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Dear David

RUATANIWHA WATER STORAGE SCHEME –REVOCATION OF PART OF RUAHINE CONSERVATION PARK

1. Forest & Bird provide these submissions in response to the letter of counsel for HBRIC dated 21 May 2015 (received by Forest & Bird on 19 June 2015). Forest & Bird do not agree with the position set out in that letter.
2. Forest & Bird's position is that the Minister must make two preliminary decisions:
 - (a) Whether the land ought to be declared as being held for conservation purposes under s 7(1) of the Conservation Act 1987 (**Act**); and
 - (b) If so, whether that status should be revoked under s 18(7).

If the Minister approaches either of these decisions with a view to enabling the land to become stewardship land, so that it may be disposed of by way of a land exchange, then the Minister will have acted in error of law.

Declaring land as being held for conservation purposes under s 7(1)

3. Prior to the commencement of the Act, the land was a forest park and so under s 61(2)(a) is deemed to be a conservation park. In order for any steps to be taken with the land it must first be declared to be held for a conservation purpose under s 7(1).¹ These matters are addressed in Forest & Bird's earlier submissions, and not repeated here, other than to note that the order of events set out in the 5th paragraph of Mr Williams' letter is incorrect. The land will be held for conservation purposes from the point at which it is declared under s

¹ Or vested in a State enterprise, but that is not relevant.

7(1) to be so held. It is not held for conservation purposes as a consequence of its specially protected status being revoked, as Mr Williams states.

4. Setting that aside, the legal argument from HBRIC appears to be that an end purpose of exchanging the land can be taken into account when deciding whether land should be held for conservation purposes. This is wrong.
5. Allowing land to be disposed of by way of a land exchange, particularly where the ultimate end is to enable the land to be flooded, is inherently not a conservation purpose. Indeed, it is antithetical to a conservation purpose. It is not open for the Minister to declare that land is to be held for a conservation purpose when the underlying reason for making that declaration is for a non-conservation purpose. In doing so the Minister would be acting in error of law and with improper purpose.

Should status be revoked under s 18(7)

6. If land is held for conservation purposes, a decision to revoke that status must be made only if the Minister is satisfied that the land is no longer required for conservation purposes. That is the clear and unavoidable conclusion of *Buller Electricity Ltd v Attorney-General*. The ratio of the decision is:

When the Act is looked at as a whole, there is no basis upon which the Minister could sell the land or otherwise dispose of it unless he was satisfied that it was no longer required for conservation purposes. The Minister could not properly give consideration to social and economic or other factors.

7. As such, the HBRIC argument that it is open to the Minister to take into account the exchange proposal is wrong. The exchange proposal is not a conservation purpose – as noted above, disposing of and then flooding the land is antithetical to its conservation. Taking into account the exchange proposal would be taking into account factors unrelated to the conservation purposes of the land and so is not available to the Minister.
8. The argument advanced by HBRIC would see the Minister err in law by collapsing the distinction between conservation park land and stewardship land. In essence, the HBRIC position is that the Minister can make an overall assessment of its portfolio of assets without specific assessment of the subject land and its status, such as would enable the Minister to revoke the conservation park status on the basis that other land will be gained in its place.
9. Such an approach cuts across the statutory scheme distinguishing conservation park land from stewardship land. It in practice applies to conservation park land the same disposal/exchange considerations of stewardship land. The structure of the Act speaks against this. *Buller* says it cannot be done. There is no ‘artificiality’ in this approach – it is the approach required by the statute.
10. The claim that Forest & Bird’s position requires that conservation park status “be treated in effect as ‘sacrosanct’” is false. Forest & Bird recognises that conservation park status may be varied under s 18(7).² However, such a decision must be on the basis that conservation park status is no longer appropriate for the land, having regard to whether the land itself ought to have that status. This is not a question that is impacted by wider issues about other land (or social or economic factors).

² Forest & Bird also recognizes that a concession may be granted over conservation park land.

11. HBRIC's position is that it would not expect the Minister to revoke the conservation park status of the land for its own sake. The status, it says, should only be revoked having regard to other land that may be acquired. Forest & Bird says that is not an approach that is legally available to the Minister under the Act.

Conclusion

12. HBRIC's position effectively urges the Minister to take a 'portfolio approach' to conservation park land. It suggests that the Minister can 'trade off' one section of conservation park in order to acquire more conservation land. That approach is fundamentally incorrect. Conservation park status is given to land on the basis of the intrinsic values of that specific land. In this case, the land's specially protected status is conferred by operation of the legislation providing for former forest park to be deemed conservation land.
13. The Act requires that the conservation status of specially protected land is to be assessed by reference to *that* land, not by viewing it as part of a trading portfolio. For the Minister to adopt such an approach would be an error of law.
14. There is no suggestion by any party that the land has low conservation value such that its status could properly be revoked; indeed all parties accept that it is of national significance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sally Gepp".

Sally Gepp
Solicitor
Royal Forest and Bird Protection Society of New Zealand Inc.