A fresh start for Te Waihora

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Introduction

Sustainable and integrated freshwater management remains a topical issue throughout the country. When reflecting on the potential of collaborative governance in dealing with freshwater issues, it is worth considering the initiatives that are being taken in Canterbury to restore Te Waihora/Lake Ellesmere.

The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) established a new regime in the Canterbury region for a Water Conservation Order (WCO). The first application to be considered under the ECan Act was a proposal to amend the existing WCO which applied to Te Waihora. The application was made jointly by Te Rūnanga o Ngāi Tahu and the Department of Conservation. The overall purpose of the application was to restore the quality and integrity of Te Waihora, with express recognition sought for additional outstanding features.

This article describes the WCO application and discusses the recommendation by the hearing committee, before considering the implications for freshwater management generally.

Te Waihora

Te Waihora is the largest lake in Canterbury and the largest coastal freshwater lagoon in New Zealand, despite it being less than half its natural size due to land drainage practices. It lies to the south-east of Christchurch, on the road to Akaroa and Banks Peninsula. The lake has been described as the most important wetland habitat of its type (Canterbury Conservation Management Strategy 2000, section 4.6.2). It is renowned for the rich biological environment it supports, including a large number of indigenous bird, fish and plant species. The lake is shallow and highly eutropic and, while it is very productive in a fisheries sense, it is considered to currently be New Zealand's most polluted lake.

The lake has diverse freshwater fish fauna, dominated by significant native species which migrate between the lake, tributaries and the sea at various times. Opening of the lake to the sea is very important, as it facilitates the recruitment of fish into the lake and river population and also enables migration of fish to the sea to spawn. Te Waihora is artificially opened to the sea using mechanical means, a process that is currently managed by Environment Canterbury. Lake openings were managed traditionally by Ngāi Tahu — who were last recorded opening the lake in 1867 by a method of simply scraping a narrow channel using the korari or flax stalk to "unplug" the lake (WH Harris "Report on Lake Ellesmere" for the North Canterbury Catchment Board, 1947).

To Ngāi Tahu, Te Waihora is a tribal taonga, most famously known as a major mahinga kai (customary food gathering place) and reflected in its original name — Te Kete Ika a Rākaihautū, or the fish basket of Rākaihautū, an early ancestor famed for digging and claiming the lake in tribal traditions. The significance of the lake to the tribe was reflected in the Ngāi Tahu Treaty of Waitangi settlement, through the vesting of the bed of Te Waihora by the Crown in Te Rūnanga o Ngāi Tahu as fee simple estate. This followed strong recommendations by the Waitangi Tribunal for the return of Te Waihora to Ngāi Tahu, including the entire native fishery, to be accompanied by significant and committed Crown action to restore Te Waihora as a tribal food resource.

Customary fishing practices continue to be carried out at the lake, along with a number of other tikanga-related activities by Ngāi Tahu Whānui. Ecological restoration and cultural monitoring projects are also being undertaken, largely by the Te Waihora Management Board, which is made up of representatives of the six Papatipu Rūnanga that have traditional associations with the lake and are mandated by Te Rūnanga o Ngāi Tahu to manage the lakebed on behalf of the tribe. Te Rūnanga also own 20 per cent of all commercial fish quota associated with the lake as part of the Treaty of Waitangi Fisheries settlement.

Background to the WCO and amendments sought

In 1986 the NZ Wildlife Service (which later became part of Department of Conservation) applied for a WCO, primarily to counter threats to wildlife habitat at the time from proposals for lake reclamation and drainage. The WCO was made in 1990 and therefore it predated the RMA.

The 1990 WCO identified wildlife habitat as the only outstanding feature, consistent with the nature of the application that was lodged. This phrase is

defined in the Wildlife Act 1953 as including birds and invertebrates, but not aquatic species. The WCO failed to expressly acknowledge customary use or values. This was due in part to a lack of legislative recognition of the Treaty of Waitangi at the time and compounded by the fact that it was made in a pre-Ngāi Tahu settlement environment. It was acknowledged by the hearing committee at the time that no formal or legal recognition had been given to Māori fishing practices.

The decade leading up to the Ngāi Tahu claim saw a number of significant efforts by Ngāi Tahu to protect and recognise Te Waihora as a tribal taonga. Since 1990, a considerable body of natural and cultural resource information was also gathered regarding Te Waihora including a water-balance model which allowed for the experimental provisions within the existing WCO to be tested. As a result of various investigations, it was concluded that the WCO gave inadequate protection to the values associated with Te Waihora. There was also a need to bring the WCO in line with legislative changes. In order to address these issues, Environment Canterbury brought together the various agencies that have a statutory responsibility for various aspects of Te Waihora.

The application to amend the WCO was made in 2010. Specific changes were made to the lake opening and closing provisions, along with changes to the datum and updating of terminology. The following additional values were also proposed for recognition within the WCO — indigenous wetland vegetation complex, customary fisheries, Ngāi Tahu historical, spiritual and cultural characteristics and significance in accordance with tikanga Ngāi Tahu, including in respect of kaitiakitanga and mahinga kai.

The legislative setting

National WCOs and local water conservation notices were created by an amendment to the Water and Soil Conservation Act (WSCA) in 1981, with the objective (s 2) "… to recognise and sustain the amenity afforded by waters in their natural state".

The WCO regime was then carried into Part 9 of the RMA, with some key differences. The characteristics to be protected were broadened to include express reference to historical, spiritual and cultural purposes, as well as to outstanding significance in accordance with tikanga Māori.

For water bodies *outside* of Canterbury, the WCO provisions in Part 9 apply "notwithstanding anything to the contrary in Part 2" (s 199 RMA). In practice this means that Part 2 is given effect, but only where the provisions of Part 2 are consistent with the purpose of Part 9. In the case of Te Waihora, the application concerned a water body *within* Canterbury. It was therefore determined under the ECan Act, which applies to any application to make or amend a Canterbury WCO. This makes Environment Canterbury responsible for hearing such applications and also places a slightly different spin on the matters to be addressed.

Section 50 of the ECan Act states that:

(2) In considering whether to recommend to the Minister that a WCO be made, ECan must, subject to Part 2 of the RMA—
  (a) have particular regard to—
    (i) the matters set out in subsections (3) and (4); and
    (ii) the vision and principles of the CWMS; and
  (b) have regard to the matters specified in section 207(a) to (c) of the RMA.
(3) ECan may recommend to the Minister that a WCO be made to recognise and sustain—
  (a) outstanding amenity or intrinsic values that are afforded by waters in their natural state; or
  (b) where waters are no longer in their natural state, the amenity or intrinsic values of those waters that in themselves warrant protection because they are considered outstanding.
(4) Section 199(2) of the RMA applies to a WCO recommended by ECan.

In the case of Te Waihora, the changes brought about by the ECan Act are arguably more illusory than real. It is correct that the ECan Act imposes a different test. In addition to repealing the purpose of a WCO (s 199(1)), it made the application "subject to Part 2" and included a specific requirement to have particular regard to the vision and principles of the Canterbury Water Management Strategy (CWMS). In practical terms it is questionable however whether this resulted in a fundamental shift in philosophy. If anything, it was said to strengthen the case for an amended WCO.

Cultural values

There was extensive evidence presented at the WCO hearing about the close association that Ngāi Tahu have with Te Waihora.

The historical role of the lake as a source of mahinga kai was a key element in the network of relationships which bind Ngāi Tahu to Te Waipounamu (the

South Island). It was a major factor in foundational migration and occupying traditions. The lake was described by Sir Tipene O'Regan, who gave evidence during the WCO hearing, as being "one of the central hinges in Ngāi Tahu history".

The evidence presented at the WCO hearing sought to establish a clear nexus between the waters of Te Waihora and associated cultural values. Witnesses described the lake's rich cultural history, significance to Ngāi Tahu and importance of protecting the customary fishery. The intrinsic value of this mahinga kai taonga was said to derive not just from historical association, but also from its present use. Various witnesses also explained that customary fishing practice is not just another subset of public recreational activity. Evidence was also presented at the hearing that outlined Ngāi Tahu's perspective on current roles for tangata whenua in governance, management and decision-making frameworks.

A range of personal views were expressed at the hearing about the impact of the artificial draining of the lake and the continued "nibbling away" at the edges of wetlands. There has been considerable publicity in recent times about the degraded state of Te Waihora, being one of the most polluted water bodies in the country. However, it was said that the intrinsic values of this water body are not necessarily devalued by these incremental and cumulative losses. The strain placed on the wetland system and the customary fishery does not make the values any less important.

The case for the applicants was put in the following terms — what remains is a testament to the resilience of the natural system in the face of adversity. It was necessary to outline what had been lost, but also why the remaining features are deserving of protection. Despite the extent of intervention and active management of Te Waihora, its size and unique physical characteristics meant that it continued to be a fundamentally important resource and one which was not able to be simply replicated elsewhere.

What is "outstanding"?

Section 50(3) of the ECan Act enables a WCO to be made to recognise and sustain the outstanding amenity or intrinsic values of a particular water body.

The interpretation and application of the word "outstanding" has been previously considered by the Environment Court in the *Rangitata* WCO decision (*Rangitata South Irrigation Ltd v New Zealand and Central South Island Fish and Game Council* EnvC Christchurch C109/04, 5 August 2004). The Court recognised that the test is a reasonably rigorous one, with the requirement that a particular feature or characteristic be "quite out of the ordinary on a national basis".

With regards to the definition of "outstanding" as it relates to tikanga Māori, the position taken to date has been slightly different. It had been previously assumed that the comparative test ought to be directed towards the takiwā of that particular iwi, not New Zealand as a whole. The reasoning behind this is that it is not tika (correct) to make comparisons across iwi in relation to resources. The national comparison required in other parts of s 199 RMA therefore does not appear to be appropriate in such circumstances.

In the case of Te Waihora, evidence from cultural witnesses identified the value that is placed on the historic, spiritual and cultural associations. This evidence firmly established a nexus to the water body. Te Waihora sustains a customary fishery and mahinga kai resource that is of utmost importance to Ngāi Tahu, both culturally and spiritually. It is particularly valued for the tuna (eel) and patiki (flounder) fisheries, which are only present to this level and in this location because of the habitat provided by the lake. In determining whether a particular customary value is outstanding, it was argued that the correct approach is to consider that value within the context of the takiwā of the iwi concerned, not New Zealand as a whole. The cultural significance of Te Waihora is recognised through the settlement, a process completed after the original Order was granted. It therefore carries legislative force in its own right and was said to clearly qualify for recognition as being of outstanding significance in accordance with tikanga Māori.

Canterbury Water Management Strategy

Section 50(2) of the ECan Act requires particular regard to be had to the vision and principles of the Canterbury Water Management Strategy.

The CWMS sets a framework for integrated management and contains fundamental principles relevant to Te Waihora. It places a strong emphasis on the integration of land and water management, including protection of biodiversity. The primary principles also include environmental and customary uses as first-order priority considerations.

The application to amend the WCO was said by the applicants to represent the practical implementation of some of the key outcomes the CWMS seeks to

deliver. The amendments sought would enable the lake to be managed sustainably and properly take account of both the historical and contemporary importance of customary uses, particularly the native fishery, amenity and kaitiakitanga.

In terms of Part 2, the proposed amendments to the WCO were intended to ensure that it is effective and accurately implemented, allowing for management to improve ecological habitat conditions while still providing for agricultural land use. The amendments were intended to give full effect to the underlying conservation purpose of the existing WCO in a way that also achieved the purpose and principles of the RMA.

Hearing committee recommendation

The recommendation was made to amend the existing WCO, but with some subtle variations on the values sought.

In deciding whether to make the amendments, the hearing committee concluded (at [54]) that they needed to be satisfied that the addition of the values sought "is justified by evidence now available that is more persuasive" than that presented for the original WCO. A differently constituted special tribunal in the *Nevis* case also suggested that there may be a threshold test for amending a WCO, "requiring new information or some change on the ground for amending a WCO". At the time of writing, the *Nevis* decision was subject to appeal. As it turns out, it was not material in the case of Te Waihora as the hearing committee found that there have been important changes particularly with the recognition of Māori values since the original WCO was made.

The panel also made a finding (at 32) that "there is no doubt that Te Waihora has significant cultural and value to Ngāi Tahu", but then went on to decide that values "must be outstanding to Māori in a national context". It was also considered (at 32) that "the blanket reference to Ngāi Tahu historical, spiritual and cultural values is too general". For those reasons, the amended WCO did not separately recognise kaitiakitanga or spiritual and cultural values. Instead, the recommendation was worded slightly differently. The terms of the WCO recognise the significance of Te Waihora "in relation to tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries". This wording recognises value to Ngāi Tahu specifically, but also takes a national comparative approach to tikanga Māori. This consideration of cultural values appears to differ from previous Special Tribunal recommendations and the decision of the Environment Court in the *Rangitata* case.

The hearing committee's recommendation was accepted by the Minister and subsequently gazetted. The National Water Conservation (Te Waihora/Lake Ellesmere) Amendment Order 2011 came into effect on 22 September.

Restoring the resource

It is worth reflecting on what the amendments to the WCO could mean for the future restoration of Te Waihora, including in the broader context of sustainable and integrated freshwater management. Ngāi Tahu have strived for generations to restore Te Waihora as a food basket that can sustain future generations. The WCO provides a further tool for protecting Te Waihora, allowing for integrated decision-making which aligned with Ngāi Tahu's aspirations and also assisting the Department of Conservation to fulfil its statutory functions. The formal recognition of indigenous wetland plants and fish, as being outstanding in their own right, is also important for the wider community. It places Te Waihora in its rightful position as an outstanding place of value to many people for many reasons.

The decision to amend the WCO for Te Waihora could be said to be an expression of the aspirations that are contained within the CWMS. The amendments to the WCO will allow for effective management of the lake to improve ecological habitat conditions, while still providing for agricultural land use. Recognition of key values will also enable Ngāi Tahu to provide for their own wellbeing by providing protection to the cultural, spiritual, physical and historical values associated with the natural resource. The access to and continuation of customary fishing practices for certain iconic species is what Te Waihora is particularly known for. It is what makes it stand out. Specific protection was secured in this case because the existing terms of the WCO were not considered to adequately recognise the indigenous wetland vegetation complex, customary fishery and associated cultural and historical values.

The next step towards the restoration of the mauri and ecosystem health of Te Waihora has been confirmed with the signing of Whakaora Te Waihora in August 2011 — a long-term relationship agreement and shared commitment for the accelerated restoration of the lake between ECan, Te Rūnanga o Ngāi Tahu and Te Waihora Management Board, supported by funding from the Crown via the Ministry for the Environment. The parties have also signed an interim co-governance agreement

for the active management of Te Waihora and its catchment, implementing one of the stated goals of the CWMS. Investigating an improved lake opening regime which effectively balances fish migration and recruitment with lake-edge and catchment land use will also be a key tenet of the restoration programme. Two generations of work are anticipated as part of the cultural and ecological restoration plan, with the clean-up process planned to commence in carefully considered niche areas. This will require considerable effort by all parties involved. It is about building successful partnerships and giving effect to the concept of collaborative governance.

These measures signal a fresh start for the management of a key natural resource in the Canterbury region and the further realisation of the original recommendations of the Waitangi Tribunal made over 20 years ago. That can only happen if there is genuine commitment to the sustainable management and enhancement of the freshwater resource — mō tātou, ā, mō kā uri ā muri ake nei — for us and our children after us.

The authors appeared on behalf of Ngāi Tahu at the Te Waihora WCO hearing.

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monitored;

b) allowing an activity to be undertaken on the basis that consent can be revoked if the effects are more than minor;

c) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued on the basis of those effects.

We are of the view that cls 4(1), 13(2) and 13(3) are reasonable expressions of the precautionary-approach obligation as set out under international law. However, the effectiveness of the precautionary approach under the Bill is potentially undermined by the lack of a clear definition tying it to the interpretations set out under customary international law, and the chance that its implementation could be subjugated in favour of activities that contribute to national economic development.

In our view, the precautionary approach under the Bill, described as the "cautious approach", should be defined to ensure that its application and implementation is consistent with New Zealand's obligations under the LOSC and other international law. Furthermore, the Bill should be amended to clarify that contributions to national economic development cannot be used as a reason for failing to take a precautionary approach to decision-making under cl 10(1)(b) or cl 13. We consider (as in the case of our comments on cl 10 and cl 61(2)) that clarifying the meaning of the precautionary (or cautious) approach under the Bill will assist with integrated decision-making in respect of the RMA and remove unnecessary complexity and costs for all stakeholders involved.

Conclusion

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill brings about a welcome legislative change to the management of New Zealand's EEZ and CS. It is not the comprehensive answer to ocean governance that a number of different sectors were looking for, but it does plug a regulatory and environmental management hole that was quite simply an embarrassment when viewed in the context of regulatory advances made by other States. This was particularly the case given increasing commercial and political interest in the protection and development of New Zealand's EEZ and CS. While filling many of the gaps in the existing regime, concern remains regarding the consistency of the Bill with key principles of international law and existing domestic legislation. We have raised concerns in relation to: (a) the purpose of the Bill and its failure to incorporate a definition of sustainable development (or management); (b) the potential for cl 61(2) to lead to decision-making that is not sustainable; and (c) the Bill's lack of clarity concerning the application of the precautionary approach.

We remain hopeful that the Bill will enhance the environmental protection of New Zealand's oceans while enabling appropriate forms of investment in natural resource development. If this is achieved, New Zealand will continue to hold its place in the international community as a successful innovator when it comes to environmental management. This in turn will enable New Zealand to continue to trade on a well-earned reputation.

Robert Makgill, a law of the sea expert, was a principal drafter of the New Zealand Law Society's written submission on the Bill. He also presented the Law Society's submission to the Local Government and Environment Select Committee in mid-February of this year.