

## **Crown Pastoral Land Tenure Review**

**Lease name: CRAIGROY**

**Lease number: PO 233**

### **Public Submissions - Part 7**

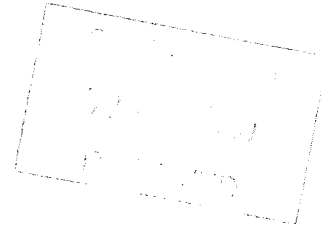
These submissions were received as a result of the public advertising of the Preliminary Proposal for Tenure Review.

**July**

**10**



2 December 2009



David Paterson  
Darroch Valuations  
P O Box 215  
DUNEDIN

**Submission on Ben Nevis and Craigroy Preliminary Proposal**

Dear Sir,

Please find attached submissions on Preliminary Proposals for Ben Nevis and Craigroy Pastoral leases and adjacent Crown land.

Yours faithfully

A handwritten signature in black ink, appearing to read "Niall Watson".

Niall Watson

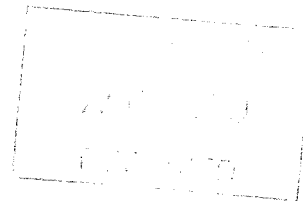
Chief Executive

*Statutory managers of freshwater sports fish, game birds and their habitats*

**Otago Region**

30 November 2009

David Paterson  
Darroch Valuations  
P O Box 215  
DUNEDIN



## **Submission on Craigroy Tenure Review Preliminary Proposal**

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

Craigroy pastoral lease and the immediately adjacent Crown Land including riverbed (Unoccupied Crown Land) and Crown reserves in the vicinity of Nevis Crossing are wholly within the Otago Fish and Game Region

### **1.0 Executive Summary**

The majority of Craigroy 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.

Craigroy 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 Craigroy Ben Nevis 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 closed 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 an 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 Craigroy 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 Craigroy and Ben Nevis that the Agreement has coloured DOC's assessment of SIVs and their recommendations on protective mechanisms. In Craigroy's PP, Schedule 2, condition 6, 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 Craigroy (and Ben Nevis) 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 skins, 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 that 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 Craigroy 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 Craigroy 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 submissions.

## 2.4 Non inclusion of adjoining Crown land in process

The Craigroy and Ben Nevis 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 Craigroy 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 Craigroy (and Ben Nevis) 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 be 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 Craigroy 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 1.3 or 1.3.1 of the Craigroy (and 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 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 Craigroy 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 Craigroy (and Ben Nevis) are not mentioned in either in s1.3.1 (p8) of the Craigroy (and 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-emphasise 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, 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 to 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.

#### **4.0 Comments on Craigroy Proposals:**

##### **4.1 Restoration of 810 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 continuation of rights to take and convey water and the proposed recreation and grazing concessions.

##### **4.2 Designation of 190 ha Scenic Reserve**

This land area has high landscape and natural values and is recreationally important. Its designation as a Scenic Reserve is appropriate.

##### **4.3 Freehold Disposal of 3442 ha. To Pioneer Generation Limited**

This area of land includes lower slopes and valley floor areas including floodplain and riparian margins of smaller streams and the main river.

The valley floor or floodplain area 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 floodplain area is readily accessible to people of all physical abilities and public access 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 Coal Creek qualify for marginal strips, others such as Barn Creek and the unnamed stream immediately upstream require protection either preferably through laying off strips of Crown reserve or alternatively 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 Coal Creek 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.

##### **4.3.1 Landscape Covenant (CC landscape)**

**Recommendation:** The condition for the CC landscape as set out in Schedule 2, point 6 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.

The covenant condition in Schedule 2 point 6 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.'

This is more explicit than the wording of the obligation placed on the Minister of Conservation by Schedule 2, condition 6 of the landscape covenant contained in the PP report. It confirms the extent to which DOC's Agreement has coloured the PP and shows there is an underlying contract between DOC and Pioneer governing this eventuality.

Evidence presented at the KWCO hearings on native fish conservation in tributary streams draining the Craigroy property area covered by this covenant noted that covenants were not a secure means of protecting fish habitat. Dr Richard Allibone [See Appendix 8, para 30] 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)

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 farm track and the river on the true right between Nevis Crossing and the upstream property boundary is retention as Crown scenic or historic reserve. Continued grazing can be accommodated in this area by way of a grazing licence.

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.

#### **4.4 Disposal of Local Purpose Reserve 1.72 ha. By Exchange**

The disposal of this small piece of Crown reserve land on the riverbank near the Nevis crossing and within the goldfield area is strongly opposed. It clearly has high public access and recreation values as well as general riparian values. Public access is a secondary object of the CPLA.

**Recommendation** The area should be retained by the Crown and incorporated into a larger Crown reserve extending across the floodplain area between the farm track alongside the river and the river itself from Nevis Crossing to Commissioners Creek.

The area fulfils all the functions of riparian land including the maintenance of the adjacent river's habitat value, maintenance of river water quality and aquatic life and the provision of public access to and along the river and recreational use of the river and the river side land.

Riparian land values are significant values in themselves and deserve to be recognised through tenure review as contributing to the ecological sustainability of reviewable land. This area of Crown reserve should not be disposed of. Its retention would be consistent with the primary and secondary objectives of the CPLA.

#### **4.5 Disposal of Conservation Land 1.65 ha Adjoining the Nevis River By Exchange**

As above, the disposal of these small pieces of Crown reserve land on the riverbank near the Nevis crossing and within the goldfield area is strongly opposed. They clearly have public access and recreation values as well as general riparian values.

**Recommendation:** The area should be retained by the Crown and incorporated into a larger Crown reserve extending across the floodplain area between the riverside farm track and the river itself between Nevis Crossing and Commissioners Creek.

The area fulfils all the functions of riparian land including the maintenance of the adjacent river's habitat value, river water quality and aquatic life and the provision of public access to and along the river and recreational use of the river and the river side land.

Riparian land values are significant values in themselves and deserve to be recognised through tenure review as contributing to the ecological sustainability of reviewable land. This area of Crown reserve should not be disposed of.

#### **4.6 Public Access Easements**

The proposed public access easement a-b is supported.

The proposed public access easement alongside the river to the upstream property boundary should be a public vehicle access easement to properly provide for recreational users of the river and adjacent areas in line with existing use at the discretion of the landholders..

**Recommendation:** Public access easement c-f, f-g, g-h, i-j be a public vehicle access easement

## 5.0 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 tebare 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 27<sup>th</sup> 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: Craigroy 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

<http://www.mfe.govt.nz/issues/water/freshwater/water-conservation/kawarau/evidence/index.html>



# 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.

#### Ecologically Sustainable

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 (Cragroy) 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.

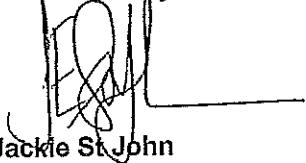
40. The Commissioner will no doubt exercise great care when deciding to treat a submission (or part thereof) as invalid because:
- a. A true consultation process should include gathering information, having an open mind on the outcome before going into consultation, not promoting any particular outcome 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**

A handwritten signature in black ink, appearing to read 'J St John', with a horizontal line extending to the right.

**Jackie St John**  
Associate  
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Department of Conservation  
*Te Papa Atawhai*

File Ref: PAL-14-04-241

27 March 2008

David Paterson  
Tenure Review Consultant  
QV Valuations  
PO Box 215  
DUNEDIN 9054

Dear David

**Ben Nevis Tenure Review**

I refer to your email of 26 March 2007 and subsequent requests for a letter expressing a definitive statement from the department that it is satisfied with the outcome of this review and that there are no inherent values of significance within the land proposed to be designated as freehold.

I have widened your brief to comment on all key aspects of the Preliminary Proposal.

The tenure review proposal for Ben Nevis largely incorporates the original recommendations made in the department's proposed designations report in 2002, and subsequent revised recommendations prepared in 2005.

Some 67% (~9745 hectares) of the pastoral lease is proposed for return to full Crown ownership as public conservation land. The area comprises high mountains exceeding 2300m, alpine lakes, fell fields, tussock grasslands and shrublands. Closer to the valley floor, extensive alluvial flats and fans contain representative examples of severely threatened wetland and dryland ecosystems which support a suite of rare and endangered plant species.

The area is suited to a variety of recreational activities including sightseeing along the Nevis Road, picnicking, fishing, kayaking, hunting, tramping, ski touring and hell skiing. The proposed conservation area will adjoin some 21,500 hectares of existing public lands comprising the Remarkables Conservation Area and Rastus Burn Recreation Reserve. In time, this area will become a core part of a Remarkables Conservation Park. Practical public access will be available into the area via the formed legal Nevis Road which adjoins the proposed conservation area for some six kilometres. Elsewhere the proposal will be accessible via 3 public access easements providing for foot, mountain bike and horse access.

The alpine basins are to be subject to a concession for hell skiing for 10 years from signing of a substantive proposal. The limited term will allow the department to undertake a management planning process commencing with the next conservation management strategy and possibly extending to more detailed planning after the creation of a Remarkables Conservation Park, with a view to providing for a range of recreational opportunities.

A separate 140 hectare conservation area protects a series of gold workings from the 1930's depression era, while a scenic reserve protects an intact red tussockland. Two separate foot access easements allow these areas to be explored as a short loop walk from the Nevis Road.

In recognition of concerns raised by four wheel drive groups regarding the range of access provisions being achieved through tenure review, seasonal vehicle access is to be secured over a farm track which links the Nevis Valley to a rough legal road which traverses a spectacular and remote section of high country, before exiting to the Kawarau Valley via Coal Pit Saddle. The department will administer a key and permit system for this route and will accept primary responsibility for road maintenance.

The entire area proposed as freehold is subject to two conservation covenants. These areas form an integral part of the impressive Nevis Valley landscape. The lower levels are overlaid with a rich veneer of historic features ranging from Moa hunter sites, early pastoral relics and a suite of mining sites. The Nevis Valley is widely acknowledged as being Otago's most intact goldfields landscape, with sites ranging from 1863 to recent. A general landscape covenant protects the majority of the area including its myriad of scattered historic sites from development beyond what has occurred to date. The level of covenant protection is similar to that afforded by the Central Otago District Plan for outstanding landscapes. The second covenant provides additional protection for areas with significant biodiversity values not being returned to full Crown ownership.

Several areas identified as having significant inherent values and originally recommended as conservation land are proposed for freeholding (but not unencumbered freeholding). In the context of securing an outcome which is overwhelmingly in the public interest, these compromises are acceptable.

A summary of these areas follows:

1. Upper sunny faces in Doolans Creek Left Branch. These lie above an unfenced boundary with extensive shrublands below proposed as conservation estate. The proposed freehold is subject to a conservation covenant which confines grazing to sheep only. It is not anticipated that sheep will push into the dense shrublands below.
2. A corridor of land in the Nevis Gorge. Scattered shrublands and a spectacular craggy landscape in this area will be adequately protected under the property wide conservation covenant.
3. Sunny faces in the Nevis Burn. Shrublands and tussockland values will be protected under a biodiversity orientated covenant which places restrictions on stocking rates, vegetation clearance and other farming related activities.
4. Sunny faces supporting shrublands and tussocklands are also proposed for freeholding in Schoolhouse Creek. These faces proposed are subject to a biodiversity orientated covenant which places restrictions on stocking rates, vegetation clearance and other farming related activities.
5. Some 200 hectares immediately to the north of Schoolhouse Flat originally recommended as conservation estate is being freeholded subject to the generic landscape covenant. This area supports some threatened wetland plant species; however most if not all of these grow in an area of red tussock, which is proposed for protection as a scenic reserve. Given that the entire Schoolhouse Flat area has a combination of farming and conservation values, it is acceptable that the most modified portion comprising some 200 hectares be freeholded, while 950 hectares are designated conservation land.
6. Approximately 45 hectares in the vicinity of the Ben Nevis homestead, recommended for protection for its historic and biodiversity values is proposed for freeholding. This area lies inside or on the margins of land which will be affected if the holder proceeds with plans for hydro electric development. The biodiversity values in this area are well represented within conservation land proposals at Schoolhouse Flat. The area contains five documented historic sites, of which one, the Ben Nevis homestead complex is

ranked as being of highest significance and is not replicated elsewhere in the Nevis Valley. Landscape and historic features are to be protected under a conservation covenant, which does however contain a clause stating that the Minister of Conservation will not unreasonably withhold consent for a hydro electric dam or its associated impoundment of water.

During consultation on Ben Nevis and Craigroy, it was agreed to freehold all areas required by Pioneer Generation Limited for possible hydro electricity development. The holders have always made it clear that their primary reason for entering tenure review is to secure freehold title over these sites. The department has endorsed the freeholding of these areas for two reasons:

1. 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 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.
2. The department made an 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.

The department's stance on the Nevis Valley floor does not inhibit other affected parties such as the Fish and Game Council and kayakers from advocating for the protection of the entire valley floor, under the public submission process. The Associate Minister for the Environment has now set up a special tribunal to consider the Fish and Game Council's request for an amendment to the WCO to close off the Nevis exception. That is part of a process under the Resource Management Act which is separate from the tenure review.

On balance, and in association with tenure review on Craigroy, the department considers Ben Nevis to be a good tenure review outcome and strongly supports its progression to Preliminary Proposal stage.

Yours sincerely



Jeff Connell  
Conservator / *Manabautū*





# Hon David Parker

APPENDIX 3

PARLIAMENT BUILDINGS, WELLINGTON, NEW ZEALAND TELEPHONE 64 4 470 6559, FACSIMILE 64 4 472 3617

To: Brian Usherwood, LINZ

24 MAR 2009

- For your action
- Returned with thanks
- For comments
- For your information
- For your approval
- Please return
- As requested
- For draft reply
- As per our telephone conversation
- With compliments

Brian - Ben Mevius a Craigroy TRS have gone to Minister of Conservation's Office today for the Minister's consideration. Our note to her is attached, and raises a range of issues.

From: John Blincoe Position: Snr Advisor Date: 7/11/08

7 November 2008

Senior Private Secretary (Attn: Gavin Rodley)  
Minister of Conservation

**BEN NEVIS AND CRAIGROY TENURE REVIEWS  
PRELIMINARY PROPOSALS**

1. Hon Parker has received reports of 8 July 2008 from Land Information New Zealand on these preliminary proposals, prepared under delegation from the Commissioner of Crown Lands (CCL).
2. Hon Parker has an opportunity to comment on the proposals, which before they proceed must receive his funding approval.
3. In this process, he is required to consult the Minister of Conservation on both proposed outcomes and funding. Accordingly, the reports are attached for your Minister's consideration.
4. In consulting your Minister, Hon Parker brings to her attention the matters outlined below.

**Cabinet policy**

5. Table 1 of both reports records the point raised by the Otago Fish and Game Council re its opposition to

... a hydro-electric development proposed by Pioneer Generation Limited post-TR that will inundate some areas of land adjacent to the Nevis River

and responds to the point by stating that

Post-TR land use is not a matter that can be dealt with under the CPLA, and is therefore outside the scope of this TR. Fish and Game has been advised of this, and that any issues with the proposed hydro development will be addressed under the appropriate legislation, which includes the RMA 1991.

6. However, last year Cabinet [see CBC Min (07) 23/19]:

agreed that high country pastoral lease properties with highly significant lakeside, landscape, biodiversity, or other values that are unlikely to be protected to the satisfaction of the Crown by the tenure review process be excluded from the process

agreed that for all non-lakeside properties currently in tenure review, the process should continue until DoC has identified a property's significant inherent values [SIVs] and whether they are practical and realistic to sustain through tenure review.

7. The response to the Fish and Game point does not appear to be consistent with the Cabinet policy, which was developed because Cabinet was unconvinced that RMA processes would adequately protect certain values post tenure review. In these tenure reviews, therefore, should potential future developments be considered in assessing whether SIVs would be adequately protected on the land proposed for freeholding?

**Water Conservation (Kawarau) Order 1997**

8. A Special Tribunal has before it an application from the New Zealand and Otago Fish and Game Councils to amend the Water Conservation (Kawarau) Order 1997, in respect of the Nevis River. The application seeks to impose a prohibition on damming the river, along with conditions on minimum flows. The Order as it stands could allow inundation of a specified stretch of the river if certain conditions were met. The application is being made in light of increased knowledge of values in the

Nevis since the original Order was finalised in 1997. (Note that Hon Parker is familiar with the original Order because he acted as legal counsel on it in the early 1990s.)

9. The Ministry of Economic Development (MED) has made a submission to the Tribunal (with Hon Parker's approval in his capacity as Minister of Energy) outlining the Government's energy objectives for the Tribunal's consideration, while not commenting on the potential local environmental effects of particular developments. MED notes, *inter alia*, that:

- energy developments should not occur at any cost and that decision-makers must have regard to the adverse environmental effects associated with proposed generation technologies
- a hydro scheme on the Nevis would make a modest contribution to increased generation capacity
- this contribution may need to be seen in the context of the significant amount of existing hydro generation development in the Otago-Southland region, and the use of a number of other rivers in the region for irrigation purposes
- while the Government's renewable electricity target would be met by some new hydro generation, the majority of new renewable generation would likely be wind or geothermal, which would be economic to develop.

**Informing Hon Parker's response to the CCL**

10. Hon Parker would particularly appreciate your Minister's views on whether:

- he should be satisfied that CBC Min (07) 23/19 has been appropriately applied to these tenure reviews and, if not, whether he should defer making a decision on funding the reviews until he is so satisfied
- it would be appropriate to defer a funding decision until the Special Tribunal has made a decision on the application to amend the Water Conservation (Kawarau) Order 1997, so he can be informed as to what further restrictions may be imposed on land proposed for freeholding in the tenure reviews
- the assessments by the Department of Conservation (DoC) of the SIVs in the areas proposed for freeholding (including the area that would be inundated by the hydro proposal) are up to date from a 2008 perspective
- the proposed inundation footprint has been taken as a given in the tenure review proposals (subject only to RMA etc processes), notwithstanding any SIVs present
- the landscape covenants to be held by DoC (see paras 12 and 13 respectively of the two reports) allow for the proposed inundation footprint and, if not, whether, in respect of the footprint, they can be displaced by the water conservation order or any amendment to it, or by other resource management processes.



John Blincoe  
Senior Adviser to Hon David Parker  
**Minister for Land Information**

*Attachments:*

08. B. 0493

12 MAR 2009

Hon Dr Richard Worth  
Minister for Land Information

Dear Richard

Just prior to the General Election, the previous Minister of Land Information sought the view of the previous Minister of Conservation on the proposed outcomes and funding of the Ben Nevis and Craigroy Tenure Review Preliminary Proposals.

I have studied the proposals and I believe they should proceed and be publicly notified.

Yours sincerely

**Signed Tim Groser**

Tim Groser  
Minister of Conservation



**Media statement: Ben Nevis and Craig Roy Tenure Reviews**

5 May 2009

Two properties in the Nevis Valley in Central Otago, Ben Nevis and Craig Roy, currently undergoing tenure review are nearing the public submission stage.

"There has been speculation in the media about whether or not the Department of Conservation has entered into an agreement with Pioneer Generation that it would be allowed to build a power station in the valley," said Land Information New Zealand (LINZ) General Manager Business Support, Brian Usherwood.

"LINZ wishes to clarify this situation with regard to tenure review.

"The Crown Pastoral Land Act 1998, which governs tenure review, does not provide for decision-makers under the Act to take into account what could happen in the future to land that is freeholded as a result of tenure review.

"Future land use is a matter for regional and district planning processes under the Resource Management Act," said Mr Usherwood.

"LINZ is not aware of any agreement to 'build a power station in the Nevis valley'. While we understand there was an historical agreement between the Department of Conservation and Pioneer Generation's predecessor Central Electric regarding the Kawarau Water Conservation Order, this information is outside the scope of the tenure reviews for Ben Nevis and Craig Roy and not considered as part of the statutory process.

The tenure review proposals for the two properties are nearing the point where they will be released for public submission. Mr Usherwood said this provides any member of the public or interested organisations with an opportunity to make a submission on the proposed outcome of the tenure reviews.

The submissions are then analysed and taken into account before the next stage of the tenure review process.

Ends

For more information about the tenure review process, visit [www.linz.govt.nz](http://www.linz.govt.nz)

Contact for media queries:  
Dionne Barton  
Land Information New Zealand  
Ph 04 460 2718 or 027 444 4223

# Dam consents would override Nevis covenant

By MARK HOTTON in Cromwell

**COVENANTS** designed to protect land in the Nevis Valley will be worthless if Pioneer Energy obtains the consents required to build a hydro-electric dam.

The revelation was made by Department of Conservation Otago conservator Jeff Connell yesterday at a special tribunal hearing in Cromwell that is considering whether damming of the Nevis River should be prohibited.

Pioneer is the leaseholder of the Ben Nevis and Craigroy stations in Nevis Valley, which are undergoing tenure review.

The electricity-generation company wants to freehold the footprint of a proposed 40-megawatt dam on the Nevis River that would flood up to 8km on the river and create two dams, one the size of Lake Hayes, near Queenstown.

In return for obtaining freehold of about 7800ha, Pioneer plans would vest significant sections of the stations into DOC protection, including 8800ha on the Hector Mountains that would become public conservation land.

DOC has taken a neutral stance on the application by Fish and Game to prohibit dams on the Nevis. This is in part because of a deal done with Pioneer 13 years ago when the electricity generator



Jeff Connell

agreed to support a water conservation order for the Kawarau and its tributaries, which include the Nevis River, in exchange for allowing a section of the river to be flooded for

hydro-electricity development.

Mr Connell yesterday told the hearing that if Pioneer did not obtain consents for the proposed dam, then the 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.

DOC could not support an application to prohibit damming the river as that was allowed under the existing water conservation order, which it had agreed to.

Going against that agreement would mean it was acting in bad faith.

Mr Connell said DOC had to constantly weigh up whether the Government's policies and the public interest were better served by making a compromise in a tenure review.

# Heritage 'needs preservation'

By MARK HOTTON in Cromwell

**THE** Nevis Valley's heritage was of national importance and needed preservation from possible destruction from any proposed hydro-electric scheme, a tribunal in Cromwell was told yesterday.

Representatives from New Zealand Historic Places Trust gave evidence yesterday, outlining the Maori and goldmining heritage sites and their significance.

Otago Southland area manager Owen Graham said little was known about the valley's historic and cultural heritage values when the previous order was being considered, in 1992. Since then, there had been more assessment in 1994 and 2005, which helped develop a better understanding, he said.

The trust was concerned about the potential damage any power generation scheme would have on the sites.

Tribunal chairman Richard Fowler asked why there were only

two sites - Maori middens and stone hotel ruins - listed on the trust's register of historic places.

Mr Graham said there was only a limited understanding of the valley's heritage and the application offered an additional chance to protect what was yet to be found.

Trust archaeologist Dr Matthew Schmidt said there were 62,000 recorded archaeological sites in New Zealand and while the trust was trying to register as many as possible, it was a lengthy process.

In his evidence, Dr Schmidt said the archaeological landscape of the lower Nevis Valley was of "national importance".

The impact of development in Central Otago along other mined rivers meant no other valley or waterway in the province could be seen to offer a virtually undisturbed snapshot of the varied human use during a 700-year period. The loss of any part of that heritage would "severely diminish" the valley's history, he said.