

**Report of the Special Tribunal appointed  
under Part 9 of the Resource Management  
Act 1991 to report on an application by the  
New Zealand and Otago Fish and Game  
Councils to amend the Water Conservation  
(Kawarau) Order 1997 in respect of the Nevis  
River**

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## Introduction

- 1 The Nevis is a place of spectacular beauty. It is arresting in its presentation and breathtaking in its sweep. The starkness is forbidding and yet wondrous. The remnants of the historical human travails in that remarkable landscape are a testament to the enterprise and sheer tenacity of human endeavour.

## The geography: a brief description

- 2 The Nevis River is situated in Central Otago and forms part of the Clutha catchment. Its source is at the southern end of the Hector and Garvie Ranges whence it flows approximately 50kms in a north/north easterly direction to its confluence with the Kawarau River.
- 3 The upper reaches flow in an open but steep-sided valley between the source and the Whittens Creek confluence. The river then flows for 9kms through a confined gorge to open out into a broader valley below Nevis township - a now abandoned settlement. A further 10kms downstream at the Nevis Crossing the river becomes more rugged and entrenched for 2kms until it enters a steeply incised gorge in which it flows approximately 13kms to its confluence with the Kawarau River.
- 4 The river is a single thread throughout its length with the gradient being gentler and the river having a more meandering character in the open valley sections. The valley floor is 800m above sea level in the upper reaches and the river falls some 500 vertical metres to the Kawarau confluence.
- 5 The Nevis River system includes a number of tributaries, the main ones being Drummond Creek, Whittens Creek, Schoolhouse Creek, Coal Creek, Nevis Burn, Potters Creek and Doolans Creek.
- 6 The mean flow of the river is 17.8 cumecs, although floods have seen levels reached as high as 954 cumecs. River flows measured at Wentworth Station near the confluence typically range up to 60 cumecs during floods and down to summer lows of 6 to 7 cumecs. The Mean Annual Low Flow (**MALF**) at Wentworth Station is 5.1 cumecs and the lowest recorded flow is 2.9 cumecs.
- 7 The total allocated take of surface water within the catchment is 1.237 cumecs with 78% of that being taken in the catchment above Nevis Crossing and one large take (263.9 litres per second) in the lower reaches.
- 8 The river and surrounding valley remain relatively unmodified tussock grasslands apart from historic mine sites mostly adjacent to the main stem between Drummond Creek and Nevis Crossing. Mining activity occurred in the valley from the late 1800s until about the 1930s with the exception of one or two more recent operations on tributaries. The remnants in the form of old races, tailings, ponds and stone ruins, are extensive.
- 9 Land tenure is Crown pastoral lease and the dominant land use is sheep and cattle grazing. The three pastoral leases in the lower valley (Ben Nevis, Craigroy and Carrick) have been progressing in recent times through tenure review under the Crown Pastoral Land Act 1998. Under this process significant areas of those pastoral

leases are reverting to the Crown and other areas are being freeholded but subject to a range of protective and access covenants.

- 10 The Nevis River and surrounding valley are used for various recreation activities. There is some ecotourism activity in the valley and the road through the Nevis is a popular route for mountain bikers and four wheel drive outings. However, the more significant recreation activities are trout fishing and kayaking. The river below Nevis Crossing is recognised as a valued and challenging journey in the kayaking community. The river is regarded as providing a spectrum of angling opportunities from readily accessible and easily fishable water to challenging angling in the rugged and remote gorge areas.

### **Narrative of process**

- 11 Since this is an application for amendment of an existing water conservation order (**WCO**), some brief explanation of the original WCO is required.
- 12 The existing WCO affecting the Nevis River is part of the Water Conservation Order (Kawarau) 1997. The original application for that WCO, which included the Nevis as a tributary of the Kawarau River, was made on 23 October 1990 under the then legislation for a 'national water conservation order'. That application was publicly notified in late June 1991. On 1 October 1991 the Resource Management Act (**RMA**) came into force and under the transitional provisions the application continued as an application for a WCO under that Act. A public hearing was held between 16 and 20 March 1992 and the Special Tribunal delivered its interim report in June 1992 following which a second hearing was held on 21 July 1992 and the final report was delivered on 15 December 1993. (The delay between the second hearing and the final report was caused by the need for a ruling by the Planning Tribunal on another WCO application which settled several questions of law which had a direct bearing on the outcome.)
- 13 Thereafter, following the lodging of submissions with the Planning Tribunal, the draft WCO was further reviewed in a report and recommendation delivered on 13 June 1996. The final WCO was made by Order-in-Council on 17 March 1997. In its final form the WCO recognised the following outstanding characteristics in respect of the Nevis River:
- 14 For the Nevis River main stem gorge from Nevis Crossing to Kawarau River confluence:
- (c) Wild characteristics
  - (e) Recreational purposes, in particular fishing and kayaking
- 15 For the Nevis River main stem above Nevis Crossing to source:
- (c) Scenic characteristics
  - (e) Recreational purposes, in particular fishing
- 16 However, the WCO in Schedule 2 'Restrictions and Prohibitions' importantly went on to state the following in respect of damming and for both of the above two sections of the river:
- No damming allowed unless a rule in a plan or condition in any water permit granted makes provision for water flows to be provided at sufficient levels to enable kayaking to be undertaken in the Gorge at

times stated in the plan or permit, and the extent of any impounded water is not beyond F42:943468.

- 17 In June 2006 this application was lodged by the Otago and New Zealand Fish and Game Councils to vary that WCO. In essence, the amendment that is sought is to remove the possibility of damming the river contemplated in the exception to the abovementioned WCO 'no damming' restriction.
- 18 Following some questions from the Minister's Office the application was amended to include flow regimes - namely the setting of a MALF plus some other amendments.
- 19 On 18 June 2008 the Associate Minister (under delegated authority) appointed this Special Tribunal under section 202(1)(a) of the RMA.
- 20 The application was extensively publicly notified in September 2008 and eventually drew over 250 submissions.
- 21 On 3 November 2008 the Special Tribunal held its first sitting by way of a 'procedural call over'. At that hearing the Special Tribunal settled various procedural matters and gave directions intended to facilitate the hearing of submissions and evidence.
- 22 A two day site visit was conducted by the Special Tribunal on 23-24 February 2009. This commenced with a drive through the entire available road access and then a helicopter fly-over that included the length of the lower gorge where there is no road access.
- 23 The Special Tribunal began hearing submissions and evidence in Cromwell on 21 May 2009. The first block of hearings ran 21-22 May 2009, 26-28 May 2009 and then in Dunedin 28-29 May 2009. Hearings continued back at Cromwell 3-5 June 2009 and 8-12 June 2009.
- 24 By this stage of the hearing it had become apparent that an issue as to jurisdiction had emerged, triggered in the first instance by a procedural issue as to the ambit of allowable evidence.
- 25 Insofar as some parties sought to give evidence of nationally significant flora and fauna affected by the possible area of inundation, a contest developed as to whether this was allowable.
- 26 Under section 205(3)(b) RMA a person making a submission may support an application, but can state a preference that different features and qualities of the water body be preserved - that is, different from those sought by the applicant. There then follow in section 205(3)(c), (d) and (e) further requirements as to how that preference should be articulated in the submission, and then all tempered by section 205(4). Nonetheless there are limits on the degree to which a supporting submission can redirect a hearing: refer *Talley v Fowler* High Court Wellington 18 July 2005 Fogarty J CIV-2005-485-117.
- 27 The Special Tribunal considered argument from the affected parties and, in an interim decision dated 14 August 2009, determined on the face of certain submissions as lodged that the hearing should be extended into a consideration of whether there were flora and fauna that qualified as outstanding characteristics pursuant to section 199. That interim decision also fixed the various procedural consequences of that determination.

- 28 The hearing continued in Dunedin 24-25 August 2009 and the applicants closed their case, at which point the hearing was complete, save for the flora and fauna issues.
- 29 By reason of availability difficulties, the evidence of one witness on flora and fauna was heard in Dunedin on 19 April 2010 and the rest of the flora and fauna evidence and submissions were heard on 24 and 25 May 2010 in Dunedin.

### **Overview of Special Tribunal's task under Part 9**

- 30 Part 9 of the RMA is an interesting jurisdiction. It would be wrong to describe it as an add-on, or an anomalous module grafted into the RMA, for it shares some significant features with other RMA processes, both substantively and procedurally. However, it is also rooted in much older statutory regimes (ie national water conservation orders under the Water and Soil Conservation Act 1967). Perhaps it is a bit like having close cousins – they share quite a lot of genetic features but often are brought up in a different environment with some variations on the family values.
- 31 The centrepiece of Part 9 is section 199 which states the purpose of a WCO. Section 199 sets the threshold of qualification for a WCO as 'outstanding' – that is there must be some value or characteristic about the water body that can be considered 'outstanding'. More will be said later as to how the epithet 'outstanding' is to be interpreted and applied. It is also noteworthy that this centrepiece provision also makes reference to Part 2 of the RMA. It is sufficient to note at this stage that three steps emerge from section 199 for the purposes of the Special Tribunal's exercise:
- 32 First, an applicant will need to identify particular values or characteristics of the water body contemplated by section 199.
- 33 Second, those values or characteristics must cross the 'outstanding' threshold.
- 34 Third, they must be values or characteristics of the water body or the water body must contribute to them (ie there must be a nexus between them and the water body).
- 35 That analysis must then be placed within the section 207 framework. Section 207 creates the unique tier of considerations for Part 9. There are clearly 2 ranks:
- 35.1 First, 'particular regard' must be given to the section 199 matters. That surely means that if a value or characteristic has survived the section 199 three step analysis set out above, then it must be something to which the Special Tribunal has 'particular regard'.
- 35.2 Second, 'regard' must also be given to:
- the application and/or submissions
  - the needs of primary and secondary industry, and of the community
  - the relevant provisions of every national policy statement, regional policy statement, regional plan, district plan and any proposed plan.
- 36 Even so, that is not quite the end of it. For the purposes of this overview we mention two other factors relevant to the analysis here.

37 First, as noted above, section 199 is the paramount consideration under section 207, and commences:

Notwithstanding anything to the contrary in Part 2 ...

38 Since Part 2 is framed as applying to the whole RMA, and there is nothing in Part 9 to suggest it is exempted from Part 2, it therefore seems evident that Part 2 considerations must also be weighed into the analysis – except only to the extent that any section 199 factor might be seen as 'contrary' to Part 2.

39 Second, there is the feature that this application is actually for an amendment to an existing WCO. And it is not the sort of amendment that effectively reverses the conservation purpose of the original WCO, or drives a horse and cart through that. In other words, a good deal of the superstructure of the original WCO is not at issue and remains unchallenged, and carries all the sub-legislative force of an Order-in-Council. It follows that the way that any amendment is dealt with or analysed, that exercise must take into account and be consistent with the 'residual' and unamended parts of the current WCO. However, what constitute the unamended parts may be more controversial.

40 Thus, the factors we have identified in paragraphs 32 to 39 above indicate the path we intend to take to complete our task. But before we set out down that path there are three issues foreshadowed above which have at least some legal flavour that require some definition:

40.1 What is the correct approach to an application to amend a WCO?

40.2 What is the meaning of 'outstanding'?

40.3 What suffices to establish a nexus to the water body?

#### **What is the correct approach to an application to amend a WCO?**

41 The issue of the appropriate approach to this application arose. As already emphasised the point of significance is that it is made within the context of an existing WCO. Indeed, neither the protection of the existing WCO nor its purpose are sought to be disturbed. Instead the essence of the application is to seek to extend the WCO protection in two respects:

41.1 To remove the possibility of dam impoundment where that possibility has been left open in the present WCO.

41.2 To set a minimum annual flow regime.

42 Since a WCO can be said to have at least sub-legislative force, and given the above observations that the major fabric of the existing WCO as it affects the Nevis and its purpose is to be left undisturbed, it follows that there must be positive reasons to displace the existing controls in favour of the proposed variations. This touches on an interesting and potentially awkward point - namely, the degree to which it is open to revisit the findings and outcome of the original hearing for the existing WCO the outcomes of which, unlike an ordinary judicial hearing, are to some degree legislatively entrenched.

43 It is worth noting too, that the length and scale of that earlier hearing was very different to the equivalent exercise today. It was completed in a fraction of the time

compared to this hearing. The 1992 hearing could be regarded as either too cursory, or more efficient, depending on one's viewpoint.

- 44 Thus, while the procedural route for an application to amend is exactly the same as for a new application by reason of section 216(4), the approach urged on us by the opposing submitters was as follows: either it must be established that there is new information that was not available or known to the original WCO process, or something has changed 'on the ground' since the original WCO was made.
- 45 Ms Baker, counsel for the applicant, pointed to authority that there is no issue estoppel in these applications and therefore issues apparently decided in the original WCO can be reopened. While that is so and issues affecting the trout fishery and the kayaking amenity could be said to be being reopened in a sense, the reality of the applicant's case was not a direct attack on the earlier findings, even on those issues, but rather an approach that was fundamentally consistent with the opposing submissions. For example, on the trout fishery the emphasis was on scientific evidence gathered in recent years that was said to tell us much more about the fishery than would have previously been known, and on the kayaking amenity the evidence was directed to the significant advances in both kayak technology and, even more so, the skill of the participants that made reaches once considered un kayakable to now be regularly kayakable.
- 46 Therefore, given the way the cases have been presented, we do not need to make a selection as between the competing approaches. We will apply the same approach to a threshold for amendment - is this new information that was unavailable or unknown in 1992 or has there been some change 'on the ground'? As long as the answers on either or both of those questions remain consistent with the undisturbed and unchallenged parts of the WCO, the case for amendment can proceed to be assessed.

#### **What is the meaning of 'outstanding'?**

- 47 We consider that the interpretation and application of the word 'outstanding' is pivotal to this application. The word in this context was considered by the Environment Court in *Rangitata South Irrigation Limited and others v New Zealand and Central South Island Fish and Game Council* EnvC Decision C 109/204 and earlier decisions referred to in paragraph [17] of that decision where it had been held that:

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

- 48 In *Rangitata*, the Court accepted that:

... the amenities should stand out on a national comparative basis. If one takes a national comparative approach the fact that a 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. (emphasis added)

- 49 Given the particular evidence and context in this case, it is appropriate that we should say a little more as to how we have applied those very helpful dicta.
- 50 In our assessment of the various characteristics in issue, we have sought to test each one on a 'national comparative' basis. We have endeavoured to do that in a broad sense and not slavishly. Thus we have not sought to set the threshold at a point where the characteristic is totally unique or not found elsewhere in New Zealand. In

our view that is setting the bar too high. Obviously, if that were the situation with any particular characteristic then that might be a powerful, but not necessarily conclusive, factor. But we would also consider a characteristic might meet the test if it fell slightly short of that - ie that it was close to unique in that it was also present in, say, one or two other places in New Zealand.

51 On the other hand, we do not consider that characteristics that, although valued, or even highly treasured, are found elsewhere in a number of other parts of New Zealand, would readily meet the test. It would therefore be insufficient, for example, to simply establish that a particular characteristic is the last or only one of its kind in Central Otago.

#### **What suffices to establish a nexus to the water body?**

52 Simply because a characteristic is 'outstanding' in terms of the earlier discussion of that epithet does not mean that it also qualifies as a characteristic under section 199, because that section plainly contemplates some sort of nexus between the characteristic and the water body. In that sense it becomes a jurisdictional issue. It is plainly an issue largely driven by fact as can be seen from its loose description as a 'waterline contest' during the hearing. In other words, as we noted in our interim decision on jurisdictional issues dated 14 August 2009 (paragraph 13):

There must come a point at which a characteristic is so disconnected from the water body that the jurisdiction of the Tribunal ceases.

53 So far as we are aware, this issue has not been directly addressed in any of the authorities or other Special Tribunal decisions. However, in this particular application some of the characteristics and their location vis-à-vis the water body, raise this issue quite squarely.

54 Perhaps the nearest authority is the Motu River report (*Re National Water Conservation (Motu River) Order 1983* (1984) 10NZTPA 7 at 12-14) where the Planning Tribunal under the Water and Soil Conservation Act 1967, section 20D(2), which provision was virtually indistinguishable from section 199, made some observations that that subsection did not confine a conservation order to the banks of a river, but then went on to observe that the provision is not concerned with land based activities which are controlled by other means.

55 Opposing submitters did not seek to argue that jurisdiction ended at the waterline and from the wording of the legislation that was plainly a proper acknowledgement. By the same token, it was argued that the legislation nonetheless required a relatively strong or direct nexus and it was pointed out, for example, that if a particular plant found within the dam footprint was held to be 'outstanding', it would not necessarily have the requisite nexus with the river simply because it happened to be located there. The applicant and Forest and Bird argued for a nexus that did not necessarily turn on proximity and allowed for less direct connections.

56 There was some exploration in argument of the definition of 'water body' and 'river' under the RMA allowing the area covered by the water body to extend to areas only occasionally flooded by virtue of the inclusion of the word 'intermittently' (ie therefore to include the whole flood plain of a river). Fish and Game suggested a spectrum approach, whereas Forest and Bird urged a two limbed test assessing the geographic connection and a relationship component.

57 We are disinclined to adopt the Forest and Bird two limbed test. We fear it is a little too mechanical in an area where the outcome is highly likely to be fact driven. However, that does not mean that we entirely abandon to 'ad hocery' the task of distilling some principles that we will need to apply to the facts on the issue of nexus. In that regard, we are driven back to the provisions of Part 9 and in particular the wording of section 199. In our view, it is of overwhelming significance that the word 'waters' appears a number of times in section 199. Section 199(2) describes what a WCO may provide for. Subsection (a) relates to waters in their natural state and is not presently relevant. But subsections (b) and (c) are relevant and the wording used in both is:

The protection of characteristics which any water body **has or contributes to...**

(Emphasis added)

58 This suggests a relatively strong and direct relationship with possibly even a causative element. However, we would stop short of suggesting that this wording requires an element of reliance or dependence in every case. Obviously, if there is reliance or dependence on the water body, the nexus may be easier to establish.

59 Then there is the broader Part 9 context to consider. As emphasised in argument, Part 9 is in some respects a rough fit within the overall RMA framework. It is something of a semi-independent state. It has a relatively confined purpose, but once the requisite thresholds are attained, a WCO trumps other planning instruments and applications. In other words, it is relatively heavy artillery in the RMA armoury and it would be unlikely to have been the legislative intent to extend the reach of a WCO without clear and cogent evidence of a close, or strong, or at least clear and obvious, nexus. Conversely, a tenuous or faint nexus will not suffice. That is the approach we intend to take to this issue.

60 We now turn back to work through the Part 9 analysis we had earlier identified.

**Overview: What are the candidate values or characteristics that are said to be outstanding?**

61 Section 199 sets the purpose of a WCO and thence the 'gold medal' criteria under section 207 (requiring 'particular regard'). It operates essentially by identification of outstanding values or characteristics, before one turns back to the 'silver medal' criteria in section 207(a), (b) and (c) (requiring 'regard').

62 We note that both the words 'value' and 'characteristic' are used in what appears to be a relatively interchangeable way. For the purposes of efficiency, in this part of the Report we will mostly hereafter refer to 'characteristic' even if in some instances the particular subject might also be more aptly described as a 'value'.

63 The identification of the relevant characteristics and the evaluation of whether they reach the threshold of 'outstanding' in the meaning we are applying as described earlier in this Report, are therefore absolutely central.

64 We have chosen to tackle this part of the exercise in three stages:

64.1 First, in the part that immediately follows, we will provide an overview of all of the characteristics that were identified by the applicants or submitters.

- 64.2 Secondly, we will discuss some of those that in our view, whilst significant in themselves, evidently fall short of the 'outstanding' threshold for one reason or another and therefore do not require closer examination.
- 64.3 Thirdly, we will examine more closely the characteristics where the threshold contest was keenest and the case for amendment is more plainly arguable.
- 65 When undertaking this exercise we will also bear in mind the fact that this is an application for amendment and therefore the other threshold factors mentioned earlier on that topic will need to be overlaid at some point.
- 66 As to the first stage of our analysis, in the course of the application and its hearing the following characteristics were identified:
- 66.1 trout fishery: this had been considered in 1992 but the applicants said new and better information was now available which should compel a different view - particularly on dam impoundment.
- 66.2 Gollum galaxiid: this was new - the identification of this separate galaxiid species and its significance through geological capture were unknown at the time of the original WCO.
- 66.3 kayaking amenity: while this was known as a possibility at the time of the original WCO hearings, the applicants contended that there had been changes in the forms of significant advances in kayak technology and participant skill rendering the un kayakable or barely kayakable Nevis of 1992 now within the reach of many of the more accomplished kayakers.
- 66.4 wild and scenic qualities: this had been considered in 1992 and no one was suggesting there had been 'a change on the ground'. The degree to which anything new was advanced is a matter we will return to shortly.
- 66.5 heritage values: this was new information in the sense that the first comprehensive assessments of the Nevis heritage values post dated the original WCO.
- 66.6 tikanga Maori: this was also new information. A separate contest occurred as to whether there was jurisdiction to entertain the Kai Tahu case at the hearing given the terms of Kai Tahu's submission as lodged.
- 66.7 rare indigenous flora and fauna: this was new information and was even a 'Johnny come lately' to the already once amended application and required a separate legal argument, an interim ruling, and a belated cameo round of evidence and submissions some time after the evidence on the other characteristics had been completed.
- 67 We turn now to the second stage of our analysis.
- 68 We start with the wild and scenic qualities. The application sought to extend the 'wild and scenic' characteristic epithet to the entire area of the Nevis rather than the confinement to 'scenic' for at least part. However, although comprehensive expert evidence was called on both sides of this contest, it seems clear to us that this was a matter that was carefully considered in the original WCO and in the light of the

aspects of that WCO that are to remain undisturbed we are unconvinced that there is anything that has been produced to displace or unstitch the findings supporting those parts of the original WCO. Put shortly, nothing has changed, and there is not really any information that is new or would have been unknown at that time.

69 We next consider tikanga Maori. As signalled above there was a fierce legal contest on whether the Special Tribunal had jurisdiction to entertain the Kai Tahu case as presented on account of the way their submission was originally framed. While that in itself would be an interesting point, on the view we have reached it is unnecessary for us to rule on it. That is because on the evidence we do not consider the Kai Tahu case crosses the section 199(2)(c) threshold.

70 However, before discussing this further we think it is helpful if we demarcate the nature of our evaluation. Kai Tahu submitted (inter alia) that the significance of the Nevis ('Papapuni') in tikanga Maori terms can only be determined by the tangata whenua. We accept that. But that does not mean our overall obligation to make a determination under section 199(2)(c) is somehow abrogated. Indeed, we can and must take that evidence of significance conveyed to us by the tangata whenua and then still evaluate it in terms of section 199(2)(c).

71 Turning to that evidence we would like to record that we found both fascinating and helpful the expert evidence of Dr Williams. Nonetheless the overall impression we were left with was that the main significance of the locality was as part of a walkway from Southland to Central Otago and that it provided temporary settlement and a limited food basket along the way. This is to some degree corroborated in exiguous evidence of heritage sites. But it is evident that Kai Tahu does not relate closely to the Nevis Valley and has little direct involvement with it. Further, it cannot be said on the evidence that a dam impoundment particularly affects or compromises that association as a trail, etc, even if the association was stronger.

72 Finally in this stage we consider the kayaking amenity. The case advancing that amenity to the 'outstanding' threshold started by explaining the very considerable changes in kayaking technology and levels of skill since the original WCO.

73 A range of kayaks was displayed to us and we were shown some truly inspirational video footage of extremely skilled kayakers navigating the lower Nevis Gorge - including age group and national champions and representatives of which Central Otago has an enviable record as something of a Mecca and breeding ground. The Nevis had once been considered as beyond all but the most elite of kayakers. Now as a result of these changes it is within the range of kayakable water for much greater numbers.

74 From there the case for the kayaking amenity proceeded by way of an attenuation exercise. The Graham Charles 2006 handbook lists 15 grade 5-6 rivers in the South Island, but that reduces to just eight (including the Nevis) that share top end difficulty, remoteness and need for kayaker commitment. From there that list reduces to just the Nevis and the Upper Hokitika that have easy portages throughout. And then only the Nevis has a clean, tree-free riverbed and the widest range of paddleable flows.

75 As well reasoned as that analysis may be, the major difficulty is that all of those features were known at the time of the original WCO and neither the changes in technology nor the upskilling of kayakers are factors of or directly related to the river itself. We would also be wary of assuming that those who framed the original WCO

were necessarily blind to the probability that kayaking technology would change and that kayakers would become more skilful - any more than we would assume so now. Therefore insofar as the original WCO hearings addressed the kayaking amenity, recognising it to a significant measure in the existing WCO, but also countenancing dam impoundment in specified reaches, we are unpersuaded that a case for amendment by reason of the kayaking amenity has been made out.

76 We now embark on the third stage of our analysis in this part, where we more closely examine the trout fishery, the heritage values, the rare indigenous flora and fauna and the Gollum galaxiid.

### **The trout fishery**

77 By far the bulk of the applicants' case was directed to demonstrating that the trout fishery of the Nevis is an outstanding characteristic that demands amendment of the WCO. Given the identity of the applicants that was hardly surprising.

78 In terms of the justification for amendment, the applicants' case is that very much more is now known about the trout fishery than was the case when the WCO was made, and that new information points towards the protection of the Middle Flats section (the most popular for angling and the most prolific for brown trout<sup>1</sup>) from impoundment.

79 In the face of the quite extensive evidence about the fishery, what are the characteristics that were identified that either individually or, more likely in combination, are 'outstanding'?

80 The answers appear from the applicants' evidence to be thus:

80.1 A relatively high proportion of large brown trout (in excess of 60cms) within the brown trout population.

80.2 The setting of a back country/headwater fishery.

80.3 The disproportionate growth in the use and reputation of the fishery.

81 At this point we should interpolate that there was a good deal of evidence and fierce contest over whether impoundment in the Middle Flats area would compromise these features. But that evidence only becomes pivotal if we are satisfied that the characteristics advanced are indeed 'outstanding'.

82 So are they?

83 Without in any way diminishing the impressive witnesses called on behalf of the applicants on those issues, we gained the clear impression that getting these characteristics (even in combination) over the 'outstanding' threshold was something of a struggle.

84 It is certainly true that the Nevis population seems to harbour a disproportionately large number of 60cms plus fish. But then so do a number of other fisheries - even in

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<sup>1</sup> The Nevis also supports rainbow trout but only in the lower Nevis and some brook char in some of the smaller tributaries.

the Otago/Southland area. As to the back country or headwater fishery a number of other fisheries, again in the lower South Island, were mentioned in evidence such as the Oreti. Indeed it was acknowledged that nationally there are approximately 160 headwater fisheries and 'a couple of hundred' back country ones.<sup>2</sup> We tested a number of the witnesses giving evidence relevant to this issue and it was significant to us that none were prepared to go as far as to claim this fishery was unique in New Zealand or even close to that.

85 In some respects the concept of disproportionate growth in use and reputation of a fishery could well be challengeable as a characteristic in itself. But it might fairly be identified as the insignia of a change in significance. Either way in our view it does not matter because Mr Unwin, the applicant's key witness on this point, whilst identifying the remarkable increase in angling popularity of the Nevis (110 angler days in 1994/95 growing to 880 in 2007/2008) did not suggest the Nevis was a nationally important trout fishery on the basis of usage, and indeed his data on other fisheries amply demonstrated that.

86 If the Nevis was to make 'the cut' at all it would have to be the combination of the other two characteristics. Whilst we do not regard mention in the literature as necessarily determinative, we nonetheless thought it significant that the Nevis is not featured or particularly identified as a classic or iconic fishery in any of the well known fishing text or guide books. Further, it is not mentioned in the Ministry for the Environment documents recording water bodies of national significance in this regard.

87 Our overall conclusion is that while these characteristics are significant, or could even be regarded as highly valued, they fall short of crossing the very high threshold to be considered as 'outstanding', even in combination.

### **The heritage values**

88 It would be fair to say that the evidence of heritage values is new information. Although the WCO was finally made in 1997, the hearings predated the availability of the first comprehensive heritage assessment of the Nevis by Dr Hamel and certainly predated the subsequent studies that have been completed since hers.

89 It is also notable that there was a good deal of common ground in the expert archaeological evidence - namely that the Nevis Valley is unusually and uniquely endowed with gold mining sites that link up into whole systems. In other words the Nevis can be viewed as an outdoor museum containing several largely intact gold mining systems from the water races at some distance from and height above the river down to the remains of a dredge in the river, as well as covering the different gold mining eras.

90 The other matter of common ground is that if dam impoundment occurs then certainly some of the recorded sites would be affected or destroyed, although some sites (eg stone buildings) could be moved or replicated. Of the two sites that have already been formally listed, the Krolls Ruins with their unique stonework would be within the inundation footprint.

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<sup>2</sup> Mr Unwin responding to questions.

- 91 We are persuaded that the overall completeness of these remnant gold mining systems would indeed meet the definition of 'outstanding'. We were told that no other gold fields sites of this nature have survived modification from residential development, horticulture or irrigation. But the problem is whether there is sufficient nexus between this characteristic and the river.
- 92 Of course the parts of the system that are in close proximity to the water body would in our view be sufficiently connected to the water body for it cannot have been the intention of the legislature in including reference to heritage values in section 199 to have only meant heritage items in the water body itself. But how far beyond the water body and its immediate environments is it permissible to go? It similarly cannot have been the intention of the legislature to permit the inclusion of heritage values that are derived from features that are hundreds of metres above or beyond the highest ordinary river levels.
- 93 Ms Baker, counsel for the applicants, argued that it is the river's presence that is central to the alluvial gold mining activity and in that sense all the heritage sites are closely linked to the river.
- 94 For example, even the most remote water races were fed from the river. She also made the point that the inclusion of some heritage sites in the Shotover in the original WCO were justified as being within the flood plain, and that the same analysis would include many of the Nevis sites.
- 95 Ingenious as these arguments may be, we take the view that the degree of proximity (or more correctly the lack of it) defeats the possibility of these albeit outstanding values being sufficiently connected with the water body to fall within the meaning of section 199. While it is true that the river is a central element of the gold mining systems, it is the allure of the gold and the remnants of human tenacity that are the overriding features.
- 96 In short, the protection of these outstanding heritage features lies outside the ambit of a WCO in the Nevis and would need to be pursued through other avenues. (As to that and as an aside, we have noted that since the hearing concluded the New Zealand Historic Places Trust Board has confirmed the registration of a 'Lower Nevis Historic Area' under the Historic Places Act 1993 with the attendant statutory consequences.)

### **Flora and fauna**

- 97 Flora and fauna (in respect of the particular characteristics advanced by Forest and Bird and Messrs Douglas and Patrick) were something of a supplementary inquiry for the Special Tribunal - both procedurally and substantively. In the further hearing days that that entailed at the end of the other hearings, those parties became effectively applicants, Pioneer Generation Limited (**Pioneer**) the opposing submitter, and the Director-General of Conservation took a neutral but informed position.
- 98 The case for fauna can be quickly disposed of. The relevant fauna were said to be geckos and skinks, birds, some moths and butterflies and a large beetle. The only expert herpetologist to give evidence demonstrated that the sole lizard that is endemic to the Nevis Valley is the Nevis skink and it is not confined to areas in proximity to the river and is not reliant on it. As to birds, the expert evidence was that the Nevis River provides only a very small area of suitable bird habitat and therefore small numbers of a few species. Although some of the species are threatened, the

low diversity and small numbers mean that the birdlife value/characteristic could not be described as outstanding. An expert entomologist explained that the beetle (*Mecodema chiltoni*) is not restricted to the Nevis Valley; its altitudinal range is high and there is no evidence to suggest that valley floor riparian habitats are required for it.

99 The case for flora, however, was very different. The Special Tribunal was assisted by the evidence of three well qualified and experienced ecologists/botanists: Dr Lloyd for Forest and Bird, Mr Simpson for Pioneer and Mr Barkla for the Director-General. It transpired there was a significant measure of common ground, or views that could be reconciled as between these three experts, and we have endeavoured to distil those as well as to explain our preferences where some differences remained.

100 First of all, as to individual species, six attracted closer consideration. It appears that two can be discounted as more common than first thought: *Carmichaelia vexillata* and *Myosotis pygmaea* var. *drucei*. But the position of the remaining four warrants further examination:

100.1 *Myosotis pygmaea* var. *glauca*: Dr Lloyd and Mr Barkla were in agreement that whilst it was not exclusively so, a significant number of this threatened and nationally vulnerable species were within the dam footprint.

100.2 *Myosurus minimus* subsp. *novae-zelandiae*: All three experts noted that one of just two Nevis populations of this plant was within the dam footprint, although Mr Simpson thought he had also seen a reasonable population of this threatened and nationally critical plant near Alexandra.

100.3 *Leptinella conjuncta*: Mr Simpson and Mr Barkla were in agreement that this plant is extremely rare with a status of nationally critical, with perhaps just a one metre square area growing in the Nevis - although this is outside the dam footprint.

100.4 *Acaena buchananii*: All three experts agreed that this plant, while no longer threatened as a species, is at its south-western limit in the Nevis Valley and within the dam footprint. (All experts agreed that plant populations at the margins of their range are generally given higher importance as they may comprise different genotypes to those at the core of the species' distribution.)

101 Secondly, the botanical/ecological community of experts places some importance and credibility on its classification of threatened and endangered species. The system itself has been very recently revised, along with the classification of these plants within the system. The *Myosurus* has been upgraded to 'nationally critical'. Three of the other species in the Nevis are classified as 'threatened - nationally vulnerable'. In addition, Dr Lloyd pointed to the LENZ (Land Environments New Zealand) classification of New Zealand which has level IV at its apex with 500 land environments nationally. The Nevis Valley floor comprises a number of level IV environments and, unusually, it has distinctive features of acutely threatened land environments above 600 metres - ie, in upland areas. These classifications are objective and, importantly for this exercise, are national comparatives that certainly appear to give strong indications of national uniqueness and significance.

102 Thirdly, and perhaps most significantly of all, there was the occurrence of these species together on the Nevis Valley floor. Dr Lloyd said of this:

... The assemblage of nationally threatened and uncommon plant species on the Nevis Valley floor is an outstanding feature of the site. I am not aware of this assemblage of species being replicated in any other upland basin in Central Otago ... or in any other site in New Zealand.

[Paragraph 40]

- 103 Mr Simpson took the view that the locations were too widespread to be considered a significant plant community or concentration. Crucially, however, Mr Barkla agreed with Dr Lloyd and said that he could not think of another site nationally that has the same concentration of these threatened species.
- 104 We are firmly of the view that the above three factors, and especially the third, point decisively to the conclusion that this characteristic, namely an assemblage of nationally threatened plants, must qualify as 'outstanding' as earlier defined. But does this characteristic have a sufficient nexus to the river?
- 105 On the evidence, informed by the analysis of what is required to establish nexus, the answer must be 'no'. There was certainly no evidence of a direct link in the nature of reliance or dependence on the part of any of these plants vis-à-vis the river. The most that could be said of an indirect link was that the geological processes of riverine erosion and deposition in the lower Nevis flats have created the plant habitats there. In that sense, as the river processes are to a degree continuous, there is an ongoing connection between the river and its floodplain that contains the habitat.
- 106 But it is very hard to elevate that to a qualifying nexus: it is just too tenuous and slight. Mr Smith, counsel for Pioneer, put the point in the form of a question: if the river stopped dead, would these plants still exist? As he pointed out, there was nothing in the evidence to suggest that they would not.

### **The Gollum galaxiid**

- 107 'Gollum galaxiid' (also called 'Smeagol') is an informal name for a distinct species of small native fish more officially described as *Galaxias gollumoides*.
- 108 At the time of the original WCO hearings the presence and status of the population of Gollum *Galaxias* in the Nevis was unknown, and also unknown was the potential impact of koaro (*Galaxias brevipinnis*) from Lake Dunstan.
- 109 Thus this aspect is new information previously unavailable.
- 110 It is necessary to set out further significant background in order to make an assessment in terms of the 'outstanding' test.
- 111 There are populations of Gollum *Galaxias* in a number of places in the southern South Island and Stewart Island. It had been assumed that the Nevis population was simply part of that broader population (ie, the same species) - albeit that the Nevis river population was the northern most extent of the known range of the species and at the highest altitude.
- 112 But relatively recently it was ascertained that it is, in fact, a genetically distinct species.
- 113 Apparently in that regard it represents the most ancient offshoot from the ancestral Gollum galaxiid population as a consequence of geographic isolation from all other

Gollum galaxiid populations because of the 'capture' of the Nevis River by the Kawarau River that took place 500,000 to 800,000 years ago. Indeed, prior to that point the Nevis river used to flow in the other direction.

- 114 It would appear from the evidence that the genetic and biological significance of this separate species caught in something of a time warp, is still being understood. Even during the hearing the status of the species changed on the threat classification system. On the 2005 list it had ranked in the fifth highest threat classification. In June 2009 a revised draft list was published. The Special Tribunal was told that the classification system itself had been changed, as well as the ranking of the Nevis galaxiid, which was now recognised as a separate species. The outcome was that the Nevis 'one species assemblage' is now elevated to the third highest threat classification. The Special Tribunal was also told that although the draft list was still to be peer reviewed, changes are likely to be minor. Dr Allibone, the applicants' expert, was of the view that the diversity of native fish species at single sites in New Zealand is often low and this 'one species assemblage' is 'unique', rare, and now considered threatened.
- 115 What then are the threats to this species and does a dam impoundment elevate those threats?
- 116 It is necessary to understand that the Gollum galaxiid does not inhabit lakes or reservoirs. They are found in 26 sub-populations in tributary streams of the Nevis River where their range is quite limited - often no more than 20 metres. Thus apart from the loss of stream habitat, the real threat is that of piscivorous predators - whether existing (ie large salmonoids) or new (ie koaro). Whilst salmonoids do have some climbing abilities, they are modest compared to koaro which, on the evidence, have not unfairly been described as the 'true Gurkhas' of the inland migratory species in New Zealand fisheries. Already well established in downstream Lake Dunstan, the concern is that hydro-impoundments in the Nevis Valley would provide an excellent rearing habitat for these renowned climbers before they venture further.
- 117 At least two of the Gollum galaxiid sub-populations lie within the dam impoundment. That is calculated to be 11.5% of the known sub-populations.<sup>3</sup>
- 118 Leaving aside whether that is an acceptable loss, the issue that then arises is whether the remaining sub-populations can be sequestered by the use of barriers - ignoring for the moment the legal issue of whether such a requirement can be imposed in this jurisdiction.
- 119 On the issue of fact we are left in considerable doubt that sequestration (particularly from koaro) is currently technically feasible. Dr Ryder thought that it would be feasible, although he had no direct evidence of koaro-proof barriers. Mr Neilson, on behalf of the Director-General of Conservation, gave evidence initially of some diffidence as to the efficiency of such barriers. When he returned to give further evidence he maintained that diffidence. Dr Allibone had considerable reservations. He said that nine streams would require (as yet unproven) barriers. He added that even if successful such barriers, along with the water reservoir, would prevent the upstream passage of the Gollum galaxiid and would lead to fragmentation of a suite of populations precluding gene flow between sub-populations among tributaries and

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<sup>3</sup> Dr Allibone thought it might be four.

risk extinction in each due to drought, catastrophic floods, disease, inbreeding depression, lack of mature habitats and unbalanced sex ratios.

- 120 Against that background can it be said that the presence and continuing existence of this species is an 'outstanding' characteristic?
- 121 We are of the view that it must be. Quite apart from the fact that the species is unique, there are some genetic and geological dimensions to that uniqueness that still are only partially understood. Further, whether or not imposition of a condition requiring fish barriers is within this jurisdiction, there is considerable doubt attached to the viability of such barriers above a reservoir - both as to the containment of piscivorous predators and as to a long term unintended disastrous effect on the Gollum galaxiid species.
- 122 Finally, on the issue of nexus with the river, as a fish species the nexus is undeniable. No one sought to argue that the water habitat of the tributaries was too disconnected from the main stem of the river and it could not seriously be argued that the survival of a rare indigenous fish species in a tributary turning on the damming of the main stem failed the nexus test vis-à-vis the main stem.
- 123 We now turn to the other section 207 matters to which 'regard' must be had.

#### **The application and all submissions**

- 124 The Special Tribunal is required to have regard to the application and all submissions.
- 125 As one would expect the application contained a good deal of supporting material, all of which has been considered.
- 126 The submissions were extensive and covered an ambit that extended from some that opposed the application (particularly parties who wished to at least keep open the possibility of dam impoundment as contemplated by the current WCO), those who supported the application, those that supported the application but sought by one means or another to extend the WCO to a different value or characteristic and a few submitters who took a neutral position or who saw their role as more in the nature of assisting the Special Tribunal and to provide guidance and information. All such papers lodged have been reviewed together with, of course, the evidence and argument presented at the hearings. There may be some unintended circularity about the didactic of section 207(a), but it is nonetheless an explicit requirement that we have regard to the application and all submissions. We are not sure that there is much more we can add to that acknowledgement.

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

- 127 Pioneer took the main carriage of the case for some form of hydro development, although it was by no means the only power generator or party to appear and support that proposition. It is important to record at the outset that Pioneer, with its ownership of the relevant land, was careful to record that it was mere speculation at this point that it would ever build a dam that would impound the waters of the Nevis let alone to the full geographical extent allowed by the current WCO. Pioneer emphasised that a number of possible lesser configurations were open, including a two dam option that would impound a significantly smaller area.

- 128 The other point that Pioneer rightly emphasised was that even if permitted by the WCO, a dam would still need to run the full gamut of a resource consent and all that that entails.
- 129 The case under this head for the needs of primary and secondary industry linked in quite a remarkable way to the needs of the community. Some little background explanation is required.
- 130 Pioneer has no retail customers and its only shareholder is Central Lakes Trust which distributes the income (approximately \$6 million per annum) to community projects. Such projects in the past have included the Clyde Hospital, St John Ambulance stations and swimming pools. The short point is that in as much as Pioneer flourishes, there is a direct and tangible return for community projects.
- 131 Pioneer owns and operates 12 small hydro power stations that range in capacity from 400KW to 7.8MW. All of these feed into the local distribution network because they are less than the 10MW generation capacity required for distribution into the national grid.
- 132 The Nevis could provide a 45MW capacity dam and self evidently this would exceed the capacity of any of the current Pioneer schemes or stations and could feed into the national grid. Not only that, a hydro scheme on the Nevis would also provide a second point of supply to Queenstown to help meet its growing demand for electricity.
- 133 Nonetheless, it is also important to note that Pioneer is currently pursuing other options for power generation within its geographical area of interest and has no firm plans at present for a scheme on the Nevis. In other words, Pioneer's position is very much one of wanting to keep a hydro development option open on the Nevis.
- 134 There was a sharp contest over the need on a national scale for further hydro development. It became something of a clash of titans.
- 135 Mr Donnelly, a consulting economist with an outstanding national reputation, put the case for more hydro generation. He pointed to such factors as how New Zealand's electricity supply system is hydro dependent and vulnerable to dry year events and considered there had been inadequate commissioning of new generation. He argued for the promotion of a broad range of projects available at any point in time to capitalise on rapidly changing economic conditions. While he considered energy efficiency initiatives laudable, he doubted they would alleviate the need for new generation. He was troubled by the dominance of wind generation in new projects and the higher generation costs of that compared to hydro generation. While he acknowledged New Zealand has abundant and under-developed geothermal resources, he said the amount available to electricity generation is a small portion of the total resource and concentrated in the Taupo volcanic zone.
- 136 Mr Parker, a current list MP and former Minister of Energy in the 2005/2008 Labour government, took the contrary position. He argued that a hydro scheme on the Nevis would make only a modest contribution to increased generation capacity and produced Electricity Commission data that he said demonstrated that the projects already under construction or consented, or for which consent has already been sought, total 5,600MW of which wind generation is substantially the largest and environmentally more reversible than hydro generation. In his view the Otago/Southland region has already made a sufficient contribution of its natural river values to the national interest of secure electricity supply.

137 We wish to acknowledge the contested positions advanced by the parties and witnesses under this head – hence the outline set out above. However, for reasons set out in our conclusions where we weigh up the various factors under section 207, we are not required to make a series of findings preferring one side or the other of this contest. As will be seen later in our overall evaluation, that is because even if we preferred Mr Donnelly's analysis over Mr Parker's under this head we have reached a particular view as to where that weighs vis-à-vis the section 199 analysis to which we must have 'particular regard'.

**Relevant provisions of every national policy statement, regional policy statement, regional plan, district plan and any proposed plan**

138 The position regarding national policy statements is that there are none currently in force relevant to the application but there are three proposed ones that were referred to during the hearing. They were proposed national policy statements on electricity, fresh water and national environmental standards. The question of whether such proposed national policy statements can be considered under section 207 arose. As it happens that same question was argued before the Special Tribunal appointed to report on an application for a water conservation order on the Hurunui River. The report of that Special Tribunal is dated 5 August 2009 and became available in the course of this hearing.<sup>4</sup> The issue is addressed at paragraph 57 of that decision where the Special Tribunal makes the point that section 207(c) is explicit and does not require the Tribunal to have regard to *proposed* national policy statements, yet by contrast it does require a Tribunal to have regard to 'any proposed plan'. We agree with that Special Tribunal that unlike proposed plans, proposed national policy statements do not have legal effect until they are made. We take the same view and do not therefore take any of the proposed national policy statements that were referred to into account under section 207(c).

139 Turning then to the other planning instruments, the Otago Regional Policy Statement contains nothing inconsistent with the application. However, the next tier of planning instruments is unsurprisingly framed around the existing WCO. The Regional Water Plan (including proposed changes) and the Central Otago District Plan both could allow dam impoundment in the terms of the existing WCO. Indeed, the Outstanding Landscape provisions of the latter, which themselves were the eventual product of an Environment Court consent order, show a deliberate decision to remove the area of possible future hydroelectric development from the Outstanding Landscape protection. At present, a land use consent for a dam would be a discretionary activity under the District Plan and similarly a discretionary activity for damming and diversion under the Water Plan.

140 Since a WCO would always trump planning instruments such as these, the fact that these two plans contemplate something that the amended WCO would remove as a possibility is certainly not of itself fatal to the application for amendment. But we think section 207(c) must require more consideration than just that, otherwise no application for a WCO could be rebuffed by section 207(c). Instead we have looked at those instruments to see if this application would disrupt or upset their relevant planning provisions. We cannot see that it does. Dam impoundment is simply countenanced as a possibility. It is not part of the essential fabric of either instrument.

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<sup>4</sup> The report of that Special Tribunal has since been legislatively rendered redundant.

- 141 However, the contest on section 207(c) raised a further and interesting point. It was contended that the resource consent process provided a much more complete assessment of all relevant effects on the environment rather than attempting to deal with dam impoundment in a vacuum via this application. Indeed, it was argued that a resource consent process can actually enable the enhancement of a threatened species through imposition of conditions to that effect that would be unavailable through a WCO and that to protect threatened species through the passive effect of a WCO might just do nothing more than ensure continued deterioration.
- 142 While these are useful points, we are conscious that a WCO is both a bottom line protection for some outstanding value or characteristic and of limited or even nil impact beyond that protection. A WCO recognises and protects that outstanding value or characteristic. A resource consent necessarily relates to something else and the protection of such conditions is incidental. Further, the resource management framework for unaffected activities remains unchanged. For example, it became apparent that the application did not need to address the future utilisation of oil shale or lignite deposits because such utilisation would be land based and not located within the bed of the river.
- 143 For completeness, we mention that several other documents were referred to us (the Kai Tahu ki Otago Natural Resource Management Plan 2005, the Otago Conservation Management Strategy 1998 and the Sports Fish and Game Management Plan for Otago Fish and Game Region), but none of those are planning instruments within the meaning of section 207(c) and thus they have not been considered.
- 144 Overall, we have reached the view that the section 207(c) planning instruments are very much a neutral factor in our evaluation. They do not particularly weigh for or against the application.

### **Overall evaluation**

- 145 It follows from the above analysis thus far that of the various candidates advanced as 'outstanding' values or characteristics within the meaning of section 199, just one, the Gollum galaxiid, in our view crosses that very high threshold.
- 146 It also follows that in terms of our required analysis under section 207 we are required to give 'particular regard' to it but then to weigh in the other section 207 factors to which 'regard' must be had. How does that work and does it create some form of presumption in favour of the section 199 finding?
- 147 In *Rangitata* the Environment Court held that there is a legal or persuasive onus on an applicant and supporting submitters to put forward evidence to establish that the necessary judgements can be made as to the outstanding characteristics claimed, but once that is established, a presumption does arise. The relevant passage is paragraph [58]:
- However, once it is found that a part of the river has outstanding characteristics then the purpose of a water conservation order and the non-repugnant provisions of Part 2 of the Act entail that there is a presumption that those characteristics should be recommended for specified protection.
- 148 Yet we do not read that presumption as tantamount to a trumping. In our view it is still necessary to go to the remaining factors in section 207 to which in comparison mere 'regard' (as opposed to 'particular regard') is to be had, and then even after that

as the above cited passage in *Rangitata* indicates, to consider the 'non-repugnant' Part 2 factors. And, as we have already said, since this is an application for amendment we think we must also take into account the residual parts of the current WCO for which amendment is not sought.

- 149 Thus we now need to evaluate or balance the finding we have made that the Gollum galaxiid crosses the high section 199 threshold, against those other factors.
- 150 As we have already observed, the section 207(a) consideration of the application and the submissions is somewhat circular. In saying that we do not mean to dismiss it as a consideration. We read it as a need to remind ourselves of all that has gone before in terms of the processing of this application and in particular the positions of the large number of parties that they have taken in the application and submissions as lodged. We have endeavoured to review all of that. We are not sure there is much more we can say about that other than that there is nothing that changes the views we have reached on the various topics addressed in this report thus far.
- 151 As to section 207(b) we have reached the view that even if there is a case for more hydro generation, it would not prevail over the section 199 outstanding characteristic that needs to be protected - namely the existence and survival of the Gollum galaxiid and its habitat. The point can be put more provocatively, but perhaps not as accurately: if there is a need for more hydro generation, it was not suggested that there are no other options that do not involve the eradication of a particular species from the planet.
- 152 As to section 207(c) we have found that the planning instruments that can be considered under that provision are very much a neutral factor and do not particularly weigh for or against the application.
- 153 Turning to the non-repugnant Part 2 considerations, we are of the view that there are as many factors that favour the application as would be against it. It is true with regard to the case for dam impoundment that Part 2 refers to economic wellbeing and health and safety in the context of sustainable management (section 5(2)), the need to have particular regard to the efficient use and development of natural and physical resources (section 7(b)), the efficiency of the end use of energy (section 7(ba)), and the benefits to be derived from the use and development of renewable energy (section 7(j)). But, if anything, the balancing exercise just might favour the protection of the Gollum galaxiid with the references to safeguarding the life supporting capacity of ecosystems (section 5(2)(b)) the declared national importance of the protection of significant habitats of indigenous fauna (section 6(c)), the exhortation to have particular regard to the intrinsic values of ecosystems and any finite characteristics of natural and physical resources (section 7(d) and (g)). Either way we are not prepared to draw any firm conclusion that the evaluation of Part 2 factors definitely weighs in favour of protection of the Gollum galaxiid, but we are certainly of the view that the case for dam impoundment does not prevail over the Gollum galaxiid in this part of the evaluation.
- 154 Turning to the residual part of the current WCO, we see nothing in the residual wording of the WCO itself that would cut across the protection of the Gollum galaxiid or create some sort of internal incoherence or inconsistency. There was a faint argument that this need for residual coherence or consistency went beyond just the formal wording of the Order-in-Council and would reach to the reasoning and findings of the original Special Tribunal under section 207(b). There was emphasis, for

example, in a shift in the wording relating to damming between the interim report and the final report and the addition of a reference to the expected growth in the Queenstown population and some careful balancing around the regard given to community needs. However we do not agree that the need for coherence reaches quite that far and to do so would fall foul of the clear indication on the authorities that the doctrine of issue estoppel does not apply in this jurisdiction.

- 155 In an overall sense we are very conscious of the far reaching effect of a WCO, and effectively extending its reach as would be the outcome of the proposed amendment. Counsel for DOC not inappropriately described it as 'jamming the tap open'. Although in the end only one outstanding value crossed the requisite threshold, we have found the case for it to be compelling and the initial presumption resulting from that not to have been displaced by any of the other section 207 factors or the additional two factors we have traversed. The qualification of the Gollum galaxiid as a separate species and its elevated position on the threat classification list are factors that speak for themselves and without more would have weighed very heavily in favour of WCO protection. However, the bio-geographic factor resulting from the river capture and the relatively unexplored genetic significance of the species makes the case compelling. On the evidence Gollum galaxiid sequestration is relatively untried and untested, and at least two of the three relevant experts had no confidence that sequestration would work for the remaining subpopulations not lost within the impoundment.

### **Conclusion**

- 156 We have therefore reached the conclusion that the application should be granted, but the amendments confined to recognition of the outstanding value of the Gollum galaxiid.

### **Draft Water Conservation Order**

- 157 The Special Tribunal is required by section 208 RMA to include in this report a draft of the Water Conservation Order it is recommending. The draft is attached as Appendix 1 in the form of the amendments (by way of insertions or deletions) that would be made to the existing WCO.
- 158 With the exception of perhaps two relatively ancillary matters, no further explanation is required in that the recommended amendments follow directly from the conclusions we have reached.
- 159 The first of those ancillary matters relates to the omission of MALFs. The current WCO does not have a MALF and the application sought to add two - one at Wentworth Station and another at Nevis Crossing. Whilst it could be said that a MALF would reinforce a prohibition on damming, our strong impression was that it would have a more direct relationship with the protection of the trout fishery. Since we have decided against enhancement of the WCO in order to protect the trout fishery, we do not see the need to impose MALFs. We would prefer to keep the position simple: the complete prohibition of damming achieves all that is necessary to protect the outstanding characteristic of the Gollum galaxiid and a MALF does not really add to that. The river will do whatever it will do in its wild and unmodified state and its flows will be whatever the forces of nature dictate.



## Appendix 1.

### Proposed Amendments to Water Conservation (Kawarau River) Order 1997

1. Deletion of clause 7
2. Amendments to Schedule 2:  
(additions to present text shown in underlining and deletions in crossing out)

#### WATERS TO BE PROTECTED

Waters	Outstanding characteristics	Restrictions and Prohibitions
<p>Nevis River mainstem gorge from Nevis Crossing to Kawarau River confluence (S133:877677 to S133:847538)</p>	<p>(c) wild characteristics;</p> <p>(e) recreational purposes, in particular fishing and kayaking.</p>	<p><del>(i) no damming allowed unless a rule in a plan or condition in any water permit granted makes provision for river flows to be provided at sufficient levels to enable kayaking to be undertaken in the gorge at times stated in the plan or permit, and the extent of any impounded water is not beyond S143:836485;</del></p>
	<p><u>Native fishery habitat (Non migratory galaxiids.)</u></p>	<p><del>(ii) fish passage to be maintained;</del></p> <p><u>(i) no damming or diversion allowed</u></p> <p>(ii) <del>(iii)</del> water quality to be managed to Class CR, Class F, and Class FS standards.</p>
<p>Nevis River mainstem above Nevis Crossing to source (S133:847538 to S142:673213)</p>	<p>(c) scenic characteristics;</p> <p>(e) recreational purposes, in particular fishing.</p>	<p><del>(i) no damming allowed unless a rule in a plan or condition in any water permit granted makes provision for river flows to be provided at sufficient levels to enable kayaking to be undertaken in the gorge at times stated in the plan or permit, and the extent of any impounded water is not beyond S143:836485;</del></p>

~~(ii) fish passage to be maintained;~~

Native fishery habitat  
(Non migratory  
galaxiids.)

Scientific –  
biogeographic River  
capture

(i) no damming or diversion  
allowed

(ii) ~~(iii)~~ water quality to be managed to Class F and Class FS standards.