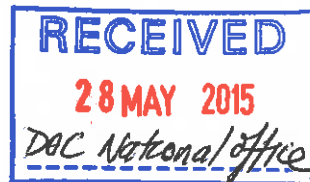


21 May 2015



Marie Long
Director Planning, Permissions and Land
Department of Conservation
PO Box 10420
WELLINGTON 6143

Dear Marie

RWSS REVOCATION AND LAND EXCHANGE

The purpose of this letter is to take the opportunity to formally put in writing HBRIC Ltd's position as to the issue of procedure raised by the Royal Forest and Bird Protection Society of New Zealand (**Forest and Bird**) in its submission regarding the proposed revocation of Conservation Park status land that was subject of the hearing on 10 March 2015.

Forest and Bird submitted that the proposal is unlawful on the basis that land deemed to be a Conservation Park is not available for exchange,¹ and that case law requires there be a "good and proper basis" for revoking Conservation Park status (and so uplifting the protection which has been placed and applied upon the land).²

Counsel for HBRIC Ltd addressed the Forest and Bird submissions at the hearing and responded to the range of arguments made in them, including relative to the *deemed* Conservation Park status of the land, the Department of Conservation General Policy and the Hawke's Bay Conservation Management Strategy. A copy of those submissions is **appended** for convenience.

In this letter I focus solely on the issue of whether revocation of the deemed Conservation Park status of the land at issue is lawful, where undertaken to facilitate subsequent exchange of that land under s16A of the Act.

The first point to confront, and HBRIC Ltd makes no attempt to avoid, is that the purpose of revoking the Conservation Park status of the land at issue is specifically such that it then falls within the definition of land held for "conservation purposes", and in turn becomes a stewardship area available for exchange under s16A of the Act.

The essential point that Forest and Bird raise is that it is unlawful to revoke the deemed Conservation Park status of land under s18(7) of the Act, unless that discrete step *in and of itself* is warranted, and in its own right.

¹ Paragraphs 7 to 9 of the Forest and Bird submission.

² Paragraphs 13 and 29 of the Forest and Bird submission.

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Forest and Bird relies on a decision of the High Court (*Buller Electricity Limited v Attorney-General* [1995] 3 NZLR 344) for this proposition.

The High Court in *Buller Electricity* established the principle that there must be a "good and proper basis" for uplifting the protected status applied to a stewardship area (as relevant in that case, under s26 of the Act, and where the land at issue was already a stewardship area).

As pointed out at the hearing however, the case is distinguishable.

The issue before the High Court in *Buller Electricity* was whether the Ministry could take into account social and economic factors (in particular facilitating hydroelectric development) in deciding whether to dispose of the stewardship area in question.

The High Court found, with reference to the purpose and scheme of the Conservation Act, that this was not a relevant consideration and that there must be a good and proper *conservation* basis to such disposal before it could proceed.

Beyond that, the High Court did not fully close out all potentially relevant considerations in the case of such disposal, stating also as follows:

"... it is apparent that the objective of the 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. There are no doubt cases where that would arise where land, for example, has been acquired as part of a stewardship area which in fact has no natural or historic resources for protection: for example, where to obtain an area desired for protection a larger area has had to be obtained. Other examples can readily be thought of, as, for instance, where land long held as a conservation area may have within it areas that do not require or desire protection in terms of the Act.

The critical distinguishing feature between our situation and that confronted in *Buller Electricity* is that there is an exchange proposal on the table. There was nothing of that kind at stake in *Buller Electricity* – the proposal was a "one way street".

It is quite logical that in the *Buller* situation, as the Court found, the Minister must confine him or herself to the conservation purpose for which land is protected, in deciding whether to invoke the step in question, and only do so if satisfied the land was no longer required for conservation purposes.

The situation here is very different.

The Minister is not being requested to, nor would HBRIC Ltd expect that she propose to, revoke the Conservation Park status of the 22 hectares in question for its own sake.

The only reason this proposal is in contemplation, is that the Conservation Park land would then be exchanged for other land received through HBRIC Ltd. It would be entirely artificial to overlook this dimension, as Forest and Bird appears to be arguing.

Fundamentally and this is the critical point, unless and until the Minister is satisfied that the s16A tests for exchange are met, the overall proposal would not proceed. The s16A tests provide the very "good and proper basis" that the High Court in *Buller Electricity* was referring to, in the context of this particular proposal.

Specifically, those tests require that the Minister first be satisfied that the overall proposal will “enhance the conservation values of land managed by the Department” and “promote the purposes of the Conservation Act”.

As a matter of basic principle, (revealed through the *Buller Electricity* case but in different circumstances), I agree with Forest and Bird that any statutory power must be exercised in a manner consistent with the objective of the Conservation Act.³

Another similar authority is the decision of the New Zealand Supreme Court in *Unison Networks Limited v Commerce Commission* [2008] 1 NZLR 42 in which the Supreme Court stated:

A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision – maker “so uses his discretion as to thwart or run counter to the policy and objects of the Act”. *A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power.* There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.

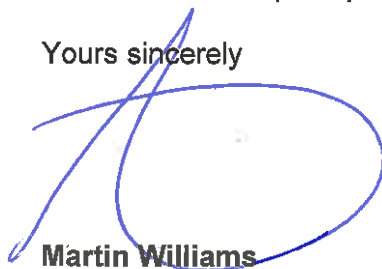
(emphasis added)

Stepping back, the direction of the Supreme Court confirms that provided the s16A tests are met, there would be nothing unlawful or improper in the Minister approving the overall proposal, but on the basis that the revocation step is only confirmed by way of *Gazette* notice (under s7(1)) at the point at which the proposed exchange land (146 hectares) is confirmed as available to HBRIC Ltd, and whereby that exchange would itself be authorised contemporaneously by *Gazette* notice pursuant to s16A(1).

The Forest and Bird submission, if accepted, requires that Conservation Park status be treated in effect as “sacrosanct”, and yet it is clear from the specific wording of s18(7) that Conservation Park status can be revoked. Deemed conservation park status, as arising under s61 of the Act, is certainly no exception. Through combined application of s61(3) and (9), and s18(1) and (7), the statutory mechanism is clearly available.

With respect, the Forest and Bird submission that the procedure being proposed for revocation and exchange is unlawful is without foundation. Properly understood in its context, the case law referred to in the Forest and Bird submission actually supports the proposal, and whereby it may only proceed upon a finding that the exchange facilitated by the revocation step will promote the conservation purpose of the Act.

Yours sincerely



Martin Williams

210515 Long(DOC)

³ Refer footnote 17, reference to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030 cited at paragraph 12 of the Forest and Bird submission.

IN THE MATTER

of the Conservation Act 1987

AND

IN THE MATTER

of a Notice of Intention to revoke the
Conservation Park status of 22 hectares of land
within the Ruahine Conservation Park

**SUBMISSIONS IN REPLY BY
HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED**

Dated

2015

Introduction- General Remarks in Reply

- 1 As the party principally affected by the broader Proposal at stake¹, it is basic to natural justice that HBRIC Ltd have a right of reply to issues raised in submissions; particularly where they challenge the statutory basis of the proposed power to revoke (Conservation Park status) of the relevant land.
- 2 Whether framed as 'clarification' or otherwise, it is important that the Panel have a balanced perspective on such issues, so that it is able to proceed fairly and reasonably (as required by administrative law principles that also apply).

Good and Proper Basis to revoke- Conservation Act purposes

- 3 Counsel for Forest and Bird has correctly submitted that there needs to be a "good and proper basis" for uplifting the Conservation Park status of the 22 hectares of land in question, citing the High Court decision in *Buller Electricity Limited v Attorney-General*.²
- 4 HBRIC Limited submits that there is such a "good and proper basis".
- 5 That "good and proper basis" is the addition to the Ruahine Conservation Park of 146 ha of land, of which some 132 ha has significant ecological value in containing both equivalent black beech forest, and habitat for the range of Threatened and At Risk species present in the area.
- 6 Fundamentally, the Proposal must enhance conservation values of land managed by the Department and promote the purposes of the Conservation Act 1987 ("the Act"); failing which no land exchange could proceed under section 16 A of the Act ("the Section 16A tests").
- 7 There can be no better or more proper basis to proceed than enhancement of conservation values and promotion of the Act's purpose.
- 8 The only expert opinion based on actual site inspection before the Hearing Panel is from Kessels & Associates. The Department of Conservation's Technical Advisor confirms his view (following consultation with other department staff) that the Proposal would enhance conservation values and the

¹ As outlined in the Submission by the Department to the Minister, dated 9 December 2014, and comprising three components; the section 16A exchange, the section 7(1) declaration, and the notice of intention to revoke under section 18(7)-(8) of the Conservation Act 1987

² [1995] 3 NZLR 344, as cited at paragraph 29 of the Forest and Bird submission.

Department's submission advises that the Proposal would promote the purposes of the Act.³

- 9 It would be artificial to separate the various aspects of the Proposal as Forest and Bird has suggested; arguing that the decision to revoke should be made without considering the conservation benefits that would be secured through the subsequent land exchange.⁴
- 10 None of the advice to the Minister proceeds on that basis but instead looks at the proposal holistically.
- 11 Beyond that, the *Buller* decision as relied on by Forest and Bird actually deals with *disposal* of stewardship areas,⁵ not exchange, and so is not directly on point.
- 12 Simply put, the Court did not have an integrated proposal of this kind in front of it, and cannot be said to have ruled out applying the section 16A tests (which directly bring enhancement of conservation values and promotion of the purposes of the Act into play), in a revocation context.

'Deemed' Conservation Park

- 13 That point aside, the basis upon which the Ruahine Forest Park actually holds Conservation Park status must not be overlooked.
- 14 This is not a Conservation Park that acquired that status by the Minister declaring such through the public process established under section 18 of the Act, and following inquiry into its particular values.
- 15 Instead, and along with some 94000 ha of adjacent land, the 22ha in question land has "deemed" Conservation Park status arising from the transitional provisions of the Act (s61(2)).
- 16 Certainly, the Hawke's Bay Conservation Management Strategy does not suggest that all of the Ruahine Conservation Park is of such value that no part of it should be divested.
- 17 To the contrary, that strategy records that:

³ Section 14.1 Submission to Minister of Conservation (9 December 2014) and conclusion of Graeme La Cock, Technical Advisor, Ecology within the Department (21 November 2014).

⁴ Paragraphs 6 to 22 of the Forest and Bird submission.

⁵ Under s26 of the Act.

Large areas of the vegetation of both parks⁶ have been extensively modified by natural events in the past and more recently by the influence of introduced plants and animals.⁷

- 18 The Act contains a conservative procedure enabling a conditional release of transitional Conversation Park status, by *presuming* that the Minister had originally made a specific declaration at the outset, where a section 7(1) declaration is made.⁸ This in turn triggers public notification before such status can be revoked (under Section 18(7) and (8) of the Act).
- 19 The reality though is, an assessment of specific conservation value was never made at the outset.
- 20 Such an assessment has now been made for the 22 ha in question by Kessels & Associates; and this has been peer reviewed by the Department's Technical Advisor.
- 21 Equally, the Minister has decided to proceed through the more conservative public process that triggered the requirement for this hearing, than assume any lesser status for the land (for example that it is a "stewardship area", and by applying section 7(1A) of the Act).
- 22 If, upon close and careful evaluation as facilitated through this process, the exchange is accepted by the Hearings Panel to meet the section 16A tests (i.e. promote the purposes of the Act and enhance conservation values) it would seem at best counterproductive to make a decision to refuse to revoke Conservation Park status. The approach being advanced by counsel for Forest and Bird would defeat that substantive conservation benefit from being realised.
- 23 As a matter of law, any legislation must be interpreted and applied so as to promote the broader purpose of that legislation.⁹
- 24 It is submitted that a positive decision regarding the Proposal before the Hearings Panel not only can, but should, be made accordingly.

⁶ Referring also to the Kaweka Forest Park.

⁷ Page 10 of the Hawke's Bay Conservation Management Strategy.

⁸ Under s18(1) of the Act, refer section 61(3) of the Act.

⁹ As the Forest and Bird submission itself points out, at paragraph 12.

Exchange of Conservation Park Land

- 25 I submit this also answers the point made by Forest and Bird that exchange of Conservation Park land is not provided for under the Act (with reference to the Conservation Law Reform Bill 1989).¹⁰
- 26 Parliament may not have provided for direct exchange of Conservation Park land (in the absence of revocation of Conservation Park status).
- 27 But the s18(7) power to revoke Conservation Park status exists, and status as such is not irreversible, even where the land was specifically declared a Conservation Park at the outset (which is not the case here) .
- 28 As already submitted, if the power to revoke is legitimately applied to promote the purposes of the Act (as required for the exchange to proceed under section 16A), that would be the very kind of “*good and proper basis*” that the Court in *Buller Electricity Limited v Attorney-General* confirmed as necessary. The mechanism of exchange is then available.

Conservation General Policy and Hawke’s Bay Conservation Management Strategy

- 29 Forest and Bird has submitted that the proposal is in conflict with these documents, and as such not available under s17A of the Act.¹¹
- 30 Firstly I wish to clarify that s17A provides:
- “Subject to this Act the Department shall administer and manage conservation areas in accordance with ...statements of general policy and conservation management strategies.”*
- 31 If a finding is reached that the overall Proposal would promote the purposes of the Act, then that finding should prevail over the specific provisions of any subordinate instrument prepared under the legislation; again as a matter of basic legal principle.
- 32 Secondly, I note that the General Policy and the Hawke's Bay Conservation Management Strategy are discretionary, and do not purport to determine the outcome in every given case in definitive terms.

¹⁰ Paragraph 9 of the Forest and Bird submission.

¹¹ Paragraph 23 of the Forest and Bird submission.

- 33 Conservation General Policy 1 makes it clear that the Minister retains a constitutional role as decision maker (reflecting the administrative law requirement that any policy must reserve a power to depart from it).¹² The Policy records that where the word “may” is used in the Conservation General Policy, this is intended to “allow flexibility in decision making”.¹³
- 34 The aspects of Section 6 of the General Policy cited by Forest and Bird fall into that category (in stating the basis upon which the status of public conservation land *may be* reviewed).
- 35 Thirdly I note that the Hawke’s Bay Conservation Management Strategy is under review.
- 36 Finally, I note that s17D of the Act provides that nothing in any conservation management strategy shall *derogate* from any provision in the Act or any other Act.
- 37 Again, I revert to the submissions above, that if the Proposal is adopted on the basis that it would promote the purposes of the Act and enhance conservation values, then the conservation management strategy would not (legally) stand in its way.

Ecological Equivalence

- 38 Both the submissions of Forest and Bird and Te Taiao Environment Forum (in particular) question the relative ecological merits of the 22 hectares of Conservation Park land, and the Smedley Exchange Block.
- 39 Issues are raised in relation to:
- (a) The relative standing of each area of land under the Threatened Environment Classification system (eg Acutely versus Chronically Threatened);
 - (b) Respective wetland resource values;
 - (c) Comparative species diversity;

¹² *West Haven Shellfish Limited v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158.

¹³ Policy 1.1(d)(iii).

(d) Respective presence of Threatened and At Risk species (falcon, bat, mistletoe, indigenous fish species).

- 40 Mr Kessels will briefly respond to and clarify points made regarding these issues.
- 41 Beyond that, HBRIC Ltd submits that the Hearings Panel has a robust body of information upon which to make a decision. It outright rejects any assertions of “conflict of interest”.¹⁴
- 42 The submitting parties have produced no independent expert assessment of their own including from their own surveys to support their submissions.
- 43 Mr Kessels’ evaluation (by contrast) has been corroborated by internal advice from the Department’s Technical Advisor.
- 44 The conclusions they have reached have been (I understand) “borne out” through inspections undertaken of the Conservation Park and Smedley Exchange Block land in question by representatives of the East Coast and Hawke’s Bay as well as Wellington Conservation Boards.
- 45 I submit that the Hearings Panel can and should prefer that evidence accordingly.
- 46 The submitters make representations that can by no means themselves be claimed as impartial, and which stray into the pejorative.¹⁵
- 47 That some submitters are requesting that the Proposal not proceed, but that the Department move to nevertheless acquire the Smedley Exchange Block as a “*valuable addition to the Conservation Park*”¹⁶ is particularly telling in this context.

Recreation Values

- 48 The submission from Federated Mountain Clubs of New Zealand raises concern about impacts on recreation, and access to the Park in particular.

¹⁴ As raised by the Te Taiao Environment Forum submission, page 5.

¹⁵ Dismissing Department internal review as “perfunctory” – paragraph 4 of the Forest and Bird’s submissions.

¹⁶ Submission by Mr Pain and by Ms Kathryn Bayliss.

- 49 It is a specific commitment of the Ruataniwha Water Storage Scheme (**RWSS**) Integrated Mitigation and Offset Approach (**IMOA**) projects that access be maintained to the Ruahine Forest Park.
- 50 This would be secured in the manner displayed on the Public Access and Offset Mitigation Progress Plan submitted with the HBRIC Ltd proposal,¹⁷ and as also displayed on the visual material available at this hearing.
- 51 If the RWSS proceeds, there would for the first time be **formal legal access** available to the Ruahine Forest Park, which represents an enhancement of the present situation (informal access only currently available over private land).
- 52 Specific conditions of the RWSS consents require that this access be secured and established before the project can commence.¹⁸ The access has not been “laid out on the ground” as noted by this submitter, because the RWSS cannot commence until all (including this) regulatory process has been completed.

Effects of the RWSS

- 53 Beyond that, it is submitted that the effects of the RWSS itself, including more generally within the Ruahine Conservation Park or elsewhere within the Makarora River catchment and indeed Region (both positive and negative) are not relevant to the Hearing Panel's decision.
- 54 Much of Ms Bayliss' submission falls into this category. Those matters have been determined by the Board of Inquiry.
- 55 As with *Buller Electricity Limited*, this proposal should be decided solely on its conservation merits having regard to the parcels of land directly in question, and on those merits alone.
- 56 It is for that reason that HBRIC Limited accepted a “current values” assessment approach to the exchange, and put forward a proposal involving over five times the land area (including 132 hectares of significant ecological resources) as part of the exchange accordingly.

¹⁷ Appendix 8 to HBRIC Limited's letter of 26 August 2014.

¹⁸ Condition 7 of Schedule 2 to the RWSS consents requires that all necessary third party land agreements to implement project A (as includes provision for alternative access) be secured prior to commencement of dam construction.

57 But just as HBRIC Ltd cannot (under this process at least) “claim” the benefits which its IMOA projects will have in terms of enhancing the values of the Smedley Exchange Block over time; nor can these parties raise adverse consequences of concern to them regarding implementation of the RWSS either.¹⁹

Dated at Napier this 10th day of March 2015



Martin Williams
Counsel for HBRIC Limited

¹⁹ See also, paragraph 40 of Forest and Bird’s submission, and page 4 of the Te Taiao Environment Forum submission.