Toitu te whenua
Land Information New Zealand

Crown Pastoral Land Tenure Review

Lease name: BEN NEVIS

Lease number: PO 241

Public Submissions
- Part 9

These submissions were received as a result of the public advertising of the Preliminary Proposal for Tenure Review.

July 10

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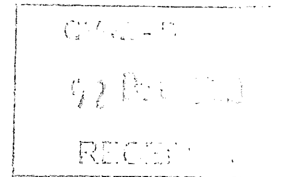

30 November 2009

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Submission on Ben Nevis Tenure Review Preliminary Proposal

This submission is made on behalf of Otago Fish and Game Council.

Ben Nevis pastoral lease and the immediately adjacent Crown Land including riverbed (Unoccupied Crown Land) are wholly with the Otago Fish and Game Region

1.0 Executive Summary

The majority of Ben Nevis pastoral lease lands have Significant Inherent Values (SIVs) which need to be maintained and protected through the tenure review process. This protection needs to be certain and enduring in accord with the objects of the Crown Pastoral Lands Act (CPLA), namely the ecological sustainability of reviewable land and protection of SIVs on that land. The CPLA expresses a preference for protection of SIV's by retention as Crown land.

The current preliminary proposal (PP) does not comply with the objects of the CPLA and major changes are needed to provide appropriate protection for SIVs on the Nevis valley floor . This area has layers of important values - as habitat for indigenous plants and animals, as an historic area without peer in New Zealand; as part of an outstanding heritage landscape; in providing public access and recreational opportunity associated with the Nevis River's nationally important brown trout fishery and kayaking opportunity. The significance of these latter values are already recognised through the Kawarau Water Conservation Order 1997(KWCO).

The PP also does not comply with the objects of the CPLA because it does not address the unique and nationally threatened native fish species - 'Smeagol galaxias' - found mostly in small tributary streams on lease land earmarked for freeholding.

Ben Nevis tenure review has serious flaws which have compromised the public's ability to take part in the process. The property's SIVs have been understated or overlooked to the extent that the proposals for reviewable lower altitude land will not be managed in a way that is ecologically sustainable if confirmed in the currently proposed form .

The Commissioner of Crown Lands (CCL) needs to look closely at these issues and to make changes to the PP to ensure ecological sustainability and protection of SIV of reviewable land and adjacent Crown land. In Fish and Game's view this means retaining Crown land on the valley floor for management as a Crown reserve in accordance with the preference for Crown ownership of land with SIVs that is expressed in the CPLA.

Fish and Game has sought legal advice on a number of matters of concern with the Ben Nevis and Craigroy tenure reviews. That advice is adopted within this submission and a copy is

attached as Appendix 1. This appendix is an integral part of this submission and should be fully considered by the CCL.

2.0 Process Issues

2.1 Predetermination

The shape of the PP has been predetermined by a prior agreement between DOC and Pioneer Generation Limited (PGL) the leaseholder ('the Agreement'). The Agreement involves a trade off of valley floor land, which PGL want for hydro development and the high altitude land which DOC want for conservation park. It is important to note that this is not a routine trade off within the tenure review process. DOC claim the Agreement came out of the original KWCO process from 1997 or before, but if it did, it was not part of the formal process rather a 'behind cl;osed doors' arrangement. It is not a component of the 1997 KWCO outcome and it is clearly a longstanding agreement separate from the tenure review process. As such it should not have any bearing on the outcome of the tenure review.

DOC is the primary adviser to the CCL in tenure review but in this case the PP reflects the Agreement rather than an objective assessment of the SIVs on the property. This suggests a real possibility of predetermination.

Although the tenure review commenced in 2002 DOC's agreement with PGL was not declared explicitly or acknowledged as existing until 2008 in a letter from DOC to LINZ agent David Paterson dated 27 March 2008 [Appendix 2]. In that correspondence the then Otago Conservator Jeff Connell stated that:

> 'Freeholding land required for hydro purposes is the key to achieving tenure review outcomes on Ben Nevis and Craigroy. The completion of these tenure reviews will result in net gains for conservation. These tenure review proposals protect a substantial area which is extremely important for biodiversity, contributes to the future conservation parks network, secures new public recreation opportunities and protects our historic heritage. To the extent that the historic heritage may be inundated, it is of minor significance compared with the rest of the valley that will be protected, and it can be fully studied before any inundation.'

and that

> 'The department made and agreement with Pioneer Generation's predecessor Central Electric, which achieved their support for the Kawarau Water Conservation Order (WCO) in return for allowing an exception in the WCO for the Nevis Hydro Proposal. It is the Department's view that as a matter of good faith this carries over into tenure review.'

Normally within tenure review SIVs are assessed on their merits and then proposals are made by the CCL for their protection, and in negotiations with the landowner some peripheral trading–off will occur to achieve a robust and acceptable outcome for both parties. While viewed practically, the process may be said to involve compromises, the primary objectives of the process must be to ensure ecologically sustainable management of reviewable land, and to ensure that SIVs are conserved and protected against the background of the New Zealand Biodiversity Strategy

It is important to note that the Minister of Lands did not know about the Agreement in November 2008 because he sought advice from the Minister of Conservation on that and other points of concern over the PPs but did not receive a reply on that point. [Appendix 3].

LINZ claimed a lack of knowledge of the DOC/ PGL Agreement over hydro development in a press release as recently as May 2009 [Appendix 4] so it seems conceivable that the CCL is still not aware that the proposal for freeholding valley floor land on Ben Nevis subject only to protective covenant (CC landscape) is a reflection of the Agreement, rather than the properly applied tenure review process.

The existence of the Agreement should be irrelevant to the tenure review process because DOC is an adviser to the CCL within the process, not the decision-maker. But it is clear from Appendix 2 and the conditions in Schedule 2 of the CC landscape covenants for both Ben Nevis and Craigroy that the Agreement has coloured DOC's assessment of SIVs and their recommendations on protective mechanisms. In Ben Nevis's PP, Schedule 2, condition 7, the Minister of Conservation both acknowledges that the land is intended for hydro development and agrees not to unreasonably withhold consent for such development. This means the covenants cannot achieve the primary objects of the CPLA namely ecologically sustainable management of reviewable land and protection of significant inherent values of the land.

Recommendation: It is recommended the CCL carefully review the effect of the Agreement on the content of the PP and background reports, particularly the DOC advice on freeholding land subject to the proposed covenant CC landscape, and the adequacy of that advice to identify and protect SIVs. The CCL must satisfy himself that the PP has not to any degree been predetermined by the Agreement.

2.2 Shortfalls in DOC Advice on SIVs and Their Protection

DOC advice to LINZ on the Ben Nevis(and Craigroy) review has understated the importance of valley floor or SIVs in areas where the landscape covenant (CC landscape) is proposed and on tributary streams draining this covenanted area.

The DOC response [Appendix 2] to a request from David Paterson asking whether DOC was satisfied with the outcome of the review and satisfied that there are no inherent values of significance within the land proposed as freehold (which includes the important valley floor area) puts arguments to justify major compromises as acceptable in the overall deal and implies suitable protection will be achieved through the covenant.

As quoted in 2.1 above Mr Connell lists the significant gains to come from the review but then notes only one SIV, historic heritage, as being affected by inundation when the SIV's present and likely to be affected by inundation are many – rare native fish, rare, plants, rare skinks, an outstanding trout habitat area, insect life and recreational amenity for angling, kayaking, nature and heritage appreciation. This is a serious understatement of the SIVs present on valley floor land.

In other correspondence from DOC to Mr Paterson, DOC advised that…

> " During consultation DOC has recommended a lessening of the significance of the SIVs within the footprint of the lessee's proposed hydro development if the balance of SIVs on both leases are adequately protected" [Appendix 6]

SIVs are either significant or they are not and hat will be determined by expert evaluation. The significance of SIVs cannot be lessened as DOC has said it has recommended be done in this case.

Since 2000 DOC has been required to give effect to the aims and intents of the New Zealand Biodiversity Strategy through tenure review. DOC has acknowledged to the Environment Court that it must give effect to that responsibility (Royal Forest and Bird Protection Society v Central otago DC, EnvC Auckland, (A128/04), Judge Bollard). This includes Goal Three: Halt the decline in New Zealand's indigenous biodiversity and Priority Action: Enhance protected areas and prospects for threatened species.

The PP for Ben Nevis fails to give effect to the aims and intents of the NZ Biodiversity Strategy because rare and threatened plants, a skink and a native fish species on the valley floor and in tributary streams have not been adequately researched as part of the process and those SIV's are not given adequate protection despite their threat status. This is outlined in more detail in section 3.1 and 3.3 below.

Recommendation: It is recommended that the CCL fully review the assessment of SIVs and reject any 'lessening of the significance of SIVs' within the footprint of the proposed hydro development. The CCL should assess whether the aims and intents of the NZ Biodiversity Strategy have been given effect to in the PP.

2.3 Confusion over Public Notification

The public notification for the Ben Nevis PP included an ambiguous statement about the admissibility of submissions mentioning hydro development. The clear implication was that submissions that referred to hydro development would be invalidated and not considered [Appendix 9] This has caused consternation amongst interest groups and individuals because PGL's hydro development plans are a central consideration in both the ecological sustainability of reviewable land and in protection of SIVs on the valley floor and values relating to the river itself. Fish and Game queried the CCL's public statement and belatedly the CCL replied clarifying the statement for Fish and Game but it has made no public statement of clarification [Appendix 10]. While Fish and Game has shared this information with interest groups it remains probably that some individuals will remain ignorant of it and will either not submit or will limit their submissions for fear of disqualification.

While the CCL's powers are limited to considering submissions on the merits of the PP itself that relate to the objects of Part 2 CPLA, the advertisement did not make it clear that discussion of hydro development in relation to part 2 issues would be legitimate.

There is only one opportunity for public input into tenure review and it is vital that the CCL facilitates that input as far as possible and is responsive to it. The issue is, after all, an important one - the permanent retention or disposition of public land depending on its inherent values and ecological sustainability.

Suggestion: It is suggested that the CCL fix this procedural flaw by renotifying the PP for public sibmissions.

2.4 Non inclusion of adjoining Crown land in process

The Ben Nevisand Craigroy PPs are being undertaken concurrently but separately and both leases include only small areas of Crown land within the reviews. Those areas are small bridge reserves on the true right at Nevis Crossing (Craigroy) and small areas of Unoccupied Crown Land on the true left below Nevis Township (Ben Nevis). A better approach would have been to include them together in one review along with all adjacent unused Crown land, and assess issues holistically. This would not prejudice or inconvenience any lease holders because both properties are leased by PGL.

Whether or not by design, the adopted approach works strongly against fair consideration of those SIVs on the valley floor including the immediate floodplain, the riverbanks, and the riverbed. This coupled with the uncertainty over the location of the lease boundaries, Crown riverbed land and the location of the other public land in the form of roads and marginal strips in the area severely limits the scope of the two tenure reviews. It results in the Nevis River and riverbed being left out of serious consideration of SIVs when the river (bed, banks and water) is a dominant natural element within the valley.

This approach also allows the KWCO to be given little weight in the tenure reviews even though it recognises various outstanding characteristics of the river including recreational angling and kayaking amenity and wild and scenic landscape characteristics.

Under the CPLA the CCL has the option under s29 of including any neighbouring unused Crown land as follows:

> **CPLA s29 Inclusion of unused Crown land**
> The Commissioner may include in the review of land held under a reviewable lease or reviewable leases any neighbouring unused Crown land.

The CCL has done that for the small parcels of land mentioned above, two of which are described in the PP report as 'Nevis River streambed'.

Recommendation: It is strongly recommended that the Ben Nevis review be expanded to include adjacent unused Crown riverbed land which needs to be clearly and accurately identified . This is particularly relevant in the reach from Nevis Crossing to Commissioners Creek but is also important in the reach downstream.

2.5 Unreasonableness

The above-mentioned process concerns add to those that were raised in the Land Minister's query and Conservation Minister's non–response in appendix 3, namely whether:

- Funding for the tenure review should be deferred until the KWCO tribunal decision has been made so that the Minister can be informed as to what further restrictions may be imposed on land proposed for freeholding in the tenure reviews.
- The assessment by DOC of the SIVs in the areas proposed for freeholding (including the area that would be inundated by hydro proposals) are up to date.
- The proposed inundation footprint has been taken as a given (subject only to RMA processes), notwithstanding any SIVs present.

- The landscape covenants to be held by DOC allow for the proposed inundation footprint and, if not, whether, in respect of the footprint, they can be displaced by the KWCO or any amendment to it, or by other resource management processes.

It appears that the CCL as decision-maker could make an unreasonable decision over the Ben Nevis (and Craigroy) PP by failing to take into account relevant considerations and and/or taking into account irrelevant considerations. The CCL also needs to consider whether there is any evidence of unreasonableness in the process so far. Central to this are whether:

- SIV's have been accurately assessed and all relevant facts taken into account.
- Any irrelevant considerations have been taken into account such as the DOC/PGL Agreement and its effect on shaping the PPs through the 'lessening' of SIVs by DOC.
- The format of the reviews, which by not including unused Crown land in the riverbed to any extent, has overly limited consideration of ecological sustainability and protection of SIVs

Recommendation: That the CCL must satisfy himself that none of the points raised above give rise to unreasonableness in the tenure review.

3.0 New Information Available Since Agreement on Preliminary Proposal

Evidence Presented by PGL in May 2009 to the hearing of an application to amend the Kawarau Water Conservation Order 1997 ('the KWCO hearing')noted that the draft Preliminary Proposal was 'signed' by PGL 'about two years ago' around May 2007. The PGL evidence of Peter James Dowling (ref. para. 35) is attached as Appendix 7.

A large amount of new information has come forward since 2007 but has either not been taken into account or has not been given due weight in the subsequent development of the PP. The PP is therefore not based on up-to-date information. Changes in information on SIV's since the PP was 'signed' by PGL are significant in the following five main areas:

3.1 Status of Non-Migratory Galaxiid

In 2007 the non-migratory galaxiid population in the Nevis was described as Gollum galaxias - a species found throughout Southland and on Stewart Island. The Nevis population was unusual because it was the only sub population of Gollum within the Clutha catchment. This resulted from river capture when the Nevis reversed its flow millions of years ago due to tectonic uplift. In 2007 the Nevis Gollum population was recognised as genetically distinct and was classified as a threatened species with a ranking of 'gradual decline'.

However, in August 2009 expert evidence was presented to the KWCO hearing by Dr Richard Allibone confirmed a change in status. [Appendix 8]. The committee responsible for assessing threat status of species considered the Nevis valley population to be a distinct taxa and ranked it separately from Gollum galaxias elsewhere. The Nevis Valley population was given a draft ranking of 'Nationally Vulnerable' the third highest ranking available. The Nevis valley galaxias are now considered a separate species and has been given a new name 'Smeagol galaxias'. The Nevis Valley population is currently considered to be stable (that is, without taking into account the impact of a potential hydro development on the population) but it is restricted to a limited geographic area giving rise to its relatively high ranking.

Again the ranking came about without consideration of the probability of threats to ecological sustainability post tenure review from hydro development. These hydro development impact threats are very real given PGL's stated commitment to the pursuit of hydro dam options and the lightweight covenants (CC landscape) proposed in PPs for both Craigroy and Ben Nevis which do not provide protection against that eventuality.

The DoC addendum to the Conservation Resources Report for Ben Nevis and Craigroy is dated 2006 and discusses the significance of aquatic values in section 4.4. This statement does not mention the species threat status of Gollum galaxias as it was then, and the list of major threats is incomplete. It does not include as a major threat, inundation and subsequent colonisation of a reservoir by the predatory native migratory galaxiid, koaro.

Koaro are not found in the Nevis at present but reservoir construction and downstream flow modification as proposed by PGL would increase the likelihood of colonisation. Once a koaro population is established in a reservoir they would able to migrate into small tributaries and predate Smeagol galaxias because of their ability to climb wet surfaces [see appendix 8, paragraph 20 onwards]. This risk of predation was acknowledged by DOC witness, Mr Murray Neilson, at the KWCO hearing.

The stronghold of Smeagol galaxias includes small tributaries on Ben Nevis in land earmarked for freehold but with protective covenants to protect values. But native fish are not even mentioned within the covenant as values to be protected. This shortfall in protection is covered further below in the response on the specific PP proposals.

Native fish are not mentioned in section 1.7 or 1.7.2 of the Ben Nevis (and Craigroy) PP or in the CC landscape covenant's Schedule 1, condition 3, 'Values of Land to be Protected'. As the covenant requires the land to which it applies to be managed so as to preserve the Values identified in Schedule 1, it offers no protection to native fish or their habitat.

3.2 Historic Research and Registration

There has been considerable additional research undertaken into the historical values of what is described as the Lower Nevis Historic Area which covers a large area of both Ben Nevis and Craigroy pastoral leases. The PP is based only on earlier work by Hamel and Middleton and not the more recent work of the NZ Historic Places Trust.

In addition the NZ Historic Places Trust has recently (September 2009) initiated a registration process in respect of the Lower Nevis Historic Area. Registration does not in itself provide protection but it does recognise the importance of historic values and can lead to protection through RMA District Plans.

Again significant new information has arisen on historical SIVs on Ben Nevis since the PP was signed off with PGL and so the PP is based on out-of-date information.

3.3 Native Flora and Fauna

Skinks barely rated a mention in the 2006 DOC Conservation Resources Report for Ben Nevis (and Craigroy) are not mentioned in either in s1.7.2 (p14) of the Ben Nevis PP or in the CC landscape covenant's Schedule 1, condition 3, 'Values of Land to be Protected'. As the

covenant requires the land to which it applies to be managed so as to preserve the Values identified in Schedule 1, it offers no protection to skinks or their habitat.

Rebuttal evidence presented at the KWCO hearings by Dr Richard Allibone noted that cryptic skinks were commonly found on tailings on the floodplain area adjacent to the Nevis River and that the Nevis Cryptic skink population was under review and may be a separate species. Clearly there is an important value on the land proposed for freeholding. Dr Allibone noted that ...

> 'Since Mr Connell presented his evidence [*to the KWCO hearing in May 2009*], genetic studies investigating the cryptic skink have determined that the Nevis population of the cryptic skink is distinct from other cryptic skink populations and warrants species specific status. This species has been most commonly recorded in the areas close to the Nevis River where it is most abundant in old gold mining tailings (Trent Bell, Landcare Research Dunedin, pers. com. Figure 2). This skink represents another unique and rare biogeographic value that is associated with the Nevis River. The skink's association with tailings piles along the river and tributaries also means the protection of riparian habitat is of relevance to the skink and any inundation caused by a hydro-electric dam will lead to a reduction in habitat and the skink population' [Appendix 8].

The PP report notes insect life as an important feature of high altitude land to be retained by the Crown but does not mention insect life of land proposed for freeholding with protection by way of a landscape covenant. Evidence presented at the KWCO hearings by Mr Brian Patrick noted that there was an abundance of insect life on the valley floor in the area covered by the CC landscape covenant but these values are not identified in Schedule 1, condition 3 of the covenant and so it offers not protection to insect life.

The PP report notes the important botanical values of high altitude land to be retained by the Crown but does not mention botanical values of land proposed for freeholding with protection by way of a landscape covenant except for *Carex meulleri*. Evidence presented at the KWCO hearings by Dr Richard Allibone noted in paragraph 46 and 47 of his evidence that:

> 'Six threatened plants occur on the valley floor on the alluvial terraces,wetlands and the riparian zones. This includes three acutely threatened plants, *Myosotis pygmaea* var *glauca*, *Myosotis pygmaea* var *minutiflora* and *Myosurus minimus* var *novaezelandica*. These plants occur within and without the proposed dam inundation area.
>
> .... the lower Nevis Valley retains some of the least modified areas of critically endangered environments in New Zealand and these areas support a number of acutely and chronically threatened species.'

This information has been generated through the tenure review process but has been left out of the PP report to de-emphasis the SIVs of valley floor land proposed for freehold. In addition, threatened plants are not mentioned in the CC landscape covenant's Schedule 1, condition 3, 'Values of Land to be Protected'. As the covenant requires the land to which it applies to be managed so as to preserve the Values identified in Schedule 1, it offers no protection to threatened plants and their habitat.

The KWCO Special Tribunal has invited further expert evidence on botanical and faunal values which is to be presented at a hearing scheduled for April 2010. Evidence prepared by Wildlands Consultants, Dr Kelvin Lloyd has confirmed the importance of threatened plants on the valley floor (Appendix 12, paragraphs) and is directly relevant to consideration of SIVs and

appropriate protection for them on the valley floor part of the land covered by the CC landscape covenant. Dr Lloyd notes in paragraph 40:

> ...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

3.4 Landscape Values and Provisions of Central Otago District Plan under review.

The PP report explains that the level of protection afforded by the landscape covenant (CC landscape) is the same or similar to the Central Otago District Plan (COD Plan). The inclusion of this statement in the PP reports shows that it is a matter which has been taken into consideration in development of the PP. This repeats the DOC advice in Appendix 2.

There is no indication that there has been any consideration of the recent review of landscape values in the COD rural zone [Appendix 11] or the fact that the landscape provisions of the COD Plan are now subject to a formal Plan Change process (Plan Change 5A - 5W) based on the recommendations of that review.

The review report [Appendix 11] recognises the whole of the Nevis Valley as an 'Outstanding Natural Landscape' with 'high natural character' and 'high landscape quality' and it was given the highest sensitivity rating of 'extreme sensitivity'. The district plan change was publicly notified in 2008 and the process has now passed the public submissions and further submissions stages. A hearing will follow in due course

The key points for the CCL to note are that there is new information on the outstanding nature of the whole Nevis valley landscape and a District Plan change is currently underway. Aligning landscape covenant provisions to the existing COD plan provisions does not take account either of the new information available on landscapes or of the proposed changes to COD planning framework.

3.5 Ngai Tahu Position

In August 2009 Ngai Tahu provided evidence on the cultural importance of the Nevis valley to them in submissions tt the KWCO hearings. This information was not available when agreement was reached with PGL over the PP in 2007. The CCL's requirement under the CPLA to consult Ngai Tahu is noted but there is already new relevant material available from the Ministry for the Environment or from the MfE website from the KWCO hearings.

Recommendation: The CCL must take into account the new information that is available on these five points and decide whether the information that the PP is based upon is current or adequate.

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4.0 Comments on Ben Nevis Proposals:

4.1 Retention of 8,807 ha. Higher Altitude Lands to Crown Control.

This land area has high landscape and natural values and is recreationally important. Its retention by the Crown is appropriate subject to the proposed easement and recreation concession.

4.2 Retention of 950 ha Lower Altitude Lands to Crown Control (CA2)

This land area is composed of lower hill slopes, river terraces, riparian lands alongside the Nevis River and the immediate floodplain area for about 7 kilometres. The area has high historic, landscape and natural values. Its retention as Crown land is strongly supported subject to proposed conditions.

The retention of riverside land and the immediate floodplain area is very important. This area has multiple values including indigenous flora and fauna including rare and threatened plant species, historic values, public access and recreation values for SIVs associated with the Nevis River and the immediate floodplain area. The values of this part of the valley floor are strongly complemented by the rest of the floodplain area between Nevis Crossing and Commissioners Creek. Protecting one part of the valley floor but not the other is inconsistent.

4.3 Retention of 140 ha Lower Altitude Lands to Crown Control (CA4)

This land area is composed of lower hill slopes. It has high historic, landscape and natural values. Its retention as Crown land is appropriate subject to proposed conditions.

4.4 Retention of 160 ha. Of Lower Altitude Lands by the Crown.(CA5)

This land situated in the middle reaches of Doolans Creek catchment has high botanical values and landscape values. Its retention by the Crown under the conditions proposed is appropriate subject to proposed conditions.

4.5 Retention of 8 ha. of Floodplain Land by the Crown.(CA3)

These two small land area of what is described in the PP report as 'Nevis River streambed' have high historic, landscape, public access and natural values. The area also has public access and recreation values for SIVs associated with the Nevis River and the immediate floodplain area. Its retention as Crown land is appropriate and is strongly supported. But this inclusion again begs the question why other areas of streambed or floodplain area are not included in the review when they have similar SIVs.

4.6 Retention of 52 ha. of Lower Altitude Land by the Crown.(RI Scenic)

This small land area on the Nevis valley lower slopes has high landscape, public access and natural values. Its retention as Crown land is appropriate.

4.7 Disposal of 4,451 ha to Pioneer Generation Limited as Freehold

This proposed disposal is strongly opposed.

This area of land includes lower slopes and valley floor areas including floodplain and riparian margins of smaller streams and the main river for about three kilometres above Nevis Crossing and then over six kilometres of riparian lands adjacent to the river downstream of Nevis Crossing.

The valley floor or floodplain area above Nevis Crossing should not be freeholded as it has multiple SIVs as habitat for rare and threatened plants and skinks, a component of habitat for trout and native fish (riverbanks and riparian areas and dredge ponds), historic goldfields sites, landscape, public access for river based recreation including angling and kayaking, public amenity for recreation including nature, landscape and heritage appreciation.

Retention as Crown reserve is the preferred option for protection of land with SIVs under the provisions of the CPLA. The valley floor or floodplain area is readily accessible to people of all physical abilities and public accces is a secondary object under the CPLA.

Recommendation: Therefore the valley floor or floodplain area it should be retained in permanent Crown ownership and managed as Crown historic or scenic reserve.

Tributary streams draining the area need specific protection to maintain native fish habitat values for Smeagol galaxias. While some tributaries such as Nevis Burn qualify for marginal strips, others such as the two unnamed streams immediately downstream from the Nevis Burn and the unnamed stream with the confluence at Nevis Crossing require protection preferably through laying off strips of Crown reserve or alternatively with carefully designed secure covenant protection designed to address all the threats to native fish habitat values. Trout spawning and rearing occurs in large tributary streams including Nevis Burn and marginal strip establishment should provide appropriate protection for those values.

Recommendation: That tributary streams with native fish habitat are given appropriate protection with marginal strips, Crown reserve strips or secure, permanent covenant protection.

4.7.1 Landscape Covenant (CC landscape)

Recommendation: The condition for the CC landscape as set out in Schedule 2, point 7 should be deleted. There is ample evidence that the significant inherent values of the CC are very high and warrant protection under some form of Crown ownership with appropriate grazing concessions particularly on the valley floor or floodplain area between Nevis Crossing and Commissioners Creek.

The condition is a reflection of the prior Agreement that DOC have with PGL. The covenant gives the initial appearance of permanent protection of the SIVs present, although the values listed do not cover all values present and exclude fish habitat values, but it is designed to move aside in the event of hydro development. It is fundamentally inadequate.

Evidence presented to the KWCO hearing in June 2009 by the then DOC Otago conservator was reported on in the Southland Times as follows [Appendix 5]:

> 'Mr Connell yesterday told the hearing that if Pioneer did not obtain consents for the proposed dam, then covenants would protect the land for perpetuity. But if approval was obtained, the Conservation Minister would be contractually required under the tenure review agreement to move the covenants off to one side and allow the land to be flooded.'

Evidence presented at the KWCO hearings on native fish conservation in tributary streams draining the Ben Nevis property area covered by this covenant noted that covenants were not a secure means of protecting fish habitat. Dr Richard Allibone [See Appendix 3] noted that...:

> In 2003 as the author of The Non-migratory Galaxiid Recovery Plan (DOC 2004) I wrote Appendix 3 of the plan that presents a series of land protection levels for the protection of non-migratory galaxiid populations (Appendix 1 of this evidence) This indicates that preferred land protection is Crown ownership or covenants that allow DOC full management of the galaxiid inhabited catchment and no water abstraction is allowed. There is a descending set of protection levels that afford decreasingly levels of protect and management options. I would note that landscape covenants are not considered as a protection mechanism for non-migratory galaxiids. It is therefore my opinion that the proposed tenure outcomes present by Mr Connell do not provide a protection for Gollum galaxias in the Nevis as no populations occur on areas proposed to be return to full Crown ownership and landscape protection covenants are not an appropriate protection mechanism.

The concern expressed about the reliability of covenants to protect significant inherent values is not new, it has been expressed by DOC representatives in the past(refer to appendix 2 of Dr Allibone's rebuttal evidence at Appendix 8)

<u>Recommendation: Given the very high SIVs and the high public interest in the floodplain area the only acceptable option for the area of land between the Bannockburn – Garston Road and the river on the true left between Nevis Crossing and Commissioners Creek is retention as Crown scenic or historic reserve. Continued grazing can be accommodated in this area by way of a grazing licence.</u>

The valley flank areas within this area, above the floodplain, may be able to be dealt with through protective covenant but such covenants should recognise all values and should not be compromised by conditions giving prior agreement to future development.

4.8 Public Access Easements

Easement a-b-y-c-d : The public vehicle access easement a-b-y-c-d is strongly supported if the realignment of the existing road reserve to serve this purpose cannot be achieved. The road reserve is mostly off the alignment of the track which current exists through the area but such

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alignments have been achieved in the past as part of tenure review on Earnslceugh Station (eg. Hawkesburn Road) with the co-operation of the Central Otago District Council.

Easement y-z: This easement for Otago Fish and Game management access to the Dell Area, should become a public vehicle access easement. The Dell is a highly regarded area of the river for angling and associated recreation, and it is a common drop off and pick up point for kayakers.

Zig Zag off Easement y-c: A public access easement should be created from the existing public vehicle access easement y-c down the zig-zag track shown on the topographic map leading down into the lower gorge on the true left. This track which joins y-c about 2 kilometres south of Doolans Saddle is useful addition to river access.

Other Easements: The public access easements over the proposed freehold in several locations leading to Crown land areas, some at higher altitude, and w-x, an access point on the river all deserve support where land is freeholded.

Public access easement w-x would not be necessary where the land between the road and the river on the true left was retained as Crown reserve from Nevis Crossing to Commissioners Creek as Fish and Game believes this area deserves based on the SIVs present.

Recommendation: Public access to the Nevis River and riverside land in the floodplain area and the gorge should be properly provided for given the recognition the river has for recreational trout fishing kayaking and landscape values.

Where possible public access should be based on existing road reserves. Public vehicle acces is required to the Dell area (y-z) and down the lower valley (a-b-y-c-d). Additional public access should be provided to the gorge area (zig-zag).

Conclusion

It is important to note that DOC advice on SIVs and ecological sustainability of reviewable land has fallen short of the standard required for tebure review. In some respects it has understated the importance of SIVs, it is not complete and it is not up-to-date.

The existence of DOCs Agreement with PGL appears to have coloured the development of the PP in terms of recommendations on land for disposal as freehold with lightweight covenant protection which does not provide for all SIVs present.

The process so far is potentially open to challenge because of process issues outline in section 2.0 above. In Fish and Game's view it would be unreasonable to proceed with a review which has clearly been influenced by DOC's prior Agreement with PGL.

The failure to include unused Crown riverbed land within the review has limited the potential of the review to address SIVs, ecological sustainability and biodiversity issues. This is particularly so for aquatic habitat values for trout and native fish in the Nevis River, the river's floodplain and its tributaries. While the river water may been argued by some to be outside the scope of the review, the river is underlain by Crown riverbed and adjoined by Crown land on the floodplain

area. In this respect the PP fails to recognise life outside the reviewable land that is supported by ecosystems within the land.

Freeholding of valley floor land between the riverside farm track and the river is unacceptable given the very important SIVs present. This area, including the track, should be retained by the Crown as either Scenic or Historic reserve.

The proposed disposal of riverside Crown reserve land at Nevis Crossing is unacceptable because they have important SIVs and functions as riparian lands and will make a valuable contribution to a valley floor Crown reserve.

Retention of the whole property as pastoral lease would be a better option for the protection of SIVs and ecological sustainability than to proceeding with the PP involving disposal of land with multiple SIVs on the valley floor. Government has noted in the past that pastoral lease tenure offers protection to SIVs and the ecological sustainability of pastoral lease land.

Yours faithfully

Niall Watson

Chief Executive

Appendices:

1. Legal advice from Anderson Lloyd
2. DOC letter to LINZ Agent 27th March 2008
3. Letter from Minister of Lands Office to Minister of Conservation November 2008 and reply from Tom Grosser, Minister of Conservation ? ?? 2009
4. LINZ press release May 2009
5. Southland Times report of KWCO hearing, May 2009
6. DOC advice to LINZ agent
7. KWCO hearing evidence of Peter James Dowling of PGL
8. KWCO hearing rebuttal evidence of Richard Mark Allibone
9. Public Notice: Ben Nevis PP including CCL's statement on hydro development.
10. F&G correspondence on the public notice and the CCL's response.
11. Central Otago District Rural Review, Landscape Assessment, Report and Recommendations, Central Otago District Council Plan Change Proposals.
12. KWCO hearing evidence prepared by Kelvin Michael Lloyd

ANDERSONLLOYD

Appendix 1

25 November 2009

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For: Niall Watson

Dear Niall

Ben Nevis and Craigroy Tenure Reviews - Crown Pastoral Land Act 1998

1. You have asked us to review the consistency of the Ben Nevis and Craigroy tenure reviews with the objects of the Crown Pastoral Land Act 1998 ("CPLA").

Executive Summary

2. The primary objectives of the CPLA, which the Crown Commissioner of Lands ('the Commissioner") must take into account in tenure review and which the review must be consistent with, are ecologically sustainable management of reviewable land and protection of significant inherent values ("SIVs") of the land. Other objects include freeing up land for economic use, making public access and enjoyment of the land easier, and disposing of land into freehold title, but these are subsidiary to the main objectives.

3. The following issues, which suggest some inconsistency with the statutory objectives or undermining of the tenure review process, could be raised in Fish & Game ("F&G") submissions for the Commissioner's consideration:

   a. The Conservation Resource Reports for each tenure review property, which quantify the SIVs, are not current. If the preliminary proposal is not based on current information there is a risk that SIVs are being overlooked or not afforded adequate protection, which would be contrary to the objectives of the CPLA.

   b. The tenure review should give effect to the aims and objects of the New Zealand Biodiversity Strategy ("NZBDS"). The NZBDS sets goals and priority actions which ought to be assessed against the preliminary proposals to ensure they are being met.

   c. The existence of a prior agreement between the Department of Conservation ("DoC") and Pioneer Generation Ltd should be irrelevant to the tenure review process. To the extent that it could be demonstrated that it had in some way coloured DoC's assessment of the SIVs of the land, this could well constitute an error of law or perhaps an irrelevant consideration, and this in turn could give

grounds for a challenge to the tenure review process by way of judicial review. The Commissioner should be invited to carefully consider and address any evidence of the prior agreement influencing the tenure reviews.

d. 'ecological sustainability' under the CPLA requires the management of reviewable land in a way that safeguards the life supporting capacity of the land's ecosystems (including the ability of those ecosystems to support life outside the reviewable land) in the long term. To the extent that the preliminary proposals provide only short or medium term management, or fail to recognise life outside the reviewable land that is supported by ecosystems within the land, they are inconsistent with the object. Further, if the proposals achieved ecologically sustainable management at the cost of the protection of SIVs this would not accord with the CPLA – both objectives carry equal weight and priority.

e. Despite recognition within the Conservation Resource Reports for these properties that aquatic life is a SIV there is no associated covenant protection for this Value. The starting point is that the SIV should be protected, and if it is not protected this must be fully justified.

f. The covenant protections will fall away and all the scheduled Values will lose protection if at any time in the future hydro electric development is approved. The benefits of the covenants are potentially only temporary, and the future protection of the Values remains uncertain. It is unclear why hydro development (a secondary object under the CPLA – economic use of the land) should be entitled to proceed at the cost of protection of SIVs (a primary object). It is also unclear why hydro development should be able to trump SIVs, but other development cannot. The argument could be made that the Values are worthy of protection because of their inherent nature, or they are not worthy of protection. Giving preference to hydro development seems to sit uneasily within the statutory framework.

g. The special conditions of the covenants do not explicitly state that the covenants will not be uplifted until such time as resource consent has been obtained for hydro electric development and all avenues of appeal exhausted. As currently drafted they could potentially be uplifted earlier, and this is unsatisfactory.

h. The tenor of the public notice for these reviews, intentionally or not, suggested that **any** submissions raising hydro development would not be welcome and would be treated as invalid (in part or in whole). The advertisement did not clearly identify that discussion of hydro development in relation to Part 2 issues would be legitimate. If the public notice mislead potential submitters, this could be considered prejudicial. Submitters will have lost their only opportunity to participate in the tenure review process. To rectify this the Commissioner could re-notify the preliminary proposals, clarify the statements made within the notice about invalid submissions, and extend the date for submissions.

CPLA Objectives

4. The tenure review process is governed by Part 2 of the CPLA. It is undertaken in accordance with the objects stated in section 24:

> 24 Objects of Part 2
>
> The objects of this Part are—
> (a) To—
> (i) Promote the management of reviewable land in a way that is ecologically sustainable:
> (ii) Subject to subparagraph (i), enable reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under reviewable instrument; and
> (b) To enable the protection of the significant inherent values of reviewable land—
> (i) By the creation of protective mechanisms; or (preferably)
> (ii) By the restoration of the land concerned to full Crown ownership and control; and
> (c) Subject to paragraphs (a) and (b), to make easier—
> (i) The securing of public access to and enjoyment of reviewable land; and
> (ii) The freehold disposal of reviewable land.

5. The primary objects are ecologically sustainable management of reviewable land and protection of significant inherent values of the land. Secondary objects include freeing up land for economic use, making public access and enjoyment of the land easier, and disposing of land into freehold title.

Significant Inherent Value ("SIV")

6. SIVs are defined in the CPLA to mean "inherent value of such importance, nature, quality, or rarity that the land deserves the protection of management under the Reserves Act 1977 or the Conservation Act 1987". 'Inherent value' is defined to mean a value arising from—

> (a) A cultural, ecological, historical, recreational, or scientific attribute or characteristic of a natural resource in, on, forming part of, or existing by virtue of the conformation of, the land; or
> (b) A cultural, historical, recreational, or scientific attribute or characteristic of a historic place on or forming part of the land.

7. Therefore it is a question of identifying and assessing (with the aid of qualified advice and assistance) those inherent values that are significant within the reviewable land so as to require protection. The Conservation Resource Reports for each tenure review property assess the SIVs. The most recent of those reports for Ben Nevis and Craigroy is dated March 2006 (we note it is not current. New information has emerged about values since – for instance regarding the non-migratory galaxiid).

8. DoC revised its approach to tenure review following release in February 2000 of the New Zealand Biodiversity Strategy (NZBDS), prepared by DoC and the Ministry for the Environment, assisted by other governmental organisations. Under the approach as revised, DoC is concerned to ensure that the biodiversity strategy is heeded and applied under tenure review negotiations and outcomes - tenure review is now conducted so as to give effect to the

aims and intent of the NZBDS. The NZBDS can be found at the following website: http://www.biodiversity.govt.nz.

9. We do not analyse the NZBDS in this advice, we simply note that the preliminary proposal should be consistent with the goals and priority actions identified in the Strategy. For instance, one goal that may be considered relevant to these tenure reviews is Goal Three:

> **Goal Three: Halt the decline in New Zealand's indigenous biodiversity**
> Maintain and restore a full range of remaining natural habitats and ecosystems to a healthy functioning state, enhance critically scarce habitats, and sustain the more modified ecosystems in production and urban environments; and do what else is necessary to
>
> Maintain and restore viable populations of all indigenous species and subspecies across their natural range and maintain their genetic diversity.

10. A priority action identified to support Goal Three is:

> **Enhance protected areas and prospects for threatened species**
> New Zealand's public conservation lands and other protected areas currently secure a mix of extensive upland areas, island sanctuaries and lowland remnants. These areas fall short of representing the full range of indigenous habitats and ecosystems however, and many protected ecosystems are at threat from animal and plant pests. Threatened species often require targeted recovery action to prevent their further decline and loss.
>
> The preference will be to work with landowners to adopt sympathetic management practices. However, where this is not possible or where the ongoing management requirements are significant, additions will be made to public conservation lands. In particular, additional purchases will be made where there are scarce or under-represented habitats and ecosystems, or habitats where there are endangered species and a high risk of irreversible loss, and where public ownership is needed for effective management of the land (Action 1.1b).

11. In considering what is a 'significant' value this necessarily imports the notion of informed judgment as to those natural resources that need to be protected. A factor in coming to that judgment is the extent to which the biodiversity resource has already been diminished. In *Royal Forest and Bird Protection Society v Central Otago DC,* Environment Court, Auckland (A128/04) Judge Bollard identified that in terms of biodiversity, Central Otago has suffered a disproportionate degree of loss consequent upon human occupation. He noted that Central Otago comprised some 1.1million hectares, of which (in 2004) some 66,500ha was managed by DoC as public conservation land, or was otherwise protected under the Reserves Act 1977 or the Conservation Act 1987. A further 2752ha was protected by QE II covenants. The distribution, however, was uneven. In the alpine zone, 26.5% of the land was either within the Crown conservation estate or protected by covenant. The comparative figure for the montane zone (mean elevation 828m asl) was 4.1%, and in the lowland areas (mean elevation asl 439m), just 2.2%. Approximately 350,331ha was Crown pastoral lease land. Most of the land likely to be retained by the Crown from tenure review processes would probably lie at an altitude higher than 900m asl. This case identified that at that time DoC was well aware of the "loss factor" within Central Otago, and the critical need to protect significant areas, particularly in the montane and lowland regions. The Ben Nevis and Craigroy reviewable land includes montane and lowland areas with SIVs and therefore it seems reasonable to

conclude that these areas are in "critical need" of protection under the tenure review process.

12. There is a statutory preference within the CPLA for Crown ownership of land with SIVs, since the Crown is charged with protecting areas of significant conservation values.

13. Normally in tenure review SIVs are assessed on their merits, then proposals are made by the Commissioner for their protection, and in negotiations with the landowner there may be some peripheral 'trading off' of values to achieve a robust and acceptable outcome for both parties. The process involves a concerted endeavour to achieve an outcome that pays due heed to each side's main aspiration — conservation and protection of SIVs on the one hand, and economic rural land use opportunity on the other. While, viewed practically, the process may be said to involve compromises, the primary objectives of the process must be to ensure ecologically sustainable management of reviewable land, and to ensure that SIVs, against the background of the NZBDS, are conserved and protected.

14. However, these tenure reviews are somewhat unique - the background to them is influenced by an agreement reached between DoC and the landowner before review commenced. The existence of an agreement between DoC and Pioneer Generation Ltd entered into prior to the commencement of the tenure review process should be irrelevant to the review process, and to the extent that it could be demonstrated that it had in some way coloured DoC's assessment of the ecological and other inherent values of the land, this could well constitute an error of law or perhaps an irrelevant consideration, and this in turn could give grounds for a challenge to the review process by way of judicial review. This concern would need to be supported by evidence that SIVs may not have been robustly identified or protected in the tenure review preliminary process, and that the focus on management of the land in an ecologically sustainable way has been influenced by that agreement.

15. That concern might be supported by the fact that some SIVs appear to be given limited, or no, protection under these tenure reviews. For example, as was identified by Dr Allibone in evidence given in the hearing of the application to amend the Water Conservation (Kawarau) Order (paragraphs 27-32), the protection afforded to aquatic values – Gollum galaxias populations on the reviewable land – appears limited. Only one small population potentially occurs on areas proposed to be returned to full Crown ownership, and the proposed covenants are not considered to be an effective biodiversity protection mechanism.

<u>Ecologically Sustainable</u>

16. This key term is not defined in the CPLA and there is no relevant case law. However guidance on how the term will be applied can be found in an agreement reached by DoC and Land Information New Zealand ("LINZ") as to the meaning of 'ecological sustainability' under the CPLA (covering letter and paper dated 20 and 4 August 2008 respectively, **attached**). They agreed:

    a. "sustainable management" in relation to land resources means sustaining the life supporting capacity and productivity of the land on an ongoing basis;

b. management in a way that is ecologically sustainable will have a similar meaning to "sustainable management" under the Resource Management Act 1991, but with priority given to sustaining the life supporting capacity of the ecosystems and ecological processes on the land;

c. ecosystems may support life outside the reviewable land, for example through the supply of water or other ecosystem services to biota, people or communities;

d. promoting the management of reviewable land in a way that is ecologically sustainable means making decisions that safeguard the life supporting capacity of the land's ecosystems **in the long term**. A broad approach should be taken to this to meet the enabling interpretation of the CPLA (our emphasis);

e. As long as tenure review, taken overall, promotes the management of the reviewable land in a way that is ecologically sustainable, it is acceptable for minor components to fail to do so.

17. In our view the last point indicates willingness to 'trade off' conservation management and protection of "minor components" in favour of some of the secondary objects of the CPLA, such as economic use and freeholding land. We acknowledge that the tenure review process inevitably involves some compromise, and that may be acceptable, provided it does not compromise the primary objects of ecological sustainability **and** protection of significant inherent values.

18. In our view the two primary objects of the CPLA cannot be considered in isolation. Promoting ecologically sustainable management in a broad sense should not be achieved at the cost of the protection of SIVs. The objects are of equal status and importance in the CPLA. It thus becomes a question of weighing both objects and incorporating them within the tenure review process in order to produce a carefully analysed and well-balanced preliminary proposal for achieving the CPLA's purpose. SIVs should not become submerged and lost sight of in the mix of the preliminary proposal.

19. In conclusion the departments agreed and recommended to their Ministers that:

> "Promoting "ecologically sustainable" management in tenure review decision-making means **safeguarding the life supporting capacity of the land's ecosystems, including the ability of those ecosystems to support life outside the reviewable land.**" (our emphasis) and
>
> "A common sense application of this particular tenure review objective means that the decisions in each tenure review should be looked at as a whole to see whether, overall, they promote ecologically sustainable management."

20. Further points worthy of note include:

a. The departments recognise that an enquiry into the life supporting capacity of ecosystems is not limited to the reviewable land, but extends outside it. It should include the support those ecosystems give to life outside the reviewable land. F&G may consider this significant, as freshwater fish life in the Nevis River could fall into this

category. If the review has not considered ecosystems outside the land this would not be in accordance with the objects of the CPLA.

b. The intention is to promote long-term ecologically sustainable management of the land, not short or medium term. If aspects of the tenure review only achieve the CPLA's objectives short term then this could be considered unsatisfactory (for instance, the covenants discussed below).

c. The Minister for LINZ noted below his signature *"in some instances (e.g. around lakesides) the status quo is better than the ? tenure review outcome."* This suggests there may be cases where tenure review objects cannot improve upon the existing situation.

21. If it could be demonstrated that the object of ecologically sustainable land management under the CPLA had been compromised by prior agreement between DoC and the landowner, that would provide ground for an assertion that these tenure review processes were flawed.

CPLA - Commissioner's Obligations

22. In undertaking tenure review the Commissioner must take into account the matters outlined in section 25, including the objects of Part 2:

> 25 Matters to be taken into account by Commissioner
>
> (1) In acting under this Part, the Commissioner must (to the extent that those matters are applicable) take into account—
> (a) The objects of this Part; and
> (b) The principles of the Treaty of Waitangi; and
> (c) If acting in relation to land used or intended to be used by the Crown for any particular purpose, that purpose.
>
> (2) In acting under this Part in relation to any part of the land held under a reviewable instrument or reviewable instruments, the Commissioner must take the objects of this Part into account in the light of—
> (a) Their application to all the land held under the instrument or instruments; rather than
> (b) Their application to that part of the land alone.

Tenure Review Covenants

23. Landscape protection covenants are raised in the preliminary proposals for Ben Nevis (Appendix 11) and Craigroy (Appendix 8). The covenants have the objective of managing land marked "CC Landscape" on the designations plan so as to preserve the Values.

24. "Values" means "any or all of the Land's natural environment, landscape amenity, wildlife, freshwater life, marine life habitat or historic values as specified in Schedule 1." We observe that freshwater life values are not identified in Ben Nevis nor Craigroy's scheduled Values, despite being identified in the Crown Conservation Resources Report. Further, F&G's Resource Reports for each property identify the value of trout spawning, juvenile rearing and adult trout habitat in those areas. The F&G Ben Nevis revised report dated 11 October 2005 suggested that:

> "a covenant should be included on any land transferred to freehold, which prohibits any activities that may result in any loss of sports fish spawning and juvenile recruitment habitat in the Nevis River and/or tributaries of the Nevis River."

However the covenants do not provide that level of protection, or in fact any direct protection, for the sports fishery.

25. The standard conditions of the covenants must be read subject to the special conditions in Schedule 2. Special condition 7 (Ben Nevis) and 6 (Craigroy) record:

> "The Minister [of Conservation] acknowledges that it is intended that the Land be used for hydro electricity development, including the erection of transmission lines. Accordingly, it is agreed by the parties that a plan be prepared for submission to the Minister, which identifies the hydro electric development proposed, its location, extent, groundworks, associated services and facilities, for the Minister's consent (such consent not to be unreasonably withheld). In considering the Plan the Minister will read the provisions of the covenant, including in particular the provisions of clause 3.1, so as not to prohibit the hydro electric development but with the ability to impose such conditions as may be deemed reasonable to avoid, remedy or mitigate adverse effects upon the values identified in this covenant."

26. Therefore, the covenants have been constructed to 'move aside' to allow the landowner to undertake hydro electric development. The Minister may add conditions to protect the Values, but this will not protect freshwater life values since they are not values identified in the covenant.

27. The covenants are expressed as being 'in perpetuity' (clause 6). This is partly correct – they will remain permanently in force if there is no hydro electric development, and they will protect against any other type of activity proposed by the landowner. However, they will give way and cease to exist in the future if hydro electric development is approved. The Minister is contractually bound to lift the covenants, and not 'unreasonably withhold' consent to, or prohibit, the planned hydro electric development. In those circumstances, which are clearly contemplated as a real possibility, the covenants will not remain in perpetuity. It could reasonably be asserted that the effectiveness of the covenants as a conservation protection mechanism is undermined by the 'contractual' arrangement with the Minister.

28. Normally covenants in tenure review are designed to remove development pressures and sustain life forms and ecological processes, hence why they are described as "protective mechanisms". Here it appears that a decision has been made that it is acceptable for this component of the tenure review to fail to promote the long term management of the reviewable land in a way that is ecologically sustainable, where that will conflict with the development of the water resource for hydro generation.

29. Generally, either there are SIVs deserving of protection, or there are not. Here it is accepted that there are SIVs on the reviewable land and that they warrant covenant protection from most types of development. However, inexplicably it seems they do not deserve ecologically sustainable management or protection when hydro development is proposed. Under the CPLA the Commissioner is not entitled to compromise the Part 2 primary objectives in favour of economic use of the land, yet this arrangement appears

to be doing precisely that - this creates an uneasy tension within the statutory context.

30. It is not explicitly stated that the Minister will only uplift the covenants once resource consent for the development is obtained - the special conditions refer to submission of plans to the Minister being the trigger for the Minister's consent. Perhaps it is implicit that the Minister will not interfere in the resource consent application process that follows, and will not finally uplift the covenants until resource consent is granted and all appeals exhausted. However the special conditions could be made clearer to remove all doubt.

31. A covenant is a promise contained in a deed, and it is only enforceable as a contract between the parties to it. Interested third parties, like F&G, cannot undertake enforcement of the covenant, or have direct input into any hydro development plan approval process or conditions implemented by the Minister. The only opportunity for input to occur would be if DoC consulted with F&G once a development plan was received.

32. For completeness, although it may never be utilised, we note that under section 317 of the Property Law Act 2007 covenants can be modified or extinguished in part or in whole. The occupier of land that is subject to a covenant may apply to the District or High Court for such an order. They would have to satisfy the Court that

> (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
> (ii) the character of the neighbourhood:
> (iii) any other circumstance the court considers relevant; or
>
> (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
>
> (c) every person entitled who is of full age and capacity—
> (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
> (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
>
> (d) the proposed modification or extinguishment will not substantially injure any person entitled.
>
> (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

33. The covenants are likely to be considered unsatisfactory from F&G's perspective because:

    a. the Values identified in Schedule 1 do not include freshwater life values (and some other SIVs), therefore those values remain unprotected even while the covenants are in place;

b. the covenants will fall away and all the scheduled Values will lose protection if at any time in the future hydro electric development is approved. The conservation benefits of the covenants are potentially only temporary, and the future protection of the Values remains uncertain. The covenants do not seem to promote the long-term management of this part of the reviewable land in an ecologically sustainable way. There is a strong element of "picking winners" apparent in this arrangement. It is unclear why hydro development should be able to trump protection of the Values, but other development cannot. The argument could be made that the Values are worthy of protection because of their inherent nature, or they are not worthy of protection. Giving preference to hydro development seems to sit uneasily within the statutory framework;

c. the special conditions do not explicitly state that the covenants will not be uplifted until such time as resource consent has been obtained for hydro electric development and all avenues of appeal exhausted. As currently drafted they could potentially be uplifted earlier;

d. more is known about SIVs in the area now than was known when the Values contained in Schedule 1 of the covenants were settled upon. For instance, the Values do not appear to recognise that the Department of Conservation has confirmed Gollum 'Smeagol' Galaxias is a distinct taxa from Gollum found throughout Southland and ranked it as 'Nationally Vulnerable'. Ideally the Values should be reassessed to take into account all relevant new information. Otherwise they could be considered inaccurate and incomplete, and the tenure review process flawed for failing to take into account relevant information. Potentially important conservation opportunities could be lost;

e. under the CPLA there is a statutory preference for public access and conservation values to be protected by returning the land to full Crown ownership for management under the Reserves Act or Conservation Act. Covenants are provided for, and have their place, but are inherently a more risky protection method than direct ownership by the Crown. The statutory preference must be given some meaning.

34. We note that land freeholded under the tenure review process is not exempt from the general duty imposed by section 17 of the RMA to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the relevant landowner. As Judge Bollard noted in *Royal Forest and Bird Protection Society v Central Otago DC*, rural landowners must carry on and advance their farming and other rural activities in collaboration with maintaining and enhancing the environment, and promoting the sustainability of those natural resources that are vitally representative of the Central Otago district's inherent values and character. However, the Judge acknowledged that those valued resources remain constantly vulnerable *"to stealthy erosion and diminution through the unremitting application of a "thousand cuts", paradoxically well-intentioned in a case by case context"*. Therefore values that are not protected by the tenure review process will remain vulnerable.

Tenure Review Public Notices

35. The public notices for the Ben Nevis and Craigroy preliminary proposals stated:

> "The Commissioner will not consider any submissions which discuss the possible future use of any part of the land for the generation of electricity from the Nevis River. The bed of the Nevis River is Crown land and not part of the proposal, The purpose of submissions is to allow interested parties an opportunity to comment on whether the proposal achieves the objects of Part 2 of the Crown Pastoral Land Act 1998. Any submission or parts of submissions which discuss use of the Nevis River for hydro-electricity development will be treated as invalid."

36. In correspondence dated 29 September 2009 F&G identified to the Commissioner that the public notices were confusing to intending submitters. In correspondence to F&G dated 2 November 2009 the acting Commissioner clarified that:

> "The intention of the statement was to make it clear that it is only submissions on the preliminary proposal itself and matters contained in it that will be considered and not submissions relating to the possible broader hydro-electric development. The possible future use of the Nevis River is not a matter which arises from the preliminary proposal.
> ...those parts, or individual points as you say, that are outside the scope of my tenure review powers and functions will be disregarded, not the entire submission."

37. We agree with the Commissioner that his powers are limited to considering submissions on the merits of the preliminary proposals that relate to the objects of Part 2 CPLA. Submissions focussing upon the use of the current bed of the Nevis River for hydro electric development, or the merits of that form of power generation, may well be outside scope. Unfortunately the tenor of the advertisement, intentionally or not, suggested that **any** submissions raising hydro development would not be welcome. The advertisement did not clearly identify that discussion of hydro development in relation to Part 2 issues would be legitimate.

38. Potentially if a hydro development proceeds some of the reviewable land may be inundated by the River and/or infrastructure or structures may be placed on the land. It would be improper to invalidate submissions regarding the impact upon Part 2 objects, such as ecological sustainability and significant inherent values, because they mention "the possible future use of the Nevis River" in a hydro development or "discuss the possible future use of any part of the land for the generation of electricity from the Nevis River". A submission on the merits of allowing Part 2 Objects to be 'compromised' or 'traded' for future development of the land is a legitimate submission. The Commissioner has an obligation to consider Part 2 matters, they should not be regarded as irrelevant or collateral or be disregarded in any decision making.

39. It is difficult to know, but some legitimate submitters may have been deterred from making a submission because of the tenor of the public notice. This would be most unfortunate. If the public notice mislead potential submitters into believing their submission would be considered invalid, this could be considered prejudicial to submitters. They will have lost their only opportunity to participate in the tenure review process. If the Commissioner considers there may have been potential prejudice to submitters he ought to re-notify the

preliminary proposals, clarify the statements made within the notice about invalid submissions, and extend the date for submissions. This would serve to eliminate any potential challenge to the validity of the notification process.

40. The Commissioner will no doubt exercise great care when deciding to treat a submission (or part thereof) as invalid because:

    a. A true consultation process should include gathering information, having an open mind on the outcome before going into consultation, not promoting any particular outcome but hearing what submitters have to say and being prepared to alter the preliminary proposal. Consultation, particularly with lay submitters, should encourage rather than discourage information sharing. Unduly limiting submissions would not accord with the ideals of full and open consultation;

    b. There is limited scope for the public to participate in the tenure review process – these submissions are the only opportunity. There is no ability to submit at a later stage, or to appeal against the final proposal. The submissions are already narrowed to focus on Part 2 issues – points relating to the Conservation Act or other matters cannot be considered. On this basis the Commissioner should not unduly limit laypersons submissions;

    c. Under section 27 of the New Zealand Bill of Rights Act 1990 *"Every person has the right to observance of the principles of natural justice by any...public authority which has the power to make a determination in respect of that persons rights...or interests protected or recognised by law."* It is important that the public has full opportunity to make submissions and 'be heard' on the preliminary proposals, as public interest in ecological sustainability, inherent values of the land, and public access stand to be affected by the Commissioner's decision. As section 5 of that Act states, any limitation on that right must be a reasonable limit, prescribed by law, and demonstrably justified in a free and democratic society;

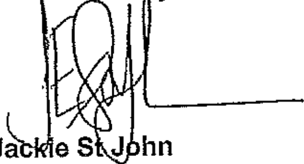
    d. Any decision of a public nature, which is "in substance public" or has "important public consequences", is a potential subject of judicial review. The presumption of review is strengthened where individuals affected by a decision would otherwise be left without any alternative form of redress (as is the case here, where the submission process is the only way of participating in the tenure review). There is potential for review of any decision by the Commissioner to reject part of a submission as invalid if relevant considerations have been disregarded or it was an unreasonable decision. The review would consider whether the decision was reached in accordance with the law, fairly and reasonably, and if successful might involve the Court substituting its decision for that of the Commissioner.

Conclusion

41. F&G might reasonably suggest in submissions to the Commissioner that there are aspects of the Ben Nevis and Craigroy tenure reviews that require close scrutiny before any final decisions or recommendations are made on the preliminary proposals. The main points that require consideration from a legal perspective are outlined in the Executive Summary above.

42. F&G is likely to have other submission points to make on the merits of the preliminary proposals.

Yours faithfully
Anderson Lloyd



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