

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

**November 2007**

Published in November 2007.

This document is available on the Ministry for the Environment's website:  
[www.mfe.govt.nz](http://www.mfe.govt.nz)

## Summary of the Special Tribunal's Findings

1. In May 2005 the New Zealand Fish and Game Council and Southland Fish and Game Council (the applicants) applied to the Minister for the Environment for a water conservation order for the Oreti River under Section 201 of the Resource Management Act 1991 (the Act).
2. The Oreti River rises in mountainous country to the south of Lake Wakatipu, and flows some 200 kilometers to enter an estuary just to the west of Invercargill. The middle and lower reaches of the river are lined with stopbanks. Here the river is used for many purposes, including dilution of discharges, gravel extraction, irrigation from both surface water and hydraulically linked groundwater, and domestic water supply to Invercargill.
3. The headwaters of the river upstream of Rocky Point (near Mossburn) are very little used, with no authorised discharges. The river flows through a broad U-shaped valley formed by a glacier. Headwater reaches have exceptionally clear water, and low flows are buffered by water entering the river from many small spring seepages.
4. The application sought protection of flows and water quality in the main stem of the river and its tributaries from Rocky Point upstream. The application also sought a prohibition of damming of the full flow of the river downstream of Mossburn, and a full prohibition of damming the main stem upstream of Mossburn.
5. A Special Tribunal comprising Dr Brent Cowie (chair), Dr Paul Blaschke and Dr Gail Tipa was appointed by the Minister to hear the application.
6. The application was publicly notified in accordance with Section 204 of the Act on 30 September 2006. Seventy-seven submissions were received, of which 63 supported the application, 13 opposed it and one was neutral.
7. The Special Tribunal inspected the catchment by helicopter and by car in January 2007.
8. The Tribunal heard the application in Invercargill over six days, being 26 and 29-31 January 2007, and 19-20 April 2007. The second stage of the hearing was delayed, with the approval of the applicant and submitters appearing, until decisions on the Southland Proposed Regional Freshwater Plan ("Water Plan") as amended by variations were available. This enabled the remainder of the application process and the Tribunal's findings to be made in the context of the best possible information and most up-to-date policy context.
9. The applicant's right of reply was heard on 18 June 2007.
10. The legal framework for considering applications for water conservation orders is in Part 9 of the Resource Management Act. The purpose of a water conservation order, set out in Section 199, is to "recognise or sustain outstanding amenity or intrinsic characteristics" of waters.
11. The Tribunal relied in large part on the Environment Court decision on an application for an order on the Rangitata River in Canterbury for its decision-making framework.

12. To qualify for protection by a water conservation order, a water body must have or contribute to outstanding characteristics. The Environment Court has determined that “to qualify as outstanding, a characteristic would need to be quite out of the ordinary on a national basis”.
13. After careful consideration the Tribunal has determined that at least parts of the Oreti River provide for or contribute to four outstanding characteristics:
  - (a) The river supports an outstanding brown trout fishery, particularly in its upper reaches above Rocky Point. The fishery is outstanding because of the size of brown trout in the upper river: the largest of any South Island headwater fishery; and because the number of large trout present is also comparatively very high.
  - (b) The headwaters of the river upstream of Rocky Point provide outstanding angling amenity. Characteristics that contribute to this amenity include the presence of many large brown trout, peace and solitude and the very clear water which allows anglers to “spot” and fish to particular trout. Although the Oreti is the third most heavily fished trout river in the country, there was insufficient evidence that the entire river supports outstanding angling amenity.
  - (c) At least some parts of the river provide outstanding habitat for endemic black-billed gulls (*Larus bulleri*) which is regarded as a threatened species in serious decline in New Zealand. About 70–80% of the national population of 80,000 to 100,000 black-billed gulls breed in Southland, where the Oreti River, along with Aparima River to the west, carry the greatest numbers of breeding birds. Most gull colonies are found in the middle reaches of the Oreti.
  - (d) The river, at least in the reach upstream of Rocky Point, is of outstanding significance in accordance with tikanga Māori. The presence of taonga species (both fish and wildlife), the relatively unmodified upper catchment, evidence of past occupation in the form of archaeological sites and remains, the continuity of flow in the waterway from its source to coast, and high water quality are factors that help determine that the mauri of the Oreti River is robust and vibrant.
14. The Tribunal considered that the presence of the invasive diatom *Didymosphenia geminata* (“didymo”) may at times detract from the outstanding angling amenity of the upper river. This would, however, only be for short periods as the cobble bed of the river is very mobile during freshes or floods. As a result of this, didymo appears unable to establish itself in the Oreti River to the extent that it has in more embedded rivers such as the Mararoa and lower Waitaki. Indeed the comparative value of the Oreti may increase, given the likely more adverse effects of didymo on angling amenity in some other valued South Island river fisheries.
15. The applicants presented evidence about other values which they considered to be outstanding, including wild and scenic values and native fisheries. While these values are significant and may contribute to the values which the Tribunal considered were outstanding, the evidence did not establish that in the Oreti River they were outstanding in a national context.

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

regional council in preparing the Water Plan and its variations, with the very limited consultation undertaken by applicants about the water conservation order application. Concerns were also raised about the relative inflexibility of water conservation orders.

26. The Tribunal had considerable sympathy for these views. Certainly the Water Plan is a robust document with a high level of community buy-in. But the law requires the Tribunal to have particular regard to the purpose of water conservation orders, and only regard to the provisions of the Plan. This means that as, in the Tribunal's view, the Oreti River has or contributes to outstanding characteristics, and the Plan does not offer sufficiently strong protection for those outstanding characteristics, a water conservation order has to be made.
27. As the final step in the process the Tribunal had to determine what waters be covered by the draft order, what provisions the draft order should include to protect outstanding characteristics or features, and what exemptions should be allowed for.
28. The first determination was that the Oreti River and its tributaries upstream of Rocky Point near Mossburn deserved the greatest level of protection. This area, which includes the Windley River and Weydon Burn, is where the outstanding brown trout habitat and angling amenity is. The measures deemed necessary to protect the outstanding features comprise a prohibition on damming, a requirement to maintain fish passage, and a requirement that no discharge affect water quality after reasonable mixing.
29. In the remainder of the river, the only restriction imposed by the order is a requirement to maintain fish passage. This is because of evidence presented that the population of very large brown trout in the headwaters of the Oreti relies on migration from downstream reaches of the river.
30. The order as drafted will help protect the outstanding contribution the Oreti River makes to tikanga Māori. It will do little, however, to protect the outstanding habitat of black-billed gulls provided by the river. This is because the order can do little to protect those gulls against threats such as predation, flooding or disturbance. The order does, however, complement the Water Plan which will help protect those gull colonies by providing for flows in the river.
31. Importantly the draft order has a number of exemptions that allow particular activities to occur as of right on any part of the river. These include maintenance of roads, bridges and other network utilities, works undertaken for river control and soil conservation purposes, protection or enhancement of fisheries and wildlife habitats, and the protection of human or animal health.
32. The Tribunal considers that the order as drafted will make little difference to the competent day-to-day management of the water resources of the Oreti River exercised by Environment Southland. The order drafted will, however, alongside the flow-related provisions of the Water Plan, help sustain the outstanding characteristics of the river. And that is what the purpose of water conservation orders is.