IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2016-485-392
[2017] NZHC 1346

BETWEEN	LOWER NORTH ISLAND RED DEER FOUNDATION INCORPORATED Applicant
AND	THE MINISTER OF CONSERVATION Respondent
AND	WAIRARAPA HELICOPTERS LIMITED Interested Party

Hearing: 2 May 2017

Counsel: S F Quinn and K E Krumdieck for Applicant
B R Arapere and P D Williams for Respondent
C P Brosnahan for Interested Party (by written submission)

Judgment: 19 June 2017

JUDGMENT OF SIMON FRANCE J

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Introduction

[1] Wild animals, including deer, are a conservation risk. They can damage vegetation, soils, waters and wildlife. The Wild Animal Control Act 1977 (the Act) has as its primary purpose the control of such animals. This is achieved by hunting and killing the wild animals. Accordingly, other purposes of the Act are to co-ordinate hunting endeavours, and regulate the different hunting methods.[1]

[2] The Act identifies three forms of hunting – recreational, commercial and wild animal recovery operations (WARO).[2] For present purposes, the latter two types of hunting can be treated as synonymous. WARO involves the use of aircraft, almost inevitably helicopters, to hunt, kill, and recover the animals and then transport the carcasses.[3] Control of the wild deer population is achieved by a combination of recreational hunters and WARO. Recreational hunters are responsible for a much larger percentage of the overall kill.

[3] There is a tension between the two activities. WARO activities are regarded by recreational hunters as interfering with their endeavours by disturbing the stock when flying over the areas, and by reducing the numbers of deer. However, the Department of Conservation's (the Department) assessment, which there is no basis to doubt, is that WARO is necessary and recreational hunting will alone not suffice to achieve the necessary control.

[4] WARO activities are regulated by the issue of concessions. Presently there are two concessions – one each for the North Island and South Island. The concessions control where and when WARO activities may take place. They do not limit the number of stock a WARO operator may take, although it has been considered necessary to impose minimum catches in order to maintain the concession. This reflects that the primary purpose is to ensure numbers of wild deer are sufficiently controlled.

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1 Wild Animal Control Act 1977, s 4.
2 Section 4(2)(c).
3 Section 2(1), see definition of "wild animal recovery operation".

[5] The present WARO concession structure was established in 2009 following extensive consultation. It changed the former approach. The concessions issued in 2009 were for a six year period, meaning fresh concessions were offered in 2015.

[6] All conservation land on which WARO hunting (and recreational hunting) can occur is divided up into three zones:

(a) prohibited areas, where no WARO can occur;

(b) restricted areas, where WARO is permitted subject to conditions; and

(c) permitted areas where WARO is freely permitted other than during some well established shutdown periods (such as Christmas/New Year).

[7] Prior to the 2015 concession process, and having obtained information from the local district offices, the Department made changes to the 2009 classifications of land within certain Parks.[4] The evidence suggests that, measured over the whole country, the changes were not significant.

[8] The applicant, as its name suggests, represents recreational deer hunters in the lower North Island. The hunting areas on which their attention is directed were the subject of considerable changes which the applicant says significantly increased the possibility of WARO activity.

[9] The applicant submits the 2015 process was flawed to such an extent that the concessions should be cancelled. Alternatively, it seeks a direction that the concessions be modified to return the zoning to its 2009 position. The alleged flaws can be grouped into three challenges – a failure to afford the applicant the opportunity for input; an error of fact, namely that deer numbers were increasing; and a failure to have regard to mandatory considerations, and in particular the effects of increased WARO activity.

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4 These included Ruahine Forest Park, Tararua Forest Park and Rimutaka Forest Park and Rimutaka Forest Park.

[10] Each of the challenges is addressed in turn.

Issue one – no opportunity for input

[11] The label, "opportunity for input", is used here to address three grounds of review

(a) the applicant had a legitimate expectation to being consulted;

(b) the Minister had a obligation in the circumstances to publicly notify the concession process, thereby allowing input; and

(c) natural justice required an opportunity for input. Four matters impact upon this analysis – the statutory scheme, what happened in 2009, the changes being made in 2015 and the process by which they were implemented.

[12] Finally, a post-decision review by the decision maker of his original decision is also addressed.

Statutory scheme

[13] The Act provides for the issuing of WARO concessions.[5] The process for granting such concessions is generally to be found in the Conservation Act 1987, but the Wild Animal Control Act does have something to say on the topic. First, s 21(c)(iii) and 23(b) of the Act both say that in carrying out the Conservation Act process, the Minister must have regard to the purposes of the Wild Animal Control Act. Second, s 23(c) requires the Minister to have regard to:

> the role of persons engaged in hunting for recreation in achieving the purposes of this Act.

That obligation can be seen as tying back to the purposes of the Act which include co-ordinating hunting measures to achieve control.[6]

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5 Wild Animal Control Act 1977, ss 21–23.
6 Section 4.

[14] Part 3B of the Conservation Act prescribes the process for granting concessions. Concessions are not required for recreational activity. Section 17U sets out the mandatory considerations:

> **17U Matters to be considered by Minister**
>
> (1) In considering any application for a concession, the Minister shall have regard to the following matters:
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> (a) the nature of the activity and the type of structure or facility (if any) proposed to be constructed:
>
> (b) the effects of the activity, structure, or facility:
>
> (c) any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity:
>
> (d) any information received by the Minister under section 17S or section 17T:
>
> (e) any relevant environmental impact assessment, including any audit or review:
>
> (f) any relevant oral or written submissions received as a result of any relevant public notice issued under section 49:
>
> (g) any relevant information which may be withheld from any person in accordance with the Official Information Act 1982 or the Privacy Act 1993.
>
> ...

[15] Relevant also to the present case is s 17W, which considers the relationship between concessions and conservation management plans. Such a plan exists for the Ruahine Forest Park, which is one of the hunting areas used by the applicant and concerning which changes were made in 2015. In relation to aircraft, the Ruahine Forest Park Conservation Management Plan provides:[7]

> Helicopters have not been allowed in several areas of the Park (except for management purposes) for a number of years. As indicated in section 4.2, in these areas recreational hunting is the main means of deer control.
>
> As there are no helicopters allowed in these areas recreational hunters are solely responsible for animal (deer) control. Should animal numbers build up to an unacceptable level the Department may allow helicopters throughout the area for both transport of hunters and aerial recovery. There are indications, from the state of the vegetation and deer returns that deer numbers are building up in some of these areas, for example the Pourangaki

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7 *Ruahine Forest Park Conservation Management Plan* (Department of Conservation, M333.78, February 1992) at 74, emphasis added.

> Catchment. As foot access is unsatisfactory in this area, it may become necessary to allow helicopters to operate in it to achieve adequate deer control.
>
> While areas currently not open to helicopters may be opened up for this use, conversely other areas, with good access and low deer numbers may be suitable helicopter-free areas in the future.
>
> *At all times, the guiding principle will be the protection of natural values. Recreational hunting groups, conservation groups etc will be consulted prior to any decision on helicopter access.* If recreational hunters wish to maintain areas of the Park helicopter-free they must demonstrate that they can control animal numbers. Co-operation between the Department and hunters is essential in this respect.

[16] Relevant to the italicised commitment, s 17W of the Conservation Act states:

> **17W Relationship between concessions and conservation management strategies and plans**
>
> (1) Where a conservation management strategy or conservation management plan has been established for a conservation area and the strategy or plan provides for the issue of a concession, a concession shall not be granted in that case unless the concession and its granting is consistent with the strategy or plan.

[17] The only express statutory consultation requirement is contained in s 17T(4) of that Act, which says that grants exceeding 10 years must be publicly notified. For concessions of a shorter duration the Minister may publicly notify it if they consider it appropriate to do so having regard to the effects of the concession.[8]

2009 process

[18] Following a 1999 amendment to the Act, concession rounds were held in 1999 and 2004. A WARO concession at that time was general and covered multiple activities including deer recovery and assisting trophy hunting. Neither concession round was publicly notified.

[19] In 2009 it was decided to separate out different WARO activities and address each by a specific concession. At the same time further obligations were proposed in relation to WARO operators, such as flight and data recording. Also, those involved

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8 Conservation Act 1987, s 17T(5).

in deer hunting would now need certified supplier status from the Ministry of Primary Industries.

[20] Recognising these to be significant changes, the Department undertook an extensive consultation process with stakeholders. The process involved first distributing the initial proposal and seeking feedback. The policy was updated as a consequence and distributed again for final comment. Included in this second distribution were the proposals for land zoning and WARO closure times. Following consideration of responses, the new framework was finalised.

[21] The applicant notes how extensive this process was. Maps, letters and disks were provided to ensure participants were informed. The process took four months spanning April to August 2009.

[22] Following the establishment of the new framework, the 2009 concession process itself was not publicly notified. The decision maker was a duly authorised delegate who received what is termed an "Officer's Report". This Report explained the background to the offer, and traversed the various statutory criteria. It recommended approval of the concessions, a recommendation the decision maker accepted.

2015 changes and process

[23] Because the focus of the applicant is on the lower North Island parks, I have only been provided with the detail of the land zoning changes made to these areas from that which existed in 2009. In setting these out, however, it is important to note as context that the exercise is a national one covering many areas.

[24] The four affected areas were:

(a) Ruahine Forest Park – a large portion (the applicant says 67 per cent) went from restricted to permitted. A small amount went from prohibited to permitted;

(b) Tararua Forest Park – all the area previously prohibited (applicant says 15 per cent) became restricted;

(c) Rimutaka Forest Park – previously 81 per cent of the park was prohibited. The reclassification left 16 per cent as prohibited, and 84 per cent as permitted;

(d) larger Wairarapa blocks – all were changed from prohibited to permitted.

[25] The delegated decision maker, Mr Michael Slater, has deposed that he decided public notification would not be appropriate. He was influenced by the fact that the concession process had not publicly been notified previously. Mr Slater says he was aware the applicant wanted it to be publicly notified because there was a public interest in the matter but Mr Slater notes public interest is not an "effect" of a WARO concession (so presumably therefore thought to be irrelevant). This is a reference to s 17T which says the notification decision is to be governed by the effects of the concession.

[26] Mr Slater denies the applicant could have an expectation to be consulted. That had only occurred in 2009 because the whole framework was being reorganised. The 2015 process was a standard WARO round which operated within the established framework, and that process had never been notified.

[27] A point made by the applicant is that in 2015 the Department nevertheless consulted with WARO operators, and so unfairness exists in the decision not to consult with deer hunters. Mr Slater confirms such consultation occurred but says that is because the WARO operators are applicants for a concession. Concerning this consultation, the initial letter to existing WARO concession holders advised that a WARO round was imminent and invited submissions on the existing 2009 framework and how it was working. Mr Slater summarised the responses from this invitation as being:

(a) North Island operators were generally happy with the status quo but suggested "some improvements in the land offer", by which is meant changes to the land zoning areas. The North Island operators did not seek a meeting;

(b) South Island operators requested a meeting, which was held. A number of issues were raised.

[28] Next in relation to consultation, reference is needed to the Game Animal Council which was established in 2013. Its functions are:[9]

> **7 Functions of Council**
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> (1) The Council has the following functions in relation to game animals:
>
> (a) to advise and make recommendations to the Minister:
>
> (b) to provide information and education to the hunting sector:
>
> (c) to promote safety initiatives for the hunting sector, including firearms safety:
>
> (d) to advise private landowners on hunting:
>
> (e) to develop, on its own initiative or at the direction of the Minister, voluntary codes of practice for hunting:
>
> (f) to raise awareness of the views of the hunting sector:
>
> (g) to liaise with hunters, hunting organisations, representatives of tangata whenua, local authorities, landowners, the New Zealand Conservation Authority, conservation boards, and the Department of Conservation to improve hunting opportunities:
>
> (h) to conduct research, including research on the hunting of game animals:
>
> (i) in respect of herds of special interest for which the Minister has delegated management powers under section 20 to the Council,—
>
> (i) to undertake management functions that are compatible with the management of public conservation land and resources generally; and

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9 Game Council Act 2013, s 7.

(ii) to exercise its powers for the effective management of the herd:

(j) to operate voluntary certification schemes for professional hunting guides and game estates:

(k) to promote minimum standards and codes of conduct for certified hunting guides and game estates:

(l) to investigate complaints and take disciplinary action in relation to certified hunting guides and game estates:

(m) to provide any other services to hunters that the Minister is satisfied are ancillary to the Council's other functions:

(n) to perform any other functions conferred on it under this Act or any other enactment:

(o) to assess the costs of managing herds of special interest and make recommendations to the Minister on ways to recover those costs.

(2) In performing functions other than the functions in subsection (1)(a) and (f), the Council must have regard to any views expressed in writing by the Minister to the Council.

[29] As part of the 2015 exercise the Department liaised with this body. The Council was not however asked for comment on the draft land offer (i.e. the proposed zonings).

[30] As in 2009, prior to making the decision Mr Slater was provided with an Officer's Report which followed the same structure as previously.[10] At the outset the Report notes:[11]

> The 2015 national permit offer is essentially a continuation of that same activity (i.e. wild animal recovery – noting, however, that wallabies are no longer classified as a wild animal under the Wild Animal Control Act and so have been removed from the South Island schedule of the permit). This activity, as described above, has previously been assessed as not being contrary to the relevant legislation and not inconsistent with statutory plans. However as part of this review the Department has:

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10 Janine Sidney *Non-notified Concession Report to Decision Maker on National WARO Permit Offer* (Department of Conservation, May 2015).

11 At 3.

- re-assessed the public conservation land that is to be made available to or excluded from the activity to ensure the assessment is current and reflects any changes in statutory management plans or other mitigating factors eg increases in animal numbers at site, and

- sought feedback from existing operators and the newly established Game Animal Council. This feedback is further detailed and addressed in Section 2 of this report.

The re-assessments (ie changes to land zoning) are not then described in the document but apparently can be ascertained by viewing the contents of two discs provided to the decision maker at the same time.

The effects of the proposed 2015 WARO concession were considered to be the same as in 2009. This reflects the Department's view that the effects are well known, and constant. Indeed the 2015 Report does not itself analyse the effects at all but merely refers the reader to the analysis of effects in the 2009 Report which was appended.[12]

[31] In the section detailing feedback from the WARO operators, there is a section summarising the comments on the proposed zoning. It is noted that:[13]

> As advised in 2.1.1 the assessment of the land that was undertaken by Conservation Services who were provided with the assessment criteria and the Directors were asked to sign off the assessment for their region. On receipt of the industry feedback the relevant Directors were asked to review their justifications and to advise if they wished to make any changes. As a result there have been some changes to the lands that have been restricted or excluded as below, but no changes to the remaining lands and justifications for exclusion or restriction. These changes are reflected in the revised land assessment which is found at Appendix 11…
>
> Changes to the land offer in response to industry feedback:
>
> Ruahine Forest Park:
>
> - Feedback requested that the Department reassess the orange restrictions (ie only allowing hunting to take place during Winter). The Department has determined that due to a steady increase in the deer population and the expected negative impact this population increase is likely to cause to the quality of the forest and grassland ecosystems, the proposed restrictions will be relaxed.

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12 At 13.

13 At 21. The Ruahine Forest Park comment is included in the extract because it is one of the areas about which the present application is concerned.

- The removal of restricted access will allow WARO operations to continue all year round in two-thirds of the forest park, with the exception of peak hunter activity periods. This increased access will allow WARO operators to better target the higher-altitude grasslands at a time of the season when deer are increasing their use of this ecosystem.

[32] Mr Slater approved the proposed zoning and conditions and applications were then received.

[33] The President of the applicant, Mr Gordon George, says his organisation sought involvement in the process from 2014 but was rebuffed. He says he was only advised after the event that permits had been issued which included the zoning changes previously noted. Mr George notes that while the Game Advisory Council was consulted on a general level, it too was not provided with the detail of land changes. As noted earlier, Mr Slater accepts that is the case. The Game Advisory Council's submission, which was noted in the Officer's Report, was at a much broader level and was to the effect that the present system is not working.[14]

Review of the 2015 process

[34] Mr Slater notes that after the decision approving the concession structure was made, the applicant, the Game Animal Council and the New Zealand Deerstalkers Association all raised concerns, particularly in relation to the Ruahine Forest Park changes. Mr Slater decided to exercise his power to review his decision. He described the decision to undertake a review as a gesture of good faith to show the Department's commitment to its relationship with recreational hunters.

[35] The review was undertaken and involved consultation with the groups noted above, two of the affected WARO operators, and the Ruahine User Group. A further Officer's Report was prepared and ultimately Mr Slater revoked the changes to the zoning for the Ruahine Forest Park by returning them to the 2009 configuration.

[36] Mr Slater considers his change in position does not imply the original decision was incorrect. Rather, "it fell on a continuum of available options consistent with the legislative requirements." Mr Slater says the same is true of the

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[14] At 8–10.

review decision, but that decision was now at a spot on the continuum more favourable to the deer hunter's interests. The change in outcome is said by Mr Slater to reflect the complexity of the competing interests. The applicant, not surprisingly, submits it reflects the initial lack of consultation.

A legitimate expectation?

[37] The applicant submits a legitimate expectation existed as a product of several events. First there was the establishment of the Lower North Island Hunter Liaison Group. It is an informal group with no statutory basis but seems to have been a Department initiative. When it was established, draft Terms of Reference, which have never been finalised, were set up.

[38] Mr Quinn relies on two aspects of the draft Terms of Reference. In the Principles it is stated the Group will work in an inclusive manner and on the basis of good faith, respecting and listening to different viewpoints. Further, it will operate in a no-surprises manner, with the parties bringing any concerns to a meeting. These are submitted to be promises made to the group (of which the applicant is effectively the successor).

[39] Next, reference is made to the Ruahine Forest Park Conservation Management Plan, and the commitment there that recreational hunting groups, among others, will be consulted prior to changes to aircraft access (see extract above at [15]). The third matter is a Department document prepared for the 2009 exercise. It is called the Land Justification document and identifies all land that is closed to WARO, with reasons why. Included in this list are three areas in the Ruahine Forest Park. The accompanying explanation says that "some consultation" would be required if the area was to be opened up to helicopter hunting. I observe this comment could be seen as merely a repetition of the statement to that effect in the Conservation Management Plan for that Park.

[40] The next alleged statement is that the Department had advised recreational hunters there would be no changes until a Conservation Management Strategy was finalised. In what might be seen as somewhat of a stretch, the following statement in an internal email from the Department is proffered by the applicant:

> We have publicly stated to the hunting fraternity that the CMS review would be the vehicle to review this activity, and where it can happen. To not honour this would definitely undermine our relationship with a lot of stakeholders.

[41] The final matter touched on is the extensive consultation that was undertaken in 2009.

[42] The case for the applicant holding a legitimate expectation concerning any changes to the Ruahine Forest Park merits individual consideration. The Conservation Management Plan expressly says recreational hunters, amongst others, will be consulted. I do not accept the respondent's proposition that this commitment relates only to charges to existing no-fly areas but consider it to be a wider commitment concerning the Forest Park, and aircraft access.

[43] In terms of who might be the beneficiary of this commitment to consult, given the location of the Ruahine Forest Park, and the fact that the applicant group is a body set up with the Department's assistance to be available for consultation, it is reasonable to conclude the expectation rests at least with the applicant. However, it is not necessary to consider whether all the required aspects of a legitimate expectation are made out, because the reality is that the changes to Ruahine Forest Park have been undone by the Review decision.

[44] More generally, in the absence of a specific commitment such as that in the Ruahine Forest Park Conservation Plan, there could be no legitimate expectation in the applicant group that it would be consulted over the WARO exercise. This is a national exercise involving all conservation land in New Zealand that is open to hunting across the country. The applicant body, although of some size, is just one of a number of groups representing recreational hunters. Further, there is a national body, the New Zealand Deerhunters Association. Recalling that this is not an assessment of whether there should have been consultation, but whether there existed a legitimate expectation in the applicant, I consider the answer can only be no.

[45] Establishing a legitimate expectation that a public authority must act fairly and reasonably requires more than a mere hope that a cause of action will be pursued.[15] To be a legitimate expectation, it must, in the circumstances be reasonable for the applicant to rely on the expectation.

[46] Undertakings to work towards a collaborative approach, or to recognise an organisation's interest in an issue, are generally seen as too vague to create a legitimate expectation.[16] An example of this is the Terms of Reference document for the Lower North Island Hunter Liaison Group. The principles relied upon were never formalised and are a collection of broad aspirational goals that a joint group will work towards. They are general in their expression. They cannot be seen as an express commitment by the Minister's delegate to consult with the group on a WARO exercise. Any expectation of consultation sourced in the Terms of Reference would not be reasonable.

[47] The statement in an internal email on which the applicant also relies is likewise too vague. The email itself, being internal and unknown at the time to the applicant, could not create an expectation in the applicant. However, it does refer to public statements by the Department that a more widespread exercise culminating in a Conservation Management Strategy is being planned, and that exercise will take place when a review of WARO occurs. The context of these broad statements is not known, but they cannot be read as saying that no changes at all will occur in the interim, or that the applicant will be consulted on any change within its area of interest.

[48] Finally, I accept the respondent's submission that the 2009 exercise was qualitatively different and did not create a reasonable expectation in relation to the much lesser process in 2015, which was merely the implementation of the new system established in 2009. Accordingly, with the exception of the Ruahine Forest Park, there is no statement by the Department that constitutes a commitment of sufficient clarity to found a legitimate expectation.

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15 At [121]–[127].

16 *Comptroller of Customs v Terminals (NZ)Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [121]–[124].

A duty to consult?

[49] Notwithstanding the absence of a legitimate expectation, the circumstances may give rise to an obligation to consult. That obligation may be inferred from the statutory scheme, or be recognised as a requirement of fairness in the particular circumstances.[17] In *Nicholls v Health and Disability Commissioner*, Tipping J recognised that there may be a duty to consult:[18]

> where the demands of fairness in the particular circumstances clearly require the decisionmaker to consult either generally or with a particular person or persons before reaching the decision in question.

[50] In the present case a duty to consult the applicant cannot be implied from the terms of the statute. The extent of compulsory consultation is contained in s 17T of the Conservation Act where circumstances are prescribed for mandatory and discretionary public notification. The statutory scheme in the Conservation Act is one which applies to all concession processes in relation to a large range of activities and various types of concession including leases, licences, and permits. Its purpose is to provide a general procedural framework applicable to many situations and there is little scope to read into it a specific duty to consult in the present circumstances.

[51] I observe, however, there is in Mr Slater's evidence an implied suggestion that a negative public notification decision exhausts consideration of whether lesser consultation might be needed. If that is the proposition, it would be an error. As noted, a more localised obligation may arise in particular circumstances. That obligation, if it exists, can be fulfilled without needing to engage the complete notification process which would call for input from everyone.

[52] That indeed is the real issue here. Did the particular circumstances require consultation with the applicant, notwithstanding that it was a national process, and generally intended only to apply an established framework?

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17 Graham Taylor Judicial Review: *A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [13.73]; and Mathew Smith *New Zealand Judicial Review Handbook* (2nd ed), Thomson Reuters, Wellington, 2016) at [48.1.2].

18 *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370.

[53] I am satisfied such a duty existed. It is convenient to list the combination of factors that lead to this conclusion and to then expand on them as necessary:

(a) the changes proposed were significant;

(b) WARO operators were given an opportunity to comment on the zoning;

(c) the recognition in s 23(c) of the Wild Animal Control Act of the role of recreational hunters and the fact that the statute makes this a mandatory consideration;

(d) the commitment in the Ruahine Forest Park Conservation Management Plan to consultation;

(e) the establishment of the Lower North Island Hunter Liaison Group; and

(f) the consultation process that was followed in 2009.

[54] By any measure the proposed changes were significant. The interested party, a WARO concession holder, filed evidence that the effect may not be significant in practical terms. For example, that the interested party considers the Ruahine Forest Park to be overstocked and therefore the deer to be of poor quality. For that reason it does not presently hunt at all in that Park, albeit it acknowledges that another operator still does. It remains my view that whatever the practical consequences of the changes, they were at least potentially significant. Internal email traffic makes it plain that it was appreciated by the Department the changes were significant at least in relation to Ruahine Forest Park, and that recreational hunters would be concerned by the changes. Mr George's complaints about a lack of consultation are specifically acknowledged (but not acted on).

[55] This was a nationwide exercise and so caution is needed in identifying specific areas as candidates for localised consultation. However, the conservation aims, and the wild animal control aims, are not just national objectives. Adequate

control in each of the individual areas is a goal, and that indeed was what motivated the Ruahine Forest Park changes. Because control must be achieved not just nationally but in each Park, the possibility of the need for localised consultation is more present. The Court does not have the information on how the Lower North Island changes compare with other areas in the country, so is not in a position to consider the implications for other areas of identifying a consultation obligation here.

[56] The figures identified above at [24] tell their own story. The Ruahine Forest Park changes concerned a large portion of the Park.[19] For the Tararua Forest Park, all no flying land was removed; and the switch in the Rimutaka Forest Park on its face was dramatic (81 per cent no flying down to 16 per cent). The Department filed no evidence to suggest these were not significant changes. The scale of the change therefore suggests the recreational hunters represented by the applicant could be significantly affected.

[57] The next factor is that WARO operators were given an opportunity to comment on the zoning. The respondent says this was because they were applicants but that response says nothing about whether consequences arise from the need to consult WARO operators. The Department itself recognises there is a tension between the two groups, and that they are competitors. Further, the consultation with WARO operators about the zoning was undertaken before the WARO operators actually filed an application. It was undertaken at the stage when the boundaries were being confirmed, which is the same stage at which consultation with the applicant could occur.

[58] Internal emails show that the comments by WARO operators on the land boundaries caused the relevant Department official to go back to the managers of the districts for a response. It is also the comments by the WARO operators that seem to have provoked the significant changes to the Ruahine Forest Park classifications (i.e. those which were subsequently reversed). The input from WARO operators was accordingly relevant and potentially influential.

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[19] When assessing the duty to consult, it is appropriate to consider the changes then under consideration rather than the situation following the Review.

[59] There is undoubtedly a level of unfairness created here. If it is considered necessary to give potential WARO operators an opportunity to make submissions on the boundaries or zoning, then whatever the reason for doing that, consideration also needed to be given to affording a similar opportunity to the recreational hunters who would be most affected by any changes.

[60] That observation is reinforced by s 23(c) of the Wild Animal Control Act. It specifically requires the Minister, when conducting a WARO exercise, to have regard to the role of persons engaged in hunting for recreation in achieving the purposes of the Act. I consider it would go too far to infer from this provision a statutory obligation to consult, as opposed an obligation to bear these interests in mind. But a question inevitably arises in particular situations as to whether it is possible to properly bear these interests in mind if the affected parties are not themselves consulted over the proposed changes. I consider the statutory recognition in s 23(c) of the central role of recreational hunters provides another reason why here consultation was required.

[61] The next factor is the Ruahine Forest Park Conservation Management Plan, the terms of which have previously been noted. The Plan represents an express prior commitment to consult and should not have been read restrictively. Likewise, and again consistent with s 23(c), the Department recognised the role of the applicant when participating in or indeed initiating the establishment of the Lower North Island Hunters Liaison Group. When proposing significant changes to WARO access to the main parts within the catchment area, it is not then a stretch to suggest there ought to have been consultation. The existence of this group created for that specific purpose is another factor contributing to the conclusion that ought to consult was in fact a duty to consult.

[62] Finally, reference should be made to the 2009 process. As noted, I accept the context was different and it did not create a legitimate expectation. However, it is notable that the second round of consultation invited submissions on the land classifications and zoning. That was nothing to do with changes to the WARO concession structure itself but was much more an implementation aspect, like 2015.

[63] Standing back, I am satisfied this has been an unfair process caused by a failure to consult with the applicant. Whilst numerous cumulative factors have been identified, I doubt that in the absence of significant changes and of consultation with WARO operators I would hold there to be a duty. It is that consultation with a rival interest that translates what would otherwise just be desirable or sound practice into a formal obligation, particularly as here where the changes proposed were significant, and there was an identifiable easily accessible body to consult.

[64] This latter point is of some importance and provides a response to the floodgates argument advanced by the respondent. The duty to consult arises from the particular circumstances. Almost inevitably, the identification of particular circumstances will also identify who is to be consulted with reasonable particularity. Here it is the group set up by the Department for that very purpose. For completeness I note that the respondent, correctly, did not submit that consultation with the Game Animal Council discharged the obligation. What occurred there did not involve consideration of the zoning changes.

[65] It accordingly follows that the decision to offer the 2015 North Island WARO concessions on the terms set out, and in particular with the land classification changes from 2009 in the four areas discussed, was invalid. It was reached after an unfair process that denied the applicant the opportunity to have input. It can be observed it was an opportunity the applicant was actively seeking and which was specifically denied by the respondent. I will consider relief later.

Issue two – error of fact

[66] The changes in zoning followed a process whereby the Department obtained feedback from all its managers on the ground about the state of the wild animal population and the effectiveness of current control. The decision to allow greater WARO activity seems to have been primarily prompted by the view that deer numbers had increased.

[67] The applicant says this is an error. The reasoning is challenged on two fronts – there is no reliable scientific evidence to show it is correct, and, in the opinion of the applicant, it is wrong.

[68] The former proposition is true but does not provide a basis for review. The method adopted by the Department is a reasonable one and is obviously seen by them as generally sufficient to enable it to make the necessary assessments. A considerable degree of deference is due to the Department in making this type of assessment. It is core to their responsibilities and expertise.

[69] As for it being an error, the applicant's opinion is just assertion, albeit based on anecdotal evidence. The difficulties are highlighted in this case where there are three opinions – the applicant says there are not more deer, the interested party says in relation to Ruahine Forest Park there are and it is grossly overstocked, and the Department has concluded there are more deer such as to require adjustments to the control methodology.

[70] For the purposes of the judicial review I conclude no error of fact has been shown, nor has it been shown that the Department's approach is unreasonable. The reality is that the evidence is largely anecdotal, hence the significant margin of deference that should be accorded to the Department.

Issue three – mandatory considerations

[71] The primacy focus here is on the duty to have regard to the effects of the concession. The applicant points to the lack of any analysis in the 2015 Officer's Report as to the effect of the changes. The respondent says the effects are static and it was permissible to address them by way of reference of the 2009 analysis.

[72] I consider this issue to be finely balanced, and do consider the approach in the Officer's Report to be fraught with dangers. The 2015 concession exercise is a separate exercise. It may be that the nature of the effects are constant, but in theory anyway it cannot be that a change in the balance between recreational hunting and WARO is irrelevant. If one is increasing WARO then the relevant albeit static effects such as over-flights, noise, or risk, must correspondingly increase. One would expect at the least a recognition of this and confirmation that it has been considered and identified as not material.

[73] It is arguable that it is implicit in the Report's approach to effects that it was considered no significant change to effects would occur as a result of the particular changes. Further, Mr Slater says in his evidence that he considered the effects. This aspect of Mr Slater's evidence led the applicant to complain of "back-filling" and to caution the Court against allowing it. This is where the decision maker is said to augment the face of the record after the event with further evidence about what was considered.

[74] I am not satisfied that has occurred here. Mr Slater is testifying that he had regard to material that was available to him in the package of information that he was provided. I have no reason to not accept that. Likewise by a narrow margin I accept that that information was sufficient to allow Mr Slater to have regard to the matters that he needed to. He would have had to work assiduously on his obligation to access that information because the core report did not clearly lay it out, but the information was there. The zoning changes, for example, were contained in maps available on the CD, and the identified effects were detailed in the 2009 appended Report. It can be accepted that a person in Mr Slater's position is able to work out that those effects will be increased or diminished by the altering of the balance between recreational hunting and WARO, and to have regard to that.

[75] That said, and perhaps by way of assistance, I consider the Report is deficient in this regard. It is dangerous to address mandatory considerations merely by cross-reference to reports that are six years old. Further, it would make it clearer if the Report itself at least summarised the core land zoning changes, and passed comment on why those changes did not alter an effects assessment that is now six years old. Notwithstanding these observations I am satisfied that effects were considered.

[76] The other main mandatory consideration said to have been overlooked is s 23(c) of the Act, namely the role of the recreational hunter in controlling wild animals. I have already observed that I consider insufficient attention was given to the relevance of this factor when assessing whether the applicant needed to be consulted. However, it cannot be said that the matter was not considered at all. The role of the recreational hunter and the tension with WARO is readily apparent

throughout the Report. The statutory requirement is to consider the role of recreational hunting in achieving control and in many ways the entire WARO exercise is informed by that. It is well recognised that WARO impacts on recreational hunting. The current ability of recreational hunting to achieve adequate control in a particular area is an inherent consideration in assessing whether the current balance between recreational hunting and WARO is achieving the statutory purpose.

[77] Accordingly, I do not consider the challenge based on failure to have regard to mandatory considerations is made out.

Conclusion on challenges

[78] The Minister's delegate was under a duty to consult with the applicant in order to achieve a fair process. The applicant had a recognised interest in the land boundaries within the Parks, and the Department knew any changes would affect the applicant and be of interest to them. The duty to consult is particular to the circumstances before the Court, and is the cumulative effect of several factors. However, key to the outcome is that the other interested party, the applicant's "competitor", was given an opportunity for input into what were significant changes to the boundaries. Also of particular relevance is that the statute recognises the role of the recreational hunter in carrying out the Act's purposes, and makes that a mandatory consideration for the Minister to take into account.

[79] The material before the decision maker, whilst not presented in a manner that facilitated focus on the key mandatory considerations, nevertheless contained all the information the decision maker was required to have regard to. The evidence that this material was considered is accepted. The decision did not proceed on a material error of fact.

[80] A declaration that the decision approving the form of the concession, and in particular the land boundaries, was invalid is appropriate.

Relief

[81] Two forms of relief were raised at the hearing. The first is to quash the WARO concessions. The second is to declare the conditions of the concessions should be amended to return the boundaries to their 2009 state.

[82] Concerning quashing, I am satisfied that would not be appropriate relief. The concessions cover the whole of the North Island. To quash them would be to affect numerous concession holders who do not hunt in the areas that have been the focus of this case. That would be an unwarranted interference with their livelihood. Further, there is a need for WARO to occur in order to achieve the control purposes of the Act, and cancelling all concessions for the North Island would not be appropriate.

[83] Nor does the evidence leave me satisfied that the impact of the changes on the applicant and its members is such as to need immediate relief. It does not appear to be making their endeavours unachievable. In that regard it is important to note that two years of the three year term of the permit have now expired. The applicant, by the declaration, has achieved one of its key litigation aims, and I consider quashing the concessions at this stage would be a disproportionate response

[84] The other option is that the conditions of the concession may be amended to return the boundaries of their 2009 position. I am not satisfied the Minister has a power to do that. Section 17ZC is the relevant provision and it provides:

> **17ZC Changing conditions**
>
> (1) The Minister and the concessionaire may at any time, by agreement in writing and without any public notification, vary any conditions in the concession document where—
>
> (a) the variation is of a minor and technical nature and does not materially increase the adverse effects of the activity or the term of the activity or materially change the location of the activity; or
>
> (b) the variation will result in a reduction of the adverse effects or the duration of the activity.

(2) The concessionaire may at any time apply to the Minister for a variation or extension to the concession and such application shall be treated as if it were an application for a concession; and the provisions of sections 17S to 17ZB shall apply accordingly.

(3) The Minister, on request or on his or her own motion, may vary the conditions of a concession where—

(a) the variation is the result of a review provided for in the concession document; or

(b) the variation is necessary to deal with significant adverse effects of the activity that were not reasonably foreseeable at the time the concession was granted; or

(c) the variation is necessary because the information made available to the Minister by the concessionaire for the purposes of the concessionaire's application contained inaccuracies that materially influenced the decision to grant a concession and the effects of the activity permitted by the concession require more appropriate conditions;—

and the concessionaire shall be bound by every such variation.

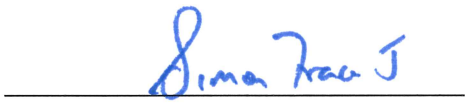
...

[85] The power to unilaterally amend is contained in subs (3). None of the paragraphs seem applicable. In particular, there is no evidence of significant adverse effects being created.

[86] Accordingly, I conclude that the appropriate relief is the declaration proposed, and nothing else. I consider this is the correct outcome. Planning will no doubt begin soon for the next WARO round, or for whatever is planned in advance of that. There will be an opportunity then for appropriate input, and hopefully the message from this judgment will be taken on board.

[87] Accordingly, there will be a declaration that the decision fixing the framework for the 2015 WARO round, and in particular that aspect concerning the amendments to the land boundaries in the Parks that are the subject of this judgment, was invalid due to a failure of natural justice.

[88] The applicant is entitled to costs for a standard proceeding on a 2B basis, together with reasonable disbursements to be fixed by the Registrar if required. The costs liability is that of the Minister. The interested party is to bear its own costs, but is not liable to pay costs to the applicant. Although supporting the respondent's position, its role was limited such as to make it inappropriate to impose costs liability.



Simon France J