. ... while there is no doubt that both the upper Ngaruroro and the lower Ngaruroro water have significant cultural and economic importance to tangata whenua, the absence of endorsement from all associated hapū and iwi, makes it difficult if not impossible on cultural grounds for the Tribunal to independently find that these water bodies are of outstanding value for cultural and spiritual purposes.

¹⁰³ Memorandum 30 June 2021.

[384] As mentioned, all Māori trust representatives, groups and individuals who were engaged in the hearing process opposed an order and did not waver from that position during the hearing and in closing submissions. It was clear that the several representatives and individuals appearing were united in their opposition. In broad terms they:

- (a) were disappointed by the Special Tribunal findings;
- (b) were dismayed by the approach taken by the Applicants;
- (c) considered themselves inadequately consulted with (with the planner for the applicants apologising for that failure to do so during the hearing);
- (d) sought mechanisms and approaches outside the RMA and the jurisdiction of the Court on the water conservation order e.g. co-governance, transfer of consenting powers;
- (e) drew to our attention the content of and benefits from Ngā Whenua Rāhui Kawenata (Section 77A Reserves Act 1977) and the purposes of and nature of arrangements, including funding for approved works from the Minister of Conservation, to protect and enhance the natural integrity of Māori land and preserve mātauranga Māori on Owhaoko A East and A1B Blocks Trust land, Owhaoko B & D Trust land and Owhaoko C Trust land in the upper catchment;
- (f) referred to settlement claim and conservation estate (DOC land) opportunities and potential future governance arrangements;
- (g) were critical of their experience of and outcomes from water conservation orders in adjoining catchments – Rangitikei and Mohaka;
- (h) had a concern that a water conservation order over the upper waters would mean more people on their land and issues around that;
- (i) did not see a water conservation order as adding to the protection of values;
and

- (j) considered any of the various water conservation order versions did not recognise “inherited ancestral ownership of our lands, our water, our taonga, our sites, wahi tapu and our kaitiaki status as described in s 6(e), (f) and (g)”.

[385] Then, in closing submissions, these arguments were reaffirmed.

Closing submissions

[386] Those Māori landowner representatives, as well as groups and individuals who made closing submissions were still, in broad terms, taking a common position opposing any order.

[387] The Owahaoko C Trust response was:

In the preferred “versions” of the submitted Water Conservation Orders as it applies to the Upper Awa, there are positive parts within both, however both are not complete and lack the fullest recognition of mana whenua, tangata whenua historic and cultural occupational rights. Our Kaitiakitanga.

For the Owahaoko C Trust any “version” is not palatable as the rights of Maori and the mauri of our waters and our whenua, which inextricably intertwined are not fully recognised and acknowledged. This statement is supported by the fact of the Minister of Conservation and staff did negotiate several Kawenata over and upon our lands and so recognised our rights on our lands and waters thereon. Treaty partnership approach. Any form of a WCO will extinguish our inherited rights and be contrary to the Kawenata and as such put the Crown at risk.

An additional comment around the reference to community should be addressed by firstly the community resident in, upon and around the landscape and the Awa, and secondly, those related groups and all communities along the Awa o Ngaruroro and Taruarau and not be subsumed by the communities of Forest and Bird and Whitewater NZ Inc, whose members are spread wide and far somehow seem to be the prime advocates and users of the Awa.

...

... as stated to the Court hearing on the 14 June 2021 is that the Special Tribunal failed and that failure is as set out in clause 80 of their findings so did not meet the fullest scope of s. 6(e).

Is not only about evidence it is also about enquiring. In our view the Special Tribunal assumed an obligatory position of relegating us away by saying all we had was an economical and cultural attachment, and did not recognise of inherited ancestral ownership of our lands, our water, our taonga, our sites,

wahi tapu and our kaitiaki status as described in s6(e), (f) and (g). In this regard, it is the Trusts position that the consultation or the need to consult arises from the principle of partnership in the Treaty of Waitangi and that this requires the partners, participants to act reasonably and to make informed decisions. The applicants and the Special Tribunal did not do this in a complete and timely way.

...

Our recommendation ... is to start again: ...

Design an alternate WCO that does not include all waterways and only the mainstems or

That we all enter into a formal discussion around an alternative, s.33 RMA or other vehicle to recognise the principle of partnership as defined in the Treaty of Waitangi.

[388] In his closing submission for the Owhaoko B & D Trust, Mr R Steedman echoed the points made by other submitters, underscoring the failure of the consultation process and how this must undermine any attempts to achieve the intent of Part 2 s 6(e). The key issue is, for several of the hapū and marae directly affected, that it was not so much a criticism of the inadequacy of consultation, but more that there was no meaningful engagement with them at all. Mr Steedman stressed this point regarding Ngāti Whitikaupeka and Ngāi Te Ohuake:¹⁰⁴

With our affiliation to the iwi of Ngāti Whitikaupeka and Ngāi Te Ohuake who hold manawhenua interests from the West and up to and including the awa of Ngaruroro we can assert that we have never been notified or engaged with for this process.

Not only have we not been engaged with but we have been marginalised and invisibilised.

[389] To demonstrate the flaw in the process, Mr R Steedman underscored that it was only by chance that the tribal groups and trusts he represented became aware of the application and how this late entry into consultation meant that any meaningful engagement with the Applicants was accordingly limited and unsatisfactory:¹⁰⁵

As a Maori land owning Trust adjoining and including the Awa of Ngaruroro

¹⁰⁴ Reply Submission of Richard Steedman for Owhaoko B&D Trust, Te Runanga o Ngāti Whitikaupeka and Te Runanga o Ngāi Te Ohuake 27 August 2021.

¹⁰⁵ Reply Submission of Richard Steedman for Owhaoko B&D Trust, Te Runanga o Ngāti Whitikaupeka and Te Runanga o Ngāi Te Ohuake 27 August 2021.

we did not enjoy full, early or proper engagement. In fact it was not until our whanaunga Owhaoko C Trust alerted us to this process that we became engaged at all but this late engagement has limited us to a hearing process only which has not been at all satisfactory for us to ensure we are building a “cohesive, collective and representative” pathway forward for our Awa.

[390] He further emphasised that while there had been consultation with land trusts, the lack of engagement by the Applicants with the hapū and iwi he represented must compromise the legitimacy of the consultation process and inevitably force Ngāti Whitikaupeka and Ngāi Te Ohuake into a default position of opposing the water conservation order:¹⁰⁶

This limited to nil engagement of Maori to the West side of the subject awa cannot be construed to adequately ‘recognise and provide for’ ‘the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga’ as per Part 2 s 6(e) of the Act.

In turn this limited to nil recognition and provision for Part 2 s 6(e) of the Act must be regarded by the Environment Court as both inadequate provision for ‘the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori’ as per s 199 2(c) and inadequate regard to the purpose of the water conservation order as per s 212 as originally envisaged by the Applicants (Significance in accordance with tikanga Māori).

It is on the basis of the above advice that the Owhaoko B&D Trust must continue to oppose the “proposed” WCO.

[391] In an 18 page written submission dated 12 August 2021, Wero Karena, on behalf of himself and as a member of Ngāi Te Upokoiri hapū of Ngāti Kahungunu as well as Honomōkai and Mahuika, also provided detailed information on significant sites, wāhi tapu, marae, kainga and related areas including the Ngaruroro river and its tributaries.¹⁰⁷ Mr Karena demonstrated an extensive knowledge of customary and contemporary interests relevant to his hapū and iwi and their connection with the river. While Ngāi Te Upokoiri has a strong affiliation with Omāhu Marae, according to Mr Karena’s submission, the hapū and the others he listed also have extensive interests in part of the upper reaches of the Ngaruroro.

¹⁰⁶ Reply Submission of Richard Steedman for Owhaoko B&D Trust, Te Runanga o Ngāti Whitikaupeka and Te Runanga o Ngāi Te Ohuake 27 August 2021.

¹⁰⁷ Reply Submission of Wero Karena for Ngāi Te Upokoiri, Honomōkai and Mahuika.

[392] The closing submission of Ngā Kaitiaki o te Awa o Ngaruroro opposed a water conservation order on the grounds that:

- (a) the mechanism is not fit for purpose;
- (b) they await a mechanism/instrument reflective of their values through working towards joint and shared partnerships and outcomes, thus far not exemplified by the Applicants nor parties, apart from the mana whenua groups and the Court's recognition and implementation as equals as Expert Witness in the joint conferencing;
- (c) any transfer of powers should be to hapū;
- (d) if there is an order, seek to reverse the words "iwi and hapū".

[393] In closing Mr O Steedman for the Opaea Whanau Trust opposed an order, asking why Tangata Whenua would want to cede full rights, powers and privileges to incorporated societies.

[394] In closing, the Regional Council submitted:¹⁰⁸

No party sought the recognition of cultural values for the upper Ngaruroro River and in my submission, it is irrelevant that the original application sought the inclusion of cultural values. Indeed, during the Special Tribunal hearing on the application, which was split in two, no evidence was ever called by the Co-Applicants as to the cultural values that are in existence in the upper Ngaruroro River, and in my submission, they did not have the appropriate mandate to do so.

That does not mean that no party presented compelling and persuasive evidence before this Court as to the existence of values that are significant from a cultural perspective. However, those parties who did present such evidence did so on the basis that they intended to demonstrate that a WCO was not necessary and added no value to the acts of kaitiaki already underway in the upper Ngaruroro River. Mr Ross' evidence was clear and concise in this regard; he did not consider there was any added benefit of a WCO.

For these reasons, the Court has no jurisdiction to recommend a WCO for the upper Ngaruroro River in respect of cultural values.

¹⁰⁸ At [32]-[34].

[395] While in their closings the Applicants had a contrary view, they stopped short of suggesting how Māori values might be further recognised and protected in the order.

[396] In closing, the Council also noted it had joined each of the Trust's submissions as an interested party but remained neutral with respect to the relief sought in relation to the upper river.

[397] In closing, the Applicants submitted that, if supported by the evidence, it would be appropriate for the Court, with recourse to Part 2, including s 6(e) and s 8, to recognise Māori spiritual and cultural values in the water conservation order. However, these values could not be used to achieve an outcome that was contrary to the conservation purpose of a water conservation order. That is, if it is found that there are nationally outstanding values in the upper river, s 6(e) and related matters could not be used to justify declining the order as this outcome would be contrary to the purpose of an order set out in s 199.

Evaluation

[398] As a general observation, applicants involved in consultation with tangata whenua under the RMA may be unfamiliar with the lay of tribal landscapes and their ebb and flow over time. Discerning who should be consulted in any given set of circumstances can sometimes be a complex and even challenging task, depending on the expertise available to an applicant. This may be particularly so where an iwi entity has been in place for some time and where it might be assumed that such an organisation has the relevant mandate for consultation purposes. For example, boards established under the Māori Trust Boards Act 1955 and their successor post-settlement governance entities.¹⁰⁹ However, this is not always the case and the relationship between such boards and their constituent hapū or between competing tribal enclaves can result in unresolved claim and mandate overlaps.¹¹⁰ It is also often

¹⁰⁹ See Te Runanga o Ngai Tahu Act 1996 and Te Runanga o Ngati Awa Act 2005.

¹¹⁰ For examples, see *Tau - Ngai Tahu Trust Board* (1990) 4 South Island Appellate Court MB 673 (4 APTW 673); *Ngāti Paoa Whānau Trust v Hauraki Māori Trust Board* (1995) 96A Hauraki MB 155 (96A H 155); *Paewai v Tamaki A Nui-A-Rua Tāwhenua (Kahungunu) – Rangitane o Tamaki Nui-A-Rua Inc Society* (1996) 11 Tākitimu Appellate MB 96 (11 ACTK 96); *Tē Rūnanga o Ngāti Hine v Tē Rūnanga a Iwi o Ngāpūbi* [2013] Māori Appellate Court MB 89 (2013

important to distinguish between those individuals and groups asserting a mandate contrasted with those who actually possess that authority on a continuing basis.

[399] In any event, it is well settled that hapū and marae, being the principal representative entities for tribes, along with iwi authorities, where appropriate, are invariably the first point of contact for consultation in an RMA context where the proposal affects a kin group rather than an individual. It is also well settled that both Te Tiriti o Waitangi and the principles that it has been found to embody, including the principle of consultation, along with tikanga Māori, are part of the law of New Zealand.¹¹¹

[400] In the context of attempting to identify tangata whenua for consultation purposes, there are various government agencies who have knowledge of iwi and hapū representative entities. That includes both local councils and ministries like Te Puni Kōkiri, the Department of Conservation, the Ministry for the Environment, the Ministry for Primary Industries and even the Māori Land Court. Indeed, Te Puni Kōkiri administers Te Kāhui Māngai – the online directory of Iwi and Māori organisations which provides details of iwi, their hapū and marae as well as their contact organisations:¹¹²

Te Kāhui Māngai is a useful tool for anyone to find out basic information about iwi, hapū and marae.

Te Kāhui Māngai also assists the Crown in meeting its obligations to local authorities under section 35A of the Resource Management Act 1991.

Te Kāhui Māngai gives information on iwi identified in the Māori Fisheries Act 2004 [see MFA map], and those iwi/hapū that have begun the process of negotiating settlement of their historical Treaty of Waitangi claims; this includes their rohe, hapū, marae, and the organisations whose mandates to represent these iwi/hapū have been recognised by the New Zealand Government. These representative organisations are;

APPEAL 89); and *Ngāti Whatua Orakei Trust v Attorney-General* [2022] NZHC 843. In addition, and where relevant, there are also a number of recognised urban Māori authorities and taura here groups who may have an interest in consultation, given the size of their constituency and the potential effects a resource consent application may have on them.

¹¹¹ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC); *Trans-Tasman Resources Ltd v Taranaki-Wanganui Conservation Board* [2021] 1 NZLR 801 (SC). See also the recently released Supreme Court decision as it relates to tikanga *Ellis v R* [2022] NZSC 114.

¹¹² <https://www.tkm.govt.nz/>. There is also a useful website <https://maorimaps.com/> which lists every marae in the country and usually their contact details as well as iwi and hapū affiliations.

- Mandated Iwi Organisations and Recognised Iwi Organisations in the Māori Fisheries Act 2004; and
- Mandated bodies recognised for Treaty of Waitangi settlement purposes, including Treaty negotiations and post-settlement governance entities;

Te Kāhui Māngai also includes:

- Iwi authorities and Groups that represent hapū for the purposes of the Resource Management Act 1991;
- National and Urban Māori organisations that have statutory associations with representative iwi organisations ("Other Organisations"); and
- Urban/Community marae and Institutional marae.

[401] Ironically in the context of the present application, this website's maps identifies Ngāti Whitikaupeka and Ngāi Te Ohuake as represented at the hearing by Mr Steedman, along with other marae, as having interests over the rohe that includes the upper reaches of the Ngaruroro river. The website also provided contact details for their representative entities including postal addresses and Mr Steedman's email address.

[402] It is also trite to observe that many local authorities also have extensive networks into Māori communities that can include formal subcommittees and liaison staff with specific responsibilities for consultation with tangata whenua. There are also non-governmental organisations like Te Ohu Kaimoana - the Māori Fisheries Commission who will have information on tribal mandates and rohe.¹¹³ The essential point is that applicants intending to consult with tangata whenua under the RMA need not start their journey with a blank page as there are a range of sources that they are able to engage with to assist in their information gathering processes over who needs to be consulted and to what extent.

[403] Turning then to the present case, the submissions from tribal representatives from the upper reaches of the Ngaruroro River in particular, stressed the point that it was not simply that consultation was inadequate but that, in certain instances, it was non-existent. So, while at least one marae, Omāhu from the lower Ngaruroro and

¹¹³ <https://teohu.maori.nz/iwidecisionregister/>

near Hastings, had been consulted, others with an interest in the application were not and in simple numerical terms, they would form a majority.¹¹⁴ Added to that were the significant land holding entities who also made submissions given their proximity to the river. Undoubtedly, they would be affected by any order that was made.

[404] Unfortunately, hapū and representatives of tangata whenua are not always consulted in the context of applications filed under the RMA, in a manner consistent with their tikanga. This can then cause complications and confusion and inevitably delays the process. On occasion, applicants assume that by consulting one group that has an interest in customary terms, that will suffice for consultation with the wider tribal confederation. That, with respect to the applicants, is both contrary to the well settled Treaty principle of consultation as well as being incongruent with tikanga Māori. It would therefore be incorrect to conflate one segment of a tribal confederation as being representative of the rest and in this case, the majority.

[405] In addition, while there are invariably significant overlaps of personnel from time to time, consulting with a trustee of a land trust is not the same thing as engaging with that same individual who may also be a member of an iwi or hapū with similar if not greater customary interests in the application. A separate process is necessary if it is to be consistent with tikanga. That overlaps can also be managed for efficiency is also a possibility but there needs to be the proper processes of consent and mandate. In summary, it is inaccurate to suggest that because one group of Māori were consulted that would suffice for the rest in terms of compliance with both s 8 of the RMA as well as the terms and principles of Te Tiriti o Waitangi.

[406] Moreover, while it is correct that the law places conservation in the context of this water conservation order, at the highest level for consideration, that should not diminish recognition of the need for both Treaty and tikanga compliant as well as lawful processes of consultation being applied. Put plainly, it was not an unreasonable expectation of the hapū and marae referred to by Mr Steedman to have direct

¹¹⁴ Taking into account Ngāti Whitikaupeka and Ngāi Te Ohuake. It is also likely that Ngāti Hinemanu me Ngāti Paki, based out of Winiata Marae in Taihape would have important customary interests in the Ngaruroro river and its tributaries in its upper reaches.

consultation with the Applicants. That the marae might have agreed, having been properly informed by the Applicants, at a preliminary stage at least, to then group together for the purposes of consultation in the context of this water conservation order, would have been entirely appropriate, if that was their decision. Unsurprisingly, those marae with greater proximity to the Ngaruroro river and its upper reaches, may consider that they would have been the better venue for a proper process of consultation and engagement with the Applicants for that part of the rohe.

[407] However, that did not occur and, as foreshadowed, according to the Applicants it was Omāhu Marae that was consulted in a formal sense. While several significant Māori land entities were eventually involved in the experts conferencing process, as underscored, they do not represent all of the hapū and marae with an interest in the water conservation order. They represent, to the extent that their landowners have given them a mandate, the interests of those landowners who are affected by the proposal. At the risk of belabouring the point, it is the hapū that is the “corporate” entity of tribal governance, given that it was the hapū that signed Te Tiriti o Waitangi in 1840. That is not to say individual Māori, as well as whānau and even iwi are excluded in any consultation framework, but simply to emphasise the traditional primacy of hapū as the custodians of customary interests and rights in accordance with tikanga Māori.

[408] In any event, we gave tangata whenua who were engaged in the process including Māori landowner representatives, groups and individuals, the opportunity to amend their position, but their evidence and submissions remained opposed to an order.

[409] In that context, we discussed with Mr Carlyon the fact that the very iwi and hapū who would be affected by any water conservation order that applied to the upper reaches, had running parallel to the environmental processes, their historic Treaty claims being heard before the Waitangi Tribunal.

[410] The irony was not lost on Mr Steedman that, at the very time his tribal groups were making submissions to the Waitangi Tribunal on flaws in the resource management legislative regime, historic and current, this process had been wending its way through the system, yet without direct input from tangata whenua iwi and hapū of some of the affected area. Put another way, it was surprising to hear that even though the Waitangi Tribunal process had been taking place in plain view, the Applicants were, for whatever reasons, not able to engage with all the relevant tribal groups who have interests in the Ngaruroro River and its environs. That too may explain, in response to the Regional Council’s closing submission, that no party sought the recognition of cultural values on the Upper Ngaruroro River – they did not do so because they had not been properly consulted by the Applicants in the first place.

[411] In short, the consultation process concerning several of the hapū and marae of the upper Ngaruroro river who have an interest in the proposed water conservation order was inadequate. They should have been included given their extensive customary interests across the region.

[412] In closing the Regional Council acknowledged the additional clause in the Applicants’ order acknowledging the rights and interests of Māori landowners, iwi, hapū, and the exercise of their mana whenua and kaitiaki rights, duties and obligations. Its reasons for not including that clause in its preferred order are:¹¹⁵

the Council considers that the proposed clause is uncertain as to its application and the Council foresees difficulty with the interpretation of the clause in the future given its breadth.

[413] We conclude that the drafting and the word “includes” result in the uncertainty of application identified by the Regional Council. For clarity, we redraft the clause and confine it to the two matters put forward in the Applicants’ order as follows:

12.1 This Order acknowledges the rights and interests of the Māori landowners, iwi and hapū and the exercise of their mana whenua and kaitiaki

¹¹⁵ At [5].

rights, duties and obligations in this regard and nothing in this Order prevents the exercise of any of those rights, duties and obligations:

- (a) To aspire to obtain a transfer of authority concerning the management of water to an iwi authority pursuant to s 33 of the RMA 1991; and
- (b) Under the provisions of any Ngā Whenua Rāhui Kawenata.

[414] The order acknowledges and records that Māori landowners, iwi and hapū may have aspirations to obtain a transfer of authority concerning the management of water to an iwi authority under s 33 of the RMA. It makes it clear that nothing in the order prevents that. We note that the Environment Court has no jurisdiction in respect of such a transfer of authority.

[415] We had evidence on Ngā Whenua Rāhui Kawenata that provides us with a foundation for the inclusion of the second matter.

K Is there a strong, compelling case to displace the presumption of conservation for the upper and lower rivers?

[416] The Court of Appeal stated in *Asburton Acclimatisation Society v Federated Farmers of New Zealand Inc.*¹¹⁶

... In particular cases the needs of industry or other community needs or planning schemes may demonstrably outweigh the goal of conservation. But as a general working rule or guideline preservation of the natural state, either as fully as possible or to the extent of protection of outstanding characteristics or features, is to be aimed at unless clear and clearly sufficient reason is shown in the contrary. The ultimate criterion must be the public interest. **The presumption is in favour of conservation. A strong, really compelling case is needed to displace it.**

(emphasis added)

[417] We do not find there is such a compelling case to displace the presumption of conservation for the upper waters and the mainstem of the lower Ngaruroro River.

¹¹⁶ *Asburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1998] 1 NZLR 78 (CA) at 88.

Planning framework

[418] We do not find the water conservation order is not needed or there are better mechanisms. We do not accept that the current planning framework and those instruments under preparation provide sufficient recognition of and protection for the outstanding values. The TANK Proposed Plan Change 9 is still in process. Implementation of the NPS-FM 2020 is yet to occur. There is not the certainty a water conservation order provides.

[419] We accept Mr Carlyon's view that the water conservation order is a complementary instrument that informs and works with other instruments in the hierarchy.

[420] The recognition of values and their protections in the regional planning framework are for regionally outstanding values (Proposed Plan Change 7) and not nationally outstanding values. We do not accept that the processes in preparing these instruments are superior to those for consideration of whether a water conservation order is justified.

[421] There is no certainty of recognising and even holding (let alone improving) the line now in the water conservation order in the hierarchy of instruments. Processes still to come could take some time and there is no assurance of their outcome and longevity.

[422] The recognition of the values in the water conservation order will inform the work to be done on the NPS-FM 2020 and to address clause 1.3 of that document, the fundamental concept of Te Mana o te Wai.

[423] HortNZ submitted that the tier two position in the hierarchy in the NPS-FM 2020 of enable the health needs of people such as drinking water and the tier three to provide for social, economic and cultural wellbeing are relevant at the level of consideration of the needs of the community and strengthens the imperative to consider needs as they relate to horticulture outputs. HortNZ also submitted that

strengthens the arguments that needs of the community including in relation to horticulture are an important consideration that further weighs against the water conservation order.

[424] We find that to be a self-serving argument that could be made in the context of any water conservation order. The RMA provides for a water conservation order as a higher order or superior instrument.

Primary and secondary industry and the community

[425] We do not find that the case has been made out for primary and secondary industry or community needs to outweigh conservation.

Flood protections

[426] Neither do we find that the Council's flood control and other management responsibilities should override the conservation presumption in the RMA.

Climate change

[427] As to the effects of climate change, we find that no compelling case was made out that this should override the purpose of the water conservation order. A water conservation order is capable of modification (including strengthening its provisions) to adapt to any changes required because of the effects of climate change on the waterbodies themselves and also on their outstanding values. That process involves community input.

Cultural values

[428] The Regional Council submitted that we heard evidence from the various Trusts as to cultural values that exist in the upper and lower river to emphasise the Trusts' position of no order. Further that such evidence from the various Trusts may provide the "strong, really compelling case" needed to displace the presumption of a water conservation order for the upper river.

[429] We note that Part 2 has the following specific provisions:

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

- (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) Kaitiakitanga:

...

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[430] We also note the decision of the Supreme Court on the relationship between ss 5, 6, 7 and 8 in *King Salmon*¹¹⁷ insofar as it is relevant to the specific purpose of a water conservation order and s 199 of the RMA which states “Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to recognise and sustain ...”:

[26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers “shall recognise and provide for” what are described as “matters of national importance”, whereas s 7 requires decision-makers to “have particular regard to” the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to “recognise and provide for” the specified matters as “matters of national importance” identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement

¹¹⁷ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

in s 7 is to “have particular regard to” them (rather than being in similar terms to s 6).

[27] Under s 8 decision-makers are required to “take into account” the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

[28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from “inappropriate” subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words “protection” and “avoiding” in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.

[431] The manner in which the iwi and hapū say that ss 6, 7 and 8 of the RMA are not met is because of inadequate consultation. An issue is whether (absent a specific reference to consultation in the relevant parts of the RMA¹¹⁸) granting the water conservation order does not meet the s 8 requirement to “take into account” the principles of the Treaty.

[432] We also note the Privy Council in *McGuire* said:¹¹⁹

These [s6(e), 7(a), 8] are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, Their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation

¹¹⁸ The RMA only has one specific reference to consultation relevant to a water conservation order. That is in Section 202 where the Minister must consult with ministers about membership of a Special Tribunal.

¹¹⁹ *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at 594.

to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

[433] Despite the Applicants' efforts to engage with tangata whenua, our conclusion is that did not occur in a thorough and comprehensive manner. It is not enough that those efforts were genuine because they did not result in even a minimal level of engagement with all affected iwi and hapū having a relevant interest according to tikanga.

[434] Those tangata whenua who were part of this hearing had the opportunity to be involved in mediations, expert conferencing and to provide evidence. However, there are those who Mr Steedman advised were not here. Their rights and interests are both extensive and significant in customary terms.

[435] We return to carefully considering whether the shortcomings in consultation with tangata whenua are such as to outweigh the presumption of conservation in our conclusion. If an order is not made, the only statutory protection of the 'natural state' waters and the outstanding values in other waters we have identified are in the planning documents. We have determined they will not, on their own, provide the necessary protection of the River

[436] We stop short of recognising in the order characteristics which are considered to be outstanding, for cultural purposes, or which are of outstanding significance in accordance with tikanga Māori in the absence of support for those. However, we accept that the proposed new clause 12.1 (with amendment) is an appropriate addition in the absence of the recognition in the order of the protection of characteristics which the Ngaruroro and its tributaries have or contribute to, and which are considered to be outstanding, for cultural purposes, or which are of outstanding significance in accordance with tikanga Māori.

L Our Conclusion and Recommendation

[437] We find that recommending an order over the upper Ngaruroro waters is a close-run matter for reasons upon which we now elaborate.

[438] There is the lack of consultation with the hapū and marae from the upper reaches of the Ngaruroro river by the Applicants. We have expressed our view on the inadequacy of providing affected hapū and marae the appropriate opportunity to be consulted in accordance with tikanga. It is not an issue of tangata whenua having a right of veto over such applications, which the law confirms, in such situations, they do not. It is simply a case of tribes who are directly affected by the application not being consulted, as Mr Steedman confirmed.

[439] Consultation assists in giving the Court confidence that the Court's responsibilities under ss 6(e), 7 and 8 of the RMA have been discharged. More specifically, that the Court has adequately considered tangata whenua's relationship with their whenua, (much of which they still own and with the Ngaruroro river running near or through those lands) or had adequate regard to their kaitiakitanga responsibilities as they have exercised them for generations. In addition, it assists in informing the Court whether the relevant Treaty principles, including those of consultation, active protection and acting in good faith, have been properly applied.

[440] The water conservation order process does not allow for the Court to go back to the start of the process and fix the deficiencies that occurred in the consultation undertaken by the Applicants before lodging the application for a water conservation order. Neither does it allow the Court to direct that the Special Tribunal reconvene and reconsider its findings as that body has undertaken its function.

[441] The Court too is limited in what it can achieve through the proceedings before us on a water conservation order. The Court is not able to direct outcomes such as requiring the Regional Council to transfer authority concerning the management of water to an iwi authority under s 33 of the RMA. Neither can the Court direct a formal discussion around an alternative, whether a s 33 process or other vehicle, to recognise the principle of partnership.

[442] There are many interests and factors that we also find relevant to our evaluation of the reasons for ultimately finding in favour of our recommended order.

[443] The water conservation order is different in nature from an application for a water permit or discharge permit generally involving a site specific development proposal of benefit to an individual or particular group. In contrast the water conservation order has a conservation purpose that identifies nationally outstanding values (that are greater than those of regional significance) and contains specific protections of those values. That order also informs what is appropriate in lower order planning instruments, like the approach in the regional policy statement and regional plan objectives, policies and rules. An order also informs the values and protections to be considered in consent application processes.

[444] As we have found there are values that justify the national recognition of various waterbodies as “outstanding”. There is an area of “natural state” in part of the upper waters. There are avifauna habitats in the upper waters and in the mainstem of the lower river that reach the threshold of “outstanding”. In the upper waters too there are other values, such as recreational and amenity characteristics, as the Special Tribunal found and which were not the subject of specific challenge before us.

[445] There are also waterbodies such as the tributaries of the lower Ngaruroro and hydraulically connected groundwater of the upper Ngaruroro that contribute to those outstanding values. Without the recognition (and protection) of their contribution to the waters identified as having outstanding values, those outstanding values would be put at risk.

[446] The RRMP and Proposed Plan Changes 7 and 9 (the TANK Plan Change) do not, as we have found, adequately recognise and provide for the protection of the nationally outstanding values. Neither could the provisions of such plans give the certainty a water conservation order can that there will be the necessary recognition and protection of the nationally outstanding values into the future.

[447] We are satisfied that the protections in the order are necessary. Damming is to be restricted both in the upper waters and also in the mainstem of the lower river.

[448] Water takes in the upper waters are to be restricted largely as in the Special

Tribunal Order.

[449] In the lower river (and the contributing tributaries) the operative minimum flow at Fernhill, carried through into the notified TANK Plan Change, is required to hold the line for the outstanding avifauna habitat in the mainstem. That does not mean that a regional plan cannot set higher minimum flows or reduce the allocable volume for any of the waterbodies in the order.

[450] Controls on discharges are also important to protect water quality. In the upper waters the order requires that a regional plan cannot contain a rule authorising the discharge of contaminants onto land or into waters that will cause, either by itself or in combination with any existing consents, activities or rules, the deterioration of the existing state of water quality.

[451] Nothing in our order affects or restricts any resource consent granted prior to our order coming into force until the expiry of that consent. Notably the order does not prevent the granting of replacement water permits.

[452] Our order also does not limit those sections of the RMA that provide for the take use and use of water for an individual's reasonable domestic needs, or for the reasonable needs of an individual's animals for drinking water, or for fire-fighting purposes provided that intakes (other than those for emergency fire-fighting) have fish screens designed and maintained to prevent the entrapment or impingement of fish.

[453] Our order acknowledges the rights and interests of the Māori landowners, iwi, hapū and the exercise of their mana whenua and kaitiaki rights, duties and obligations in this regard. It provides that nothing in the order prevents the exercise of any of those right, duties and obligations under the provisions of any Ngā Whenua Rāhui Kawenata. A provision in the order makes it clear that the order does not prevent a transfer of authority concerning the management of water to an iwi authority under s 33 of the RMA.

[454] Our order contains an exception to the controls restricting or preventing various activities. Those activities are for the purpose of:

- (a) research into, and protection of restoration, rehabilitation or enhancement of, water quality, cultural, spiritual and tikanga Māori values, fisheries and wildlife habitats;
- (b) minor activities necessary for the management of land administered by DOC;
- (c) the operation, maintenance, removal, protection or replacement of any existing road, ford or bridge, or network utility operation;
- (d) temporary construction dewatering activities;
- (e) the maintenance or operation of the Ngarururo Flood Protection and Drainage Scheme; and
- (f) the protection of human or animal health.

For those activities there is still the protection that no resource consent may be granted or rule included in a regional plan that would allow those activities if that would compromise the protection of the outstanding values.

[455] Our order also does not prevent the grant of a resource consent that would otherwise contravene the controls in the order for consents for other specific purposes provided a consent authority is satisfied that the exercise of any such consent would not compromise the protection of the outstanding values identified for the waters in the Schedules. The consent must be for:

- (a) a discharge that is of a temporary nature; or
- (b) an activity that is associated with necessary removal, maintenance or replacement works for works and structures not otherwise prohibited by this Order; or
- (c) discharge of herbicides for control of pest plants.

[456] We are mindful that the water conservation order application in front of us was lodged with the Minister for the Environment in 2015. We cannot risk recommending the declining of a water conservation order and leaving things up in the air for future processes notwithstanding our concerns about the failings of the Applicants to consult with hapū and marae in the upper Ngaruroro waters. That would not be a responsible course of action for this Court to take.

[457] Weighing these matters carefully, we conclude that the outstanding values and the protections cannot be set to one side on the upper Ngaruroro waters (or indeed for the outstanding avifauna habitat on the mainstem of the lower Ngaruroro). It is important that the recognition of the values and the controls in the order are put in place immediately. A water conservation order, with its place in the hierarchy of RMA documents, provides that certainty and security.

M Commissioner Mabin

[458] Commissioner Mabin was unable to participate in our decision-making due to ill health. This Interim Report is therefore the report of the remaining three members of the Court.

N Acknowledgements

[459] Their Honours would like to acknowledge the work contributed by Commissioner Edmonds in the preparation of this Report.

O Our recommended order

[460] Annexure 1 contains the recommended draft water conservation order tracked against the applicants' Preferred Order (with amendments by the Applicants¹²⁰ in response to the Regional Council's proposed order suggested in its reply submission).

¹²⁰ Joint Reply Legal Submissions for the Royal Forest and Bird Protection Society of New Zealand Inc & Whitewater New Zealand Inc 20 August 2021.

[461] In progressing our recommended draft order we require:

- The Applicants to prepare a revised draft order (on both a track change and untracked versions) with replacement map as directed at [44] by 21 November 2022;
- Parties then have 10 working days to provide any comments on the revised draft order that concern the drafting and not the substance.

For the Court:



MJL Dickey
Environment Judge



APPENDIX A: DRAFT ORDER¹

1. Title

This order is the Water Conservation (Ngaruroro River) Order 2021.

2. Commencement

This order comes into force on the 28th day after the date of its notification in the New Zealand Gazette.

3. Interpretation

In this order, unless the context otherwise requires:

Act means the Resource Management Act 1991.

damming means the artificial impounding of all or part of the natural flow of any water, including but not limited to circumstances involving:

1. an associated temporary or permanent structure, or:
2. any intake or diversion structure, structure in the river bed, or modification of the river bed, that impedes the passage of fish or navigation by personal watercraft.

~~**waters** means ...~~

upper Ngaruroro waters means the mainstem of the Ngaruroro and its tributaries, (including wetlands) from its source in the Kaimanawa Ranges down to Whanawhana cableway (at or about NZTM 1891901E, 5615830N) as identified in Schedule 1A and 1B; and for the purposes of Schedule 3, the tributaries to the lower Ngaruroro River.

lower Ngaruroro waters means the mainstem of the Ngaruroro River from Whanawhana cableway (at or about NZTM2000 1891901E, 5615830N) downstream to the Chesterhope Bridge (at or about NZTM2000 1932603E, 5609853N as identified in Schedule 2).

existing water take means any water permit granted, or any water take or activity lawfully established or authorised and being undertaken, in respect of the Schedule 1A, 1B, 2 or 3 waters, prior to this order being made.

replacement water permit means any water permit granted to authorise an existing water take into the future, including:

- (a) A change of conditions of a water permit authorising the existing water take; and
- (b) A water permit which replaces one or more existing water permits; and
- (c) Any further or successive replacement consents;

provided:

- (d) Application for the replacement consent is made prior to the expiry or surrender of the existing water permit, or within 6 months after the date on which the rule which requires previously permitted activities to obtain consent became operative; and

¹ Track changes to Applicants' preferred order and incorporating Regional Council amendments accepted by Applicants.

- (e) The replacement consent, and any conditions imposed on it, result in adverse effects that are the same, similar or reduced in character, intensity, and scale to those arising from or associated with the existing water take.

4. Outstanding characteristics, features and values

The waters identified in Schedules 1A, 1B, 2 or 3 include or contribute to, to the extent specified in Schedules 1A, 1B, 2 or 3, the following outstanding characteristics, features and values:

- (i) amenity and intrinsic values
- (ii) habitat for rainbow trout;
- (iii) rainbow trout fishery;
- (iv) angling amenity and recreation;
- (v) habitat for avifauna;
- (vi) habitat for indigenous fish;
- (vii) whitewater kayaking and rafting amenity and recreation;
- (viii) wild and, scenic ~~and natural~~ characteristics.

5. Waters to be retained in natural state

Because they are in their natural state, and because of the outstanding characteristics, features and values identified in clause 4 and in Schedule 1A, the Upper Ngaruroro waters specified in Schedule 1A are to be retained in their natural state including the quality, quantity, level and rate of flow of the waters.

6. Waters to be protected for outstanding characteristics

Because of their outstanding characteristics, features and values identified in Schedules 1B and 2, and the contribution made to water supporting outstanding characteristics, features and values, the Upper Ngaruroro waters identified in Schedule 1B are to be protected in accordance with clauses 8, 9, 10 and 11 and the lower Ngaruroro waters identified in Schedule 2 are to be protected in accordance with clauses 8, 9 and 10.

7. Waters to be protected as contributing to outstanding characteristics

Because of their contribution to outstanding characteristics, features and values identified in Schedules 1A, 1B and 2, the waters specified in Schedule 3 are to be protected in accordance with the relevant conditions in clause 9, and, in the case of hydraulically connected groundwater to the waters specified in Schedules 1A and 1B, clause 11.

8. Restriction on damming of waters

No resource consent may be granted, or rule included in a regional plan authorising the damming of the upper or lower Ngaruroro waters.

9. Restriction on alterations of river flow and form

(A) Upper Ngaruroro waters

- 9.1 Except where clause 12.2 applies, no resource consent may be granted or rule included in any plan that provides for abstraction of surface water from the waters specified in Schedule 1A or 1B.
- 9.2 No rule may be included in a regional plan that provides for abstraction of hydraulically connected groundwater to the upper Ngaruroro waters as identified in Schedule 1A or 1B, that will have a more than a minor stream depletion effect on Schedule 1A or 1B waters.
- 9.3 When managing the taking of hydraulically connected groundwater identified in Schedule 3 in accordance with clause 9.2, the regional council may take account of the degree of hydraulic connection and any delay between the taking of water and stream depletion effects in determining whether the stream depletion effects on Schedule 1A or 1B waters are more than minor.

(B) Lower Ngaruroro waters

9.4 —...

- 9.5 All consents granted for the taking of water from the lower Ngaruroro waters or their tributaries must include a condition that requires taking to cease when the flow at Fernhill is less than 2,400 l/s.
- 9.6 This clause does not restrict a regional plan from imposing rules that set higher minimum flows or that reduce the allocable volume for any of the waterbodies referred to in this Order.

10. Requirements for fish screens

No resource consent may be granted, ~~or rule included in a regional plan or activity undertaken~~ (other than those for fire-fighting purposes) in respect of the taking or diversion of the waters specified in Schedules 1A, 1B, 2 and 3, ~~as exempted by clauses 11 and 12,~~ unless all associated intakes are screened and maintained in accordance with the minimum standards for fish screens and intakes contained in Schedule 4.

11. Requirements to protect water quality

- 11.1 No rule may be included in a regional plan authorising the discharge of contaminants onto land or into waters specified in Schedules 1A and 1B that will cause, either by itself or in combination with any existing consents, activities or rules, the deterioration of the existing state of water quality.

11.2 —...

11.3 —...

11.4 This clause does not restrict a regional plan from imposing more stringent water quality standards for the purpose of improving water quality where it is not in its natural state.

12. Scope of order

- 12.1 This Order acknowledges the rights and interests of the Māori landowners, iwi, hapū and the exercise of their mana whenua and kaitiaki rights, duties and obligations in this regard and, nothing in this Order prevents the exercise of any of those rights, duties and obligations, ~~including but not limited to:~~
- (a) ~~The aspirations of Māori landowners, iwi and hapū~~ To aspire to obtain a transfer of authority concerning the management of water to an iwi authority pursuant to s 33 of the Resource Management Act 1991; and
 - (b) Under ~~the~~ provisions of any Nga Whenua Rāhui Kawenata.
- 12.2 This order does not limit sections 14(3)(b) and (e) of the Act, or any permitted activity rule that gives effect to those sections, relating to the take and use of water for an individual's reasonable domestic needs, or for the reasonable needs of an individual's animals for drinking water, or for firefighting purposes, provided that all intakes (other than those for emergency fire-fighting) be screened to be designed and maintained to comply with the minimum standards specified in Schedule 4 to prevent the entrapment or impingement of fish.
- 12.3 Subject to clause 12.4 this Order does not restrict or prevent the grant of resource consents or inclusion of a rule in a regional plan for the purpose of:
- (i) research into, and protection or restoration, rehabilitation or enhancement of, water quality, cultural, spiritual and tikanga Māori values, fisheries and wildlife habitats; or
 - (ii) the operation, maintenance, removal, protection or replacement of any existing road, ford or bridge, or network utility operation (as defined in section 166 of the Act); temporary construction dewatering activities; or the maintenance or operation of the Ngaruroro Flood Protection and Drainage Scheme, ~~subject to Clause 9.4(a)~~; or the protection of human or animal health; or
 - (iii) minor activities necessary for the management of land administered by the Department of Conservation.
- 12.4 No resource consent may be granted or rule included in a regional plan that would allow activities specified in clause 12.3 if exercise of any such resource consent or rule would compromise the protection of the outstanding characteristics, ~~and features~~ and values identified for the waters specified in the Schedules.
- 12.5 This order does not prevent the granting of replacement water permits.

13. Exemptions

- 13.1 Nothing in this Order prevents the grant of a resource consent that would otherwise contravene ~~conditions set out in~~ clauses 5,6,7,8,9, 10 and 11 ~~if provided that~~ a consent authority is satisfied that:
- (i) The exercise of any such consent would not compromise the protection of the outstanding characteristics, ~~and features~~ and values identified for the waters specified in the Schedules; and
 - (ii) the consent is for:

- (A) a discharge that is of a temporary nature; or
- (B) an activity that is associated with necessary removal, maintenance or replacement works for works and structures not otherwise prohibited by this Order; or
- (C) discharge of herbicides for control of pest plants.

14. Existing consents

Nothing in this Order shall affect or restrict any resource consent granted prior to this Order coming into force in respect of the protected waters, until the expiry of that consent.

Schedule 1A – Waters to be retained in Natural State (See Appendix 1
- Map Proposed Ngaruroro River WCO)

Waters	Outstanding Characteristics, or Features or Values	Conditions to apply
<p>The mainstream of the Ngaruroro River and its tributaries from its source in the Kaimanawa Ranges down to immediately above the confluence with the Taruarau River (at or about NZTM 1887167E, 5622021N)</p>	<p>Amenity and intrinsic values afforded by natural state</p> <p>Habitat for rainbow trout</p> <p>Rainbow trout fishery</p> <p>Angling amenity and recreation</p> <p>Habitat for avifauna</p> <p>Whitewater rafting and kayaking amenity and recreation</p> <p>Wild, and scenic, and natural characteristics</p> <p>Contributions to outstanding habitat for indigenous fish</p>	<p>Natural state (cl 5)</p> <p>Prohibit damming (cl 8)</p> <p>Alteration of river flow and form (cl 9)</p> <p>Fish screens (cl 10)</p> <p>Water quality (cl 11)</p>
<p>The mainstem of the Taruarau River and its tributaries from its source immediately about the confluence with Woolwash Creek (at or about NZTM 1873381E, 5633601N)</p>	<p>Amenity and intrinsic values afforded by natural state</p> <p>Habitat for rainbow trout</p> <p>Rainbow trout fishery</p> <p>Angling amenity and recreation</p> <p>Habitat for avifauna</p> <p>Wild, and scenic and natural characteristics</p> <p>Contributions to outstanding habitat for indigenous fish</p>	<p>Natural state (cl 5)</p> <p>Prohibit damming (cl 8)</p> <p>Alteration of river flow and form (cl 9)</p> <p>Fish screens (cl 10)</p> <p>Water quality (cl 11)</p>

Schedule 1B – Waters to be protected for their outstanding characteristics – upper Ngaruroro (See Appendix 1 - Map Proposed Ngaruroro River WCO)

Waters	Outstanding characteristics or features and contribution to outstanding characteristics and features <u>Outstanding Characteristics, Features or Values</u>	Conditions to apply
<p>The mainstream of the Ngaruroro River and of its tributaries from immediately above the confluence with the Taruarau River (at or about NZTM 1887167E, 5622021N) down to Whanawhana cableway (at or about NZTM 1891910E, 5615830N)), excluding the mainstem of the Taruarau River and its tributaries from its source to immediately above the confluence of Woolwash Creek (at or about NZTM 1873381E, 5633601N)</p>	<p>Amenity and intrinsic values</p> <p>Habitat for rainbow trout</p> <p>Rainbow trout fishery</p> <p>Angling amenity and recreation</p> <p>Habitat for avifauna</p> <p>Whitewater rafting and kayaking amenity and recreation</p> <p>Wild, and scenic and natural characteristics</p> <p>Contribution to outstanding habitat for indigenous fish</p>	<p>Prohibit damming (cl 78)</p> <p>Alteration of river flow and form (cl 89)</p> <p>Fish screens (cl 910)</p> <p>Water quality (cl 1011)</p>

Schedule 2 – Waters to be protected for their outstanding characteristics – lower Ngaruroro (See Appendix 1
- Map Proposed Ngaruroro River WCO)

Waters	Outstanding characteristics or features and contribution to outstanding characteristics and features <u>Outstanding Characteristics, Features or Values</u>	Conditions to Apply
The mainstem of the Ngaruroro River from Whanawhana cableway (at or about NZTM 1891910E, 5615830N) downstream to the Chesterhope Bridge, located on the mainstem Ngaruroro River (at or about NZTM 1932603E, 5609853N) 'lower Ngaruroro waters'.	<p>Habitat for avifauna</p> <p>Habitat for indigenous fish</p> <p>Contribution to outstanding habitat for indigenous fish in the Upper Ngaruroro Waters</p>	<p>Prohibit damming (cl 8)</p> <p>Restrictions on alterations of river flow and form (cl 9(5) – 9(6))</p> <p>Fish screens (cl 10)</p>

Schedule 3 – Waters to be protected for their contribution to outstanding characteristics (See Appendix 1 - Map

Proposed Ngaruroro River WCO)

Waters	Outstanding Characteristics, or Features or Values contributed to	Conditions to apply
Hydraulically connected groundwater to the waters specified in Schedules 1A and 1B	<p>Amenity and intrinsic values afforded by natural state</p> <p>Habitat for rainbow trout</p> <p>Rainbow trout fishery</p> <p>Habitat for avifauna</p> <p>Habitat for indigenous fish</p> <p>Angling amenity and recreation</p> <p>Whitewater rafting and kayaking amenity and recreation</p> <p>Wild and scenic characteristic</p>	<p>Abstraction of hydraulically connected groundwater (cl 9.2, 9.3)</p> <p>Water quality (cl 11)</p>
Tributaries to the Lower Ngaruroro River from Whanawhana cableway (at or about NZTM 1891910E, 5615830N) Chesterhope Bridge, located on the mainstem Ngaruroro River (at or about about NZTM 1932603E, 5609853N)	<p>Habitat for avifauna</p> <p>Habitat for indigenous fish</p>	<p>Restriction on alteration of river flow and form (cl 9.5 – 9.6)</p> <p><u>Fish screens (cl 10)</u></p>

Schedule 4 – Minimum requirements for fish screens and intakes

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

Appendix 1 Natural State area to be amended as directed in Interim Report.

