



SUBMISSION

From: Royal Forest and Bird Protection Society of New Zealand Inc
Royal Forest and Bird Protection Society of New Zealand (Hastings/Havelock North branch)
Royal Forest and Bird Protection Society of New Zealand (Central Hawke's Bay branch)

Date: 3 March 2015

Re: RUAHINE FOREST PARK – REVOCATION OF SPECIALLY PROTECTED STATUS AND LAND EXCHANGE

Summary of submission

1. The proposal to revoke the conservation park status of part of the Ruahine Forest Park ("Conservation Land") in order that it may be disposed of by exchange is unlawful, as:
 - a. it is being proposed for an improper purpose; and
 - b. there is no proper basis for revoking the conservation park status of the Conservation Land.
2. The proposed revocation is contrary to the Conservation General Policy and the Hawke's Bay Conservation Management Strategy.
3. The proposed land exchange is unlawful. Disposal by exchange of 22 ha of high value conservation land goes beyond the proper scope of the section 16A power.
4. The proposed land exchange will not enhance the conservation values of land managed by the Department or promote the purposes of the Conservation Act. The Department's assessment that the proposed exchange reflects an enhancement of conservation values cannot be relied upon. It is perfunctory, inaccurate, based mainly on information provided by Hawke's Bay Regional Investment Company Limited, and inappropriately disregards certain values of the conservation Land on the basis that "DOC chose not to raise this issue in its submission on the dam proposal [the resource consent application]".¹
5. Forest & Bird wishes to speak to this submission at a hearing.

Revocation of specially protected status

Proposal is unlawful

6. Revocation of the conservation park status of land in order for it to become stewardship land and thus be able to be disposed of by exchange is not a good and proper purpose, and is contrary to the Conservation Act's objective. The proposed exercise of the Minister's discretion to revoke conservation park status in a manner contrary to the statutory objective is unlawful.

¹ File Note *Subject: Assyst Request (R56997): Proposed land exchange at Ruataniwha Dam* dated 21 November 2014.

7. As former forest park, the Conservation Land is “deemed” conservation park.² Upon being declared to be held for conservation purposes³, the Land becomes conservation park.⁴ Conservation parks are to be managed firstly so that their natural and historic resources are protected, and secondly to facilitate public recreation and enjoyment (subject to the protection purpose).⁵ It is required to be managed in a manner consistent with those purposes.⁶
8. The Conservation Act 1987 expressly limits the manner in which different categories of conservation land may be used for commercial purposes or disposed of. No conservation area or interest in a conservation area may be disposed of except in accordance with the Conservation Act.⁷ Stewardship land may be disposed of, or exchanged, or a concession may be granted in relation to it.⁸
9. The Act does not contain a provision providing for the disposal or exchange of conservation parks. The ability to dispose of stewardship land by exchange for private land was added to the Act in 1990⁹. The Conservation Law Reform Bill 1989 originally provided for all categories of conservation land to be disposed of by land exchange.¹⁰ This was deliberately changed at the select committee stage to limit land exchanges to stewardship land (and, separately, marginal strips). This shows a clear statutory intention for the power to exchange conservation land to be limited to stewardship land.
10. For conservation parks, commercial access is only available if the statutory tests for granting a concession¹¹ are satisfied. The statutory tests for a concession are not satisfied in this case. When the applicant applied for a concession to inundate the Conservation Land on 26 June 2013, the Department’s draft report on the application determined that the statutory tests for granting a concession were not satisfied, and the application should be declined under section 17T(2) of the Act, because:
 - a. The effects of flooding the Conservation Land cannot be avoided, remedied or mitigated in any way;¹²
 - b. The area could no longer be managed to protect the natural resources of the Park, and due to the permanent damage to the Conservation Land, granting the concession was deemed to be inconsistent with the purpose for which the land is held;¹³

² Section 61(2) Conservation Act 1987.

³ Under section 7(1), as provided for in section 61(2).

⁴ Section 61(3) provides that when deemed conservation park land is declared to be held for conservation purposes under section 7(1), it is deemed to have been declared to be held for the purpose of a conservation park under section 18(1).

⁵ Section 19.

⁶ Section 18(5)

⁷ Section 16.

⁸ Sections 26, 16A, and Part 3B respectively.

⁹ Conservation Law Reform Act 1990, section 11.

¹⁰ Clause 11.

¹¹ Under Part 3B.

¹² Section 17U(2)

¹³Section 17U(3)

- c. While this is a small portion of land, particularly in comparison to the total area of the Park, the values of the Conservation Land are such that the application is inconsistent with the terms of the Conservation Act 1987 and the relevant Conservation Management Strategy.¹⁴
11. On that basis, the concession application ought to have been declined by 22 July 2013.¹⁵ On 22 July 2013 the Concession Application was put on hold at the Applicant's request. Its "on hold" status has been extended several times, most recently being extended (on 19 February 2015) to 25 August 2015.¹⁶
 12. Section 18(7) provides that the Minister may vary or revoke the purpose for which specially protected land is held. The provision does not set out any statutory test or relevant considerations. This does not mean that specially protected status may be revoked for any reason. The provision must be used in a manner consistent with the objective of the Conservation Act.¹⁷
 13. The High Court has held that the objective of the Conservation Act is "to ensure that land which has been reserved for conservation purposes should be so reserved unless there is a good and proper basis for uplifting the protection which has been placed upon the land."¹⁸ This objective is found in:
 - a. The long title of the Act and the Department's functions as set out in section 6.
 - b. Section 7(1) which provides that where land is declared for conservation purposes, it shall, subject to the Act, be thereafter so held.
 - c. Section 18(5), which provides that every area held under the Act for one or more of the purposes described in subsection (1) (which includes conservation park purposes) shall be managed in a manner consistent with that purpose, and that nothing in sections 19 to 24 limits the generality of section 18(5). The Act does not distinguish between "deemed" conservation park, and declared conservation park.¹⁹
 - d. Section 19, which requires every conservation park to be managed firstly so that its natural and historic resources are protected, and secondly to facilitate public recreation and enjoyment. Protection, in relation to a resource, means maintenance, so far as is practicable, in its current state; but includes: (a) its restoration to some former state; and (b) its augmentation, enhancement, or expansion.

¹⁴ From Draft Officers Report on Hawke's Bay Regional Investment Company Limited Application to Inundate Public Conservation Land dated 15 July 2013

¹⁵ Section 17T(2)

¹⁶ Letter David Bishop to Forest & Bird dated 24 February 2015.

¹⁷ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030; *Buller Electricity Limited v Attorney-General* [1995] 3 NZLR 344, page 11-12.

¹⁸ *Buller Electricity Limited v Attorney-General* [1995] 3 NZLR 344, page 13.

¹⁹ Section 61(3) provides that when a deemed conservation park is declared to be held for conservation purposes under section 7(1), it is deemed to have been declared to be held for the purpose of a conservation park under section 18(1).

- e. Provisions which provide for commercial access to conservation park land by way of a concession where the statutory requirements for a concession are satisfied (such requirements not being satisfied in this case).
14. The Department's intention to use this land for a land exchange does not amount to a good and proper basis for uplifting the protection which has been placed upon the land. That is apparent from the clear statutory intention to limit land exchanges to stewardship land. Revocation for that purpose is contrary to the Conservation Act's objective.
15. As discussed in the Draft Officers Report the Conservation Land retains its high conservation values. It triggers all four of the "National Priorities for Protecting Rare and Threatened Biodiversity on Private Land" and there is no doubt that it is nationally significant indigenous vegetation and habitat. Those values are consistent with retaining the Conservation Land's conservation park status. There is no good and proper basis for uplifting the protection which has been placed upon the land.
16. The exercise of a discretion in a manner contrary to the statutory objective is unlawful.
17. The proposal is also an improper use of the stewardship land classification. The Minister's introductory statement to the Conservation Bill in December 1986 indicated an intent that stewardship land status would be used for "land for which no end use has been decided". The stewardship land provisions should not be used to enable the Minister to deal more freely with land which, as deemed conservation park, has been determined by Parliament to be held for the purpose of a conservation park.
18. Advice on this proposal by Department officials to the Minister of Conservation²⁰ states that:
- Conservation parks are held and managed for the protection of natural and historic resources and to facilitate recreational use. **It will be necessary to decide that the area to be revoked does not need to be retained as part of the park for those purposes.** Those are the particular values conservation parks are intended to protect. In this instance there is no special emphasis on identified ecological values as there would be if the area was an ecological area but any special conservation values present on the area will also need to be taken into account.*
19. This "test" (*that the area to be revoked does not need to be retained as part of the park for those purposes*) is correct insofar as the Department needs to be satisfied before forming an intention to revoke its status that the land does not need to be retained, in terms of the objective of the Conservation Act and the values of the land.
20. However, to the extent that this paragraph suggests that the land's status can be revoked if it is not required "as part of the park" (presumably with reference to the impact of the loss of this area on the rest of the conservation park), this is incorrect. The proper question is whether there is a good and proper basis for uplifting the protection which has been placed upon the land under consideration (in this case, by the operation of section 61(2) and (3)).
21. In any event, the Department does not appear to have applied that test. Documents provided in response to Forest & Bird's Official Information Act request do not demonstrate any consideration of whether the Land's status can properly be revoked, or any assessment

²⁰ Submission initiated by the Department, dated 21 November 2014, Ref PAL-06-23-01-01

of the land's values for the purposes of that assessment. The Department has focussed entirely on whether the proposed land exchange meets the section 16A exchange requirements. The Submission to Minister of Conservation states that *"Forming the intention to revoke this status is predicated on a decision that the land exchange should be progressed, since that is the only reason that revocation would proceed"*. The Department's approach appears to be that if section 16A is satisfied, this is a sufficient basis to revoke specially protected status.

22. This approach treats section 16A as if it applied to conservation park land, which it deliberately does not. The decision as to whether to revoke the conservation park status of the Conservation Land should be taken separately from the decision whether it should be exchanged as stewardship land (if its conservation park status is properly revoked for a lawful reason). Conflating the relevant considerations of the two decisions in order to provide a basis for the revocation is unlawful.

Conservation General Policy and Hawke's Bay Conservation Management Strategy

23. The Department is required to administer and manage all conservation areas and natural and historic resources in accordance with the Conservation General Policy and any relevant conservation management strategies.²¹
24. The proposal is contrary to the Conservation General Policy and the Hawke's Bay Conservation Management Strategy. The Conservation General Policy sets out when it is considered appropriate to review the classification of land:

6 (b) Subject to statutory requirements, the classification of any public conservation lands may be reviewed from time to time to ensure that the classification of such lands continues to either:

- i. give appropriate protection and preservation for their natural resources, and/or historical and cultural heritage; or*
- ii. give appropriate protection and preservation for their educational, scientific, community, or other special features, for the benefit of the public; or*
- iii. enable integrated conservation management identified in conservation management strategies or plans; or*
- iv. provide for access and enjoyment by the public where that is in accordance with the purposes for which the land is held; or*
- v. reflect the values of public conservation lands that are present; or*
- vi. enable specified places to achieve conservation outcomes in the future.*

The proposal does not fall within any of those triggers for classification review.

25. The Conservation General Policy also states that Land disposal may be considered where the legislation to which it is subject allows for disposal and the land has no, or very low, conservation values (Policy 6(c)) but that land disposal should not be undertaken where the land in question has international, national or regional significance; or is important for the survival of any threatened indigenous species (Policy 6(d)). The Department's advice confirms that the Land meets those criteria, and so land disposals "should not be undertaken".

²¹ Section 17A

26. The Hawke's Bay Conservation Management Strategy states in relation to Land Administration (Section 3.7) that:

(ii) The Department will review the status of areas under its management and proceed to appropriately alter them if necessary. This may result in a change of status to give greater protection to natural or historic values, or it may result in disposals or exchanges of lands which have low natural or historic value.

The Land does not have low natural value. The proposal to revoke the status of a high natural value area is not consistent with the Hawke's Bay CMS.

Land Exchange

27. The land exchange proposal is unlawful.

Improper use of land exchange provision

28. Section 16A was not intended to provide a mechanism for disposal of significant areas of the conservation estate with high conservation values. It "enables boundary adjustments to be made and is a useful tool to enable a speedy rationalisation of a conservation area".²² Reflecting its purpose, the land exchange provision is simple and non-specific. There is a requirement to consult the local Conservation Board, but not the public. The Minister only needs to be satisfied that a land swap will "enhance the conservation values of land managed by the Department" and promote the purposes of the Act. Use of section 16A to enable the disposal by exchange of 22 ha of high value conservation park (following revocation of that status) is to use it for an improper purpose.

29. The limited scope of section 16A is obvious when section 16A is compared to section 26 (disposal of stewardship areas) which requires public consultation, and includes considerations in relation to the effect of the disposal on adjacent conservation areas or land. The High Court has held that section 26 may only be used where there is a good and proper basis for uplifting the protection which has been placed upon the land (*Buller Electricity Limited v Attorney-General* [1995] 3 NZLR 344).

Exchange does not enhance the conservation values of land managed by the Department and promote the purposes of the Act.

30. The Department's assessment²³ that the proposed exchange reflects an enhancement of conservation values cannot be relied upon. It is perfunctory, inaccurate, based mainly on information provided by Hawke's Bay Regional Investment Company Limited, and inappropriately disregards certain values of the conservation Land on the basis that "DOC chose not to raise this issue in its submission on the dam proposal [the resource consent application]".

31. The assessment File Note states that freshwater issues have not been considered. It is not clear why the Department has not assessed the freshwater ecological values of the two

²² Conservation Law Reform Bill: Report to the Planning and Development Select Committee by Officials of the Department of Conservation, 27 October 1989, p. 46

²³ File Note *Subject: Assyst Request (R56997): Proposed land exchange at Ruataniwha Dam* dated 21 November 2014.

sites. Evidence before the Board of Inquiry²⁴ indicates that threatened fish species have habitat within the Conservation Land proposed for exchange.

32. When discussing matters critical to the assessment of the exchange, the assessment File Note frequently uses equivocal terms such as:

- a. “there is likely to be similar habitat to that which is being inundated”.
- b. “it will be duplicated within the Park”.
- c. [The land] “is probably not actively managed”.
- d. “Most of this appears to be incorporated in the Smedley Exchange Block”
- e. “I assume the significance criteria would have been met for most of [the conservation land]”
- f. “There will be similar habitats to that which will be lost”.

33. This approach is based on assumption and surmise, and is an inadequate approach to a technical assessment that is intended to form the basis of a statutory decision. The Department should have properly determined the facts that are then relied on to draw the conclusion that the proposed exchange will enhance conservation values.

34. The assessment File Note does not consider the extent to which each area of land contains threatened land environments. This is highly unusual, as in our experience this is a matter which the Department invariably considers. The four National Priorities for Protecting Rare and Threatened Biodiversity on Private Land (MfE and DOC, 2007) are widely used as national assessment criteria for ecological values. The first National Priority is protection of Threatened Land Environments of New Zealand. Acutely threatened land environments are those land environments of which nationally less than 10% remains in indigenous cover. Chronically threatened land environments are those where nationally less than 20% remains in indigenous cover. An assessment of the land exchange in terms of the Threatened Land Environments and National Priorities does not support the exchange:

- a. 99.1% of the 22 ha conservation Land comprises acutely threatened (16.6%) and chronically threatened (82.5%) land environments.
- b. In contrast, of the remaining indigenous vegetation on the Smedley land, 29.95ha falls within the chronically threatened land environments, and none is within the acutely threatened land environments category. Most of the Smedley land that is in indigenous vegetation (about 161 ha) is on “less reduced and better protected” land environments. Protection of those land environments is not a National Priority.

35. The second National Priority is protection of wetlands. The presence of an oxbow wetland on the true right of Dutch Creek triggers Priority 2 for the conservation Land. The oxbow wetland habitat type does not appear to be represented elsewhere in the Ruahine Forest

²⁴ From Dr Young of Cawthron, called by Hawke’s Bay Regional Investment Company Ltd. All evidence before the Board of Inquiry is available at <http://www.epa.govt.nz/Resource-management/Tukituki/evidence/Pages/Evidence.aspx>

Park.²⁵ This is contrary to the Technical Advisor's view that "there is likely to be similar habitat to that which is being inundated in the main block of the Park... it will be duplicated within the Park". The oxbow wetland contains diverse indigenous species, is hydrologically intact and is well-connected to surrounding indigenous vegetation, habitats, and the riparian margins of Dutch Creek. In contrast, the wetland within the Smedley block is has been classed as a seepage (A treeland with podocarps (e.g. kahikatea and rimu), lacebark, manuka, cabbage tree linked to a seep zone with remnant sedges, fern species, blackberry, pasture grasses and herbs)²⁶ and is highly degraded.

36. The Conservation Land includes a small area of braided river, which triggers the third National Priority for Protection (Naturally Rare Ecosystems).
37. The fourth National Priority is protection of habitats of threatened and declining species. The Conservation Land supports North Island long tail bat (including maternity roosts), North Island fernbird, NZ falcon and red mistletoe (not all of these are identified in the Technical Advisor's File Note). The Smedley land is not known to support any threatened or at risk species. The potential for the Smedley land to support threatened species in future is highly uncertain.
38. If the Department "chose not to raise"²⁷ the issue of the dam's impacts on long-tail bats in its submission on the Ruataniwha Dam resource consent application, that is entirely irrelevant to its present assessment of the values of the two sites. It is concerning that a supposed technical assessment by an ecologist would consider policy issues such as whether the Department had raised a matter in a separate context. This suggests a lack of independence by the author of the assessment.
39. The importance of the Conservation Land as long tail bat roosting and foraging habitat is a highly relevant aspect of its value that ought to be considered. The Smedley Block is not known to be bat habitat. The Conservation Land has been undervalued due to its value as bat habitat having been disregarded.
40. The assessment of the values of the Smedley land explicitly disregards the impacts that the Ruataniwha Dam and reservoir will have on those values (the "Current values" assessment)²⁸. The reservoir, if constructed, will abut the Smedley land, causing edge effects on the vegetation and habitat. Clearance of 0.39 ha of ecologically significant black beech will be required (on a chronically threatened land environment) to replace the lost forestry road access. Any freshwater fishery values will be impacted by the loss of fish passage past the Ruataniwha Dam downstream of the Smedley land.
41. The question under section 16A(2) is whether the exchange will enhance the conservation values of land managed by the Department and promote the purposes of this Act. The

²⁵ Mr Kessels' Evidence in Chief to the Board of Inquiry considering application for resource consents for the Ruataniwha Water Storage Scheme included the statement that: "**Apart from the small area of oxbow wetland**, these habitat types appear to be well represented elsewhere in the Park..." (paragraph 7.11)

²⁶ Terrestrial Ecology Report, Kessels and Associates.

²⁷ File Note *Subject: Assyst Request (R56997): Proposed land exchange at Ruataniwha Dam* dated 21 November 2014.

²⁸ The Kessels' report at 3.3.3, states that '*On a 'current values' basis however, it is the present situation that applies (without the dam) in assessing relative conservation values lost and gained through any exchange of land*'. The Department's FILE NOTE takes the same approach.

actual values of the land that will be received in exchange, rather than the theoretical values of the Smedley land without the Ruataniwha Dam, should be assessed. Clearly if the dam would inundate the entirety of the Smedley land, the Department could not ignore that impact and assess the Smedley land on a “Current values” basis. It follows that the inevitable or reasonably foreseeable effects of the Ruataniwha Dam on the Smedley land must be taken into account in assessing its values.

42. There is also an inconsistency in an approach which discounts foreseeable future adverse effects on the Smedley land, but takes into account the potential for enhancement of values, for example by removing grazing.²⁹
43. For all of the above reasons, the Department’s assessment that the proposed exchange enhances conservation values cannot be relied upon.
44. In addition, if the Smedley land were considered to be a desirable addition to the conservation estate, it would have been identified as a Recommended Area for Protection. PNAP surveys have identified RAPs in the area (Smedley Bluffs, Mangaoho 1 &2) but did not identify the Smedley land as a RAP.
45. The proposed land exchange will not enhance the conservation values of land managed by the Department, or promote the purposes of the Act.

²⁹ For example, Kessels’ report at 3.6: *Aside from 4.4 ha and some tributary escarpments, most of the indigenous vegetation remnants are grazed. This offers opportunities for enhancement of values.*