SUBMISSION ON PRELIMINARY PROPOSAL FOR TENURE REVIEW OF SIMONS PASS PASTORAL LEASE, MACKENZIE BASIN

SUBMITTER DETAILS

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INTRODUCTION

1 This is a submission on the Commissioner of Crown Land's (**Commissioner**) preliminary proposal for tenure review of the Simons Pass pastoral lease (**Preliminary Proposal**) publicly notified under s43 Crown Pastoral Land Act 1998 (**CPLA**).

2 The Environmental Defence Society Incorporated (**EDS**) is a not-for-profit, non-government national environmental organisation. It was established in 1971 with the objective of bringing together the disciplines of law, science, and planning in order to promote better environmental outcomes in resource management. EDS has been active in assessing the effectiveness of statutory processes in addressing key environmental issues including landscape, natural character, and biodiversity. It has previous involvement in processes relating to the South Island Intermontane Basin environment, in particular in the Mackenzie Basin.

3 Attached to and informing this submission are expert statements by:

- Diane Jean Lucas – landscape.
- Dr Susan Walker – ecology.

4 EDS opposes the Preliminary Proposal because it:

- Reflects unlawful application of the decision-making framework and statutory objects applying to tenure review under Part 2 CPLA.
- Reflects incorrect interpretation of key terms and definitions underpinning decision-making on tenure review.
- Reflects and relies on material that is inconsistent with the objects of tenure review in s24 CPLA.
- Is based on inadequate and insufficient information.
- Fails to provide sufficient reasons for the decision reached and designations proposed.

- Fails to consider alternatives to the proposed designations.
- Does not promote land management that is ecologically sustainable.
- Does not enable protection of the significant inherent values (**SIVs**) of the property or the Mackenzie Basin.

5 The following issues are discussed:

- Summary of Preliminary Proposal
- Tenure review: summary of outcomes
- Tenure review: Mackenzie Basin
- Summary of legal framework
- Consultation
- Preliminary Proposal: Reasons
- Preliminary Proposal: EDS position
- Relief

SUMMARY OF PRELIMINARY PROPOSAL

6 The Simons Pass lease covers[1] an area of approximately 5,575.2867 hectares within the part of the Mackenzie Basin subject to Mackenzie District Council jurisdiction. The land is owned by the Crown but subject to pastoral lease no. PT019 established under s66 Land Act 1948.

7 Under the Preliminary Proposal:[2]

- Approximately 1,265 hectares are proposed to be designated to Crown ownership and control as conservation area pursuant to s35(2)(b)(i) CPLA. That area is proposed to be subject to an easement to convey water and right of way for irrigation purposes. It is marked CA1 on the accompanying maps.
- Approximately 4,310 hectares are proposed to be designated as land to be disposed of by freehold to the leaseholder subject to Part 4A Conservation Act 1987 and s11 Crown Minerals Act 1991. Those areas are marked FH1 and FH2 on the accompanying maps.
- The Crown is required to construct and pay for a rabbit proof fence between areas CA1 and FH1. Specific construction details apply.

TENURE REVIEW: SUMMARY OF OUTCOMES

8 The outcomes of tenure review to date have been subject to extensive academic scrutiny[3]. Key points include:

[1] File reference 12680 (*Pt019*), Land Registry Folio Ref CB529/5, Legal Description Part Run 86.
[2] See: Notice of Preliminary Proposal; Summary of Preliminary Proposal; Preliminary Proposal Schedule 2.
[3] By the PCE: April 2009 Report: *Changes to the High Country: Environmental Stewardship and Tenure Review.* June 2011 Follow up report. By various academics e.g.: *South Island High Country Land Reform 1995-2015,* Ann Brower: http://igps.victoria.ac.nz/publications/PQ/2016/PQ12-1-Brower.pdf, *Land reform in the Godzone: Case Studies in the Environment*, A

- Rapid loss of threatened, endemic high country ecosystems demand a moratorium on tenure review for a comprehensive process review.

- Areas being retained in Crown ownership and control are not the areas which contain the most significant, rare, or threatened ecosystems. In other words, the more threatened the ecosystem, the more likely it is to be freeholded under tenure review.

- A black and white approach is being taken with Crown ownership or fee simple being the only management options pursued. This is resulting in suboptimal outcomes. A more nuanced[4] and innovative approach is available if consistent with s24 CPLA.

- The quantum paid by the Crown to the leaseholder for the lease is significantly more than that paid by the leaseholder to the Crown for the land. This is despite evidence that on average new freehold land sells for 493 times the Crown's selling price.

- The entire Mackenzie Basin is a significant natural area for the purposes of s6(c) RMA. Those significant values are being lost quickly. There is a strong ecological and economic case for immediate moratorium.

- Any freehold land should be subject to a wilding pine removal covenant.

Relief: An independent economist(s) be commissioned to undertaken a review (and update if required) of the valuation approach applied in tenure review to land value and lease value.

TENURE REVIEW IN THE MACKENZIE BASIN

9 Tenure review is one of a number of land management processes at play in the Mackenzie Basin. The others are:

- Regional consents for water take and discharges

- District consents for land use

- Establishment of the Mackenzie Country Trust

10 Failure by administrators to take a joined up and strategic approach between processes has resulted in deterioration of the natural environment with resultant loss of internationally, nationally, and regionally unique, rare, and threatened ecological, landscape and natural character values[5]. This failure was tackled head on by the Environment Court in its recent decision[6] on Plan Change 13 to the Mackenzie District Plan the purpose of which was to protect the Mackenzie Basin outstanding natural landscape[7]. In summary the Court considered that:[8]

- The regional council's method of managing stock discharges *"gives a strong incentive to a pastoral lessee to freehold as much land as they can even if it is subject to covenants…because the CRC's method of calculating the nutrient balance is based on the total area of the farm. That means there appears to be a strong financial incentive for a*

Brower 2017, *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) By the Courts: ***Federated Farmers v Mackenzie District Council*** [2017] NZEnvC53.

[4] For example a more nuanced approach might include freeholder land around a farm based area which does not exhibit ecological SIVs subject to a covenant for landscape purposes. Some land revert to Crown ownership and direct control and some reverting to Crown ownership and concession granted for low density grazing by DOC.

[5] See Statements of Dr Susan Walker and Diane Lucas for discussion on loss of ecological and landscape values.

[6] ***Federated Farmers of New Zealand v Mackenzie District Council*** [2017] NZEnvC 53 (11th Decision). **Attachment C**.

[7] As per s6(b) RMA.

[8] At [548]-[551].

pastoral farm to frustrate section 24(b)(ii) CPLA which seeks to enable the protection of significant inherent values of land held in pastoral leases by maximising the freehold areas of their farm."

- The geomorphological and ecological characteristics described at length in the decision (chapter 2) are "*inherent values*". Although the Court did not comment on whether those inherent values were significant for CPLA purposes it found that "*large areas of those inherent values are being lost quickly*". Pastoral lease areas containing outwash gravels (like Simons Pass) "*needed to be looked at very carefully*".

- It is "*counterproductive for the Crown to freehold land without imposing a continuing obligation (as a covenant under the CPLA) to remove wilding pines from freehold land…Without such a covenant it is difficult to see how the CCL can justify freeholding as consistent with the purpose of tenure review under the CPLA*.

11 The Court concluded that there is "*a strong ecological (and economic) case for an immediate moratorium (by the CCL) on further freeholding of any land in the Mackenzie Basin containing such gravels while a comprehensive "all-station" review is carried out and plan formulated…"*

12 EDS agrees with the Environment Court's conclusion. It understands that a cross agency review of the processes listed above is being undertaken. Tenure review must stop while that review is undertaken. Otherwise the precise values that review is seeking to protect and manage will already be lost.

Relief: An immediate moratorium be placed on tenure review until a comprehensive all-station review is carried out and plan formulated, and uncertainty/disagreement as to correct legal process clarified via declaratory proceedings (discussed below)

SUMMARY OF LEGAL FRAMEWORK

13 Tenure review is the process under which the tenure (ownership) of land currently owned by the Crown but subject to a pastoral lease established under s66 LA is reviewed and, potentially, changed.

14 The process is set out in Part 2 CPLA. It comprises 3 steps:

- Initial review (ss27-33 CPLA).

- Release of a preliminary proposal (ss34-45 CPLA).

- Release of substantive proposal (ss46-82 CPLA).

15 SS24-26 CPLA set out the underlying decision-making framework that applies to all 3 stages.

16 S24 CPLA sets out the objects of tenure review:

> ***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.

17 S24 "*is not about balancing competing values; it has an internal structure that avoids that*"[9]. It contains a hierarchy. The importance of the hierarchy in s24 to decision-making is discussed below.

18 S25 CPLA sets out the matters that must be taken into account by the Commissioner in acting under Part 2 CPLA. It sets out the framework for decision-making on tenure review: what is to be considered and how:

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.

19 S26 sets out consultation requirements that must be fulfilled before undertaking each of the 3 process steps:

26 Consultation

(1) Before taking any action specified in subsection (3), the Commissioner must consult the Director-General of Conservation.

(2) At any time, the Commissioner may consult any person or body the Commissioner thinks fit (including the Director-General of Conservation) about taking any action specified in subsection (3).

(3) The actions are—

[9] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 29.

(a) undertaking a review under section 27:

(b) putting a preliminary proposal to a person under section 34(1):

(c) putting a substantive proposal to a person under section 46.

CONSULTATION

20 Consultation is required at all 3 stages of the tenure review process. Consultation with DOC is mandatory. Consultation with "*any person or body the Commissioner thinks fit"* is optional.

21 There is no requirement to consult with the lease-holder. There is no prohibition on consultation at any stage with other interested groups, for example, the Mackenzie Trust and EDS.

22 Consultation involves the statement of a proposal not yet finally decided upon, and that the party obliged to consult must keep an open mind and be ready to change and even start afresh[10]. It does not require neutrality.

23 Requirement to consult does not prevent the Crown from pursuing its own interests. In tenure review those interests are set out in s24 CPLA. The Crown cannot approach or participate in consultation in a way that secures outcomes contrary to s24 CPLA. To do so would be undertaking process mandated by the CPLA in a way that is unlawful under the CPLA[11].

Relief:

1. ***That the Commissioner and LINZ approach and participate in consultation advocating for achievement of the objects of tenure review. Failure to do so is unlawful.***

2. ***That EDS be included in consultation on the Substantive Proposal as available under s26(2) and (3)(c).***

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[10] See: ***Wellington International Airport Limited & Ors v Air New Zealand Ltd & Ors*** HC Wellington CP403/91, 6 January 1992, McGechan. Referenced in CPLA context in ***Kyeburn Downs Ltd & Ors v Commissioner of Crown Lands*** CIV-2008-412-000197 (HC).

[11] This issue has been succinctly addressed by Professor Barton in analysis commissioned by the PCE in *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 30:
"*(i)* ***consultation does not require neutrality****. It requires openness to what the consulted party has to say, and it requires fairness in making sure that the consulted party can provide its input effectively. But it does not prevent the consulting party from having policies of its own. While it would be wrong to consult on a proposal that it had no intention of changing, it can certainly consult on the basis of a proposal that is consistent with its usual policies, and which it intends to put into effect if nothing in the consultation is enough to make it change its mind.*
(ii) ***A party that must consult can also pursue its own interests****. Consultation need not deter a party from making a decision consistent with its own interests. Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671 (CA) is a good example – a commercial enterprise with profit as its motive was obliged by statute to consult the main users of its facilities as a restraint on its behaviour as the owner of an effective monopolist; but it was not obliged to obtain their consent to its prices. The veto power of the Commissioner – the power to withdraw from a tenure review at any time before the substantive proposal – is not compromised or watered down by reference to his or her duty to consult certain parties at certain points in the tenure review process.*
(iii) ***A party who must consult can also negotiate****. It is often said, rightly, that consultation is not negotiation. But the existence of a duty to consult does not prevent a party from negotiating as well if it thinks fit to do so and is not legally prevented from doing so. It can negotiate with the parties to be consulted, or with other parties.*
(iv) ***A party who must consult can also advocate****. It is commonplace in administrative law to find a decision-maker who is pursuing a definite policy, and is entirely at liberty to do so even while exercising statutory powers of decision. A usual case is a minister of the Crown who has been elected and appointed on a party policy platform. The cases generally hold that the decision-maker must exercise the power as Parliament had intended, and that usually requires him or her to be openminded, and willing to change or adapt the policy, or even abandon it.* ***But the decision-maker is not wrong to have a policy and to advocate for it****. Indeed, in government and administration we would often expect nothing less from conscientious officials.*
(v) ***The decisions that result after consultation can certainly favour one interest over another****. Indeed, a decision of any kind will inevitably do so. And the presence of a duty to consult in the procedures leading to the decision makes no difference to the range of decisions that can lawfully be made.*
(**emphasis** added).

DECISION-MAKING

24 EDS is concerned that an incorrect and so unlawful approach to decision-making has been applied to tenure review to date. Set out below is its understanding of correct legal process.

S25 CPLA: decision-making framework

25 S25 sets out the framework for decision-making on tenure review. In undertaking any action as part of the tenure review process the Commissioner must "*take into account*":

- The objects of Part 2 CPLA. These are set out in s24 CPLA.
- The principles of the Treaty of Waitangi.
- In relation to land used or intended to be used by the Crown that purpose of that use.

26 Central to the application of s25 CPLA is interpretation of "*must take into account*". EDS considers that the following interpretation applies:

- The obligation on decision-makers to "*take into account"* the listed considerations is mandatory – it "*must*" be done[12]. Failure to do so is unlawful[13].
- Although the weight to be given to each of the listed mandatory considerations is a matter of discretion for the decision-maker[14] the Commissioner cannot reject a mandatory consideration under s25 CPLA or give it no weight. Actual provision must be made for each consideration[15].
- In reaching and recording a decision mandatory considerations must be weighed on a "*fine grained basis*", "*openly and transparently*", or risk a finding of "*no weight*". Decision-makers should specifically refer to mandatory considerations and evaluate each consideration in turn. Failure to do so is a strong indication of a failure to engage in genuine evaluation[16].

[12] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955: Mandatory considerations may not be "*rebuffed … by a closed mind so as to make the statutory process some idle exercise*" (***NZ Fishing Association Inc v Minister of Agriculture & Fisheries*** [1988] 1 NZLR 544 (CA) at 551, quoted with approval in ***A-G v Refugee Council of New Zealand*** [2003] 2 NZLR 577 (CA) at 608).

[13] Failure to consider a relevant matter.

[14] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955: However the weight to be given to mandatory considerations is a matter for the decision-maker: (***Valuer-General v Wellington Rugby Football Union Inc*** [1982] 1 NZLR 678 (CA). Most recently applied in ***Minister of Immigration v Al Hosan*** [2008] NZCA 462, [2009] NZAR 259 at [66].)

[15] The Court has been clear that ultimately which meaning applies depends on context. It is a matter of statutory interpretation: ***Bleakley v Environmental Risk Management Authority*** [2001] 3 NZLR 213 (HC) at [72]. In some situations, for example, where there is a deliberate legislation contrast between directions in different purpose sections e.g. take into account v recognise and provide for (as per RMA) a consideration subject to a take into account directive can be given no weight. In other situations the phrase has been held to require actual provision be made for the factor concerned. Interpretation of "*take into account*" that requires actual provision to be made for each factor must apply to the CPLA. It does not contain a second or alternate decision-making provision requiring that certain factors be considered in a more directive way (e.g. recognised and provided for). The only decision-making provision that applies to all stages of the tenure review process is s25 CPLA and it states the Commissioner "***must*** *take into account"* the factors listed (**emphasis** added). The first factor is "*the objects of*" tenure review. The objects are multifaceted. They address the public interest in environmental protection and leaseholder interests. They are arranged in a hierarchy and environmental protection is given precedence. Where the factor that must be taken into account is the underlying object(s) of a statutory process it cannot be Parliament's intention that it can be cast aside in preference for other, unlisted, objects. Particularly when that object along with other listed decision-making factors cover multiple interests: public, private, Maori, Crown. For the Commissioner of Crown Lands to be able to take the objects of tenure review into account and ignore them would render the tenure review process farcical: the objects in s24 CPLA may as well be deleted.

[16] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955 quoting relevant case law at footnotes 134-138.

- Considerations that are not listed in s25 CPLA cannot be taken into account. The considerations listed are comprehensive and detailed by virtue of reference to s24 CPLA[17]. Ability to consider extraneous material is limited to information necessary to inform assessment of the listed considerations. Any material must be consistent with the hierarchy of objects of tenure review[18].

- The requirement to "*take into account*" in s25 CPLA does not apply to s24 CPLA. It applies only to what is to be looked at in decision-making under Part 2 generally. The "*take into* account" balancing exercise cannot be transposed into s24. There is no ability to consider the different elements of s24 and give some greater weight over others. The hierarchy in s24 CPLA bites. S24 CPLA prescribes that ecological sustainability and protection of SIVs are the primary goals of tenure review. Those objects cannot be compromised.

Relief: The Commissioner applies the s25 decision-making framework as set out above. If there is uncertainty/disagreement as to correct legal process this should clarified via declaratory proceedings in the High Court. EDS would be prepared to be a joint applicant.

S24: Objects of tenure review

27 Under s25(1)(a) and (2) the Commissioner must "*take into account*" the objects of Part 2 CPLA.

28 EDS is concerned that the objects in s24 CPLA have been misinterpreted and so unlawfully applied. It considers:

- S24 contains a hierarchy which must be applied. S24 "*is not about balancing competing values; it has an internal structure that avoids that"*[19]. Promotion of managing reviewable land in a way that is ecologically sustainable and protection of SIVs sit at the top of the hierarchy. Sitting underneath (or "*subject to*") is the subordinate object of enabling reviewable land capable of economic use to be freed from the management constraints (direct and indirect) resulting from its tenure under a reviewable instrument. That objective does not necessitate freeholding. Multiple management techniques are available[20]. Sitting under that are the third tier objects of making easier public access and freehold disposal of reviewable land. There is also a hierarchy in respect of how protection of SIVs should be achieved. Return of pastoral lease land to Crown ownership and control is preferred over other protective mechanisms.

- Promotion of ecological sustainability requires affirmative action[21] [22].

[17] *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3(4) pg 953-955 quoting relevant case law at footnotes 134-138.

[18] The Commissioner's discretion to consider other factors or information is fettered. Statutory powers are given for an object/purpose and their exercise must always promote that object/purpose: *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch23.2.3 pg 941; *Constitutional and Administrative Law in New Zealand,* 4th Edition, P A Joseph, Ch22.7 pg 895 referencing ***Unison Networks Ltd v Commerce Commission*** [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

[19] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 29.

[20] S40 CPLA.

[21] *Legal Aspects of High Country Pastoral Leases and the Tenure Review Process: A background paper*, Barry Barton, July 2006 (Report for the PCE) at pg 25.

[22] In the RMA context the meaning and strength of the requirement to promote sustainable management under s5 RMA was recently considered by the Supreme Court in ***EDS v NZ King Salmon Co*** [2014] NZSC 38. Its commentary is useful for interpretation under the CPLA:

[21] Part 2 of the RMA is headed "Purpose and principles" and contains four sections, beginning with s 5. Section 5(1) identifies the RMA's purpose as being to promote sustainable management of natural and physical resources. The use of the word "promote" reflects the RMA's forward looking and management focus. While the use of "promote" may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in

- An accurate, clear, and scientifically derived definition of "*ecological sustainability*"[23] is imperative if tenure review is to avoid perverse outcomes and the s24 objects are to be achieved. EDS understands the definition of ecological sustainability being applied by the Commissioner and LINZ is "*making decisions that safeguard the life supporting capacity of the land's ecosystems, including the ability of those ecosystems to support life outside the reviewable land*"[24] [25]. The evidence of Dr Walker is that this definition is incorrect because[26]:

  > *"ecological sustainability cannot be reduced to safeguarding the life-supporting capacity of the land's ecosystems as in the definition above (at paragraph 18). The flaw is that the term 'life supporting capacity' does not reveal what life is to be supported. If it is any life that is to be supported, then almost most ecological change, short of sterilisation, would achieve ecological sustainability."*

  EDS considers Dr Walker's alternative definition (incorporating advise to LINZ from Landcare[27]) should be applied:

  > "*Management that is ecologically sustainable is management that sustains, and avoids depletion of, the attributes and processes of the system of interacting living organisms and their environment, and of connected ecological systems and processes beyond land under consideration.*"

- The relevant ecosystem is that at the time tenure review is occurring. There is no express reference that ecosystems are indigenous. But indigeneity is strongly implicit. The relevant ecosystem is that at the time tenure review is occurring. It is the ecosystem naturally occurring in the particular area. For example, in the Mackenzie Basin the mosaic of cushion mat, shrub and tussock grassland vegetation and associated fauna in its different manifestations is determined by the Basins ecotone gradient. That ecosystem may thrive in conditions that are not conducive to productive use e.g. shallow, dry soils are a natural part of the Basin. The relevant ecosystem is not the ecosystem that would exist subsequent to human manipulation to facilitate intensified farming that is to be sustained.

- Enabling protection means to make something possible.[28] It requires positive action. Meaning of protection should be assessed by reference to the Conservation and Reserves Act[29].

- Protection of SIVs by restoration to full Crown ownership and control must be preferred.[30]

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every instance, the obligation of those who perform functions under the RMA to comply with the statutory objective is clear. At issue in the present case is the nature of that obligation.
The CPLA is similarly forward looking in its focus on future management and use of New Zealand's high country landscapes currently held under pastoral lease.

[23] Not defined by the CPLA. Ecosystem is defined in s2 CPLA: a system of interacting living organisms and their environments.

[24] Summary Preliminary Proposal at [3.1].

[26] Statement of Dr Walker at [14]-[26].

[26] Statement of Dr Walker at [14]-[26].

[27] *Draft Guidelines for Understanding the Promotion of Ecological Sustainability in Tenure Review*, Allan Hewitt & Grant Hunter, Landcare Research, Contract Report: LC0304/145, June 2004. The definition proposed by Landcare Research is: "*the maintenance and enhancement, in the longer term, of ecosystem attributes, for a defined tract of land, while avoiding effects that compromise offsite ecosystems*

[28] Oxford Online Dictionary.

[29] This is considered to be the correct approach given qualification for protection under the CPLA is determined by reference to qualification for protection under the Conservation and Reserves Acts: s2 and s24 CPLA.

[30] It appears that an alternative approach may be being applied: The Cabinet Paper supporting the current Strategic Direction for Tenure Review Minute 0927C mandates an approach inconsistent with s24's preference for Crown ownership and control stating: "*Whether the lessee or the Crown is the most appropriate party to protect those values should be considered on a case by case basis,*

Relief: The Commissioner applies the correct interpretation of the s24 objects and relevant definitions as set out. If there is uncertainty/disagreement as to correct legal process this should clarified via declaratory proceedings in the High Court. EDS would be prepared to be a joint applicant.

PRELIMINARY PROPOSAL REASONS

29 The Preliminary Proposal is summarised at paragraphs 6 and 7 above.

30 Reasons for the proposed designations are set out in the Summary of Preliminary Proposal[31]. The reasons are:

- Area CA1 contains significant inherent values of the "*highest*" and "*high*" significance[32].
- Area CA1 has "*attributes which sustain the special natural quality and integrity of the high country landscape and its ecological diversity. It is well covered with largely intact native vegetation and is considered ecologically sustainable."*[33]
- The operation of the easement over CA1 "*will not adversely affect the significant inherent values of public enjoyment of the conservation area*"[34]
- Restoration of CA1 to Crown ownership and control *"provides for protection of significant inherent values on the reviewable land."*[35]
- The soils in the FH1 and FH2 areas range from Class IV to VII which are suitable for "*pastoral use with moderate restrictions."*[36]
- Part of the FH1 and FH2 areas is already developed: "*32 hectares are in cultivated paddocks, 1535 hectares have been direct drilled and 189 hectares have been oversown and topdressed."*[37]
- FH2 is "*a small area on the western boundary that falls in the orbit of an irrigation pivot. No SIVs were identified in this area*"[38]
- "*Ecological sustainability needs to be considered in the context of previous land development and use of the property…All ecosystems within the pastoral lease have been subject to the influence of pastoral farming to some degree…by grazing management and physical development."*[39]
- Of the 4,310 hectares recommended for freehold disposal (FH1 and FH2) "*the majority is for a Land Use Classification suited to pastoral use with moderate restrictions. This land has been used for such purposes for many years and has a good vegetative cover that is not prone to erosion. It is capable of ecological sustainable management under a pastoral regime in its present state."*[40]

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rather than an objective stating a clear preference." (Cabinet Economic Growth and Infrastructure Committee Paper, A676415 Appendix C Row 2 Discussion Column). That may be the author's or Cabinet's view but it is not the law. Decision-making applying that approach is open to legal challenge.

[31] The Preliminary Proposal document itself sets out the specific terms of the proposal. It provides no analysis, explanation or reasons.

[32] Summary of Preliminary Proposal, April 2017, Section 2.1 pg. 3-4.

[33] Ibid at section 3.1 pg. 7.

[34] Ibid at section 2.1.1 pg. 5.

[35] Ibid at section 3.3 pg. 8.

[36] Ibid at section 2.2 pg. 6

[37] Ibid at section 2.2 pg. 6.

[38] Ibid at section 2.2 pg. 6.

[39] Ibid at section 3.1 pg. 7.

[40] Ibid at section 3.1 pg. 7.

- The balance of the 4,310 hectares is also suited to pastoral use. It is in a "*depleted and eroding state*" and freehold disposal *"will encourage investment in this area thus promoting the management of the land in a manner that is ecologically sustainable*".[41]

- The land is capable of economic use supporting release from management constraints because the property can "*sustain a pastoral operation and is capable of further development which would lead to greater productivity*."[42]

- Development to improve depleted land "*will require significant investment, which is proposed with existing consents in place."*[43]

PRELIMINARY PROPOSAL EDS POSITION

Evidence

31 EDS has received expert advice on the Preliminary Proposal from:

- Dr Susan Walker on ecological SIVs and ecological sustainability.

- Diane Lucas on landscape SIVs.

32 That evidence:

- Confirms designation of CA1 to crown ownership and control as a conservation area.

- Supports Conservation Resources Reports' and underlying expert reports'[44] recommendations regarding further areas that should be designated to Crown ownership and control or Crown ownership subject to protective mechanisms.

- Considers that the majority of land designated by the Preliminary Proposal as freehold should be designated to Crown ownership and control, or Crown ownership subject to a protective mechanism if expert assessment shows such an approach is consistent protection of SIVs and ecological sustainability.

- Considers that updated assessments of SIVs, ecological sustainability, andappropriate management consistent with achieving those outcomes at a property and Basin scale are required.

Law

33 On review of the Preliminary Proposal EDS holds the following concerns:

Information

34 It does not appear from the documents provided online or in response to EDS's requests to LINZ and DOC that adequate information has been considered:

- There is no assessment of the ecological sustainability of the proposed designations[45] at the property or Mackenzie Basin scale. Despite its being identified as "Ecological Sustainability Advice"[46], The Scion Report[47] does not address the ecosystem[48] sustainability of the inner-

[41] Ibid at section 3.1 pg. 7.
[42] Ibid at section 3.2 pg. 9.
[43] Ibid at section 3.2 pg. 9.
[44] See Statement Dr Walker fn 2.
[4545] See Statement of Dr Walker for explanation of best practise approach
[46] LINZ title for Scion Report.

montane, dryland ecosystem. It assesses "*the role of trees in restoring degraded soils*"[49]. It promotes the planting of exotic conifers in parts of the Mackenzie Basin with Fork and Mackenzie soils, including specifically on Simons Pass[50]. This is ironic given conifers are considered one of New Zealand's biggest pest threats, particularly in the Basin. It also ignores the fact that Fork and Mackenzie soils, and the cushion, mat and tussock vegetation they support are a natural component of the Basin ecosystem. Conifers are not. As a result, the Scion Report in fact promotes ecological degradation and loss not sustainability.

- The Conservation Resources Report and Scion Report are from 2008 and 2009 and are outdated. Significant change has occurred in the Mackenzie Basin in the intervening years. That change fundamentally alters assessment and protection of significance of inherent values and what land management is ecologically sustainable[51]. No updated assessment of significant inherent values or ecological sustainability in the 2017 context appears to have been undertaken. It does not appear assessment undertaken as part of other recent processes have been considered for example, or relevant decisions of the Environment Court.

35 As a result, the Preliminary Proposal has:

- Been put forward on misinformation as to established and material facts[52].
- Failed to address all relevant considerations in making a decision under s25 CPLA.
- Considered information inconsistent with the hierarchy in s24 CPLA.
- Reached a conclusion as to appropriate designations and protective mechanisms that is unreasonable.

Definitions

36 The definition of "*ecologically sustainable"* land management applied in deciding on the Simons Pass designations is that set out at paragraph 28 above. As stated, EDS considers application of and reliance on this definition as resulted in designations decisions that are contrary to s24 CPLA. The Preliminary Proposal's designations are a case in point.

Reasons: inadequate

37 The Preliminary Proposal supporting documents do not give adequate reasons for the designation decision reached.

38 Reasons must be more than a statement of conclusion[53] or of the test to be applied. They may be abbreviated[54], but should be "*sufficient to show to what they were directing their mind*"[55] thereby

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[47] *Scion Report: Can trees restore degraded soils and promote ecological sustainable management in tenure review of dryland Mackenzie Basin properties?,* June 2009, Nick Ledgard.
[48] Inner-montane dry inland ecosystem as described by Dr Walker in her statement and in the DOC Reports underpinning the Conservation Resources Report.
[49] Scion Report, Objective pg (ii).
[50] Scion Report, Executive Summary, Conclusions at (iii) and Section 5 Conclusions at (i) Fork/Mackenzie Soils and Afforestation location summary, Simons Pass.
[51] See Statement of Dr Susan Walker at xx.
[52] ***CREEDNZ Inc v Governor – General*** [1981] 1 NZLR 172 (CA) Richardson J at pg 200.
[53] In the RMA context the Court has confirmed that 'reasons' must be more than a statement of conclusion: ***Environmental Defence Society Inc v Manawater-Wanganui Regional Council***; ***Friends of Houghton Valley Inc v Wellington City Council*** [2015] NZHC 234, (2016) 19 ELRNZ 62, [2016] NZAR; ***Marche Ltd v Auckland Council*** [2016] NZHC 145, (2016) ELRNZ 55, [2016] NZRMA 139, [2016] NZAR 542.. At the level of principle are transferrable to CPLA decision-making.
[54] ***Lewis*** fn8 at [81].
[55] ***Lewis*** fn8 at [81] quoting Lord Donaldson MR in ***R v Civil Service Appeal Board, ex parte Cunningham*** [1991[4 ER 310, 319.

showing whether the decision was lawful. The three underlying grounds for the importance of giving adequate reasons for decisions are[56]:

- To uphold the principle of openness in the administration of justice[57]. Openness is critical to maintenance of public confidence in the justice system. Without reasons it may not be possible to understand how a decision was reached, excluding public from decision-making. Accountability is undermined[58].
- To provide a basis on which the lawfulness of decisions can be assessed on appeal or review[59].
- To provide protection against wrong or arbitrary decisions[60].

39 Failure to give adequate reasons leaves decisions vulnerable to challenge[61].

40 The reasons given for the Preliminary Proposal are inadequate because they do not:

- Explain how and to what extent the hierarchy in s24 CPLA has been taken into account.
- Explain how and to what extent the Treaty of Waitangi has been taken into account.
- Address why DOC's recommendation to designate the majority of FH1 to Crown ownership and control has been ignored, or the progressive reduction in area designated to Crown ownership and control.
- Explain why the proposed designations are the best way to achieve the objects of tenure review and what other alternative designation options (including use of protective mechanisms) have been considered;
- Set out what if any additional information has been considered in reaching a decision on the Preliminary Proposal.
- Acknowledge or address the significant inherent values experts have identified on FH1.
- Identify how freehold ownership will enable protection of SIVs in FH1[62].
- Give supporting evidence and rationale for the conclusion that the land is capable of ecological sustainable management under a pastoral regime in its present state (in particular when that

[56] ***Lewis v Wilson Horton Ltd*** [2000] 3 NZLR 546 (CA) at [70]. Unsuccessful appeal by Lewis of a decision of the High Court quashing an order made in the District Court prohibiting the publication of his identify in any report of the court proceedings. Both appellate courts found that it was impossible to know what factors the District Court had considered relevant from the decision. The High Court had been correct to find this an error of law.]. Note that this collapsed the 6 grounds previously identified by the Court of Appeal in ***Sing v Chief Executive, Department of Labour*** [1999] NZAR 258 (CA) at 262-263:
"(1) Formulating reasons imposes discipline on decision-makers as the cognitive process involved can cause preliminary views to be revisited;
"(2) Reasons assure parties that their evidence and arguments have been carefully assessed in accordance with law;
"(3) Reasons identify the chain of logic that supports a decision and assists parties to decide whether to challenge it by appeal, review or other complaints mechanism;
"(4) Reasons ensure parties of an effective right of appeal or review and assist counsel and the court in marshalling the challenge and assessing its merit;s
"(5) A practice of providing reasons establishes a body of precedence or guidance affecting the exercise of powers; and
"(6) Reasoned decisions assure the legitimacy and openness of the exercise of power and promote public accountability."
[57] ***Lewis*** fn8 at [76].
[58] ***Lewis*** fn8 at [79].
[59] ***Lewis*** fn8 at [80].
[60] ***Lewis*** fn8 at [82].
[61] ***Marche*** fn9 at [23]-[24].
[62] Instead the Preliminary Proposal Summary focuses on the ability for those areas to absorb pastoral development; the small area of the total of F1 and F2 that has been subject to modification.

conclusion is contrary to DOC's recommendations and no ecological sustainability report provided).

- Address how the conclusion that encouraging investment in the area proposed for freehold will promote management that is ecologically sustainable was reached (in particular when that conclusion is contrary to DOC's recommendations).

- Explain how freeholding land to enable further development is consistent with promoting ecological sustainability and enabling protection of significant inherent values. This failure is particularly stark when that conclusion is contrary to DOC's recommendations.

41 The inadequacy of the Preliminary Proposal is also apparent in its proposal to freehold land because it is degraded due to pest and weed infestations[63]. Control of pests and weeds are required of the lease-holder by law under s23 LA. Failure to control should not be used as justification for allocation to freehold. This risks rewarding leaseholders for behaviour that violated the terms of the lease contract itself. The obligations a lease-holder takes on under a pastoral lease were a key reason the High Court concluded a pastoral lease confers exclusive right of possession[64]. Leaseholders cannot seek confirmation of the strength of their rights and ignore their statutory responsibilities.

42 As a result EDS considers that:

- The Preliminary Proposal is invalid due to failure to give adequate reasons for the decision reached thereby failing to ensure openness of administration and compromising ability to assess lawfulness.

- Based on the reasons given the Commissioner has failed to take into account relevant considerations.

- Based on the reasons give the Commissioner has taken into account irrelevant considerations.

- On the reasons given (including the lack thereof) the decision-maker has failed to lawfully apply s24 CPLA.

Other material

43 EDS understands that LINZ's approach to decision-making on tenure review is to apply Cabinet Minute (09) 267C (**Minute**)[65]. EDS accepts that application of the Minute is not recorded in the Preliminary Proposal documents.

44 The Minute sets an "*end outcome"* for Crown pastoral land (and so tenure review) that "*Crown pastoral land is put to the best use of New Zealand"*[66]. That outcome is stipulated to mean "*that Crown pastoral land is put to the best use for economic, environmental, and cultural purposes"*[67].

45 The Minute also records the "*government's objectives for Crown pastoral land*"[68]. Objectives different and additional to those in s24 CPLA are set, relevantly:

- Ensure that "*pastoral*" values are maintained and protected.

[63] It appears in terms of quality and values and in terms of financial support.
[64] ***New Zealand Fish and Game Council v Commissioner of Crown Lands*** at [74] & [83].
[65] Email from Janet Harris 6/7/17 to Gary Taylor in response to request for information on LINZ process link to Minute and supporting Cabinet paper included.
[66] Minute at paragraphs 7 and 8.
[67] Minute at paragraph 9.
[68] Minute at paragraph 10.

- Promote "*the contribution of Crown pastoral land to New Zealand's economy*".

- Value the "*iconic nature of high country farming and its contribution to New Zealand culture".*

- Value "*viable rural high country communities".*

46 EDS considers the Minute is *ultra vires* the CPLA and should not be applied because:

- It is inconsistent with s24 CPLA. Extraneous material can only be considered if consistent with the stated objects of tenure review. That is set in s24. It contains a number of objectives which sit within a hierarchy and which are the intended end outcome of tenure review. At the top of the hierarchy are promoting land management that is ecologically sustainable and enabling protection of significant inherent values. Freeing from management restraint and freeholding and subordinate.

  The Minute effectively replaces and redrafts s24 CPLA. No hierarchy is stipulated. New economically focused objectives are included. A balanced exercise between economics, environment, and cultural factors is applied[69].

- Cabinet cannot override legislation and purport to fetter the Commissioner's ability to consider tenure review proposals under the decision-making framework in ss24-26 CPLA[70].

RELIEF

47 EDS seeks:

1 The relief as set out in the body of this submission.

2 With respect to tenure review generally:

- A moratorium be placed on tenure review until completion of an overall analysis of ecological state and necessary protection and sustainability interventions across the South Island high country, and until completion of the cross-institution review of the different land management processes in the Mackenzie Basin.

- Decision-making process for tenure review be applied as set out by EDS. If LINZ disagrees with that process then High Court declarations should be sought to clarify correct decision-making approach including the extent of information required and the extent of reasons required. EDS would be prepared to seek declarations jointly.

- Independent economic review of the valuation approach applied in tenure review.

3 With respect to tenure review of Simons Pass:

- That no Substantive Proposal be put to the leaseholder and the property remains in pastoral lease. The process can be started afresh subsequent to moratorium and review.

- LINZ commission up to date expert assessment of:

  - Ecological and landscape significance of the Mackenzie Basin as a whole, current state, pressures, and rate and scale of ecosystem degradation and loss.

[69] Cabinet Paper A676415 pg 4, [49] bullet 1: explanation of interpretation and application of strategic direction requiring balancing approach.

[70] For a recent analogous situation where fettering of decision-making power by governing body resolution was found to be unlawful see: ***Wellington Fish & Game Council & Environmental Defence Society Inc v Manawatu-Wanganui Regional Council*** [2017] NZEnvC 37 at [37]-[48] and [186].

- Review of existing material addressing the above points including but not limited to the PCE's Reports, the Environment Court's 11th Decision on PC13, the Environment Court's declaration decision.

- SIVs on the property.

- Role and importance of each part of the property in terms of ecological sustainability on property and within the context of the entire Mackenzie Basin.

- Best combination of designations and protective mechanisms to apply to the property to achieve protection of significant inherent values and ecological sustainably, and providing for economic use where and in a way consistent with those outcomes.

- That EDS be included in any negotiation/consultation on development of the Substantive Proposal as available under s26 CPLA.