

Before an Independent Hearing Commissioner at Hurunui District Council

*under:* the Resource Management Act 1991

*in the matter of:* application RC210098 for land use consent to install  
and operate a Gravity-Based Recreation Activity within  
the Conical Hill Reserve, Hanmer Springs

*between:* **Hanmer Springs Thermal Pools & Spa**  
*Applicant*

*and:* **Hurunui District Council**  
*Consent Authority*

Right of reply by Mandy D. Tocher

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Dated: 15 November 2021

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## **INTRODUCTION**

- 1 My name is Mandy D. Tocher. I currently hold the position of Principal Herpetologist for LizardExpertNZ, having very recently been a Principal Ecologist for Ryder Environmental, Dunedin.
- 2 I have previously provided ecological evidence and a summary statement in relation to the Flyride proposal. My Evidence in Chief (EIC) is dated 23 September 2021 and my summary statement is dated 7 October 2021.
- 3 I have also completed a Lizard Management Plan (LMP) for the Applicant, entitled "The Te Tihi o Rauheia/Conical Hill Reserve Switchback Project Lizard Management Plan", dated 3 May 2021 (referred hereon in as the "LMP").
- 4 On 24 October 2021, the Commissioner issued Minute 4 which outlines matters the Applicant might wish to address in the right of reply. This includes commentary on the effects on wildlife. Some matters set out have been addressed in my response to the peer review of the LMP, dated 5 November 2021.
- 5 My right of reply seeks to provide the technical information and necessary clarification for remaining ecology matters that were not addressed in that response. Specifically, my reply addresses:
  - 5.1 Issues raised about the breeding of eastern kārearea / falcons in the area and whether this changes any views expressed;
  - 5.2 Processes associated with the Wildlife Act, including the permits and mitigation package; and
  - 5.3 Significance of effects on eastern kārearea / falcon.

## **EASTERN KĀREAREA/FALCON BREEDING WITHIN OR NEAR TO THE FLYRIDE FOOTPRINT**

- 6 In my EIC and my Summary Statement, I acknowledge that:
  - 6.1 Potential nesting habitat was created in 2016 near the proposed base/stop station and within the Flyride footprint, when a cutover area favoured by nesting eastern kārearea/falcon in plantation forestry was created by the felling of large conifers (paragraph 41 of my EIC).
  - 6.2 Eastern kārearea/falcon may nest on the reserve in the future, including over 2021/22 when construction of the Flyride is planned (paragraph 54 of my EIC).

- 7 Further to the opinions expressed in paragraph 6, and in response to Mr Ross Carter who at the hearing reported seeing eastern kārearea/falcon nests “high up in trees” when he was younger, I also accept that eastern kārearea/falcon have nested on Te Tihi o Rauhea/Conical Hill in the past, when forest habitat was more open than it is now. That is, before a closed canopy of vegetation formed.
- 8 Due to the possibility that breeding including nesting may have occurred over the Te Tihi o Rauhea/Conical Hill Reserve at some time in the past and therefore may occur in the future, I made recommendations to impose best-practice conditions on the applicants’ activities relating to the construction of the Flyride, for the specific purpose of safeguarding any nesting/breeding eastern kārearea/falcon (paragraph 61 of my EIC).
- 9 I also recommended that an adaptive management approach is adopted to manage any risk to eastern kārearea/falcon during the ongoing operation of the Flyride (paragraphs 62-64 of my EIC).
- 10 My recommendations go further than best practice for forestry operations. They also go further than recommendations favoured by the Department of Conservation (DOC) when formulating their conditions<sup>1</sup> (paragraph 61-64 of my EIC).
- 11 Notwithstanding points made in paragraphs 6-7, in my EIC I recorded that although potential nesting habitat existed in 2016, I believed it *unlikely* that nesting occurred over recent time within the Te Tihi o Rauhea/Conical Hill Reserve, the period the cutover area has been present (paragraphs 37 & 43 of my EIC).
- 12 During the hearing, Mr Martin referred to a photograph he had taken to show a site near the proposed base/stop station where Mr Rodley watched fledglings being fed and trained to fly by a pair of adult birds.<sup>2</sup> At the hearing, Mr Martin stated that this photograph shows that eastern kārearea were nesting within the reserve, and not within Oregon Heights as submitted earlier by Celia Rodley.
- 13 The date of the sighting of fledglings being fed and trained was not provided so it is not possible to reach a firm conclusion on the issue of breeding including nesting on the Te Tihi o Rauhea/Conical Hill Reserve.
- 14 However, through the photograph and associated information provided by Mr Martin, together with the 100 m distance sighting from the Rodley’s home provided in their joint letter to the Commissioner,

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<sup>1</sup> Those recommendations are included in a peer reviewed published paper and are set out in Appendix 3 of my EIC.

<sup>2</sup> The fledglings and adults are not pictured but the photograph shows where they were observed on another occasion to when the photograph was taken.

I am satisfied that nesting has occurred within the Te Tihi o Rauheia/Conical Hill Reserve at some time in the past 22 years and I maintain my view that it could occur in the future.

- 15 In my view, detail of exactly when nesting occurred is not important as there is sufficient common ground on the key issue of nesting having occurred within the Te Tihi o Rauheia/Conical Hill Reserve.
- 16 Notwithstanding the above, the recommendations outlined in my EIC remain unchanged (paragraph 61 of my EIC). My recommendations were designed to capture the possibility of eastern Kārearea/falcon nesting on the reserve in the future.

### **WILDLIFE ACT (1953) PROCESSES**

- 17 I now provide commentary on what I understand to be the typical process undertaken for DOC to issue a Wildlife Act permit, to carry out works over lizard populations.<sup>3</sup>
- 18 The Wildlife Act process typically begins when a lizard survey is carried out by a herpetologist to determine the lizard values (lizard habitat and populations) of the development site.
- 19 If lizards are discovered, and populations/habitat cannot be avoided, a permit must be sought from DOC to carry out works.
- 20 The trigger to require a permit is the presence of a single indigenous lizard, regardless of the DOC threat classification, as all indigenous lizards are absolutely protected under the Wildlife Act (1953).
- 21 In this way the Wildlife Act sets a higher bar than the RMA Section 6 (c) and its typical significance criteria, as lizards classified as 'not threatened' also trigger the need for a Wildlife Act permit but do not trigger significance under the RMA (unless present as a diverse assemblage).
- 22 A Wildlife Act permit application (DOC form 9) requires an accompanying lizard management plan, although DOC policy on this requirement is rather ambiguous if one relies solely on the DOC website for guidance.
- 23 A thorough lizard survey is required to inform a LMP. At times, DOC require additional survey to be carried out, including survey outside of the development footprint to provide the necessary context that enables them to process the permit.

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<sup>3</sup> The issue of habitats of lizards versus the lizard populations themselves is a grey area, as I understand it, only partially informed by Wildlife Act (1953) case law.

- 24 Since 2018, the formulation of a LMP has been assisted by a DOC Lizard Management Plan template.<sup>4</sup> Should lizard salvage form part of the LMP, DOC have also produced a guidance document containing nine developing practice principles.<sup>5</sup> These are the same principles that are referred to extensively over paragraphs 28-94 of my response to the LMP peer review (dated 5 November 2021).
- 25 In terms of an effects assessment in the LMP, DOC have not published a formal definition of "effect" (such as that included in section 3 of the RMA (1991)). The LMP template does, however, require an assessment of "actual and potential effects", and when planning a salvage action, actual and potential effects must also be described (principle 2 of the 2019 salvage guidance document).
- 26 A helpful list of "common effects on lizards associated with development" form Appendix 1 of the 2019 salvage guidance document (attached here as Appendix 1). Of note, this list includes both lizard population and habitat effects.
- 27 Although the RMA (1991) mitigation hierarchy does not explicitly apply to actions undertaken under the Wildlife Act, the DOC LMP template requires that avoidance and mitigation actions are documented.
- 28 Following avoidance actions, the DOC LMP template then promotes the development of a cohesive package of mitigation actions, rather than strict adherence to any hierarchy of actions as is required by the RMA (1991). LMPs, as a result, can sometimes be out of step with an RMA-led process.
- 29 When the LMP is near completion, a request can be made to DOC for a pre-submission meeting. During this meeting, a DOC technical advisor may give advice on a without prejudice basis on the sufficiency of the survey carried out to document lizard values, and/or the sufficiency of the LMP mitigation package.
- 30 Once any feedback DOC have provided is incorporated, the Wildlife Act application and supporting LMP is lodged with the DOC permissions team (based in Hamilton). At this point, some applications are fast-tracked using informal and in-house DOC criteria. As I understand it, LMPs relating to major infrastructure projects maybe fast-tracked, or applications where funding is subject to government-imposed timeframes.

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<sup>4</sup><https://www.doc.govt.nz/contentassets/02b1a908bcb34ff1a37652ad357d3e2c/lizard-management-plan-template.pdf>

<sup>5</sup><https://www.doc.govt.nz/contentassets/02b1a908bcb34ff1a37652ad357d3e2c/lizard-salvage-and-transfer-nz.pdf>

- 31 Generally speaking, however, DOC have no interest in conforming to the external timelines. When acting under the Wildlife Act, DOC are not required to conform to any statutory timeframes; the processing of a permit can take many months. Also, appeal rights under the Wildlife Act are limited.
- 32 In line with Wildlife Act case law, when assessing the LMP DOC require that the mitigation package, once implemented, results in a demonstrable protective benefit to the lizards affected.
- 33 Once assessed by DOC, it is typical for them to liaise directly with the author of the LMP (herpetologist) to discuss and negotiate any modifications/revisions required to ensure a protective benefit will result from the LMP implementation.
- 34 On receipt of the revised and final version of the LMP (and sometimes earlier), DOC are obligated under section 4 of the Conservation Act (1987) to consult with affected iwi. Iwi are given 20 working days to respond and provide feedback.
- 35 Further revisions may then be required to the LMP to enable DOC to issue the permit, with conditions, to meet expectations of iwi.
- 36 At times, an LMP serves the dual purpose of being a requirement of a resource consent (or likely requirement) and a requirement under the Wildlife Act to carry out work over populations and habitat of absolutely protected lizards.
- 37 In these situations, efforts are made by all involved to align any conditions of consent with conditions imposed on the issued Wildlife Act permit.
- 38 In summary, the Wildlife Act and the RMA have separate, albeit overlapping, processes and considerations.

#### **SIGNIFICANCE OF EFFECTS: EASTERN KĀREAREA/FALCON**

- 39 In the absence of appropriate mitigation, the Flyride may generate significant adverse effects on any eastern kārearea/falcon that frequent the footprint.
- 40 However, in my opinion and should consent be granted, implementation of my recommendations through consent conditions will ensure that any adverse effects on the eastern kārearea/falcon that frequent Te Tihi o Rauheia/Conical Hill Reserve will be negligible (i.e., no more than minor).

Dated: 15 November 2021

A handwritten signature in blue ink, appearing to read 'Mandy D Tocher', written in a cursive style.

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Mandy D Tocher

**Appendix 1:** Appendix 1 from: DOC 2019, Key principles for lizard salvage and transfer in New Zealand.

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*Key principles for lizard salvage and transfer in New Zealand*

## Appendix 1

### Common effects on lizards associated with development

Development-related activity/consequence	Effect on lizards and lizard habitats
Afforestation	Habitat loss, habitat quality reduction, displacement
Deforestation	Habitat loss, habitat quality reduction, displacement
Domestic stock exclusion	Habitat change, possible displacement, possible change in predator-guilds
Dust and vibration	Habitat change, possible displacement, diet changes.
Earthworks	Habitat loss, displacement, injury, death
Fire	Habitat loss, displacement, injury, death
Flooding	Habitat loss, displacement, death
Grazing-domestic animals	Habitat loss, habitat change, possible displacement, trampling, possible change in predator guilds
Habitat relocation	Habitat loss, displacement, injury, death
Herbicides	Unknown
Irrigation	Habitat loss, habitat change, possible displacement, possible change in predator guilds
Light/glare	Habitat change, possible displacement, diet changes
Pesticides	Decreased survival, possible sub-lethal and lethal effects if ingested
Ploughing/cultivation	Habitat loss, displacement, injury, death
Quarrying/rock removal	Habitat loss, displacement, injury, death
Roading/realignments	Habitat loss, habitat change, possible displacement, possible change in predator guilds
Salvage and transfer	Can be managed with experienced herpetologist, but include overheating, overcrowding, competition, displacement, injury, death
Tourism/visitor impacts	Disturbance, trampling, poaching, displacement, reduction in reproductive output
Vegetation clearance	Habitat loss, displacement, injury, death
Weed encroachment	Habitat loss, habitat change, possible displacement, possible change in predator guilds